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

Volume 21, No. 7 **April 1, 2019**

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The appellants appealed a Queen's Bench chambers decision dismissing their application to commence third party claims on the basis that Chernesky was a controlling precedent. Chernesky held that s. 3 of The Contributory Negligence Act (Act) only operated with respect to negligence. The appellants argued that since they were being sued in negligence, s. 3 applied, even though they wanted to commence a third party claim for contribution or indemnity against an alleged intentional tortfeasor. Alternatively, the appellants argued that Chernesky should be overturned. The two respondents, J. and S., were at a nightclub in April 2016 when they were shot and injured by the third-party respondent, O. The respondents commenced an action against the appellants, who were the operator of the nightclub and the owner of the nightclub, in June 2016. The respondents argued that the appellants had been negligent because they created a dangerous and hazardous environment by failing to put in place adequate and appropriate security measures. The appellants brought applications to add O. as a third-party defendant, relying on Rule 3-31 of The Queen's Bench Rules.
HELD: The majority of the Court of Appeal of Saskatchewan

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dismissed the appeal. Section 3 of the Act is only concerned with negligence, not with tortious or at-fault acts more generally. The court adopted the approach in Rizzo to determine the meaning of s. 3: 1) the wording of the Act; 2) the object and legislative history of the Act; and 3) the case law from other jurisdictions that has interpreted legislation similar to the Act. The court analyzed the considerations as follows: 1) the word "fault", which is used in s. 3, is broader than "negligence". The title of the Act being Contributory Negligence Act suggests that s. 3 does not apply to all torts or to all at-fault conduct. The long title of the Act refers to an Act for Damages for Negligence where more than one party is at fault. The court concluded that the ordinary meaning of these words is that the Act is concerned with negligence only. The court found it appropriate to consider the title because the word "fault" is ambiguous. The long title was found to suggest that any lack of clarity in the meaning of "fault" should be resolved by reading it as meaning "negligence". The wording of the Act, taken as a whole, suggests "fault" in s. 3 means negligence; 2) the common law is the no-contribution-among-tortfeasors rule, a principle prohibiting defendant tortfeasors from seeking contribution from each other in respect of losses committed jointly or severally. The court reviewed the Uniform Law Conference and determined that the work of the Uniform Law Conference made it clear that s. 3 was aimed only at negligence; and 3) the authorities from other jurisdictions were of limited assistance because they did not explore the highly relevant deep legislative history of s. 3 and its equivalents. Also, in some instances, such as Ontario's Negligence Act, 1930, the relevant statutory language was quite different from what was found in s. 3. The court also noted that an interpretation allowing fault to be construed in a broader way could lead to a slippery slope. The respondents were entitled to costs in the usual way. One Court of Appeal judge dissented and found that in the circumstances of the case, the Act allows, at least, a defendant who is sued in negligence to be able to join an intentional tortfeasor and trespasser. The judge also adopted the Rizzo purposive method of statutory interpretation. The dissenting judge applied s. 10 of The Interpretation Act to determine the fair, large and liberal construction and interpretation that best ensured the attainment of the objects of the Act, having regard for the whole of the Act, including its titles. The long title was found to be the only indicator of legislative intent restricting the application of the Act to negligent tortfeasors. According to the dissenting judge, the individual words should not be used to constrain the whole. To permit the appellants' application would serve to permit all the issues regarding liability and apportionment to be determined at one trial. Also, the dissenting judge indicated that intentional tortfeasors or trespassers should not be able to escape liability because a plaintiff chose not to bring an action against them. The historical basis for resisting the third party application also did not apply to this matter because it was not the intentional tortfeasor seeking contribution from the negligent tortfeasor.

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Wilson v Adams Estate

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R v Olynick, 2019 SKPC 16

Anand, March 1, 2019 (PC19013)

Criminal Law – Elements of the Offence
Criminal Law – Arrangements to Commit Sexual Offences Against Child, Section 172.2

The accused was charged with an offence contrary to s. 172.2(1)(b) of the Criminal Code for making an arrangement with another person to commit sexual offences against an eleven-year-old girl. The accused posted an advertisement online seeking a sexual encounter with a mother and daughter. A police officer posed as the mother and arranged to meet the accused at a hotel room. The officer told the accused she was the mother and would be bringing her eleven-year-old daughter. The accused indicated that he was never going to do anything with the daughter and was going to the hotel to be with the mother. He further indicated that he only engaged in sexual communications involving the daughter to arouse the mother. The only arrangements with respect to the child, according to the accused, were fantasy role play. The issue was whether the accused possessed the necessary mental element pursuant to s. 172.2(1)(b) to be found guilty. The remaining elements of the offence were not in issue. The court analyzed the following: 1) the actus reus of s. 172.2 offences; 2) the mens rea of s. 172.2 offences; and 3) elements in this case
HELD: The court's analysis was as follows: 1) the actus reus of the offence is comprised of the voluntary/intentional use of telecommunications with a person to make an arrangement. The arrangement requires communication to commit the secondary offences as well as the acceptance of that plan by the communicants. The court concluded that an arrangement under s. 172.2 requires the communication of a plan to commit one of the secondary offense as well as the acceptance of that plan by the other person; 2) there must be an intent to make the agreement or arrangement, it is not necessary to show that the accused intended to follow through with the plan to commit the secondary offence. The accused must intend that the communication be taken seriously by the recipient. The court held that motive should be part of the offence's fault element. The last mental element is regarding the offender's belief that the subject of the secondary offence is underage; 3) the accused conceded that all of the elements were met except for the fault requirement. He used telecommunication when he posted the advertisement and when he used texts and emails to communicate with a person, and the communication was intentional on his part. The accused made arrangements to commit the offence of invitation to sexual touching against the daughter and he accepted the plans. He knew that the daughter was 11 years old. The accused

acknowledged two aspects of the fault element: a) the only reasonable inference from the words used was that he intended to communicate the words that constituted the impugned arrangements; and b) he never questioned the age of the child or alluded to the possibility that he did not believe that she was a real 11-year-old child. The Crown established beyond a reasonable doubt that the accused believed that the daughter was underage. The accused argued that he made the impugned arrangements to arouse the mother to engage in sexual relations with him and he never had the intention of sexually touching or being touched by the daughter. During interrogation the accused acknowledged that he knew or was aware of the risk that the mother was not role playing. The court found that the accused at least intended that the mother take his words seriously and he was not engaged in pure fantasy role playing that could allow a not guilty finding. The accused was found to have made two arrangements to commit an offence under s. 153 against the daughter. He had the requisite guilty mind. All the elements of the offence under s. 172.2(1)(b) of the Criminal Code were proven beyond a reasonable doubt. The accused was found guilty.

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EMW Industrial Ltd. v Good, 2019 SKQB 47

Barrington-Foote (ex officio), February 14, 2019 (QB19044)

Contract Law – Employment Contract – Restrictive Covenant – Non-Competition Clause – Non-Solicitation
Contract Law – Restrictive Covenant – Injunction
Corporate Law – Restrictive Covenant – Director – Shareholder
Injunction – Restrictive Covenant

