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Subject Index

R v Vandelinden, 2018 SKPC 79

Henning, December 20, 2018 (PC18075)

Criminal Law – Blood Alcohol Level Exceeding .08 – Approved Screening Device
Criminal Law – Care and Control over .08
Criminal Law – Defences – *Charter of Rights*, Section 10

The accused was charged with driving over .08. He argued that his Charter rights were breached. The accused was found unresponsive in the driver's seat of a running vehicle by a paramedic in the middle of the afternoon. The vehicle was blocking traffic. At the hospital, and two and a half hours after he was found in the vehicle, the accused gave blood samples pursuant to a demand. An expert concluded that the accused's blood alcohol content was .254 when he was located in the vehicle. The expert was questioned regarding "bolus" drinking, which is drinking large quantities of alcohol and then driving before the alcohol is even absorbed. She said that it was theoretically possible for that to happen. The officer at the ambulance indicated that there was a slight smell of alcohol coming from the accused. An ASD was administered while the accused was in the ambulance and the test resulted in a fail reading. At the ambulance, the accused spoke of an anxiety attack and admitted to very limited alcohol consumption. He was arrested for impaired driving. The officer accompanied the accused to the hospital. The blood test was done at the hospital when the officer realized she would not be able to perform a breath test within the two hours. She did not give the accused additional information about right to legal counsel indicating that she was not required to because the accused's jeopardy had not changed, only the method of

investigation had changed. There were two empty liquor bottles located in the vehicle. The issues were: 1) whether the circumstances constituted operation of a motor vehicle, or care and control of a motor vehicle, which is a related offence; 2) whether there were sufficient grounds to justify the ASD test; 3) the validity of the expert evidence to establish the blood alcohol readings at the time of the driving or care and control of the vehicle; and 4) whether the officer was required to provide the accused with a second right to counsel when the demand for a blood sample was made.
HELD: The issues were determined as follows: 1) the court accepted the law as settled that the accused was in care and control, and that the offence is an included offence of operation of a motor vehicle; 2) there was a slight smell of alcohol and the accused admitted to minimal alcohol consumption. The court found that there were sufficient grounds for a valid ASD demand; 3) the Crown does not have to prove beyond a reasonable doubt every assumption underlying the expert opinion. There was no evidence to support "bolus" drinking by the accused. The court noted a case that indicated that it was not necessary that the absence of bolus drinking be proven by the Crown; and 4) the officer's decision to give the accused a blood demand was found to be justified. The court found that the accused's jeopardy did not change from beginning to end, regardless of whether a breath or blood sample was used. Both tests must be done under prescribed conditions by qualified persons, even though the blood test was somewhat more intrusive. The court concluded that there was no obligation to provide a second right to counsel, and therefore, there was no Charter breach. After the informational component of the right to counsel was given the accused had an obligation to exercise that right with some diligence. No evidence was excluded.

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R v Chapman, 2018 SKQB 289

Keene, October 29, 2018 (QB18354)

Criminal Law – Controlled Drugs and Substances Act – Possession for the Purpose of Trafficking – Cocaine
Criminal Law – Defences – *Charter of Rights*, Section 7, Section 8, Section 9, Section 10(a)

The accused was charged with possession of cocaine for the purpose of trafficking, contrary to s. 5(2) of the *Controlled Drugs and Substances Act* (CDSA). Constable H (Cst. H.) and Corporal (Cpl. D.) pursued an SUV they believed to be travelling more than 60 km/h when passing police vehicles on the side of the highway with their lights on. Cst. H. attended the driver's side of the vehicle and did not tell the accused why he was stopped nor why he was being detained. The accused was not told why he had been stopped for

approximately 30 minutes. Cst. H. went back to the police vehicle and a CPIC search revealed that the accused had a criminal conviction for a weapon offence. A search on PIP revealed that the accused might have gang involvement in British Columbia. The computer then froze and it took Cst. H. 15 to 20 minutes to get it to reboot. In the meantime, Cst. D. went to Cst. M.'s vehicle (who had now pulled up to the scene) to use his computer. Approximately 30 minutes after the traffic stop, the officers decided that they had enough grounds to arrest the accused. The accused was arrested for possession of a controlled substance. When 3,172 grams of cocaine was located in the vehicle, the accused was re-arrested for possession of cocaine for the purpose of trafficking and he was re-read his rights to counsel. The accused said he wanted to talk to a lawyer and did so at the detachment. Cpl. D. testified as to the grounds the officers discussed prior to arresting the accused: the accused was more nervous than expected; there was a five hour energy drink in the car; there was a radar detector in the vehicle; the vehicle was a rental vehicle; the short vehicle rental agreement; the accused appeared to have a canned or rehearsed story; the car was rented in British Columbia and was travelling east; the conviction for a weapon offence; the indication of gang involvement; and an overall query that Cpl. D. believed the accused had involvement with guns, gangs, and drugs. Cpl. D. indicated that the sniffer dog was not deployed because they had already formulated reasonable grounds for the arrest. The accused raised three main points with respect to the evidence: 1) the speed of the vehicle; 2) whether Cst. H.'s computer froze before or after Cpl. D. found out about the CPIC and PIP information; and 3) the stage in the investigation that the officers formulated their belief they had reasonable grounds, and did they ever consider mere suspicion. The accused raised Charter issues and a voir dire was held. The issues were: 1) whether the traffic stop violate ss. 7 and 9 of the Charter; 2) whether the accused's s. 10(a) rights were violated because he was not promptly informed of the reasons for being pulled over; 3) whether the accused should have been informed of his rights to counsel pursuant to s. 10(b) sooner; 4) whether reasonable grounds existed for the arrest of the accused on the initial possession of the controlled substance, and if not, whether his ss. 8 and 9 Charter rights were breached; and 5) an application of s. 24(2) for any Charter breaches.

HELD: The court decided on the three points of evidence argued by the accused as follows: 1) the officers' testimony was accepted; 2) the court found that Cpl. D. was mistaken because Cst. H. said they had the information just before his computer froze; and 3) the stop remained a traffic stop until approximately the 25-minute mark, when the totality of the evidence was discussed in the group discussion and a decision was made that there were reasonable grounds to arrest the accused. The Charter issues were determined as follows: 1) the traffic stop was authorized under the TSA. The accused was not arbitrarily detained when he was pulled over; 2) Crown counsel conceded that it was a breach of the accused's s.

10(a) rights because he was not advised of the reason for being pulled over for approximately 30 minutes; 3) the accused did not have to be provided with his rights to counsel on a traffic stop. There was not a further breach of s. 10(a) or 10(b) of the Charter; the officers all testified, and were believed by the court, that it was not until they met together that the investigation turned to a drug investigation; 4) the court concluded that a reasonable person placed in the position of the arresting officer could conclude that there were reasonable grounds for the arrest of the accused for possession of a controlled substance. The search of the vehicle was authorized as a search incident to arrest; and 5) the only information acquired from the accused in the first 25 minutes of the stop was his licence, registration, car rental agreement, and his brief explanation regarding his travel plans. The arbitrary detention was not because of a blatant disregard for the accused's rights. Cst. H. was not acting in bad faith. The breach had only a minor impact. The court then balanced society's interests and the accused's. The evidence, being the cocaine, was found to be highly reliable and non-bodily evidence. Cocaine is a dangerous drug with a negative impact on individuals and their communities and suppression of the evidence would be contrary to societal interests. This factor favoured inclusion of the evidence. The court was not persuaded that inclusion of the evidence would bring the administration of justice into disrepute. The accused's application to exclude evidence under s. 24(2) was dismissed.

