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highlighting recent case digests from all levels of Saskatchewan Court.
Published on the 1st and 15th of every month.

**Volume 22, No. 6** **March 15, 2020**

Subject Index



## ***Regina Bypass Design Builders v Supreme Steel LP***, 2019 SKQB 256

Chicoine, September 26, 2019 (QB19317)

Statutes – Interpretation – Builders' Lien Act, Section 5

Regina Bypass Design Builders (RBDB) applied for a declaration that The Builders' Lien Act (BLA) did not apply to any work performed by or on behalf of it for the Regina Bypass project. The respondent, Ministry of Highways, had entered into a contract with the respondents, SGTP Highway Bypass Limited Partnership (SGTP), for the design and construction of the project. SGTP entered into a contract with RBDB for the latter to handle the actual construction of the project. All of SGTP's obligations in its contract with the Ministry of Highways passed to RBDB. The respondent, Supreme Steel, then contracted with RBDB to provide all labour, material and equipment regarding the steel girders for a number of bridges that formed part of the project. In October 2018, Supreme Steel served RBDB with written notice of lien for $7,529,800 in respect of work performed on multiple parcels of land owned by the province, part of or connected to new or existing highways owned by the Government of Saskatchewan. RBDB asked Supreme Steel to vacate its notice of lien on the basis that the BLA did not apply to the project, and when it refused, RBDB applied to the court, submitting a bond in the amount of the lien claimed. The court granted an order vacating the lien without prejudice to RBDB's right to challenge the validity of the lien. RBDB argued in this application that because of s. 5, the BLA did not apply to any work performed by Supreme Steel under its subcontract. The legislature specifically decided to exempt the BLA from applying to situations where

services or material are provided "in connection with" a contract entered into under or pursuant to The Highways and Transportation Act, 1997 (HTA). Therefore, Supreme Steel did not have the right to file a written notice of lien. Supreme Steel argued that s. 5 of the BLA does not extend to subcontracts between private parties such as RBDB and Supreme Steel.
HELD: The application was dismissed. The court found that the BLA applied to the project. The exception in s. 5 of the BLA applied only to the prime contract between the Ministry of Highways and SGTP.

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### ***R v Barker***, 2019 SKQB 257

Danyliuk, October 10, 2019 (QB19318)

Criminal Law – Evidence – Beyond a Reasonable Doubt
Criminal Law – Evidence – Credibility
Criminal Law – Utter Threat – Elements of Offence
Criminal Law – Utter Threat – Police Officer
Criminal Law – Warned Statement – Vetrovec Warning

The accused was charged with uttering a threat to cause death or bodily harm to a police officer, contrary to s. 264.1(1)(a) of the Criminal Code. The events occurred at a federal correctional centre halfway house. The accused and A.C. were housed in the same living unit and had the same parole officer. A.C. testified that the accused blamed the police for framing him regarding the abuse of his wife. The accused told A.C. that he planned to take revenge on the police officer whom he thought was particularly involved. His plan involved two stages: first, he would ruin the officer's marriage; second, he was going to shoot and kill the officer. A.C. told his parole officer of the accused's plan. The accused and A.C. had a falling out over money. The parole officer said that the accused was very vocal about how he thought the officer had ruined his life. There was documentation to support the testimony by way of entries in the CSC reports from the very beginning of the accused's incarceration. The accused's parole was suspended and a warrant for his arrest was issued. He was returned to prison. The parole officer said that she did hear the accused talk about harming the officer after his parole was suspended. She indicated that A.C. had provided her with information in the past, and on all but one occasion, it had been true and accurate. On the other occasion, the information was not found to be false, it simply could not be confirmed. The accused's warned statement regarding the threat was admitted into evidence. In that statement, he indicated that the officer deserved to be hurt. When asked whether A.C. was lying about the threat, the accused said no, he had made the threat. The accused identified the officer by name and residence. The issues

Wilchuck

Chapman v R

Consumers' Co-operative Refineries Ltd. v Unifor Canada, Local 594

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were: 1) the elements of the offence, credibility and findings of fact; 2) whether the accused committed the physical element of the offence; and 3) whether the accused possessed the required mental element.
HELD: The accused was found guilty. The issues were determined as follows. 1) The elements of the offence are: a) the identity of the accused; b) the time, date, and place as set out in the indictment; c) that the accused uttered or conveyed words which, assessed objectively, involved a threat to cause death or bodily harm; and d) that the accused intended the threat to be taken seriously or to intimidate. However, the person threatened does not have to hear the threat or be frightened or intimidated by it. The court found A.C. credible on the main points of his testimony and found that the threat was made by the accused as related by A.C. It did not matter that the accused did not advise A.C. of the identity of the officer: the court could infer that from the accused's description of the arresting officer whom he blamed. Further, other evidence, such as the parole officer's, pointed to the accused blaming the officer for his hardship. The accused also unequivocally acknowledged and admitted to threatening the officer in his warned statement. The court was unable to conclude that the debt dispute motivated A.C. to tell officials about the threat. The parole officer confirmed A.C.'s general reliability. The court discussed whether a Vetrovec warning was required. Even if a Vetrovec self-instruction was warranted, the court found that it had sufficient confirmatory evidence to place reliance on A.C.'s testimony. Vetrovec warnings are not automatic due to the category a witness falls within. The trier of fact should examine the witness' motivation to lie, and there should be an assessment within the context of his or her past conduct and within the totality of the evidence. The court determined that the conclusion would be the same regardless of whether or not a Vetrovec warning was given. A.C. was credible, and it was found as a fact that the accused uttered the words A.C. ascribed to him in his testimony. 2) The court found that the Crown proved beyond a reasonable doubt that the accused uttered and conveyed words to A.C. The court had no doubt that, viewed objectively, these utterances of the accused conveyed a threat to kill or do bodily harm to the officer in question. The third element of the offence, the actus reus, was proved; 3) the court found ample evidence that the accused intended the threat to be taken seriously or to intimidate. The court discussed some concerns with the warned statement. It was arguable that the accused should have received a Charter warning when the interview went from questions regarding stolen property to the threat, but the defence did not make that argument. The court also considered the case as if the warned statement had not been admitted into evidence. The court found that there was still sufficient evidence of the accused's guilt. The officer did not have to be aware of the threat for the mens rea to be met. The mens rea of the offence was proven beyond a reasonable doubt.

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from those endorsed by the *Citation Guide for the Courts of Saskatchewan*.

***R v Panasiuk***, 2019 SKQB 258

Elson, September 20, 2019 (QB19319)

Criminal Law – Assault – Sexual Assault

The accused was charged with suffocating the complainant so as to enable himself to commit the offence of sexual assault contrary to s. 246(a) of the Criminal Code and with committing the offence of sexual assault on the complainant contrary to s. 271 of the Code. The complainant and the accused were 17 and 19 years of age, respectively, and had dated and then lived together for one month in the house of the accused's grandparents before the alleged offence. The complainant testified that while they were lying on their bed watching TV, the accused climbed on top of her and told her he wanted sex. She said no, and the accused began strangling her. She blacked out, and when she regained consciousness, the accused's hand was still on her neck, and he was having intercourse with her. She pushed him off and then immediately began to remove her personal belongings from the house. The accused's grandparents did not understand why she was so upset, but she did not tell them. When the accused was driving her, she repeatedly asked him why he had assaulted her, but he did not answer. After she reached her family's home and later that night, she was seen by police officers. They testified that the complainant was distraught and sobbing during their interview. Although she went to the hospital for a series of tests, none of the results were presented in evidence. The complainant advised that she had thrown out the clothes after the incident because she did not want to be reminded of it. In cross-examination, the complainant stated that there had been problems in the relationship because she disliked the accused's recreational use of marijuana. The accused denied choking or sexually assaulting the complainant. He testified that on the night in question, he had smoked some marijuana, the accused had confronted him about it, and that had evolved into a lengthy argument. The complainant told him that she was going to leave and wanted to do so immediately. He drove the complainant to her family's house while she repeatedly why he kept using marijuana, but he said nothing.
HELD: The accused was found not guilty on both counts. The court applied the test set out in D.W. as modified by the decision in Ryon and found that neither of the scenarios described by the complainant and the accused was obviously implausible, and, based upon the standard of proof, the court could not answer the question one way or the other.