The applicants were a group of companies and their shareholders of which the personal respondent, D.G., was a former employee, director and shareholder of. The corporate respondents were companies that employed D.G. The applicants applied for an interim injunction requiring D.G.'s employment with the respondents, and any other corporate entity associated with the companies, be terminated and restraining the continuation of the alleged breaches. The applicants argued that D.G. breached a non-disclosure agreement with the applicant dated May 10, 2016 (2016 Agreement) and a non-disclosure/non-competition/non-solicitation agreement with the applicant dated March 2017 (2017 Agreement). The applicant provided maintenance, repair, and construction services to clients in the agriculture and mining industries. The respondent also provided services to the agriculture industry with a strong presence in the small and large capital project sector of the grain and fertilizer business. D.G. was employed with the applicants from 2001 to 2017, beginning as a welder. He indicated that he was a

project manager when he left, whereas the applicants said he was one of four department managers in the Ag Division. His responsibilities when he left related to one major client of the applicant. D.G. sent a letter of resignation effective October 27, 2017. He received a written offer of employment from the respondent companies on October 13, 2017 and started working for them in the position of “Business Development” on October 30, 2017. The executives of the respondents indicated that there was minimal competition between the applicant companies and the respondent companies. The executives also indicated that D.G. had not shared confidential or proprietary information of any kind. The applicant argued that the respondents were its largest competitors. The issues were: 1) whether D.G. had a continuing fiduciary duty as a director of one of the applicant companies, and if so, whether he was breaching those duties; 2) the 2016 and 2017 Agreements; and 3) whether D.G. was a fiduciary employee.
HELD: The application was dismissed. The issues were discussed as follows: 1) the court found that there was no evidence that the applicants continued to treat him as a director or that he acted as one after his resignation. The court concluded that the applicants did not make out a strong prima facie case that they did not receive effective notice of D.G.’s resignation. It was noted that the court would not have granted an injunction even if D.G. were found to continue to be a director because the application for an equitable remedy should turn on a former employment relationship, not on whether the person was a minority shareholder or director; 2) the 2017 Agreement provided for a continuous term for the restrictive covenant. The applicants therefore failed to make out a strong prima facie case on that basis because the term was not only broad, but non-existent. Another clause, clause L, referred to a two-year limit. The court also found that the 2017 Agreement overreached in several other respects. The applicants did not make out a strong prima facie case that the non-competition and non-solicitation provisions of the 2017 Agreement were enforceable. The 2017 Agreement indicated that it constituted the entire agreement between the applicants and D.G. and, therefore, the applicants failed to make out a strong prima facie case that the 2016 Agreement continued in force. The court noted the following: a) the analysis was undertaken with the same standard of scrutiny that would have applied if D.G. was not a shareholder or director because the court found that the employer-employee relationship was the primary relationship; b) the 2017 Agreement indicated that if the provisions were found to be “void or unenforceable”, the provisions would be reduced in scope, duration of time or geographical limitation to the extent necessary to make them enforceable. The court was not prepared to rewrite the 2017 Agreement and provided case law to support its decision; and c) there were non-disclosure provisions in addition to the non-competition and non-solicitation provisions in the 2017 Agreement. The court was not satisfied that D.G. disclosed or would disclose confidential information; and 3) there was conflicting evidence as to the scope of D.G.’s powers and duties

when employed by the applicants. The court concluded that D.G. did not participate in senior management functions. Although D.G. had access to a broad range of proprietary information, there was no evidence that he used that access or that he took any information when he left the applicants' employment. There was, however, a strong prima facie case that D.G. was a fiduciary because he had major responsibilities in being the key contact for a very significant client and he had knowledge of some confidential matters such as pricing and supplier information. A fiduciary is precluded from unfairly competing by soliciting clients of the former employer for a limited time. D.G. was not obliged to avoid soliciting all clients for all kinds of business. There was one key client that D.G. worked with. D.G. had done very little that was considered competition with the applicant in relation to any client, let alone the client he worked for when employed by the applicants. The application was also not heard for over six months after he resigned, which may have been a period longer than he would have had to avoid soliciting applicant clients. The court held that there was not a strong prima facie case that D.G. used or shared confidential information so as to engage concern with unfair competition by a fiduciary. Nor was there a strong prima facie case that he competed unfairly otherwise by soliciting the applicants' clients. The court did not agree that D.G. could not work for the respondents in any capacity because employment by a competitor would result in sharing confidential information.

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Larson Manufacturing Co. of South Dakota, Inc. v Jahnke, 2019 SKQB 11

Chow, January 14, 2019 (QB19033)

Debtor and Creditor – Mortgage – Assignment
Land Titles Act – Mortgage – Discharge
Mortgages – Assignment
Statutes – Interpretation – Land Titles Act, 2000, Section 125

The applicant applied for: an order vacating a mortgage registered on behalf of the respondent; an order directing the Registrar of Land Titles to cancel or vacate the registration of the mortgage; and an order authorizing them to have the mortgage discharged from the Saskatchewan Land Titles Registry. In May 2015, the owner of condominium (condo) lands obtained financing from the applicant to assist with development of a condo project. The financing was secured by a mortgage granted by the owner as mortgagor in favour of the applicant as mortgagee (applicant mortgage). The applicant mortgage was registered against the title to the condo lands, but it was subordinate to another mortgage, the AP Mortgage. A company owned by the respondent, MG, arranged for the Ministry of

Highways to pay it $929,124.20 for a parcel of land. The title to that land was encumbered by the AP Mortgage. The proceeds of the sale were paid with $518,587.89 paid to the respondent and $337,231.61 paid to AP. The amount left owing on the AP Mortgage in January 2016 was $8,772.20. In early 2016, the AP Mortgage was assigned to the respondent. In February 2016, the applicant's counsel received a statement of adjustments indicating that the sum of $8,806.64 had been paid to AP from the sale of a condo unit. The applicant thought that was the total amount left owing under the AP mortgage. Later that year, the owner of the condo lands defaulted under the applicant mortgage. The owner transferred the land to the applicant late 2016. The applicant knew the title was not free and clear but thought that there was little or no money owing on the AP Mortgage. The applicant applied to discharge the AP Mortgage. An accounting was ordered to determine the balance of the mortgage. The respondent argued that $431,153.51 was owing. The Local Registrar concluded that the matter turned on a question of law and referred the matter back to the court for determination.
HELD: The court held that the assignment of the AP Mortgage to the respondent was not one that was authorized by s. 125 of The Land Titles Act, 2000 (Act). The previous Act had an identical section that was judicially considered at length. The right of a mortgagor or other interested party to insist upon an assignment in lieu of the discharge of a mortgage in Saskatchewan only arises once that mortgagor or interested party is entitled to redeem. The entitlement to redemption arises when the mortgage is in default and proceedings have been commenced to enforce it. There was no evidence that the AP Mortgage was ever in default or that the mortgagee, AP, had commenced foreclosure proceedings. The mortgagor, MG, was therefore not entitled to redeem the AP Mortgage, nor was MG entitled to require AP to assign the mortgage to the respondent in lieu of discharge. The Ministry paid $337,231.61 directly to AP in 2015. The Statement of Adjustments was found to confirm that AP received a subsequent sum of $8,806.64 to AP from the sale of condo lands. The payment was prior to the purported assignment, therefore, at the time of the purported assignment the indebtedness had been fully satisfied and extinguished. The court granted the applicant the relief it sought. Costs in the amount of $1,000 were awarded to the applicant.

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M.L.S. v N.E.D., 2019 SKQB 26

Goebel, January 22, 2019 (QB19034)

Family Law – Custody and Access – Costs – Disbursements
Family Law – Custody and Access – Costs – Double Costs
Family Law – Custody and Acees – Costs – Queen's Bench Rules, Rule 4-31, Rule 15-25

Family Law – Custody and Access – Costs – Solicitor and Client Costs

The issue was the appropriate award of costs. In the fall of 2015, a trial was commenced with respect to the custody of the parties' two teenage children. The court heard from 13 witnesses including four psychologists. The trial decision was reserved, and an interim order was made directing the family to participate in an immersive reunification program. In June 2017, the court decided that it was in the children's best interests to remain in the sole custody and primary care of their mother with prescribed and conditional time with their father. The mother argued that solicitor and client costs were appropriate because of findings made in the judgment respecting the father's behaviour. Alternatively, she sought double costs pursuant to Part 4 of The Queen's Bench Rules. The father argued that costs should be limited to those prescribed by the tariff. The court dealt with the following issues: 1) what would the taxable costs be; 2) were solicitor and client costs appropriate; 3) were Part 4 double costs appropriate; 4) how should disbursements be dealt with; and 5) other considerations.
HELD: Costs in family law matters are discretionary. The issues were determined as follows: 1) the successful party in an interlocutory motion is generally entitled to costs, rather than costs being in the cause. The court did not include three substantive interim applications in the taxable costs: two had direction from the chambers judge that there would be no costs and the third was silent on costs. Conference calls with the pre-trial justice for management purposes were appropriate to include, but post-trial calls initiated by the court to clarify information were not included. The court did allow other post-trial calls. An application for child support after the trial was included. The taxable costs were $22,500; 2) solicitor client costs respond to inappropriate conduct on the part of the litigant in the course of litigation, not findings regarding the custody dispute. The conduct during the proceeding was found not to justify solicitor and client costs. The father's attitude and conduct respecting the children's relationship with the mother was concerning, but it was not scandalous, outrageous, or reprehensible. Neither was his conduct over the course of the proceeding; 3) Queen's Bench Rule 4-31 entitles a party who serves a valid formal offer, and who subsequently obtains a judgment that is equal to or more favourable than the rejected offer, to double costs for all steps taken in relation to the action after the offer was served. Rule 15-25 states that Rule 4-31 applies to family law proceedings. The party intending to rely on double costs bears the burden of proving, on a balance of probabilities, that the offer to settle was equal to or more favourable than the judgment rendered. Rule 4-31 does not apply if costs are awarded pursuant to the court's discretion under Rule 11-1. The mother served the father with an offer to settle in September 2015. The court agreed with the father that it could not be found that the offer was "as or more" favourable than the final judgment rendered. The offer only allowed the father contact with the children after a

