The Law Society of Saskatchewan Library's online newsletter
highlighting recent case digests from all levels of Saskatchewan Court.
Published on the 1st and 15th of every month.

Volume 21, No. 20 **October 15, 2019**

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Richards Whitmore Schwann, August 30, 2019 (CA19083)

Criminal Law – First Degree Murder – Conviction – Appeal

The appellant appealed his conviction after trial by judge and jury on a charge of first degree murder contrary to s. 235 of the Criminal Code. During the trial, the Crown presented evidence that the appellant's marriage had been failing and that, after he discovered that his wife was having an affair, he sent threatening text messages to her lover in October 2011. She was, in fact, conducting simultaneous affairs with others as well. The appellant and his wife continued to live together, but she was never seen again after November 11, 2011. The appellant was aware that she wasn't in the house on the morning of November 12 and that she had not taken her vehicle but did not report her missing until November 15 because he believed that she was with another man. He told the police that she had taken her makeup bag with her. On November 15, two of the victim's lovers received threatening text messages from her cell phone. When interviewed about this by the police, the appellant advised that his wife's cell phone, purse and wallet including identification and credit cards were missing and described a ring she had been wearing the last time he saw her. The police then searched the appellant's house and garage, found the missing items and later located the ring. They also found items of the victim's clothing and a receipt dated November 12 from a hardware store showing the purchase of a hacksaw, 50 feet of rope and a roll of polyethylene. On January 12, 2012 the police publicized that a woman's body had been found outside the city and shortly thereafter, they surveilled the appellant, who drove to a spot in a

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rural location and then returned. When the police checked the site, they discovered the wife's body wrapped in polyethylene secured by electrical tape. An expert in forensic pathology said that the victim had been killed elsewhere. She had been hit on the head and then strangled with a rope. She had not struggled to remove the ligature because she was unconscious from the blow and/or because her hands had been tied behind her back. Other Crown witnesses testified that the rope, polyethylene and tape used were identical to those that the appellant had purchased at the hardware store or that had been found in the police search of the appellant's property. The appellant denied that he had murdered his wife and testified that after he had found her belongings in her vehicle, he hid them and admitted that he lied to the police. He did not explain why he drove to where the body was. His counsel argued that someone else had killed the victim and planted the other evidence on his property. The Crown submitted that the appellant confronted and then murdered the victim and hid her body until he could dispose of it. The murder was planned and deliberate or was committed in the course of unlawfully confining the victim. The appellant's grounds of appeal were that: 1) he suffered a miscarriage of justice because of ineffective trial counsel. Amongst numerous allegations of incompetence, he said that his counsel failed to: introduce exculpatory evidence; prepare him for cross-examination; and challenge certain Crown evidence; 2) the trial judge erred, after a voir dire, by admitting the October and November text messages into evidence that suggested bad character and by his instructions to the jury regarding same; 3) the trial judge erred in his charge to the jury with respect to his instructions regarding the forceable confinement. Based upon the appellant's post-offence conduct, including the November text messages, the appellant's late missing person report and his admissions that he lied about the victim's belongings, the judge should have instructed the jury that this evidence could not be used to determine whether the victim's murder was planned and deliberate; and 4) the jury's verdict was unreasonable. If it had been properly instructed, the jury could not have returned a guilty verdict of first-degree murder because the evidence did not support a conclusion that it was planned and deliberate, nor that the victim's death was caused while he committed the offence of unlawful confinement.

HELD: The appeal was dismissed. The court found with respect to each issue that: 1) there was no miscarriage of justice. After applying the test set out in R v G.D.B., it was not necessary to consider whether the performance of the appellant's trial counsel was incompetent because the substantial amount of inculpatory evidence in the record weighed against the possible implications of the proposed errors. The trial counsel's alleged failures and decisions had not caused a miscarriage of justice; 2) the trial judge had not erred in admitting each set of text messages. Their probative value outweighed their prejudicial effect. The October message showed motive and no special jury instruction was required. The November messages possessed high probative value due to their

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similarity to the October messages and because they were sent from the victim's phone, suggesting that her murderer was their author. The judge explained to the jury the use to which the messages could be put and was not required to give special instructions; 3) the trial judge properly instructed the jury that it could consider evidence of the appellant's post-offence conduct to determine guilt or innocence, but also must consider possible innocent explanations; and 4) the jury's verdict was reasonable. The evidence supported a conviction of for first-degree murder. Circumstantial evidence can be used to prove planning and deliberation and, in this case, the forensic pathologist's uncontroverted evidence concerning the manner in which the victim was murdered demonstrated planning. Similarly, there was evidence to support the conclusion that death was caused while the appellant unlawfully confined the victim by tying her hands behind her back prior to the murder.

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Choli v R, 2019 SKCA 87

Ottenbreit Ryan-Froslie Schwann, September 9, 2019 (CA19086)

Criminal Law – Controlled Drugs and Substances Act – Possession for the Purposes of Trafficking – Conviction – Appeal
Criminal Law – Trial – Rebuttal Evidence

The appellant was acquitted of unlawfully importing opium under s. 6(1) of the Controlled Drugs and Substances Act and possession for the purposes of trafficking under s. 5(2) of the Act. The Crown appealed and a second trial was held. The judge found the appellant guilty and he appealed his convictions. The appellant, who was from Iran, had come to Canada as a refugee after living for two years in Turkey. The charges were laid after he accepted delivery of two boxes addressed to him purporting to contain pizza makers from a sender address in Mersin, Turkey. An undercover police officer conducted the controlled delivery, posing as a Canada Post employee and wearing its uniform. Opium was concealed in the false bottom of the pizza makers. After receipt, the appellant put the two unopened boxes on the floor of the living room closet. The boxes contained a total of 1.8 kilograms of opium. The police obtained a search warrant for the appellant's vehicle and located a priority post packing slip for another parcel sent from an address in Mersin, Turkey. The police also searched the appellant's phone and found some photographs and a video of the parcels taken within minutes of the delivery that showed the appellant examining the condition of the parcels, including the condition of the tape on the bottom of the boxes. The Crown's expert witness provided opinion evidence regarding business practices associated with importing opium into Canada from Turkey. They included arranging the delivery by postal service to a trustworthy courier here who would

Wolfram v Gordon

Woods v R

be required to assess whether the delivery seemed suspicious and whether any tampering of packaging had occurred by inspecting it closely and photographing it. Couriers were not permitted to open parcels, only to wait for them to be taken by another person. In the opinion of the expert witness, the appellant's video of his behavior was consistent with that of a courier. The appellant provided various explanations regarding his actions given first in his post-arrest statement, then at trial during examination and in cross-examination. In his statement to the police, the appellant said that he was suspicious of the delivery person because her uniform was the wrong colour. In cross-examination, he denied being suspicious and testified that he meant to say "surprised". He then asserted for the first time that that it was the police officers who transported him to jail after his arrest who had provided him with the information about the undercover officer's uniform being the wrong colour. As a result of this testimony, the Crown applied to adduce rebuttal evidence from the transport officers on the basis that their evidence would contradict the appellant's evidence. The judge permitted the rebuttal evidence to be adduced because the Crown could not have anticipated that the appellant would allege those details of the officers' remarks to him and because the appellant offered these remarks as partial explanation for his statement to the police that he was suspicious of the delivery person. The Crown was not splitting its case. The officers testified that there were no differences between the delivery person's and Canada Post's uniforms and regardless, they had not spoken about the matter to the appellant. The judge accepted their evidence. According to the principles set out in R v D.W., he found that he did not believe the appellant's evidence that he did not know what was in the packages in light of the expert witness' testimony and the appellant's conduct. The appellant raised five grounds of appeal. The first ground was whether he erred by allowing the Crown to call rebuttal evidence after he testified. He argued that the evidence was not new, as it could have been anticipated and was collateral. The other grounds related to whether the trial judge had erred in the way he had considered the appellant's evidence and in his findings on credibility. ;HELD: The appeal was dismissed. The court found that the trial judge had not erred by allowing the Crown to call rebuttal evidence after the appellant had testified. Further, the trial judge had not made any palpable or overriding error in making his findings regarding credibility. His verdict was one that he could reasonably have reached on the evidence before him.

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Guenther v Princess Homes Ltd., 2019 SKCA 88

Richards Whitmore Leurer, September 5, 2019 (CA19087)

Statutes – Interpretation – Lands Contracts (Actions) Act, Section 3(7)

The appellants appealed the decisions of two Queen's Bench chambers judges granting the respondent an order abridging the time for service on the appellants of its application for leave to commence an action for foreclosure and granting the respondent leave to commence its action. The appellants sought to have the statement of claim declared a nullity. They submitted that s. 3(7) of The Land Contracts (Actions) Act (now repealed and replaced by The Land Contracts (Actions) Act, 2018) required a minimum of 15 days' notice before the hearing on the question of whether a foreclosure action could be commenced and this period could not be abridged. In this case, the chambers judge ordered that the time for service be abridged to four days. Following the respondent's service under this order, a second chambers judge granted the application for leave to commence an action and the respondent issued its statement of claim.
HELD: The appeal was allowed. The court set aside both decisions made in the Court of Queen's Bench and declared the action a nullity. The Court of Queen's Bench had no authority to abridge the notice period prescribed by s. 3(7) of the Act.