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***Thomas v Thomas***, 2019 SKQB 259

Wilson, September 30, 2019 (QB19320)

Family Law – Spousal Support – Review

The petitioner wife applied for an order for continuing spousal support. At the trial in 2014 regarding the division of family property and spousal support, the court found that the petitioner's income to be $58,000 and the respondent's to be $175,000, resulting in spousal support of $4,200 per month payable to the petitioner for five years. At the end of that period, the support would cease unless the petitioner brought an application for continuation of it and was able to satisfy the court of her need for it to continue (see: 2014 SKQB 153). The petitioner deposed that after the trial, she had continued to work part-time as a nurse in the intensive care unit of the hospital as she had since 1997. She submitted that she was severely stressed and suffering burnout from the pressure and workload in critical care. She also had been diagnosed with early osteopenia, which might eventually render her unable to work in the future. She was placed on stress leave in June 2019 and remained off work. Her income ranged between $66,500 in 2015 to $57,200 in 2018. The respondent's income had plummeted since the trial. In 2015, sales began to decline at his car dealership. He earned $84,000 in 2017, but after his income dropped to $55,000, his business partner discovered that he had improperly borrowed funds from the dealership, and he quit the business. His reputation had been badly damaged, and it would be impossible for him to obtain similar employment. He now suffered from stress and panic attacks. The respondent submitted that spousal support should end because the petitioner should have taken steps during the five-year period to become self-sufficient, and he no longer had the means to pay. HELD: The application was granted. The court ordered the respondent to pay $2,000 per month to the petitioner from April 2019 to December 2020. The court found that, in this case, the application was for a review of the petitioner's support under s. 15.2 of the Divorce Act and not an application to vary it. The trial judge's 2014 order was based on material uncertainty regarding the petitioner's circumstances at the time of the trial. It decided that the petitioner had not taken reasonable steps to become self-sufficient and could have worked more than part-time. It imputed income of $85,800 to her. There had been a substantial change to the respondent's income, but he had not provided evidence of what it was. He had not made reasonable efforts to find employment. The court imputed income to him of $150,000.

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***Novak v McDougall***, 2019 SKQB 261

Layh, October 1, 2019 (QB19322)

Wills and Estates – Administration – Accounting
Wills and Estates – Executor – Removal

The applicant was a beneficiary of the estate of his deceased father. Under the terms of the deceased's will, the respondent, the applicant's sister, was appointed his trustee under an absolute discretionary trust (Henson trust). The applicant applied for an order removing the respondent as trustee pursuant to s. 16 of The Trustee Act, 2009 and appointing another person or the Public Guardian as trustee. The applicant had been receiving benefits from the Saskatchewan government under the Saskatchewan Assured Income for Disability Program (SAID) but payments stopped after the respondent informed the Ministry of Social Services of the trust. The applicant engaged legal counsel to successfully challenge his disentitlement to SAID funds. He argued that, as the Henson trust had been set up to ensure that he would continue to receive benefits from government, the respondent had not managed her important obligation to him. The applicant also sought an accounting from the respondent pursuant to s. 3(1) of The Administration of Estates Act and Queen's Bench rule 16-50. He argued that the respondent had overcharged the estate for her executrix's fees. The respondent had paid herself executrix fees of $81,300, which represented five percent of the value of the estate assets ($1,625,900). Most of the value of the estate was in farmland that had been sold in a straightforward manner by the respondent with a lawyer's assistance. She wished to pay herself an additional $16,800 for providing services in an auction sale of the deceased's farm equipment that had yielded sales of $139,800, calculated at $435 per hour for 480 hours. The respondent also planned to pay ten people, members of the family, for their labour associated with the auction at the same rate. She also sought out-of-pocket expenses of $18,500.
HELD: The application was granted in part. The court decided not to remove the trustee because there was no replacement. The Public Guardian did not wish to be appointed, and the person suggested by the applicant was inappropriate. Regarding the respondent's executrix's fees, it found that they were not reasonable under s. 52(1) of The Trustee Act, 2009. It applied the five considerations set out in MacDonald Estate and concluded that in the circumstances, the appropriate fee payable to the respondent was 2.75 percent of the gross value of the estate of $51,175 and the amount she claimed for unpaid disbursements. The respondent would have to forgo her claim for services for arranging the auction and repay the estate the sum of $11,590. The unpaid claims of the other people regarding the auction would only be dealt with upon application to the court by either party to determine the appropriateness of the fees.

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### ***Rozdilsky v Kokanee Mortgage M.I.C. Ltd.***, 2020 SKCA 1

Richards Schwann Kalmakoff, January 7, 2020 (CA20001)

Civil Procedure – Appeal – Costs - Court of Appeal Rules, Rule 52
Civil Procedure – Solicitor-Client Costs
Debtor and Creditor – Mortgage – Foreclosure
Mortgages – Foreclosure – Order to Confirm Judicial Sale – Appeal

A mortgage on three properties secured the appellant's loan from the respondent. Pursuant to an order nisi for judicial sale, the respondent accepted offers for the sale of two of the properties. The respondent obtained orders granting both sales. The appellant appealed the orders, but the court dismissed its appeal orally. The respondent sought solicitor-client costs based on the terms of the mortgage contract. The costs were sought for the appeal and the unsuccessful application to lift the stay pending appeal.
HELD: Rule 52 of The Court of Appeal Rules gives the court discretion to make any order that it considers appropriate. Solicitor-client costs are not only restricted to exceptional cases where there is conduct deserving of censure. As a general rule, the court may exercise its discretion to reflect a contractual right to solicitor-client costs. The court, however, still retains discretion if solicitor-client costs are not appropriate in the circumstances. Reasons to exercise that discretion include vexatious, oppressive, fraudulent, or otherwise inequitable conduct on the part of the mortgagee, or other circumstances resulting in solicitor-client costs being unfair, excessive, or unduly onerous. The appeal court found nothing in the record to suggest that the respondent engaged in any conduct that could be characterized as fraudulent, vexatious, oppressive, or otherwise inequitable. The respondent was entitled to solicitor-client costs on the appeal. The appellant was entitled to costs on a party-and-party basis on the respondent's application to lift the stay.

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### ***Feng v Saskatchewan (Economy)***, 2020 SKCA 6

Ottenbreit Ryan-Froslie Schwann, January 9, 2020 (CA20006)

Administrative Law – Judicial Review – Procedural Fairness – Breach of Duty

The appellant, a Chinese national, was offered a job with a Saskatchewan employer and applied to the Saskatchewan Ministry of the Economy for nomination under the Saskatchewan Immigrant Nominee Program (SINP). The appellant was nominated under SINP, but owing to the Ministry's concern with the legitimacy of his job offer, followed by the withdrawal of that offer by the prospective employer, his job was invalidated. When he was unable to obtain alternate employment, the Ministry revoked his SINP nomination.