therapist deemed it appropriate, whereas the order did not. The rule of double costs was found not to apply; 4) the father proposed that expenses be shared equally. There were two categories in dispute: a) the court-ordered assessments and interventions; and b) the fees incurred by the mother for the independent expert she called at trial. Because a report was ordered by the court, it was found that the cost of its production should be included in the costs assessment. There were three court-appointed witnesses. At the close of evidence, the children and parents were ordered to participate in the Family Bridges Program, which had a substantial cost, the majority of which was paid by the mother. The mother had proposed the program. The court did not find that the lack of success with the program was the father's fault. The court found that the father should have been responsible to pay the majority of the costs related to the court-ordered therapy and a significant portion of the costs related to the program. The court fixed the father's additional costs at $25,000; and b) the costs to the mother for calling her witness were $5,550. The court stated that expert fees, disbursements, and other charges are not automatically included in an assessment of costs. The court did not significantly rely on the mother's expert's evidence to decide the matter. The expert served mainly to supplement the detailed evidence already provided by the court-appointed psychologists. The court was not satisfied that it was reasonable to require the father to pay for the mother's expert and; 5) the father requested that some consideration be given to the financial hardship he would have if a high award for costs were ordered against him. The court found that the parties were in similarly modest circumstances and there was no basis to weigh the father's hardship more heavily than the mother's.

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NewAgco Inc. v Syngenta Crop Protection LLC, 2019 SKQB 56

Meschishnick, February 25, 2019 (QB19053)

Civil Procedure – Judgments and Orders
Judgments and Orders – Foreign Judgments – Registration
Statutes – Interpretation – Enforcement of Foreign Judgments

The court ordered the registration of a judgment (Sask Judgment) in the amount $1,123,500 against the applicant. The applicant applied to set aside the Sask Judgment and for an order terminating the seizure of its bank account. The respondent was a company organized under the laws of the State of Delaware. The applicant was a Saskatchewan corporation with the same person as the only officer, director, and shareholder, namely J.M. There was also a company in Barbados that shared the same first descriptive word with the applicant. The directors, shareholders, and officers of the two companies were different. The respondent was entitled to

compensation under U.S. law if others used its data in an application for the registration of a pesticide. When a company is entitled to compensation, and if the parties cannot negotiate the compensation, it is determined by arbitration. The respondent referred a matter to arbitration when compensation could not be negotiated. A settlement was reached at arbitration (Settlement Agreement) between the respondent and the Barbados company. The Settlement Agreement was confirmed by a consent judgment (Arbitration Judgment). When the payor defaulted under the Arbitration Judgment, the respondent brought an action in the United States to confirm the Arbitration Judgment. The pleadings were personally served on J.M. in Saskatchewan. He did not appear or file any material. The District of Columbia court entered a judgment in December 2017 (Columbia Judgment). That judgment was registered in this court and became the Sask Judgment. The applicant argued that it and the Barbados companies were separate companies and that the applicant was not party to the Settlement Agreement.

HELD: Section 4(a) of The Enforcement of Foreign Judgements Act outlines that the Columbia Judgment shall not be enforced in Saskatchewan if the originating court lacked jurisdiction over the applicant or the subject matter was contrary to ss. 8 and 9. The court found that the applicant would succeed if: 1) it did not expressly agree to submit to the jurisdiction of the originating court; and 2) there was no real and substantial connection between the State of Delaware and the facts on which the Columbia Action were based that would in turn require proof that the applicant did not carry on business in Delaware or that the Settlement Agreement was to be performed in that state. The court said that if the questions were answered in the applicant's favour, then it would have to address whether the Barbados company or one of its board of directors was authorized to bind the applicant to the terms of the Settlement Agreement. The two requirements were dealt with as follows: 1) the pleadings in support of the petition to confirm the Arbitration Judgment treated the applicant and the Barbados company as being the same entity. The court found that the applicant and the Barbados company were separate corporations. They had different dates of incorporation and they were not under common control at the management or board of director level. The originating court had jurisdiction over the Barbados company. There was no evidence that the applicant participated in the negotiation of the Settlement Agreement or agreed to be bound by it. The applicant did not expressly agree to submit to the jurisdiction of the originating court; and 2) the applicant was not registered to conduct business in the United States, nor did it carry on business in the United States. The Barbados company filed the application for the registration of the pesticide, and they were named by the respondent in the arbitration proceedings. The Barbados company negotiated and signed the Settlement Agreement. The applicant satisfied the court that it did not carry on business in the State of Delaware. Section 9(d) of the Act was not of assistance to the respondent because it was not the

applicant that was liable to make the payments to the specified bank in the United States. The respondent argued that the applicant's separate corporate existence should not insulate it from liability under the Settlement Agreement. The person signing the Settlement Agreement was a director of the Barbados company and there was no evidence that he or any other director of the Barbados company had authority to sign the Settlement Agreement on behalf of the applicant. There was also no evidence to suggest that J.M. participated in the negotiation of the Settlement Agreement or had anything to do with the application for registration of the pesticide. The court concluded that the Barbados company was not acting as agent for the applicant when it signed the Settlement Agreement. The applicant and the Barbados company did not have a common directing mind. The application was allowed, and the judgment was vacated. Any enforcement of that judgment was also ordered to be vacated. The applicant was awarded costs, to be taxed.

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Peterson v Peterson, 2019 SKQB 24

Megaw, January 21, 2019 (QB19016)

Family Law – Child Support – Determination of Farming Income
Family Law – Child Support – Retroactive Support
Family Law – Child Support – Shared Parenting
Family Law – Custody and Access – Best Interests of Child
Family Law – Custody and Access – Joint Custody
Family Law – Custody and Access – Mobility Rights
Family Law – Custody and Access – Shared Parenting

The parties had two children. They lived in different countries and each wanted the children to live with them. The petitioner and his brother owned a farming corporation that farmed land in Saskatchewan. He also had farm land in his personal capacity that he farmed in North Dakota. The petitioner indicated that the farming operation was more likely to expand in Canada than in North Dakota. The petitioner moved to Saskatchewan and obtained his citizenship in 2015. His parents and other family members continued to reside in North Dakota. When the parties got married, the respondent moved to Saskatchewan. She was a pharmacy technician in North Dakota before moving to Saskatchewan but was unable to work as a pharmacy technician in Saskatchewan because she was unable to become licensed. The respondent's family continued to reside in North Dakota. After the parties' separation, the respondent returned to North Dakota and obtained employment as a pharmacy technician. They initially shared parenting of the children. In 2016, when the oldest child was to start school, an interim order directed that the she be enrolled in school in Saskatchewan and required the children to remain in Saskatchewan