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R v Chapman, 2018 SKQB 310

Keene, November 15, 2018 (QB18355)

Criminal Law – Controlled Drugs and Substances Act – Possession for the Purpose of Trafficking – Cocaine
Criminal Law – Drug Offences – Possession

The accused was charged with possession of cocaine for the purposes of trafficking, contrary to s. 5(2) of the *Controlled Drugs and Substances Act* (CDSA). A voir dire was held, and it was determined that no evidence was to be excluded. The accused was stopped for speeding when he was the driver and only occupant of a rental vehicle from British Columbia. A search incident to arrest led to the finding of 3,172 grams of cocaine. An officer testified that he saw a body panel of the vehicle out of place in the back interior of the vehicle. When he opened up the panel, he found the cocaine. The issue was whether the Crown proved beyond a reasonable doubt that the accused had possession of the cocaine found in the rear panel of the rental car he was operating. The Crown argued that it would not be reasonably possible that the rental car company placed the cocaine in the vehicle.

Wal-Mart Canada Corp. v Saskatoon (City)

Wells v General Motors of Canada Co./Cie. General Motors du Canada

HELD: The issue of possession was one of circumstantial evidence. The court concluded the photos confirmed that the panel was out of place and appeared to be easy to notice. The court found that it was reasonable to conclude that the agents of the rental company would have noticed the panel out of place and done something about it before renting out the vehicle. The accused also could have done something about it. The court found it was not reasonably possible that the rental company or its agents were involved in placing the cocaine in the vehicle. There was no evidence of any third party using or controlling the vehicle after the accused rented it. There was no evidence of a break-in to the vehicle. The accused rented the vehicle and had sole control over it. It was not necessary for the police to conduct forensic testing on the drug packages. The court found that there were no other reasonable possibilities and was satisfied beyond a reasonable doubt that the accused was in possession of the cocaine in the vehicle that he rented. The accused was found guilty of the offence contrary to s. 5(2) of the CDSA.

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Saskatchewan Crop Insurance Corp. v Rick Peterson Farms Ltd., 2019 SKCA 19

Jackson Whitmore Schwann, February 19, 2019 (CA19018)

Civil Procedure – Queen's Bench Rules, Rule 5-12(2)
Civil Procedure – Disclosure of Documents – Privilege

The appellant, Saskatchewan Crop Insurance Corporation, appealed the decision of a Queen's Bench judge in chambers that granted the respondent's application for production of a report issued by the appellant's Provincial Appeal Panel (panel) (see: 2017 SKQB 215). The respondent had entered into an insurance policy with the appellant covering loss resulting from the inability to seed crops due to weather conditions in 2013. The appellant denied the respondent's claim under the policy and the respondent first appealed, unsuccessfully, to the appellant's regional management group and then to the panel, an independent advisory body that hears appeals and provides recommendations to the appellant's board of directors, which then makes the ultimate decision whether a claim will be denied. To participate in the panel appeal process, the respondent agreed to an "appeal panel limitations and restrictions" agreement (agreement) containing a confidentiality clause requiring it to acknowledge that its application was a voluntary act and that the panel's recommendations to the board "constituted privileged information". The board denied the respondent's appeal based on the findings in the panel's report. In accordance with the agreement, the report was provided to the appellant but not to the respondent. The respondent then issued a statement of claim and requested that the appellant produce the

report. It refused, claiming privilege, and the respondent applied for production of it pursuant to Queen's Bench rule 5-12(2)(a). The chambers judge found, based on the decision in *Cote*, that neither litigation nor settlement privilege applied to the report. He determined that the parties had agreed that the report would be privileged and that the Supreme Court's decision in *Bombardier* that a confidentiality clause could override the exception to settlement privilege was confined to cases of settlement-mediation and was not applicable to the agreement in this case. The judge applied the fourth of the *Wigmore* criteria, decided that the benefit gained for the correct disposal of the litigation outweighed any injury caused by the disclosure of the report, and ordered it to be disclosed. The grounds of appeal were that the judge erred: 1) by not honouring the confidentiality clause. He recognized that it privileged the panel report and thus he ought not to have used the *Wigmore* criteria. He failed to apply *Bombardier* to find that it is open to parties to create their own rules regarding privilege so as to displace the common law when such rules are created in the context of alternative dispute resolution (ADR) processes; and 2) in his application of the *Wigmore* criteria.

HELD: The appeal was dismissed. The standard of review was correctness. The majority found with respect to the grounds that the chambers judge: 1) correctly applied *Bombardier*. That decision must be confined to the context of settlement privilege only and was not intended to confer privilege as a class whenever a confidentiality clause exists. Further, the relationship between the parties here did not fall within a recognized class privilege, nor could the decisions in *Bombardier* or *Slavutych* be extended so as to presumptively create privilege in the ADR context established by the Panel appeal process by reason of a confidentiality agreement alone. The judge correctly approached the matter as a claim of case-by-case privilege and to then refer to the *Wigmore* criteria; and 2) correctly applied the fourth *Wigmore* criterion because as the parties had opted for a confidential dispute resolution process and signed a confidentiality agreement, the first three criteria were redundant. He found that the appellant had not persuaded him that the injury to the appellant outweighed the benefit of production despite recognizing that the confidentiality clause strongly supported non-production. The court found his decision on this point concerned a question of mixed fact and law and was entitled to deference and there was no error justifying intervention. In dissent, Jackson J.A. found that the judge had erred in applying the *Wigmore* criteria to the circumstances. Parties to a dispute can contract for a greater expansion of the law of privilege and agree that communications, at least in the context of ADR, will be privileged. Once the judge found that there was a clear agreement between the parties that the panel's recommendations would be privileged, he should have given effect to it.

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Wal-Mart Canada Corp. v Saskatoon (City), 2019 SKCA 20

Jackson, February 19, 2019 (CA19019)

Civil Procedure – Appeal – Leave to Appeal
Municipal Law – Appeal – Leave to Appeal
Municipal Law – Appeal – Committee Decision

The applicants applied for leave to appeal pursuant to s. 33.1 of The Municipal Board Act regarding a decision of the Assessment Appeals Committee (committee) contained in a letter dated June 25, 2018 and with further reasons dated July 23, 2018. The respondent City had appealed five committee decisions where the committee remitted assessments to the assessor with specific directions. The appeal was dismissed, and the court remitted the assessments to the assessor for a re-evaluation in accordance with the committee's decision. The effect of the re-evaluation was an increase in the assessed values of four of the properties and a decrease in one. The applicants did not expect that there was any potential for an increase in value. The committee wrote to the applicants on June 25, 2018 noting the remittal assessed values. The applicants wrote to the committee after receiving the letter indicating that the assessor's remittal response "defie(d) the decision of the Committee and, indeed, of the Court of Appeal". The committee responded to the applicants in the July 23 letter. The applicants argued that the committee had the jurisdiction to determine whether the assessor had complied with the committee's remittal decisions. The assessor took too narrow a view of the scope of the committee's remittal decision according to the applicants. They also said that they should have been able to make submissions to the committee regarding the adequacy of the assessor's remittal response before the letters were written.
HELD: The applicants were correct in that the committee's decision was that it had no jurisdiction to consider whether the assessor had complied with the committee's remittal decisions. The court relied on the *Corman Park* decision even though it was concerned with The Municipalities Act, not The Cities Act. The applicants' arguments were the same as those considered and rejected by the court in Corman Park. The applicants' appeal was found to be prima facie destined to fail on the basis that the committee's decision, deciding it had no jurisdiction, is correct. The court also determined that it would serve no useful purpose to grant leave to appeal on the ground that it was an error of law to fail to grant a hearing if the committee had no authority to accept or reject the assessor's remittal response in any event. There was no need for the court to consider whether the arguments were of sufficient importance to engage the second arm of the test for leave to appeal. The application for leave to appeal was dismissed.

