The Law Society of Saskatchewan Library's online newsletter
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The appellant and co-accused were convicted of possession of cocaine for the purposes of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act. He appealed his conviction. The appellant's vehicle was stopped on a highway with him and three others as occupants. All occupants were arrested. The stop was based on the strength of information provided to the police by two confidential informants. The issues on appeal were: 1) whether the Provincial Court acted without jurisdiction; and 2) whether the trial judge erred in failing to exclude the evidence of cocaine discovered during the search of the appellant's vehicle.
HELD: The appeal was dismissed. The issues were determined as follows: 1) pursuant to s. 536 of the Criminal Code, the appellant had the right to elect the court to be tried in. If the appellant was not afforded the right to elect, then the trial judge did not have jurisdiction to hear the trial. On the day that the appellant advised the court that he intended to represent himself at trial, the presiding judge also advised him of his right to elect the mode of trial, which was in substantial compliance with s. 536(2) of the Criminal Code. A

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couple of months later, the Crown swore a new joint information (information 675) wherein all accused were charged. The appellant appeared by phone and the presiding judge confirmed his not guilty plea as well as his desire to have his trial in Provincial Court. The appeal court did not find the situation analogous to an amendment of an information, as argued by the Crown. The appeal court did agree with the Crown that the appellant "waived formal compliance with the requirement to explain the modes of trial again", and the appellant "was tried in the way he then wished to be tried". The presiding judge who had accepted the election on information 675 asked whether the appellant "still" wanted to have his trial in Provincial Court. The conditions for an effective waiver of the requirements of s. 536(2) were met and the Provincial Court had jurisdiction to proceed with the trial; and 2) the appellant argued that his unlawful arrest led to an improper warrantless search. He argued that his ss. 8 and 9 Charter rights were breached. The trial judge found that the arrest was lawfully made pursuant to s. 495(1)(a) of the Criminal Code. The appellant's arrest followed an investigation and was based on information obtained from two confidential informants, C1 and C2. The trial judge had to consider whether reasonable grounds existed for making an arrest based on information received from a confidential informant. To do so, he turned to DeBot as providing the framework. The trial judge concluded that the Sergeant's subjective belief that he had reasonable grounds to order the immediate arrest of the occupants of the appellant's truck was subjectively reasonable and therefore the arrest was justified pursuant to s. 495(1)(a). The appeal court agreed with the appellant that the trial judge had erred when he said that he did "not need to delve into the actual credibility or reliability of C1 and C2". The appeal court undertook a fresh consideration of the DeBot factors. Firstly, with respect to C1, the confidential tip was compelling and there was evidence that C1 was both credible and reliable. The police were also able to corroborate C1's information. With respect to C2, the information was very detailed and corroborated by the police before the arrests. The appeal court found it significant that C2's information was predictive in nature. There was no evidence to allow the credibility of C2 to be assessed independently. However, the appeal court pointed out that the DeBot questions are not separate tests, but "they point to factors to weigh in the court's objective assessment of the totality of the circumstances". The appeal court concluded that the appellant's Charter rights were not violated.

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Kishayinew v R, 2019 SKCA 127

Jackson Barrington-Foote Tholl, November 26, 2019 (CA19126)

Criminal Law – Appeal – Conviction
Criminal Law – Assault – Sexual Assault – Consent – Capacity to Consent – Intoxication
Criminal Law – Evidence – Reliability

The appellant appealed his conviction for sexual assault and his sentence of 4.5 years in prison for the offence. The evidence indicated that the appellant approached the victim in a back alley. The victim had been drinking and was surfacing from a blackout. The victim indicated that the appellant took her to his residence and had sex with her without her consent. She did not remember the intercourse because it was during another blackout. She did remember telling the appellant that she wanted to go home when he told her to lay down and go to sleep. The victim said that the appellant prevented her from leaving the basement. She testified that she told the appellant not to touch her chest and kiss her. The victim said that the appellant stopped but would not let her leave. She said she had a blackout after remembering trying to pull her pants up as the appellant was pulling them down. The victim next remembered her pants and underwear being down. She snuck out of the bathroom and ran from the house. The appellant testified that the victim moved closer to him and started kissing him, asking him if he had a condom. He testified that the victim removed her pants while he got a condom. The appellant said that the victim asked him to stop 15 to 20 minutes through intercourse, so he did, and she went to the bathroom and then suddenly left the house. The appellant and victim had never met before. A semen sample taken from the victim matched the appellant's DNA. The trial judge found that the victim did not have the necessary operating mind to be able to freely and consciously grant, revoke, or withhold her consent to engaging in sexual activity with the appellant. The trial judge did not comment on the reliability of any of the witnesses.
HELD: The majority of the appeal court allowed the appeal and ordered a new trial. The issues discussed by the majority were: 1) whether the trial judge made inconsistent findings of fact in relation to consent leading to an unreasonable verdict; 2) whether the trial judge made a finding of fact relating to reliability that was incompatible with evidence not otherwise contradicted or rejected by the trial judge, leading to an unreasonable verdict; and 3) whether the trial judge made a finding of fact relating to capacity to consent as a result of intoxication that was incompatible with evidence not otherwise contradicted or rejected by the trial judge, leading to an unreasonable verdict. The issues were dealt with as follows: 1) the trial judge did not reach inconsistent conclusions that the victim both did not consent and consented but did not have the capacity to consent. The trial judge made a positive finding that the victim did not have the capacity to consent. The trial judge, therefore, had only one way to convict the appellant. The lack of capacity to consent meant a conviction for the appellant; 2) the trial judge had to reconcile how the evidence of intoxication could support both the finding of incapacity and the implicit conclusion

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Verdient Foods Inc. v United Food and Commercial Workers, Local 1400

that the victim's evidence was reliable. According to the appeal court, the decision then meant that there was an implicit finding of fact that the victim was reliable that was incompatible with evidence of intoxication that was not contradicted, nor rejected by the trial judge; 3) the trial judge did not refer to crucial direct evidence from the victim herself relating to her level of intoxication. The victim's evidence was that she was not that intoxicated. Therefore, the trial judge's conclusion that the victim lacked capacity to consent (a finding of fact that was essential to the verdict) was incompatible with important evidence given by the victim as to the extent of her intoxication that was neither contradicted nor rejected by the trial judge. The one dissenting judge concluded that the conviction appeal should be dismissed. The issues discussed by the dissent were: 1) whether the trial judge failed to properly assess the reliability of the victim's evidence, leading to a verdict that was unreasonable or unsupported by the evidence; and 2) whether the trial judge made inconsistent findings of fact in relation to consent, leading to an unreasonable verdict. The issues were determined as follows: 1) even though the decision was not worded as clearly as it could have been, the trial judge did conclude that the victim had not consented to sexual intercourse. The dissenting judge found that trial judges do not have to explicitly address the issue of reliability, if their reasons are sufficient for an appellant court to determine they turned their mind to the issue of reliability and evaluated the relevant reliability factors. When the trial judge analyzed credibility, he also implicitly analyzed reliability; 2) the appellant argued that the trial judge made inconsistent findings of fact by finding that the victim did not consent and that she did not have the operating mind to consent. The dissent concluded that the trial judge convicted the appellant due to an absence of capacity, which did not conflict with his finding of an actual absence of consent. The trial judge did not need to determine if the appellant should have taken additional steps to determine if the victim was truly consenting because there was no air of reality to honest but mistaken belief in communicated consent.