until a trial of the action. The parties continued the shared parenting. The respondent split her time between Saskatchewan and North Dakota. She expected to be able to obtain full-time employment once the parenting issues were determined. The daughter was in grade two at the time of the trial. The petitioner was paid $18,000 per year from the Saskatchewan farming corporation and he also received money from grain sales in North Dakota. There were eight issues at trial: 1) where the children should reside; 2) the respondent's income for child support purposes; 3) the petitioner's income for child support purposes; 4) each parties' child support obligation; 5) a determination regarding retroactive child support; 5) a determination regarding retroactive child support; 6) the respondent's entitlement to spousal support; 7) a determination regarding retroactive spousal support; and 8) costs. HELD: The issues were determined as follows: 1) the court considered the following factors: a) the respondent's reasons for moving were relevant to meet the children's needs. The respondent wanted to move for full-time employment and to be with her new partner. Her family was also in North Dakota. The petitioner could continue to farm in Saskatchewan with his base in North Dakota; b) the feasibility of the respondent's ability to move to Saskatchewan. The respondent indicated that she could not afford to continue to live part-time in Saskatchewan. The court accepted that it was not feasible for the respondent's partner to relocate to Saskatchewan; c) the feasibility of a parallel move by the petitioner. The petitioner does continue to farm in North Dakota, although it is a much smaller operation than the one in Saskatchewan; and d) the disruption to the child if there was a change in residence. The court concluded that a disruption to the children was not such that should prevent a decision being made to allow them to relocate to North Dakota. Also, a shared parenting regime could be continued if the children relocated, but not if they remained in Saskatchewan. It was determined to be in the best interests of the children to permit their relocation to North Dakota where the parents were entitled to continue with a shared parenting arrangement. Joint custody of the children was ordered; 2) the court determined that the respondent's income was as shown on her 2017 income tax return, $29,991; 3) the petitioner's 2017 income tax return showed an income of $83,031. The court considered additional issues with respect to his income: a) the court did not include random grain cheques in the petitioner's personal income; b) the court included $12,000 of expenses paid by the farming company to the petitioner's personal income; c) the court did not adjust the petitioner's North Dakota farming income for child support purposes; d) the court did not add any depreciation of North Dakota assets back into the petitioner's income due to lack of evidence; e) the respondent was found to have met her onus of demonstrating that s. 18 of the Guidelines was engaged with respect to the petitioner's income from the farming corporation. The petitioner was being paid an income less than minimum wage to co-manage a significant and sophisticated farming operation. The court added $40,000 to the petitioner's

income for child support purposes. The petitioner's income for child support purposes was determined to be $135,300; 4) neither party called evidence or argument with respect to a Contino analysis. The court set off the amount of child support to be paid by the petitioner to the respondent pursuant to s. 9 of the Guidelines. The parties were ordered to pay s. 7 expenses proportionately to their incomes; 5) the petitioner had been paying child support of $993 per month. The court considered the following factors to determine whether an order for retroactive support should be made: a) the considerations weighed in favour of there being a reasonable excuse for why the respondent did not make application sooner than trial. The petitioner unilaterally decided the child support amount; b) the court concluded that the petitioner did not do anything untoward in setting the support amount, even though it was a unilateral decision by him; c) it appeared that the children were properly provided for; d) there would be no hardship occasioned by the petitioner if there was a retroactive award made; and e) the court found that in all of the circumstances it was appropriate for a retroactive award to be made. The child support was adjusted from the date that the petition was commenced, June 2016. The total retroactive award was $17,921.94; 6) the respondent indicated that she would not be seeking spousal support if the children were ordered to be relocated to North Dakota. The court nonetheless addressed the issue. A cohabitation and prenuptial contract was entered into in February 2010 providing that neither party would receive spousal support. The considerations for the court when there is an agreement are as follows: a) there was no evidence of the negotiation and execution of the agreement; b) an assessment of the agreement as a whole led the court to conclude that it was not in substantial compliance with the objectives of the Divorce Act. The court declined to uphold the provisions of the agreement with respect to spousal support; c) the respondent significantly sacrificed in the marriage. She suffered economic disadvantage arising from the marriage and its breakdown. Because the respondent could remain in North Dakota and pursue her career, the court ordered spousal support at the low end of the range of the Spousal Support Advisory Guidelines, $1,465 for five years; 7) the considerations for retroactive spousal support are the same as for retroactive child support. The court concluded that there should be an order for retroactive spousal support, but not one strictly in accordance wit the Spousal Support Advisory Guidelines. The court ordered a lump sum payment of $15,000 for retroactive spousal support; and 8) the respondent was entitled to costs pursuant to Column 1 of the Tariff.

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Primewest Mortgage Investment Corp. v Azimi, 2019 SKQB 37

Mitchell, January 31, 2019 (QB19036)

Civil Procedure – Application to Strike Statement of Defence – No Reasonable Cause of Action
Civil Procedure – Queen's Bench Rule 7-9
Contract Law – Unconscionability

The applicant sought to strike the respondent's statement of defence in the foreclosure proceedings pursuant to Rules 7-9(1)(a) and 7-9(2)(a) and (c) of The Queen's Bench Rules. The respondent's mortgage matured on January 1, 2016 but he was unable to make regular payments before that time due to business difficulties. The last payment made was $2,176.15 on August 1, 2017. The arrears at January 23, 2018 when the foreclosure proceedings were commenced were $210,000. The indebtedness owing as of May 31, 2018 as stated in the Statement of Claim was $236,704.52. The respondent asserted in his statement of defence that that the mortgage contract was unconscionable: the mortgage broker used was disreputable and had induced him to enter into an improvident agreement with the applicant; and the broker and applicant conspired to coerce him to enter into his mortgage. At the time of the transaction, the mortgage broker was under investigation by the Saskatchewan Securities Commission for allegations of fraudulent representations and improper conduct in securing mortgages for recent immigrants. The respondent was unaware of the investigation. The mortgage broker eventually had his licence suspended. The mortgage was for $197,000. A fee of $15,000 was paid to the applicant, $1,500 to the mortgage broker, and $2,000 to the lawyer. The applicant made two arguments in favour of striking the pleading: a) the defence focuses on the actions of a third party whose dealings with the respondent were irrelevant to the applicant's claim for foreclosure; and b) the respondent relied on the doctrine of unconscionability but did not specify why the mortgage was unconscionable.
HELD: The court determined that the body of law interpreting and applying former Rule 173 applied to the interpretation and application of Rule 7-9. Where the application seeks to strike the entire claim, the court's assessment is not confined only to the pleadings. The pleading should not be struck unless it is plain and obvious that it is going to fail. The respondent's pleading must allege a sufficient factual basis to support the cause of action asserted and the court must assume that he or she can prove every factual assertion. The court applied the Gawdun/Dolter criteria: a) whether there was significant inequality in bargaining power between the parties due to ignorance, need, or distress. There was power disparity at play between the parties. The respondent was a recent immigrant from Afghanistan with limited English skills. The court therefore understood why the respondent would want to use a mortgage broker. The respondent asserted in his pleadings that he was told by the mortgage broker that he would forfeit the $40,000 he paid to the realtor if he did not enter into the mortgage with the applicant. The respondent's poor financial position must have influenced his decision to conclude the mortgage transaction. The

court found that the most significant reason for finding an inequality of bargaining power was that the respondent did not have independent legal advice. The first criterion was satisfied; b) whether the stronger party used its position of power in an unconscionable manner to achieve a material advantage over the weaker party. The respondent's pleading did not present a factual basis to satisfy this criterion; and c) whether the bargain achieved was grossly unfair to the weaker party. The respondent did not plead facts sufficient to support a finding that the impugned mortgage was so grossly unfair to him that it diverged from community standards of commercial morality. The mortgage terms were not found to deviate from acceptable legal practices in Saskatchewan. Also, the respondent acknowledged in writing that allegations of unconscionable conduct, if proven, would not relieve him from his obligations under the mortgage in their entirety. The respondent's statement of defence was struck in its entirety pursuant to Rule 7-9(2)(a) for failing to disclose a reasonable defence to the foreclosure. The applicant was awarded costs of $500.

