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Subject Index

T.F. v R, 2019 SKCA 82

Jackson Barrington-Foote Kalmakoff, August 29, 2019 (CA19081)

Criminal Law – Sexual Offences Against Children – Sexual Assault
Criminal Law – Sexual Offences Against Children – Sexual Interference
Criminal Law – Sentencing – Appeal
Criminal Law – Sentencing – Apprehension of Bias
Criminal Law – Sentencing – Demonstrably Unfit
Criminal Law – Sentencing – Mitigating and Aggravating Circumstances
Criminal Law – Sentencing – Sentencing Principles
Criminal Law – Sentencing – Totality Principle

The appellant pled guilty to the following Criminal Code offences: two counts of sexual assault, contrary to s. 271, and two counts of sexual interference, contrary to s. 151. The victims were his toddler and infant daughter, A.B. and C.D. One of the victims revealed the offences to the appellant's wife. The appellant eventually attended to the RCMP to give a full confession to conduct going beyond what the child disclosed. The abuse occurred approximately 20 to 30 times over a period of 16 months. The offences were major sexual offences. The appellant was 43 years old at the time of his arrest. He did not have criminal record and was a nurse supervisor at a large hospital. He lost his job when he was arrested. The appellant's parents were alcoholics. He was abused physically, emotionally, and sexually as a child. According to the pre-sentence report, the appellant was a low risk for re-offending generally and a below average risk for re-offending sexually. The appellant pled guilty early on without a preliminary inquiry or trial. He took

responsibility for his actions, apologized to his wife and the victims and committed to undergo treatment. The Provincial Court judge sentenced the appellant to six years of imprisonment by giving three years of imprisonment for each of the s. 271 sexual assault convictions and three years concurrent for each of the s. 151 offences. He also made ancillary orders including an order under s. 161 of the Criminal Code prohibiting the appellant from various forms of contact with children for an additional five years following his release from prison. A victim surcharge of $800 was also ordered. The appeal court answered five questions to determine the appeal. The questions were whether: 1) there was a reasonable apprehension of bias; 2) the sentencing judge erred in principle, failed to consider a relevant factor, or gave erroneous consideration to an aggravating or mitigating factor; 3) if so, whether the identified errors justified intervention; 4) the sentence was demonstrably unfit; and 5) the sentencing judge erred in making the order under s. 161 of the Criminal Code.

HELD: The appeal was allowed in part by varying the conditions of the s. 161 order and cancelling the surcharges. The appeal court answered the questions as follows: 1) they did not find anything in the record that raised even a hint of bias on the part of the sentencing judge. The judge seized himself with the matter when the appellant asked for the sentencing hearing to be adjourned so that he could retain a new lawyer, which was not bias; 2) the appellant argued that the sentencing judge failed to give the appellant's confession and guilty plea separate consideration as mitigating factors. These were both entitled to significant consideration as mitigating factors. The sentencing judge committed an error in principle by failing to specifically consider the mitigating effect of the appellant's confession, especially in light of the complete absence of any other evidence against him relating to the offences against C.D. The fact that the appellant suffered abuse as a child should only have been considered as a mitigating factor, not as both a mitigating and an aggravating factor as the sentencing judge considered it. The appeal court agreed that the sentencing judge incorrectly applied the totality principle. The totality principle is to be applied after the sentence for each offence is rendered. The appeal court found that the sentencing judge first determined the global sentence within the totality principle and then distributed the sentence among the various offences; 3) the appeal court concluded that none of the sentencing judge's errors, individually or taken together, had an impact on the sentence that called for intervention on the appeal; 4) the appellant argued that the six-year total sentence was demonstrably unfit because it did not accord with principles of proportionality, parity, and totality. The appeal court did not agree; and 5) the appellant argued that the sentencing judge erred in making the s. 161 order because the evidence did not disclose a pattern of offending on the appellant's part and the evidence indicated that the appellant was unlikely to reoffend against children in any of the circumstances against which the conditions were designed to guard. A deferential standard of review

Employment Act, Section 6-50

Statutes – Interpretation – Tax Enforcement Act

Tax – Provincial Sales Tax Assessment – Appeal

Cases by Name

101133912 Saskatchewan Ltd. v First Care Medical Management Inc.

Alie-Kirkpatrick v Saskatoon (City)

Blyth v Lakeside Machinery Co-operative Ltd.

Borowski v R

Brent Gedak Welding Ltd. v Maverick Oilfield Services Ltd.

Business Development Bank of Canada v Beckerland Farms Inc.

Canadian Pacific Railway Co. v Saskatchewan

Cathcart v R

Conexus Credit Union 2005 v Fink

Deren v SaskPower

Frenchman Butte (Rural Municipality) v Husky Energy Inc.

Jahnke v Thomas

L.C.R. v I.J.E.R.

Link v Schulte

Lunn v Saskatchewan (Finance)

Mercredi v Saskatoon Provincial Correctional Centre

Olumide v Saskatchewan Human Rights Commission

was warranted, given the discretionary nature of the decision to make the order under s. 161. The sentencing judge was found to have misstated the applicable law. The offender did not have to establish that there was "no likelihood" he would reoffend. The sentencing judge also failed to give consideration to the imposition of conditions that were responsive to the appellant's personal circumstances and the nature of his offences. The appeal court would impose a s. 161 order of five years, like the sentencing judge did. There was no public aspect to the offending. The appeal court found it reasonable for the s. 161 order to have conditions that prohibited the appellant from having employment relating to, being in a position of trust, or having unsupervised in-person contact with children under the age of 16. The conditions were amended accordingly. The surcharges order was cancelled pursuant to the Supreme Court of Canada's finding in Boudreault.

 Back to top

R v Ali, 2019 SKCA 83

Jackson Whitmore Kalmakoff, August 29, 2019 (CA19082)

Criminal Law – Indictable offence – Election – Re-election
Criminal Law – Criminal Code, Section 567
Criminal Law – Joint Charges – Severance

The Crown argued that the Court of Queen's Bench improperly failed or refused to exercise jurisdiction on an indictment. The two respondents, N.A. and R.D., and a third person, M.H., were jointly charged with trafficking cocaine and possession of cocaine for the purposes of trafficking, contrary to the provision of the Controlled Drugs and Substances Act (CDSA). All three charged elected to be tried by Provincial Court Judge. They pled not guilty and a trial date was set for May 10, 2017. On May 10, 2017, M.H. filed a notice of his intention to re-elect to Court of Queen's Bench judge without a jury. He waived his preliminary inquiry and consented to be ordered to stand trial. The respondents were aware that M.H. was intending to do so. The trial did not proceed. The Provincial Court judge also appeared to agree with the Crown that M.H.'s re-election was binding on the respondents, because it was a higher election. R.D.'s lawyer indicated that he had been provided with instructions to consent to be ordered to stand trial. R.D. was committed to stand trial. N.A.'s lawyer was granted leave to withdraw and a warrant for N.A.'s arrest was granted because he did not appear. That Provincial Court judge "deemed" N.A. to have elected trial by Queen's Bench judge alone and ordered him to stand trial. Trial dates were arranged. M.H. thereafter re-elected again, to be tried in Provincial Court, where he entered guilty pleas. The Crown stayed the indictment against M.H. but continued the prosecution of the indictment against the respondents. On the Queen's Bench trial day,

Omorogbe v Saskatchewan Power Corp.

R v Ali

R v Heimbecker

R v McNab

R v R.C.

Sharma, Re (Bankrupt)

T.F. v R

United Food and Commercial Workers, Local 1400 v Affinity Credit Union

Walker v Walker

the Queen's Bench judge questioned whether N.A. and R.D. were entitled to their original election given M.H.'s re-election back to Provincial Court. The Crown argued that by virtue of s. 567 of the Criminal Code, the Provincial Court judge properly concluded inconsistent elections could not be entered for the three accused, and the deemed election to the Court of Queen's Bench and the consent committals for trial that followed meant the trial judge had jurisdiction to hear the matter. The trial judge disagreed. She determined that she had no jurisdiction to hear the matter, holding that the Crown's decision to stay the indictment against M.H. meant that the respondents were entitled to the mode of trial they had initially elected.

HELD: The appeal was dismissed. The appeal court determined that the Court of Queen's Bench did not have jurisdiction over the indictment, but not because they were entitled to revert to their original election once the Crown stayed proceedings against M.H. The trial judge erred in that regard. The appeal court reached its determination because: 1) a re-election by one jointly charged person is not binding on the others, but s. 567 does require the judge to consider whether or not it is appropriate to permit inconsistent elections to be recorded. If the judge determines that it is not appropriate, then all accused will be deemed to have elected trial by judge and jury. Evidence of a clear intention by either of the respondents to re-elect to be tried by Queen's Bench judge alone was not on the record; 2) the respondents could not be deemed by operation of law to have elected trial by Queen's Bench judge sitting alone; and 3) in the circumstances of this case, the respondents were not deemed to have elected or re-elected trial by judge and jury under the provisions of the Criminal Code that permit a court to deem such an election or re-election to have been made. Section 567 of the Criminal Code outlines that an accused person may be unable to have his or her preferred method of trial in cases where multiple individuals are jointly charged and jointly charged persons wish to enter different elections. Section 567 gives the judge discretion. If one jointly accused person re-elects, the judge must canvas whether the remaining co-accused wish to re-elect in a similar manner. If they do, that re-election should take place in accordance with the procedure set out in s. 561. If one or more of the accused does not wish to re-elect, then the judge must turn his or her mind to s. 567. The Provincial Court judges who ordered R.D. and N.A. to stand trial did not exercise their discretion under s. 567. The Criminal Code does not provide authority for the judges to deem the respondents bound by the election of M.H. Once M.H. re-elected, the Provincial Court judges had the following options: a) to allow M.H.'s inconsistent election to stand, in effect severing the proceedings; b) to put the question of re-electing to the respondents in a way that complied with s. 561 or obtain a clear waiver of the formalities and give them the option to re-elect as M.H. did. If they did not want to re-elect the judge, they could exercise discretion under s. 567, decline to record the inconsistent elections and deem all three to have elected judge and jury; or c) to invoke s. 555, decline

to adjudicate on the respondents' matters and continue the proceedings against them as a preliminary inquiry, in which case their elections would be deemed to be trial by judge and jury. The respondents' "consent" to be ordered to stand trial in the Court of Queen's Bench had no legal effect and did not provide authority for the Crown to prefer an indictment against them. The Court of Queen's Bench therefore had no jurisdiction over the indictment against the respondents. The appeal court declined to retroactively make the necessary recordings. The Crown's appeal was dismissed.