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605499 Saskatchewan Ltd. v Rifle Shot Oil Corp., 2019 SKCA 133

Richards Caldwell Kalmakoff, December 16, 2019 (CA19132)

Statutes – Interpretation – Surface Rights Acquisition and Compensation Act, Section 30
Statutes – Interpretation – Freedom of Information and Protection of Privacy Act

The appellants, owners of farmland in Saskatchewan, appealed an order made by the Surface Rights Arbitration Board (board) that

denied their request for access to agreements filed under s. 30 of The Surface Rights Acquisition and Compensation Act (SRACA). The background to their request was that they had been unable to reach an agreement with the respondent, Rifle Shot Oil Corp. (Rifle), on the amount of compensation payable under Rights of Entry Orders (ROEs) held by Rifle. The ROEs had been granted earlier, following hearings before the board under ss. 31 and 41 of SRACA. The board then held a hearing to determine compensation payable by Rifle and, at the outset, counsel for the appellants made a verbal request for access to records held by the board, describing it as the usual application under s. 30 of SRACA for access to its records. Section 30 of SRACA provides that every agreement made between an operator and owner with respect to compensation for any surface right shall be in writing and a copy of it shall be filed by the operator with board. The appellants' counsel took the position that the agreements held by the board under s. 30 would be relevant to establishing a "pattern of dealing" and might assist the board in determining what the appropriate compensation should be. Counsel did not make a written application for such relief, nor did he press the board for a ruling. The matter proceeded and the board issued a written decision that determined the compensation payable by Rifle and denied the appellants' request for access to s. 30 agreements on the basis that such access was governed by the provisions of The Freedom of Information and Protection of Privacy Act (FOIPPA). It stated that since SRACA does not address the confidentiality of the agreements and because the board is subject to FOIPPA as a prescribed government institution under FOIPPA regulations, it denied access to the records under s. 19 of FOIPPA as the agreements were provided implicitly in confidence. The appellants appealed pursuant to s. 71 of SRACA and requested that the court set aside the board's order, grant them access to its records and remit the matter to the board for a new hearing. They contended that the board erred in law by rejecting their application for access to records filed under s. 30 on the basis that FOIPPA applied and argued that a proper purposive interpretation of SRACA would result in a finding that the mandatory filing of agreements under s. 30 was intended to, in effect, create a registry that permits public access to them in order to ensure that parties involved in surface rights matters are treated fairly and equitably. Rifle submitted that the board correctly determined that FOIPPA applies to the s. 30 agreements and the appellants were required to follow the process set out in that legislation to gain access. As the appellants had not followed it, there was no application before the board and it had therefore not erred.

HELD: The appeal was dismissed. The court found that the standard of review was correctness. After reviewing SRACA and FOIPPA and interpreting their respective provisions, it agreed that the board was entitled to apply FOIPPA to the issue of access to s. 30 agreements because the board is a "government institution" as defined in FOIPPA; the agreements are "records" as defined in FOIPPA; there is no other existing procedure in SRACA by which s.

30 agreements may be accessed; and the agreements are not matters of public record as set out in ss. 3(1)(b), 4(b) and 4(f) of FOIPPA. The board correctly rejected the appellant's application for access to s. 30 agreements because they did not following the procedures set out in FOIPPA for seeking access.

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M.H. v A.B., 2019 SKCA 135

Caldwell Schwann Kalmakoff, December 17, 2019 (CA19134)

Family Law – Custody and Access – Appeal
Family Law – Child Support – Determination of Income – Appeal
Civil Procedure – Court of Appeal Rules, Rule 38, Rule 59
Statutes – Interpretation – Federal Child Support Guidelines, s. 16, s. 18, s. 19

The appellant appealed the decision of a Queen's Bench trial judge that ordered that the parties have joint custody of their child but determined that the respondent would be the primary caregiver and have the greater share of parenting time. The appellant was ordered to pay retroactive and ongoing child support based on a calculation of income that included the pre-tax value of dividends the appellant paid himself from a professional corporation (see: 2018 SKQB 317). The appellant applied for leave to adduce fresh evidence relating to his income for 2017 and 2018 on the basis that it was relevant because it showed that it had declined substantially from June 2017 to June 2018 as a result of the suspension of his licence to practice medicine. His grounds of appeal included that the trial judge had erred regarding: 1) custody and parenting. He had no principled reason to depart from an equal-time, shared-parenting arrangement. The judge erred in his application of ss. 8(a) and s. 9(1) of The Children's Law Act, 1997 in a variety of ways, such as by giving undue prominence to the approach taken by each party to the child's participation in extracurricular activities in determining fitness and failing to apply the maximum contact principle; 2) his calculation of child support by calculating the appellant's income for 2015, 2016 and 2017 based on the taxable amounts of dividends paid to the appellant by his professional corporation instead of the actual dividend paid as required by Schedule III, s. 5 of the Guidelines. After the appeal was heard, the appellant applied for leave, pursuant to rule 38 of The Court of Appeal Rules, to raise new arguments and submit new authorities in relation to this issue. HELD: The appeal was allowed in part with respect to the calculation of the appellant's income. It reduced the appellant's annual income for the period in question and varied the child support order accordingly. The appeal regarding parenting was dismissed. The application to adduce fresh evidence was denied because the 2017 information could have been adduced at trial and

the 2018 information was not relevant to the issue that the trial judge was required to decide at trial in 2017. The application for leave under rule 38 was not granted because the proposed new argument had not raised a new point of law, the issue had been thoroughly canvassed at the appeal hearing, and the court was aware of the authorities. The court found with respect to each ground that the trial judge had: 1) not erred in his decision regarding custody and parenting. There was no basis upon which it could intervene. The judge had considered all the evidence, made factual determinations supported by it, and reviewed and applied the relevant law; and 2) erred in using the grossed-up value of dividends that the appellant paid himself from his professional corporation rather than the actual value. The decision to attribute corporate income under s. 18(1) of the Guidelines or to impute grossed-up value of a dividend under s. 19(1)(h) instead of using the actual amount of the dividend cannot be arbitrary. It must be based on evidence that supports the conclusion that doing so is appropriate and necessary to reflect the amount of money truly available for child support purposes. In this case, the judge provided reasons as to why attribution under s. 18(1) of the Guidelines was appropriate and necessary but failed to conduct any analysis of the evidence regarding imputation under s. 19(1)(h).

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Verdient Foods Inc. v United Food and Commercial Workers, Local 1400, 2019 SKCA 137

Leurer, December 17, 2019 (CA19136)

Civil Procedure – Application for Leave to Appeal

The proposed appellant, Verdient Foods Inc. (Verdient), sought leave to appeal an order made by a Queen's Bench chambers judge in which he granted the respondent union's application to lift an interim stay and directed the Saskatchewan Labour Relations Board to proceed to tabulate ballots (see: 2019 SKQB 288). The respondent had applied for bargaining rights on behalf of certain employees of Verdient in accordance with The Saskatchewan Employment Act. After a secret vote, the ballots were sent to the board pending the determination of the appropriate bargaining unit. Verdient disagreed with the scope of the unit and sought to exclude certain positions. A hearing was held before the board and it accepted the union's bargaining unit description. Verdient filed an application for judicial review to quash the board's decision and for an interim stay of the counting of the ballots. The board advised that it would be unsealing and tabulating the ballots regardless of the application, whereupon Verdient applied ex parte to the Court of Queen's Bench for an order staying the tabulation while the judicial review proceeded. The application was granted, but as the judicial review

had been delayed for various reasons, the union applied to set aside the ex parte order. The issues were now whether Verdient should be granted to leave to appeal that lift stay order and, if so, should the stay order remain in place pending the appeal? Verdient's notice of appeal alleged that the chambers judge failed to properly consider the irreparable harm that would likely occur if the interim stay were lifted, including the public interest in ensuring that the employees' votes would remain confidential. If the votes were tabulated before the hearing of the judicial review and Verdient were subsequently successful on its appeal and certain positions excluded from the bargaining unit, the parties would be able to discern which employees voted for the union by a comparison of the vote tallies. HELD: Leave to appeal was granted. The court found that Verdient's application met the two tests set out in Rothmans and possessed sufficient merit and importance. With regard to the latter, the issue was of importance not only to the litigants and employees of Verdient but also had the potential to impact other cases. The operation of the lift stay order was stayed until the hearing of the appeal so that the ex parte order remained in effect.