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R v Jat, 2019 SKQB 51

Gabrielson, February 19, 2019 (QB19052)

Criminal Law – Child Pornography – Possession
Criminal Law – Child Pornography – Transmission
Criminal Law – Extortion
Criminal Law – Sexual Offences – Luring

The accused was charged with four Criminal Code offences: 1) luring, contrary to s. 172(1)(a); 2) possession of child pornography, contrary to s. 163.1(4); 3) transmission of child pornography, contrary to s. 163.1(3); and 4) extortion, contrary to s. 346(1.1)(b). The events resulting in the charges occurred in July 2016. The complainant, G.D., who was 17 at the time, accepted a friend request on Facebook and sent nude pictures of herself to the person as requested. G.D. was then told to "have sex with a guy" or the nude pictures would be sent to her family and friends. G.D. told her mother and the account was locked. The mother also contacted the police. The chats were no longer visible on Facebook. Later in July, a new Facebook account sent G.D. the nude images of her. G.D. gave the police access to her Facebook account. While the police were logged into G.D.'s account, the new account sent a message threatening to send the nude pictures to family and friends if G.D. did not have sex with "Abdul". The address that the account originated from was obtained and a search warrant was executed. The accused was arrested when a cell phone owned by him was identified as using the Facebook account. The accused pled not guilty and a voir dire was held at the commencement of trial. The

Charter application was dismissed. A statement was also determined to be voluntary and admissible at trial. The accused indicated that there were two issues at trial: 1) whether it was proven beyond a reasonable doubt that he was actually involved in the creation of the two Facebook accounts and the nature of the involvement. The accused admitted to involvement in a statement. However, at trial, he said a friend created the accounts and sent out the majority of the material; and 2) whether the accused believed that G.D. was at least 18 years old at the time of the offences and whether, in the context of his disability, this belief was reasonable in the circumstances. The accused was diagnosed with having a mild intellectual disorder.
HELD: The court applied the three-part test in D.W. and concluded that the accused's evidence was not believed. There was a significant contradiction between the evidence given in his statement to the police and his evidence at trial. The court was satisfied that the accused was both a participant and he aided in the offence. The accused's evidence at trial that he was not involved in the creation of the Facebook accounts or the transmission of the photos of G.D. and extortion of her was not believed. The second step required a consideration as to whether the evidence left the court with a reasonable doubt as to his guilt. The court did not have a reasonable doubt as to his guilt after reviewing all of the accused's evidence. The final step was a consideration of whether the court had a reasonable doubt that the accused committed the offences after considering the accused's evidence as well as all of the other evidence in the case. The court did not have any doubt. The essential elements of the luring offence were made out because the communication was from the accused to a 17-year-old and was pornographic. The accused argued that he thought G.D. was 18 because she looked like she was 18. The accused never asked her how old she was. The court concluded that the accused did not take reasonable steps to ascertain whether G.D. was 18 years of age. The forensic psychiatrist testified that he did not think that the accused realized G.D. was a minor but admitted that was based on his interview with the accused. The issue was whether reasonable steps were taken not whether the accused understood that G.D. was a minor. The Crown proved beyond a reasonable doubt that the accused did not take reasonable steps to ascertain G.D.'s age as required by s. 172.1(4). The accused was found guilty of the luring charge. The accused argued that he was not guilty of the possession of pornography charge because he did not know that G.D. was under 18. The Crown argued that the accused was aware of certain factors that should have aroused his suspicions as to G.D.'s age, such as the fact that she was a student at a high school. The court was satisfied beyond a reasonable doubt that it never occurred to the accused to question G.D.'s age or that her age mattered. The accused never took any reasonable steps, let alone all reasonable steps, as required in s. 163.1(5), to ascertain G.D.'s age. He was found guilty of possession of child pornography. The accused was also found guilty of transmitting child pornography because he

transmitted sexual images of G.D., who was under 18. The Crown proved that the defence of honest but mistaken believe was not applicable in the circumstances of the case. The accused was also found guilty of extortion because he threatened to send the pictures to friends and family of G.D. if she did not do something he wanted her to. He also forwarded some of the nude photos to another person.

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R v L.A.M.R.P., 2019 SKQB 40

Smith, February 6, 2019 (QB19040)

Criminal Law – Kidnapping
Criminal Law – Murder – First Degree – Manslaughter
Criminal Law – Unlawful Confinement

The accused was a young offender charged with three Criminal Code offences: 1) first degree murder, contrary to s. 235(1); 2) kidnapping with intent to cause confinement or imprisonment, contrary to s. 279(1.1); and 3) confining the victim, contrary to s. 279(2). The victim was the same in all three offences. An agreed statement of facts was entered wherein the parties agreed that: the victim was killed at a particular time and place; he died from loss of blood due to stab wounds of the lower left extremity; and the accused stabbed the victim the six times causing his death. She argued that she did not intend to kill the victim. There were a group of people gathering at a home until they were kicked out by the tenant. The group had been accusing the victim of stealing. The group of people, which included the accused and victim, got into a truck. The evidence conflicts as to whether the victim got into the truck voluntarily or was forced by a third party. They had all consumed methamphetamine. The group continued to yell at the victim, accusing him of being a thief. They eventually headed to an isolated country road. The group stopped, a man hit the victim over the head with a crowbar and the accused hit him in the body with a bat. When the victim fell into the ditch, the accused stabbed the victim in the thigh. She said that she always carried a knife. The accused said that she thought the victim was still alive when they drove away. The accused argued that at the time of the offence, she was high on methamphetamine and alcohol and though she intended to harm the victim, she did not intend to cause him harm that she knew would likely cause his death. She argued that she was only guilty of manslaughter. The accused testified. In custody, the accused had a conversation with someone she thought was another inmate, but who was an undercover officer. The accused argued that the conversation with the undercover officer, as well as a warned statement to police, made it clear that she never had the intent to cause bodily harm to the victim that she knew would likely cause

his death and she was not reckless, whether death had ensued or not.
HELD: The court agreed with the accused that the Crown failed to prove, beyond a reasonable doubt, that the accused had the requisite intent for second degree murder. Therefore, section 231(5) was not engaged. The evidence was found not to prove that the accused was guilty of kidnapping because the evidence did not show that the accused was part of a group that unlawfully took the victim and carried him away by force or fraud against his will. The accused was passive until she joined the man outside beating the victim. The court agreed with the Crown that the accused unlawfully confined the victim because she deprived him of the ability to freely move from one place to another at his own choosing. The accused was found guilty of the lesser included charge of manslaughter and also of unlawful confinement.

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R v Olynick, 2019 SKPC 16

Anand, March 1, 2019 (PC19013)

Criminal Law – Elements of the Offence
Criminal Law – Arrangements to Commit Sexual Offences Against Child, Section 172.2

The accused was charged with an offence contrary to s. 172.2(1)(b) of the Criminal Code for making an arrangement with another person to commit sexual offences against an eleven-year-old girl. The accused posted an advertisement online seeking a sexual encounter with a mother and daughter. A police officer posed as the mother and arranged to meet the accused at a hotel room. The officer told the accused she was the mother and would be bringing her eleven-year-old daughter. The accused indicated that he was never going to do anything with the daughter and was going to the hotel to be with the mother. He further indicated that he only engaged in sexual communications involving the daughter to arouse the mother. The only arrangements with respect to the child, according to the accused, were fantasy role play. The issue was whether the accused possessed the necessary mental element pursuant to s. 172.2(1)(b) to be found guilty. The remaining elements of the offence were not in issue. The court analyzed the following: 1) the actus reus of s. 172.2 offences; 2) the mens rea of s. 172.2 offences; and 3) elements in this case
HELD: The court's analysis was as follows: 1) the actus reus of the offence is comprised of the voluntary/intentional use of telecommunications with a person to make an arrangement. The arrangement requires communication to commit the secondary offences as well as the acceptance of that plan by the communicants. The court concluded that an arrangement under s. 172.2 requires the

communication of a plan to commit one of the secondary offense as well as the acceptance of that plan by the other person; 2) there must be an intent to make the agreement or arrangement, it is not necessary to show that the accused intended to follow through with the plan to commit the secondary offence. The accused must intend that the communication be taken seriously by the recipient. The court held that motive should be part of the offence's fault element. The last mental element is regarding the offender's belief that the subject of the secondary offence is underage; 3) the accused conceded that all of the elements were met except for the fault requirement. He used telecommunication when he posted the advertisement and when he used texts and emails to communicate with a person, and the communication was intentional on his part. The accused made arrangements to commit the offence of invitation to sexual touching against the daughter and he accepted the plans. He knew that the daughter was 11 years old. The accused acknowledged two aspects of the fault element: a) the only reasonable inference from the words used was that he intended to communicate the words that constituted the impugned arrangements; and b) he never questioned the age of the child or alluded to the possibility that he did not believe that she was a real 11-year-old child. The Crown established beyond a reasonable doubt that the accused believed that the daughter was underage. The accused argued that he made the impugned arrangements to arouse the mother to engage in sexual relations with him and he never had the intention of sexually touching or being touched by the daughter. During interrogation the accused acknowledged that he knew or was aware of the risk that the mother was not role playing. The court found that the accused at least intended that the mother take his words seriously and he was not engaged in pure fantasy role playing that could allow a not guilty finding. The accused was found to have made two arrangements to commit an offence under s. 153 against the daughter. He had the requisite guilty mind. All the elements of the offence under s. 172.2(1)(b) of the Criminal Code were proven beyond a reasonable doubt. The accused was found guilty.

