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Subject Index

Holmes v Jastek Master Builder (2004) Inc., 2019 SKCA 132

Ottenbreit Ryan-Froslie Schwann, December 9, 2019 (CA19131)

Contract Law – Breach

The plaintiff appellants are the representative purchasers for a class of persons who entered into agreements with Jastek Valencia (J.V.) between November 2006 and March 2007 to purchase condominium units in the Valencia Project to be built in Saskatoon. Their agreements were subject to Jastek Master Builder 2004 Inc. obtaining a building permit from the City of Saskatoon. After the cancellation of the project, they brought a class action against Jastek Master Builder 2004 Inc. (Jastek MB); J.V.; 585323 Saskatchewan Ltd. (585); R.P. (cumulatively "the Jastek parties"); GDP Construction Corp. (GDP); 626040 Saskatchewan Ltd. (626); and G.P. (cumulatively "the GDP parties"). The claim was certified (see: 2010 SKQB 156). The appellants raised various causes of action, including breach of contract against J.V. and Jastek MB; inducing J.V. to breach the contract against Jastek MB, 585, R.P., and the GDP parties; and conspiracy to breach the contract with intent to injure or cause loss against the Jastek parties and the GDP parties. They also claimed that J.V. and Jastek MB were the agents for 585 and requested that the court lift the corporate veil regarding Jastek MB, 585, 626, and R.P. and G.P. personally. GDP counterclaimed for damages under s. 68 of The Land Titles Act, 2000 against the appellants for their improper registration of a certificate of pending litigation (CPL) on the title of the condominium property. R.P. was the sole shareholder, director, president and secretary of 585, which in turn was the sole shareholder of Jastek MB and J.V. The natural person behind the GDP parties was G.P., R.P.'s brother. After R.P. informed

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the appellants that he was cancelling the project in April 2007 because the building permit had not been issued, GDP then successfully applied for one and proceeded to build another condominium development on the same site. The brothers and their respective companies shared an office and worked together on a formal and informal basis on various construction projects. In 2017, summary judgment applications were brought by: 1) the appellants, against Jastek MB and J.V. for breach of contract; 2) the Jastek parties, to dismiss some of the appellants' claims against those parties and dismissing the entire action against Jastek MB, 585, and R.P.; 3) the GDP parties, dismissing the appellants' claims against them and granting judgment on its counterclaim. The chambers judge granted summary judgment in favour of the purchasers against J.V. and Jastek MB for breach of contract because they had not used their best efforts to obtain a building permit and ordered the issue of damages be set for trial on an individual basis. He granted the application of the Jastek parties and the GDP parties to dismiss the purchasers' claims of conspiracy, inducing breach of contract, and breach of contract (except breach of contract as against J.V. and Jastek MB as previously noted). The judge had concluded that the corporate veil of J.V. should be lifted because it was Jastek MB's agent, but dismissed the claim against 585 and R.P. and declined to lift its corporate veil as neither of them had made representations as related to the operation of J.V. Regarding the allegation that the GDP parties and the Jastek parties had conspired to have J.V. breach the agreement, the judge concluded, concerning the first branch of the tort, that there was no evidence to suggest that the primary purpose of the parties was to injure the appellants. As to the other branch of the tort, conspiracy related to unlawful means, the judge found that there had been no agreement between the parties to engage in unlawful conduct to breach the contract. He then determined that R.P., Jastek MB or 585 had not induced J.V. to breach the agreement. The decision to breach it was made by R.P. alone on behalf of J.V. Further, none of the GDP parties were liable for inducing breach of contract. He dismissed the counterclaim of GDP in its entirety because it had not proven that it incurred loss as a result of the improper registration of the CPL. The appellants appealed the judge's decision to refuse to lift the corporate veil of 585, the dismissal of their claims of conspiracy by unlawful means and inducing breach of contract. J.V. and Jastek MB cross-appealed the judge's lifting of the corporate veil of Jastek MB and J.V., and his finding there had been a breach of contract. GDP cross-appealed the dismissal of its counterclaim.

HELD: The appellants' appeal with respect to the Jastek parties was allowed in part, regarding piercing of the corporate veil of 585 to make it liable for breach of the agreement by J.V. The court dismissed the appellants' other grounds of appeal regarding the Jastek parties and the GDP parties. The Jastek parties' cross-appeal was dismissed, as was that of GDP. The court found that the chambers judge had not erred in his handling of the evidence that J.V. had not used its best efforts to obtain a building permit and

Miller v Saskatchewan

Neptune Capital Inc. v Yorkton (City)

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Wood Mountain Lakota First Nation No. 160 v Goodtrack

thereby breached the agreement. He had erred, however, in dealing with the issue of lifting the corporate veil for 585 because he mistakenly identified Jastek MB as the parent company of J.V. when it was, in fact, 585. The court found that the corporate veil of 585 should be lifted and that it was in breach of the agreement in the same way as J.V. The judge was correct in lifting the corporate veil of Jastek MB and in finding that it was responsible for the breach as well. The judge had not erred in deciding that the evidence he accepted had not established conspiracy by unlawful means or inducement to breach. He had not erred in dismissing the entirety of GDP's counterclaim as he had authority to do so under either Queen's Bench rule 7-5(1)(a) or (b) because GDP failed to provide evidence of loss. In a summary judgment application, it had failed to put its best foot forward.

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Richer v R, 2019 SKCA 134

Richards Jackson Kalmakoff, December 16, 2019 (CA19133)

Criminal Law – Parole
Criminal Law – Habeas Corpus

The appellant appealed from the decision of a Queen's Bench judge that dismissed his application for a writ of habeas corpus. The appellant, a prisoner serving a life sentence in the Saskatchewan Penitentiary, prepared an application for day parole and gave it to his parole officer in the expectation that he would send it to the parole board immediately, but the officer did not send it until May 2019, and the review hearing was then scheduled for October 2019. The judge rejected the appellant's argument that the delivery of the application to the officer was delivery to the board. Although s. 157(2) of the Corrections and Conditional Release Regulations provides that the board shall review a day parole application within six months of its receipt and here, the board had not done so. The judge found that delivery of the application to the officer was not delivery to the board. As a result, there was no breach of s. 157(2). If there had been a breach, the appellant was not entitled to a writ of habeas corpus because there had been no change to his residual liberty interests. Finally, an unconditional release would not be an appropriate remedy even if the appellant had experienced an unlawful deprivation of liberty because of a breach of s. 157(2). HELD: The appeal was dismissed. The court decided not to deal with the issue of the status of the parole officer. It found that the judge had correctly decided that habeas corpus was not available even if the board had failed to comply with s. 157(2) of the Regulations because there had been no change to his residual liberty interests. The appellant had never acquired the status of a parolee.

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Even if the board had failed to comply with the Regulations, unconditional release would not be a proper remedy.

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Neptune Capital Inc. v Yorkton (City), 2019 SKCA 136

Whitmore Schwann Leurer, December 17, 2019 (CA19135)

Municipal Law – Tax Assessment – Assessment Appeals Committee - Appeal
Statutes – Interpretation – Cities Act, Section 227

The appellant owned a commercial property located in the city of Yorkton. The history of the dispute between the appellant and the respondents, the city and the Saskatchewan Assessment Management Agency (SAMA), began in 2013. The property was valuated at $2,989,200 in 2013, the base date, after the appellant had successfully appealed the assessment to the Board of Revision (BOR). However, SAMA appealed the BOR assessment to the Saskatchewan Municipal Board Assessment Appeals Committee. The committee did not render its decision until March 2016, and in the interim, the city carried forward the 2013 assessment to the 2014 assessment roll. SAMA appealed the 2014 assessment to BOR too, but it declined to hear the appeal. SAMA then appealed to the committee. The committee heard the 2013 and 2014 appeals together. Regarding the 2013 appeal, the committee changed and increased the assessed value of the property to $3,448,200 but it dismissed the 2014 appeal because SAMA had failed to pay the required fee. It said that it did not have jurisdiction to hear the appeal and stated that it confirmed the 2014 assessed value as that set by the city when it carried forward the revised 2013 assessment. Immediately after releasing its decision, the committee issued a revised decision, affirming its conclusion regarding jurisdiction and omitting both the statements that the appeal had been dismissed and giving the 2014 assessment figure as $2,989,200. Neither the 2013 nor the 2014 committee's decisions were appealed. The city increased the assessment in 2016 to the higher amount after the committee rendered its decision regarding the 2013 assessment. In 2017, the appellant applied to the committee for a ruling on the application of s. 227 of The Cities Act to the 2014 and 2015 assessments of its property. The committee found that its decision regarding the 2013 assessment carried forward and applied to the 2014 assessed value, and as SAMA had not appealed the 2014 assessment, it carried forward to 2015 and 2016. After the 2017 committee decision, the Court of Appeal released two decisions about the interpretation of s. 227: South Hill Mall and PA Co-op. The appellant took the position with the committee that the 2017 committee decision was inconsistent with those judgments and asked the committee to revisit its decision. The committee declined

to do so, and the appellant commenced this appeal. It argued that the committee erred in its application of s. 227 based on the interpretation given it in South Hill and PA Co-Op because the section could not be invoked as there was an extant appeal taken by SAMA in 2014. Since the court's interpretation of s. 227 does not allow for a carry-over of a previous year's assessed value in the face of an appeal, the appellant contended the assessed value for the property in 2014 should be the initial assessed value recorded on the assessment rolls in 2014. The issues were whether: 1) s. 227 of the Act applied when an appeal has been dismissed for non-payment of the filing fee as happened in the committee's 2014 decision. The appellant argued that SAMA's failure to pay the filing fee for its 2014 appeal did not negate the existence of its appeal; 2) s. 40(5) of The Municipal Board Act empowered the committee to issue a revised decision in the circumstances; 3) the committee erred in determining the initial and final assessed values for 2015; and 4) the committee erred in determining the final assessed value for 2015. The appellant argued that the committee's capitalization rate should have been applied to the original assessed value of $2,989,200. HELD: The appeal was allowed. The committee's 2017 decision was set aside. The court found concerning each issue that: 1) the committee erred in applying s. 227 of the Act to the 2014 assessment year because that assessment was under appeal and that appeal was not withdrawn. Therefore, the initial assessed value for 2014 should be $2,989,200. 2) The committee's revised 2014 decision that removed references to the assessed value for 2014 did not implicitly mean the value should be $3,448,200 instead of $2,989,200. 3) The committee erred in law in its 2015 decision regarding the 2015 assessment because it conflicted with the court's decision in South Hill. The initial assessed value should be $2,989,200; and 4) the matter was remitted to the committee for a calculation of the final 2015 assessed value.