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Berger v Saskatchewan (Financial and Consumer Affairs Authority), 2019 SKCA 89

Richards Ottenbreit Caldwell, September 16, 2019 (CA19088)

Statutes – Interpretation – Securities Act, 1988, Section 27

The appellant appealed from the decision of a hearing panel appointed by the respondent, the Financial and Consumer Affairs Authority of Saskatchewan, that he had violated s. 27(2a) of The Securities Act, 1988 by trading in securities without being registered. The appellant, a resident of Costa Rica, worked as a day trader and a commodity investor through a company described as the Latin Clearing Corporation (LCC). He agreed to invest funds provided by a Saskatchewan resident (the resident). After a number of months, the appellant raised the possibility with the resident that he should open a second trading account. Without authorization, the appellant opened the account and demanded the provision of more funds. When the resident refused, his trading account was frozen and the appellant would not refund his original investment. The resident complained to the respondent and it launched an investigation. The appellant appeared at the hearing, but LCC did not and took no part in the proceedings. The panel decided that the appellant and LCC had contravened s. 27(2)(a) of the Act because without being registered as required, they had engaged in the

business of trading securities or exchange contracts in Saskatchewan. The panel imposed sanctions on the appellant and LCC, including that they permanently cease trading in securities in Saskatchewan. The appellant appealed the decision under s. 11 of the Act, submitting that: 1) the panel breached its duty of procedural fairness because it declined an adjournment he requested and, though he was self-represented, failed to provide him with appropriate guidance throughout its hearing; and 2) the panel erred in law by making a key finding of fact based on no evidence. It stated that the appellant had denied any relationship with LCC when he had in fact explained that he had simply used LCC accounts. It then treated the appellant and LCC as being one and the same; and 3) the panel erred in deciding that it had authority to entertain the allegations against him. It had stated that the fact that the appellant and LCC were not resident in Saskatchewan was not relevant to the determination of whether they acted as dealers in Saskatchewan.
HELD: The appeal was allowed and the matter returned to a new panel for a hearing. The court found with respect to each issue that: 1) the panel's refusal to grant a further adjournment in the circumstances was not a denial of procedural fairness and did not affect the appellant's ability to defend himself. It had not denied him procedural fairness by failing to do more than it did to explain the nature of the process; 2) the panel had erred in its finding that the appellant had denied any knowledge of LCC when his testimony showed that he had not done so. The factual foundation necessary to evaluate the complaint against the appellant was corrupted; and 3) the panel erred in its approach to the jurisdictional question. It should have determined first whether the matter before it had a sufficient connection to Saskatchewan and the question of the appellant's residency was an issue to be decided in that determination.

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R v R.C., 2019 SKPC 51

Rybchuk, September 6, 2019 (PC19042)

Criminal Law – Sentencing – Aboriginal Offender – Gladue Factor
Criminal Law – Sentencing – Pre-Sentence Report
Criminal Law – Sentencing – Sentencing Principles
Criminal Law – Sentencing – Sexual Interference

The offender was found guilty of sexual interference and sexual assault contrary to ss. 151 and 271 of the Criminal Code. A Pre-Sentence Report (PSR) containing Gladue factors was obtained. The victim was nine years old at the time of the offences. The offender touched the victim's leg and stomach, rubbed his penis on her cheek and ejaculated on her face. The offender was 39 years old at the time

of the offences. He had never met his biological father and his mother abandoned him when he was six years old. He lived in foster care and with various relatives until he was 13. The offender's mother continued to suffer from alcohol abuse and addictions issues. She was violent and abusive towards him. In his late 20s, the offender married and had five children. The offender and his wife were gainfully employed. Since the offences, the offender had isolated himself and participated in his Aboriginal culture. The offender admitted that alcohol had been a problem over the years. On the night of the offences, the offender was extremely intoxicated by marijuana and alcohol. He had not consumed alcohol since then, despite not having participated in any treatment or programming. The offender attended universities where he completed a program in Indigenous People's Resource Management Training. He was a self-employed Indigenous Resource Manager for various Aboriginal Bands throughout western Canada. The offender was assessed as a medium risk for general recidivism and an average risk for sexual recidivism. He had a record with 18 convictions consisting of seven youth convictions and eleven adult convictions. Four of the adult convictions were for offences of a violent nature. The record was dated with most offences having occurred before he met his wife. The offender denied being guilty of the offences and took no responsibility for them. The victim's mother provided a victim impact statement indicating that the victim, a family friend of the offender's, was seriously impacted and traumatized by the offence. The Crown sought a sentence of two years' less a day imprisonment with three years of probation to follow. The offender requested a sentence of 12 to 15 months' imprisonment with probation of two years or more to follow. The Crown proceeded summarily; therefore, the mandatory minimum sentence was 90 days' incarceration and the maximum was two years' less a day incarceration.

HELD: There was a factual and legal nexus with respect to the two offences. The court agreed with the Crown that the sexual interference offence contained a more accurate description of the criminal act committed, so a conviction was entered for the offence contrary to s. 151 and the s. 271 offence was judicially stayed. Pursuant to s. 718.01 of the Criminal Code, the court placed primary emphasis on the sentencing objectives of denunciation and deterrence. The fact that the Crown proceeded summarily should not be taken as a sign that the Crown viewed the offence as less serious. The court declined to categorize the offence as "major" or something "other than major" because it served little useful purpose. This offence was an isolated incident of brief duration. The victim was a young Indigenous girl. Indigenous girls and women are three times more likely than non-Indigenous females to be victims of sexual assault. The court found that the offence ruined the victim's young life. Aggravating factors included: the abuse was of a person under 18; the offender was in a position of trust or authority to the victim; and the offence had a significant impact on the victim. Mitigating factors included: the offender successfully complied with

strict bail conditions, including moving out of his family home; the offender had significant community supports; he was educated and had been gainfully employed since his marriage in 2008; and he cooperated fully with police without legal counsel. The court analyzed the Gladue factors. The offender's systemic history provided context for his offending behaviour and diminished his overall moral culpability. Because the offender did not have a history of this type of behaviour, an overly lengthy period of incarceration was not required. A period of incarceration was, however, warranted. The offender was sentenced to a term of imprisonment of 18 months followed by a period of probation of 24 months so that he could receive sexual offending treatment. The probation included numerous terms and conditions, including participating in assessments and programming for addictions and sexual offending; no possession or consumption of alcohol or drugs; and no contact with the victim. The mandatory SOIRA and DNA orders were made, but the court declined to make either ancillary discretionary order under ss. 110 or 161 of the Criminal Code.

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R v Mushanski, 2019 SKPC 52

Evanchuk, August 27, 2019 (PC19043)

Criminal Law – Sentencing – Sentencing Principles
Criminal Law – Sentencing – Failing to Stop at an Accident Where Bodily Harm was Caused, Section 252(1.2)

The offender pled guilty to a charge contrary to s. 252(1.2) of the Criminal Code for having care, charge, or control of a vehicle that was in an accident, and knowing someone was caused bodily harm, failed to stop his vehicle and assist the injured person with the intent to escape civil or criminal liability. The offender was 27 years old at the time of the offence. He was driving to a drive-thru restaurant at 1:30 am when he struck a pedestrian. After the accident, the offender sped away. The victim suffered serious injuries, including multiple spine fractures and a brain bleed. He was left unable to work. Vehicle debris was obtained from the accident, allowing police to match the make and model of the vehicle in question. When the offender was stopped and arrested on safety warrants, he provided a false story about the cause of the damage to his vehicle. A few days later, the offender confessed to the accident. The offender apologized to the victim when they had a meal together, and the victim forgave the offender. The offender was 28 at sentencing and married with three young children. He had a grade 9 education and was employed as a framer for a construction company. The offender indicated that he initially denied involvement in the accident out of fear of losing his kids. The victim, his mother, and his brother provided victim impact statements. The

victim's second statement indicated that he had improved significantly and had a better outlook on his life. The Crown submitted that a six-month sentence of incarceration followed by a two-year period of probation was appropriate. The offender submitted that a 90-day sentence to be served intermittently, followed by a period of probation, was appropriate. The offender also conceded that a discretionary driving prohibition was appropriate.
HELD: Since admitting to the offence, the offender had expressed considerable and heartfelt remorse for his actions. The court accepted the range of sentences in the Cook case for the offence to be from two to 15 months' incarceration. The mitigating factors were: the offender pled guilty, albeit after first denying his involvement; the offender had limited criminal involvement with a six-year gap; the offender was relatively young; the offender had been employed consistently for 10 years and with his current employer for four years; alcohol or drugs were not a factor in the accident; and the offender expressed remorse for his actions. The offender located the victim on Facebook and took him out for dinner to apologize in person. The aggravating factors were: there was a level of deceit in the offender's actions after the offence; the offender had a history of regulatory driving offences showing a disregard for traffic laws; the offender did have a serious criminal record; and the level of bodily harm suffered by the victim was high. The court determined that the offence and the circumstances of the offender placed the case at the lower end of the sentencing range. The focus was on denunciation and deterrence. The court did not accept the 90-day intermittent sentence as appropriate. The cases referred to where that sentence was imposed were distinguished by the court. For example, neither offender in those cases had a criminal record. A sentence of six months was also found not to be appropriate. The court noted the extreme intoxication of the victim, not as a mitigating factor, but as reducing somewhat the offender's moral blameworthiness because he had not driven dangerously nor impaired. The court sentenced the offender to four months' incarceration followed by a period of probation of one year with only the mandatory terms and conditions as required by s. 732.1(2) of the Criminal Code. A one-year driving prohibition was also imposed to commence at the completion of the jail term.