 Back to top

Mercredi v Saskatoon Provincial Correctional Centre, 2019 SKCA 86

Ottenbreit Whitmore Barrington-Foote, September 9, 2019 (CA19085)

Criminal Law – Appeal
Criminal Law – Habeas Corpus
Criminal Law – Inmate – Unit Assignment – Procedural Fairness
Statutes – Interpretation – Correctional Services Act, 2012

The appellant was an inmate at the respondent correctional centre. He objected to being placed in Unit A low-security unit because inmates in Unit A spend more time in their cells than inmates in other low-security units. Two corrections managers, exercising authority delegated by the director of the institution, made the placement decision. The evidence used to make the placement decision was not provided to the appellant; he was only provided with the decision to downgrade his security level from medium to low. The appellant argued that placement in Unit A was a deprivation of his residual liberty interests because imprisonment in Unit A was more onerous than it would have been in Overflow Unit Four. The respondents acknowledged that fact. In February 2018, the Queen's Bench Court dismissed the appellant's application for a writ of habeas corpus relating to his incarceration in Unit A. The appellant appealed that decision, arguing that the judge erred in law in finding the unit placement decision was made in a manner that complied with the duty of procedural fairness and was accordingly lawful. Assessments and unit placement decisions are made pursuant to The Correctional Services Act, 2012 (Act) and The Correctional Services Regulations (Regulations). The Queen's Bench judge found that there was no procedural unfairness to the appellant's security assessment and unit placement because there was compliance with the Regulations and policy. The appellant had since been released for serving his sentence, so the habeas corpus remedy was not available.
HELD: The appeal was allowed. Whether corrections officials have a duty of procedural fairness to inmates in the context of unit

placement decisions is a matter of public interest, so the appeal court exercised its discretion to decide the merits of the appeal. The court found that the basic question on an application for habeas corpus was whether the decision resulting in the detention was lawful. If there had been a breach of procedural fairness, it was not lawful. The appellant was found to have established a deprivation of his residual liberty as a result of his placement in Unit A. Unit A had inmates locked alone, in separate cells, for more than double the time they would be in other low-security units. The appellant raised a legitimate ground to question the legality of the deprivation: the failure to comply with the duty of procedural fairness. The respondents then had the onus to demonstrate that the application judge was correct in deciding that corrections officials complied with that duty. The respondents argued that the security level assessment, not the unit placement, was the important decision. They noted that the legislation does not provide for written reasons on unit placements, but it does for other decisions like security assessments, which, according to the respondents, means the Legislature, in calling for a higher degree of procedural fairness, recognized some situations are more important to the inmate. The assessments are done every 21 days, so the respondent argued that a high level of procedural fairness would be difficult for the administration of the facility. The appeal court found that security assessments and unit placements are different decisions. The appellant was afforded the right to make representations regarding his security assessment, but not in relation to the unit placement decision. The Queen's Bench judge found that there was a requirement for fairness in unit placement decisions, but that there was no requirement to provide reasons for the decisions. The appeal court had difficulty reconciling the two findings. The decision-making process regarding the unit decision did not have the usual participatory features of a fair process. The appeal court concluded that there was no evidence to support the respondents' argument that requiring procedural fairness to inmates regarding unit decisions would result in administrative catastrophe. Also, a high degree of procedural fairness was not the only option: the content of the right to procedural fairness is variable. The appeal court also noted that the Act does not contain any express language excluding procedural fairness relating to unit placement decisions. The unit placement decision concerning the appellant and his incarceration in Unit A was unlawful.

 Back to top

Cathcart v R, 2019 SKCA 90

Richards Barrington-Foote Kalmakoff, September 18, 2019 (CA19089)

Criminal Law – Unlawful Confinement – Conviction – Appeal
Constitutional Law – Charter of Rights, Section 7
Criminal Law – Conduct of Trial – Appeal

The self-represented appellant appealed his convictions. He had been jointly charged with two other accused with unlawful confinement contrary to s. 279(2) of the Criminal Code and of attempted robbery contrary to s. 344(1) of the Code. The appellant was self-represented at trial. The appellant and his co-accused were found to have taken two women into a vehicle that the appellant drove and unlawfully confined them in it while the two co-accused attempted to rob them. The credibility of the complainants was a central issue in the trial and the trial judge accepted their testimony regarding the event that took place inside the appellant's vehicle. The appellant argued that the trial judge: 1) erred by finding the Crown's evidence to be credible; 2) erred by failing to find that the Crown had breached its disclosure obligations. The appellant identified numerous items of disclosure he requested from the Crown but had not received, one of which was a video recording of the service area of the police station. It recorded audio and video of the complainants in the presence of police officers while the investigation was still ongoing. During the trial, after the Crown closed its case, the trial judge asked the appellant if he wished to call evidence and he informed him that he had applied to the Crown for the videos but had not received them. He explained that he wanted the video to help him cross-examine witnesses and challenge the credibility and reliability of their evidence. The judge recognized the relevance of the evidence but did not resolve the issue during the trial.
HELD: The court allowed the appeal, set aside the convictions and ordered a new trial. It found that the trial judge erred by failing to rule on the question of the Crown's disclosure of the videos or failure to preserve them once the appellant had identified them as relevant. This was a potential breach of the appellant's rights under s. 7 of the Charter. As the appellant was self-represented, the judge had an obligation to provide reasonable assistance to him to raise the issue, invite full submissions and inquire into whether there was a breach.

 Back to top

Frenchman Butte (Rural Municipality) v Husky Energy Inc., 2019 SKCA 91

Whitmore Ryan-Froslie Leurer, September 18, 2019 (CA19090)

Administrative Law – Municipal – Assessment Appeals
Municipal Law – Assessment Appeal – Resource Production Equipment
Statutes – Interpretation – Municipalities Act, Section 199

The appeal raised the question of whether certain oil storage tanks and chemical storage tanks owned by the respondent were subject to taxation pursuant to The Municipalities Act (Act). Three properties in two rural municipalities were involved. The wells met the non-producing standard. In 2017, Saskatchewan Assessment Management Agency assessors (SAMA) determined the that tanks were to be taken into account when determining the value of the three properties for the purposes of municipal taxation. The respondent appealed to the Board of Revision (board) arguing that because the tanks were fixtures by which oil wells operated, and the wells associated with the properties were not in production, the tanks should each have a $0 assessment. The board dismissed the respondent's appeal for the first property. The board for the rural municipality where the second and third properties were located held that the assessed values for the tanks should be $0. The respondent appealed with respect to the first property and SAMA appealed with respect to the second and third. The assessment appeals committee (committee) determined that the legislators intended there to be an exemption from assessment if the Resource Producing Equipment (RPE) was associated with non-producing petroleum oil wells. Because none of the oil wells on the properties was producing, the committee attributed nominal value to the RPE. The buildings on the properties were not RPE and were subject to assessment. SAMA was granted leave to appeal from the committee decision on the issue of whether the committee erred in law "by finding oil storage tanks and chemical storage tanks are [RPEs] pursuant to [the Act] and the Saskatchewan Assessment Manual" (Manual) "and are therefore exempt from assessment".
HELD: The appeal was dismissed. The standard of review was correctness. The parties agreed that RPE was subject to municipal taxation under the Act, subject to an exception. The exception is that RPE associated with non-producing petroleum oil or gas wells is not assessable or is subject to nominal assessment (ss. 199(4) and (6)). SAMA argued, however, that the respondent's tanks did not fall within the definition of resource production equipment. The court found that if the words used in the legislation for the definition of "resource production equipment" were given their ordinary meaning and read in isolation, the tanks would qualify as RPE. All three preconditions of the inclusive definition were met. SAMA argued that because the tanks were not required for every oil well, they did not fall under the definition of RPE. The court found that the statutory definition of RPE does not refer to fixtures that are required for the operation of the mine or oil or gas well. The focus is on the use of the fixture. SAMA argued that the definition should be read disjunctively, meaning that the improvement did not have to fit within all four categories of the items listed. The court did not agree. The court next looked at how the defined terms work in the broader scheme of the Act. Subsection 199(6) was found to reinforce that the RPE must be put to economic use before it is assessed because the section requires the RPE to have been in production for more than 29 days. Subsection 199(2) specifically refers to the storage of the oil

in a tank that is an RPE. SAMA's argument that the tanks were structures, or types of building, was not to the point: the question was whether the tanks qualified as resource production equipment. The respondent's tanks fell within the definition of RPE because they are fixtures. The committee was correct when it concluded that the tanks associated with the three subject properties qualified as RPE. The committee was incorrect when it stated that the RPE was not to be assessed. According to the Act, the RPE is still assessed, but the value to be attached to it is to be a nominal amount for the year. The respondent was awarded costs.