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Herron v R, 2019 SKCA 138

Jackson Caldwell Leurer, December 18, 2019 (CA19137)

Criminal Law – Appeal – Conviction
Criminal Law – Evidence – Circumstantial Evidence
Criminal Law – Evidence – Credibility
Criminal Law – Evidence – Reliability
Criminal Law – Verdict – Reasonableness
Criminal Law – Murder – Aid and Abet
Criminal Law – Murder – First Degree Murder
Criminal Law – Murder – Second Degree Murder

The appellants had been jointly charged with first-degree murder. A jury convicted J.H. of second-degree murder and O.J. of first-degree

murder. They appealed their convictions and neither appellant called evidence. The appellants submitted that they were not present at the 27th Street, Prince Albert house when the fatal shooting occurred. There was no physical evidence connecting them to the shooting. The appellants argued that the two witnesses placing them at the house during the shooting were not reliable for various reasons, such as their level of intoxication. All but one of the lay witnesses were highly intoxicated during the events in question. The witnesses testified that the appellants shot the window when they attended the 27th Street house and were not allowed in (first incident). Witnesses said the appellants returned to the house shortly after. O.J. had a gun and witnesses indicated that he went to the bedroom the victim was in, and they heard a shot. The victim was found fatally wounded in the bedroom (second incident). There were bullet holes on the exterior, including one in the picture window. The issues raised by J.H. were that: 1) the witnesses were unreliable; 2) his presence at the 27th Street house was insufficient for party liability; 3) the evidence before the jury regarding knowledge and intent was circumstantial; 4) the jury's verdict was unreasonable, and 5) the trial judge erred by not declaring a mistrial due to O.J.'s counsel's address to the jury, wherein she referred to wrongful convictions with a particular emphasis on David Milgaard's case. The issues raised by O.J. were that: 1) it was an error to compare the same evidence against both appellants and weigh it differently against them, and 2) the verdict of first-degree murder was unreasonable due to J.H.'s second-degree murder verdict.

HELD: The appeals were dismissed. The issues raised by J.H. were dealt with by the appeal court as follows: 1) the appeal court found J.H.'s argument failed to consider all the evidence and it attempted to isolate each witness's narrative. The appeal court found that there was evidence to support the jury's finding that J.H. was at the house at the critical time. Neither the jury nor the appellate court had to account for every detail that did not fit with one narrative. The issue was whether there was evidence that could reasonably support each essential fact that the jury was required to find in order to arrive at a reasonable verdict. 2) The trial judge charged the jury on the difference between mere presence and the question of aiding and abetting. The charge was found to be in accordance with authorities. The jury could reasonably conclude that J.H. knew that O.J. intended to commit an offence. The appeal court did not find any merit in J.H.'s argument that he was convicted by his mere presence. 3) The evidence as to who shot the victim and the circumstances surrounding the shooting itself were entirely circumstantial. The evidence implicating J.H. as having aided O.J. was a combination of direct and circumstantial evidence. The appeal court indicated that the evidence of J.H.'s intent was circumstantial. The appeal court found that it would be reasonable and supported by the evidence for the jury to have found that the only reasonable conclusion was that J.H. knew and intended his conduct would have the effect of aiding O.J. in the commission of the offence of causing grievous

bodily harm or murder. 4) It was found to be reasonable for the jury to conclude that J.H.'s guilt was the only reasonable conclusion available on the totality of the evidence; and 5) J.H. argued that O.J.'s counsel invited the jury to avoid convicting O.J. and suggested that J.H. was the more likely perpetrator by referring to wrongful convictions and Mr. Milgaard in her closing remarks. The appeal court found the ground of appeal to lack merit. The address would also have had the effect of benefitting J.H. Further, J.H.'s counsel approved the correcting instruction at trial. J.H.'s appeal was dismissed in its entirety. The appeal court dealt with O.J.'s issues as follows: 1) the trial judge did direct the jury to consider the exact same evidence in order to determine whether the Crown had proven planning and deliberation beyond a reasonable doubt. The appeal court indicated that the verdict against O.J. was not inconsistent with J.H.'s verdict on a comparison of the strength of the evidence against each man; and 2) O.J. argued that he should not have been convicted of first-degree murder because J.H. wasn't. The difference in strength of the evidence against each appellant was found to support a finding of planning and deliberation on the part of O.J.

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6517633 Canada Ltd. v Clews Storage Management Keho Ltd., 2019 SKCA 140

Jackson, December 20, 2019 (CA19139)

Civil Procedure – Appeal
Debtor and Creditor – Judgment Registration – Notice of Appeal
Statutes – Interpretation – Court of Appeal Rules, Rule 15
Statutes – Interpretation – Enforcement Act
Statutes – Interpretation – Land Titles Act

The respondent company obtained summary judgment dismissing a claim that the appellant brought against it. The appellant filed a notice of appeal of the chambers decision. The respondent was awarded costs. The respondent company registered an enforcement charge in the judgment registry established under s. 18 of The Enforcement of Money Judgments Act (EMJA) and registered an interest based on its judgment against 14 separate titles to the land held by the appellant under s. 11 of the Land Titles Act (LTA). The appellant applied in chambers for an order pursuant to Rule 15 of The Court of Appeal Rules directing that the interests registered against the 14 titles be removed and that no enforcement of the $4,328 judgment and $780 in registration costs be permitted pending decision. Alternatively, the appellant argued the order could be made pursuant to the court's inherent jurisdiction.
HELD: The appeal was dismissed. Section 21(2)(b) of the EMJA permits registration of a judgment in the judgment registry while an

appeal is pending with respect to the judgment. The appeal court found it plain that the legislature intended that a creditor with a money judgment may take immediate steps to register, and secure, the judgment by registering it. The filing of an appeal precludes the registration of a judgment in the judgment registry if the judgment has not already been registered. The appellant submitted that if the direct registration against a title to land, as opposed to registering it in the judgment registry, is permitted before a notice of appeal is filed, it is not permitted after a notice of appeal is filed. The appeal court had to determine what "execution" meant as used in Rule 15 of The Court of Appeal Rules. There is case law defining it broadly and there is case law defining it more narrowly. The appeal court concluded, for four reasons, that the registration of an interest based on a judgment against land does not constitute execution in the context of Rule 15(1). First, a narrow interpretation is consistent with the intentions of the EMJA and the LTA. Section 21(2)(b) of the EMJA indicates that the registration of a judgment is a preliminary step to execution. A distinction before an appeal is filed versus after an appeal is filed would create a strange technicality within the enforcement system. Second, enforcement charges and enforcement measures are distinguished in the EMJA. Third, none of the provisions in the legislation prior to the enactment of the EMJA required the sheriff to wait for the appeal period to expire to perform the registrations pursuant to The Executions Act and LTA, as it then was. Fourth, Rule 15 does not determine any priorities: it is directed to maintaining the status quo. The appeal court found that permitting the registration of a judgment interest against personal property and land is consistent with the purpose of Rule 15. Rule 15 does not preclude the registration of a judgment interest against the title to land after an appeal is filed. For an act to be an execution of the judgment for the purposes of Rule 15, it must be a step taken that will lead to the judgment being satisfied, such as through the actual seizure of property or the garnishment of debt. The appeal court declined to exercise its inherent jurisdiction to remove the interest registrations filed by the respondent. The action was dismissed without an order to costs.

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Saskatchewan (Attorney General) v Latzkowski, 2019 SKQB 335

Scherman, December 23, 2019 (QB19314)

Criminal Law – Appeal – Acquittal
Criminal Law – Approved Screening Device – Refusal to Provide Sample
Criminal Law – Charter of Rights – Arbitrary Detention – Handcuffing

Criminal Law – Defences – Charter of Rights, Section 9, Section 24(2)

The accused was acquitted of refusing to provide a breath sample contrary to s. 254(2) of the Criminal Code. The trial judge found that handcuffing the accused in a s. 254 investigative detention was, in the circumstances, arbitrary detention that breached the accused's s. 9 Charter rights. The judge excluded evidence of the refusal pursuant to s. 24(2) of the Charter. The accused was found sleeping in his vehicle at 2:30 am with the motor running at the Saskatoon airport. A commissionaire at the airport located the accused in the vehicle and called the police. He had previously observed the accused to be stumbling, with impaired speech, inside the airport building. The accused did not wake up when police knocked on the door. Officers then opened the front doors and shut off the vehicle. An officer noticed a small odour of alcohol when he reached in the vehicle to shut it off. The accused was read an ASD demand. He was placed in handcuffs and escorted to the police vehicle. Four attempts to blow into the ASD were not successful at obtaining a result. When police produced a new machine, the accused refused to provide a sample. He was arrested approximately 20 minutes after the police arrived at his car. He had been handcuffed for 16 minutes. The accused was polite and cooperative throughout. The officer testified that he handcuffed all individuals he detained for officer safety reasons. The trial judge found that the handcuffing was not objectively reasonable. The Crown's grounds of appeal were: 1) the trial judge erred in finding arbitrary detention based on the police officer handcuffing the accused, and 2) the trial judge erred in his s. 24(2) analysis and his decision to exclude the evidence of refusal. HELD: The grounds of appeal were dealt with as follows: 1) judicial decisions are conflicting on whether handcuffing during investigative detention is permissible. There was no cited case where the standard practice of handcuffing in all investigative detention situations to ensure officer safety was appropriate. The court, acting as an appellate court, could not find any palpable or overriding error on which to overturn the findings of fact of the trial judge. The trial judge also stated the correct law. He was also correct in his application of the legal principles to the facts of the case as he found them. The appeal court did not find that the trial judge said a pat-down search would have been authorized, nor did it agree with the Crown's submission that handcuffing is less or no more intrusive than a pat-down search. Handcuffing during investigative detention requires objectively reasonable grounds for using handcuffs, the grounds required being more than those required for a pat-down search, given the greater interference with liberty and bodily integrity; and 2) the appeal court found that the trial judge considered each element of the Grant analysis and found no basis upon which to interfere with the decision of the trial judge. The trial judge's conclusion that the state conduct was on the more serious side of the scale of seriousness and favouring exclusion of the evidence was not unreasonable. The impact of the breach was also

appropriately considered. The finding that the police action of handcuffing the accused had a significant impact on his right not to be arbitrarily detained was reasonable. The trial judge also appropriately considered society's interest in the adjudication of the charge on the merits. He recognized that the charges of impaired driving and refusal are serious matters that society has an interest in adjudicating. The trial judge undertook a comprehensive analysis of whether admitting the evidence would bring the administration of justice into disrepute. The Crown's appeal was dismissed.