The appellant then applied for judicial review of the Ministry's invalidation of his job and revocation of his nomination. His application was dismissed (see: 2018 SKQB 11). In his appeal of the decision, the appellant argued that the chambers judge erred in not setting aside the Ministry's decisions to invalidate his job (January 2016) and revoke his nomination (April 2017) because the decisions were unreasonable and, in reaching them, the Ministry breached the duty of procedural fairness owed to him.
HELD: The appeal was dismissed. The court found that the chambers judge had erred when he did not deal with the question of whether the appellant had been accorded procedural fairness with respect to the Ministry's January 2016 decision on the bases that the appellant did not have standing to challenge that decision and that it was not a final decision and therefore not subject to judicial review. The duty of fairness has been expanded to include more than final determinations of legal rights. It includes, as in this case, the investigation undertaken by the Ministry into whether the appellant's job had been invalidated that resulted in the January 2016 decision. The investigation was flawed, and it had a serious adverse impact on the appellant. Specifically, the Ministry must notify a SINP nominee that his or her job offer is under investigation and of the reason why it is under investigation and must allow the employer and the nominee an opportunity to respond. Regarding the Ministry's April 2017 decision, the court held that there had been no breach of procedural fairness because the basis of the eventual revocation of the appellant's SINP nomination was not the job invalidation, but rather that his prospective employer had withdrawn the job offer. Thus, the foundation for the nomination no longer existed. The court found that remitting the January 2016 decision to the Ministry would be futile because the withdrawal was not connected to the impugned investigation.

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### ***Home Depot of Canada Inc. v Hello Baby Equipment Inc.***, 2020 SKCA 7

Richards Schwann Kalmakoff, January 14, 2020 (CA20007)

Civil Procedure – Appeal – Class Action
Civil Procedure – Appeal – Leave to Appeal
Class Action – Appeal
Class Action – Representative Plaintiff
Statutes – Interpretation – Class Actions Act, Section 39
Statutes – Interpretation – Court of Appeal Act, Section 7
Statutes – Interpretation – Queen's Bench Act

The appellants, H.D. and W., both appealed the settlement order in a class action. The appellants were not representative plaintiffs. The respondents applied to quash the appeals, arguing that the

appellants had no right to appeal the settlement order. The appellants then applied for leave to appeal pursuant to s. 10 of The Court of Appeal Act, 2000. They also applied for appointment as representative plaintiffs to prosecute their appeals pursuant to s. 39(4) of The Class Actions Act (CAA). The appellants also launched appeals in other Canadian jurisdictions. Their appeals were quashed in those jurisdictions.

HELD: The court granted the applications to quash the appeals and dismissed the applications for leave to appeal and for appointment as representative plaintiffs. Section 39(1) of the CAA allows a party to appeal to the court, without leave, from a judgment on common issues. The appellants argued that "party" was defined broadly enough in The Queen's Bench Act, 1998 (QBA) to allow them to appeal. The court did not agree because a) the definition of "party" in the QBA does not apply across provincial statutes generally: it applies to that Act. A member of a class in class proceedings is not a party; b) the definition of "party" in the QBA is someone who "is served or entitled to be served" with notice of an action or matter. The appellants only received notice of the settlement proceedings because the chambers judge directed so in a Plan of Dissemination. The appellants were not "served" or "entitled to be served" with notice of the settlement proceedings; c) the right of appeal is on "a judgment on common issues", not on a settlement approval order; and d) s. 39(4) allows for a class member to be appointed as a representative plaintiff to pursue an appeal when the representative plaintiff fails to do so. The court indicated that if the appellants' interpretation of s. 39(1) were correct, there would be no need for s. 39(4). The appellants also argued that they had rights of appeal pursuant to s. 7(2) of the Court of Appeal Act. The court disagreed, concluding that the Legislature intended, through s. 39 of the CAA, to specify and to limit the appeal rights of class members. In British Columbia, the clause similar to s. 10 of The Court of Appeal Act has been interpreted by the appeal court as conferring jurisdiction on it to permit an appeal, with leave, by individuals who were not parties to the proceedings in the court below. The appellants thus sought leave pursuant to s. 10 of The Court of Appeal Act to appeal the order approving the settlement. The appeal court concluded that s. 10 did nothing more than confirm the ability of the court to act upon a properly constituted appeal. Even if the appeal court was wrong, it indicated that this would not be the case to grant leave because the CAA does not contemplate appeals of settlement approval orders by individual class members. The representative plaintiffs control the conduct of the proceedings and can enter settlements binding on class members. The appellants also attempted to rely on s. 39(4) of the CAA. The appeal court found that s. 39(4) operates only in respect of appeals that the representative plaintiff might have pursued under ss. 39(1) or (3). Specifically, the order approving the settlement was not a judgment on common issues. The court granted costs to the respondents.

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***Chapman v R***, 2020 SKCA 11

Jackson Caldwell Kalmakoff, February 4, 2020 (CA20011)

Criminal Law – Appeal – Conviction
Criminal Law – Arrest – Reasonable and Probable Grounds
Criminal Law – Controlled Drugs and Substances Act – Possession of Cocaine for the Purpose of Trafficking
Criminal Law – Defences – Charter of Rights, Section 8, Section 9, Section 10(a), Section 24(1), Section 24(2)

The officers believed that the appellant did not slow down to below 60 km/h when he passed them while they were doing a traffic stop on the side of the highway. Cst. H. and Cpl. D. pursued the appellant's vehicle and stopped it. The officers went to the vehicle where Cpl. D. noticed an empty energy drink container on the floor of the passenger's side. They also noted a radar detector and that the vehicle was a short-term rental from British Columbia. Cst. H. indicated that the appellant had a "nervous twitch" in his upper lip and his hands were shaking when he turned over his documents. Cst. H. went back to the police vehicle to conduct the ordinary checks. While he was doing the checks, he had to reboot his computer, which took 15 to 20 minutes. The CPIC and PIP query notified the officer that the appellant had been convicted of weapons offences in 2005 and that there was police intelligence information suggesting that the appellant was involved in illegal gang and drug activity. Cst. H. communicated this information to Cpl. D. The officers discussed their observations and findings and, approximately 30 minutes after the initial stop, concluded that they had reasonable grounds to believe the appellant was in possession of illegal drugs. They decided to arrest the appellant. Because they were beyond merely having reasonable suspicion, the officers felt there was no need to deploy Cst. M.'s police dog. Cst. H. realized that he had never advised the appellant of the reason for the initial stop, so he did so and then arrested him for possession of a controlled substance. The appellant was arrested for possession for the purpose of trafficking when the police located cocaine in the vehicle. The trial judge accepted the officers' testimony that they believed the appellant was travelling at greater than 60 km/h when he passed the police vehicles. The trial judge also accepted that the officers treated the stop as nothing more than a traffic stop until 25 minutes after the stop. They had violated the appellant's right to be promptly informed of the reason for his detention as guaranteed by s. 10(a) of the Charter because they had not initially advised him of the reason for the stop. The trial judge concluded that a reasonable person placed in the position of the arresting officer could conclude there were reasonable grounds for the arrest of the appellant for possession of a controlled substance. After analyzing the Grant factors, the trial judge admitted the cocaine as evidence. The issues were: 1) whether the trial judge erred in concluding that there was

no violation of the appellant's rights under s. 9 of the Charter; and 2) if there had been a violation of the appellant's rights under ss. 8 and 9 of the Charter, what remedy, if any, should follow?
HELD: The appeal was dismissed. The appeal court did not find it a palpable and overriding error for the trial judge to find as a fact that the purpose of the stop was a traffic stop for the first 25 minutes. The issues were determined as follows: 1) the trial judge incorrectly stated that the appellant had the burden of proving, on a balance of probabilities, that the warrantless search violated his Charter rights. A warrantless search reverses the burden. The Crown had to prove both the lawfulness of the arrest and the reasonableness of the search of the vehicle. The appeal court extensively discussed reasonable suspicion versus reasonable grounds to believe. The appeal court concluded that the constellation of factors, including the officers' training and experience, fell short of satisfying the objective criteria necessary to ground a reasonable belief that the appellant was transporting illegal drugs when they arrested him. The trial judge erred by finding that there were reasonable grounds for the appellant's arrest and failing to find a violation of his rights under s. 9 of the Charter. The trial judge thus also erred in failing to find that the warrantless search of the appellant's vehicle conducted incidental to the arrest was unlawful and in violation of s. 8 of the Charter. The conduct of the officers in this matter was found not to come close to meeting the standard required for a stay of proceedings. The appeal court found violations of the appellant's ss. 8 and 9 Charter rights in addition to the trial judge's finding of a s. 10(a) breach. The court analyzed the three Grant factors. The trial judge had been correct to conclude that the s. 10(a) breach was at the low end of seriousness. Concerning the ss. 8 and 9 breaches, the appeal court found they were not willful, flagrant, or even negligent violations of the appellant's rights. The seriousness of the breach was not found to favour exclusion of the evidence. The appeal court then considered the impact of the breaches. The s. 10(a) breach had only a minor impact. The impact of the ss. 8 and 9 breaches was serious and weighed towards the exclusion of evidence. The appeal court noted the evidence was physical and reliable when discussing the third Grant factor. The third line of inquiry favoured admissibility. The court balanced the Grant factors and indicated it was close, but the balance tipped in favour of admission of the evidence. The court did not interfere with the trial judge's decision.