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Abrametz v Law Society of Saskatchewan, 2019 SKCA 21

Leurer, February 22, 2019 (CA19020)

Professions and Occupations – Barristers and Solicitors – Discipline – Appeal – Application to Stay Penalty
Statutes – Interpretation – *Legal Profession Act, 1990*, Section 56(4)

The appellant appealed the penalty order imposed by the respondent after its hearing committee found him guilty of conduct unbecoming a lawyer and ordered that he be disbarred and pay costs. Pursuant to s. 56(4) of *The Legal Profession Act, 1990*, the appellant applied for an order staying the penalty order and proposed that the stay be subject to conditions that would limit any perceived risk to the public if he continued to practise and ensure that his appeal would be prosecuted promptly. Since the respondent's investigation of him began in 2012, the appellant had been subject to and obeyed all the conditions it had imposed upon him. The respondent opposed the application and said that the court had no jurisdiction to impose conditions on any stay ordered. HELD: The application was granted and the penalty order was stayed. The court found that the test established in *RJR-MacDonald* was appropriate to apply in the context of an application for a stay pending the appeal of a professional disciplinary decision. It also found that it had the jurisdiction to impose conditions to a stay under s. 56(4) of the Act. The appellant had demonstrated that his appeal had raised a serious question on its merits and that he would suffer irreparable harm if the stay were not granted: his legal practice would be damaged if he were unable to practice until the appeal had been decided and his clients would be harmed if they had to engage new counsel. The conditions imposed by the court were the same as those imposed by the respondent since 2013. The court ordered the appellant to perfect his appeal within two months of the decision.

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Blue Hill Excavating Inc. v Canadian Western Bank Leasing Inc., 2019 SKCA 22

Whitmore Schwann Leurer, February 26, 2019 (CA19021)

Civil Procedure – *Queen's Bench Rules*, Rule 7-5
Civil Procedure – Summary Judgment
Debtor and Creditor – Appeal – *Personal Property Security Act* – Improvident Realization

The appellants appealed the grant of summary judgment in favour of the respondent for an amount owing under an equipment lease. The equipment was seized and sold by the respondents, but the proceeds were insufficient to cover the amounts due. The appellants

admitted to breach of the lease and legitimacy of the seizure; however, they argued that the respondents acted unreasonably when they sold the equipment and thereby increased the deficiency otherwise owing. They argued that "improvident realization" cannot be determined by summary judgment but requires a trial. As of August 26, 2016, the respondent claimed $518,818.10 owing under the lease and commenced an action against the appellants. The appellants consented to an order pursuant to s. 63 of *The Personal Property Security Act, 1993* (PPSA) to allow the respondent to take possession of the equipment. The appellants defended the action arguing that the fair market value of the equipment exceeded the debt owed to the respondent. The equipment was sold at an auction in March 2017 for $160,000 with net proceeds of $143,996.85. The appellants argued that the respondent failed to act in a commercially reasonable manner contrary to s. 65(3) of the PPSA. The chambers judge concluded that the respondent had acted in a commercially reasonable manner in the disposition of the equipment. The chambers judge granted judgment for the full amount claimed by the respondents, without deduction for any amount attributable to the alleged breach of s. 65(3) of the PPSA. The issues were: 1) whether the chambers judge applied the wrong legal test for improvident realization; 2) whether the chambers judge misunderstood the onuses applicable in the context of the respondent's application for summary judgment; 3) whether the chambers judge erred in the exercise of his fact-finding power; and 4) whether the chambers judge erred by deciding summarily that the respondent had disposed of the equipment in a commercially reasonable manner.

HELD: The appeal was dismissed. The issues were determined as follows: 1) the appellants argued that the chambers judge should have considered not only what steps the respondent took, but also what steps it could or should have taken to ensure the best price was received. The court agreed; however, it found that the appellants misapprehended the chambers judge's decision because alternatives open to the respondent had been taken into account. He concluded that there was no evidentiary basis to conclude that any other method of disposition was reasonably open to the respondent that would have resulted in higher net proceeds; 2) the appellants argued that on summary judgment the onus works differently than at trial such that the respondent, the party applying for summary judgment, had the onus of establishing it took all reasonable steps to sell the equipment. The court found that the appellants misapprehended the analysis actually undertaken by the chambers judge. The respondent was found to have met the onus by leading evidence of the steps taken to realize, in a prudent way, on the security it held over the equipment. The appellants could have argued that even on the evidence there was a genuine issue requiring trial and not provided evidence of their own. They chose to lead evidence of their own in an attempt to convince the chambers judge that there was a genuine issue for trial. The chambers judge was left to decide whether the evidence allowed

him to be confident he could reach a fair and just determination on the merits. The chambers judge did not err in the way he approached the issues of burden and onus; 3) the chambers judge exercised the power given by Rule 7-5(2) to draw inferences and weigh evidence. The appellants argued that he acted outside the scope of the fact-finding powers provided in Rule 7-5(2) when an inference was drawn not supported by evidence in his statement that he was "not persuaded that the plaintiff could have or should have done anything else...". The chambers judge had a significant body of evidence before him that related to the respondent's conduct in general and particularly in the attempts to sell the equipment; and 4) the issue of process (should the judgment have been granted summarily) and merits (should judgment have been granted) are inextricably intertwined. The appellants' affidavit did not offer much, if any, direct evidence that the respondent had acted unreasonably. The court found the appellants did not lead any actual evidence that the alternatives were practical, or what the results may have been if they had been pursued. The appellants led no evidence as to attempts they made when they had the equipment in their possession. On the basis of the evidence before him, the chambers judge could determine that the respondent's efforts were commercially reasonable. The appellants also invited the court to take a fresh consideration of the factors the chambers judge looked at to consider whether a trial was necessary. The court found that the appellants were inviting it to substitute its own discretion for the chambers judge's. The chambers judge made no error.

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Hoffart v Carteri, 2019 SKCA 23

Barrington-Foote, March 8, 2019 (CA19022)

Civil Procedure – *Court of Appeal Rules*, Rule 71
Civil Procedure – Appeal – Leave to Appeal

The applicants applied pursuant to s. 9(6) of *The Court of Appeal Act, 2000* and Rule 71 of *The Court of Appeal Rules* to extend the time to serve and file their notice of appeal of the judgment of a Queen's Bench chambers judge that granted summary judgment in the amount of $179,000 against them for damages suffered by the respondents respecting residential premises owned by them and occupied by the applicants (see: 2018 SKQB 150). The judge gave judgment on May 11, 2018 against the applicants on the basis of ss. 49(5) and 49(6) of *The Residential Tenancies Act, 2006*, but adjourned the formal entry of the judgment sine die pending a reference under Queen's Bench rule 7-5(5) to determine the respondents' rental costs. The parties then entered into settlement negotiations relating to the respondents' claim for lost rental income. When no settlement was reached, the respondents advised the applicants that they would not

pursue the lost rental income claim and would seek issuance of the judgment. The applicants then instructed their counsel to appeal. When counsel attempted to file notice of appeal on October 31, the registrar advised that this application was required. The applicants submitted that the reason for the delay in filing was based on their counsel's belief that time for appeal would not run until the formal judgment had been entered.
HELD: The application was granted. The court assumed that the time within which to file a notice of appeal began to run as of May 11, based upon the applicants' application. It reviewed the factors set out in *Dutchak* and found that it was just and equitable to grant the order. In considering the first factor of delay, the court noted that the applicants were entitled to rely on their lawyer's advice that time did not begin to run until the chambers judge disposed of the issue of damages. Such reliance constituted a reasonable explanation for the delay in pursuing an appeal prior to October 9. The applicants' counsel also took responsibility for the delays that occurred after that date.