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Huerto v College of Physicians and Surgeons of Saskatchewan, 2019 SKCA 139

Ottenbreit Schwann Tholl, December 20, 2019 (CA19138)

Professions and Occupations – Physicians and Surgeons – Discipline – Judicial Review – Appeal

The appellant appealed the 2016 decision of a Queen's Bench chambers judge that dismissed his application to set aside the decision of the Council of the College of Physicians and Surgeons (CCPS). The CCPS denied the appellant's request pursuant to s. 86 of The Medical Profession Act, 1981 for restoration of his licence to practice medicine. The appellant couched his application to the Court of Queen's Bench in 2015 in terms of a judicial review but argued, in the alternative, that it was also an appeal. The chambers judge determined that the application was a judicial review, that the statutory appeal provisions in s. 62 of the Act were not applicable, and that the standard of review was reasonableness. He found that the decision of the CCPS fell within the range of reasonable outcomes. Regarding the appellant's allegation that there was a reasonable apprehension of bias in the CCPS because various members of the College were defendants in a lawsuit brought by him and because the CCPS misused their professional knowledge, the judge found that the appellant had not met the onus of demonstrating bias and had not proven his complaint. Regarding the appellant's argument that the CCPS had acted in bad faith and failed to provide him with any understanding as to what new

practice he would have to adopt to satisfy it and to ensure that his record-keeping would be such that the public interest would be adequately protected, the judge found that the CCPS was not required to prescribe a form of practice that it would accept and that it had not manifested any bad faith. The CCPS had addressed and considered the appellant's concerns. The grounds of appeal were whether the chambers judge: 1) erred in law by finding that the appellant did not have the right to appeal the CCPS decision under s. 62 of the Act; 2) erred in finding the decision reasonable; 3) erred in law by failing to apply the standard of correctness to the issue of alleged breaches of the duty of fairness; and 4) erred in finding that the CCPS had not breached the duty of fairness.
HELD: The appeal was dismissed. The standard of review was whether the chambers judge selected and applied the proper standard of review. The court found with respect to each ground that: 1) applying the correctness standard to the chambers judge's decision, he had correctly concluded that there was no right of appeal in this case. Under s. 86 of the Act, the only remedy for an unsuccessful application for restoration is judicial review; 2) the chambers judge applied the correct standard of review by deferring to the expertise of the CCPS, a professional governing body, with respect to misconduct and incompetence, and applied the correct standard of review of deference to its findings of fact and credibility. The court reviewed the transcript of the findings challenged by the appellant in his judicial review and in this appeal and found that the chambers judge had not erred in determining that they were reasonable based upon the evidence; 3) the CCPS had not made a decision with regard to fairness and reasonable apprehension of bias and thus there was no standard of review that the chambers judge was obligated to apply; and 4) the chambers judge correctly identified the applicable law. He concluded that the onus was on the appellant to prove his complaint. He had not done so and there was nothing in the transcript of the CCPS's decision that supported his arguments.

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Mosten Investment LP v The Manufacturers Life Insurance Co., 2019 SKCA 141

Caldwell Barrington-Foote Tholl, December 23, 2019 (CA19140)

Civil Procedure – Court of Appeal Rules, 2000, Rule 17

The applicant, Canadian Life and Health Insurance Association Inc., applied pursuant to Court of Appeal rule 17 for leave to intervene in three appeals and three cross-appeals. Each of the proceedings involved common issues. The appellants appealed the decision of a Queen's Bench judge to deny them declaratory relief. They had sought an interpretation of a universal life insurance policy (ULIP)

issued by the respondent insurer that would allow the appellant insured discretion to invest certain funds under the terms of the ULIP. The judge held that the ULIP did not permit the insured to invest funds as the insured had sought (see: 2019 SKQB 75; 2019 SKQB 76; 2019 SKQB 77). In their cross-appeals, the appellants alleged that the chambers judge erred in by excluding relevant evidence and in his interpretation of The Saskatchewan Insurance Regulations, 2003 as they pertain to ULIPs.
HELD: The application was dismissed. The court reviewed the factors to be considered in an intervenor application under rule 17 as set out in R v Latimer. Although it found that there were factors that weighed in favour of granting the application, such as that the issues in the proceedings had the potential to set a precedent for the broader insurance industry, it was not persuaded to grant leave because the appeals related to a private dispute regarding the individual insurance policies. Further, the respondent insurers were sophisticated litigants and members of the applicant who could represent the industry and the applicant would not be able to add anything meaningful to the respondents' arguments. The court recommended that prospective intervenors should file a draft factum as part of an application for leave to intervene to show what they propose to contribute to the appeal.

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Ammazzini v Anglo American PLC, 2019 SKCA 142

Caldwell, December 24, 2019 (CA19141)

Civil Procedure – Appeal – Leave to Appeal
Statutes – Interpretation – Court of Appeal Act, 2000, Section 8
Statutes – Interpretation – Class Actions Act, Section 39

The applicants, plaintiffs in a proposed class action, applied for leave to appeal the decision of a Queen's Bench chambers judge to permanently stay their action in Saskatchewan against the defendants (see: 2019 SKQB 60). The applicants raised 16 proposed grounds for the proposed appeal.
HELD: Leave to appeal was denied. The court first noted that it would treat the application for leave under s. 8 of The Court of Appeal Act, 2000 (CAA) as though the Queen's Bench decision under appeal were an interlocutory decision. The applicants had identified the source of their right of appeal as s. 8(1) of the CAA, but the court queried whether the decision below was actually a final decision that did not require leave and, further, whether a right of appeal of an order staying an action existed under s. 39 of The Class Actions Act. The court proceeded to apply the two-step test set out in Rothmans. Regarding the first step, the court assessed the merit of the proposed appeal, after reviewing the Queen's Bench decision and each of the proposed grounds of appeal and found that

there was minimal prospect of success, and thus they were not compellingly meritorious. The proposed appeal was not sufficiently important to warrant granting leave because it would not raise any new, controversial or unusual issue of practice in class action proceedings or class action law.

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R v A.M., 2019 SKPC 68

Henning, November 21, 2019 (PC19065)

Criminal Law – Assault – Sexual Assault

The accused was charged with committing sexual assault contrary to s. 271 of the Criminal Code and with sexual touching against the same victim, a person aged 16 years, contrary to s. 153(1)(a) of the Code. The complainant was the daughter of the accused and at the time of the alleged offence, was living with the accused, her stepmother and brother in the family home. She alleged that she been sleeping in her bedroom when she was awakened at 3 am by the accused. In her telling of the alleged incident, the complainant testified first that while the accused was beside her bed, he touched her breasts over her shirt, but then said that the accused had not just touched her breasts but had taken a position on the bed on his hands and knees over her and then altered her description of his actions to say that while he was lying beside her, he touched her breasts. After the incident, the complainant tried to contact her former boyfriend and when she saw him the next day, he and a school counsellor both told her to go to the police, which she did two days after the alleged offence. The complainant went to live with her boyfriend and his family. The accused denied the allegations. The theory of the defence was that the complainant was distressed just before the alleged offence because her boyfriend had ended their relationship. The complainant fabricated the allegation because she was unhappy with her home situation and wanted to re-establish her relationship with her boyfriend and did so by means of the sexual assault allegations because it gave her the pretext for contacting him in a situation that would attract his concern.
HELD: The charges against the accused were dismissed on the basis of reasonable doubt. The court weighed the complainant's evidence and was unable to fully accept it as reliable but was not able to accept the accused's denial as being unequivocally true either. However, the defence's theory had sufficient credibility to raise a reasonable doubt even if the accused's evidence was not fully accepted.