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***Jackson v Jackson***, 2020 SKCA 15

Richards Jackson Tholl, February 19, 2020 (CA20015)

Civil Procedure – Appeal – Perfecting the Appeal
Civil Procedure – Appeal – Stay Pending Appeal – Court of Appeal Rules, Rule 15

Family Law – Appeal – Stay Pending Appeal – Court of Appeal Rules, Rule 15

The applicant applied to vary an order made in chambers. The chambers judge made an order respecting the custody and access of the parties' daughter, and the applicant filed a notice of appeal in July 2019. In August 2019, the court lifted the stay of execution pending appeal. On December 19, 2019, the court issued a perfection order requiring the applicant to order a complete transcript of the proceedings appealed from by January 10, 2020, as well as serve and file an appeal book and factum within 45 days of receiving the transcript. If the applicant did not follow the perfection order, the respondent could apply to dismiss the appeal on five days' notice. The applicant did not order the transcript. Instead, he applied pursuant to s. 20(3) of The Court of Appeal Act, 2000 to vary the perfection order. The applicant argued that he had not had a reasonable amount of time to raise the necessary funds to order the transcript. According to the applicant, he was dealing with the imminent threat of losing his home for failure to pay property taxes. The applicant sought an additional 45 to 60 days to raise funds. He indicated that he could sell a vehicle during that time.
HELD: The court granted the application. The chambers judge had given the applicant a relatively short time over Christmas to order the transcript. The chambers judge appeared to have done so because he believed, erroneously, that the respondent was barred from enforcing the Queen's Bench Order until the hearing of the appeal. The stay had been lifted pursuant to Rule 15(1); therefore, Rule 15(4) was not applicable. The order lifting the stay allowed the respondent to take steps, pending the resolution of the appeal, to enforce the terms of the Queen's Bench Order. The respondent would not suffer any prejudice if the applicant were allowed additional time to perfect his appeal. The respondent could take steps to enforce the Queen's Bench Order if she chose. The court gave the applicant an extra 60 days to order the transcript. He was also ordered to serve and file an appeal book and a factum or written argument within 45 days of receiving the transcript. If the applicant failed to do so, the respondent could apply on five days' notice to dismiss the appeal for want of prosecution. Costs were reserved.

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***R v Duckworth***, 2020 SKPC 5

Kovatch, January 24, 2020 (PC20006)

Constitutional Law – Charter of Rights, Section 9, Section 10(b)
Criminal Law – Motor Vehicle Offences – Driving with Blood Alcohol Exceeding .08

The accused was charged with impaired driving and driving while his blood alcohol content exceeded .08. At the commencement of the trial, a voir dire was held by agreement to deal with the defence's application alleging that the accused's ss. 9 and 10(b) Charter rights had been breached. An RCMP officer had stopped the accused after she had received a complaint regarding a possible impaired driver. The officer testified that she noted a faint smell of alcohol coming from the vehicle, so she asked the accused to step out of it so that she could confirm that it was emanating from him. After confirming that it did, and because he had bloodshot eyes and a dry mouth, she read the ASD demand. After the accused failed the test, the officer advised him that he was under arrest for impaired driving. She said that she had reasonable grounds for a breath demand and read the demand to the accused. She then read him his Charter rights and asked him if he understood, and the accused responded affirmatively but gave conflicting answers to whether he wanted to call a lawyer. The officer repeated the question, and twice, the accused said no. She then read the police warning. At the station, the accused provided his first breath sample. The technician testified that the accused asked him about the result, but he did not answer the question because it was his practice not to advise an accused of any results until following the completion of the second test because of his fear that they might refuse to provide the second sample. The accused was held in the cells for some time following the breath tests. The defence argued that the accused's s. 10(b) Charter rights had been breached because the information provided by the officer had been confusing, and the accused's confusion might have been the reason he had been equivocal in his decision not to call a lawyer. The officer should have read the accused his Charter rights before making the breath demand. Further, when the accused asked about the results of the first reading, the officer was obliged to provide an answer. By failing to do so, the officer had breached the accused's right to counsel again. The defence requested that the evidence of the breath tests be excluded. As there was no basis to hold the accused in custody after providing adequate breath samples, he should have been released, and police breached the accused's s. 9 Charter right by holding him. The officer testified that she had kept the accused in custody because of the high readings obtained from the breath samples.

HELD: The court dismissed the Charter application under s. 10(b) and admitted the evidence of the breath tests. It decided that the accused's s. 9 Charter right had been breached, and it would provide a remedy following the conclusion of the trial proper. The court found that the defence had not established a violation of the accused's s. 10(b) rights. The fact that the officer reversed the order of advising the accused of his Charter rights with the breath demand was not a Charter breach. The accused may have momentarily indecisive but then stated that he did not want to contact a lawyer, and there was no evidence that he was confused. There was no evidence that the accused would have called a lawyer if the officer who administered the breath test had told him the

result, nor was there any legal obligation on his part to answer the question. The jeopardy faced by the accused after the first test did not increase, so the officer was required to advise him again of his Charter rights. Concerning the overholding of the accused, the court found that it was not justified under s. 497(1.1) of the Code as there was no evidence that he should not have been released as soon as practicable.

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### ***R v Chaboyer***, 2020 SKPC 6

Schiefner, January 31, 2020 (PC20004)

Criminal Law – Assault
Criminal Law – Defences – Defence of Property
Criminal Law – Defences – Self-defence
Criminal Law – Evidence – Credibility

The accused was charged with assault, contrary to s. 266 of the Criminal Code. At trial, the accused acknowledged there had been an altercation between him and the victim. However, he submitted that the victim was the aggressor and that he only applied force in self-defence. The victim was helping a landlord clean a residence that was rented to a third party. The lease payments were in arrears, and the landlord was advised that the tenant had left the province and would not be returning. The landlord took the position that the tenant had abandoned the lease, so he went to clean the property. When the landlord arrived at the property, the door to the apartment was blocked from the inside, and the accused was inside. The accused would not let the landlord in, so he called the police. The police used a battering ram to open the door. The accused left the property. After he left, he said he received a call from his sister advising him that people were throwing his items off the balcony, removing his property from the apartment and throwing it out. The victim and another person began carrying various items out of the apartment after the accused left, and they put the items on a trailer owned by the landlord. The accused came back to the apartment, and according to the victim, he started yelling at them. The victim denied having said anything racist or provocative to the accused. He said that during the exchange of words, the accused punched him in the face once and then left. The victim said that he did not punch back. The person helping the victim move items also indicated that the accused threw the first punch and made "one good contact". The accused testified that the victim pushed a box towards him and then began swinging at him. He indicated that the victim threw the first punch and speculated that the victim was the aggressor because he was caught taking the accused's property. The accused acknowledged that he was not on the lease, nor had he paid any rent associated with the apartment. He also did not dispute that he

intentionally applied force, but that the force was in self-defence. The issue was whether the accused's actions were justified at law. HELD: The court found that the accused intentionally applied force to the victim. If the victim was the aggressor, the force used by the accused was reasonable. The court, however, did not accept the accused's testimony that the victim started swinging at him first. The evidence of the victim and third party was clear, cogent and compelling. The court found that the accused's testimony was confusing, fluid, and self-serving. His testimony that the victim started the fight was unbelievable. There was no air of reality. Therefore, s. 34 of the Criminal Code was found not to apply. The court next considered defence of property, which is triggered when a person subjectively believes that the actions of another are threatening the peaceable possession of the subject's property. The accused was found to subjectively believe that he was in peaceable possession of particular property in the apartment. He believed subjectively that the victim and another man were interfering in his peaceable possession of that property. The court was not, however, satisfied that the accused's response to the threat was objectively reasonable under the circumstances: the force was disproportionate to the threat. The punch was largely unproductive at securing the safe storage of his property. Section 35 was found not to apply. The accused was found guilty of assault.