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Reid v Leader, 2019 SKPC 55

Demong, September 4, 2019 (PC19044)

Contract Law – Interpretation
Small Claims – Contract – Interpretation – Intention of Parties
Small Claims – Costs
Small Claims – Evidence – Credibility

The plaintiff claimed for the recovery of a vehicle that she said she lent to the defendant, to be returned on demand. The payments on the loan for the purchase of the vehicle were made by the plaintiff. The plaintiff claimed for money to reflect the payments, a claim of "loss of use" or alternatively, "the depreciated value" of the vehicle while it was in the defendant's wrongful possession. Further, the plaintiff sought damages for vehicle damage or because the vehicle was not kept in a good state of repair while in the defendant's possession. The defendant replied and counterclaimed asserting that the parties entered into a contract of sale wherein the plaintiff sold her the vehicle for one dollar. A bill of sale was presented wherein a third party allegedly sold the vehicle to the defendant for $1.00. The defendant said that the third party was acting as the plaintiff's agent. The defendant counterclaimed for $2,500, alleging that she lent the plaintiff that amount. She also alleged that the plaintiff caused damage to her tires, her garage, and the door on her fence. The defendant further sought damages for stress, mental anguish, damage to her reputation, and a reduced ability to earn an income. The defendant claimed a total of $35,000. At the case management conference, the defendant was advised that the court did not have jurisdiction to deal with allegations of defamation.

HELD: The court needed to look at more than the clear words of the Bill of Sale to determine the true intentions of the parties. The $1.00 price in the bill of sale was $15,000 less than the vehicle's value. The plaintiff argued that the document was drawn up only to allow the defendant to register the vehicle in her name temporarily until the plaintiff could again put it in her name. The plaintiff said that she was convicted of impaired driving in 2017, so could not drive the vehicle. The plaintiff said that she agreed to lend the vehicle to the defendant because hers was being repaired. According to the plaintiff, the vehicle was owned by her but registered in the name of the third party. The court was satisfied that the bill of sale was executed while the plaintiff was the actual owner of the vehicle with the authority to transfer it. The court found that text messages showed that the defendant originally asked to borrow the vehicle because hers had broken down. They also showed that the plaintiff requested a return of the vehicle in April 2018. The defendant's responses to the request were found to show that that she was fully aware of the true nature of the plaintiff's ownership. The court concluded that the genesis of the transaction was to allow the defendant to borrow the vehicle for temporary use. The defendant indicated that she loaned the plaintiff $2,500 because the plaintiff could not access her bank account when the defendant visited the plaintiff in Calgary. The plaintiff denied the loan and led evidence that she was able to access her bank account at the time of the purported loan. She also entered bank documents showing that she had $7,500 in her bank account at the time. The court concluded that the defendant did not prove on a balance of probabilities that the loan occurred. The court preferred the plaintiff's evidence over the defendant's. Neither the defendant nor any witnesses saw the plaintiff cause the damage as alleged by the defendant. The court

found it difficult to believe that the plaintiff would slash the tire of the vehicle she had come to collect. The defendant did not meet the burden of proof with respect to the tire slashing. Further, there was no corroborating evidence of the other two vandalism claims, nor had she repaired the damage in issue or paid her landlord for the repairs. The counterclaim was dismissed. The court ordered the return of the vehicle to the plaintiff pursuant to s. 3(1)(b) of The Small Claims Act, 2016. The court was not prepared to order costs for new tires, rims, and headlights for the vehicle. There was no evidence that the defendant purposefully damaged the headlights or slashed the tire. There was no agreement that the vehicle be returned in its original condition. There was also no agreement that the defendant would be responsible for making the vehicle payments. Because the plaintiff indicated that she intended to sell the vehicle upon its return, her loss was the diminished value of the vehicle (the difference in price between the value of the vehicle when she asked for its return and the date of trial). The plaintiff did not provide evidence regarding the diminished value, so the court allowed a reference on the issue of the damages. The plaintiff could file, with proof of service on the defendant, further documentation and calculations proving the value at the time she requested the vehicle back and at the trial date. If calculations were not filed by September 27, 2019, the court would treat the damage claim as abandoned. The plaintiff was entitled to costs, including out-of-pocket expenses pursuant to s. 36(1) of the Act. The expenses ordered were $674.21 and due to the simple issues in dispute and the rather nominal counterclaim, $600 in general costs were ordered. The court declined to make an order for pre-judgment interest.

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R v McAdam, 2019 SKPC 56

Schiefner, September 6, 2019 (PC19045)

Criminal Law – Arrest – Reasonable and Probable Grounds
Criminal Law – Defences – Charter of Rights, Section 8
Criminal Law – Evidence – Credibility
Criminal Law – Unauthorized Possession of Ammunition

The accused was charged with two counts of unauthorized possession of ammunition. The ammunition was located in a vehicle operated by the accused. The search was warrantless. The accused was arrested for dangerous operation of the vehicle when he was found crouched down in the driver's seat of the vehicle that was of interest to the police. The vehicle had recently driven off at a high rate of speed when the police were following it. The vehicle weaved through traffic, drove through a stop sign, and made a series of rapid turns. Officer M. indicated that his primary reason for searching the vehicle was for public safety, given his concern that

the accused was hiding something or that the vehicle was stolen. Officer M. stuck his head in the vehicle and looked around. Officer O. said that he had three reasons for searching the vehicle: a) the officers did not know who owned the vehicle so he was looking for anything to evidence ownership of it; b) he assumed the accused was doing something illegal since he evaded police; and c) since the officer intended to seize the vehicle, he wanted to ensure it was searched prior to being turned over to the tow company so nothing dangerous was in it. Officer O. looked inside the glove box and centre console. He searched the back seat and observed a paper bag from a pizza restaurant. The weight of the bag indicated that it did not contain food. The bag contained a large quantity of two types of ammunition, pieces of what appeared to be a firearm, and a modified hacksaw blade. The accused argued that his s. 8 Charter rights were breached because he had a reasonable expectation of privacy in the vehicle. During the voir dire, it was agreed that the police had reasonable grounds to arrest the accused. At the outset of the trial, the accused acknowledged that he had breached an undertaking not to operate a motor vehicle. He also acknowledged that he operated the vehicle in a manner dangerous to the public. The accused did not dispute that he had possession and control of the items in the vehicle. The issues were: 1) whether the accused was lawfully arrested; 2) whether the accused's privacy interests were affected by the search of the vehicle; 3) whether the search of the vehicle was incidental to the accused's arrest; 4) whether the search was reasonable and justified under the circumstances; 5) the disposition of the Charter application; and 6) whether the accused was in possession of prohibited ammunition.

HELD: The accused had a privacy interest in the vehicle, but the search was lawfully conducted by the police as incidental to arrest and for valid safety reasons. The issues were determined as follows: 1) the accused did not dispute the lawfulness of his arrest. The court was also satisfied that the officers had reasonable grounds to suspect the accused was the operator of the vehicle they had attempted to stop earlier; 2) the accused had a privacy interest in the vehicle he was operating, regardless of whether or not he owned that vehicle. Because the search was warrantless, it was prima facie unreasonable; 3) the court found the officers' evidence to be clear, cogent, and credible. The court found that the first two reasons offered by the officers for the search justified the search; public safety prior to turning the vehicle over to the tow company and to determine the ownership of the vehicle. The third reason offered, to find evidence as to why the accused drove the vehicle in a dangerous manner or why there was an attempt to evade police, may also have justified the search. It was not unreasonable for the officer to move the pizza bag, and once moved, note that the weight and feel of the bag was not indicative of food. The court disagreed with the accused that the officers could only search for evidence relevant to the offence for which the accused was arrested and that there was no further safety risk once he was arrested. The officers only had to suspect the vehicle might be stolen and that evidence of ownership might

reasonably be expected to be found in the cab of the vehicle. The search of the vehicle served a valid objective incidental to the accused's arrest. The court found a clear connection between the facts giving rise the accused's arrest and the subsequent search of the vehicle. The court was also satisfied that the officers had the authority to conduct a superficial search of the cab of the vehicle to ensure that it did not contain anything dangerous before turning it over to the towing company; 4) the search was truly incidental to the arrest. The search was a reasonable and proportionate use of the police authority to investigate a potential offence and as a reasonable and necessary response to a potential threat to public safety; 5) the Grant analysis was not necessary. The Charter application was dismissed, and all evidence tendered during the voir dire was admissible at trial; and 6) the accused conceded, and the court was satisfied beyond a reasonable doubt, that the accused had possession and control of the ammunition. The accused was found guilty of two counts of possession of prohibited ammunition without authority, contrary to s. 91(2) of the Criminal Code.