 Back to top

Alie-Kirkpatrick v Saskatoon (City), 2019 SKCA 92

Richards Barrington-Foote Tholl, September 19, 2019 (CA19091)

Statutes – Interpretation – Tax Enforcement Act
Statutes – Interpretation – Provincial Mediation Board Act, Section 9
Statutes – Interpretation – Land Titles Act, 2000, Section 2(1)(cc), Section 132
Administrative Law – Judicial Review

The appellant appealed the decision of a Queen's Bench judge that dismissed her application in chambers (see: 2019 SKQB 13). The respondent, the City of Saskatoon, had taken title to a residential property owned by the appellant after she had failed to pay arrears in taxes. It had followed the requirements set out in ss. 23 and 24 of The Tax Enforcement Act (TEA) and s. 7 of The Provincial Mediation Board Act (PMBA). The appellant continued to occupy the property after the respondent acquired title and was deemed to be the respondent's tenant under s. 36 of the TEA with The Residential Tenancies Act, 2006 (RTA) applying to the tenancy. In July 2018, the respondent served the appellant with a notice to vacate the property pursuant to s. 58(1) of the RTA. A hearing at the Office of Residential Tenancies was adjourned by consent because the parties were attempting to negotiate an agreement whereby the appellant could buy back the property. The respondent said that it would be a condition of the agreement that that appellant must first pay out a judgment debt obtained against her and registered against the title, but the appellant refused. She then served the respondent with notice of her application to the Court of Queen's Bench. In it, she sought an order that she be permitted to redeem the property as well as judicial review resulting in injunctive and/or declaratory relief stating the repayment of the judgment debt was not appropriate to include as a condition of her regaining title and requiring the respondent to trigger the process under s. 9 of the PMBA. The chambers judge found that: the TEA was a complete code for tax enforcement proceedings; the respondent's decision regarding the condition was not eligible for judicial review, as it was

a private contractual matter; and as there was no agreement between the parties, there was no basis for the respondent to refer the matter to the Provincial Mediation Board under s. 9 of the PMBA. The court awarded costs against the appellant. The issues on appeal were whether: 1) the appellant had a right to redeem the property on a basis not contained in the TEA. She argued that once the respondent registered its interest in the property under The Land Titles Act, 2000 (LTA), it imported the LTA redemption process under ss. 2(1)(cc) and 132(1)(e) into the tax enforcement process; 2) decisions made by the respondent after it obtained title were subject to judicial review; and 3) the costs award should be upheld. The appellant submitted that because the litigation involved novel issues of interest to the public, the judge should have ordered that each party bear its own costs.
HELD: The appeal was dismissed. The court found with respect to each issue that: 1) there was no right of redemption outside of the TEA. The tax enforcement process created by it might intersect with the LTA and other legislation, but as the TEA, in combination with the PMBA, was intended to deal exhaustively with the enforcement of tax arrears, it would apply to exclude s. 132 of the LTA even if the definition of mortgage under s. 2(1)(cc) were interpreted to include a tax lien; 2) the respondent's decision regarding the terms of the sale of the property back to the appellant was private in nature and not subject to judicial review. As there was no sale agreement between the parties, the matter could not be referred to the board under s. 9 of the PMBA; and 3) it could not interfere with the exercise of the judge's discretion to set the costs in the terms he did.

 Back to top

R v Heimbecker, 2019 SKQB 204

MacMillan-Brown, August 22, 2019 (QB19215)

Criminal Law – Guilty Plea – Criminal Code, Section 606
Criminal Law – Evidence – Expert Witness – Qualification

The accused was charged with two counts of possessing cocaine for the purpose of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act. In January 2019, her guilty pleas to both counts were accepted after she confirmed her agreement to the statement of facts tendered by the Crown. At the sentencing hearing, the accused sought to have a Senator qualified as an expert. The Senator was the Executive Director of the Canadian Association of Elizabeth Fry Societies from 1992 until she was appointed to the Senate in 2016. The Senator taught prison law and other courses at several Canadian law schools. She authored and published hundreds of reports and articles on the negative impacts of imprisonment on Indigenous women and girls, classification processes, delays in classification and the resulting impact on offenders, segregation and

resulting impacts on prisoners. The Senator sat on many committees, often in an advisory capacity. The overarching area that the accused sought to have the Senator qualified as an expert in was on "the negative and harmful impacts of incarceration known to have [sic] on Indigenous women and girls, from a societal and cultural perspective and on Correctional Service of Canada ("CSC"), in particular, the CSC classification process". There were six specific areas that the accused sought to have the Senator qualified for. The Crown objected to the sixth area: the questions of whether or not the correctional system met the sentencing principles of denunciation or deterrence.
HELD: The court concluded that the Senator would not be qualified as an expert at all due to the requirement that an expert be impartial and independent. The first stage of the expert evidence analysis is satisfying the admissibility requirements by establishing threshold reliability on a balance of probabilities. There are four criteria, the Mohan criteria, in this stage. The fourth Mohan criterion is whether the proposed expert was impartial, independent, and unbiased. The Senator did testify that she understood that her duty as an expert witness was a duty owed to the court and that her obligation was to provide fair, objective and non-partisan evidence for the benefit of the court. The court was satisfied that the Senator understood her duty. The fourth criterion was met. If the first stage is met, the court then has to determine whether the proposed expert should be qualified and what the scope of the expert evidence should be. The court must determine whether the benefit of admitting the proposed expert evidence outweighed the risks. The accused described the Senator as both an activist and advocate, which was of concern to the court. The court concluded that an activist or an advocate did not have a role as an expert witness for the court. The court recognized that the Senator may not have an interest in the outcome of this case, specifically; however, she did have an interest in the outcome at a societal level given her history of advocating for Indigenous women in the criminal justice system. Prior to being appointed to the Senate, the Senator advocated for three and a half decades. The risks of qualifying the Senator as an expert were found to far outweigh any potential benefit.

 Back to top

Link v Schulte, 2019 SKQB 205

Elson, August 23, 2019 (QB19216)

Civil Procedure – Summary Judgment
Torts – Proprietary Estoppel

The plaintiff sought summary judgment against the owners of an adjacent acreage, the defendants. The plaintiff alleged proprietary estoppel due to the access, and subsequent denial of access, to a

water well that the plaintiff constructed on the defendants' property. The defendants permitted the plaintiff to construct a water well on their acreage with costs of approximately $10,655. There was no written agreement. The defendants denied that there was an agreement for access to the property. The plaintiff argued that part of the consideration for the water well was the plaintiff allowing the defendants to connect to the gas line on his property. The defendants indicated that the connection was carried out at the suggestion of SaskEnergy, resulting in a benefit to both the plaintiff and defendants. The plaintiff's former spouse deposed in an affidavit that the water well was gratuitously allowed and had nothing to do with the gas line. There was evidence that the plaintiff and his former spouse attempted to get the defendants to sign an easement agreement with respect to the water well. The defendants indicated that they did not sign the easement agreement because they were not interested in giving anyone else a registrable right in their property. In 2015, the defendants made it clear to the plaintiff that his well was no longer welcome on their property. The decision was made after the plaintiff shot and killed their dog on his property. The plaintiff pled guilty to one count of killing a dog, contrary to s. 445 of the Criminal Code. The plaintiff indicated that he was forced to construct a well on his property at a cost of $28,325. The defendants did not accept the value as being accurate. The plaintiff commenced his action in Small Claims Court. However, it was transferred to the Court of Queen's Bench because of the equitable remedy sought. The issues were: 1) whether it was appropriate to resolve this action by way of summary judgment. Both parties agreed that the matter should be resolved by summary judgment; 2) whether the circumstances reflected in the evidence raised an equity requiring the protection of proprietary estoppel. This required a determination as to whether there was a representation or assurance upon which the plaintiff reasonably relied to his detriment. If so, the court must further determine whether circumstances were such that the asserted equitable remedy was required.

HELD: The issues were resolved as follows: 1) the court was not bound by the parties' agreement that the matter should be resolved by summary judgment. The court was satisfied that the case had all the necessary considerations for a determination by summary judgment; and 2) in proprietary estoppel, the court must determine whether the alleged representor is acting so unfairly or unconscionably that a remedy in favour of the represented is called for. Proprietary estoppel may result in the recognition of a permanent interest in property. An agreement in writing is not a requirement. The court found that the defendants agreed to the construction of the well purely out of a desire to be "neighbourly", with no expectation of benefit or consideration in return. The permission was only to construct the well and draw water from it thereafter. The permission did not result in the grant or conferral of any registerable interest in the defendants' property. The court found that the plaintiff knew this to be so when the defendants

refused to sign the easement agreement. Further, the defendants' permission was found not be irrevocable. The court found that the revocation would not have to be justified, although the unlawful shooting of the defendants' dog would constitute reasonable and sufficient cause. The plaintiff did rely on the defendants' permission to his detriment. The plaintiff's claim for proprietary estoppel was found to be based on the premise that it was permanent. The plaintiff's claim for damages based on the construction of a well on his acreage was otherwise inexplicable. The plaintiff knew or should have known that the permission was not permanent. Proprietary estoppel was not made out. The only possible equity the court could provide to the plaintiff would be any reusable parts from the well; however, there was no evidence of such parts. The court ordered summary judgment in favour of the defendants. The defendants were awarded taxable costs of the action and the application, calculated under Column 1.