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George v Merasty, 2020 SKCA 9

Richards Caldwell Barrington-Foote, January 23, 2020 (CA20009)

Family Law – Child Custody and Access – Appeal
Family Law – Child Custody and Access – Maximum Contact Principle
Family Law – Child Custody and Access – Mobility
Family Law – Child and Custody Access – Parental Custody
Family Law – Child and Custody Access – Queen's Bench Rules, Part 7, Part 15
Family Law – Child Custody and Access – Summary Judgment

The parties began cohabiting in 2009, married in 2014 and separated at the end of 2015. Their children were born in 2010 and 2012. A parenting agreement was signed in 2015, whereby the parties would have joint custody with the respondent having primary responsibility for the children on a day-to-day basis. The appellant's access was liberal, including every second weekend and one to two nights per week when the respondent was working nights as a registered nurse. The respondent became engaged to a police officer living in Manitoba, near Winnipeg. The appellant's parents lived in Winnipeg and had a strong relationship with the children. The respondent had accepted a new higher-paying job in Winnipeg. She applied by summary judgment application to move with the children, and the order was granted. The chambers judge found that the respondent was the primary caregiver when the parties were together and that she struggled to have the appellant engage as a parent. The appellant was found not to take initiative regarding participating in his children's activities. The chambers judge found that the respondent's position in Manitoba was in significant part due to the appellant's reluctance to care for the children cooperatively or generously. Her new job was only regular day shifts. The appellant argued that the chambers judge erred by: 1) proceeding by way of summary judgment; 2) not correctly considering and applying the maximum contact principle; 3) failing to adequately consider or explain how his decision was in the best interests of the children; and 4) improperly taking parental conduct

into account.
HELD: The appeal was dismissed. The appellant's arguments were dealt with as follows: 1) Rule 15-2(2) of the Queen's Bench Rules states that the general procedure and practice of the court must be adopted with any necessary modification in a family law proceeding. Part 15 itself also has provisions contemplating proceedings in the general nature of summary judgment. For example, a judge can hear oral evidence on an application pursuant to Rule 15-19(12). Further, the trial of an issue can be by way of oral or affidavit evidence or otherwise as the judge conducting a trial may direct (Rule 15-22(1)). The appeal court canvassed issues regarding the relationship between Parts 7 and 15 of the Rules, noting, however, that none of that was specifically at issue in the appeal. The appellant could only succeed on this argument if there had been a palpable and overriding error regarding whether there was a genuine issue requiring a trial. He did not do so. The court did, however, agree that the application of the summary judgment procedure in family law required caution because a) the potential impact can be dramatic, and b) affidavit evidence can obscure the truth or reveal only parts of it. The appellant also questioned the timing of a summary judgment decision since it had not been made until December 28, 2018, with trial scheduled for January 7 to 11, 2019. He said the approach was inconsistent with summary judgment offering timely and cost-effective dispute resolution. The appeal court found legitimacy in the argument; however, it was unable to see the consideration as being a ground for overturning the decision. The appeal court confirmed that there was no genuine issue requiring a trial. The parties were also spared considerable expense by not having the trial; 2) the appellant did not show how the chambers judge had not accounted for the maximum contact principle. The appeal court found that the chambers judge was alert to the maximum contact principle. The appellant had been given as much opportunity to have contact with the children as was reasonably possible, given the move; 3) the appellant did not persuade the appeal court that the chambers judge's decision did not take into consideration the best interests of the children. The chambers judge expressly framed his analysis around the best interests of the children; and 4) the appellant said that his parental conduct was taken into consideration when the chambers judge referred to the appellant's use of vulgar and offensive language. The appeal court did not find that the referral had any impact on the ultimate decision of the chambers judge. The respondent was entitled to costs in the usual way.

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Wood Mountain Lakota First Nation No. 160 v Goodtrack, 2020 SKCA 10

Caldwell Schwann Tholl, January 31, 2020 (CA20010)

Civil Procedure – Appeal
Damages – Damages in Tort – Trespass
Torts – Trespass

The appellant, a First Nation, and the respondents had a long-standing dispute regarding the right to use some agricultural land located in the First Nation reserve (reserve). The appellant received a permanent injunction prohibiting the respondents from occupying agricultural land on the reserve, along with a judgment for damages, foregone rent, and punitive damages. The appellants appealed that decision, arguing that the chambers judge erred by not awarding damages for a demolished fence and past loss of funding under a federal government program. The respondents farmed 5.25 sections of agricultural land (land) located on the reserve for many years without paying any rent. The appellant created an interim land management policy in 2012 that required users of agricultural land to obtain a permit to occupy the land and to also pay fees for doing so. The reserve worked to meet all the requirements to be enrolled in the Reserve Lands and Environmental Management Program (RLEMP) and was entitled to funding for all the reserve land that it had under permit in 2013 and subsequent years. The respondents would not fill out the permit application. They continued to exclusively use and occupy the land from the start of 2013 until the end of 2017 without a permit and without paying rent. The respondents also tore down a fence erected by the reserve. The respondents denied that they committed any trespass because they had implied consent from the reserve. The chambers judge did not award damages in relation to alleged losses under RLEMP or in relation to the destruction of a fence even though the chambers judge found that the respondents tore it down. The issues were: 1) whether the chambers judge erred by not awarding damages for the fence destroyed by the respondents; and 2) whether the chambers judge erred by not awarding damages for loss of RLEMP funding.
HELD: The appeal was allowed. The cross-appeal was dismissed. The issues were dealt with as follows: 1) one of the respondents admitted that he tore down the fence and the chambers judge found as a fact that the respondent tore down the fence. The reserve indicated that the fence cost $6,509.20. The appeal court found that the chambers judge erred in law by failing to address the claim under the special category of damages. The appeal court awarded the reserve $6,509.20 in damages; and 2) the chambers judge was not satisfied "that the First Nation actually suffered a loss" so did not award damages for foregone RLEMP funding for the period that lost rent was awarded. The funding for the program is determined using a formula that is directly tied to the number of acres for which permits have been issued in the previous years under s. 28(2) of the Indian Act. No RLEMP funding was provided to the reserve for the land the respondents occupied for five years because it was not permitted. The respondents were aware that the reserve wanted them to apply for a permit. They were also aware the RLEMP

funding required the land be permitted for funding to be received. The chambers judge rejected the claim for damages because he said that the reserve did not adequately explain what it had to do to obtain the funding. The appeal court found that the chambers judge overlooked or misapprehended a large portion of the uncontradicted evidence setting out the steps the reserve had taken to qualify for RLEMP funding for the land. If a permit application had been received from the respondents, the reserve would have performed the remaining simple steps and a permit and funding would have been granted. Alternatively, the respondents could have vacated the land, thereby allowing someone else to apply for a permit to farm the land. Damages in trespass should place a plaintiff in the same position in which it would have been without the trespass. There was no doubt regarding the loss and quantification of the RLEMP funding. The lost funding was $155,552.62. Necessary expenses to obtain the funding must be subtracted as must any amount avoided because of the trespass. There were no costs avoided as a result of the land not having been permitted under RLEMP. The court of appeal found that the losses under the RLEMP program were a foreseeable consequence of the respondents' trespass on the land. The loss of RLEMP funding was found to be a foreseeable consequence of the respondents' intentional tort. The appeal court increased the damage award by $155,552.62 to account for lost RLEMP funding for the years 2013 to 2017. The reserve was awarded fixed costs of $5,000.00.

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R v Gartner, 2020 SKCA 13

Ottenbreit Barrington-Foote Tholl, February 10, 2020 (CA20013)

Criminal Law – Appeal – Acquittal
Criminal Law – Dangerous Driving Causing Death – Speed
Crown – Evidence – Totality of Evidence

The respondent was charged with dangerous driving causing death contrary to s. 294(4) of the Criminal Code when the passenger of the motorcycle he was driving was killed as a result of a collision. The accident occurred when the motorcycle collided with a vehicle at an intersection. The respondent was travelling behind Mr. B.'s vehicle when they approached the intersection. Mr. B. stopped at the intersection when the light changed from green to amber. The respondent passed Mr. B.'s stopped vehicle and entered into the intersection where he collided with Mr. H.'s car. Mr. H. was turning left into the intersection. According to Mr. H., he had entered the intersection on the green light, waiting to make a left turn. He indicated that when the light turned amber and then red, he attempted to make the left turn to clear the intersection. Mr. H. said that he braked when he saw the motorcycle. Mr. B. had a forward-

facing dash camera that recorded audio and video of the incident. The dash camera recording evidence did not fully accord with Mr. H.'s description of his movements at the intersection. The respondent consented to Cst. B. being qualified as an expert in the area of collision analysis, including the calculation of speed. The trial judge found the respondent's speed to be a relevant consideration and concluded that the respondent was travelling at 57 km/hr, which was the lower of the vault speed calculations provided by Cst. B. The trial judge refused to review the dash camera recording to determine the position of the motorcycle when the light turned amber. The trial judge found that the actus reus of the offence had been proven. The respondent was driving in a manner that was dangerous to the public. The trial judge was not satisfied that the mens rea had been proven. The Crown raised the following questions of law on appeal: Did the trial judge err 1) by determining the Crown was required to prove the respondent's speed beyond a reasonable doubt; 2) by speculating about matters that were not in evidence; 3) by failing to consider the totality of the evidence; and 4) in his application of the mens rea element for dangerous driving?