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Harvey v Saskatchewan Legal Aid Commission, 2019 SKQB 191

Gabrielson, August 12, 2019 (QB19198)

Administrative Law – Appeal – Right of Appeal
Administrative Law – Appeal – Standard of Review
Administrative Law – Certiorari
Statutes – Interpretation – Legal Aid Act

The applicant sought an order for reinstatement to the private bar panel (panel) maintained by the respondent, the Saskatchewan Legal Aid Commission, or, alternatively, for judicial review of the decision not to appoint her to the panel. Private bar lawyers are engaged to provide legal services to clients of the respondent when necessary, for which purpose the respondent maintains a panel of lawyers. The applicant was a member of the panel at varying times as both a staff lawyer with the respondent and as a private bar lawyer for the years 2000 to 2016. The applicant resigned as legal director of one of the respondent's offices on January 31, 2016. She applied to be on the panel of the respondent and was approved in July 2016. The applicant was employed by the respondent off and on from January 2018 to August 31, 2018. In September 2018, the applicant again applied to be on the panel and was told that the application would be considered by the respondent at its next board meeting. The respondent determined that the applicant was not a member of the panel. They indicated that the decision was based on the wording of The Legal Aid Act. The applicant brought an originating application in February 2019 seeking reinstatement to

the panel. Her originating application was amended in May 2019 to seek an order of certiorari quashing the decision of the respondent to dismiss her application to be on the panel and requesting an order in the nature of mandamus compelling the respondent to place the applicant on the panel. In the amended application, the applicant refers to a letter she wrote to the Minister of Justice indicating that the CEO of the respondent was acting irresponsibly by proposing cuts to offices. The respondent filed an affidavit outlining that a reason for not allowing the applicant on the panel was due to her "… animus towards, disrespect for and bias against…" the respondent and its CEO. The issues were: 1) the circumstances concerning the applicant's removal from the panel; 2) whether the applicant had a right of appeal from her removal from the panel; 3) whether the decision of the respondent not to place the applicant on the panel was subject to judicial review; and 4) the applicable standard of review.
HELD: The issues were determined as follows: 1) the respondent indicated that the applicant voluntarily gave notice of her resignation effective August 31, 2018, was automatically removed from the panel and had to make a new application to be placed on the panel. This was the standard practice of the respondent. The court found that the applicant must have accepted and acceded to the standard practice because she completed and filed an application the same day she was advised that she was no longer on the panel. The removal of the applicant from the panel was not for cause but was an administrative act. The court concluded that the removal of the applicant's name from the panel was in accordance with the standard policy and procedure of the respondent; 2) s. 16(4) of the Act provides for a right of appeal from removal from the panel, but only in respect to a removal of a solicitor from the panel for just cause. The applicant's application for reinstatement to the panel was therefore dismissed; 3) the applicant argued that the decision not to reappoint her to the panel violated a duty to treat her fairly. The court found that the decision not to appoint the applicant to the panel was not a public action, but a private action not subject to judicial review; and 4) if the decision of the respondent were subject to judicial review, the court found that the standard of review of such decision was one of reasonableness. The court noted that it would have found the respondent's decision to be reasonable.

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Braun v Braun, 2019 SKQB 199

Wilson, August 21, 2019 (QB19199)

Family Law – Child Support – Adult Student
Family Law – Child Support – Retroactive Support

The parties married in 1992 and separated in 2014. They had three children. The oldest two were independent at the time of the application. The respondent mother applied for payment of child support with respect to the youngest child (child). The child was attending university in Saskatoon. The parties executed an interspousal contract in 2015. A term provided that child support would be renegotiated at the time the child reached the age of majority if she were unable to withdraw from her parents' charge due to post-secondary education. In December 2015, the child moved in with the respondent full time. The interspousal contract was amended to provide for joint custody of the child with primary residence with the respondent. The petitioner agreed to pay the respondent $550 per month for child support commencing February 2016 and continuing as long as the child was a dependent and attended post-secondary education on a full-time basis. Another term indicated that if the child were no longer dependent but was attending post-secondary education on a full-time basis, the parties would be equally responsible to pay for the child's extraordinary expenses once the child exhausted all financial aid possibilities, including bursaries, loans, and RESPs. An Agreement as to Child Support was executed when the parties applied for divorce. The agreements outlined that: the petitioner's income was $100,294.50 for 2016; the respondent's income was $51,798.00 for 2016; the petitioner would pay child support of $845 per month; the petitioner was to contribute $100 monthly to the child's RESP; and the agreed-upon s. 7 expenses would be shared on a pro rata basis with the petitioner paying 66 percent of the expenses. The child support payments were paid until the child turned 18 in July 2018. The child started full-time university in September 2018. The respondent lived 70 kilometres from Saskatoon, so the child would stay with a friend when attending classes. In December 2018, the child moved to live with her sister closer to Saskatoon. The petitioner argued that the child was no longer a dependent and requested that the court make an order pursuant to the agreement whereby the parties would equally share the child's extraordinary costs. The issues were as follows: 1) what was the nature of the application; 2) whether the child was a "child" within the meaning of the Divorce Act; 3) if she were a child, did s. 3(2)(a) or s. 3(2)(b) of the Guidelines apply; and 4) the amount payable by each parent, and the child, towards the child's post-secondary education.

HELD: The issues were determined as follows: 1) a party cannot apply to vary an interspousal agreement; however, the court can make reference to the agreement as reflecting the parties' intentions regarding child support; 2) the petitioner acknowledged that the child remained a dependent child. The petitioner argued that there had been a unilateral, unjustified termination of the parental relationship by the child. The court found that the petitioner did not meet the high threshold required for the argument. The petitioner was found to continue to have an obligation to support the child; 3) the respondent argued that the Guidelines should be used to determine the amount of support payable because she was paying

for the child's expenses and had her in her care on the weekends and holidays. The court agreed with petitioner that ss. 3(2)(b) should be used to calculate the support; and 4) the court determined that the child should not have to obtain a student loan. The court accepted the expenses set out by the respondent but did not include horse boarding and farrier expenses because having a horse was a choice the child had made, and she should be responsible for the expenses in relation to it. The average monthly expenses of the child were $1,321. The petitioner's income was $114,692 and the respondent's was $34,729, so the petitioner was to pay 77 percent of the costs. The total tuition was paid from scholarships. The RESP account was to be withdrawn in the amount $3,300 every year for the next three years. The child's tuition, fees, textbooks, and housing would be paid by scholarship and bursary funds first, followed by RESP funds. The shortfall would be shared proportionally between the parties. The monthly expenses were then calculated at $920 per month. The petitioner argued that the child could earn $5,400 per summer. The evidence showed that she had earned $3,500 during the summer of 2018. The court estimated that the child could earn approximately $4,500 in the summer. After deducting the child's earnings, the remaining annual expenses were $6,540, with the petitioner's share being $5,036 per year or $420 per month. The money was to be paid to the petitioner to assist the child with her monthly expenses. The father was ordered to pay retroactive support for September 1, 2018 to August 31, 2019. He was ordered to pay $500 per month for that period. The court did not make an order regarding costs.

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Wolfram v Gordon, 2019 SKQB 202

Brown, August 21, 2019 (QB19196)

Family Law – Custody and Access
Statutes – Interpretation – Children's Law Act, 1997, Section 6, Section 8, Section 9
Statutes – Interpretation – Change of Name Act, 1995, Section 9

The petitioner and the respondent cohabited for just under two years, during which time they had two children, now aged five and four respectively. The major issue outstanding between the parties was custody and access, although they agreed to joint custody. The parties separated in 2016 and since then, their sons had their primary residence with the petitioner mother in Yorkton. She testified that she was the primary parent from birth and had provided almost all of their care. The respondent's shift work schedule at a mine required the petitioner to deliver the children to and them from their daycare. At trial, she advocated for a continuation of her having primary residence and the respondent

having specified access. Although the respondent had asked for more parenting time with the children after the parties separated, the petitioner confined his access to three-hour visits one day per week and every other weekend. The respondent submitted that he ought to have shared parenting. He testified that his employer would allow him to work flexible hours so that during his parenting time, he would be able to take the children to their daycare and bring them home. In addition, he purchased a house in Yorkton and would move there to facilitate his parenting time. The respondent also requested that the children's surnames be changed to include his family's name in hyphenation with the petitioner's family name. Child support was to be set on the basis that the petitioner earned $72,400 per annum and the respondent's income was $127,700. HELD: The court ordered that the parties enter a shared parenting arrangement whereby the children would be parented by the respondent for 40 percent of the time in each two-week period. It found that the arrangement would be in the best interests of the children pursuant to The Children's Law Act, 1997. The status quo had been established because the petitioner had unilaterally imposed the terms of the respondent's access. The court gave leave to the petitioner to bring the matter back for review within four months if the respondent had not yet relocated or arranged a more flexible work schedule. It ordered that the children's names would include the respondent's surname. If the petitioner had not provided her consent within 15 days of the judgment, then her consent would be dispensed with pursuant to s. 9 of The Change of Name Act, 1995. Based upon their respective incomes, the petitioner was ordered to pay $1,759 per month in child support and the petitioner should pay him $1,009. Thus, the respondent would pay $750 per month to the petitioner in set-off.