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Knight Archer Insurance Ltd. v Dressler, 2019 SKCA 24

Barrington-Foote, February 27, 2019 (CA19023)

Injunction – Interim – Restrictive Covenant – Appeal
Statutes – Interpretation – Court of Appeal Act, 2000, Section 20(1)

The applicant, Knight Archer Insurance Ltd., applied for an order extending the order granted by a Queen's Bench judge on December 18, 2018 pending the hearing of its appeal. The appeal related to a Queen's Bench action based on alleged breaches of non-solicitation and confidentiality agreements by the respondents, former employees of the applicant. The December 18 order was an interim order that restrained the respondents from disclosing or using confidential and proprietary information and from soliciting the applicant's clients for 60 days. It was about to expire. On December 28, 2018, the applicant filed a notice of application with the Court of Queen's Bench that sought substantially the same injunctive relief on an interim basis. In January 2019, the chambers judge dismissed that application (see: 2019 SKQB 3), following which the applicant filed a notice of appeal, alleging that the judge had made a number of errors, including finding that there was no strong *prima facie* case the non-solicitation agreements with the respondents were enforceable and there was no real possibility of irreparable harm to the applicant. Knight Archer then filed a notice of motion seeking to extend the December 18 order pursuant to s. 20(1) of *The Court of Appeal Act, 2000* pending the determination of the appeal. The court decided that the December 18 order expired when the chambers judge made his decision, and therefore this was not an application

to extend it but an application to decide whether an interim injunction should issue until the appeal was decided. Knight Archer submitted that the tests set out in *RJR-MacDonald* applied and therefore the first leg, whether the appeal raised a serious question to be tried, was appropriate. The respondents argued that Knight Archer should have to meet the higher standard of demonstrating a prima facie case that the appeal would succeed because it sought to uphold a restrictive covenant in an employment contract.
HELD: The application was dismissed. The court found that the applicant had to meet the higher standard and had failed to show a strong prima facie case that the appeal panel would find that the chambers judge erred in concluding that the agreements were unenforceable. The standard of review of matters involving interlocutory injunctive relief was one of deference. The court supported the judge's findings regarding the ambiguity of the terms of the agreement as being the basis of his decision that they were unenforceable.

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Veolia Water Technologies Inc. v K+S Potash Canada General Partnership, 2019 SKCA 25

Richards Ottenbreit Schwann, March 19, 2019 (CA19024)

Injunction – Interlocutory Injunction – Appeal

The appellant appealed the decision of a Queen's Bench judge that dismissed its application for an interlocutory injunction. It had entered into a contract with the respondent to design and supply a system for the respondent's potash mine. It provided the respondent with two irrevocable letters of credit for which it was the beneficiary. The first letter stipulated that the respondent could draw upon it if the appellant defaulted in any of its obligations and failed to remedy the default within a certain period. The appellant provided a large piece of equipment and in July 2016, the steel frame supporting the equipment collapsed. The respondent believed that the appellant was responsible for the collapse and resulting damages. The second letter of credit was provided after the incident and stated that the respondent was entitled to draw upon it pursuant to a reservation of rights agreement between the parties that provided the respondent determined in good faith that the cause of the incident was attributable to the appellant. After two years had passed and after conducting a thorough investigation, the respondent concluded that the incident was so caused, and after the appellant had refused to rectify any default, the respondent made a demand on each letter. The appellant commenced an action in Queen's Bench alleging various breaches of the contract by the respondent. It sought an interlocutory injunction to prevent it from drawing on the letters until a court or arbitral tribunal determined

whether it had the right to do so. Following *Angelica-Whitewear*, the chambers judge held that the respondent could be enjoined from drawing on the letters only if the appellant had established a strong *prima facie* case of fraud, and it had not alleged fraud. It appealed on the ground that that requirement did not apply to this situation wherein the subject of the injunction was the beneficiary of a letter of credit rather than the issuer.
HELD: The appeal was dismissed. The court found that that chambers judge had not erred in rejecting the appellant's application. It did not have to decide the appeal based upon the appellant's ground because it determined that the appellant had not established a strong *prima facie* case that the respondent was contractually prevented from making the draws based upon its review of the terms in the first letter and the second letter in combination with the reservation of rights agreement. As its case was not sufficiently strong to warrant the issuance of an injunction, the court found it unnecessary to consider the questions of irreparable harm and balance of convenience.

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Hess v Thomas Estate, 2019 SKCA 26

Richards Caldwell Barrington-Foote, March 22, 2019 (CA19025)

Civil Procedure – Summary Judgment – Affidavits – Admissibility – Application to Strike
Civil Procedure – Summary Judgment – Appeal
Statutes – Interpretation – *Limitations Act*, Section 8(1)(b), Section 8(2)

The appellant appealed the decision of a Queen's Bench judge that granted summary judgment in favour of the respondents by declaring that a 2010 lease was void. The lease was between the appellant and the respondents' mother, who died in 2014. The respondents were the executors of her estate and in their statement of claim, they had alleged that the appellant acted unconscionably or exercised undue influence over, and took advantage of, the deceased. The appellant had first leased farmland from the deceased in 2007 and paid $8,000 per year for a three-year term with an option to renew for three more years at the same price. When he exercised his renewal option, the deceased told him she wanted a longer term and suggested 10 years with rent set at $5,000 for the first five years and $10,000 for the remainder. The appellant's lawyer drafted the lease and it contained new provisions which were more favourable to the appellant regarding rights of renewal. The deceased was not represented by counsel and signed the lease without legal advice. The appellant deposed that the deceased understood the agreement and did not lack capacity. The witness to the lease also deposed that there was no indication the deceased lacked capacity. The

respondents deposed that the deceased began experiencing cognitive decline in 2009 that worsened and by 2012, they arranged to have her execute a power of attorney to them. The operator of the care home in which the deceased was residing at that time witnessed the power of attorney and deposed that she believed that the deceased had the capacity to understand the nature and effect of an enduring power of attorney when she signed it. The respondents submitted affidavits from experts: one from a financial advisor in farm financial planning who opined that the 10-year term and the renewal period were unreasonable and unheard of in farming leases; and the other from the deceased's physician, a family doctor with 23 years' experience, who deposed that when he examined the deceased in 2009, he found her confused and she performed very poorly on a test of her cognitive abilities. The appellant then applied to strike portions of these affidavits and for summary judgment on the ground that the action was barred by *The Limitations Act*. The chambers judge refused to the strike the expert opinions and found the limitation period and unconscionability issues suitable for summary determination, but not the capacity to contract issue. He found that the limitation period had not expired and that the 2010 lease was void for unconscionability. The appellant's grounds of appeal were that the judge erred in: 1) refusing to strike expert evidence. The financial advisor was not an expert and in the case of the physician, he formed his opinion when he saw the deceased in 2009 and had not seen her again until September 2011. Further, he was not qualified to provide expert advice on the mental capacity to enter into contracts. Thus the prejudicial effect of the opinion outweighed its probative value as it lacked a sufficient foundation, was not reliable and went beyond his stated expertise; 2) finding that the limitation period had not expired. After reviewing ss. 8 and 9 of *The Limitations Act*, the judge found that the deceased lacked capacity and that the limitation period was suspended from March 2010 until 2014 (date of death) because the respondent had rebutted the presumption contained in s. 8(2) and the respondents had issued their claim within the two-year limitation period. The appellant argued that s. 8(1)(b) should be interpreted so that the limitation period was not suspended because it implicitly included an enduring power of attorney as had been granted here and the attorney would have the authority to commence an action. However, when the judge had found that the respondents had rebutted the presumption that the deceased had the capacity to commence this proceeding based on the physician's opinion, he committed a palpable and overriding error in concluding that the issue of whether the deceased lacked capacity was not a genuine issue requiring trial; and 3) deciding the deceased did not have the capacity to commence this proceeding after March 2010 by relying on the physician's opinion to decide that the respondents rebutted the presumption that the deceased had the capacity to commence it; and 4) finding that the lease was void for unconscionability.
HELD: The appeal was allowed in part: respecting the expert evidence; as to the limitation period; and as to unconscionability.