 Back to top

Jahnke v Thomas, 2019 SKQB 212

Krogan, August 27, 2019 (QB19218)

Civil Procedure – Application to Cross Examine Affiant on Affidavit
Civil Procedure – Application to Strike Statement of Claim – No reasonable Cause of Action
Civil Procedure – Mandatory Mediation – Queen's Bench Act, 1998, Section 42(1.2)
Civil Procedure – Queen's Bench Rules, Rule 6-13, Rule 7-9
Civil Procedure – Summary Judgment
Torts – Unjust Enrichment
Trusts – Breach of Trust

A subset of the defendants (the T defendants) sought the following: 1) an order exempting the parties from participating in mandatory mediation; 2) an order striking portions of the amended statement of claim regarding breach of trust and unjust enrichment for disclosing no reasonable cause of action, or alternatively; 3) summary judgment in their favour by dismissing portions of the claim alleging breach of trust, unjust enrichment, fiduciary duty, and conspiracy. The plaintiffs sought permission to cross-examine various deponents on their affidavits. In 2012, Sask Corp. was incorporated as a holding company to acquire and purchase the land for development. The directors included the plaintiffs. The bylaws required all directors to disclose conflicts of interest. The unanimous shareholder agreement required Class B shareholders to provide other shareholders the opportunity to purchase the shares if a third party were offering to purchase them. Financing for the purchase of land was arranged from L. The directors of L were defendants. Security for the $6.5 million loan included a credit

agreement, a quit claim, and a transfer agreement. By December 2014, L wanted the full amount of $9,437,614.47 paid on the mortgage. The parties' evidence conflicted on whether the plaintiffs arranged for someone to purchase portions of the land. The plaintiffs indicated that they were not aware of Sask Corp. contemplating the quit claim procedure in June 2014. The T defendants arranged to pay $900,000 to two shareholders for their shares in Sask Corp., an arrangement the plaintiffs indicated they were not provided the information or documentation on until the legal proceedings. The parties executed a share purchase agreement whereby the T defendants would purchase all of the plaintiffs' shares and they would resign as director and officer of Sask Corp. According to the plaintiffs, the T defendants represented to them that there would be a written agreement whereby the 30 percent profit on the developed land would go to the T defendants and the plaintiffs. The plaintiffs said that they thought the share transfers would be with Sask Corp. receiving full market value for its assets. Sometime in 2015, the relationship between the plaintiffs and the T defendants deteriorated. The T defendants indicated that the plaintiffs were well aware that L did not want to work with them. In 2014, the T defendants agreed that Sask Corp. would be forfeited to L, including the land, to satisfy the amounts owing. The shares in Sask Corp. were transferred to BC Corp. and Sask Corp. was dissolved. The plaintiffs maintained that the land was worth more than the mortgage registered against it. The T defendants entered into a memorandum of agreement and consulting agreement with L and were provided an option to purchase two portions of the land. HELD: The summary judgment application was adjourned. The court dealt with the T defendants' application first: 1) the parties all agreed to T defendants' application for exemption from mandatory mediation. The court granted the request given the agreement of the parties and because of the number of complicated legal proceedings with a factual nexus. Resolution could not occur without involvement of the parties of all the different actions. Mandatory mediation on this action would not include all of those parties; 2) breach of trust – the alleged trust was T defendants holding the plaintiffs' shares pending the successful conclusion of a profit-sharing agreement with L, to which the plaintiffs would be a party. The breach occurred when the shares were transferred to the BC Corp. without the plaintiffs' knowledge or consent. The court found that sufficient facts were pled to establish the existence of a trust and a breach of that trust. That portion of the claim was not struck. Unjust Enrichment – the enrichment pled by the plaintiffs was that the T defendants received shares in Sask Corp. for a nominal amount. The plaintiffs were deprived because of the loss of shares in Sask Corp. and the lost opportunity of a profit-sharing agreement with L. The court did not find a juristic reason for this to occur. It was not plain and obvious that the claim of unjust enrichment could not succeed and 3) the summary judgment application was adjourned sine die because the plaintiffs' application to cross-examine was successful. The requested cross-examination was

necessary to assist the court in resolving the issues. It would not be an injustice to allow the cross-examination. Cross-examination was ordered for the plaintiffs and for the T defendants. Costs were left to be determined at the conclusion of the summary judgment application.

 Back to top

Omorogbe v Saskatchewan Power Corp., 2019 SKQB 215

Robertson, August 28, 2019 (QB19219)

Civil Procedure – Queen's Bench Rules, Rule 5-19, Rule 5-33, Rule 15-33
Civil Procedure – Questioning Officers of Corporations – Proper Officers – Second Officers
Civil Procedure – Undertakings – Reply to Undertakings

The plaintiff applied for orders to: 1) compel the defendant to designate a proper officer or employee for questioning, pursuant to Rule 5-9 of The Queen's Bench Rules (Rules); 2) use the questioning transcript as evidence; and 3) require the defendant to produce undertakings given at questioning in 2019 by a specified date or, in the alternative, striking the defendant's defence. The plaintiff was employed by the defendant from 2006 to 2015. He was questioned by police a few months after his employment ended regarding a bomb threat made against his then former employer. In 2017, the plaintiff filed a statement of claim for damages for wrongful dismissal, malicious prosecution, and breach of privacy. A defence denying the claim was filed in 2018. An employee of the defendant appeared for questioning as a proper officer of the defendant. The employee was the plaintiff's direct supervisor, so he was familiar with the circumstances relating to the wrongful dismissal claim, but less familiar with the claim relating to the bomb threat and the identification of the plaintiff as a possible person of interest in the investigation. The undertakings that resulted from the questioning had not yet been provided. The lawyer for the defendant indicated in his affidavit that the response to undertakings would be provided to the plaintiff a month from hearing the application.
HELD: The court granted the order to produce the undertakings given at questions in 2019. The other two requests were not granted. The Rules make it clear that a corporate defendant is to be represented by a single officer at questioning for discovery. She or he will not be expected to know the answer to every question but may be asked to provide an undertaking to find the answer and then later provide a written answer to the question. Questioning additional persons is allowed but is an exception to the Rules. The court found that the officer was a proper officer of the defendant for questioning. He indicated at the outset that the answers would be binding on the defendant and he had a sufficient connection to the

primary subject matter of the action. The court was not satisfied that the questioning of the officer was unsatisfactory or that there was another exceptional circumstance to justify a second attempt with a different officer. The questioning of the officer may not even be completed, depending on the undertakings. The court dismissed the application to question another officer of the defendant. The application to use the transcript of the questioning of the second officer as evidence was moot because the court did not order that a second officer be questioned. The questioning had been more than three months prior and it was more than two months since the parties had received the transcripts recording the undertakings. Rule 15-33 requires that replies to undertakings occur "within a reasonable time". The court was not aware of the undertakings, so it could not determine what was a reasonable time for reply. The court accepted the defendant's lawyer's assurance that the defendant was working diligently towards fulfilling its duty to provide a timely response to the undertakings. The court ordered that the responses shall be provided by September 16, 2019. The court did not make an order as to costs given the mixed success on the application.

 Back to top

Blyth v Lakeside Machinery Co-operative Ltd., 2019 SKQB 219

Robertson, August 29, 2019 (QB19223)

Statutes – Interpretation – Co-operatives Act, 1996, Section 190
Civil Procedure – Queen's Bench Rules, Rule 1-3

The applicant sought an oppression remedy under ss. 181 and 190 of The Co-operatives Act, 1996. The applicant's membership in the respondent co-operative having been terminated in 2019, the applicant was entitled to payment of his membership share within one year pursuant to the respondent's bylaws. The applicant sought an independent appraisal of the property owned by the respondent in order to provide a fair valuation for his share. The applicant had joined the respondent in 2005. It had been formed in 1971. Over the years, the respondent employed a consistent method of valuation. It produced its annual statements itemizing and valuing its assets and liabilities. The valuation was based on the cost of original purchase with deduction for depreciation. The respondent then deducted its total liabilities from the total asset value to arrive at a final or book value. The respondent asserted that this method of valuation had been supported by its members unanimously as required by its bylaws and it would be fair to the applicant as it had been consistently applied during the applicant's time as a member for making payment to other departing members. The applicant had accepted the respondent's annual financial statements during his tenure. The respondent argued that the application was premature and it could be decided by an action in the future if the applicant

was dissatisfied with the payment.
HELD: The application was dismissed without prejudice to the applicant's right to challenge the amount of the payment after it was determined by the respondent. The court found that the Act applied to support the remedy sought in the application and it was appropriate to consider it pursuant to Queen's Bench rule 1-3 to achieve a timely resolution. Based upon the respondent's bylaws, its past practice and the applicant's own agreement to the valuation of other departing member's shares, the applicant did not have a reasonable expectation that his payout would be calculated based upon an independent appraisal to determine the fair market value of the assets of the respondent. The respondent had not acted oppressively in continuing to use its historic method. If its valuation was clearly below what might reasonably be expected, then the valuation might be subject to challenge.

 Back to top

Olumide v Saskatchewan Human Rights Commission, 2019 SKQB 227

Krogan, September 5, 2019 (QB19214)

Civil Procedure – Application to Strike Statement of Claim – No Reasonable Cause of Action
Civil Procedure – Queen's Bench Rules, Rule 1-4(3), Rule 7-9
Statutes – Interpretation – Saskatchewan Human Rights Code, 2018

The plaintiff made two applications against the respondent Saskatchewan Human Rights Commission (SHRC). The SHRC applied for: 1) an order striking the plaintiff's statement of claim; 2) an order dismissing the plaintiff's proceeding; 3) an order restraining the plaintiff from initiating further proceedings in the court against the SHRC without leave of the court; and 4) costs. The plaintiff had commenced numerous actions in numerous provinces. He had been found to be a vexatious litigant on a number of occasions. The plaintiff was a resident of Ontario. He was unsuccessful in receiving the nomination for the federal Conservative Party in an Ontario riding in 2015. The plaintiff concluded that he did not receive the nomination because he is not Caucasian. He argued that s. 45 of The Election Act, 1996 left potential candidates vulnerable to discrimination because it does not require a political party to give reasons why a person is not nominated as a candidate. When the Government of Saskatchewan would not amend the Act, he complained to the SHRC indicating the inaction was connected to his race. The SHRC concluded that it did not have authority over matters arising in Ontario, nor jurisdiction connected to federal political parties. The SHRC only addresses complaints arising in Saskatchewan regarding the specified areas in The Saskatchewan Human Rights Code, 2018. The

SHRC did not accept the plaintiff's complaint. The plaintiff then commenced an action against the SHRC. The claim was 27 pages long, unfocused, contained passages from newspapers, legislation in the United States, Canadian jurisprudence, Saskatchewan legislation and other sources. The plaintiff seemed to believe that he was the object of discrimination by the SHRC when they would not formalize his complaint.
HELD: The SHRC's applications were dealt with as follows: 1) and 2) the plaintiff's claim was struck in its entirety. The SHRC could not be sued in the manner the plaintiff attempted. The SHRC is an administrative, not a commercial, body. Other provinces have similarly concluded regarding their commissions. The SHRC could not be sued. It was, therefore, plain and obvious that the claim against the SHRC could not succeed. The court went on to consider whether the claim disclosed no reasonable cause of action. There were insufficient facts pled to establish the requisite elements for a Charter breach as alleged by the plaintiff. Further, the SHRC cannot change the legislation, which was one of the plaintiff's goals. There was no reasonable chance that the plaintiff's claim would succeed. The claim was struck because it disclosed no reasonable cause of action. The court did not add Saskatchewan as a party as requested by the plaintiff. Saskatchewan was not involved in the events that gave rise to the claim. The court did not have to consider whether the SHRC and its employees are immune from civil liability or whether the claim was scandalous, frivolous, vexatious and an abuse of the court's process; 3) Rule 1-4(3) permits the court to exercise its inherent jurisdiction as a superior court to prevent plaintiffs from commencing further claims without leave of the court. The court found it appropriate to restrain the plaintiff from bringing further proceedings of any kind in the court with respect to SHRC without further leave of the court to do so; and 4) costs against the plaintiff were ordered to be paid within 30 days.