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Cornerstone Heights Condominium Corp. v Payam and Sanaz Holdings Ltd., 2019 SKPC 70

Demong, December 10, 2019 (PC19063)

Statutes – Interpretation – Condominium Property Act, 1993, Section 65(6)

The plaintiff, a condominium corporation, brought an action against the defendant to recover the amount of the deductible it paid with respect to a claim made under its insurance policy. The defendant owned a unit in the condominium complex that it rented to a tenant. The plaintiff alleged that water escaped from the furnace room of the defendant's unit and flowed down and into the furnace rooms of the units on the two floors below it. The cost to repair the water damage of $6,200 was paid by the plaintiff's insurer subject to the payment of the deductible and it now sought to recover that amount from the defendant. The claim was based on a right of recovery set out in s. 65(6) of The Condominium Property Act, 1993 that authorizes a condominium corporation to add to the common expenses of a unit owner the deductible limit of an insurance policy responding to damage caused to another condominium unit through an act or omission of that unit owner. The defendant argued that even if water had leaked from the furnace, it was unaware of the problem and, on the facts, there was no evidence to support the conclusion that it was negligent. It submitted that the phrase "act or omission" in s. 65(6) of the Act should be interpreted as implying a "negligent" act or omission and thus it would only be liable if it were found to be negligent.
HELD: The court awarded judgment to the plaintiff in the amount of $2,500. It found that it was satisfied that the water damage to the other units was caused by the escape of condensate from the unattached condensate line running from the furnace belonging to the defendant, but that the defendant had not been negligent. The court reviewed s. 65(6) of the Act in the context of the purpose of the legislation and found that the legislators meant to place the burden of paying the insurance deductible on the unit owner who caused the loss without consideration of whether that unit owner's actions were negligent.

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Affinity Credit Union 2013 v Renz, 2019 SKQB 301

Megaw, November 21, 2019 (QB19277)

Statues – Interpretation – Administration of Estates Act, Section 46.2

The plaintiff, a credit union, was the mortgagee of lands owned by the deceased, M.B. As a result of M.B.'s death, the mortgage went

into arrears and the plaintiff commenced foreclosure proceedings. At that time, the plaintiff sought to have C.B. appointed as the personal representative of M.B. solely with respect to those proceedings. An order was granted pursuant to s. 33(1)(b) of The Queen's Bench Act, 1998, appointing C.B. as the personal representative of M.B. in the foreclosure proceedings with C.B.'s consent. The proceedings involved an application to determine whether leave to commence an action ought to be granted pursuant to The Saskatchewan Farm Security Act (SFSA) and an application for an order nisi for sale of the land. As well, C.B. instructed his lawyers to pursue obtaining a vesting order and C.B. had also had to deal with M.B.'s partner's claims for an outstanding maintenance order through the foreclosure. An order nisi for sale was granted and the land listed for sale. The Canada Revenue Agency (CRA) served a Requirement to Pay upon the plaintiff with respect to income tax owed by M.B. prior to his death and obtained a judgment for $12,325 which it registered against the land after the order nisi for sale was granted. C.B. negotiated his right of first refusal with the plaintiff pursuant to s. 27 of the SFSA to purchase the land and then purchased the land for $190,000. The net sale proceeds were $41,725. An order confirming the sale to C.B. was made, ending the involvement of the plaintiff. The sale proceeds were held to the credit of the action in court and in this application, CRA sought payment of its judgment and C.B., in his limited representative capacity, sought payment out of the whole amount in priority to the CRA judgment. The parties agreed that C.B. had paid certain items on behalf of M.B.'s estate of approximately $12,140: funeral expenses ($9,900) and property taxes and arrears ($2,225). In addition, C.B. had incurred legal fees of $48,450 to date and had paid somewhat less than half that amount. Further fees were to be billed as a result of this application. The issues were: 1) what administrative fees were eligible to gain priority over other claims, pursuant to s. 46.2 of The Administration of Estates Act (AEA); and 2) what expenses claimed were reasonable in the circumstances? HELD: The court ordered that $12,140 be paid out of court for funeral expenses, property taxes, arrears and insurance. There would be a further order directing payment out of court of the amount of legal fees incurred within this specific administration of foreclosure proceedings. The court granted leave to have the matter returned to it for further directions if the parties were unable to agree on this specific amount. It found with respect to each issue that: 1) C.B., in his representative capacity, was entitled to recover payment of reasonable legal expenses incurred with respect to his acting as administrator in the foreclosure proceedings and to payment in the amount of $12,140 as claimed in priority to other claims. He was not entitled to recover legal fees incurred outside of the administration of the foreclosure expenses; and 2) pursuant to s. 46.2 of the AEA, the funeral expenses, property taxes, insurance expenses and legal fees of the foreclosure administration were to paid in priority to the CRA judgment. C.B. should be indemnified for the legal fees regarding his appointment as administrator in

foreclosure proceedings, dealing with the maintenance claim of M.B.'s partner, negotiations involved in the settlement of the foreclosure proceedings, the vesting application and the CRA.

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R v Anderson, 2019 SKQB 304

Rothery, November 25, 2019 (QB19284)

Charter of Rights, Section 7, Section 11(d)
Constitutional Law – Validity of Legislation – Criminal Code, Section 278.92(1), Section 278.92(2)(b), Section 278.94(2) – Charter of Rights, Section 1
Criminal Law – Assault – Sexual Assault
Criminal Law – Evidence – Cross-Examination – Sexual Assault Complainant – Electronic Records

The accused applied for a determination as to whether certain amendments to the Criminal Code effective December 13, 2018 must be struck for being constitutionally invalid. Specifically, he argued that ss. 278.92(1), 278.92(2)(b) and 278.94(2) of the Criminal Code were inconsistent with his ss. 7 and 11(d) Charter rights. The accused asserted that the sections restricted an accused's right to cross-examine a complainant in a sexual assault trial. The new sections allow the complainant to appear and make submissions at the hearing to determine the admissibility of a record. The accused argued that defeated the purpose of cross-examination. He submitted that the right to cross-examine Crown witnesses is a principle of fundamental justice protected by s. 7 of the Charter to ensure the right to a fair trial as articulated in s. 11(d) of the Charter. The court had to balance the accused's right to full answer and defence as against the complainant's privacy rights in the electronic communications the complainant sent out that the accused now had in his possession.
HELD: The accused has a right to full answer and defence and the complainant has a right to privacy when the specific Criminal Code provisions are invoked. The new sections give the complainant a privacy right to electronic communications, such as email and texts. The court determined that the accused proved that his s. 7 and 11(d) Charter rights were infringed by the impugned amendments. The privacy rights of the complainant were found to have to give way to the accused's Charter rights. The accused may not even know which records are useful on cross-examination until the Crown completes its examination-in-chief. The procedural screening requirements would eradicate the most valuable tool available to the defence in a sexual assault trial. The trial judge could still hold a voir dire to determine the admissibility of any record that holds a high degree of privacy. Counsel for the Attorney General had the burden of

justifying the Charter infringement pursuant to s. 1 of the Charter, such matter to be dealt with on an adjourned date.