The summary judgment was set aside and it was left to the parties to decide whether, for the purposes of trial, they would apply for an order pursuant to Queen's Bench rule 7-6 to enable them to use any of the affidavit evidence presented at the application or otherwise to streamline the process for resolving the dispute. The court found with respect to each issue that the chambers judge had: 1) not erred in admitting and relying on the affidavit of the first expert because there was evidence that he had extensive experience in the area of farm land values. The judge had not erred in finding that the physician's opinion was relevant and met the requirements for threshold admissibility, but he erred in failing to undertake the risk-benefit analysis set out in *White Burgess*. There was no evidence that the physician had any information about the deceased for the relevant period and therefore his opinion was sufficiently unreliable as to have no probative value; 2) not erred in interpreting s. 8(1)(b) as not including a power of attorney. The language of the section is clear and it does not apply to attorneys appointed pursuant to enduring powers of attorney; 3) erred in relying on the physician's evidence. Regardless of whether his opinion was admissible, it was a palpable and overriding error to conclude that the issue of whether the deceased lacked the capacity to commence this proceeding and that the limitation period was accordingly suspended was not a genuine issue requiring trial; and 4) erred in this finding because it was based upon the same reliance on the physician's opinion and erred in concluding that unconscionability was not a genuine issue requiring trial.

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R v Anderson, 2019 SKCA 27

Jackson Ryan-Froslie Schwann, March 22, 2019 (CA19026)

Criminal Law – Assault – Sexual Assault – Conviction – Appeal
Criminal Law – Conduct of Trial – Jury Trial – Charge to Jury – Appeal

The appellant was convicted of sexual assault after trial by jury. He appealed the conviction on the ground that the trial judge improperly charged the jury. A Crown witness had responded to a question during examination by saying that the appellant wanted him to make an offer to pay off the complainant because it would be cheaper than paying his lawyer for a second assault case. The lawyer who represented the appellant at trial immediately objected and the jury was excused. He contended that the evidence was prejudicial and inadmissible. Crown counsel suggested that it would highlight the comment for the jury if the judge raised it at that point and it might be better dealt with in his charge to the jury. Defence counsel agreed, but he was not given the opportunity to read the charge before it was given to the jury. In the judge's charge

to the jury, he mentioned the statement made by the witness alleging that he had offered money to the complainant at the request of the appellant to drop the charge and implying that the appellant had done this in the past. The judge directed the jury to ignore the comment as it was without foundation. Defence counsel did not object to the direction.
HELD: The appeal was allowed and the conviction set aside. The court ordered a new trial. It found that the trial judge had erred in law because his instruction to the jury did not adequately identify the evidence to be disregarded. The fact that the appellant's trial counsel had not objected to the direction given was not fatal to the appellant's right to appeal in the circumstances in this case. When the witness referred to a prior sexual assault, the trial judge had a duty based on D.(L.E.) to caution the jury immediately to disregard the evidence or, if he believed that to be insufficient, he should have ordered a mistrial.

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A.F. v Saskatchewan (Social Services), 2019 SKCA 28

Richards Caldwell Leurer, March 25, 2019 (CA19027)

Family Law – Child in Need of Protection – Permanent Order – Appeal
Family Law – Child in Need of Protection – Person of Sufficient Interest

The appellant appealed the decision of a Queen's Bench judge, sitting as a variation judge in an application to vary a permanent order regarding the custody of a child, to deny his application to be designated as a person of sufficient interest (PSI) with respect to the child, his grandchild. The background to the appeal was complicated. At the first protection hearing concerning the child held before a judge (described as the order judge), only the Ministry of Social Services officials and the foster parents were present and the order judge was prepared to summarily issue a permanent order. Just as the Ministry moved to have the trial opened for that purpose, the girlfriend of the appellant, who had been previously designated a PSI to the child, came forward. During a recess, the girlfriend, the appellant and the Ministry officials came to an agreement. Consequently, no trial was held. The Ministry advised the judge of the agreement and asked him to make a permanent protection order, but to make it subject to the Ministry's undertaking not to pursue it for six months, in order to allow the appellant to apply to vary the permanent order. The appellant informed the judge of his interest in the child's welfare and his intention to obtain custody. The Ministry advised that its undertaking could not be put in the permanent order but agreed that the undertaking should be put on the court record. The

appellant then brought an application within the six-month period to vary the permanent order, seeking that his grandchild be placed in his care indefinitely under s. 37(1)(b) of *The Child and Family Services Act* and that he be designated a PSI. At the hearing, the Ministry opposed the relief sought on the ground that the appellant lacked standing to vary because he was not a PSI under s. 23(4) of the Act. The variation judge hearing the application, a different judge from the order judge, agreed.
HELD: The appeal was allowed. The decision of the judge at the variation hearing was set aside and the matter remitted to the Court of Queen's Bench. The court found that that judge's conclusion was in error. On the basis of the unusual circumstances, it found that the appellant was a party to the hearing before the order judge for the narrow purpose of having standing to apply to vary the permanent order under s. 39 of the Act. The court granted the appellant 30 days, and further time if necessary, to apply to Queen's Bench for an order designating him a PSI under s. 23. If granted, his application under s. 39 to vary the permanent order should be set down for a new hearing before a Queen's Bench judge.

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Wells v General Motors of Canada Co./Cie. General Motors du Canada, 2019 SKCA 29

Richards Caldwell Leurer, March 26, 2019 (CA19028)

Civil Procedure – Queen's Bench Rules, Rule 7-3
Civil Procedure – Summary Judgment – Appeal
Civil Procedure – Summary Judgment – Affidavits – Application to Cross-Examine

The appellant appealed from the decision of a Queen's Bench judge to grant the respondent's application to dismiss his claim (see: 2018 SKQB 253). The appellant had been driving a vehicle manufactured by the respondent when it was totally destroyed by a fire for which there was no external cause. In his claim, the appellant pled that the respondent failed to manufacture the vehicle in a way that would prevent it from starting to burn without some external cause. The appellant identified that the fire might have been started by a defect relating to the driver's side door that had been the subject of a manufacturer's recall or, alternatively, some defect other than the reason for the recall. After filing its defence, the respondent provided its affidavit of documents sworn by its expert engineering analyst. No documents were identified that would relate to any potential cause for the fire other than the specific recalls. The appellant's counsel asked for disclosure of documents concerning spontaneous fires in the vehicle model. The respondent then applied for summary judgment and filed a second affidavit from the same deponent that reviewed the history of the manufacture and

ownership of the subject vehicle. It had been inspected and there was no evidence that the fire was caused by the door module. The appellant applied for production of any documents related to spontaneous under hood fires. At the hearing, the appellant argued that the respondent's application for summary judgment was premature. Although it was unclear whether the appellant's counsel withdrew his request for additional document disclosure, he did request an order to permit cross-examination of the respondent's witness on his first affidavit. The judge denied the request on the basis that cross-examination on an affidavit is dependent on the existence of contrary evidence or the need to clarify information deposed to by the affiant where the information is solely within the knowledge of the affiant. As there was no evidence of how the respondent failed in the vehicle's manufacture or how that how the failure led to the fire, there was no genuine issue requiring trial. The issue on appeal was whether the chambers judge erred by failing to allow cross-examination on the affidavit before determining the respondent's application for summary judgment.
HELD: The appeal was allowed. The order granting summary judgment was set aside and leave granted to the appellant to cross-examine the witness on his affidavits. The court found that the judge erred in principle in his analysis of when cross-examination is appropriate in the context of a summary judgment application. In the decision in *Ter Keurs*, cross-examination was ordered because the facts relating to the issues in dispute were solely within the knowledge of the party whose affidavit was offered in support of the application for summary judgment.