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### ***R v D.A.***, 2020 SKPC 7

Martinez, January 28, 2020 (PC20005)

Criminal Law – Assault – Sexual Assault – Consent

The accused was charged with sexual assault contrary to s. 271 of the Criminal Code. At the time of the offence, the accused and the complainant were aged 15 and 16, respectively. The accused admitted that he intentionally touched the complainant but alleged that she had consented to his physical contact and the sexual nature of the contact, or that he had an honest but mistaken belief that she had consented to the sexual touching. The complainant testified that she had been sleeping but was awakened by the accused having intercourse with her from behind. She did not consent to the accused's sexual contact with her after she awoke. There was evidence submitted of an exchange of text messages between the parties after the alleged offence wherein the complainant asked the accused what had happened when she was sleeping. The accused texted that he had intercourse with her and that he when he had asked her if it was OK, she had answered "mmhmm". The complaint responded that she talked in her sleep. The accused said that he was sorry. The accused's evidence did not differ in any material way from that of the complainant. He testified that he had

asked her if she wanted to have sex, and she mumbled what he took to mean yes. In cross-examination, he admitted that he could not see the complainant's face and that there had been no conversation between them. The accused also denied knowing that the complainant talked in her sleep.
HELD: The accused was found guilty. The court found that the Crown had proven beyond a reasonable doubt the physical elements of sexual assault. It accepted the complainant's evidence that she was asleep throughout most of the accused's sexual activities with her, and she was not capable of consenting and had not consented after she awoke. The accused could not rely on the defence of honest but mistaken belief under s. 265(4) of the Code because he had not taken objectively reasonable steps in the circumstances to determine whether the complainant was awake and consenting before committing the offence and thus was reckless regarding her consent as provided in s. 273.2 of the Code. The text messages that the accused sent to the complainant were remorseful and indicated that he knew the risk he was taking and recklessly persisted. His recklessness met the mens rea requirement of the offence.

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### ***R v Anderson***, 2020 SKQB 11

Rothery, January 16, 2020 (QB20011)

Criminal Law – Defences – Charter of Rights, Section 1, Section 7, Section 11(d)
Criminal Law – Evidence – Complainant's Private Records
Criminal Law – Offences – Sexual Offences
Criminal Law – Procedure – Cross-Examination – Complainant

The court concluded that effect of ss. 278.92(1), 278.92(2)(b) and 278.94(2) of the Criminal Code infringed the accused's right to make full answer and defence as guaranteed by s. 7 of the Charter and infringed the accused's rights to a fair trial guaranteed by s. 11(d) of the Charter. The court had to determine whether the infringements were demonstrably justified in a free and democratic society pursuant to s. 1 of the Charter. The Criminal Code sections related to the admissibility and use during trial of the complainant's private records, which are in the possession of the accused. The sections afforded complainants the opportunity to make submissions at an in-camera hearing.
HELD: The court found that the infringements were not demonstrably justified in a free and democratic society pursuant to s. 1 of the Charter. The government had the burden of proof to show justification for a law that breaches an individual's rights. The first portion of the Oakes test was satisfied by the government. The pre-screening test to ensure that the complainant's privacy is protected

to the extent necessary was of significant importance. The second part of the test is the proportionality test, which consists of three components. First, Bill C-51 was rationally connected to the objective of attempting to codify the procedures set out in Shearing when a complainant's private records come into the possession of the accused and the accused seeks to admit those private records at trial. Second, the law must impair as little as possible the right or freedom in question. The test failed. The definition of "record" in s. 278.1 of the Criminal Code, combined with pre-screening requirements of ss. 278.92(1), 278.92(2)(b) and 278.94(2), was found to defeat the purpose of cross-examination of the complainant by the accused. The accused's ss. 7 and 11(d) Charter rights were thus infringed. The constrained cross-examination may result in innocent accused people being convicted. A free and democratic society cannot tolerate such a process. Lastly, the Oakes test requires that the proportionality between the effects of the measures that limit the Charter right and the objective are of sufficient importance. The court found the sections of the Criminal Code to have a disproportionately severe effect on the accused. The infringement could not be saved by s. 1 of the Charter.

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### ***Gladman v Double R Land Co. Ltd.***, 2020 SKQB 12

Layh, January 17, 2020 (QB20009)

Real Estate – Interest in Land – Caveat

The respondent owned land in the oil-producing region of Saskatchewan. Two caveats were registered against the title in 1977 and 1999, respectively. The respondent served a notice to lapse caveat pursuant to The Land Titles Regulations, 2001 and, as a consequence, triggered an obligation upon the applicants, successors in interest to the original caveators, to prove they had a continuing interest in the land. In 1957, C.V. Pickard (CVP), the executor and an heir to the estate of the original owner, E. Pickard, applied to Queen's Bench for approval of a surface lease. The judge ruled in a fiat regarding the proposed surface lease respecting the land that CVP would not be permitted to enter into a 25-year lease with the British American Oil Limited (BA). The judge declined to make the order because he found that the lease was neither beneficial nor necessary to the estate. In 1958, CVP transferred the title to the land to himself, his sister, M. Gladman (MG) and his brother (collectively the Pickards) and then executed a 25-year lease with BA (1958 surface lease) for which the Pickards received annual rents. BA was permitted to renew the lease, which it did for two further 25-year terms. To protect its interests in the 1958 surface lease, it registered a caveat. It acquired further lands under the lease so that the applicants received payments for five annual surface

lease rentals from BA's successor, Canadian Natural Resources Limited (CNRL). The applicants were the heirs and the spokespersons for the other heirs of CVP and MG. In 1976, CVP and MG entered into an agreement with the Richards and in 1977, they sold the land to the Richards. One month after the transfer of the land, CVP and MG registered a caveat against the land to protect their rights under the 1976 agreement. The agreement was not attached to the caveat which merely claimed "an interest in the land". In 1982 CVP died and his one-half interest in the land was transferred to his two beneficiaries. In 1988, the Richards sold the land and that owner transferred the land to the respondent corporation. In 1998 MG died and her one-half share was given to her heirs. In 1999, the executors of CVP's estate registered another caveat against the land, claiming an interest in a surface lease dated 1958. As mentioned above, the 1958 surface lease had not been attached to the caveat. Instead, the 1954 surface lease was attached, the lease that the Queen's Bench judge declined to approve in 1957. The parties agreed that the 1976 agreement was determinative of the applicants' interest in the land. In it, the Richards were named as purchaser and lessors and CVP and MG as lessees. Two oil companies, BA and Union Oil Company (UOC), were described as sublessees. Following the description of the four leases, the granting clause in the 1976 Agreement and which, on its face, apparently purported to say that the Richards agreed to lease to CVP and MG, portions of the Land that CVP and MG had leased to BA and UOC. Another term stated that the lessors and lessees agreed that the lessees would retain all the benefits accruing from the subleases by way of rental payments and that the lessors agreed to lease certain portions of the land to the lessees for the purposes and upon the terms and conditions set forth. Although the 1976 agreement stated that the agreement for sale was attached, it had not been and could not be found.