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R v Paterson, 2019 SKQB 305

Keene, November 25, 2019 (QB19285)

Criminal Law – Appeal – Stay of Proceedings
Criminal Law – Defences – Charter, Section 8 – Reasonable Expectation of Privacy of Detainee
Criminal Law – Impaired Driving – Care or Control of Vehicle
Criminal Law – Impaired Driving – Charter of Rights, Section 8, Section 24(1)
Criminal Law – Stay of Proceedings – Judicial Stay

The Crown appealed the trial judge's decision to grant a stay. The accused was charged with impaired driving contrary to ss. 255(1) and 253(1)(a) of the Criminal Code. The police responded to a 911 call and found the accused slumped over the console of a vehicle in a parking lot. The vehicle was not running. The accused had difficulty walking and had to be pulled to the police vehicle by the officers. She was arrested for impaired driving and taken to the police station. There were surveillance cameras in the detention area in which the accused was placed. Footage of the accused as she stood up from the toilet was shown on thirty monitors. The monitors could be seen by members of the police service, but not members of the public. The trial judge found that the accused's s. 8 Charter rights had been violated by the video footage. She held that a stay was the only appropriate remedy. The issues were: 1) whether the accused had a reasonable expectation of privacy and, if so, whether it was breached; 2) whether a stay was justified under s. 24(1) of the Charter: a) did the trial judge misinterpret the decision in Wildfong; and b) was the stay entered for punitive, rather than prospective, purposes?
HELD: The trial judge was correct that there was a breach of the accused's s. 8 Charter rights; however, a stay was not an appropriate remedy in the circumstances. The issues were determined as follows: 1) Ontario cases have found that there is still a reasonable expectation of privacy in detention, even though it is lower. The cases referred to by the Crown did not involve video surveillance over a toilet. The totality of the circumstances must be considered. The inquiry must balance the expectation of privacy and the necessity of close monitoring of detainees for safety and security purposes. The court found that it was not unreasonable for the respondent to expect privacy while using the toilet. The evidence supported the trial judge's finding that the accused's s. 8 rights were breached; 2)a) the ability to interfere with the granting of a stay is limited to circumstances wherein a trial judge misdirects him- or

herself or wherein a decision is so clearly wrong as to amount to an injustice. The fact that a case is not a case of first instance was not determinative; it was merely a factor that could affect how egregious the breach was. The fact that it was a case of first instance in Wildfong was one of many listed factors the court considered. The appeal court agreed with the appellant that the trial judge misdirected herself on the law in terms of expanding the effect that the factor of first instance should have on the overall balancing exercise required under s. 24(1). The Wildfong case involved a different police force and the decision was directed at that police force. It was the only case of its kind in Saskatchewan. There was no evidence to suggest that this breach demonstrated a systemic disregard for detainees' rights or that policy changes would not occur if a stay were refused; and b) the trial judge failed to address whether the stay was necessary and prospective. The trial judge did not consider whether the views of the testifying officer represented the police force. There was no evidence that the surveillance of detainees using the toilet without privacy protection was systemic or that there was no thought by the police service regarding detainees' privacy rights. The appeal court found that the trial judge took a punitive approach as a result of the thoughtlessness demonstrated by the officers in this case. The breach was serious, but the trial judge misinterpreted Wildfong and Mok and relied on assumptions to punish the officers' thoughtlessness rather than considering whether a stay was necessary to change policing practices moving forward. Stays are a remedy of last resort used only in the clearest of cases. The appeal was allowed, and the stay was vacated. The accused was found guilty of having care or control of a motor vehicle when her ability to operate a motor vehicle was impaired by alcohol or drug contrary to ss. 255(1) and 253(1)(a) of the Criminal Code. The case was remitted back to the Provincial Court for sentencing.

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C.P.B. v L.M.B., 2019 SKQB 306

Robertson, November 26, 2019 (QB19280)

Family Law – Surrogacy Agreement
Civil Procedure – Queen's Bench Rules, Rule 15-3, Rule 15-4

The petitioners, a same-sex married couple, made an application without notice in which they sought a declaration to confirm who would be accorded parental status to a child born through assisted reproduction and to direct amendment of the record of birth to conform to the declaration of parentage. They also sought an order directing that the parties and the infant child be referred to by pseudonyms in the proceedings. The petitioners and respondents all resided in Estevan but the application was brought in Swift Current.

The petitioners arranged with the respondents, an opposite sex married couple, for L.M.B. to be implanted with an embryo and bear the child. The embryo was created with sperm from one of the petitioners and the egg from an unidentified donor by in vitro fertilization at a private clinic in Saskatoon. The parties entered into a surrogacy agreement in February 2019. The child was born in November 2019 in Estevan and had lived with the petitioners since. The "Other Parent Registration of Live Birth" form was completed with L.M.B. entered as mother, C.P.B. entered as father and T.B.B. as other parent. The parties entered into a custody agreement whereby the petitioners would be given joint custody and the respondents agreed to relinquish all parental rights. The application was supported by affidavits signed by the petitioners which attached copies of the Other Parent Registration and the custody agreement as exhibits. The respondents each swore individual affidavits. The surrogacy agreement was not filed and neither were certificates of independent legal advice nor other evidence that the respondents received independent legal advice before signing the agreements or affidavits. The issues were: 1) what jurisdiction and authority did the court have on this kind of application; 2) who should be named on the birth certificate as the parents; 3) whether the application should be determined on a without notice basis; and 4) whether the court should order that pseudonyms be used.
HELD: The application without notice was dismissed with leave granted to bring an application with notice that should be served on both the respondents and the Registrar of Vital Statistics. The application should be brought in the Judicial District of Estevan unless the parties agreed to have it heard in Regina. The court found with respect to each issue that: 1) it had inherent jurisdiction as parens patriae to protect children; 2) the application would not be granted at this time because: the surrogacy agreement was not provided and it was necessary to determine that it had contravened the law as commercial surrogacy is prohibited by the Assisted Human Reproduction Act; proof of independent legal advice supporting the consent of the respondents was required; the status of the biological mother should be explained; the filing of the application in the Judicial District of Swift Current was contrary to Queen's Bench rule 3-3; and the Registrar of Vital Statistics should be given notice; and 4) this part of the application was dismissed on the basis that the law, s. 99 of The Queen's Bench Act, 1998 and Queen's Bench rules 15-3 and 15-4 already provide sufficient protection regarding privacy.

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Churko v Merchant, 2019 SKQB 307

Tochor, November 27, 2019 (QB19281)

Civil Procedure – Queen's Bench Rules, Rule 1-4, Rule 1-5, Rule 1-6, Rule 4-23, Rule 7-5, Rule 7-9

The plaintiff commenced a claim against the defendants in which he sought damages for breach of contract. The defendants responded with a defence and counterclaim against him. In September 2019, the plaintiff made an application for: summary judgment; an injunction requiring the defendants to pay the amount claimed; and the defendants to deliver their respective affidavits of documents. Each of the defendants brought applications in response: Merchant Law Group (MLG) applied for an order that the plaintiff provide a copy of his documents; Evatt Merchant, Q.C., Anthony Merchant, Q.C. and Merchant Law Group Professional Corporation (MLG) each applied for an order striking out the claim against each of them respectively, pursuant to Queen's Bench rule 7-9(1) or 7-9(2) or, alternatively, an order for security for costs pursuant to Queen's Bench rule 4-23.
HELD: The plaintiff's applications were allowed in part. The applications of the defendants were dismissed except for MLG's application for production of documents. With respect to the plaintiff's application for summary judgment, the court adjourned it sine die. The court found that as the requirements set out in General Application Practice Directive #9 had not been met, the parties were not ready to proceed to hearing. The plaintiff's application for an injunction requiring the defendants to pay him the amounts claimed was dismissed because the plaintiff had not met the second and third tests for an interlocutory injunction by showing irreparable harm and the balance of convenience. He could be compensated by damages or, if successful at trial, by a monetary award. The court ordered that each of the defendants serve their respective affidavit of documents on the plaintiff within 21 days. MLG's application for production of documents was granted. The defendants' applications to strike the plaintiff's claim were dismissed. They had not met the tests under either Queen's Bench rule 7-9(2)(a) or rule 7-9(2)(b) – (e). The defendants' application for security for costs was denied.

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R v Shingoose, 2019 SKQB 308

Layh, November 28, 2019 (QB19282)

Criminal Law – Defences – Charter, Section 8
Criminal Law – Impaired Driving Causing Bodily Harm
Criminal Law – Search and Seizure – Reasonable Expectation of Privacy
Criminal Law – Search and Seizure – Reasonable Search

The accused was charged with causing bodily harm to the victim when operating a vehicle while impaired by alcohol, contrary to s.