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G.C. v Merck Canada Inc., 2019 SKQB 42

Keene, February 11, 2019 (QB19039)

Statutes – Interpretation – *Class Actions Act*, Section 6
Civil Procedure – Class Actions – Certification

The plaintiff applied for certification of a class action pursuant to *The Class Actions Act* (CAA) and to be appointed as representative plaintiff. The defendant opposed certification. The defendant manufactured and sold two different drugs, both of which contained the active ingredient finasteride, which was known to have potential side effects, including sexual dysfunction. Each drug received approval from Health Canada. It published advisories as recently as 2011 that included information that some men had reported erectile dysfunction that continued after stopping the medication. The plaintiff claimed that the defendants were negligent in failing to warn patients of the risk that sexual dysfunction might persist after discontinuation of treatment with either drug. The plaintiff's evidence consisted of six affidavits from lay deponents

and an affidavit from a physician who provided expert opinion evidence. The defendant argued that the application lacked evidence. It provided a report of its own medical expert who opined that the scientific evidence was insufficient to establish a causal relationship between finasteride and persistent sexual dysfunction. Another expert provided her opinion regarding the regulation of pharmaceutical products in Canada and concluded that the clinical trials involving the two drugs showed no evidence of erectile dysfunction in subjects after treatment was stopped.
HELD: The application for certification was granted. The court reviewed the requirements set out in s. 6 of the CAA and found that the plaintiff had met them.

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Casbohm v Winacott Spring Western Star Trucks, 2019 SKQB 44

Kalmakoff, February 14, 2019 (QB19042)

Civil Procedure – *Queen's Bench Rules*, Rule 5-39, Rule 5-41, Rule 7-5
Civil Procedure – Summary Judgment
Occupier's Liability – Contractual Entrant

The plaintiff applied for summary judgment pursuant to Queen's Bench rule 7-5, claiming the defendants were liable, both on the basis of occupier's liability and in negligence, for injuries he suffered after falling from a ladder while working on their property. The two defendants also applied for summary judgment requesting that the plaintiff's claim be dismissed, as he had not proven that they were liable for his injuries. The plaintiff was working as a truck driver for a company for whom he delivered trucks from a manufacturing facility to the defendant, Winacott's, dealership. After delivering a truck, the plaintiff had to re-attach exhaust stack units, removed during transit, at Winacott's business premises. He used a stepladder provided by Winacott to effect the reattachment. While doing so, the plaintiff fell to the ground and suffered serious injuries. No one witnessed the fall and the plaintiff retained no memory of it. After regaining consciousness, he noticed that the leg of the ladder was bent. Neither he nor Winacott's employees had noticed any problem with the ladder prior to the incident. Winacott submitted that the ground on which it was placed was stable and supplied photographs taken after the accident showing that no hazard was visible. After the accident, an employee disposed of the ladder because it was damaged and he was unaware of any possible legal claim by the plaintiff. Both sides provided reports from engineers qualified as expert witnesses, but none of them were thus able to examine the ladder. The plaintiff's two experts' opinions indicated that the fall had been caused by pre-existing damage or

weakness of the ladder. Winacott objected to the admissibility of their evidence on a number of grounds, including that some conclusions were arguments and not based on evidence and that the second expert opinion was not permitted by Queen's Bench rule 9-18(1). The expert witness retained by the defendants suggested that the damage to the ladder occurred when the plaintiff fell on it, citing an experiment he designed and conducted to prove his thesis. The plaintiff argued that he was entitled to summary judgment because the defendants were liable for his injuries in occupier's liability, asserting that he was a contractual entrant on their premises and his injuries resulted from the defendants' failure to keep the premises as safe as reasonable care could make them. The defendants maintained that the plaintiff was only an invitee and they had not breached their duty as occupiers to take reasonable care to protect him from unusual dangers. The plaintiff claimed that the defendants were negligent as well because of their failure to supply safe equipment; to warn of unsafe equipment; to inspect the equipment and workplace; and to secure the ladder. The issues were whether: 1) this was an appropriate case for summary judgment; 2) the plaintiff was an invitee or a contractual entrant; 3) the experts' evidence was admissible; 4) an adverse inference should be drawn against the defendants based upon the disposal of the ladder as constituting spoliation; and 5) the plaintiff had proven that the defendants breached the duty of care they owed him in occupier's liability or in negligence, and that such breach was the cause of his injuries.

HELD: The plaintiff's application for summary judgment was dismissed, the defendants' application was granted and the plaintiff's claim was dismissed. The court found with respect to each issue that: 1) Queen's Bench rule 7-5(1)(b) was applicable because all of the parties agreed that there was no genuine issue requiring trial and it determined that it could make the appropriate findings of fact based on the affidavit evidence provided; 2) the plaintiff was a contractual entrant on Winacott's premises because there was a contract between his employer and the truck manufacturer that required him to reattach the exhaust unit on Winacott's premises after delivery of the truck; 3) it would admit portions of the expert evidence, but there were deficiencies in each report that affected the credibility and reliability of the evidence. The plaintiff's second expert was permitted to give her opinion because she addressed a different subject from the first expert, i.e., she did not merely provide a "second opinion"; 4) the disposal of the ladder by Winacott was not spoliation of evidence because litigation was not contemplated at that time; and 5) the plaintiff had not proven his claim under occupier's liability nor negligence, nor had he proven that a breach of either duty caused his injuries. There was no evidence as to how he had fallen nor of pre-existing damage to the ladder and it appeared to have met safety standards. The location at which the accident occurred showed no unusual hazards. The experts' opinions were conflicting and none of them were compelling.

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Acoose v Delorme, 2019 SKQB 52

Brown, February 20, 2019 (QB19046)

Family Law – Custody and Access – Best Interests of Child
Family Law – Custody and Access – *Children's Law Act, 1997*
Family Law – Custody and Access – Interim
Family Law – Custody and Access – Person of Sufficient Interest

When the now four-year-old was born, his mother, the petitioner, voluntarily placed him with her aunt, the respondent. The child has only lived in the respondent's home. At the time of the child's birth, the petitioner was struggling with addictions. The petitioner overcame her addictions and had been on a healthy plan for over a year. She was successfully parenting her two other children with her current partner. The petitioner sought primary residence of the child. There had been no previous order finding the respondent to be a person of sufficient interest. The issues discussed were: 1) persons of sufficient interest; 2) the best interests of the child; 3) the quality of the child's relationship with the parties; 4) the home environment proposed by the petitioner; and 5) the child's personality, character, and emotional needs.
HELD: The court did not make a permanent order, but instead made an interim order. The issues were discussed as follows: 1) *G.E.S.* set out a two-stage analysis for persons of sufficient interest applications: a) a threshold requirement that the applicant be either a "parent" or "other person having, in the opinion of the court, a "sufficient interest"; and b) the merits of making an order must be considered with reference to the best interests of the child. The respondent was found to be a person of sufficient interest (PSI) with respect to the child; 2) the factors in s. 8 of *The Children's Law Act, 1997* (Act) are not the only considerations in determining the best interests of the child; 3) the child was clearly very bonded to the respondent. He was also close to the petitioner. He had family with both parties. He had, however, not had a great deal of time to become more connected to the petitioner and his siblings. He had access with them a few hours a week. The court concluded that the child had a strong relationship with the respondent and a good relationship with the petitioner; 4) both homes were appropriate and had other children in them. The petitioner's home would have a father figure whereas the respondent's did not. The respondent's home offered consistency and the place the child had been his whole life while the petitioner's had siblings closer to the child's age; 5) the child had anxiety when his routine was broken and that manifested itself through hyperactivity and aggressiveness, particularly in the evenings. The respondent's home had been stable for four years. The petitioner had only had a constant level of stability for the past year. The length of stability of the petitioner led to the matter being

decided on an interim basis. The matter needed to proceed to pre-trial. The court found that progressing access was in the child's best interests. The court ordered progressing access that increased every two months with overnight access starting in June 2019. No order was made with respect to costs.