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Edenwold (Rural Municipality) v Aspen Village Properties Ltd., 2019 SKQB 203

Krogan, August 21, 2019 (QB19200)

Civil Procedure – Civil Contempt
Civil Procedure – Queen's Bench Rules, Rule 11-26, Rule 11-27
Criminal Law – Criminal Contempt
Municipal Law – Contempt Application

The court ordered the respondent to remove the buildings from and cease use of a location (subject land) by October 31, 2017. The order was made pursuant to s. 242(10) of The Planning and Development Act, 2007 (Act). The applicant rural municipality (RM) applied for a finding of contempt against the respondent for not complying with the court order. The subject land was zoned for residential use only. The respondent owned a golf course on adjacent land. The

clubhouse was destroyed, and the RM allowed the respondent to put a temporary commercial building on the subject land for a year to allow a permanent building to be built on the golf course. The extension permit expired in June 2014. A new club house was not built. The RM corresponded with the respondent regarding a deadline for an application to rezone the subject land. Prior to the October 31, 2018 deadline, the respondent emailed the RM regarding the rezoning. The RM did not open the email because it did not have a subject line. An application was not received by the applicant until December 6, 2017, after the contempt application had been made on November 23, 2017. The respondent did remove the temporary buildings by April 5, 2018.
HELD: The court concluded that the behaviour of the respondent did not rise to the level required to make out criminal contempt. Criminal contempt requires an open, continuous and flagrant violation of a court order without regard for the effect that may have on the respect accorded to the court. The intent required for civil contempt is proof beyond a reasonable doubt that the person intentionally did, or omitted to do, an act that breached a clear order of which he or she had notice. There are three elements required to find civil contempt: i) whether the court order clearly and unequivocally indicated what should be done. The order was found to be clear and unequivocal in the obligation it imposed on the respondent; ii) whether the respondent had actual knowledge of the court order. The order was served on counsel for the respondent, so it had actual knowledge; and iii) whether the respondent intentionally failed to perform acts the court order compelled it to perform. The court found that this element was not proven beyond a reasonable doubt. The respondent thought that it was conducting itself in a manner that complied with the court order by seeking the authorization to keep the temporary buildings on the land. The respondent emailed correspondence to the RM prior to the October 31, 2018 deadline, but the RM did not open the email because it did not have a subject line. The respondent was not aware that the email was not opened until December 6, 2017, at which time he forwarded an application to rezone the subject land. The court found the respondent's steps in emailing the RM were reasonable. The buildings were removed so there was eventual compliance. The court did not find that civil contempt was made out.

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Khan v 101275276 Saskatchewan Ltd., 2019 SKQB 208

Currie, August 26, 2019 (QB19203)

Business Corporations Act – Oppression Remedy
Corporate Law – Business Corporations Act – Oppression Remedy

The applicant numbered company (116) operated four video stores for many years. The personal applicants, M.K. and U.K., were the principals of 116. In 2015, M.K. and U.K. joined M.C. and A.A. (the personal respondents) to operate a video store in another city. Two numbered companies (276 and 278) were incorporated for that purpose. M.K., M.C., and A.A. owned 276 while U.K., M.C., and A.A. owned 278. All three owners of 276 and 278 were directors. In March 2017, the parties realized that they could not work together so they negotiated an agreement for M.K. and U.K. to withdraw from involvement. A document was signed on July 21, 2017 which incorporated a July 12, 2017 document. The July 12 document indicated that 116 provided funds to 276 and 278 and provided inventory to 278. On July 20, 2017, the earlier document was amended to indicate that the monies owed by 276 and 278 to 116 were investments which were to be paid and M.K. or U.K. would sell their shares in 276 and 278. Also, it was agreed that 116 supplied inventory to 278 with payment being made upon the provision of receipts. M.K. and U.K. alleged that M.C. and A.A. failed to complete the following obligations: 1) arranging for M.K. and U.K. to be released from liability with respect to the loans; 2) making the payments required to be made to 116; and 3) purchasing M.K. and U.K.'s shares in 276 and 278. The respondents indicated that they could not proceed until the applicants provided backup documentation for the actual value of the inventory provided from 116 to 278. The applicants argued that the respondents acted inappropriately as described in s. 234(2) of The Business Corporations Act (Act). The issues were as follows: 1) whether each of the applicants was a "complainant" under the Act; 2) whether it was established that any of the respondents engaged in conduct that was oppressive, prejudicial or unfairly disregarded the interests of an applicant; and 3) in the event of oppressive conduct, what direction should be ordered?

HELD: The issues were discussed as follows: 1) the court did not find it necessary to address who was a "complainant" under the Act because the application was determined under the second issue; 2) s. 234 had not been triggered, regardless of who qualified as a "complainant". All of the individuals involved provided testimony. The court indicated an inability to conclude that the testimony of any individual was clearly unreliable or clearly reliable. The court assumed that the first prong of the oppression remedy was met: the respondents' failure to meet the applicants' reasonable expectations. The second prong of the test required a determination of whether the respondents' conduct amounted to oppressive conduct. The court found that none of the three forms of oppressive conduct referred to by the Supreme Court of Canada in BCE Inc. v 1975 Debentureholders were present. The three forms are: a) oppression. There was no unilateral or punishing conduct by the respondents. The required element of harshness and abuse was not established; b) unfair prejudice. The respondents were not intentionally deceptive, nor was their conduct dishonest. The prejudice to the applicant, though present, was no more unfair than the unfairness inherent in

a typical business dispute that ends up in court; and c) unfair disregard. The court concluded that the evidence did not establish that any of the respondents engaged in unfair conduct such as underhandedness. The dispute was direct and face-to-face. The applicants did not establish that any of the respondents engaged in oppressive conduct in relation to any of the applicants; 3) there was no oppressive conduct found, so this issue did not have to be determined. The parties' dispute remained unresolved. The application was made pursuant to s. 234 of the Act, so dismissing the action left the court with no context within which to determine the dispute. The court directed that an amendment to their amended originating application could be filed but must be consented to by the respondents. The amendment must confirm the parties' agreement that the court would determine the remaining issues on the basis of the evidence before the court on the s. 234 application. The s. 234 application was dismissed without prejudice to the right of the applicants to amend their amended originating application by consent as outlined by the court. The respondents were awarded one set of the column 2 costs of the matter.

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Michel v Joint Medical Professional Review Committee, 2019 SKQB 209

Barrington-Foote (ex officio), August 26, 2019 (QB19201)

Occupations and Professions – Physicians – Billings – Documentation
Occupations and Professions – Physicians – Billings – Medically Necessary
Occupations and Professions – Physicians – Billings – Counselling Services
Statutes – Interpretation – Saskatchewan Medical Care Insurance Act

The respondent, the Joint Medical Professional Review Committee (committee), reviewed the appellant's billings for a review period and determined that he was required to repay $122,957.16. The appellant appealed the decision pursuant to s. 49.21 of The Saskatchewan Medical Care Insurance Act (Act) with respect to the reassessments for: 1) documentation; 2) counselling services; and 3) electrocardiograms (ECGs).
HELD: The appeal was allowed in part. The appellant alleged errors of both law and fact. The standard of review for all the appellant's grounds was reasonableness. The appeal court dealt with the appeal as follows: 1) the decision referred to the poor legibility of the appellant's notes as well as that the records were lacking the required components for the applicable billing code. The committee reduced the payment for these records. The court agreed with

previous cases that the specific language used in the billing code mattered, and that different phrasing of the records requirement for different services indicated a different meaning. It would not be reasonable for the committee to require that every assessment have certain requirements. That would result in the payment schedule requiring performance of services to a certain standard. The court did not agree with the respondent that the medical record had to be legible to the committee and sufficient to enable the committee to carry out its audit function by assessing medical necessity and frequency. Because the court could not determine how the errors affected the reassessment, it was referred back to the committee for reconsideration; 2) the appellant indicated at the hearing that he interpreted counselling to include an in-depth discussion of one or multiple medical matters in a manner that went beyond the typical routine office visit. The decision concluded that the appellant was converting partial assessment services to counselling services based on the time spent with the patient. The committee converted 75 percent of those billings to partial assessments. The conclusion that the appellant was converting services in this way was unreasonable. The appellant explained that he only billed for counselling services if they went beyond those normally associated with a partial assessment. The committee did not find that the appellant lacked credibility, nor did the committee indicate a reason for rejecting his evidence. The court could not understand why the committee found that the appellant was not entitled to bill for counselling. The decision was found not to have the required justification, transparency and intelligibility to conclude that the appellant was converting partial assessments to counselling based on time alone. The matter was remitted back to the committee to reconsider its reasons for the decision relating to counselling and the outcome based on the court's concerns; and 3) in its notes, the committee indicated that the Act required the ECG to be required medically for it to be billed. The committee concluded that the ECGs were rarely medically necessary. The appellant argued that it was his training and practice to conduct an ECG during most complete assessments and that he should not be punished for following the procedure based on his education and experience. The court concluded that it was reasonable for the committee to reassess the appellant's billings for ECGs. There was evidence to support the committee's conclusion that the ECGs performed by the appellant were rarely medically necessary. The appellant was awarded costs on column 1 of the tariff.

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Input Capital Corp. v Thomas, 2019 SKQB 210

Krogan, August 26, 2019 (QB19202)

Civil Procedure – Queen's Bench Rules, Rule 7-2, Rule 7-5
Civil Procedure – Summary Judgment
Contracts – Unconscionable
Torts – Negligent Misrepresentation
Torts – Good Faith Bargaining
Statutes – Interpretation – Consumer Protection and Business Practices Act
Statutes – Interpretation – Unconscionable Transactions Relief Act