HELD: The court found neither the 1977 caveat nor the 1999 caveat affected the rights of the respondent. The applicants could not rely on the 1954 surface lease and the 1999 caveat because the court ruled in 1957 that the former was not an agreement and it never came into existence. The 1958 surface lease therefore wrongly claimed the 1954 surface lease as its basis. The 1999 caveat claimed an interest pursuant to the 1958 surface lease but that lease was not attached but rather the 1954 surface lease. Under ss. 50(5) and (6) of The Land Titles Act, 2000, the terms of an attachment displaces the description of the interest in the application so that in this case, the conflict between the caveat and the attached lease was resolved in favour of the 1954 surface lease, a lease that had no legal effect and therefore the caveat had no value. The caveat could have no impact on the 1988 purchaser of the land because it was not yet registered. With respect to the applicants' position that the 1976 agreement was a surface lease and therefore an interest in land, the court found that it could not be because the Pickards had granted surface rights to BA and UOC in the 1958 surface lease. When the Richards purchased the land, they did so subject to BA's caveat and they could not

acquire from CVP and MG the oil companies' continued rights to the surface of certain portions of the land. The 1976 agreement had not created an interest in land by reserving rental payments to the applicants.

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### ***Osecap v Federation of Sovereign Indigenous Nations***, 2020 SKQB 15

Currie, January 21, 2020 (QB20014)

Civil Procedure – Queen's Bench Rules, Rule 7-1, Determination of a Question
Employment Law – Contract – Interpretation

The plaintiff accepted employment from the defendant according to a written offer of employment for the period April 1, 2016 to March 31, 2017. The work was terminated without notice or cause on June 16, 2016. The issue was the compensation to be provided to the plaintiff for early termination of the contract. The plaintiff argued that the contract had to be paid out in its entirety, whereas the defendant argued that only appropriate notice was due as per the contract. Clause 10(c) of the contract indicated that the agreement could be terminated without cause after the completion of the probationary period by providing the appropriate notice. The plaintiff applied pursuant to Rule 7-1 of the Queen's Bench Rules for determination of a question. The question was whether the termination provision was enforceable. The plaintiff had worked for the defendant at different positions since 1998. The contract for the period April 2, 2015 to March 31, 2016 did not include an express reference to a probation period. The April 1, 2016 contract did refer to a probationary period of employment. The plaintiff indicated that she was not treated as though she were on probation at any time after April 1, 2016. The contract also referred to the defendant's Human Resources Management Regulations, which included a six-month probationary period. The plaintiff argued that clause 10(c) was void for ambiguity or uncertainty, or for violating the provisions of The Saskatchewan Employment Act.
HELD: The court found the matter to be an appropriate one in which to combine the two steps contemplated in Rule 7-1. The question was discrete and could be addressed without the need for clarification of the question or the provision of additional evidence. The court noted that a shortfall of clarity in a contract seldom means that the provision is unenforceable. It usually means that the contractual provision requires judicial interpretation. The plaintiff argued that 10(c) depended on the expiration of a probationary period that was not defined. Because the probationary period was not defined, the plaintiff argued the there was no way of knowing when the clause applied. The court found two possible

interpretations that would leave the provision enforceable. One, the reference to the Human Resources Regulations incorporated those regulations into the contract, or, two, the absence of identification of a probation period in the contract means that there is no probation period. Clause 10(c) was not unenforceable by virtue of the lack of a specific definition of a probation period in the contract. The court did not agree with the plaintiff that the phrase "appropriate notice" could not be determined. There were possible interpretations of the phrase. The plaintiff also argued that clause 10(c) could be interpreted so that "appropriate notice" meant a period of notice less than the minimum required under The Saskatchewan Employment Act. The court disagreed. Clause 10(c) was not unenforceable; it was a contractual provision that was capable of being given meaning by the court. The answer to the question on the application was "yes." The defendant was successful and thus entitled to costs, under column 2, in any event of the cause.

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### ***Kozak v Moore***, 2020 SKQB 22

Mitchell, January 23, 2020 (QB20021)

Family Law – Child Support – Adult Child – Adult Student
Family Law – Child Support – Agreement as to Child Support
Family Law – Child Support – Interim
Family Law – Child Support – Retroactive Support

The petitioner applied for orders relating to the parties' child who was a full-time university student. Specifically, she requested child support according to the Federal Child Support Guidelines, a portion of s. 7 expenses, and retroactive child support and s. 7 expenses. The parties separated in 2011 after living together for numerous years. The child remained in the family home with the petitioner. The parties executed a separation agreement (agreement) in July 2011. The agreement stated that if the court became involved, the parties had a duty to comply with the table sum according to the Child Support Guidelines. There was also a clause indicating that "both parties agree to contribute half the expenses to the child's post-secondary education, such as but not limited too [sic]: tuition, books, housing arrangements, etc." The parties did not receive independent legal advice on the agreement. The petitioner argued that support should be in accordance with s. 3(2)(a) of the Guidelines, the child support tables. The petitioner provided a budget for the child's expenses. The child had earned $6,485.55 in 2019 by the end of August. The petitioner indicated that the child's RESP balance was $18,533.04 shortly after separation. The petitioner continued to make contributions to the RESP, whereas the respondent did not. The petitioner's income in the 2018/2019 school year was $97,071.80. However, due to budget cuts and reduced

hours, she expected her 2019 income to be $84,735. The petitioner argued the child should be responsible for 30% of her expenses and the parties would share the remaining 70% based on their income level. She also requested that the parties proportionately share health expenses not fully covered by health insurance. The respondent argued that the assessment should be done under s. 3(2)(b) of the Guidelines and that he should pay 50% as per the agreement. He further argued that he should not have to pay anything until his contributed share of the RESP was depleted. The respondent's 2018 income was $103,905.29. The issues were: 1) whether the respondent was required to pay support for the child's post-secondary studies, and if so, to what extent; and 2) whether the court should grant an order for retroactive arrears.
HELD: The issues were determined as follows: 1) the child was almost 20 years old but remained a "child" for support purposes because she was a full-time student. The court held that the determination of child support for the adult child should be made pursuant to s. 3(2)(b) of the Guidelines. The agreement was not found to be determinative of the issue, and the court departed from its terms for the following reasons: a) there was no independent legal advice on the agreement; b) the agreement was dated; c) interspousal agreements cannot oust the jurisdiction of the court to review and revise agreements made between parties respecting child support; and d) an order directing support for an adult child in university is exceptional, and a child is expected to make all reasonable efforts to generate income. The court determined that the petitioner's submission was preferable to the respondent's. The child would be responsible for 30% of her post-secondary costs and of the remaining 70%, the petitioner would be responsible for 45% and the respondent for 55%. The court rejected the respondent's argument that he not pay anything until the RESP was exhausted because there was no family property claim advanced in the application respecting the RESP. Further, the respondent relinquished his interest in the RESP in September 2011. The court declined to make the requested order that the respondent pay the costs within 30 days of receiving the receipts because it would be a breach of a court order if he did not pay the amounts required. There was no evidence that the respondent failed to comply with court-ordered obligations in the past, and 2) the petitioner requested arrears of $12,306 for the period July 1, 2018 to August 1, 2019. The respondent argued that he had been supporting the child since she turned 18 and that the matter should proceed to a pre-trial conference. He indicated that more information was required on each of the four factors from D.B.S. to determine if retroactive support were appropriate. The court found that there were gaps in the evidence filed. The retroactive issue was ordered to proceed to pre-trial. The court declined to make an order as to costs given the divided success of the application.