255(2) of the Criminal Code. He applied to exclude the evidence of the driver's side airbag and the blood swabs from the floor and windshield due to a section 8 Charter breach. The Crown was going to use the evidence to establish who was driving the truck. Four officers attended the accused's house after receiving a call indicating that a woman had been assaulted. Each officer testified that the occupants of the house all showed signs of alcohol consumption, some being highly intoxicated. Later that night, a 911 call was received reporting that four people were involved in an incident. There were headlights in a field off the road. The victim said that the accused had been driving and had run over her leg. The vehicle was found to be spanning the ditch. A.N. was found in the ditch and placed in a police vehicle to stay warm. The accused was trying to climb out of the ditch. He had a large, bleeding cut on his face. Cpl. P testified that the accused's speech was slurred, slow and deliberate and his breath smelled strongly of alcohol. He arrested the accused. Neither the victim nor A.N. sustained injuries that caused bleeding. The truck had a pool of blood at the feet of the driver's seat. The hat the accused had been wearing earlier in the evening at his residence was located in the truck. Pictures taken from the outside showed that the driver's side airbag had been deployed and had three red smears. The three people at the scene were transported to hospital. The Crown argued that the seizure of the airbag was justified pursuant to the common law doctrine of plain view. The issues were: 1) whether there was a search and seizure; 2) whether the search and seizure was reasonable: a) whether the search was authorized by law; b) whether the law itself was reasonable; and c) whether the search was carried out in a reasonable manner.
HELD: The issues were discussed as follows: 1) to determine whether there had been a search, the court had to answer whether the accused had a reasonable expectation of privacy. Neither the accused nor any defence witnesses testified at the voir dire so the court had no evidence as to whether the accused had a subjective expectation of privacy in his truck. The court made certain presumptions of privacy in the absence of his testimony: the location of the truck in a drainage ditch lessened the accused's expectation of privacy. The 911 caller indicated that four persons were involved, but there were only three at the scene when the officers arrived. The people were injured, it was cold and dark, and the snow was blowing. The court concluded that the accused could not have had a reasonable expectation of privacy under the circumstances. Further, the court found that what was visible from the outside of the truck, i.e. the airbag, was open to the public's view. If the item could be evidence of a criminal offence, then the reasonable expectation of privacy was diminished or non-existent. The court concluded that s. 8 was not engaged; 2) the court considered whether the search and seizure was reasonable in case an error was made regarding the reasonable expectation of privacy in the truck: a) if a search is conducted without a warrant, one of the following must exist: i) the search was in circumstances of urgency; ii) the search and seizure was incidental to arrest; iii) the search was pursuant to the doctrine

of plain view seizure; or iv) the search was pursuant to s. 489(2) of the Criminal Code. The court considered each: i) the 911 caller indicated that there were four persons involved, yet at the scene someone indicated that only three had been involved. One officer testified that he inspected the vehicle to ensure that no one was trapped inside. The court found that the officers were obligated to conduct a search of the truck to fulfill their duty as officers attending an accident scene when one person may not have been accounted for; ii) the accused argued that the search could not have been incidental to arrest because the searching officer would not have known of the arrest. The court found that the officers were acting as a unit, they were not expected to be orchestrated by one officer instructing them to perform sequential tasks. When the officer arrested the accused, it was an effective arrest for all attending officers. The court found that the search could be justified as incidental to arrest whether the search preceded or followed the arrest; and iii) the officers were lawfully in the place where the search was conducted because they had attended as a result of the 911 call. The airbags were in plain view from the exterior of the truck such that the airbags and blood upon them were subject to lawful seizure; and iv) the court found that the three requirements of s. 489(2) were met: the officers were lawfully at the scene; they were acting in the execution of their duties, and they had reasonable grounds to believe that the blood on the airbags and floor would be evidence of who was driving the truck that caused the bodily harm. The court concluded that the accused's s. 8 Charter rights had not been violated.

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Saskatchewan Joint Board, Retail, Wholesale & Department Store Union v Administrative and Supervisory Personnel Association, 2019 SKQB 309

Scherman, November 28, 2019 (QB19286)

Administrative Law – Judicial Review – Labour Relations Board – Intervenor Status
Civil Procedure – Originating Application
Labour Law – Judicial Review – Labour Relations Board

The applicant union sought judicial review of a decision (decision) of the Saskatchewan Labour Relations Board (board) in which the board denied applications by the union for intervenor status in a proceeding before it. The university applied to amend an existing certification order of an association by excluding certain employees the university considered supervisory employees within the meaning of s. 6-1(1)(o) of The Saskatchewan Employment Act (Act). When the Act came into force, there were several applications made by employers to amend existing bargaining units to exclude

"supervisory employees" on the basis of s. 6-11. The unions argued that the section only applied to new certification applications. The first case to determine the issue was the Saskatoon Library case in which the union was given intervenor status with restrictions. In the Saskatoon Library case, section 6-11 was interpreted to only apply to new certifications. Prior to the Saskatchewan Library decision, the university applied to amend the existing certification order to remove certain "supervisory employees". An email was sent to various legal counsel indicating that a panel of the board had an in-camera meeting and decided to proceed to a full hearing on the university application because it was not satisfied that the Saskatoon Library case was correctly decided. The union thereafter applied for intervenor status as it had on the Saskatoon Library case. The board indicated that the union's application for intervenor status would be determined without a hearing based on written submissions. The board dismissed all applications for intervenor status. The union sought judicial review of the decision, arguing that the board erred on numerous grounds.

HELD: The reasonableness standard of review applied. The court determined that a careful review of the decision was necessary for a number of reasons. That specific issue was not addressed in the reasons. The board is not bound by its previous decisions, but they do have precedential value. The court did not find it clear why the union was not granted intervenor status on the same basis as in Saskatoon Library. The court could not find any reason why the board decided not to grant intervenor status, given reconsideration of the correctness of the Saskatoon Library case was at least a possibility and seemingly probability. The court did not find it reasonable that the board stated in the decision that it was irrelevant that the union was granted intervenor status in the Saskatoon Library case. The court also concluded that the other reasons offered in the decision for denying intervenor status were actually reasons to grant public law intervenor status to the union with conditions that limited the scope of its intervenor status, as was done in the Saskatoon Library case. The reasons did not address why the union was denied intervenor status. The court was concerned with the board's statement that it could not overturn the Saskatoon Library case. The board could not overturn the previous decision, but it could decide differently, which was the union's concern. The court was also concerned with the board's statement that the applicant's concern that the decision would have effect on future matters involving it was not sufficient grounds for granting intervenor status. No reasons were given for the conclusion. To maintain procedural fairness and within a reasonable review, the board had to communicate to the union what its concerns with the Saskatoon Library decision were, and provide reasons that justified the denial of intervenor status when there was reconsideration of the correctness of a decision in which it had intervenor status. The reasons and conclusions were not reasonable. The court quashed the decision because it lacked justification, transparency and intelligibility within the decision-making process, and it did not fall

within a range of possible acceptable outcomes that were defensible in respect of the facts and law. The court did not remit the matter back to the board for decision: rather, it granted intervenor status to the union with limitations so that the university's application could proceed without further delay. The union was given taxed costs.