 Back to top

Conexus Credit Union 2005 v Fink, 2019 SKQB 228

Layh, September 5, 2019 (QB19224)

Statutes – Interpretation – Land Contracts (Actions) Act, 2018, Section 20

The applicant, Conexus Credit Union, applied without notice under The Land Contracts (Actions) Act (LCAA) for an appointment to set a date for a hearing to determine whether it could commence action seeking remedies under a mortgage given by the respondent mortgagor. The applicant had served the Provincial Mediation Board with a notice of intention 30 days previously as required by the LCAA. As of September 1, 2019, The Land Contracts (Actions) Act, 2018 (LCAA, 2018) came into force, repealing and replacing its

predecessor Act. Under s. 20(1) of the LCAA, 2018, "a proceeding" commenced under the LCAA but not completed before the coming-into-force date of the LCAA, 2018 is to be continued and dealt with as if it had been commenced under the latter. The issue was whether service of the notice of intention under the LCAA should be considered a "proceeding" under s. 20 of the LCAA, 2018.
HELD: The court found that the service of the notice of intention was a proceeding under the LCAA, 2018. As long as it had been served upon the Provincial Mediation Board prior to the coming-into-force date, an application for an appointment is a continuation of proceedings under the LCAA, 2018 and is dealt with under that legislation.

 Back to top

L.C.R. v I.J.E.R., 2019 SKQB 229

Layh, September 9, 2019 (QB19225)

Family Law – Child Support – Adult Child
Family Law – Child Support – Child of the Marriage
Family Law – Child Support – Child Support Agreement
Family Law – Child Support – RESPs
Family Law – Child Support – Retroactive Child Support

The petitioner claimed retroactive and ongoing child support from the respondent. The parties had two children: a son who was almost 21 and a daughter who was 19. The parties separated 14 years ago. At separation, the parties executed a separation agreement whereby the respondent would pay the petitioner $673 per month for child support based on his annual income of $51,757. The child support was to continue until the children reached 18 years of age or were unable to withdraw from the petitioner's care if over the age of 18 for a list of enumerated reasons. The respondent unilaterally increased the amount to $1,000 per month in 2009. The respondent was also required to contribute $50 per month to each of the children's RESPs. There was never a child support order. The agreement also required each party to provide the other with proof in writing of his or her gross annual income by May 1 of each year. In February 2018, certain retroactive child support was ordered for the daughter, with the remaining claims being sent to a pre-trial. The petitioner's evidence showed that the son was disadvantaged by Attention Deficit Hyperactivity Disorder (ADHD) and anxiety, resulting in his inability to withdraw from the petitioner's care. Both children completed high school in June 2018. The parties' daughter was going to take an online course in the fall of 2018 but did not do so after the parties had conflict over whether the RESP money withdrawal of $6,000 should be used for the course. The issues respecting the son were: 1) the material time to determine whether he was a child of the marriage; 2) whether he was a child of the

marriage at the material time; 3) whether he was entitled to a an award of retroactive support; 4) whether he was entitled to an award for ongoing support; and 5) whether the respondent should be ordered to repay $9,676.34 that he removed from the son's RESP. The issues respecting the daughter were: 6) whether she continued to be a child of the marriage after turning 18 and graduating from high school in June 2018 and, consequently, whether she was entitled to child support past that date; 7) whether she was entitled to retroactive child support in addition to the retroactive child support ordered in February 2018; and 8) how the $6,000 removed from her RESP should be disbursed.

HELD: The issues were determined as follows: 1) the parties agreed that the meaning of "at the material time", as found in s. 2(1) of the Divorce Act (DA), was the date of the petitioner's application of January 2018. The court held that it had jurisdiction to consider an order for retroactive support whether or not the children were children of the marriage at the material time, that being the date of the application. This was because of the provision in the separation agreement providing for the children's support if over the age of the age of 18 and unable to withdraw from the petitioner's care for one of the enumerated reasons; 2) the court concluded that the son was still a child of the marriage at the time of the application. He was 19 years old and enrolled in grade twelve classes. The court also found that the son was unable to withdraw from the petitioner's care in January 2018 because of his ADHD and comorbidity of anxiety; 3) the court examined the considerations from D.B.S. to determine whether retroactive child support should be ordered for the son: a) reasonable excuse for delay – the petitioner was frustrated with the respondent's refusal to provide income information as early as February 2007 when her counsel wrote to the respondent's counsel; b) blameworthy conduct – the court concluded that the respondent's refusal to provide income information was deliberate and highly consequential. It was found to be blameworthy conduct; c) whether retroactive child support would benefit the son – a retroactive award would enhance the son's ability to move out of his mother's care and possibly pursue sound engineering; and d) hardship occasioned on the respondent – the court noted that the order could be crafted in such a way as to minimize the hardship. The court then looked at the commencement date for the retroactive order. The respondent argued that nothing could be ordered pre-January 2015 because that was the date given in the petitioner's application. The petitioner argued that a date prior to January 2015 could be ordered because it was argued in her pre-trial brief. The court found that the petitioner gave the respondent effective notice that she expected an increase in child support in May 2017. The court concluded that it would be surprising, arbitrary, and unfair to the respondent to switch the date of retroactivity back to a date eight years earlier without some formal notice. The court concluded that the son remained a child of the marriage as of the date of trial. Retroactive support would be ordered up to and including the trial date; 4) because the court found the son continued to be a child of the marriage, he was

entitled to child support on an ongoing basis. It was determined that a soon-to-be 21-year-old should be expected to earn a certain income. The court ordered the respondent to pay 60 percent of the Guideline amount for the son. The court did not provide a termination date for the son's support. The court ordered the petitioner to provide periodic reports respecting the son's circumstances so that the respondent could negotiate with the petitioner or apply to the court if he felt a variation was warranted; 5) the court was not provided with adequate information regarding the statutorily controlled RESP, and therefore declined to make an order respecting repayment of the funds. The parties were given leave of the court to apply in chambers for a final order respecting the status of the money; 6) the daughter was working part-time at a daycare and lived with the petitioner. The daughter did not continue to be a child of the marriage; 7) the court found that the daughter was entitled to retroactive support from January 1, 2015 to May 1, 2017 for the same reasons as noted for the son; and 8) the court declined to make an order respecting the money removed from the daughter's RESP due to lack of evidence. The parties were given leave to apply in chambers for a final order respecting the status of the daughter's RESP. The respondent was ordered to pay the retroactive child support over 30 equal payments made monthly. Interest would be payable at five percent per annum on any missed payment. The respondent was ordered to pay fixed costs in the amount of $2,000 within 60 days of the judgment.

 Back to top

Borowski v R, 2019 SKQB 230

Layh, September 9, 2019 (QB19220)

Courts – Judges – Disqualification – Bias
Criminal Law – Appeal – Sentence Appeal
Criminal Law – Appeal – Summary Conviction Appeal
Criminal Law – Charter Application
Criminal Law – Court Appointed Counsel
Criminal Law – Self-Represented Litigant

The appellant was convicted of assault causing bodily harm, contrary to s. 267(b) of the Criminal Code. He appealed his sentence and conviction. The appellant was sentenced to one year of probation and a $2,000 fine. A surcharge of $600 was imposed. The appellant was self-represented at the appeal. He was represented by Legal Aid until after one witness for the appellant had testified at the trial. At that point, the Legal Aid lawyer advised the court that the appellant had dismissed him. The appellant was granted an adjournment to seek legal advice on whether he should testify or call further evidence. The appellant filed a Charter notice citing numerous sections of the Charter and requesting a dismissal of the

charges. Before the court decided on the first Charter application, the appellant filed another Charter application wherein he added section 8 of the Charter. The trial judge provided seven reasons for declining to hear the Charter applications. The trial judge advised that the trial would proceed and provided extensive direction and instruction about the proceedings to be taken in a criminal trial. The appellant examined two officers and then requested that the complainant's statement to the police be entered into evidence. Crown counsel objected because the appellant's counsel had cross-examined the officer whom the statement was given to. The trial judge did not permit the statement to be entered as part of the appellant's case. The appellant was upset with the decision and requested court-appointed counsel. The trial judge did not allow the request and provided reasons for her decision. The trial judge repeatedly asked the appellant whether he was going to testify. The appellant did not answer the question. The trial judge then adjourned the matter for closing arguments. On the adjourned date, the appellant indicated that he would not speak to the court until he had legal counsel present. The appellant then had a health issue and was taken away by ambulance. Court was adjourned and on the adjourned date the appellant requested a further adjournment, which was granted. On the adjourned date, the appellant was erratic and confused. The matter was adjourned again, and the appellant did not attend on the adjourned date, as was expected given correspondence he had sent to the court outlining that he would not be attending. The court found the appellant guilty in his absence and continued to sentence him. The court accepted the issues to be as follows: 1) whether the trial judge erred in refusing to hear the appellant's Charter application; 2) whether the trial judge erred in refusing to recuse herself; 3) whether the trial judge erred in refusing the appellant's request for court-appointed counsel or a further adjournment on May 31, 2018; and 4) whether the sentence imposed by the trial judge should be disturbed.