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***Banilevic v Cairney***, 2020 SKQB 25

Megaw, January 27, 2020 (QB20025)

Civil Procedure – Resumption of Trial
Civil Procedure – Trial – Adjournment
Family Law – Division of Family Property
Family Law – Division of Family Property – Evidence
Family Law – Division of Family Property – Exemptions
Family Law – Division of Family Property – Family Trust
Family Law – Division of Family Property – Interspousal Agreement
Family Law – Division of Family Property – Valuation
Statutes – Interpretation – Family Property Act, Section 40

The parties separated after 20 years together. The respondent argued that real property, vehicles, and cash were family property, whereas the petitioner argued that there was no family property to divide because it all belonged to a family trust with the parties' children and his sisters being the beneficiaries. The petitioner called himself a "freeman on the land", meaning that he refused to pay income taxes to the Crown. The parties entered in a "private settlement agreement" in 2019. The respondent disputed the validity of the agreement. Both parties were self-represented at trial. The parties, together with the petitioner's sisters, had registered ownership interests in two apartment blocks and two rental houses in Moose Jaw, the family home, a former carpet store property in Moose Jaw, and a house in British Columbia. According to the petitioner, the family trust was directed by his father. A trust agreement with respect to the Moose Jaw properties was tendered as an exhibit. Another document, one page in length and titled "Declaration of Trust", was tendered with respect to the BC property. The petitioner bought and sold high-end vehicles, which he asserted were property belonging to the trust. The sum of $280,000 cash was found in a safe in the family home. The respondent said that there may be as much as $800,000 cash at the BC property. The petitioner testified that $157,000 of the cash found was the proceeds of a mortgage the petitioner lent to a third person. He said the remaining money was from the sale of vehicles. It was unknown what happened to $25,000 cash that was received by the respondent from her grandmother's estate. There was also evidence that the petitioner owned two hectares of property at Isla del Rey in Panama. The respondent took steps to sell, or dispose of, certain property after separation. The respondent alleged that the petitioner also removed property, but there was no evidence as to what property or its value. The petitioner argued that the respondent had damaged the family home. The issues were: 1) the various applications for an adjournment; 2) the effect of the agreement between the parties; 3) what family property was available for division; and 4) exemptions and outstanding issues.
HELD: The issues were dealt with as follows: 1) the petitioner

repeatedly requested an adjournment of the trial for various reasons. The petitioner's applications for an adjournment were dismissed; 2) the agreement was two pages long. The respondent was to receive the $254,000 cash held by the court, the 2002 Trans Am and $2,000 cash. The respondent would relinquish her rights to all claims regarding the real property. Neither party had received legal advice on the agreement. The respondent had been experiencing serious health difficulties at the time. She has multiple sclerosis and suffered from extreme symptoms due to a relapse for much of 2019. Her ability to process information was compromised. The court concluded that the respondent was neither emotionally, nor intellectually, capable of negotiating on an even footing with the petitioner. At the time of the agreement, there was not yet full disclosure of all that was required to allow a party to make an informed decision on regarding the family property. The agreement was not an interspousal contract pursuant to s. 38 of the Family Property Act. The issue of the applicability of the agreement was left to be determined according to s. 40 of the Act. The court reviewed C.M. v S.K. and determined that the first step would be to consider the circumstances under which the agreement was signed and the second was a review of the substance of the agreement. The court listed factors to consider when determining the effect of an agreement pursuant to s. 40. After considering the factors, the court could not conclude that the agreement was fair and reasonable. The agreement was not enforceable; 3) the petitioner argued that there was no family property available for distribution because all of the property is beneficially held by a family trust. He argued further that he owed his parents $2,375,000 pursuant to a demand promissory note. No evidence was adduced as to why the debt existed. The court concluded that if the trust was not valid, the promissory note would not be either. There was a lack of evidence regarding the family trust. It appeared that the properties, cash, and vehicles were treated by the petitioner as if they were his own without any payments to the trust. The court concluded on the totality of evidence that the alleged trusts were a sham. There was no valid trust arrangement. The real properties were placed legally and beneficially into the names shown as the legal owners'. The parties' interest was to be distributed as family property. 4) The petitioner did not meet the onus to establish an entitlement to an exemption of certain property. No property was identified, nor was there an attempt to trace any property. 5) Finally, the court determined that it was necessary to re-open the trial to permit evidence regarding the extent and valuation of the family property assets. The court determined matters for which there could be evidence and argument when the trial re-opened and matters for which there could be no evidence or argument. Because the trial would resume, an order for costs was not made.

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***R v McKay***, 2020 SKQB 28

Tochor, January 31, 2020 (QB20027)

Criminal Law – Murder – Second Degree Murder
Criminal Law – Defences – Intoxication

The accused was charged with unlawfully causing the death of the victim and thereby committing second degree murder contrary to s. 235 of the Criminal Code. The police went to the residence of the accused and the victim, his wife, and the accused answered the door, covered in blood. He said that he had killed his wife. The officers found the victim's body in the house with a knife in her chest. The accused was arrested and, while in custody, he said repeatedly that he had killed his wife. Video recordings showed the accused appearing to be lucid and aware of his situation. An autopsy revealed that the victim had been stabbed 24 times and that there were many other injuries to the body. The accused testified at trial that his marital relationship was good but that both he and his wife abused alcohol. On the night of the alleged offence, he had been drinking and had taken two anti-depressant pills and as a consequence he suffered from alcohol-induced amnesia. The accused admitted that he was responsible for the victim's death but did not wilfully kill her. He explained that his recollection of the evening was affected and he knew that he had experienced a number of blackouts and had numerous fragmented memories that suggested that he was in an altered state of consciousness. He could not recall being arrested or what he said while in custody. The defence called an expert witness who was qualified to give opinion evidence on the effect of alcohol and drugs on brain functioning, behaviour and memory. He testified that, based only on the accused's evidence about the quantity of alcohol and medication he had ingested, it was possible that he had experienced alcohol-induced amnesia. The accused's daughters testified that just prior to the alleged offence, the victim had called the police because the accused was behaving violently and was threatening her life. Following this incident, the daughters left the home and the victim tried to find another place to live so that she could move out.
HELD: The accused was found guilty of second degree murder. The court conducted a D.W. analysis and found that it did not believe the accused's testimony that he experienced alcohol-induced amnesia. There was evidence that his manner while being arrested and held in custody showed no signs of overt impairment. It concluded that there was evidence of the accused's animus towards the victim in the days of before her death. The court was satisfied that it could infer the intent to kill from the number of stab wounds and the rest of the injuries. The victim's statements to the police that he had killed the victim corroborated his intent to kill.

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### *Ambassador Coffee Inc. v Park Capital Management 2012 Inc.*, 2020 SKQB 26

The plaintiff was awarded summary judgment in which it sought damages and costs from the defendant in connection with a lease agreement (see: 2019 SKQB 65). Pursuant to the terms of the judgment, the plaintiff was awarded solicitor-client costs. The parties were unable to agree on how the costs and disbursements should be calculated and applied to the court for direction under Queen's Bench rule 11-20.
HELD: The court assessed solicitor-client costs at $19,815.00. It decided that the plaintiff's claim for fees, disbursements and taxes relating to pre-litigation services performed before the issuance of the statement of claim should be taxed off, as well as its claim for computer research. The court regarded electronic research as a non-recoverable disbursement because it is part of the general overhead of a law firm. The time that the plaintiff's counsel claimed for the preparation of the statement of claim, the reply and the application for summary judgment was fair and reasonable and would not be taxed off.