HELD: The appeal was allowed. The issues were determined as follows: 1) speed is not an element of the offence of dangerous driving. It is a fact that may be relevant to the determination of the elements of the offence. The Crown does not need to prove the individual facts beyond a reasonable doubt. The trial judge erred by requiring the Crown to prove the respondent's speed beyond a reasonable doubt. The error was sufficient to satisfy the appeal court with a reasonable degree of certainty that the verdict would not necessarily have been the same had the error not occurred. 2) The Crown argued that the trial judge erred by assessing whether the respondent had made a split-second decision that he could not safely stop before entering the intersection. There was no direct evidence as to the respondent's thoughts or considerations as he approached the intersection. The appeal court found that the trial judge was not discussing the respondent's subjective thoughts regarding his ability to stop: the trial judge was examining the choice to stop or to proceed into the intersection based on the modified objective standard set out in Beatty. The trial judge did not assess the mens rea by speculating in the manner asserted by the Crown. The trial judge did not err; 3) the Crown argued that the trial judge failed to consider the totality of the evidence in reaching his verdict. Specifically, the Crown argued that the trial judge erred by expressly refusing to consider the dash camera recording when determining whether the respondent had time to stop his motorcycle safely. The Crown said that the trial judge, therefore, refused the evidence on two crucial facts: the distance the respondent was from the intersection when the light turned amber, and the ease with which Mr. B. stopped his vehicle even though he was ahead of the respondent. The Crown also argued that the error was compounded by the trial judge's conclusion that he could not determine a safe stopping distance for the motorcycle without

expert evidence covering several topics related to the respondent's ability to stop this specific motorcycle safely. The appeal court concluded that the trial judge erred by expressly refusing to view the dash camera recording to determine the respondent's position on the road when the light turned amber and to observe Mr. B's manner of stopping. It was an error of law to fail to consider the evidence in its totality concerning this issue. The appeal court found that the trial judge also erred by requiring extensive evidence on several subjects related to the safe stopping distance for the motorcycle. The respondent was an average driver and able to provide evidence within his experience and knowledge. The trial judge also should not have required expert evidence to reach reasonable inferences regarding the motorcycle's ability to stop relative to that of other vehicles on the road. The appeal court found that the errors were sufficient to satisfy it with a reasonable degree of certainty that the verdict would not necessarily have been the same had the errors not occurred. Finally, 4) the appeal court did not analyze the mens rea issue, given that they were already ordering a new trial.

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Lutz Estate v Lutz, 2020 SKCA 14

Ottenbreit Caldwell Leurer, February 20, 2020 (CA20014)

Wills and Estates – Wills – Interpretation
Family Law – Dependants' Relief – Maintenance

The appellant, the executor and sole beneficiary of the estate of her brother, G.L., appealed the decision of a Queen's Bench judge that determined that G.L.'s will was valid and that its terms entitled her to receive all of his estate. However, the judge made an order under The Dependants' Relief Act, 1996 (DRA) for maintenance from the estate for G.L.'s two daughters, aged 14 and 12 at the time of G.L.'s death in 2014. The order the judge devised would eventually result in the entirety of G.L.'s property passing to his daughters. The litigation guardian for the daughters was their mother, who had been G.L.'s common-law spouse. The parties separated in 2004, and their daughters lived with their mother but were close to G.L. In 2012, G.L. became seriously ill, and while he was in the hospital, he told the appellant that he wanted to make arrangements for his property in the event of his death and wanted her to ensure that his daughters would be taken care of. The appellant prepared the will. In it, G.L. named the appellant his executor and left all his property to her. The will was witnessed by G.L.'s friend, who testified that during their conversation at that time, G.L. was of sound mind. He further testified that G.L. confirmed he wanted his daughters to be taken care of because he feared that the money would be dissipated if their mother had access to it because she had a gambling

addiction. The witness said that G.L. wanted the appellant to handle it so his daughters would benefit. The appellant's testimony regarding G.L.'s intentions was similar. The trial judge concluded that the will was valid based on this evidence, although it was not written in a way that gave effect to G.L.'s desire for the appellant to act as a form of trustee for the property to ensure that daughters did not lose it. He therefore determined that to accomplish G.L.'s goals, the appellant held the property as a trustee so that his daughters would have access to the profits from it to advance their education, to take care of themselves and to obtain the property later in their lives. He then ordered that because of G.L.'s failure to make provisions for his daughters in the will, it would be appropriate to make an order for maintenance, pursuant to the DRA, of a grant of $5,000 cash to each daughter; $15,000 per year for each of them to pursue full-time education or training for four years; or a lump-sum payment of $10,000 at age 25 should they choose not to pursue an education and vesting of all of the remaining estate assets in the daughter's name when the youngest turned 23. The appellant argued on appeal that the trial judge erred: 1) in making the DRA order, by finding that G.L. intended to benefit only his daughters; 2) in ordering that the daughters receive all the remaining assets of the estate following the provision of maintenance; and 3) in principle, by fixing an amount of maintenance that was unreasonable. The respondents cross-appealed on several grounds.
HELD: The appeal was dismissed. The court found concerning the appellant's grounds that: 1) the trial judge's finding of fact relating to G.L.'s subjective intention should not be disturbed. He had not committed an error, let alone a palpable and overriding one; 2) the trial judge had exercised his discretion properly in making the DRA order, following the principles established in the jurisprudence regarding maintenance under the DRA. He made it to cover the future, albeit undefined, living expenses of G.L.'s children. It was, therefore, an award of an amount for their maintenance. Lastly, 3) there was no basis to interfere in the trial judge's exercise of his discretion in deciding that G.L.'s moral duty to his children was part of the basis for determining the amount of maintenance that should be reasonably awarded in this case. As a "judicious parent," G.L. would weigh the needs of his children more heavily following his death. In the unique circumstances of this case, the DRA order would fulfill G.L.'s known intentions despite the form he expressed them in the terms of his will. The court dismissed the respondent's cross-appeal.

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Wheatley v Brennan, 2020 SKPC 3

Demong, January 2, 2020 (PC20001)

Contracts – Formation – Verbal
Contracts – Interpretation
Small Claims – Breach of Contract

The plaintiffs sought judgment of $7,500 from the defendants pursuant to a settlement agreement they said was entered into in the spring of 2019. The defendants argued that there was no settlement agreement, and alternatively, if there were one, it was contingent upon the sale of a specific parcel of land to a third party. In 2010, the plaintiffs commenced an action in the Court of Queen's Bench seeking to recover $30,000 jointly and severally from each of the defendants and two other parties. The action related to an alleged non-payment for goods and services provided to the defendants in that action. The plaintiffs registered a certificate of pending litigation against the title to the property, known as Lot 6. Default judgment was obtained against the other two parties. The defendants in this action remained registered owners of an undivided one-half interest in Lot 6. In March 2019, they entered into an option to purchase agreement with a third party. The value that the defendants would receive for Lot 6 under the agreement was $24,166. In April 2019, the defendants obtained an order dismissing the QB action for want of prosecution. According to the defendants, they nonetheless contacted the plaintiffs in either late April 2019 or May 2019 and offered them the sum of $7,500 when the sale of Lot 6 went through. They did so out kindness because they were sorry that the plaintiffs had not had any success recovering from the other two parties in the QB action. A plaintiff testified that the defendants contacted him by phone and explained to him that they had a purchaser for Lot 6. He said that the defendant asked him to end the litigation, and if he did, he would give him $7,500 after the sale of Lot 6. Correspondence was exchanged between each of the parties' lawyers, resulting in the plaintiffs removing the certificate of pending litigation from Lot 6. The sale did not go through. There was correspondence between the lawyers. The issue was whether a letter from the plaintiffs' lawyer to the defendants' lawyer should be treated as an amended offer by the plaintiffs to the defendants resulting in payment of $7,500 regardless of whether the sale of Lot 6 went through.
HELD: The court accepted the evidence of the plaintiff that the defendants called him to offer $7,500 and that the plaintiff accepted it. The plaintiffs and defendants agreed that in exchange for the plaintiffs' promise to end the litigation, the plaintiffs would receive the sum of $7,500 when Lot 6 was sold. The court did not accept the defendants' argument that there was no longer an agreement in place because the sale did not go through. The original agreement was found to contemplate that payment would be received when Lot 6 was sold. The oral agreement was found to contemplate that the plaintiffs would receive $7,500 when Lot 6 was sold. The plaintiffs have a contractual arrangement where payment of $7,500 must be made when Lot 6 is ultimately sold. The money is not yet due and owing because Lot 6 has not been sold. The plaintiffs'

action against the defendants was, therefore, dismissed. The court declined to award any costs to either party.