HELD: The court dealt with the issues as follows: 1) the appellant made his Charter applications after the Crown had closed their case and after he had led a defence witness. The court was satisfied that the trial judge was aware of, and considered, the required circumstances in her decision to decline to hear the Charter applications. She gave seven reasons for her decision and did not err in law. The court found that the appellant's submissions did not disclose a reasonable argument, nor did they have a reasonable likelihood of success; 2) the appellant argued at trial that the trial judge could not hear any pre-trial rulings and also preside over the trial. This was incorrect. The trial judge nonetheless applied the circumstances of the case to the test for recusal of judges on the basis of a reasonable apprehension of bias. She did not need to recuse herself because she was from the locale. The appellant did not provide any cogent evidence to demonstrate a reasonable apprehension of bias; 3) the trial judge did provide reasons for not allowing the appellant's request for court appointed counsel even though she did not cite case authority. The court found that

common sense could be used to make the determination without the need for case authority. The trial judge's decision not to appoint counsel for the appellant was within the direction offered by the Saskatchewan Court of Appeal; and 4) neither the imposition of the fine nor the probation were found to be an error of law. The order for the victim surcharge was quashed in accordance with Boudreault. The conviction and sentence appeal were dismissed.

 Back to top

101133912 Saskatchewan Ltd. v First Care Medical Management Inc., 2019 SKQB 231

Currie, September 9, 2019 (QB19226)

Civil Procedure – Pleadings – Statement of Defence – Application to Amend
Civil Procedure – Pleadings – Counterclaim – Application to Add Defendants
Civil Procedure – Queen's Bench Rules, Rule 4-24

The defendants applied for leave to amend their defence and counterclaim by expanding their response to the plaintiff's claim and by adding two individuals and a corporation as defendants by counterclaim; and an order requiring the plaintiff to provide security for costs. Included in the defendants' proposed amendments were: 1) withdrawals of some of the defendants' admissions in their statement of defence; 2) allegations that it was an individual, and not the plaintiff corporation, with whom they had contracted and allegations that the contract was repudiated; 3) advancing a counterclaim and adding defendants by counterclaim on the basis of lifting the corporate veil of the plaintiff; 4) advancing a counterclaim against a corporation on the basis of successor liability. Their application for security for costs under Queen's Bench rule 4-24 was made on the basis that the plaintiff had no assets in Saskatchewan nor the ability to pay a costs award. The plaintiff had not provided any evidence to the contrary.
HELD: The application for leave to amend the statement of defence was allowed in part. The application for an order for security for costs was granted. With respect to the proposed amendments to the defence, the court found that it would: 1) not permit those that withdrew the defendants' admissions, because they had not established that the admissions were inadvertently made and were not correct; 2) not permit those that raised new allegations. The proposed amendments would alter the course of the action and would not be fair; 3) would not permit the two individuals to be added as defendants by counterclaim, as to do so would materially alter the course of the action and it would not be fair or efficient. Further, the information was known to the defendants at the time of their original defence, they had not explained why it had taken eight

years to assert this claim and it would prejudicial to the two individuals if the proposed amendment were allowed; 4) would permit the amendment of a counterclaim against the corporation because the issues of whether successor liability was good law in Saskatchewan and whether the facts as pleaded proved successor liability could be left for trial. There had been no delay by the defendants in making this proposed amendment because they had not learned of the corporation until questioning in 2019. The court granted an order for security for costs. Based upon the defendants' draft bill of costs, the plaintiff was ordered to pay $20,000 to the Local Registrar within 60 days of service of the order.

 Back to top

Walker v Walker, 2019 SKQB 232

Layh, September 10, 2019 (QB19221)

Landlord and Tenant – Arrears of Rent
Landlord and Tenant – Lease – Farmland
Landlord and Tenant – Termination of Lease
Landlord and Tenant – Writ of Possession

The applicant and respondent were brothers. The applicant was also the respondent's landlord under an oral lease of three quarters of farmland. In 2018, the applicant issued a small claims summons claiming outstanding rent from the respondent for the years 2015 to 2017. A demand for possession and notice to tenant of intention to apply for writ of possession was served on the respondent. After a trial of that action (the first action), the unpaid rent was found to be $23,560 and judgment was entered for that amount plus pre-judgment interest. The respondent did not satisfy any portion of the judgment. Five months after the judgment, the applicant made an originating application seeking an order for possession of the land pursuant to s. 50 of The Landlord and Tenant Act (Act). He also initiated another Small Claims action claiming damages of $26,400 for rent for 2018 and 2019 plus GST (the second action). The alternative argument of the applicant was on the basis of quantum meruit arising from the respondent's occupation of the farmland during 2018 and 2019. The issues were: 1) whether the term of the lease was three or five years; and 2) the law of re-entry and obtaining a writ of possession during the term of a lease.
HELD: The issues were determined as follows: 1) the applicant stated in the second action that one of the bases for his claim was the existence of a lease. The respondent argued that the lease was for five years, not three years as suggested by the applicant. Therefore, a writ of possession could not be sought because the lease had not expired unless the lease was terminated. The court found that the affidavit evidence was too conflicting to determine the length of the lease. If the lease were for three years, the respondent would be an

overholding tenant and a writ of possession would be in order. The court decided to accept the premise that the lease had not expired so that the matter could be determined for the acrimonious parties. The court had to determine whether a writ of possession should be ordered based on the plaintiff's rights under the Act as though he were seeking a writ of possession under an existing lease; 2) if rent is unpaid for two successive calendar months, the landlord can demand possession and then peacefully re-enter the premises under s. 9(1) or apply for a writ of possession under s. 50(1). In McDougall, the court suggests that a landlord can determine a lease and seek a writ of possession, but a landlord can also waive the determination of a lease. The respondent argued that the applicant could not simultaneously request inconsistent remedies, being a determination of the lease and, at the same time, a claim for rent. After reviewing case law, the court determined that the question was whether the application gave notice to the respondent that in terminating the lease, he would also seek damages for the unexpired term of the lease. The court found that the conduct of claiming for damages for unpaid rent in the Second Action was conduct satisfying the notice requirement in the Highway Properties case. The applicant served Form B notice in April 2018 and then delayed bringing his application for a writ of possession and claim for rent for the unexpired term of the lease until May 2019. The court did not find anything in Highway Properties requiring the notice of termination to be given simultaneously with notice of an intention to seek damages for future rent. The respondent knew that the applicant was seeking both to terminate the lease and to seek damages for current and future rent. The applicant determined the lease and gave the respondent notice that he was seeking damages for the unexpired term. An order was made granting the applicant immediate possession of the farmland and costs were awarded against the respondent.

 Back to top

Canadian Pacific Railway Co. v Saskatchewan, 2019 SKQB 233

Popescul, September 10, 2019 (QB19227)

Civil Procedure – Queen's Bench Rules, Rule 1-3, Rule 4-7, Rule 5-1, Rule 5-18, Rule 5-32

The plaintiff, the Canadian Pacific Railway Company, brought an action in 2008 against the defendant, the Government of Saskatchewan, claiming that it was not subject to paying certain taxes pursuant to clause 16 of a contract made in 1880 between the Government of Canada and the plaintiff's predecessor syndicate. The defendant raised the defence that as a result of negotiations that occurred between the parties in 1966, the original contract was

restructured resulting in the recission of any clause 16 exemption. The plaintiff sought recovery of a portion of several of the taxes paid to the defendant, limited to a period commencing in 2002 in order to comply with the applicable statutory limitation period. It asked for a declaration that future taxes were not payable. The parties exchanged documents and conducted some questioning. Each party then applied to the court to determine whether further answers should be provided. The plaintiff sought an order requiring the defendant to deliver further and better written responses to eight written questions submitted to it in 2017. The plaintiff's questions included: i) a request to identify the historical sources relied upon by the defendant to support certain allegations relating to the federal government's approach to the construction of the railway in the 1880s; ii) one that sought the letters between the plaintiff and the defendant in the mid-1960s that the latter alleged resulted in the tax exemption being overridden or rescinded; iii) one question asking the defendant to provide the 1966 legislation it relied upon as changing the freight rates and terminating the tax exemption; iv) what documents and facts surrounded the defendant's pleading regarding the Crow's Nest agreement and the changes that had occurred that altered the original agreement; and v) what harm the defendant had suffered by the payment of taxes. It had pleaded that the plaintiff should be estopped from relying upon the tax exemption, because of its words and conduct. The defendant brought an application as well, requiring the plaintiff to provide answers to 110 written questions, many of which requested that it produce records, lists and ledgers from 1880 to the present. The plaintiff had responded originally to many of the questions that it had disclosed all non-privileged documents that were within its possession and control. In the case of other questions, it refused to answer them.

HELD: The court found with respect to the plaintiff's questions that: i) the defendant was not required to answer this group as they constituted an attempt to elicit the evidence or arguments upon which the defendant might rely to advance its case; ii) the defendant must respond to the question. The letters related to the facts that it argued showed the tax exemption was rescinded; iii) the defendant must respond to the question as it was relevant to the issue of whether the exemption had been removed in 1966; iv) the defendant must respond because if there were an agreement, the circumstances and documentation should be disclosed and the nature and specifics of any changes to the original agreement were facts, the relevance of which would be determined by the trial judge; and v) the defendant must respond to the question regarding alleged harm but had sufficiently answered the question of what conduct it relied upon to its detriment. The court found that the defendant's written questions were contrary to the spirit and intent of the proportionality principles of The Queen's Bench Rules and their number was unreasonable. It found that on the whole, the plaintiff was not required to respond to them because they offended the proportionate principles or that the plaintiff had responded

sufficiently to them or that they were irrelevant. The plaintiff was awarded costs of $5,000.