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B.L.S. v B.W.S., 2019 SKQB 53

Brown, February 20, 2019 (QB19047)

Family Law – Child Support – Arrears
Family Law – Custody and Access – Best Interests of the Child
Family Law – Custody and Access – Shared Parenting
Family Law – Custody and Access – Supervised Access – Aggression and Violence
Family Law – Custody and Access – Supervised Access – Prior Sexual Assault

The parties moved in together in 2007 and married in 2010. They had one child born in 2010. Prior to the trial there had been a supervised access order in place regarding the respondent due to his behaviour towards his younger brother as an adolescent. The petitioner had three children from her previous marriage. In 2011, the petitioner learned that the respondent had sexual interactions with his younger brother when he was an adolescent. The petitioner and her older children testified as to the respondent's aggression towards them. The petitioner said that the respondent was over $13,000 in arrears for child support and over $2,000 in arrears for s. 7 expenses. She indicated that only $2,500 of the $10,000 required to be paid per the prenuptial agreement had been paid. The petitioner said the respondent owed her $9,315.62 with interest. The respondent denied the negative descriptions of his interactions with the petitioner, her older children, and the child. He acknowledged that he had sexually touched his brother when he was 14-15, that he was responsible for it, and that it was without his brother's consent. The respondent said that he did not always exercise all of his supervised access because his supervisors, his parents, were in their seventies and could not always travel the distance to Regina to do the supervising. Dr. G. prepared a custody and access assessment/evaluation for the court. He concluded that the parties should continue to have joint custody of the child in the primary care of the petitioner. Dr. G. further recommended that the supervised access visits with the respondent continue. He was worried with regards to the respondent sexually assaulting his brother and wanted an independent evaluation from someone with expertise on recidivism for the activity. Dr. N. was a qualified expert in ascertaining the risk of an individual to reoffend sexually. He concluded that the respondent was not a measurable risk to sexually

abuse his child. Dr. N. also said that the supervised visits were not justified based on the current sex offender risk. Dr. G. indicated that he would not have recommended supervised visits if he had had Dr. N.'s report at the time he had prepared his. The issues were: 1) what order was in the best interests of the child regarding her custody and access; 2) what amount of child support was owed; and 3) what amount was outstanding from the prenuptial agreement?
HELD: The issues were determined as follows: 1) the court was cautious in determining what parts of the respondent's evidence to rely on, given he was not careful or correct on a number of points. The court agreed with Dr. G.'s conclusions as supported by Dr. N.'s views. There was not sufficient evidence proving any further activity of a sexual nature at the time of trial. Long-term continued supervised access was not found to be warranted. The violence and anger of the respondent that was testified to by the petitioner and her older children were relevant considerations with respect to the respondent's ability to care for the child. The court found that there was a risk of harm to the child if the respondent did not come to fully understand his aggression and find a way to deal with it. The court ordered joint custody with the petitioner making all of the relevant decisions and having primary residence of the child. The status quo, the maximum contact principle, and the child's personality were considered to ascertain her best interests. The petitioner was the primary parent, which was found to weigh against a shared parenting order at the time. Shared parenting was found not to be in the child's best interests. The court ordered that unsupervised access begin slowly. Overnight parenting would occur once the respondent completed an anger management course or counselling specifically built around anger management. The respondent was to immediately enroll in a recognized and legitimate anger management course or find a counsellor with experience in anger management counselling and begin counselling. If the respondent continued in his counselling or anger management without incident, the unsupervised access would increase after two months. After two more months the access would increase further. Overnight visits would start in a further two months if the respondent successfully completed his counselling or anger management program and there were no incidents; 2) the respondent was ordered to pay s. 3 support of $972 per month based on his income of $113,535.03. He was ordered to pay 69 percent of the s. 7 expenses. The court found that $16,390.15 was owing in arrears for s. 3 and s. 7 child support arrears; and 3) the respondent was also ordered to pay the remaining family property payment with interest, to be paid within 90 days. The petitioner was awarded costs in the amount of $12,500, to be paid forthwith by the respondent.

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Ammazzini v Anglo American PLC, 2019 SKQB 60

Currie, March 4, 2019 (QB19059)

Civil Procedure – Class Actions – Settlement Agreement – Approval

The defendants applied for dismissal or a permanent stay of a proposed multi-jurisdictional class action pursuant to *The Class Actions Act*. They made the application under a term of a settlement agreement reached by them in October 2016 in class action suits commenced and certified in British Columbia, Ontario and Quebec for payment by the defendants of $9.4 million for the benefit of a class comprised of all persons resident in Canada who purchased gem-grade diamonds from 1994 to 2016. The BC, Ontario and Quebec courts had all approved the settlement. The court in Saskatchewan had earlier granted a conditional stay of the action (see: 2016 SKQB 53), affirmed by the Court of Appeal (see: 2016 SKCA 164) that would be effective until the Ontario action had been decided. The court had determined that it was preferable to permit the Ontario action to proceed rather than the Saskatchewan one. The issue was whether that conclusion stood: the court had to consider whether the settlement protected the interests of the proposed class members in the Saskatchewan action, a class that included residents of all provinces except BC. The plaintiff had applied to amend the claim to change the class to include people who opted out of the Ontario settlement (70 people across Canada and those who purchased diamonds since October 2016).
HELD: The application was granted and the class action proceedings in this action were permanently stayed. The court determined that the settlement was reasonable and appropriate and protected the interests of the class members proposed in the Saskatchewan action. It found that the proposed amendment of the class description would create the prospect of serial class actions which was not appropriate and concluded that the Saskatchewan action was still duplicative of the Ontario and BC actions and served no useful purpose. It constituted an abuse of process.

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Saskatchewan Power Corp. v All Canada Crane Rental Corp., 2019 SKQB 61

Layh, March 1, 2019 (QB19058)

Civil Procedure – Summary Judgment – Genuine Issue Requiring Trial

The defendants, All Canada Crane Rental Corp. (ACCRC) and Skylift, applied for summary judgment for the dismissal of the plaintiff's claim. The plaintiff sought a denial of the defendants' request for dismissal and applied for summary judgment for

damages. It agreed that its action against Skylift required a trial of the action. The plaintiff had built the Boundary Dam Integrated Carbon Capture and Storage Demonstration Project (the project) beginning in 2011. It made a contract with CG Power Systems (CG) in February 2011 under which the latter agreed to supply transformers to the project. Days later, the parties signed another contract that required CG to offload the transformers from trucks upon their delivery to the project site. CG proposed to use a crane company as its subcontractor for offloading them, but as there was already a crane there owned by ACCRC, it was determined that its crane should be used. Additional rigging services would be supplied by Skylift. There was little evidence regarding how the arrangement was made. When one of the transformers was offloaded in April 2013, it was destroyed upon falling after a line broke. Two years later, the plaintiff initiated the action against the defendants in negligence, claiming damages of $449,900. The defendants argued that the claim against them should be struck based on the comprehensive "course of construction" insurance policy that the plaintiff had purchased in May 2011 in effect for the following three years as, under such a policy, the plaintiff was not entitled to sue its own named insured. The plaintiff said that it purchased the policy months after it had entered into the contract with CG and one term stated that CG would be responsible for obtaining suitable insurance because the plaintiff had no insurance at the time.

HELD: The defendants' application for summary judgment was dismissed. The plaintiffs' application for summary judgment was dismissed. The court ruled that, following the Court of Appeal's decision in *Cicansky*, applications under Queen's Bench rule 7-5 involve a two-step analysis whereby the applicant must present evidence to prove that there is no genuine issue requiring trial. If the burden is not met, the application would be dismissed without requiring evidence from the respondent. If the applicant meets the burden, then the onus shifts to the respondent to counter by showing that there is a genuine issue requiring a trial. The court found that the defendant applicants had not satisfied the initial burden by simply relying on the principle regarding construction insurance policies that they could not be sued as co-insureds. The plaintiff's application could not succeed either, because although it attempted to show that its claim and its response to ACCRC's defence could be adequately determined under rule 7-5, the court had already found that the ACCRC's defence raised genuine issues requiring trial.