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R v Vesty, 2019 SKQB 49

Hildebrandt, February 19, 2019 (QB19050)

Municipal Law – Bylaw – Appeal
Municipal Law – Bylaw – Interpretation
Municipal Law – Bylaw – Standard of Proof – Beyond a Reasonable Doubt
Municipal Law – Bylaw – Standard of Review

The respondent was acquitted of the charge of disturbing or disrupting the contents of a recycling container contrary to ss. 75(2)(d) of a City Bylaw. The acquittal was made after the Justice of the Peace (justice) found the appellant failed to prove that the respondent was disturbing or disrupting the bin's contents. The appellant's grounds of appeal were: 1) the justice erred in law in his interpretation of proof "beyond a reasonable doubt"; and 2) the justice erred in law in failing to consider and draw reasonable inferences from the evidence presented.
HELD: The acquittal was not unreasonable. The grounds of appeal were dealt with as follows: 1) the first element of the offence was proving that the respondent was not the owner, operator, or occupant of a business or residence that the recycling container in question was assigned to. This was acknowledged by the respondent. The second element to be proved was that the respondent was not a person permitted by the Utility Services Manager to deal with recyclables. This was established beyond a reasonable doubt at trial. The fact that the container was a recycling container and was approved for collecting recyclable material was not challenged. The focus was whether the respondent disturbed or disrupted the contents of the recycling container. The Crown argued that it was not relevant whether the respondent had recycling material in his care or whether there were any items removed from the recycling bin. The appeal court agreed that whether the respondent had recyclables in his cart was not relevant; however, the court noted that if items were removed from the recycling bin, it would have suggested the contents were disrupted or disturbed. The justice concluded, correctly according to the appeal court, that there was no evidence that anything had been removed from the recycling bin and put into the respondent's cart. The appellant's witness was a block away from the recycle bin but testified that he saw an individual "digging into the bin". The respondent admitted that he checked a bin. It was not found to be unreasonable for the justice to conclude that "digging into" was different from disturbing or disrupting the contents of the recycling bin. The justice appeared to prefer the respondent's testimony over that of the appellant's witness. The justice was in the best position to assess the credibility. The appellant overstated the evidence. There was no evidence that the respondent was in the recycling bin. Disturbing or disrupting the contents of the recycling bin was an element of the offence, an element that requires an action or movement. The justice was found to appropriately consider the question as to whether the contents were disturbed or disrupted. The appellant did not prove the element beyond a reasonable doubt; and 2) the appellant overstated the evidence; there was no evidence that the respondent dove into the container. It was not unreasonable for the justice to conclude that the respondent just looked into or checked the bin. It was not unreasonable of the justice to decline to infer that the respondent had to have been rummaging in the bin and not merely looking. The appeal court did not conclude that the justice's assessment was

unreasonable. Whether the Bylaw as worded met the purpose intended was not for the court to determine.

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Shirkie v Shirkie, 2019 SKQB 33

McIntyre, January 29, 2019 (QB19030)

Family Law – Spousal Support

The parties separated in 2008 after 22 years of marriage and two children, then aged 21 and 16. The petitioner husband issued his petition that year and the parties attempted to settle their issues in the following year but they were unable to reach agreement. Although the petitioner was promoting settlement for about two years following separation, the respondent resisted due to her health problems. In 2014 she filed an answer and counter-petition, claiming ongoing and retroactive spousal support. The petitioner, a geologist, derived his income from consulting the oil and gas industry. After separation he paid between $5,200 to $4,200 per month to the respondent as well as paying the property taxes, utilities and household expense for the family home and giving monthly allowances to the two children until 2014. During 2013, the petitioner's income was reduced substantially due to the downturn in the oil and gas industry. In July 2013 he advised the respondent that he had run out of money and credit. He kept her apprised of his attempts to obtain additional work and kept paying the mortgage up to May 2014. After applying in March 2014 for interim spousal support, the respondent was granted an order for ongoing support of $7,500 per month. The petitioner assigned in bankruptcy in June 2014. In 2015, the court determined that the respondent was entitled to pursue her family property claim regarding exempt assets and that she had a provable claim outside of the family home. Following that, the Maintenance Enforcement Office (MEO) decided that enforcement against the petitioner's RRSP assets would be suspended pending trial provided he maintained spousal support payments at a minimum of $4,000 per month. Later the court decided that the respondent would receive one half interest in the family home less arrears of property taxes. By November 2018 when the home sold, the respondent had received or was entitled to approximately $430,000 in her family property claim. The respondent had maintained spousal support payments until June 2016. As of November 2018, he was in arrears of $89,300 based upon the order of $7,500 per month, but had nonetheless paid support totaling $55,100 in 2017 and $53,100 in 2018. The petitioner acknowledged that the respondent was entitled to spousal support but argued that it should be $2,000 per month and his arrears should be cancelled. The respondent resisted, saying she was 68 years old and had had health issues that prevented her from working. She

argued that the petitioner was capable of earning significant income and he was intentionally underemployed. Income in the amount of $375,000 per annum should be imputed to him and he should pay support at the high end of $14,400 per month. In addition, the respondent said that from separation until the interim order in 2014, the petitioner had underpaid his support obligation by $617,500 based upon the Guidelines amount and the petitioner's income during those years. She requested a lump sum payment in that amount.
HELD: The respondent was entitled to spousal support in the amount of $3,200 per month commencing in January 2019 and the order was not subject to a time limit in light of the length of the marriage, the role of each party and their present circumstances. The claim for retroactive spousal support was dismissed. The court found that the evidence provided did not permit it to impute income to the petitioner. He had taken reasonable steps to secure employment but was 66 years old, had health problems and there were far fewer opportunities available to him as a geologist due to the downturn in the oil industry. The petitioner had tried to settle with the respondent after the separation and then advised the respondent in 2013 that his income was dropping, but the respondent took no steps to reduce her costs by selling the house. The court found that the petitioner could earn $90,000 per year for the next few years and based upon that finding, determined the amount of support. Regarding the respondent's claim for retroactive support, the court found that as it was filed in 2014, there was nothing to suggest that support prior to that would be appropriate. The evidence showed that the petitioner paid substantial amounts of support for the respondent and their children. The respondent had not suffered hardship whereas a retroactive order would create hardship for the petitioner. The court expunged his arrears.

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Singler v Tsang, 2019 SKQB 38

Smith, February 4, 2019 (QB19037)

Limitations of Actions
Real Estate – Sale of House – Misrepresentation
Small Claims – Appeal – Damages
Small Claims – Appeal – Misrepresentation – Realtor