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Brian L. Leipert Financial Services Ltd. v Reiter, 2019 SKQB 310

McCreary, November 29, 2019 (QB19283)

Civil Procedure – Affidavits – Motion to Strike
Employment Law – Fiduciary Duty
Injunction – Interlocutory
Torts – Civil Conspiracy
Torts – Fiduciary Duty
Torts – Intentional Inducement of Breach of Contract

The plaintiffs applied for interlocutory injunctive relief to prevent the defendants from communicating with or soliciting persons or businesses who were clients of the two plaintiff companies, A and LFG. The plaintiffs also sought an order that the defendants deliver to them all records relating to the business or clients of the plaintiffs as well as an order for costs, including solicitor-client costs. LFG provided investment, financial, and insurance planning services. A was owned by LFG and provided employee life and health insurance benefits for business clients. The defendants, S.R. and J.M., were long-term employees of A and LFG, respectively. They resigned in October 2019 and began working in their own business, EWA, as a competitor to the plaintiffs. The plaintiffs alleged that the defendants had solicited the clients before they resigned. The defendants brought a motion to strike portions of the plaintiffs' affidavits. The issues were as follows: 1) was there a serious issue to be determined at the trial of the action: a) what was the standard of proof; b) did S.R. and J.M. breach fiduciary obligations to their former employers; c) were there other serious issues to be tried, i.e.: i) civil conspiracy; ii) intentional inducement of breach of contract; 2) would the plaintiffs suffer irreparable harm that could not be compensated by money damages if the plaintiffs succeeded at trial and if the injunction did not issue; 3) did the balance of convenience favour granting the injunction; and 4) if injunctive relief were appropriate, for what period of time should the defendants be restrained?
HELD: The court only struck two potions of the plaintiffs' affidavits because they were argument and not statements of facts. The issues were determined as follows: 1) a) the court did not agree that the plaintiffs must establish a strong prima facie case as the first step to injunctive relief in this case. The defendants were not bound by

restrictive covenants. The argument was based solely on the defendants owing a fiduciary obligation to the plaintiffs. The lower standard of a "serious question to be tried" was found to apply; b) the plaintiffs demonstrated that there was a serious issue to be tried respecting whether the defendants owed a fiduciary duty to the plaintiffs, and whether they breached those duties. The evidence was found to support a determination that S.R. and J.M. were key employees of the plaintiffs. The evidence was also found to demonstrate that, together, S.R. and J.M. breached the fiduciary obligations they owed to A and LFG. Of note, many of the employees of the plaintiffs resigned shortly after the defendants resigned and they were thereafter hired by the defendants' company. There was no evidence to support the defendants' argument that the clients that were solicited were not clients of A or LFG, but rather were their own clients who made up their books of business. The defendants were employees, not independent contractors; c) i) the court agreed with the plaintiffs that conspiracy was made out at the threshold level; and ii) the plaintiffs claimed intentional inducement of breach of contract on the basis that the defendants resigned without notice, which was followed by most of A's other employees and some of LFG's employees resigning and beginning to work at the defendants' company. The court found that there was a serious issue to be tried in this regard; 2) the court found that the plaintiffs were likely to suffer a substantial loss of market share and good will in the absence of injunctive relief. The quantification of those losses would be difficult. The harm included a substantial risk that the core of A's business would be converted to the defendants' company with the continued use of confidential information. A also lost its third-party administrator to the defendants' company. The defendants also destroyed some physical and electronic documents of the plaintiffs. The breach of fiduciary obligations could also result in reputational damage to the plaintiffs. The court found that the plaintiffs established a risk of irreparable harm in the absence of injunctive relief; 3) it is unfair for a fiduciary employee to solicit the employer's clients. The balance of convenience was found to clearly favour granting relief to the plaintiffs; and 4) there were three separate classes of clients, each with varying timelines required to protect the plaintiffs' proprietary interests. The court imposed the following times: three months for the plaintiffs to attempt to secure their proprietary interest in the investment/financial services clients who were at issue and nine months to prevent the defendants from soliciting the insurance and employee benefit clients who required less frequent contact. The injunction prohibited soliciting the clients of A and LFG. The defendants were also ordered to account for the location of all copies of any confidential information that they were aware of and deliver all physical, electronic or other copies of any confidential information in their power, possession or control to the plaintiffs' solicitors. If they could not agree on costs, the parties could submit a cost memorandum to the court within 30 days.

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H.M.S. v M.H., 2019 SKQB 311

Brown, December 5, 2019 (QB19287)

Family Law – Child Support – Determination of Income
Family Law – Child Support – Discretion – Federal Child Support Guidelines, Section 4
Family Law – Child Support – Extraordinary Expenses
Family law – Child Support – Interim
Family Law – Child Support – Retroactive
Family Law – Child Support – Section 7

The issue was interim child support. Specifically, the parties differed on whether the child support should be based a combination of the respondent's line 150 income in 2018 plus the pre-tax income of his professional corporation (net of the declared dividend), which totaled $141,749, or instead should be his actual income for 2019, which was reasonably anticipated to be $315,000. The parties had one child who had resided primarily with the petitioner since October 2019. The respondent also had a child with another mother where the matter of child support went to trial. In that case, the respondent's income for child support purposes was to be determined in September of each year, based on his previous year's corporate and personal income tax figures. The respondent had relatively stable income in all years except 2018, when his income dipped to $141,749 because he was suspended from practicing medicine for a period of time. In all other years, the respondent's income was over $150,000 and therefore subject to the discretion of the court to determine child support pursuant to s. 4 of the Federal Child Support Guidelines (Guidelines). Prior to this application, the parties had followed the calculation used for the respondent's child support of his other child.
HELD: If little or no information is presented, it is appropriate to rely on line 150 income from the previous year. In this matter there was not an absence of information. There was a sufficient degree of certainty. It would not be appropriate to rely simply on line 150 income from 2018 because the formula from the other child's support utilized the respondent's pre-tax corporate income in addition to his line 150 income and it should not be different for his two children. The court found that there was sufficient certainty that the respondent would earn approximately $315,000 in 2019. He traditionally made double what he had earned in 2018. The respondent argued that it would be unfair to effectively skip the 2018 year of low income, which was not a deliberate attempt to make a lower income. The court had to consider whether to use its discretion to use the lower 2018 income even though it was known that the 2019 income would be considerably higher. The court did not agree with the respondent that s. 4 discretion could be used to

determine the income of the payor. The court recognized that the order would be interim and concluded that averaging the respondent's income over three years was not the fairest way to address the issue. The court adopted fairness as the guiding criterion. The court agreed that there would be unfairness in skipping the 2018 year when the respondent had a low income due to reasons not related to an intentional avoidance of earning an income. The petitioner also had a career and was not entirely dependent on the respondent to make ends meet and provide for the child. The court concluded that child support should be calculated as it was for the respondent's other child. Child support was ordered to be paid based on an income of $141,749, which was $1,209 per month. The payment would continue until the respondent's 2019 income tax information was available and the appropriate adjustment was made pursuant to the formula used for the respondent's other child. The process was to be identical with respect to the two children. The petitioner also requested the respondent pay his proportionate share of s. 7 expenses. The court left it for pre-trial to determine which expenses were extraordinary and should be contributed to by the respondent. The court declined to make a retroactive support order in favour of the respondent at this time. No costs order was made.

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R v Tamunoilolma, 2019 SKQB 312

Tochor, December 2, 2019 (QB19288)

Criminal Law – Application to Expunge Guilty Plea

The appellant was deported to Nigeria after pleading guilty to a charge of impaired care or control contrary to s. 253(1)(a) of the Criminal Code. In April 2019, he filed a notice of appeal of his conviction, including an application to expunge his guilty plea. He filed his own affidavit and the Crown sought to cross-examine him. The court granted the Crown's request and the appellant was cross-examined on his affidavit. The Crown opposed the application, arguing that the appellant's evidence should not be accepted and that the elements of the Wong test had not been met.
HELD: The first part of the Wong test requires the accused to establish that he was misinformed about the effect of a criminal conviction upon his immigration status. In his affidavit, the appellant indicated that he did not know that a guilty plea would trigger immigration consequences. The Crown argued that the appellant must have known the consequences since he had lived in Canada since 2010. The Crown argued that the evidence was thus not credible and should be rejected. The Court accepted the appellant's evidence. There was no basis upon which to reject the evidence. The first test in Wong was met. The second step asked

whether the appellant would have acted differently if he had been properly informed. The appellant indicated that he would not have pled guilty if he had known of the consequences of doing so. He also advised that he did not receive advice from a lawyer. The court accepted the evidence and found that the second element of the Wong test was established. The appellant's application to expunge his guilty plea was allowed and the matter was remitted back to the Provincial Court.