 Back to top

R v McNab, 2019 SKQB 234

Klatt, September 9, 2019 (QB19228)

Criminal Law – Motor Vehicle Offences – Impaired Driving – Serial Offender – Sentencing
Criminal Law – Aboriginal Offender – Sentencing

The accused pled guilty to a charge of refusing to comply with a demand for a sample of his breath contrary to s. 254(5) of the Criminal Code. He had a lengthy criminal record of 42 prior convictions dating back to 1974. Of those convictions, 10 were for driving while impaired or over .08, one was for refusing a breath demand and eight were for driving while disqualified. His last driving conviction prior to the current offence was in 2011, for which he was sentenced to 24 months in prison. The Crown argued that this record established that the accused was a serial impaired driver and sought a sentence of 30 months in prison as well as a five-year driving prohibition. The defence submitted that a more appropriate sentence would be between 18 months and two years less a day having regard to the Gladue factors and because six years had elapsed between the accused's last conviction and the current offence. A Pre-Sentence Report described the accused as a 62-year-old Aboriginal man who had resided on the George Gordon First Nation all his life. He had attended residential school and highschool on reserve and obtained his GED some years later. His parents were both alcoholics and he started drinking at the age of 15. His own abuse of alcohol led to the apprehension of his two children from his care after his wife's death and had caused him to come into conflict with the law. He had participated in substance abuse treatment programs both in and of custody, had not consumed alcohol since his arrest for this offence, and had received help through meetings with a National Native Alcohol and Drug Abuse Program (NNADP) worker on his reserve.
HELD: The accused was sentenced to 30 months in prison, one year of probation and a five-year driving prohibition. The court found that the accused was a serial drunk driver and the primary sentencing objective was protection of the public by a lengthy custodial sentence. The mitigating factors were that the accused had pled guilty and had abstained from alcohol consumption for two years. The gaps between his offences were not regarded as mitigating because of his consistent pattern of drinking and driving. The accused's criminal record and serious impairment when he was arrested for this offence were aggravating factors. The court took into account the Gladue factors and concluded that they had not

reduced the accused's moral culpability in the circumstances of impaired driving offences. In considering the restorative justice approach to sentencing the accused, there was evidence that his rehabilitation had been helped by the NNADP worker and there should be a rehabilitative component to his sentence to allow him to continue with treatment in prison.

 Back to top

Lunn v Saskatchewan (Finance), 2019 SKQB 235

Mitchell, September 11, 2019 (QB19229)

Tax – Provincial Sales Tax Assessment – Appeal
Administrative Law – Judicial Review – Board of Revenue Commissioners – Appeal

The appellant appealed the decision of the Board of Revenue Commissioners made pursuant to s. 60 of The Revenue and Financial Services Act (RFSA). The board upheld a tax assessment issued by the Saskatchewan Ministry of Finance (Finance) following a Provincial Sales Tax (PST) audit against the appellant in the amount of $30,800 related to equipment that the appellant had purchased for his excavating business. The board found that s. 60(3) of the RFSA created a statutory presumption that the formal notice of PST assessment prepared by Finance was prima facie proof that the amount was due and owing. It concluded that the appellant had failed to provide any evidence that would satisfy his legal burden to demonstrate that the PST assessment was incorrect. Of the eight pieces of equipment purchased, the board dealt with a bucket truck and an excavator separately. The appellant had submitted that he purchased the truck with the intention of reselling it and as he did not "consume" or use it, it fell outside the definitions found in ss. 5(1) and (2) of the RFSA. The board said that the appellant's claim was not credible because he had owned the truck for three years and claimed capital cost allowance against it. Regarding the excavator, the appellant said that he had purchased it for farm use and thus it was entitled to PST exemption as set out in The Provincial Sales Tax Regulations (PSTR). The board found that the regulations were only applicable if the clearing of land qualified as a primary farming activity if the expense was incurred by the farmer or primary producer. In this case, the appellant rented out the farmland in question and was not operating a farm.
HELD: The court allowed the appeal only in respect of the board's conclusion on the application of PST to the excavator and otherwise dismissed it. It affirmed the rest of the board's decision. The standard of review was reasonableness. The court found that the board's decision regarding the various items were reasonable except with respect to the excavator. It had relied upon the PSTR in force at the time of hearing of the appeal when it should have applied the

regulations in force at the time the appellant purchased the excavator. Those regulations did not stipulate that in order to be exempted from PST, the clearing of land for cultivation purposes had to have been done by the farmer directly. The board's conclusion was therefore not reasonable and the court reversed it under s. 21(13)(b) of the RFSA.

 Back to top

United Food and Commercial Workers, Local 1400 v Affinity Credit Union, 2019 SKQB 236

Scherman, September 11, 2019 (QB19230)

Statutes – Interpretation – Saskatchewan Employment Act, Section 6-50

The applicant union brought an application for judicial review of the award of an arbitration board, requesting that the court quash it and remit the matters decided by it to a differently constituted arbitration board. The board was appointed pursuant to a provision in the collective bargaining agreement (CBA) between the applicant and the respondent employer to resolve an outstanding grievance. The CBA also contained a term that required a board of arbitration to render a decision as quickly as possible after completion of a hearing and investigation. As the hearing in this case was scheduled for mid-December, the parties agreed to waive a 30-day requirement for reaching a decision to a reasonable period of time because of the proximity of the Christmas holidays. It appeared that they reached this agreement because of a misunderstanding of the CBA or lack of awareness of the contents of the specific provision. The hearing concluded on December 18, 2015 and the decision of the board was reserved. The applicant inquired of the board in July 2016 as to when it would render its decision and again in August 2018, without receiving a response. In November 2018, it served notice on the board of an application in which it sought an order that the board had committed a fundamental denial of natural justice by denying it a decision, setting aside the appointment of the board's chairperson and declaring all proceedings taken by the board as null and void. In December 2018, the board released its decision. The applicant then brought this application to quash the award on the ground that the delay in rendering it violated the principles of natural justice. It was also argued that s. 6-50 of The Saskatchewan Employment Act, that states that a board of arbitration "shall" deliver its decision within 60 days after the conclusion of the hearing, is mandatory such that a failure to comply results in a loss of jurisdiction. Section 6-50(3) of the Act also provides that the time limit can only be extended with the consent of the parties. The respondent argued that there was consent of the parties to waive the 30-day requirement to reach a decision to within a "reasonable period of

time" and therefore the court should find that the parties were consenting unless and until the applicant informed the board their consent was withdrawn, which had not occurred.
HELD: The application was granted. The court set aside the board's decision as being null and void. It interpreted s. 6-50 of the Act and found that: 1) there was no continuing consent by the parties to extend the statutory requirement that the board deliver its decision within 60 days. Even if the parties' agreement to extend the time for a decision for a reasonable period operated as consent pursuant to s. 6-50(3) of the Act for the purpose of s. 6-50(2), that consent was limited to a reasonable period of time. Such a period ended long before the board delivered its decision. The applicant's November 2018 application ended the board's right or jurisdiction to decide the grievance; and 2) that s. 6-50(2) of the Act is mandatory and non-compliance with the obligation results in a nullity. Alternatively, if the proper interpretation of s. 6-50(2) is that its time limit requirements are directory, the court would not relieve against the non-compliance and would find that the board's decision was null and void for failure to comply with the direction of the Act.

 Back to top

Sharma, Re (Bankrupt), 2019 SKQB 237

Thompson, September 13, 2019 (QB19231)

Bankruptcy and Insolvency – Conditional Discharge – Non-Government Student Loans

The applicant, Royal Bank of Canada, opposed the bankrupt's automatic discharge from bankruptcy pursuant to s. 168.2 of The Bankruptcy and Insolvency Act (BIA). It held a proven unsecured claim of $200,500, being 85 percent of the proven claims in the bankruptcy estate. The bankrupt had acquired funds from the applicant through a student line of credit it had granted to him at a time when the applicant was 19 and had been admitted to the College of Dentistry. The funds were to be used for his education. The bankrupt failed his exams in 2015 and was no longer attending school. The applicant submitted that it had made the arrangement without knowledge that the bankrupt had a history of abusing drugs and alcohol. There was no evidence presented that either party considered the issue of substance abuse when entering into the lending agreement. The bankrupt used the line of credit for purposes that were not related to his education, such as purchasing a luxury vehicle and a condominium. At the hearing, the trustee's report indicated that the bankrupt's assets comprised a one-third interest in an exempt condominium with a net value of $5,000. During the bankruptcy, the bankrupt was required to pay $3,275 per month in compliance with the statutory requirement to pay surplus under the BIA. The trustee reported that there were no conduct

issues beyond the requirement for the bankrupt to pay $2,250 for outstanding surplus income. The bankrupt testified that his new employment did not pay as much as his previous position and he no longer had the ability to pay surplus. He submitted that he defaulted on the student line of credit because of his substance addictions and they were not his fault. The applicant's notice of opposition identified its objections as including that the bankrupt: had not justified that his assets were not of a value equal to 50 cents on the dollar of his unsecured liabilities as required by s. 172 of the BIA; contributed to his bankruptcy by unjustifiable extravagance; and assigned himself into bankruptcy to evade his debt to the applicant.
HELD: The bankrupt would only be discharged if met the condition that he pay $61,600 to the trustee or make financial reports to the trustee until April 2025. If at any time before that date the trustee ascertained the bankrupt had the ability to pay surplus income at any time, he would be required to make payments. If he did not complete payment of $61,600 and the trustee was able to confirm that the bankrupt had insufficient available income to do so by April 2025, the bankrupt could apply for his discharge. The court found evidence that supported its conclusion that the bankrupt had serious addiction issues which were related to some of his spending. Neither he nor the applicant considered his addiction to be a material factor at the time of the contract. The bankrupt had not conducted himself appropriately with regard to the line of credit by purchasing a vehicle and a condominium. He had contributed to his bankruptcy by unjustifiable extravagance and a condition of discharge was required. The court calculated the amount of the vehicle and condo purchases and the payments made toward them by the bankrupt as totaling $61,600.