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R v Hussein, 2020 SKPC 8

Daunt, February 14, 2020 (PC20007)

Criminal Law – Controlled Drugs and Substances Act – Possession for the Purpose of Trafficking – Cocaine
Constitutional Law – Charter of Rights, Section 8, Section 9

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 and having in his possession proceeds exceeding $5,000 from the commission of an indictable offence contrary to ss. 354(1) and 355(b) of the Criminal Code. Police laid charges after a constable, a member of the Prince Albert Integrated Street Enforcement Team (ISET), received a tip from a confidential source that an unknown black male was selling crack from a residence occupied by an. L.D. The constable had participated in a search of a previous residence occupied by L.D. that yielded crack cocaine and drug paraphernalia. After checking CPIC and learning that L.D. was subject to release conditions including a residence clause that specified her current address, the constable assembled a search team. He then prepared the information to obtain a search warrant (ITO) and presented it to a justice of the peace who issued it. The ITO stated that a confidential informant, whose identity was not revealed and who was not willing to testify, had provided the tip. The search team went to L.D.'s apartment and found the accused inside. On the basis that the accused matched the description of "black male" given in the tip, the police handcuffed him and patted him down, discovering $250, an Alberta driver's licence and a bag of crack cocaine in his pockets. The accused and L.D., who was present, were arrested for possession for the purpose of trafficking, read their rights and warnings and taken to the police station. The police then searched the residence and found only a cell phone. The Crown's case rested the items seized from the search of the accused and two dated text messages on the cell phone, neither of which had been sent or received in Saskatchewan or that could be attributed to the accused. The defence brought a Charter application, alleging that the accused's ss. 8 and 9 Charter rights had been infringed. It contended that: 1) the search warrant was issued without reasonable grounds, thereby violating the accused's s. 8 right to be secure from unreasonable search and seizure; 2) if the accused's arrest was made without reasonable grounds, his s. 9 Charter right had been violated; and 3) the evidence obtained in violation of the Charter should be excluded.
HELD: The court found that the accused's ss. 8 and s. 9 Charter

rights had been violated. It conducted a Grant analysis and found that it would not admit the evidence because it would bring the administration of justice into disrepute. It found with respect to each issue that: 1) the search of the accused was not authorized by law and violated s. 8 of the Charter. The ITO did not disclose reasonable evidence that might reasonably be believed and the warrant was invalid on its face, being issued without reasonable grounds. The court expressed concern that the ITO was based on the tip of one informant who was unwilling to testify and that the tip was vague; 2) the arrest of the accused was unlawful. The search of the accused was only lawful if it was incidental to a lawful arrest. In this case, the information in the ITO was insufficient to ground a search of the residence or to justify an arrest of anyone inside the residence; and 3) under the Grant analysis, it was of great concern that the breaches were serious and systemic: the police acted in haste without sufficient investigation; the justice of the peace issued a warrant in the absence of credible, compelling, reliable and corroborated information; and ISET's standard practice in similar circumstances was to arrest everyone they found in a residence without considering whether such arrests were necessary or justified.

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Saskatchewan Safety Council v Sherwood (Rural Municipality No. 159), 2020 SKQB 1

McMurtry, January 3, 2020 (QB20001)

Civil Procedure – Costs – Solicitor and Client Costs
Municipal Law – Resolutions – Application to Quash
Municipal Law – Servicing Agreement
Municipal Law – Zoning Bylaw – Discretionary Use

The applicant council is a registered non-profit charity (SSC) seeking to build a safety centre of excellence (centre) on land located in the respondent rural municipality (RM). The other applicant, R.A., donated 30 acres of land (land) to the SSC to allow it to construct the centre. The SSC had to apply to the RM to subdivide the land. The applicants provided the RM with a draft subdivision application in 2017 asking for feedback. The parties then started to negotiate a draft servicing agreement. The negotiations stalled. According to the applicants, the centre was designed to be self-sufficient, so the servicing fees set by the RM were speculative and inappropriate. In September 2018, the SSC appealed the RM's servicing fee requirement to the Saskatchewan Municipal Board (SMB). The RM's chief administrative officer did not object to the appeal. The hearing has not yet been scheduled. The Council advised the applicants that they would meet in May 2019 to discuss the matter. The application had not yet been made; however, the RM did make a resolution (resolution) concerning the proposed application. The resolution

stated that the RM would not grant the subdivision application because the use was not a permitted use of the land, and the discretionary use did not conform with the future land use intentions in the Official Community Plan Bylaw. A letter was sent to the applicants summarizing the meeting. Council also advised SMB that their appeal was moot. The applicants sought an order, pursuant to s. 358 of The Municipalities Act quashing the resolution because the Council of the RM did not follow its own procedure, thereby breaching its statutory obligations. The court considered the following: 1) the application of the zoning bylaw and official community plan; 2) whether the RM Council followed the Zoning Bylaw and Official Community Plan.
HELD: The RM made a decision contrary to statutorily required procedure, and thus the court quashed the resolution. The court discussed the issues as follows: 1) the centre would be an "Institutional Use", which was discretionary use for agricultural districts. The RM's Official Community Plan (OCP) indicated that the future land use would be "Highway Commercial/Light Industrial." Highway Commercial permitted Institutional Use, but Light Industrial did not. The proposed use of the centre could conform with the future use of the land if the RM chose to rezone the land as Commercial. The RM indicated that the ultimate zoning of the land was unknown, and it would make that decision upon the application of an interested developer. The applicants argued that ss. 358(b) and (c) of The Municipalities Act were violated when Council passed the resolution. The RM had a bylaw discussing the procedure it must follow upon receipt of a discretionary use application. The RM said that the resolution was a temporary indication of Council's intention only; 2) before the centre could be constructed, the applicants had to obtain: a) approval for a discretionary use; b) an agreement on servicing fees; and c) approval for subdivision of the land. The RM argued that discretionary use could be resolved before the parties discussed servicing fees and the applicants argued that the servicing agreement had to occur first. When the RM decided to put the discretionary use issue before Council, it circumvented the appeal to the SMB that both parties agreed to pursue. The RM Council also did not follow the Zoning Bylaw when it determined the discretionary use question without an application for discretionary use before it. Section 358 of The Municipalities Act allows the court to quash a resolution passed by an RM Council. The court's reviewing power is limited. The court concluded that Council made the resolution based on incomplete information because it did not have an application for discretionary use before it. Also, Council made its resolution in the flawed belief the discretionary use did not conform to the OCP. Further, the RM's procedure was also not followed. Council acted contrary to its obligations under The Planning and Development Act to receive and consider applications for discretionary use in a particular manner, i.e. the manner set out in the Zoning Bylaw. The combined weight of the RM Council's actions led the court to conclude that they acted unreasonably and outside the legislative schemes of The

Planning and Development Act and The Municipalities Act. The resolution was quashed. The court did not agree that the case was so exceptional as to warrant solicitor-client costs. The applicants were awarded one set of party and party costs.

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R v Peequaquat, 2020 SKQB 2

Tochor, January 7, 2020 (QB20002)

Criminal Law – Appeal – Acquittal
Criminal Law – Blood Alcohol Level Exceeding .08
Criminal Law – Defences – Charter of Rights, Section 8, Section 24(2)

The Crown appealed the acquittal of the accused on charges of driving over .08 and impaired driving. The trial judge found that police violated the accused's s. 8 Charter rights, and he excluded the evidence against him. An officer was made aware of a possible impaired driver at 6:55 am. A license plate number and description of the vehicle were provided. The officer could not locate the vehicle, so had dispatch give him the address of the owner of the registered vehicle. The vehicle was in the backyard of the address of the registered owner. The officer and another entered the property and saw two people sitting inside the parked vehicle. The officer opened the driver's door and detained the accused for an impaired driving investigation. The Crown argued that the accused did not establish that he had a reasonable expectation of privacy because there was no evidence that he lived at the property. The trial judge found that there was evidence the accused lived at the address and had a reasonable expectation of privacy in the backyard. The search was found to be unreasonable and, therefore, in violation of s. 8 of the Charter. The Crown appealed on the following grounds: 1) the trial judge erred in finding the police violated the respondent's s. 8 Charter rights, and 2) the trial judge erred in excluding the evidence pursuant to s. 24(2) of the Charter.
HELD: The Crown's appeal was dismissed. The court addressed its grounds of appeal as follows: 1) the Crown argued that any information provided to the officer from dispatch was hearsay and therefore inadmissible to prove the accused resided at the residence. The trial judge had found that the residence was where the registered owner of the vehicle lived, and the officer believed the accused was the registered owner. The appeal court found that there were two foundations upon which the trial judge could base the finding: a) the officer testified that she believed the accused lived at the address, and b) the sworn Information indicates the accused's address. The Crown also argued that the actions of the police in entering the property did not violate s. 8 because the entry was not to a dwelling house. The appeal court did not find an error in the

trial judge's statement that the privacy interest in the driveway was still significant enough to constitute an objectively reasonable expectation of privacy, even if it was lower than that in a dwelling house, and 2) the Crown argued that the trial judge erred by incorrectly weighing the Grant factors. The Crown disagreed that the breach was as serious as characterized by the trial judge. Further, the Crown disagreed with the trial judge's conclusions on the impact of the breach on the accused. The trial judge did not commit any error of principle, and due to the considerable deference owed to a trial judge's weighing of the factors involved in the analysis, the appeal court found no basis to interfere with the conclusion.

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Prpick White v Turanich, 2020 SKQB 5

MacMillan-Brown, January 9, 2020 (QB20022)

Civil Procedure – Limitation Period
Civil Procedure – Summary Judgment
Contracts – Sale of Land

A judge determined that the defendant had already sold farmland (land) to another purchaser, so the plaintiff commenced the action alleging that the defendant agreed to sell the land to them. The plaintiffs applied for summary judgment against the defendant and the defendant applied to cross-examine the plaintiffs on their affidavits in support of the summary judgment application. The parties were mostly in agreement as to the factual foundation of the dispute. In February 2012, one of the plaintiffs agreed to purchase the land. In the February agreement, the purchaser was noted as the plaintiff or "nominee." In March 2012, another agreement was made wherein all of the plaintiffs were listed as purchasers. The required deposit was made. D.B. had a registered miscellaneous interest (interest) against the land, which lapsed on April 10, 2012. Prior to April 10, 2012, D.B. commenced a claim against the defendant, alleging a binding agreement with the defendant to purchase the land. The purchase by the plaintiffs was suspended. The D.B. action went to trial in 2017. The trial judge found in favour of D.B. and granted him specific performance, so he took possession of the land. The two key areas of dispute between the parties were: whether the plaintiffs knew about the D.B. action before or after they signed the March agreement and what, if any, representations the defendant made to the plaintiffs in relation to the D.B. action. The defendant's arguments were that: 1) the plaintiffs' claim was statute-barred due to a limitation period; 2) there was no consideration to extend the closing date for the sale of the land; 3) it was a condition precedent that the defendant would be able to convey clear title; 4) there was a common mistake between the parties as to the defendant's ability to

convey the land to the plaintiffs; and 5) the March agreement was frustrated by the D.B. action.