The respondent enlisted the services of the appellant real estate agent to purchase a property with a possession date of March 30, 2014. Shortly after possession, the respondent discovered a number of defects in the property. The claim against the appellant, the real estate brokerage, and the former owner of the home was issued May 13, 2016. At trial, the court concluded that: the appellant made negligent misrepresentations to the respondent regarding the

condition of the home in relation to the foundation; made negligent misrepresentations regarding the cost to undertake minor repairs and improvements; and the respondent suffered damages as a result. The total judgment was $9,523.88. The grounds of appeal were: 1) whether the trial judge erred in law in finding the action was not barred by operation of The Limitations Act (Act); and 2) whether the trial judge erred in law in the assessment of damages. HELD: The grounds of appeal were addressed by the court sitting on appeal as follows: 1) the trial judge found that the respondent became aware of certain latent defects in the home on April 1, 2014, but it was not until May 13, 2014 that he became aware of the additional defects of bowing foundation walls requiring remediation. The trial judge concluded that the claim with respect to the dirt floor in the basement was statute-barred, but the claim for the recovery of costs in relation to the foundation walls was not statute-barred. The appellant argued that the respondent knew the repairs would cost $25,000 by April 24, 2014. According to the respondent's claim the appellant misrepresented that the repairs would not be more than $10,000, therefore, according to the appellant, the action was beyond the limitation period when the respondent knew the costs would exceed the $10,000. The appeal court found that the trial judge was cognizant of the date of discovery as to the costs exceeding $10,000. The court agreed with the appellant that costs incurred with respect to the minor repairs and improvements as contemplated in the $10,000 quote represented to the respondent were not recoverable. The appeal court also agreed with the trial judge that the limitation period for damages flowing from the defects in the foundation walls was May 13, 2014 and thus not statute-barred; 2) the appellant argued that some damages allowed by the trial judge did not flow from the claim against him: a) the appellate court agreed with the trial judge's reduction of the total paid to one contractor from $12,000 to $6,000 for allowable expenses; b) the appellate court agreed with the appellant that none of the damages awarded by the trial judge regarding the plumbing and heating should have been included as damages in relation to the structural work; c) the engineering invoice was allowed because it was found that the appellant did misrepresent the foundation; d) the appellant argued that the cost in relation to a disposal company charge of $2,096.38 had no relation to the misrepresentation. The appeal court found that the amount was recoverable in damages; e) the former owner of the house paid the respondent $2,500. The appellant argued that the trial judge erred by not factoring in that settlement amount; however, the court disagreed. The asbestos abatement expense was settled against the former owner and was not an expense in relation to the misrepresentation. The trial judge's decision was affirmed in relation to the Act. The appeal regarding damages was granted in part. The judgment against the appellant was $9,296.38.

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Sound Stage Entertainment Inc. v Burns, 2019 SKCA 18

Richards Jackson Ottenbreit Caldwell Whitmore, February 12, 2019 (CA19017)

Damages – Contributory Negligence
Statutes – Interpretation – Contributory Negligence Act, Section 3
Torts – Contributory Negligence
Torts – Intentional Tortfeasor
Torts – Negligence

The appellants appealed a Queen's Bench chambers decision dismissing their application to commence third party claims on the basis that Chernesky was a controlling precedent. Chernesky held that s. 3 of The Contributory Negligence Act (Act) only operated with respect to negligence. The appellants argued that since they were being sued in negligence, s. 3 applied, even though they wanted to commence a third party claim for contribution or indemnity against an alleged intentional tortfeasor. Alternatively, the appellants argued that Chernesky should be overturned. The two respondents, J. and S., were at a nightclub in April 2016 when they were shot and injured by the third-party respondent, O. The respondents commenced an action against the appellants, who were the operator of the nightclub and the owner of the nightclub, in June 2016. The respondents argued that the appellants had been negligent because they created a dangerous and hazardous environment by failing to put in place adequate and appropriate security measures. The appellants brought applications to add O. as a third-party defendant, relying on Rule 3-31 of The Queen's Bench Rules.
HELD: The majority of the Court of Appeal of Saskatchewan dismissed the appeal. Section 3 of the Act is only concerned with negligence, not with tortious or at-fault acts more generally. The court adopted the approach in Rizzo to determine the meaning of s. 3: 1) the wording of the Act; 2) the object and legislative history of the Act; and 3) the case law from other jurisdictions that has interpreted legislation similar to the Act. The court analyzed the considerations as follows: 1) the word "fault", which is used in s. 3, is broader than "negligence". The title of the Act being Contributory Negligence Act suggests that s. 3 does not apply to all torts or to all at-fault conduct. The long title of the Act refers to an Act for Damages for Negligence where more than one party is at fault. The court concluded that the ordinary meaning of these words is that the Act is concerned with negligence only. The court found it appropriate to consider the title because the word "fault" is ambiguous. The long title was found to suggest that any lack of clarity in the meaning of "fault" should be resolved by reading it as meaning "negligence". The wording of the Act, taken as a whole, suggests "fault" in s. 3 means negligence; 2) the common law is the no-contribution-among-tortfeasors rule, a principle prohibiting

defendant tortfeasors from seeking contribution from each other in respect of losses committed jointly or severally. The court reviewed the Uniform Law Conference and determined that the work of the Uniform Law Conference made it clear that s. 3 was aimed only at negligence; and 3) the authorities from other jurisdictions were of limited assistance because they did not explore the highly relevant deep legislative history of s. 3 and its equivalents. Also, in some instances, such as Ontario's Negligence Act, 1930, the relevant statutory language was quite different from what was found in s. 3. The court also noted that an interpretation allowing fault to be construed in a broader way could lead to a slippery slope. The respondents were entitled to costs in the usual way. One Court of Appeal judge dissented and found that in the circumstances of the case, the Act allows, at least, a defendant who is sued in negligence to be able to join an intentional tortfeasor and trespasser. The judge also adopted the Rizzo purposive method of statutory interpretation. The dissenting judge applied s. 10 of The Interpretation Act to determine the fair, large and liberal construction and interpretation that best ensured the attainment of the objects of the Act, having regard for the whole of the Act, including its titles. The long title was found to be the only indicator of legislative intent restricting the application of the Act to negligent tortfeasors. According to the dissenting judge, the individual words should not be used to constrain the whole. To permit the appellants' application would serve to permit all the issues regarding liability and apportionment to be determined at one trial. Also, the dissenting judge indicated that intentional tortfeasors or trespassers should not be able to escape liability because a plaintiff chose not to bring an action against them. The historical basis for resisting the third party application also did not apply to this matter because it was not the intentional tortfeasor seeking contribution from the negligent tortfeasor.

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Stacey v Lukenchuk, 2019 SKQB 41

Smith, February 7, 2019 (QB19049)

Professions and Occupations – Optometrist
Statutes – Interpretation – Fatal Accidents Act, Section 3
Torts – Negligence
Torts – Loss of Chance

The defendant applied pursuant to Rule 7-1 of The Queen's Bench Rules for determination of whether the plaintiff could bring a claim for recovery of damages for a less favourable life expectancy or decreased survival rate under The Fatal Accidents Act (FAA). The plaintiff attended the defendant's office nine times for a suspected foreign body in his eye. At the last visit, the defendant had referred

the plaintiff to a specialist. The specialist diagnosed the plaintiff with a melanoma. The plaintiff started his claim approximately a year later and he died due to complications with the melanoma 18 months later. The plaintiff claimed negligence by the defendant. HELD: The Rule 7-1 process involves two steps: a) determining whether the question is appropriate; and b) hearing the debate as defined by the question posed. The FAA is remedial legislation and as a benefit-conferring statute it must be interpreted in a broad and generous manner. The court did not agree with the defendant that the plaintiff would not have been able to maintain an action against the defendant if he had not died. If he had not died, and if he established negligence, he may have suffered general damages, incurred expenses, and suffered under various heads of loss. The action was to collect damages, it was not a "loss of chance" claim. There was a dearth of Saskatchewan case law interpreting the relevant provisions of the FAA. The court found that the interpretation of the FAA sought by the plaintiff would amount to a significant amendment to it by creating a class of defendants potentially liable under the FAA that did not cause a plaintiff's death, but contributed to it. The court concluded that the legislature intended that a defendant in an action based on s. 3 of the FAA was someone who caused the death of the plaintiff. In this case, the defendant did not cause the death, the melanoma did. The defendant may have contributed to the death or facilitated or hastened it, but those were not found to fall within the scope of s. 3 of the FAA. The plaintiff's claim was struck. The defendant was awarded costs.

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T.H., Re, 2019 SKQB 55

Megaw, February 21, 2019 (QB19048)

Civil Procedure – Lawyer as Affiant
Family Law – Child in Need of Protection – Child and Family Services – Temporary Order
Family Law – Child in Need of Protection – Children's Views
Family Law – Child in Need of Protection – Mental Health Assessment
Family Law – Child In Need of Protection – Summary Procedure

The Ministry of Social Services (Ministry) sought a four-month order committing the two children to their care. The children had already been out of their mother's care for almost four months. The Ministry argued that the mother's approach and behaviour illustrated her mental instability. The mother argued that the Ministry's actions caused her to take the approach and behave as she did. The mother had three children. One was 19 and was not of concern in the application. The other two children were 14 and 12.