The applicant entered into an Ag-Streaming Contract (Contract) with the defendants whereby the applicant would provide upfront payment of $1,750,000 to the defendants in exchange for the delivery of 1,520 tonnes of No. 1 Canada canola to the applicant for a period of six years, commencing in 2014. There were also two $76,000 crop payments each year: one payment when it was confirmed that there was sufficient canola seeded to meet the base tonnes, and another when the base tonnes were delivered to the applicant. The defendants granted the applicant a general security agreement and a collateral land mortgage to secure their obligations under the contract. The mortgage was a demand mortgage. The applicants made the demand in writing on March 13, 2015. The required canola was not delivered in 2014 or 2015 so none of the $76,000 crop payments were made to the defendant in 2014 and 2015. The applicants sought damages totaling $2,230,667.00, representing the 3,040 tonnes of undelivered canola at $450 per tonne, minus the payment that would have been made to the defendants, plus return of the upfront payment. The defendants indicated that they were in a troubled financial situation when they arranged for the contract, a fact that they said was known to the applicant. Further, they argued that they understood their canola delivery obligations to be 880 tonnes per year, but when it came time to signing the contract, a different representative of the applicant met them and the tonnage was 1,520. The defendants indicated that the applicant demanded they rent more land, or the money would not be advanced. According to the defendants, they were told to "take it or leave it" and were not permitted to confer with family or a lawyer prior to making a decision to sign the contract on the new terms. They said that they asked for the interest for the calculation of damages but were not provided it. The defendants counterclaimed. The applicant applied for summary judgment. The court considered the defendants defences: 1) unconscionability; 2) negligent misrepresentation; 3) good faith bargaining; 4) Unconscionable Transactions Relief Act (UTRA); 5) Consumer Protection and Business Practices Act (CPBPA); and 6) the defendants' counterclaim.
HELD: Summary judgment can be granted when there is no genuine issue requiring a trial. If there is a genuine issue for trial, the court may use its fact-finding powers to avoid the need for a trial. The defences were considered as follows: 1) the elements of unconscionability are: a) inequality in bargaining position. The defendants claimed that the applicants were aware of their poor

financial situation and that they were not permitted to contact a lawyer prior to the signing the contract. The applicant claimed that the defendants were sophisticated businesspeople with the ability to negotiate; b) use of position in an unconscionable manner. The defendants argued that the applicant took advantage of their financial circumstances and lack of independent advice, ostensibly forcing them to sign the contract; and c) unfair bargain. The defendants argued that the contract was substantially unfair because the interest rate was unknown, the money was not sufficient to allow the required canola production, and the security taken was far in excess of the defendants' obligations. The evidence regarding the issue of unconscionability conflicted in every respect. There was a genuine issue requiring a trial. The court determined that the contrasting evidence could not be reconciled on a more detailed and enhanced analysis of the affidavit evidence. Credibility would be an important determination; 2) the court reviewed the legal test for negligent misrepresentation in light of the evidence and concluded that a trial would be necessary to determine the negligent misrepresentation defence; 3) the defendants alleged that the applicant negotiated in bad faith by not identifying the entire contract before presenting it to the defendants to sign when they could not confer with anyone else regarding the contents. Further, the defendants argued the applicants acted in bad faith when the required canola tonnage was increased and when they negotiated a contract that the defendants could not possibly honour in their dire financial circumstances. The court found that facts would have to be established through a trial before the court could determine whether a good faith duty existed between the parties due to a special relationship between them; 4) the applicants argued that the narrow application of the UTRA did not apply to the circumstances of the case. The court concluded that the determination could not be made by summary judgment; 5) again, the court found that a trial would be required to resolve the issue; and 6) the counterclaim involved the resolution of the same issues as identified in the defendants' defences. A trial was found to be necessary to address the issues in the counterclaim. There were genuine issues requiring a trial that could not be determined by relying on the court's enhanced fact-finding powers in a summary judgment application. The defendants were awarded their taxable costs of the application.

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Rapp v Baumann, 2019 SKQB 211

Brown, August 27, 2019 (QB19217)

Family Law – Division of Family Property – Valuation
Civil Procedure – Judgments and Orders – Application for Reconsideration – Supplemental Reasons

The court heard and decided various issues regarding the division of the parties' family property in 2018 (see: 2018 SKQB 134). The petitioner and the respondent had appealed the decision. However, the Queen's Bench judgment roll had not yet been entered. The parties then applied for reconsideration of a number of matters contained in that judgment. The issues were: 1) whether the Queen's Bench judge was functus officio with respect to the reconsideration application; 2) if not, whether it was appropriate for the judge to: i) confirm the calculation provided by the business appraiser with respect to certain findings of fact made at trial regarding the value of the respondent's partnership interest in the dairy farm; ii) reconsider the judgment regarding the valuation and division of a second residence (not the family home) as a partnership asset; and iii) affirm the decision regarding the character of the family home; and 3) whether costs should be awarded.
HELD: The court issued supplemental reasons to the original judgment. It ordered the respondent to pay $144,000 to the petitioner in division of family property. It found with respect to each issue that: 1) it was not functus officio, as no judgment roll had been taken out nor an order issued. It had the authority pursuant to the inherent jurisdiction of the court. Rendering supplemental reasons would not affect the appeal and would provide a more stable base from which to appeal. It was unnecessary to rely upon Queen's Bench rule 10-10 and 10-11 because of the court's inherent authority; 2) it was appropriate to: i) affirm the appraiser's recalculations regarding the partnership values and consequently, the net increase in the value of the respondent's partnership interest was to be noted in the issuance of the final judgment; ii) consider the issue of the increase in the value of the second house. The total increase in its value as a partnership asset in the respondent's share of the partnership should not have been included; and iii) affirm that the entire value of the family home was to be shared equally in accordance with The Family Property Act. Its original character as a partnership asset was not an impediment to equal division; and 3) it would not make an award of costs as both parties had achieved some success.

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Vleeming v Thomas, 2019 SKQB 213

Klatt, August 27, 2019 (QB19204)

Civil Procedure – Queen's Bench Rules, Rule 7-2, Rule 6-58
Civil Procedure – Summary Judgment
Contracts – Unconscionable
Debtor and Creditor – Mortgage – Foreclosure

The plaintiff applied pursuant to Rule 7-2 of The Queen's Bench Rules for summary judgment to enforce his claim under a mortgage

that was granted to him by the defendant. The defendant granted the plaintiff a mortgage in the amount of $215,000 registered against his home-quarter. The defendant was required to make monthly payments of $2,150 commencing on July 1, 2016 until June 1, 2017, at which time the mortgage term expired, and the balance was due in full. The defendant was also to pay $75,000 on October 31, 2016. The interest was to accrue at 12 percent per annum and the plaintiff was entitled to charge $100 per day in late interest and $2,000 per month in administration and management fees if the mortgage were in arrears. The defendant did not make the October 31, 2016 payment nor any further payments. The plaintiff demanded payment and served the defendant and the Farmland Security Board with a notice of intention pursuant to s. 12(1) of The Saskatchewan Farm Security Act (SFSA). In May 2018, the chambers judge ordered that ss. 9(1)(d) of the SFSA did not apply to the mortgage. The plaintiff's statement of claim was issued. The plaintiff did not apply to enforce the $100 per day or the $2,000 per month fees. The defendant filed a statement of defence alleging that the plaintiff took advantage of his poor financial situation and imposed terms that he had to accept. The defendant indicated that he had the means to make the payment so an order for foreclosure or sale was not warranted. The defendant indicated that he mortgaged his home quarter to satisfy his son's debts to Input Capital Corp. (IC). The defendant said that he was not aware that IC had registered a security interest against his property and that of his company. IC seized his grain and machinery, so he was not able to pay the debts under the mortgage to the plaintiff. The defendant indicated that he commenced actions against IC for unlawful seizure of his property. The defendant said that he did not receive legal advice and the basis of the contract being unconscionable was the $100 per day late interest fees, the $2,000 per month administration fees and the interest rate. The defendant did acknowledge at the hearing that he had received independent legal advice. He also ultimately acknowledged that the terms that he felt were overbearing or unconscionable were not being enforced by the plaintiff, except for the 12 percent interest rate. The court discussed the following issues: 1) the inequality of bargaining power; 2) the unconscionable use of power; and 3) the grossly unfair bargain.

HELD: The issues were discussed as follows: 1) the court did not find any evidence that the plaintiff knew, or was wilfully blind to, the extent of the defendant's financial situation, nor that IC had security interests in the defendant's farm machinery. There was also no evidence that the defendant presented to the plaintiff as desperate and vulnerable. Further, there was no evidence that the defendant did not understand the terms and obligations under the mortgage agreement. The defendant had the benefit of independent legal advice, which generally overcomes assertions of inequality of bargaining power. The defendant did not establish the required degree of inequality of bargaining position that existed between him and the plaintiff; 2) there were no facts to establish that the plaintiff's actions amounted to an inordinate exercise of influence

over the weaker party; and 3) there was no evidence that the terms of the mortgage were so grossly unfair or diverged from community standards. The court indicated that the question of whether the bargain was grossly unfair turned on whether the cost of the loan was excessive, having regard to the risk and all the circumstances. The court agreed with the plaintiff that the interest rate, after taking into account all the fees, worked out to 20.1 percent. The cost of the loan was not excessive so as to render the bargain unfair. The court concluded that there was no triable issue and the court could find the facts and apply the relevant legal principles so as to fairly resolve the dispute. The claim was straightforward. The hope of being able to pay off the amount owing was not a valid basis to dispute the amount owed. The plaintiff was entitled to summary judgment and the amount owing under the mortgage was referred to the local registrar pursuant to Rule 6-58 to conduct an accounting.