HELD: The court first discussed the disputed facts. The lawyer indicated that she and one of the plaintiffs had spoken in late February about moving the possession date for the sale of the land as a result of the interest. Further, the lawyer indicated that she discussed the interest with the other two plaintiffs when they came into her office to sign the March agreement. The court determined that all plaintiffs knew about the interest before the March agreement was signed. The plaintiffs all said that throughout the years, the defendant indicated to them that D.B. "had no case." He assured them over the years that he would ultimately be able to sell the land to them. The plaintiffs indicated that they did not know the full nature and extent of the defendant's dealings with D.B. until the trial of that action. The defendant alleged that he never told the plaintiffs that he would ultimately be able to proceed with the sale to them. The court then considered the defendant's arguments as follows: 1) the court was not confident that it could determine precisely when the plaintiffs learned of the D.B. action. The court, however, found that the determination was not necessary for the purposes of the summary judgment application. If the limitation period started running as soon as the plaintiffs became aware of the D.B. action, it did not matter whether the plaintiffs found out in February or April. The two-year limitation period would have long expired when the plaintiffs issued their claim against the defendant. If the limitation period did not start running until the decision of 2017 on the D.B. action, then the court did not have to decide whether it preferred the plaintiffs' or defendant's evidence. The plaintiffs submit that, even if the limitation period commenced when they learned of the D.B. action, the defendant was estopped from relying upon a limitation period defence because of his representations that he made to them and that they reasonably relied upon. Whether or not the doctrine of promissory estoppel applies in a given case is highly fact-specific. The court found that the issue of the content and timing of representations made by the defendant was material. The court concluded that it could not resolve the dispute based upon the evidence before it even if the evidence was weighed, credibility was evaluated, and reasonable inferences were drawn. The application for summary judgment was, therefore, dismissed. The remaining defences were not considered. The court noted that a full trial may not be necessary. A limited hearing involving oral evidence on delineated issues may suffice. The court directed the Local Registrar to convene a conference call with counsel to discuss the format and scheduling of such submissions.

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Wishlow v Reddekopp, 2020 SKQB 6

Danyliuk, January 9, 2020 (QB20010)

Family Law – Pre-trial Conference – Filing Requirements
Family Law – Pre-trial Conference – Joint Request

A joint request for pre-trial conference form was signed by both parties' lawyers in August 2019 setting the pre-trial conference for January 8, 2020. Neither party filed all the required pre-trial conference materials by the end of 2019 as required. The petitioner's lawyer did file a pre-trial brief, but a significant amount of required supporting material was not filed at all. The respondent's brief was not filed until Friday, January 3, 2020. A fiat was rendered requiring the parties' lawyers to appear before the court on January 6 to speak to whether the matter could proceed on January 8.
HELD: The court reluctantly adjourned the pre-trial conference. The lawyers should not have signed the joint request because they were not ready for pre-trial or trial. Queen's Bench Rule 4-11(1)(a)(i) and numerous cases require readiness prior to signing the joint request. The respondent's lawyer breached the ten-day deadline for filing his client's brief of law. The court found that late filing: a) was rude and disrespectful to counsel and the party opposite; and b) diminished the party opposite's ability to properly prepare for the pre-trial conference, thus depriving the pre-trial process of its efficacy; and c) could have had an effect on the court. The pre-trial judge should have a ten-day window to prepare. The respondent's failure to file the brief in a timely manner was a significant factor in causing the pre-trial conference to be adjourned. Further, updated property statements should have been filed because the most recent on the court file were from spring 2017. There was also a lack of material to address the issues resulting from the petitioner's claim of child support for a child or children who are now adults. The court found a cost award was avoided only because there was fault on both sides. The pre-trial conference was adjourned to April 6, 2020. The material was ordered to be served and filed by 4:00 pm on March 13, 2020. The parties were given leave to remove their current pre-trial briefs and file revised briefs. The lawyer for each party was ordered to provide their client with a copy of this fiat within seven days and thereafter file an affidavit with the court within 21 days swearing that they had done so.

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Miller v Saskatchewan, 2020 SKQB 8

Goebel, January 13, 2020 (QB20007)

Civil Procedure – Limitation Period
Civil Procedure – Summary Judgment
Statutes – Interpretation – Conservation and Development Act
Statutes – Interpretation – Limitations Act

Statutes – Interpretation – Public Officer's Protection Act
Torts – Negligence
Torts – Nuisance
Torts – Trespass

The plaintiff alleged nuisance, trespass, negligence and statutory damages pursuant to s. 30 of The Conservation and Development Act (CDA) when two quarter sections of his farmland adjacent to a natural waterway were flooded. The defendants were the Government of Saskatchewan (government) and a conservation and development area authority (area authority). There was a longstanding issue with flooding from the creek. In 1961, the government authorized a project (project) to increase the flow of water in the creek by straightening its trajectory. The area authority was assigned responsibility for the project according to a memorandum of agreement (MOA). The plaintiff purchased two quarters of land, one in 1983 and one in 1992. From 1996 on, the plaintiff regularly attended meetings of the area authority and raised written concerns of flooding on his land. In 2011, the area authority funded the construction of a berm on the plaintiff's land to prevent flooding of his yard site. The plaintiff commenced this action against the government in November 2012. In June 2015, he filed an amended statement of claim, adding the area authority and watershed authority (WSA) as parties. A consent order allowed the amendments. In September 2017, the area authority brought an application for summary judgment, alleging the claim was barred because the plaintiff failed to adhere to the 60-day notice period in s. 30 of the CDA. In November 2017, the government applied for summary judgment, alleging that the claim was statute-barred. The plaintiff removed the WSA as a defendant and served the area authority with notice of his claim pursuant to s. 30 of the CDA. In early 2018, the defendants amended their claims to cite the plaintiff's breach of the limitation period in the now repealed The Public Officers' Protection Act (POPA) that mandated a 12-month limitation period for claims against public bodies. They also made applications for summary judgment based on POPA. The plaintiff acknowledged that the limitation issues had merit. He suggested, however, that the impact of the limitations provisions was merely to limit his claim to damages incurred in the two years before the date of the original claim, not to bar the claim altogether.
HELD: The government argued that s. 2(1)(a) of the POPA along with s. 31(3) of The Limitations Act (LA) created a bar to the plaintiff's claim. The plaintiff conceded that the POPA did apply and appropriately abandoned his claim that the government acted in bad faith, which would preclude application of the POPA. The government argued that it was no longer involved in the project after 1984, so any claim against it would have to have been commenced within 12 months of that date, which it was not. The LA would then apply to bar any proceeding from being commenced. The court was satisfied that the plaintiff's claim was statute-barred pursuant to s. 2(1)(a) of the POPA. The plaintiff applied to have the

notice period in the POPA extended. The court looked to the purpose of the prescribed limitation period and declined to extend the notice period. The court granted the government's application for summary judgment. The area authority argued that the mandatory and comprehensive process outlined by the CDA for the determination of damages limited the jurisdiction of the court. And, further, because the plaintiff did not comply with the notice provisions, the statutory claim was barred forever. The area authority did not deny its responsibility for the operation and maintenance of the project pursuant to s. 24(1) of the CDA and the MOA. According to the area authority, any scheme for compensation encompassed by ss. 30 and 31 of the CDA replaced any right of the plaintiff to pursue a civil remedy. The damages contemplated in s. 30 of the CDA were not exhaustive, nor did the court find the provision to be a codification of the law relating to claims founded on the torts claimed by the plaintiff. Next, the court considered whether s. 30 barred the plaintiff's claim for statutory damages. The court concluded that the 60-day notice period remained in effect. The plaintiff submitted that he had provided sufficient notice by commencing the procedure and by his numerous written complaints over the years. Section 30 did not prescribe a form, but it did require the notice to be written, setting out the particulars of the claim, and be served on an officer of the Area Authority. The plaintiff also requested an extension to the notice period pursuant to s. 25(2) of the LA. The court determined that the evidence was insufficient and controverted such that it was unable to determine the issues involved. The court then considered whether there was a genuine issue requiring a trial respecting the civil causes of action. The court first looked at whether limitation provisions barred the claims. The plaintiff argued that he did not have sufficient knowledge of the cause of the flooding until he received a copy of the MOA in January 2012. The court was not satisfied that there was no genuine issue arising out of the evidentiary and legal debate surrounding the limitation provisions. The court found that the pleadings raised genuine issues concerning the trespass, negligence, and nuisance claims. The application brought by the area authority was dismissed.

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Star Processing Ltd. v Canadian National Railway Co., 2020 SKQB 9

Rothery, January 14, 2020 (QB20008)

Civil Procedure – Queen's Bench Rules, Rule 7-1

The applicant commenced an action by originating application pursuant to Queen's Bench rule 3-49(e) against the respondents, Canadian National Railway (CN) and Infra Pipe Solutions (Infra

Pipe), seeking a declaration that the respondents had no interest in certain lands owned by the applicant and an order directing that the interests registered by CN on the title be discharged. The applicant had purchased the land and buildings from the previous owner subject to an easement in favour of CN for a right-of-way on a spur line on the edge of the land and a building restriction caveat pertaining to a siding agreement. At the applicant's request, CN cancelled the siding agreement in 1998. In 2004, CN discharged its easement and building restriction caveat against the applicant's property but later asserted that it had done so by mistake. In 2019, CN re-registered the easement and caveat. The applicant claimed that when CN discharged the easement against its land, all the rights and privileges granted to CN under the easement ceased pursuant to ss. 2 and 13.1 of The Public Utilities Easements Act (PUE Act). CN responded that the Act did not apply to it because it is a federal undertaking. It agreed to discharge the caveat but maintained that it had a valid easement over the applicant's land and continued to deliver product to Infra Pipe over the spur line. CN brought an application to seek an order pursuant to Queen's Bench rule 7-1 to set down certain questions for determination that would resolve all issues between it and the applicant without the need to seek a determination of the constitutional issue of whether the PUE Act applied to CN. The applicant and CN each posed a series of questions that they said would meet the objective of Queen's Bench rule 7-1(1)(a) by disposing of part of the claim and shortening the trial, but they could not agree on the questions. Counsel for the Attorney General of Canada advised that he would not make submissions in the application but reserved the right to intervene at a later date if matters proceeded.
HELD: The application was dismissed. The court found that the questions posed by the applicant and CN did not perform a useful purpose. The matter was complex and did not lend itself to bifurcation in advance of the trial. As well, the constitutional question that was central to the dispute might be compromised by findings of fact made in advance of the trial that might not be made if the entire litigation were heard at once.