 Back to top

Business Development Bank of Canada v Beckerland Farms Inc., 2019 SKQB 239

Rothery, September 17, 2019 (QB19237)

Statutes – Interpretation – Commercial Liens Act, Section 4

The applicant, MNP Ltd., was the receiver of the assets of Beckerland Farms Inc. (Beckerland), a Saskatchewan corporation engaged in the business of grain drying and grain storage. It applied for a declaration that it had a valid and subsisting commercial lien on the grains claimed by the respondents Solonenko and Perpeluk. Beckerland's sole shareholder and director, Tyson Becker (Becker), had guaranteed loans made to Beckerland by the Business Development Bank (BDC). After BDC began to realize on is security, it applied to have the applicant made the receiver of Beckerland. When the applicant took possession of Beckerland's facilities, it

discovered that Solonenko and Perpeluk still had grain stored on site. They each provided the applicant with documentation supporting their claims to the stored grain that consisted of contracts and their cancelled cheques. The cheques had been made payable to a numbered company. The applicant learned that Becker was listed as the sole director, officer and shareholder of the numbered company. The applicant advised the respondents that Beckerland was the owner of the grain storage facilities and it had a commercial lien claim over their grain being held there. It reached agreements with them to allow the release of the grain after they had paid funds in trust pending outcome of this application. Solonenko stated in his affidavit that he was aware that Becker had dealings with Beckerland Farms and so did not question Becker's request that he make his cheque payable to the numbered company. In support of the respondents, Becker filed an affidavit in which he swore that the numbered company operated and paid the cost of the grain storage business for the 2018–2019 crop season. The applicant argued that when Solonenko and Perpeluk entered into the contracts with the numbered company for services, they ought to have known that that they were not paying the actual provider of the services and, being wilfully blind to that fact, they could not now benefit from it.
HELD: The application was dismissed. The court found directed that the funds held in trust be paid out to Solonenko and Perpeluk. The court found that because they had paid for the services prior to services being rendered, there was no amount to which a lien could attach as provided in s. 4 of The Commercial Liens Act. It concluded on the evidence that the applicant had not proven that Solonenko or Perpeluk were wilfully blind to the fact that Becker was making out invoices to and requesting cheques payable to the numbered company while the services were actually being provided by Beckerland. There was no requirement that they pay twice for the services provided to them.

 Back to top

R v R.C., 2019 SKQB 241

Tochor, September 17, 2019 (QB19234)

Criminal Law – Judicial Interim Release Pending Appeal

The applicant was convicted of offences contrary to ss. 271 and 151 of the Criminal Code and sentenced to 18 months' imprisonment (see: 2019 SKPC 51). He appealed both the conviction and sentence and applied pursuant to s. 816(1) of the Criminal Code for release pending the hearing of his appeal. The Crown argued that the applicant's detention was necessary in the public interest pursuant to s. 679(3)(c) of the Code.
HELD: The application was granted with conditions of release

imposed upon the applicant. The court reviewed the issue of whether the applicant's detention was in the public interest by assessing the factors set out in R v Oland. The applicant's grounds of appeal were found to be clearly arguable and that mitigated in favour of his release. The seriousness of the offence was high, although prosecuted summarily, and that mitigated against release. The applicant's post-charge conduct included a conviction for a causing a disturbance and that weighed against release. The applicant would have served most of his sentence before the appeal could be heard and that operated in favour of release. The concerns of the public involving the seriousness of the offence and the applicant's post-offence conduct could be addressed by imposing appropriate conditions upon the applicant during his release.

 Back to top

Deren v SaskPower, 2019 SKQB 242

Elson, September 18, 2019 (QB19238)

Civil Procedure – Queen's Bench Rules, Rule 4-31

The plaintiffs' action against the defendants, the Saskatchewan Watershed Authority (SWA) and SaskPower (see: 2015 SKQB 366) was dismissed, as was their subsequent appeal (see: 2017 SKCA 104). SWA and SaskPower filed their statement of defence in May 2013 followed by their respective applications for summary judgment in November 2013 and February 2014. The parties exchanged affidavits and cross-examination of the affiants followed. In May 2014, SaskPower served its written offer to settle on the plaintiffs that it would forgo all costs incurred to date in exchange for a discontinuance of the plaintiffs' action. The offer was open until summary judgment was rendered, which occurred in November 2015. SaskPower and the plaintiffs had not been able to agree with respect to SaskPower's claim for taxable costs based upon the plaintiffs' rejection of the offer. The issue was whether SaskPower should be entitled to double costs based on its offer to waive costs in return for a discontinuance. The plaintiffs contended that the offer was an invitation to capitulate and did not reflect the type of compromise that justified the claim for double costs. SaskPower argued that The Queen's Bench Rules no longer require the type of compromise previously required under the former Rules and the focus is now on the genuineness of the offer.
HELD: The court held that the plaintiffs' decision to decline SaskPower's offer triggered the application of Queen's Bench rule 4-31(2) and SaskPower was entitled to double the costs it incurred after it served its offer in May 2014. The parties agreed that SaskPower had made a valid formal offer under Queen's Bench rule 4-26(2). The court found that it must take a new approach to assessing an award of costs under Queen's Bench rule 4-31(2)

primarily because it did not contain the phrase "offer of compromise" that had had been present in rule 181(2) of the predecessor Queen's Bench Rules. Utilizing the new approach, the court concluded that the offer was genuine by assessing a number of factors, including that the offer was made more than six months after the plaintiffs had received the defendants' affidavits and brief of law that alerted the plaintiffs as to the relative strength of their case and that of the defence. It would not have been unreasonable for SaskPower to have expected that the plaintiffs would give serious consideration to accepting the offer before summary judgment was given.

 Back to top

Brent Gedak Welding Ltd. v Maverick Oilfield Services Ltd., 2019 SKQB 243

Chicoine, September 18, 2019 (QB19235)

Civil Procedure – Pleadings – Statement of Defence – Noting for Default – Application to Set Aside
Civil Procedure – Judgments and Orders – Default Judgment – Application to Set Aside

The plaintiff commenced an action under The Builders' Lien Act to recover $352,200 owed to it by the defendants. It alleged in its statement of claim that under a contract to provide labour, materials and equipment in connection with the construction of an oil and gas battery owned by the defendant, Crescent Point Energy Corporation (CPEC). The plaintiff had then contracted with the defendants, Maverick Oilfield Services (Maverick) and Northern Cross Oilfield Services (NCOS) to provide these services. The defendants, Michael Schnell (M. Schnell) and Della Schnell, were the directors of Maverick and Maverick's sole shareholder was another defendant, 950 Alberta. The total contract price was $478,130. The plaintiff received $36,560 from Maverick and $94,400 from NCOS, leaving a balance owing. The plaintiff filed a lien against CPEC's interest in the project under the Act and provided notices to all of the other defendants. The plaintiff's claim against the personal defendants and against Maverick and NCOS included a claim for breach of trust under s. 16(1) of the Act. It alleged that the applicants received monies from the owner of the project, CPEC, in relation to the construction of the project which the applicants directed or paid improperly and not in accordance with the trust provisions of the Act and that they misappropriated trust funds by retaining or converting them to their own use and by failing to use the trust funds to pay sub-trades and suppliers for the project as required under the Act. The personal defendants, as directors of 950 Alberta, were alleged to be implicated in the breach of trust in relation to funds received by Maverick. After serving its statement of claim on

each of the Schnells, 950 Alberta and Maverick, the plaintiff noted these defendants for default for failure to file a statement of defence within the proper time period and took out judgments in default of defence against each of them. As a result, those defendants filed this application to set aside the noting for default and default judgments. On behalf of all applicants, M. Schnell filed an affidavit in support of the application in which he acknowledged that he was served with the statement of claim and testified that he was aware of ongoing negotiations between CPEC and NCOS, the project owner and defaulting subcontractor, and various lien claimants, including the plaintiff. He did not contact a law firm about representing him until two months later and when his lawyer contacted the plaintiff's counsel, he had been noted for default and default judgments had issued. The applicants were unable to secure the plaintiff's consent to setting aside the judgments after he had reviewed their draft statement of defence. According to his affidavit, M. Schnell said that Maverick contracted with CPEC to build the project and Maverick entered into a sub-contract with NCOS to provide welding services. NCOS then contracted with subcontractors such as the plaintiff to complete the work. M. Schnell deposed that Maverick had not entered into any agreement with the plaintiff, nor did it supply any materials to it. Therefore, no amounts were ever owed by Maverick to the plaintiff and if it had made payments, they were made on behalf of NCOS. Consequently, no trust obligations were owed by the applicants to the plaintiff and none were liable to it in debt or quantum meruit. The plaintiff filed an affidavit in response stating that he been confused by the information that Maverick and NCOS might have merged and that he had received some payments of his invoices from NCOS as well as Maverick. He stated that M. Schnell told him on numerous occasions that he was going to have a tough time paying for the job, but that he would make sure that the plaintiff was paid. The plaintiff attested that at no time did any representative of Maverick or NCOS request that the consent to the contract that he had entered into with Maverick be assigned or transferred directly and solely to NCOS.

HELD: The application was dismissed. The court reviewed the application to set aside a noting under Queen's Bench rule 3-21(3) and found it was satisfied that the applicants had acted expeditiously and that their explanation for their failure in responding to the claim was weak. It would not, however, have refused to set aside the noting and default judgments on that account; the application was denied under Queen's Bench rule 10-13 because the applicants did not have a meritorious defence. The proposed statement of defence denied that the plaintiff had a contract with Maverick and that its claim for non-payment was against NCOS, but the court did not believe the evidence presented by M. Schnell in his affidavit. It found that the plaintiff did have a contract with Maverick and that there was no evidence that that it was made with or assigned to NCOS.

 Back to top