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Kyrylchuk v Cox, 2019 SKQB 214

Layh, September 5, 2019 (QB19205)

Wills and Estates – Constructive Trust
Civil Procedure – Queen's Bench Rules, Rule 7-2, Rule 7-5, Rule 7-9
Civil Procedure – Summary Judgment

The applicants, the executors of the estate of Michal Kyrylchuk (the deceased), had obtained letters probate in 2015, but the respondent commenced an action against the estate requesting that the grant be set aside and a direction that the will be proven in solemn form. He then brought an application in 2016 alleging that the deceased was not of sound mind and not mentally capable of signing a will and that the executors unduly influenced the deceased to intentionally disinherit him. The application was dismissed because no evidence had been provided by the respondent that negatived the deceased's testamentary capacity or proved that undue influence had occurred (see: 2017 SKQB 353). Following this decision, the executors served a statement of defence upon the applicant and simultaneously applied to strike out the claim on the basis that, given the decision, the claim was an abuse of process contrary to Queen's Bench rule 7-9(2)(c). The judge who heard that application decided that although the decision in the previous application had determined many of the respondent's claims in his statement of claim, the issues of constructive trust and perhaps contract remained outstanding (see: 2018 SKQB 132). The applicants then made this application.
HELD: The application for summary judgment was granted and the respondent's claim was struck in its entirety. The court found pursuant to Queen's Bench rule 7-5(1) that the applicants had demonstrated that there was no genuine issue requiring trial under Queen's Bench subrules 7-5(1) and 7-5(2)(a) and that the respondent

had not met the onus of establishing that there was an issue. The respondent's claim in contract was dismissed because he had failed to prove, in the absence of a written agreement, that there was a contractual relationship between him and the deceased whereby there was an agreement that the former would acquire the deceased's farm property one day. The respondent's other claim of unjust enrichment, that the deceased received unfair benefits from the respondent's unremunerated improvements to the deceased's land and that the just remedy to this deprivation was that the deceased held the land in constructive trust for him, was also dismissed. The evidence showed that the respondent's acts were not donative in nature, nor had he expected the deceased to repay him for his work. The court awarded costs of $3,500 against the respondent because of his conduct in the litigation and the delay caused by him.

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Knuth v Best Western International Inc., 2019 SKQB 216

Kovach, September 16, 2019 (QB19206)

Civil Procedure – Class Actions
Civil Procedure – Summary Judgment
Civil Procedure - Queen's Bench Rules, Rule 7-2

The plaintiff commenced a proposed class action in December 2014. The statement of claim alleged that the defendants named in the potential class action own, operate or manage hotels that had wrongfully collected Destination Marketing Fees from their customers. Three of the named defendants, Best Western International (BW), Country Inns & Suites by Carlson and Radisson Hotels (Carlson) brought applications under Queen's Bench rule 7-2 for summary judgment dismissing a potential class action against them under The Class Actions Act. They argued that there was no genuine issue for trial in that the narrow issue raised against them was whether they had any involvement in the alleged wrongful acts and whether there was any basis for a class action against them. The applicants claimed that they neither own, operate or manage properties. They act in the manner of a cooperative marketing association that licences the use of their trademarks, name, logo and provides other services to its members. The members determine their own rates and fees to be charged and collected from their customers. The plaintiff argued that the summary judgment application risked duplicative proceedings and was inappropriate in the class action context of the case unless the defendant applicants provided a compelling reason for the court to treat the matter sequentially. The general principle to be applied was that certification applications take precedence and should be the first application made in a potential class action.

HELD: The application was dismissed. The court found that there was no compelling reason to make a summary judgment decision at this point. The application raised evidentiary issues that were better suited to assessment at the certification stage. Regardless of the fact that if the applicants were successful, the application would remove two defendants from the action, it would leave the risk of overlapping and inconsistent decisions and could cause later delay to an eventual certification if the summary judgment were appealed.

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R v Goodpipe, 2019 SKQB 221

McCreary, September 6, 2019 (QB19208)

Criminal Law – Manslaughter – Sentencing – Dangerous Offender Application

The accused was convicted of manslaughter after trial by jury. He had been a party to the offence of robbery committed with another accused. During the course of it, the victim died. The other accused was convicted of manslaughter. At the time of the offence, the accused had been out of jail for about seven months, following his incarceration for breaching the terms of his conditional release for a third time. The conditional release related to a previous conviction for manslaughter. Following this conviction, the court granted the Crown's application for the accused to be declared a dangerous offender (DO) and sentenced under ss. 753(4) and 753(4.1) of the Criminal Code after he had been assessed by a psychiatrist. The accused, now 36, had a lengthy criminal record commencing with his first conviction and custodial sentence received when he was 12. The offences committed in his youth were not serious, but the accused's offences as an adult included eight convictions for assault, one for robbery and his previous conviction for manslaughter. As a consequence, most of the accused's life had been spent in custody. His mother and grandmother had attended residential schools. During his childhood, his parents abused alcohol and neglected him. When he was 12, the accused's mother had stopped drinking and since then, she and the accused's stepfather had encouraged him to engage in pro-social behaviours. They continued to love and support him. The psychiatrist reported that the accused suffered from severe antisocial personality disorder with elevated psychopathy. He had a severe cocaine abuse disorder and moderate alcohol use disorder. If the accused could address his substance abuse, it might lower his risk of violence, but not enough to alter the risk assessment. The accused had successfully disassociated himself from a gang and completed his GED with high marks while in prison, but he had had little success with behavioural programming while incarcerated. He completed substance abuse and violence prevention programs, but his later conduct indicated that they had

not been effective in assisting the accused to restrain himself. The issues were whether: 1) the accused was a DO and if so: i) whether the predicate manslaughter conviction constituted a serious personal injury offence under s. 752(a) of the Code. The defence argued that it was not because the accused was only a party to the offence and there was no evidence that he had been violent with the victim or that he had known his co-accused was carrying a loaded gun; and ii) whether the accused constituted a threat to other persons because the predicate offence was part of a pattern that showed violent unrestrained behaviour likely to cause injury or death to others in the future; and that his behaviour was persistent and aggressive without regard to the reasonably foreseeable consequences; and 2) an indeterminate sentence was appropriate if the accused was declared a DO.

HELD: The accused was declared a DO and given an indeterminate sentence. The court found with respect to each issue that: 1) the accused was a DO because: i) his conviction for manslaughter as a party to the offence constituted a serious personal injury offence pursuant to Part XXIV of the Code. He knew, or ought to have known, that the robbery might involve violence that was likely to endanger the victim's life. There was no requirement that the indictable offence involving violence and punishable by Imprisonment for 10 or more years must involve a serious degree of violence; and ii) based on his record, it was satisfied that that the accused met the criteria of ss. 753(1)(a)(i) and (ii) of the Code. The predicate offence was part of a pattern of violent conduct, persistent aggressive behaviour and indifference to the reasonably foreseeable consequences of his behaviour; the Crown had established that there was a high likelihood that the accused would reoffend violently and that he constituted a threat to the safety of other persons because the predicate offence was part of his pattern. The psychiatrist's assessment was that the accused would engage in future violence and his evidence was uncontradicted. The accused's violent conduct was intractable because he had not responded to the behavioural programming he received. He breached his conditional release three times and never successfully complied with its terms. Following his release from custody in August 2015, he returned to drug use despite his parents' effort to help him address his addictions and, in March 2016, committed the predicate offence. The psychiatrist's opinion was that based upon the accused's behaviour after he was freed from prison, there was no reasonable expectation that he would respond to treatment differently. The accused might have had some potential to succeed in the future if he were interested in Indigenous cultural and spiritual approaches to treatment, but there was no evidence that that he had any such interest. As the accused planned to appeal his conviction, he had not testified at the sentencing hearing, but there was no evidence that he was remorseful or had insight into his behaviour; and 2) an indefinite sentence was appropriate pursuant to s. 753(4.1) of the Code because there was no likelihood that the risk posed by the accused would be reduced by a conventional sentence. The court considered that the

Gladue factors were numerous in the accused's case, but as he had not been historically engaged in rehabilitating himself through Aboriginal culture and spirituality and there was no evidence of his interest in doing so, it could not find that there was a reasonable expectation that a lesser sentence that involved Indigenous healing support would adequately protect the public.

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Fleury v Ensign Energy Services Inc., 2019 SKQB 222

Richmond, September 3, 2019 (QB19209)

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

The defendant brought an application for summary judgment pursuant to Queen's Bench rule 7-5 to have the plaintiff's claim dismissed. The plaintiff had been employed by the defendant as a derrick hand since 1990. He would work whenever the rig was operating. In 2016, the rig was shut down and the plaintiff laid off, but he was called back to work almost immediately. There was a dispute between the parties concerning the exchange of information that followed. According to the defendant's manager, the plaintiff informed him that he couldn't return immediately because he had an appointment with his physician respecting his back. The manager maintained that the plaintiff told him that he needed back surgery and the plaintiff claimed that he called shortly after being asked to return to work and was advised that he could not work until his surgery was completed.
HELD: The application was dismissed. This was not a proper case for summary judgment. The court did not accept the applicant's argument that the factual disputes were minor and did not go to the heart of the matter. It could not determine the matter on the basis of the evidence before it.