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R v Woolsey, 2020 SKQB 13

Danyliuk, January 20, 2020 (QB20012)

Criminal Law – Sexual Offences Against Children – Sentencing
Criminal Law – Assault – Sexual Assault – Sentencing

The accused pled guilty to committing two offences between July 2006 and July 2007: sexual assault contrary to s. 271 of the Criminal Code and invite sexual touching by a person under the age of 14, contrary to s. 152 of the Code. At the time of the offences, the

accused was 42 and the complainant was ten years old. In an agreed statement of facts, the background established that the families of the complainant and the accused were neighbours and the complainant played at the accused's house with his daughters. The accused groomed the complainant and engaged her in repeated sexual acts to gratify him over the course of one year. The accused stopped only because the complainant no longer came to his house and he found another young girl. In 2018, the complainant began to remember what had happened to her and in her victim impact statement described the psychological stress and anxiety she had suffered since the assaults took place. She was depressed and had suicidal thoughts because of the offences. The pre-sentence report (PSR) described the accused as having had a stable, happy childhood, but he started drinking at age 12 and alcohol addiction became a lifelong problem. He gave up drinking ten years prior to this sentencing. He now had a strong relationship with his church and its members and his employer was prepared to rehire him after he was released from prison. He entered his guilty pleas early and took full responsibility for his offending. He expressed remorse for his acts and apologized to the complainant. The accused had a criminal record that consisted of two phases: from 1982 to 1987, he was convicted of armed robbery, possession of property obtained by crime and impaired driving. In 2009, he was convicted of possession of child pornography, followed by a conviction for sexual interference and sexual assault that had occurred in 2000 and another conviction in 2013 for sexual assault of a female under the age of 16 that had occurred in 2006. The sentence for the latter conviction was served consecutive to the three-year sentence he received in 2011. The accused was assessed as being at low risk to reoffend generally but at a moderate risk of sexual reoffending. He had good insight into his triggering behaviour and was aware that his risk increased if he abused alcohol. He had taken all the federal sexual offender programming available.

HELD: The accused was sentenced to 42 months' imprisonment for each of the offences. The second sentence was to run concurrently because of the temporal and transactional nexus between the two offences. The court considered the mitigating factors to include that the accused's early guilty plea, his assumption of responsibility and remorse for his offences. He had dealt with his substance addiction and taken sexual offender programming and become involved with his church and its community. Letters of support from his family, friends and employer spoke to his good character and good conduct. The aggravating factors were numerous. The accused's criminal record disclosed a pattern of violence and during the second phase of his criminal conduct he showed a predilection for committing sexual crimes on young females. These crimes were violent because the victims were children and incapable of consenting to the accused's acts. The accused admitted that he groomed the complainant, a young child, and as a neighbour, he occupied a position of trust. The sexual assaults went on for a year. The accused's post-offence conduct, such as his rehabilitation, was

considered mitigating but the court took into account that it could also be considered aggravating because the complainant stopped coming to his house, depriving him of the opportunity to assault her and then he moved on to another victim. It was only after he was convicted and sentenced for that offence that the accused stopped offending and began his rehabilitation.

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Aberdeen Specialty Concrete Services v Temple Insurance Co., 2020 SKQB 14

Zerr, January 20, 2020 (QB20013)

Insurance – Contract – Interpretation

The applicants applied to the court for a determination of the date upon which the respondent, Temple Insurance Company, became obliged to defend them. As part of a construction project to build a retirement facility, All Seniors Care Living Centres (All Seniors) obtained a wrap-up policy of insurance from Temple. The named insured was All Seniors, and additional insured were the contractor (Man-Shield), subcontractors and engineering and architectural consultants. In August 2014, All Seniors sent an email to Encon Group, the company that managed the wrap-up policy for Temple, advising of a claim. In January 2015, All Seniors issued a claim against Man-Shield, the architect and a window supply company. Man-Shield filed a statement of defence, counter-claim, cross-claim and third-party claim against each of the applicants. The directors of the applicant companies deposed that at the time they were served with the third-party claim, they did not know of the wrap-up policy. They notified their insurers who assigned counsel to provide defences on their behalves. They argued on this application that Temple's duty to defend them was triggered on the dates they became third-party defendants. In April 2018, counsel for Temple wrote to counsel for each applicant advising that it would extend defence coverage to them from the date of the letter but would not cover any legal fees incurred before that date. The applicants submitted that Temple received written notice within the meaning of the policy when All Seniors emailed Encon in August 2014 and that All Seniors was sufficiently proximate to the claim. Temple argued that under the clause in the policy, coverage only commenced when it received written notice containing particulars sufficient to identify the insured. It said that the notice from All Seniors could not constitute effective notice that every unnamed party below it in the construction project might become the subject of a claim.
HELD: The court ordered Temple to pay all legal fees incurred in the defence of the applicants as of the dates they became third-party defendants. It determined that Temple knew in January 2015 that

All Seniors intended to issue a statement of claim and that one or more of the allegedly negligent parties might file a claim pursuant to the wrap-up policy. It found that All Seniors was sufficiently proximate to the claim so that as of the date it contacted Temple, the latter had effective notice under the policy that named as insured not only the general contractor but all of the contractors and subcontractors.

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Pillar Capital Corp. v Harmon International Industries Inc., 2020 SKQB 19

Elson, January 22, 2020 (QB20018)

Bankruptcy – Insolvency
Bankruptcy – Receiver – Just or Convenient
Debtor and Creditor – Receiver
Statutes – Interpretation – Bankruptcy and Insolvency Act

The respondent stopped operating as a going concern in late 2018 or early 2019. The applicant advanced a secured loan of $3.3 million to the respondent in the summer of 2018. Security for the loan included a general security agreement, a collateral mortgage of six parcels of land, and a general assignment of rents regarding the six parcels of land. The respondent defaulted on payment of the loan and owed over $3.7 million on it. It made its last payment on June 14, 2019. The applicant applied to the court pursuant to s. 243 of the Bankruptcy and Insolvency Act (BIA) for appointment of a receiver of all of the respondent's assets and properties. The general security agreement had a specific remedy giving the applicant the right to appoint a receiver by way of an instrument in writing. A notice of intention to enforce security pursuant to s. 244(1) of the BIA was served in August 2019. The applicant was concerned for the protection of its security because it alleged the respondent had neglected the buildings, equipment and inventory. The respondent's owner provided an affidavit shortly before the hearing, advising of its ongoing efforts to sell the six parcels of land. Five parcels of the land had been appraised at $5.5 million. The list price of the land was almost $5.3 million. The hearing was first heard in October 2019 when it was adjourned to January 2020 to give the parties more time to sort out the dispute. Little changed when the hearing resumed. Property tax arrears exceeded $100,000 in January 2020. The applicant provided its own appraisal of the land, valuing it at between $3.43 million and $3.65 million. The list price of almost $5.3 million was maintained. The realtor provided evidence that he had advised the respondent that the list price was too high and should be reduced. The respondent indicated that they would be changing listing agents and reducing the listing price to $4.5 million. There were two issues: 1) whether the respondent was an insolvent person

within the meaning of the BIA; and 2) if the respondent were insolvent, was it just and convenient for the court to appoint a receiver over its property, assets and undertakings?
HELD: The court ordered the appointment of a receiver of all assets, undertakings and property of the respondent. The issues were determined as follows: 1) the applicant had to establish that the respondent fit within one of the listed circumstances to be found insolvent. The court was satisfied that there was more than enough evidence to establish insolvency pursuant to s. 2 of the BIA because of the respondent's failure to pay the applicant and its failure to pay property tax obligations, and 2) the applicant had the burden of establishing that it was just or convenient to appoint a receiver. Jurisprudence provides a list of all the factors to be considered. The court discussed whether a receiver should be appointed where the applicant's security provides for private appointment of a receiver, as it did in this matter. The court indicated that the right to make such an appointment was a factor, with the real inquiry being whether a court appointment was the "preferable" option, not the "essential" one. The court concluded that it was just and convenient to appoint a receiver. Most of the factors favoured the appointment. The balance of convenience favoured the application, given the respondent had not carried on business for some time and had no stated intention of doing so. Further, and more importantly, according to the court, the nature and condition of the property factored heavily in favour of a court-appointed receiver over one appointed under the security agreement.

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Altus Group Ltd. v Estevan (City), 2020 SKQB 20

Megaw, January 22, 2020 (QB20019)

Municipal Law – Appeal – Property Taxes – Assessments
Statutes – Interpretation – Municipal Board Act, Section 53(2)

The applicant applied by originating application on behalf of various owners, pursuant to s. 53(2) of The Municipal Board Act (Act), regarding whether the Saskatchewan Assessment Agency (SAMA) complied with an order of the Assessment Appeals Committee (committee) of the Saskatchewan Municipal Board (SMB). The application concerned commercial properties in excess of 6,000 square feet. The applicant appealed the tax assessments completed by SAMA. The applicant argued that SAMA failed to account for and consider sales data for the large commercial properties and therefore, they had consistently been overvalued. The SMB committee provided decisions regarding the properties. The committee remitted the matters back to the municipalities, and a reassessment was completed. The applicant argued that SAMA's reassessment was in error and did not comply with the decision of

the committee. SAMA submitted that s. 53 only allowed the committee to enforce its own orders and was not available for other parties to cause the committee to review and consider what had been done either by the assessor or by the committee.
HELD: The legislative scheme does not allow the court to set an appeal of decisions made by SAMA. There was no previous matter wherein s. 53(2) of the Act had been applied as sought by the applicant. The review process outlined in the Act gives the committee a statutory appellate jurisdiction. The committee's decisions are subject to appeal to the Court of Appeal, with leave. The applicant sought another tier whereby the court would be able to determine whether the parties had complied with the committee's decision. The court found that the issue remained the same as considered by the Court of Appeal in both Corman Park and Wal-Mart. If s. 53(2) of the Act were applied, as proposed by the applicant, the court would effectively be made a court with appellate jurisdiction. According to Corman Park, appeals are solely creatures of statute. Section 53(2) does not give appellate authority to the Court of Queen's Bench. The application was dismissed, and the respondent was entitled to costs.