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Charles v Saskatchewan Government Insurance, 2019 SKQB 316

Rothery, December 10, 2019 (QB19291)

Statutes – Interpretation – Automobile Accident Insurance Act, Section 11.1

The plaintiff sued the defendant, Saskatchewan Government Insurance (SGI), pursuant to ss. 191 and 192 of the Automobile Accident Insurance Act (AAIA). SGI provided the plaintiff with a death benefit of $15,620 resulting from the death of his father in a motor vehicle accident, but deducted $7,315 from the benefit pursuant to s. 11.1 of the AAIA. This amount was comprised of monies owing to SGI by the deceased. The parties agreed that these amounts were incurred at least two years prior to his death. The plaintiff argued that the limitation period for SGI to collect the amounts owing by the deceased to SGI pursuant to s. 11.1 of the AAIA was the period set out in s. 5 of The Limitations Act (LA). HELD: The plaintiff's action was dismissed. The court found that the Legislature intended that s. 11.1 of the AAIA be interpreted to mean that the amounts owing to SGI from the benefits received by the plaintiff were not statute-barred by the operation of the LA. It would not have intended to require SGI to commence lawsuits against persons for amounts owed and then renew any judgments within 10 years to ensure that it could collect on the judgment, in order to ensure that the LA would not bar recovery from the person should SGI ever have to pay that person a benefit under the AAIA.

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6517633 Canada Ltd. v Clews Storage Management Keho Ltd., 2019 SKQB 320

Robertson, December 11, 2019 (QB19295)

Civil Procedure – Queen's Bench Rules, Rule 7-9, Rule 11-28
Civil Procedure – Vexatious Litigant

The plaintiffs filed an application with notice that sought an order pursuant to s. 63 of The Queen's Bench Act, 1998 and ss. 109 and 132 of The Land Titles Act, 2000 directing the Registrar to discharge a mortgage held by the defendant and an order directing the defendant to take no further collection action on a general security agreement (GSA) and promissory notes until the amount due under the mortgage was determined. The plaintiffs' request for determination formed part of their statement of claim that had been issued a month earlier. The background to the application was that the plaintiffs marketed and sold cattle oilers under a franchise agreement with the defendant. When the relationship ended in 2017, the parties entered into a settlement agreement. In addition to barring certain unfair business practices, the agreement involved obtaining a loan made by the defendant to the plaintiff secured by a first mortgage. The plaintiffs commenced an action against the defendants in 2017 that sought to tie the business claims with the debt, requesting that debt payments be paid into court. The statement of defence indicated that the mortgage debt was a debt due by the plaintiff and unrelated to the settlement agreement. The defendants successfully obtained summary judgment and the plaintiffs' entire claim was dismissed in the 2017 action (see: 2019 SKQB 152). The plaintiffs had appealed the judgment, but the appeal had not yet been heard. The plaintiffs then brought an unsuccessful without notice application under the 2017 action that sought to prohibit the defendant from any taking enforcement action on the GSA. The judge said that the application was unrelated to the action and there was no urgency requiring it to grant relief on a without notice basis. The plaintiffs then filed an application with notice for similar relief. It was dismissed because the matter was res judicata in view of the two prior decisions. The plaintiffs then commenced another action in 2019 in which they sought an order to discharge the mortgage and GSA from the title of land they owed upon payment into court of an amount due on the mortgage and to prohibit collection on the GSA and promissory notes until the amount due on the mortgage had been determined. The defendant disputed these amounts. The plaintiffs then filed this application, but before it was heard, the plaintiffs sought, by a without notice application, and obtained an order prohibiting the defendant from taking action on the GSA. The defendants applied for an order under Queen's Bench rule 7-9(1) to strike and/or dismiss the statement of claim in its entirety and for a declaration that the plaintiffs were vexatious litigants and restraining them from bringing further proceedings against the defendant without leave of the court and an award of costs on a solicitor-client basis against both the plaintiffs and their lawyer.

HELD: The defendants' application to strike was granted and the plaintiffs' claim dismissed in its entirety. The plaintiffs were declared vexatious litigants. The plaintiffs' applications were dismissed. The court commented that the application without notice process under Queen's Bench rule 6-3 should only be used when the circumstances require an immediate and interim court order and

that the party making such an applications bears a heavy onus to provide full and frank disclosure of all available information to the court. The plaintiffs' previous and successful without notice application to the court was seriously deficient. It found with respect to the plaintiff's applications that they had not provided a basis for the determination of the amount of the mortgage and there was no basis to stay debt enforcement. The court agreed with the defendant that the application sought to re-litigate a question that was decided by the 2017 judgment and it should be dismissed. The various factors required to find vexatious litigation under Queen's Bench rule 11-28 were present in this case. The conduct of the plaintiffs did not warrant an award of solicitor-client costs. However, an award of enhanced costs was made against them.

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R v Levac, 2019 SKQB 322

Mitchell, December 10, 2019 (QB19296)

Criminal Law – Assault – Sexual Assault
Criminal Law – Witness Under 16 – Testimony – Mode of Protection
Criminal Law – Conduct of Trial – Witness – Application for Support Person

The accused was charged with a four-count indictment including two counts of sexual assault on the complainant, a person under the age of 16, contrary to s. 271 of the Criminal Code and two counts of touching with his penis for a sexual purpose, the body of the complainant, a person under the age of 16, contrary to s. 151 of the Code. The accused pled not guilty to each of the charges at the opening of the trial and Crown counsel made two applications. The first sought an order pursuant to s. 486.1(1) of the Code that the complainant be permitted to have with her a police sergeant and her dog, trained as a court security dog, as support persons while she testified at trial. The second application brought pursuant to s. 486.2(1) of the Code sought an order that the complainant be permitted to testify from a soft room located in the basement of the courthouse. Regarding the first application, counsel for the defence did not object to the presence of the dog during the complainant's testimony, but to the presence of the dog's police officer handler as a support person. Although the officer was not the investigating officer in the case, she had taken two videotaped statements from the complainant subsequent to her initial disclosure to and interview with another police officer. She had also attended with the complainant at the medical examination. Defence counsel objected to the second application on the bases that it would diminish the solemnity and meaning of the proceeding and that testimony taken via CCTV makes it difficult for counsel and the judge to properly assess the complainant's testimony.

HELD: Each of the applications was granted. The court found with respect to the first that the presence of the police officer as a support person would enhance the truth-seeking function of the trial by enabling the complainant to offer full and candid evidence before the court. Her participation was necessary for "the proper administration of justice". The officer was the dog's only handler and it wasn't clear whether the dog's effectiveness would be affected by replacing the officer. In this case, the officer was not a material witness. Further, her testimony as a witness would be concluded before she acted as the complainant's support person. Regarding the second application, the court was satisfied that having the complainant testify from a soft room was reasonable and compatible with the proper administration of justice.

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Bida v BLSBEM Holdings Ltd., 2019 SKQB 323

McCreary, December 16, 2019 (QB19297)

Landlord Tenant – Residential Tenancies Act, 2006 – Appeal
Administrative Law – Procedural Fairness – Breach of Duty

The appellant tenant appealed the decision of a Residential Tenancies Office hearing officer to dismiss her claim because she failed to file a formal tenant application for claim. The respondent landlord applied for damages for rent after the appellant had vacated the premises. Before the hearing, the tenant submitted considerable evidence respecting the deficiencies in the rental unit and the work she performed to remedy them. She intended to make a claim for damages for the cost of addressing the deficiencies to be offset by any damages she might owe for outstanding rent. The officer concluded that she did not have jurisdiction to consider the appellant's claim for damages at the hearing because she had not filed the appropriate application. The officer then granted damages to the respondent.
HELD: The appeal was allowed and a new hearing was ordered. The court held that that the duty of procedural fairness in these circumstances included a duty to inform a self-represented litigant when a procedural deficiency exists which would affect the hearing officer's jurisdiction to award the remedy sought by the litigant. It found that it was obvious that the appellant had submitted evidence to support her claim for abatement of rent and believed that she could advance her claim at the hearing. The hearing officer should have advised the appellant to make the claim by filing the required application and then adjourned the hearing to allow her to do so.

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