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### *Ryan v Kreutzwieser*, 2020 SKQB 29

Currie, January 31, 2020 (QB20029)

Landlord and Tenant – Residential Tenancies Act, 2006 – Order for Possession – Appeal

The tenant appealed from the decision of a hearing officer made under the provisions of The Residential Tenancies Act, 2006 that granted the respondent landlord's application for an order of possession of the rental unit. The parties had entered into a fixed-term lease of four months. The agreement set out the term and then stated: "and continuing thereafter from month to month." At the conclusion of the term, the respondent served a Form 15 written notice advising the tenant that a new lease would not be offered and required him to vacate. The tenant did not vacate, and the respondent applied for the order for possession. The tenant argued that after the term expired, he remained the tenant under the month-to-month tenancy referred to in the agreement. The respondent had not asserted any cause for terminating the month-to-month tenancy pursuant to s. 55 of the Act. Therefore, the respondent had no basis for terminating the subsequent month-to-month tenancy and the hearing officer erred in law in ruling that the Form 15 notice had terminated the tenancy relationship.
HELD: The appeal was dismissed. The court found that the hearing officer correctly ruled that the respondent's Form 15 notice terminated the entirety of the tenancy relationship. The tenancy agreement had not provided for two separate tenancy relationships. The month-to-month tenancy was identified as something that could

continue from the fixed tenancy, but the court found that it had not come into existence. The respondent properly served the Form 15 notice and ended the fixed term.

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### ***Canadian Imperial Bank of Commerce v Wilchuck***, 2020 SKQB 35

Popescul, February 12, 2020 (QB20034)

Civil Procedure – Summary Judgment
Statutes – Interpretation – Cost of Credit Disclosure Act, 2002, Section 36

The plaintiff bank applied for summary judgment against the defendant for debts accrued by him through his use of two credit cards. The defendant denied the plaintiff's claim, but did not submit any evidence in opposition to it.
HELD: The application for summary judgment was granted as there was no genuine issue requiring trial. The court granted judgment in the amount of $22,291 representing the balances owing on the two cards as well as interest at the rate of 19.99 percent as set out in the cardholder agreements. It was unnecessary for the plaintiff to produce the written contract, since the defendant had made use of both cards as required in s. 36(5) of The Cost of Credit Disclosure Act, 2002. Further, the court exercised its discretion under Queen's Bench rule 11-1 to order solicitor-client costs as that obligation was contained in the agreement between the parties.

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### ***Last Mountain Valley (Rural Municipality No. 250) v Ter Keurs Bros. Inc.***, 2020 SKQB 37

Klatt, February 11, 2020 (QB20036)

Civil Procedure – Queen's Bench Rules, Rule 7-5(1)(a)
Civil Procedure – Summary Judgment
Contracts – Interpretation
Contracts – Real Property – Profit à Prendre
Real Property – Profit à Prendre

The plaintiff Rural Municipality (RM) applied for summary judgment against the defendant. The RM sought a declaration that it was the owner of gravel that had been stockpiled on land (land) owned by the defendant. The RM also sought reasonable time to remove the stockpile from the land. Both parties agreed to resolution of the matter by summary judgment. The RM and

defendant were the parties to a Gravel Removal Agreement (gravel agreement) allowing the RM to excavate and stockpile gravel on the land. The lease was to expire in 2017. The RM had leased the land continuously for many years and from previous owners of the land. Payments were made to the defendants as required. According to the Reeve of the RM, the stockpile was 109,634 yards at the end of 2016, which was higher than usual. T.K., an owner of the defendant, said that he attended a council meeting in February 2016 because he was concerned with the amount of excavation being done on the land. He indicated that he did not think that it was fair for the RM to extract so much gravel right before the gravel agreement expired. The RM witnesses denied that there was any discussion about the RM having to remove their stockpiles if the lease were not renewed. The RM said that T.K. spoke about the anticipated increased royalty rate upon renewal and asked that no more extraction occur until then. The RM said that they agreed not to process any more gravel until after the renewal agreement was entered into. The parties met a few times in the following months to attempt to renew the agreement. On the day that the lease expired, the RM received a letter from the defendant indicating that they were not renewing the agreement and that they were claiming ownership of the gravel stockpiles. The defendant prohibited the RM from entering the Land. According to T.K., he told the RM to clean up the stockpile during the February 2016 meeting. The issue was the ownership of the gravel stockpiles.

HELD: The court determined that the issues could be resolved through the summary judgment process. To interpret the gravel agreement, the court referred to the Supreme Court of Canada case, Sattva Capital Corp., for the need to determine the intentions of the parties and the scope of their understanding of the agreement. Contractual interpretation is not confined to the words used in the contract, but also to the factual matrix surrounding the making of it. The court had to determine what the parties agreed to when they entered into the gravel agreement as it related to the ownership of the gravel and the rights to stockpile gravel, particularly after the expiration of the agreement. The court had to assess whether the contractual relationship was a profit à prendre. The court found that when the gravel agreement was reached, the parties understood and intended that the processed and stockpiled gravel belonged to the RM. The nature of the interest in the matter was a profit à prendre. The ownership of the stockpile had already transferred to the RM and therefore they had a reasonable time to remove the gravel that they processed. The court did not find that the words of the agreement or surrounding circumstances supported the defendant's argument that the parties did not intend for the RM to have stockpile remaining after the gravel agreement expired. It was unreasonable for the defendant to assume that once the agreement ended, they automatically became owners of stockpiles they had already been paid for but that remained on the land. Such a conclusion would be wholly unjust. The court was also not convinced that RM was motivated by greed and, knowing the

contract was soon to expire and not be renewed, they extracted as much gravel as they possibly could. The RM believed that a new agreement could be reached. There was an implicit intention by the parties that the RM should have a reasonable opportunity to remove the stockpiles. Five years to remove the stockpile, as suggested by the RM, was found to be too long. The court had insufficient evidence to decide what was just and appropriate. The court preferred to leave it to the parties to reach a settlement on the issue but if they were unable to do so, the court gave them leave to file additional affidavit evidence to address the issue. The RM was ordered to give the defendant 48 hours' notice to remove all or part of the gravel stockpile. The RM was awarded costs.

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### ***Consumers' Co-operative Refineries Ltd. v Unifor Canada, Local 594***, 2020 SKQB 38

Robertson, February 12, 2020 (QB20037)

Civil Procedure - Contempt

Consumers' Co-operative Refineries Ltd. (CCRL) applied to the court for an order of contempt pursuant to Queen's Bench rule 11-26 to declare the respondent union, Unifor, Local 594; the president of the union, Bittman; and a vice-president, Holowachuk, in civil contempt for failing to comply with the injunction awarded to CCRL on December 27, 2019. CCRL had initially obtained an interim injunction and had previously applied and obtained an order finding the union in civil contempt of that order (see: 2020 SKQB 17). Since January 20, 2020, the entrances to CCRL's refinery property had allegedly been blockaded and all entry and exit from the refinery had been prevented. The union acknowledged the fact of the blockade but argued that the local was not responsible for it and it should not be fined.
HELD: The application was granted and the court declared the union and its vice-president, Holowachuk, to be in contempt of court. The union's president, Bittman, was exonerated. The court broadened the injunction to include any other person in addition to the union local and its members and authorized the removal of the barricades from CCRL's property. Under Queen's Bench rule 11-27, the union was fined $250,000. The court agreed that the union could pay half the fine to a charitable program and the other half would be paid to the government. Holowachuk was sentenced to serve 40 hours of community service instead of a fine. The court found that the injunction was clear and unequivocal and that the union had notice of it. It accepted CCRL's evidence that breaches of the injunction had occurred, and that the union was responsible for the breaches as shown by evidence that it managed the picket lines. If the union enlisted or allowed participation from outside supporters,

it could not then disown any responsibility for their actions. In the case of the vice-president of the union, the court accepted the evidence that he had denied a driver's request to proceed through the picket line once he had informed the picketers that he did not want to hear the union's message. It did not find the president of the union to be in contempt on the basis that the words he had spoken at a rally encouraged breaches of the injunction. His comments only related to bargaining issues and did not call upon members to commit breaches.

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