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Hill Top Manor Ltd. v Tyco Integrated Fire and Security Canada, Inc./Tyco feu et sécurité intégrés Canada, inc., 2019 SKQB 223

Currie, September 4, 2019 (QB19210)

Civil Procedure – Queen's Bench Rules, Rule 7-1, Rule 7-9
Statutes – Interpretation – Limitations Act, Section 5, Section 6, Section 7, Section 31
Statutes – Interpretation – Limitation of Actions Act, Section 3
Civil Procedure – Limitation Period – Discoverability Principle

The defendant applied for an order striking out the plaintiff's action pursuant to Queen's Bench rule 7-9. It argued that the plaintiff commenced its action after the expiration of the relevant limitation period. The plaintiff's claim was based on breach of contract. In 1998, it had engaged the defendant to install sprinkler systems in a personal care home it was constructing. During the course of an inspection by an engineering firm of the home in 2016, it was discovered that the defendant had not installed the system in the building's attic as required by the contract. The plaintiff commenced its action in 2017 claiming compensation for the costs it incurred in installing sprinklers. Amongst its defences, the applicant took the position that the plaintiff's action did not have a reasonable prospect of success at trial because pursuant to s. 5 of The Limitations Act (LA), the claim was statute-barred. As for discovering the alleged breach under s. 6 of the Act, the defendant argued that it had to have been discovered by the plaintiff long ago because laws and regulations require inspections of sprinkler systems and a reasonable person in the plaintiff's position would have complied with the law by conducting the inspections that would have revealed their absence in the attic. Further, under s. 7 of the Act, the plaintiff's claim was commenced outside of the ultimate limitation period of 15 years which expired in 2013. The plaintiff submitted that the defendant's application should have been brought under Queen's Bench rule 7-1 rather than rule 7-9 because the procedure under the former provides a two-step procedure to put the issue before the court. It argued that s. 31(5)(a) of the LA provides that the current Act applies as though the relevant occurrence had happened on the date of its coming into force (CIF) on May 1, 2005, and therefore the ultimate limitation period would end in 2020.
HELD: The application was dismissed. The court found that because of the application's narrow focus and the foundational rules set out in Part 1 of The Queen's Bench Rules, it had been made appropriately under Queen's Bench rule 7-9 and that the defendant had not established that the plaintiff's claim was barred by a limitation period. The question could not be determined without evidence presented at trial regarding whether the plaintiff could have discovered the breach earlier with reasonable diligence. It noted that the plaintiff's reliance on s. 31(5) of the LA was limited by s. 31(3) which required a determination as to whether the limitation period under the predecessor legislation, The Limitation of Actions Act (LAA), had expired before May 1, 2005, the CIF date of the LA. Clause 3(1)(f) of the LAA provided that actions for contract expired within six years after the cause arose and thus, the limitation period would have expired in 2004 and s. 31(3) of the LA applied. However, the court agreed with the decision in R.J.G. v Canada (Attorney General) and found that the common law principle of discoverability applied to all causes of action. It remained to be determined at trial whether the principle applied to the plaintiff's claim under the LAA so that the limitation period had not expired before May 1, 2005 and therefore s. 31(5)(a) of the LA might apply, deeming the breach to have occurred on the CIF date. Depending on

the evidence presented at trial, the ultimate limitation period could be 2020.

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Mitchelson v 101306439 Saskatchewan Ltd., 2019 SKQB 224

Tochor, September 3, 2019 (QB19211)

Creditor and Debtor – Personal Property Security Act Priority

The applicant applied for orders pursuant to s. 63 of The Personal Property Security Act, 1993 and s. 2-66 of The Saskatchewan Employment Act to declare her security interest in goods in the possession of the respondent, 1010306439 Saskatchewan Ltd. (39 Sask Ltd.); that her interest had priority over all security interests registered against the judgment debtor, 1010286521 Saskatchewan Ltd. (the debtor company); restraining the debtor company from removing or dealing with the goods in which the applicant had a security interest; and directing the debtor company to cooperate with her in the seizure of any goods in which she held a security interest. The applicant, a former employee of the debtor company, obtained a wage assessment of $96,900 in her favour. She then tried to enforce the order for payment by attempting to seize the assets previously in the possession of the debtor company but which were allegedly in the possession of 39 Sask Ltd. It stopped the seizure, submitting that the debtor company did not own the assets and therefore they could not be the subject of the applicant's security interest. The affidavit evidence submitted by each party was conflicting.
HELD: The application was dismissed. The court directed a trial on the issue of whether the respondent debtor company was in possession of any assets subject to the security interest held by the applicant. On the conflicting evidence before it in the application, it could not identify the assets in which the applicant claimed an interest, who had rights to which assets, at which time they may have held such rights and who might have priority to those assets.

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Seykora v Lake Lenore (Rural Municipality No. 399), 2019 SKQB 225

Richmond, September 4, 2019 (QB19212)

Civil Procedure – Queen's Bench Rules, Rule 7-2, Rule 7-5
Civil Procedure – Summary Judgment
Employment Law – Wrongful Dismissal

The plaintiff applied for summary judgment of his claim pursuant to Queen's Bench rules 7-2 and 7-5. He had brought an action against the defendant municipality alleging that it had wrongfully dismissed him. He was terminated by the defendant from his position as a grader operator in 2017 after 11 years of service. The defendant gave him eight weeks of pay in lieu of notice. Initially, the defendant did not advise the plaintiff that his termination was for cause. It explained that it had paid him out of a sense of kindness and fairness. Later it asserted that the plaintiff was dismissed for cause. It argued that in this case, because of conflicting evidence, it was not appropriate to proceed by way of summary judgment. It submitted that, given that it had expressed its concerns many times to the plaintiff about his performance of his duties and his failure to follow instructions, training and council policies, and based upon the record of the plaintiff's cumulative misconduct, the plaintiff had to be aware that his job was in jeopardy. The plaintiff disputed that there had been any misconduct and that he was ever disciplined. The defendant had a formal discipline policy but did not abide by it in this case. The plaintiff lost his job at the age of 65 and had expected to work until he was 69. Because of his age at termination and his limited education, that there were few jobs available to him and it was unreasonable to expect him to relocate to find new employment, the plaintiff argued that he should receive 14 months of pay in lieu of notice. Further, because the defendant had terminated him without giving reasons and may have told other people before he was informed, the plaintiff argued he should receive aggravated damages of $20,000. The defendant suggested that the award should be based on pay for one month per year of service. It suggested that the plaintiff had not mitigated his damages because he had transferrable skills and since his termination, had not applied for any positions.

HELD: The application for summary judgment was granted. The court found that this was an appropriate case for summary process and that the plaintiff had been wrongfully dismissed. It awarded him damages in the amount of his pay for 14 months and his pensions and benefits, less the amount of notice actually received. The amount was reduced by two months because of the plaintiff's failure to mitigate. His claim for aggravated damages was dismissed. The defendant had not met the onus of establishing the plaintiff was dismissed for cause. The evidence showed that the plaintiff was not informed that his job was at risk. The defendant's conduct was not sufficiently egregious to support an award for aggravated damages.

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Siwak v Red River Valley Mutual Insurance Co., 2019 SKQB 226

Hildebrandt, September 5, 2019 (QB19213)

Civil Procedure – Queen's Bench Rules, Rule 1-6, Rule 3-72, Rule 3-84, Rule 7-9
Statutes – Interpretation – Limitations Act, Section 20
Civil Procedure – Limitation Period

The plaintiffs commenced an action against the defendant insurance company in 2014 after a storm caused extensive damage to their residence. They requested specific performance directing the insurer to pay the full replacement cost of the property. The insurer filed its statement of defence and in August 2016, the parties completed mediation. In September 2018, the plaintiffs amended their statement of claim to add Lydale Construction (Lydale) as a defendant and claimed damages for its alleged negligence and/or breach of duty in repairing the house. They said that they discovered in December 2016 and August 2017 that Lydale's repairs were inadequate. Lydale applied pursuant to Queen's Bench rule 7-9 for an order removing it as a defendant and striking the portions of the statement of claim pertaining to it. The plaintiffs and Lydale agreed that the plaintiffs had not complied with Queen's Bench rule 3-72(1) because they failed to obtain the parties' agreement or the permission of the court to add the defendant and that Lydale failed to apply to the court within eight days of being served with the amended statement of claim pursuant to Queen's Bench rule 3-84. Lydale requested that the court consider the substantive issue of whether it should be added as a defendant in light of s. 20 of the Limitations Act (LA) rather than resolve the procedural matter between the parties. The plaintiffs objected to this because the determination of whether Lydale had a valid defence based upon a limitation period should be made by a trial judge or, alternatively, if the court were able to determine that ss. 5 and 6 of the LA applied, then it was appropriate for it to consider whether Lydale might be maintained as a defendant under s. 20. The issues were whether: 1) the limitation period should be determined at this point and, if so, and the claim was outside the limitation period, could the plaintiffs be permitted to maintain Lydale as party pursuant to s. 20 of the LA; and 2) Lydale had been properly added as a defendant under Queen's Bench rules 3-78(2) and 3-84 and if so, whether it could be maintained as a defendant, irrespective of the limitation period. HELD: The application was dismissed. The court made numerous findings regarding procedural errors committed by both parties. It applied its power under Queen's Bench rule 1-6(1)(a) to cure Lydale's failure to object to the amendment as required by Queen's Bench rule 3-84 because once it became aware of the plaintiffs' amended statement of claim, it brought this application promptly. However, its application to strike those portions of the amended claim directed at it on the ground that the claim was commenced outside the limitation period was premature. The plaintiffs' failure to obtain the permission of the court to add the defendant was also cured and they could proceed with the amended statement of claim. The court found with respect to each issue that: 1) it could not make a determination as to whether the claim against Lydale was outside

the limitation period. Under ss. 20(a) and 20(b) of the LA, there must be either an assumption or a finding that the limitation period had expired unless the parties acknowledged it and as the plaintiffs had not done so, the court could not assume expiration; and 2) it had the discretion to add Lydale as a defendant under Queen's Bench rule 3-78(2)(a) because the remedy claimed against it and the insurer arose out of the same occurrence: the storm that damaged the plaintiffs' house. The court ordered the plaintiffs to pay Lydale the costs of the application because they had not complied with Queen's Bench rule 3-84, nor had they applied to the court to cure their error on a nunc pro tunc basis.

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