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Leonhardt v Shlahetka, 2019 SKQB 64

Layh, March 5, 2019 (QB19060)

Civil Procedure – Summary Judgment – Evidence – Genuine Issue Requiring Trial

The petitioner sought a division of family property, alleging that she and the respondent had been and continued to be in a spousal relationship as defined by s. 2(1) of *The Family Property Act*. The parties were both in their eighties and because the respondent, Shlahetka, was incapable of participating in the proceedings, two of his nieces, who had been appointed his personal property guardians in 2016, opposed the petitioner's claim and applied for summary judgment to dismiss it. The petitioner asserted that there was a genuine issue requiring a trial. Each party presented numerous affidavits in support of their position and agreed that the principles set out in *Molodowich* applied to determine whether or not the petitioner and Shlahetka had been spouses. In the case of the respondent applicants, the individual affiants, who were all members of Shlahetka's family, deposed that when they visited his farm, they had rarely seen the petitioner there, nor was there any evidence indicating that the petitioner cohabited with him or provided services such as housekeeping or cooking and regardless, when Shlahetka's brother had taken up residency on his farm in 2011, the latter had kicked out the petitioner. As well, she had always maintained her own residence. The petitioner presented photographic evidence that she had begun a relationship with the petitioner in 1987. She asserted that they didn't cohabit continuously because the petitioner wanted to continue to work in her village and didn't want Shlahetka to have to drive her there from his farm, but that they spent a lot of time at each other's homes. She provided photographs of the work she did on his farm. Other affiants, such as relatives of the petitioner or farm neighbours, confirmed that she spent a lot of time at Shlahetka's farm. There was evidence as well that the relationship included sexual intimacy. The issue was whether Queen's Bench rule 7-5 permitted a summary adjudication to dismiss the petitioner's claim.

HELD: The respondents' application for summary judgment was dismissed. The court applied the analysis set out in *Lameman* and *Cicansky* that required the defendant applicant for summary judgment to present evidence to prove that there was no genuine issue requiring trial. If successful, the burden shifted to the plaintiff to refute the evidence. In this case, it found that the evidence provided in the defendants' application met the first step and based upon their affidavit evidence alone they had shown the parties had not cohabited and there was no genuine issue requiring trial. When the burden of proof shifted to the petitioner, she presented ample evidence that refuted and countered the moving party's evidence and showed genuine issues that required a trial. The court decided that a trial could not be avoided after it weighed all the evidence, evaluated the credibility of the deponents and drew reasonable inferences from the evidence. In addition to the conflicting evidence in the affidavits, many of them contained inconsistencies. The court

could not determine whether the petitioner and Shlahetka and the petitioner cohabited in a spousal relationship.

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Ambassador Coffee Inc. v Park Capital Management 2012 Inc., 2019 SKQB 65

Popescul, March 6, 2019 (QB19061)

Civil Procedure – Summary Judgment
Landlord and Tenant – Commercial Lease – Breach

The plaintiff applied for summary judgment pursuant to Queen's Bench rules 7-2 through 7-6. It commenced an action against the defendant, claiming that it had breached the terms of a commercial lease agreement and seeking damages in the amount of $88,800, representing amounts that the defendant failed to pay pursuant to the terms of the lease. The parties entered into the lease in 2013 for a five-year term. It provided for payment of: various specific amounts for rent (including annual increases); a portion of fixed, variable and actual operating costs respecting different years; a $5,000 security deposit; interest on any unpaid balances owing; and all legal costs incurred by the plaintiff to enforce the terms. Also, no waiver or amendment was permitted under the lease except for those expressly provided for in writing and signed by both parties. After November 2016, the defendant did not pay the base rent, the variable operating costs, its proportionate share of the actual operating costs for the last two years of the lease, nor the security deposit. After issuing a notice of default and making a demand for payment at that time, the plaintiff met with the defendant's representatives and those of another organization, Rancho Ehrlo (RE), to discuss the possibility that the plaintiff would enter into a new lease with RE. The affidavit submitted by the plaintiff's director stated that he did not agree to anything in the meeting. The defendant's representatives claimed that the plaintiff's director agreed that the defendant would be released from all present and future obligations in exchange for RE taking over the space. The defendant then entered into a sublease agreement with RE shortly after the meeting. As of December 2016, RE paid rent to the plaintiff and its director began cashing the cheques in January 2017 in order to mitigate its loss of revenues from the defendant's arrears. After the lease expired, the plaintiff brought the application. The defendant opposed it and contended there were genuine issues requiring trial that included that the plaintiff: 1) misrepresented the terms of the lease that enticed it to enter into it; 2) should be estopped from being paid the full amount specified in the lease because it accepted a lesser amount prior to it vacating the premises; and 3) waived or modified the lease by an oral agreement that its obligations would be forgiven in exchange for RE occupying the

premises as a subtenant.
HELD: The application was granted. The court found that the lease was valid and had been breached, gave judgment to the plaintiff and awarded damages pursuant to the terms of lease. The court found with respect to the defendant's position that there were genuine issues to be tried that: 1) there was no evidence that the plaintiff's representative had made any misrepresentation regarding the terms of the lease; 2) the defendant had not pled the doctrine of promissory estoppel and had not established any factual basis for its application; and 3) it accepted the affidavit evidence of the plaintiff's director that he had not agreed to anything in the meeting. Further, the terms of lease specified that any amendment to the lease would have to be made in writing.

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R v McIntyre, 2019 SKQB 66

Elson, March 11, 2019 (QB19062)

Criminal Law – Defence – Colour of Right
Criminal Law – Mischief – Conviction – Appeal

The appellant appealed his conviction by a Provincial Court judge for committing mischief contrary to s. 430(4) of the *Criminal Code*. The trial judge found that the appellant had obstructed the complainant in the lawful enjoyment of residential property. The appellant owned the property in question. He and the complainant began living together and sharing the residence in 2007. In 2012, the appellant moved away from the property, leaving it in the possession of the complainant. Following this, the complainant paid the taxes on the property and the interest on a line of a credit that the parties had obtained prior to separation. The property provided security for the line of credit. She remained in possession until February 2016, when the appellant and a friend entered the property unannounced and uninvited and refused to leave. The complainant called the RCMP and they arrested the appellant. At trial, the appellant argued that under s. 3.1 of *The Family Property Act* (FPA), the complainants' claim for exclusive possession was statute-barred. Without that claim, he and the complainant had equal rights to possession of the property under s. 4 of the FPA and the right permitted him to enter the property and precluded a mischief conviction based on his uninvited presence on it. The trial judge rejected the argument and found that although the appellant had an interest in the property, it had not been his home after the final separation and therefore the complainant had a right of lawful enjoyment such that she could be a victim of the charged offence. She decided that the appellant had the necessary *mens rea* because he could not have had an honest belief in a colour of right that would just have justified his possession or entry onto the property

and therefore was guilty. On appeal, the appellant made the same argument and said that the trial judge erred in finding that he had committed a crime by simply entering a home that he owned and on the basis that this former partner was still maintaining her residence in it.

HELD: The appeal was dismissed. The court found that the trial judge had not erred in her finding of guilt. It preferred to base its analysis on *The Residential Tenancies Act, 2006* (RTA) rather than the FPA. In this case, there was a form of tenancy at will that could be implied from the evidence. The payment of the taxes and the interest on the line of credit met the definition of "rent" in RTA and the complainant had a lawful right to exclusive enjoyment of the property on that basis. If the appellant wanted to terminate tenancy to take exclusive possession, he could only do so through the relevant provisions of the RTA. With the knowledge and acceptance of the tenancy arrangement, the appellant lacked the colour of right defence and possessed the necessary mens rea for the offence.

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