Both children were attending school at the time of the application, but the 12-year-old was not at the time of apprehension. In June 2018, the Ministry received reports of the mother living in her car with her three children and pets. The children were not apprehended at that time because the Ministry concluded that poverty alone was not sufficient grounds to apprehend children. The Ministry became concerned about the living situation as fall approached. The mother did not feel the housing options provided by the Ministry were appropriate. She indicated that she had a place to move into at the time of the apprehension. The Ministry was also concerned that the youngest child was not attending school. The Ministry enrolled the child in school in the fall of 2018, but the mother rejected the school. On October 26, 2018, the Ministry apprehended the two children. The youngest child was eventually placed with his biological father outside of the city where he was attending school. The mother did have clean and appropriate housing for her and the children at the time of the hearing. The hearing was conducted pursuant to the summary procedure that allowed for hearings on affidavits with cross-examination where the Ministry sought an order of care for six months or less. The following issues were discussed: 1) whether an affidavit sworn by counsel for the mother attaching a disputed medical report could be used as evidence; 2) whether certain email communications tendered to show additional dates offered by the mother were without prejudice communications; and 3) whether the children were in need of protection.
HELD: The issues were determined as follows: 1) the mother's counsel advised that the affidavit was withdrawn. The court noted case law and Court of Appeal Practice Directive No. 1, standing for the proposition that a lawyer may not appear as both advocate and witness, unless that which is sworn to by the lawyer is either purely formal or is uncontroverted; 2) the emails had "without prejudice" attached to each of them, therefore the court concluded that they were not properly before the court and were directed to be removed from the court file; 3) the issue of protection is at the date of the hearing and it is not measured against perfect parenting. The Ministry argued that the children were in need of protection due to the mother's mental health instability and her refusal to allow the children's biological fathers to be involved with them. The mother had secured appropriate and safe housing so it could no longer be an issue to support the Ministry's position. The youngest child was also enrolled in school. He was attending a school in the town he was residing in with his father and there was a place for him in a community school in Regina when he returned. The remaining issue was the mother's mental health condition. The mother filed a report from a doctor indicating that he saw no mental health issues, other than anxiety, with the mother. The mother failed to schedule an appropriate meeting time with the doctor and Ministry to discuss the information he was provided with and the steps taken to arrive at the conclusion. The court therefore did not put much weight on the report filed by the doctor. The court also concluded that it

needed more information to answer whether the mother's mental health raised a protection concern pursuant to s. 11(b) of The Child and Family Services Act. Mental health issues of a parent are not necessarily a reason to determine that children are in need of protection. The court accepted that the mother was confrontational, accusatory, and interfering with Ministry personnel. The court required a mental health assessment of the mother by a qualified health care professional. The court directed that a psychological and/or psychiatric assessment of the mother be completed pursuant to s. 32 of the Act and s. 97 of The Queen's Bench Act. If possible, the doctor who had prepared the report on the mother's mental health would complete the report. The Ministry was to pay the costs associated with the assessment. An interim order was made that the children be returned to the mother subject to conditions, such as maintaining appropriate housing, making sure the children are enrolled in school, and allowing the Ministry access to her home for scheduled and unscheduled visits. The court considered the children's views as allowed by s. 29 of the Act. The matter was adjourned to receive further representations from the parties for a final order.

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Wilson v Adams Estate, 2019 SKQB 39

Kalmakoff, February 5, 2019 (QB19038)

Civil Procedure – Judgments and Orders – Amendment
Civil Procedure – Mandatory Injunction
Civil Procedure – Queen's Bench Act, 1998, Section 37
Civil Procedure – Queen's Bench Rules, Rule 1-5, Rule 1-6
Civil Procedure – Stay of Civil Proceedings
Injunction – Mandatory Injunction
Wills and Estates – Proof of Will in Solemn Form

There were two actions: the land action and the will action. The deceased owned and operated a large cattle ranch. She never married and had no children. The plaintiff was the deceased's neighbour and friend. The plaintiff indicated that he began to work for the deceased full-time in 2001 on the verbal agreement that he would inherit the deceased's entire ranching operation. In 2011, the deceased made a will naming D. as the executor and not providing anything to the plaintiff. The will was probated on March 3, 2017. In September 2017, the plaintiff commenced the land action against D. in his personal capacity, against D. in his capacity as executor of the estate, and against the deceased's farming corporation. The plaintiff sought specific performance first, then a declaration that the defendants held the land and livestock for his benefit in a constructive trust, or in the alternative, damages. The plaintiff also commenced an action challenging the validity of the will and

revoking D.'s grant of probate (will action). The court ordered a trial be held to prove the will in solemn form. The defendants appealed and the plaintiff cross-appealed. The plaintiff then applied for the following relief: 1) an interlocutory injunction restraining the defendants from leasing the east pasture to third parties, and from interfering with or preventing the plaintiff's use of the lands pending the determination of the land action; and 2) an order directing a stay of proceedings of the land action pending determination of the will action. D., in his capacity as executor, sought an order to: 1) enter into leases or contracts with respect to land owned by the estate; 2) do things necessary to deal with the estate's tax matters; 3) take the steps necessary to properly maintain the estate's property; and 4) direct the defence and counterclaim in the land action. The plaintiff also sought to amend his statement of claim to add the lawyer who drafted the deceased's will as a party. HELD: The plaintiff's applications were dealt with as follows: 1) a half quarter of the east pasture was owned by the estate and the estate of the deceased's sister-in-law, each a one-half undivided interest. A third party was renting the east pasture and wished to continue to do so. The plaintiff argued that he suffered negative financial consequences because he was no longer able to use the east pasture to graze his cattle. The Supreme Court of Canada set out a three-part test to determine whether an injunction should be granted. The party applying for an injunction must demonstrate that: a) there is a serious issue to be tried. The test is more stringent where the injunction sought is mandatory rather than prohibitive. A strong prima facie case (a case of such merit that it is very likely to succeed at trial) is required for the former. The court determined that the plaintiff was requesting a mandatory injunction because the defendants would be required to vacate the east pasture in favour of the plaintiff. The plaintiff did not have a strong prima facie case. There was little if any evidence to corroborate the plaintiff's assertion of the verbal promise; b) that it will suffer irreparable harm if the injunction is not granted. The court was also not convinced that the plaintiff would suffer irreparable harm if the injunction was not granted. All of the harm pointed to by the plaintiff was readily quantifiable and able to be compensated by money; and c) that the balance of convenience favours granting the injunction. The court found that the balance was in favour of not granting the injunction. The plaintiff's case was not strong. He did not establish a meaningful risk of harm. Also, one of the parcels of land was not entirely owned by the defendants. It had also been more than a year since the plaintiff had use of the lands; he did not bring his application in a timely fashion; 2) the chambers decision directing that the will be proven in solemn form had been appealed and cross-appealed, but the appeals had not been heard. The plaintiff argued that the land action should be stayed pending the will action because it would be unmanageable to deal with both actions at once. He also argued that D. should not deal with the land action while it was uncertain whether probate would be revoked in the will action. A judge may grant a civil stay of proceedings where it is considered

appropriate in the circumstances. The court did find that the plaintiff would suffer some prejudice if both actions proceeded concurrently, however, that alone was not compelling enough to grant the requested stay. The plaintiff decided to prosecute numerous actions. The court also noted that the two actions were not completely connected. The court was not satisfied that the defendants would suffer any significant prejudice if a stay of the Land Action was granted. Rules 1-5 and 1-6 were used to cure the lack of notice by the plaintiff to the lawyer, who was clearly an interested party and should have been given notice of the application. The court found that the overriding factor was that the determination of the Will Action stood to have a major impact on D.'s authority to act on behalf of the estate. The stay was granted. The executor's requests were then assessed by the court. The court indicated that the authority to direct the defence and counterclaim did not require an order given the stay of the Land Action. The remaining requested permissions were found to be consistent with earlier orders of the court. The court had to consider whether the Court of Appeal Rules prohibited the order requested because there is usually a stay of the original order due to an appeal. The court's earlier order was injunctive in nature and therefore not subject to the stay provisions in Rule 15(1) of The Court of Appeal Rules. Because the original order was not stayed by the filing of the appeal, the court determined that it could amend the order. The court granted the order requested by the executor.

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