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Weber v Canadian Imperial Bank of Commerce, 2020 SKQB 21

Smith, January 23, 2020 (QB20020)

Civil Procedure – Application to Strike Statement of Claim – Frivolous and Vexatious
Civil Procedure – Application to Strike Statement of Claim – No Cause of Action
Civil Procedure – Costs
Civil Procedure – Queen's Bench Rules, Rule 7-2
Civil Procedure – Summary Judgment
Torts – Malfeasance

The applicant sued the respondent bank for malfeasance concerning his bank account and pre-paid Visa. He applied for summary judgment and the bank applied for an application to the strike the claim on the basis that it disclosed no known cause of action or, alternatively, that it is frivolous and vexatious. The parties agreed that summary judgment was appropriate and that a trial was not necessary to determine the matters between them. The applicant argued in his statement of claim that he had attempted to get a statement for his pre-paid Visa from the bank but was unable to do so. He indicated that he spent over 50 hours trying to: get the service he was told he could obtain; find out information on what could likely be a fraud attempt by the bank; and find a new banking institution as per the request of the bank. The applicant did not lose

any money but spent considerable time with bank officers trying to sort out problems with his account and Visa statement. He requested that he be compensated for his time at a rate of $100 per hour. The applicant saw himself and his litigation as serving a higher purpose for all those also having difficulties with banks. HELD: The court found that the applicant was confused about the distinction between credit available and actual balance and the time between authorizing and posting a transaction. The court found that the bank demonstrated that there was no error and no inappropriate entries regarding the applicant's bank account or his pre-paid Visa. The applicant was confused about how the bank recorded transactions. The applicant's application for summary judgment was dismissed in its entirety. The court declined to award the bank punitive costs, noting that the applicant was not motivated by greed but rather by trying to do good for other regular citizens who find themselves overmatched in a dispute with a bank. The bank was awarded regular costs in the amount of $2,500.

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Royal Bank of Canada v Strelioff, 2020 SKQB 23

Rothery, January 24, 2020 (QB20023)

Civil Procedure – Queen's Bench Rules, Rule 10-47
Mortgagors – Foreclosure – Judicial Sale – Costs – Real Estate Commission

The plaintiff applied for taxation of its costs and an order granting it judgment for the deficiency remaining on the mortgage as a result of the judicial sale by real estate agent of the mortgaged property. The court had indicated that the amount that could be deducted for real estate commission on the sale of the property was limited to 4% until a hearing was held to determine if the remaining 1% was validly payable. The plaintiff argued that the 1% was payable to a law firm to compensate it for administrative services performed. The administrative services included engagement of and dealing with property management, the listing and sale of the property, and where applicable, the preparation and filing of a claim to a Mortgage insurer. No hearing was held. The plaintiff instead sought an order for solicitor-client costs and deficiency judgment. The plaintiff sought leave to file a brief of law when the court inquired about the results of the hearing that had been directed. The brief referenced a Law Society of Saskatchewan ruling. In that matter, the appropriateness of lawyers charging a referral fee was dealt with. The Final Report of the Conduct Investigation Committee indicated that a referral fee should be disclosed clearly in future cases and that its appropriateness would be a matter to be heard in chambers. HELD: The court found that the brief of law did not address the concerns raised by the court. Judicial sales are equitable remedies

that are subject to supervision by the court. A mortgagee is entitled to reasonable solicitor-client costs if a term of the mortgage allows solicitor-client costs. Queen's Bench Rule 10-47 deals with a judicial sale ordered by the court. The Rule states that the real estate agent is retained by and reports to the selling officer. The question is whether the plaintiff was entitled to receive a percentage of the real estate commission to compensate its lawyers for services rendered. The court directed a hearing to determine the 1% real estate commission. The Law Society and mortgagors were to be given notice of the hearing. The court directed the local registrar to set a hearing date. The application to set costs and the deficiency judgment was dismissed, with leave to reapply after the hearing determining the 1% commission.

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Wiegers v Apple, Inc., 2020 SKQB 24

Elson, January 27, 2020 (QB20024)

Class Action – Certification
Civil Procedure – Class Action – Application to Strike Affidavit
Civil Procedure – Class Action – Evidence – Expert Evidence – Independence of Expert
Civil Procedure – Class Action – Evidence – Expert Evidence – Qualifications of Expert

The defendants sought an order to strike two of the plaintiff's affidavits. The same affiant, T.B., swore an affidavit in 2017 that attached his preliminary report and an affidavit in 2018 that attached his final report. The defendants argued that the affidavits did not comply with Rule 5-37(2), so the opinions expressed therein could not be admissible as expert opinion. The class action alleged that there were design defects related to two smartphone products manufactured by the defendants. The design defect was said to impair the responsiveness of the devices' touchscreens. The application for certification set out eight common issues. The current application only touched on three of the proposed common issues. They were: 1) whether the phones were unfit for their intended purpose; 2) whether the phones were of merchantable quality; and 3) whether the defendants breached a duty of care owed to the class in designing, developing, testing, distributing, marketing or selling the phones. T.B. was an electrical engineer with experience as an expert witness in both criminal and civil proceedings. His principal work was in the field of intellectual property, specifically patents. All but four of the 99 cases in which T.B. had presented evidence related to data maintained on a cell phone to determine usage and positioning. T.B. conceded that telecommunications engineering did not directly pertain to touchscreen functions. He also acknowledged that patent analysis and the validity of a patent were not issues in

the matter. The preliminary report was based solely on T.B.'s review of the documents supplied to him by the plaintiff. It did not indicate that he examined the phones before expressing his opinion. The defendants also filed an affidavit of an expert. The court discussed the following issues: 1) the general rules for the admissibility of expert opinion evidence; 2) the extent to which admissible expert opinion can include third-party sources; and 3) the application of the admissibility rules to expert evidence presented in class action certification proceedings.

HELD: The issues were discussed as follows: 1) the court discussed the Mohan decision and the four threshold criteria for the admission of expert evidence. In White Burgess, the court indicated that the first component to admitting expert evidence was satisfaction of the four criteria. In the second component, the court performs a "gatekeeping" function to exclude evidence if its prejudicial effect outweighs its probative value. 2) Information obtained from a party and then used by an expert as the factual basis to form the opinion is admissible only to show the basis upon which the opinion is formed. The information is not admissible as evidence going to the truth or accuracy of the information. Trustworthiness and reliability both factor into the use of information or opinions from internet websites such as those used by T.B.; and 3) the probative value of expert evidence in class action certification applications is confined to determining whether there is some basis in fact for one or more of the evidence-based criteria. Expert evidence may be directed to the presence of common issues. In such matters, it is not necessary to prove the cause of action or establish a prima facie case. The court held that it is misleading to describe the "some basis in fact" standard as a "lesser evidentiary foundation." Where expert opinion evidence is used to establish commonality, the application of the Mohan/White Burgess inquiries must be confined to the scope of that particular factual issue. A certification judge can weigh the extent to which expert evidence presents an opinion on the existence of common issues. The court concluded that both of T.B.'s affidavits must be struck for two reasons: a) the court was not satisfied that T.B. possessed the necessary qualifications, training and experience to provide any meaningful or relevant opinion on the functions or operations of smartphone touchscreens. T.B.'s experience with cellular telephones was dated and confined mainly to patent issues and forensic data analysis. He also had a lack of experience and training in smartphone technology, particularly touchscreen operations and functions; and b) T.B.'s opinion lacked the independence required of an expert. All of the material reviewed came from the plaintiff. There was no indication that T.B. conducted any independent research. T.B.'s report was found to do little more than repeat the conclusions from the internet articles with which he had been provided. There was also no information before the court on these websites or the authors of the articles. The court noted that the defendants' evidence was not a factor in making the determinations. The court also declined to make an order sealing the unredacted copies of the defendants' affidavits and exhibits. Instead,

all affidavit evidence of the defendants would be returned to them. The defendants were awarded costs of $2,000 in any event of the cause, but not payable forthwith.

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Lawless v Conseil scolaire fransaskois, 2020 SKQB 27

Mitchell, January 30, 2020 (QB20026)

Civil Procedure – Queen's Bench Rules, Rule 5-14

The defendant applied pursuant to Queen's Bench rule 5-14 to strike the plaintiffs' entire action because of their failure to serve a copy of their affidavit of documents upon the defendant in compliance with an order it had obtained from a Queen's Bench judge in November 2018. The litigation guardian for the plaintiffs, their mother, applied for an order that would appoint her as temporary litigation guardian or as an intervenor for the purpose of responding to the defendant's application and for a stay of the action for six months. Although she had been appointed as a litigation guardian at the outset of the plaintiffs' claim made in 2013, her son T. had turned 18 in January 2015 and was currently 23 years old. He attended the mandatory mediation in May 2017 but had not participated in the litigation since. His mother explained that her son had Asperger's syndrome and had developed addictions to drugs and alcohol, and that was why he had not responded to his counsel's request for assistance in preparing an affidavit of documents. T. left Saskatchewan in September 2018 to enter a rehabilitation program in British Columbia. He had since left the program and his whereabouts were unknown. His mother believed that he would likely return to Saskatchewan in the next couple of months. Once she was in communication with him, her intention was to apply to be appointed his litigation guardian as she did not believe him capable of making his own decisions respecting the litigation. HELD: The plaintiffs' litigation guardian's application was dismissed. The defendant's application was granted. The court dismissed the aspect of the plaintiffs' litigation personal to T. The court would not grant the stay because it would serve no useful purpose. The decision had been reserved for six months and there had been no indication that T. was in communication with his mother or that she had commenced an application to be appointed his litigation guardian or co-decision maker under The Adult Guardianship and Co-decision-making Act. It would not appoint her as an intervenor because she was trying to serve as T.'s surrogate and not to assist the court with an alternative perspective on the issues. The court found that it was appropriate to exercise its discretion under Queen's Bench rule 5-14(2)(a) to strike T.'s action because of his pattern of non-compliance with the Rules and the order to serve his affidavit of documents. As an adult, he was

presumed to be in a position to make reasonable decisions respecting the prosecution of the lawsuit and had chosen not to do so. In the circumstances, however, the court would not award double costs to the defendant.

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