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Phillips Legal Prof. Corp. v Cowessess First Nation No. 73, 2020 SKCA 16

Ottenbreit Caldwell Whitmore, February 21, 2020 (CA20016)

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Constitutional Law – Constitution Act, Section 91(24) – Paramountcy – Professions and Occupations – Lawyers – Legal Fees – Assessment

The appellants appealed a chambers decision referring 67 statements of account issued by them to the respondent, a First Nation, for assessment pursuant to s. 67 of The Legal Profession Act, 1990 (LPA). The appellants also appealed the order requiring them to pay the respondent $20,000 in solicitor-client costs. The Attorney General of Saskatchewan (AG) intervened because the appellants submitted that the LPA was inapplicable to the respondent by virtue of the doctrines of interjurisdictional immunity and paramountcy. The appellants applied to file a reply factum under Rule 33.1 of The Court of Appeal Rules (Rules) in response to the AG factum. The respondent retained the appellants as general counsel in July 2013. It was terminated in April 2016, the day after the election (election) of a new Chief and Band Council of the respondent. There was a June 2015 retainer agreement. Three weeks prior to the election, the respondent signed the April 5 Band Council Resolution (BCR) requesting the appellants to continue to act as counsel and approving a further retainer agreement drafted by the appellants (2016 retainer). The 2016 retainer confirmed the 2015 retainer and provided that all work performed by the appellants would be governed by the 2015 retainer. The 2016 retainer also confirmed the

Civil Procedure – Evidence – Affidavit Evidence – Argument and Opinion – Mortgage – Foreclosure – Application for Judicial Sale – Order Nisi Civil Procedure – Costs – Foreclosure

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right to assess accounts. The chambers judge found that an application to refer a lawyer's bill for assessment is interlocutory, so evidence on information and belief can be admitted. The appellants' application to strike some of the respondent's evidence was dismissed with the exception of a few paragraphs. The appellants argued that ss. 67 and 71 of the LPA were an intrusion on the core of Canada's jurisdiction relating to Indians and lands reserved for Indians pursuant to s. 91(24) of the Constitution Act, 1867 to such an extent that the entire scheme of the LPA was inapplicable to Council. The appellants argued that any advice they gave to the respondent was a federal matter. The LPA did not touch the core federal jurisdiction so as to engage the doctrine of interjurisdictional immunity. The appellants also argued that ss. 67 and 71 are inoperable pursuant to the doctrine of paramountcy because they were inconsistent the respondent's Bylaw (financial bylaw), the April 5 BCR, or s. 18 of the Federal Courts Act. The chambers judge held that even if it was assumed the April 5 BCR was a federal regulation, it did not preclude an application for assessment. The chambers judge concluded that the April 5 BCR and the 2016 retainer "were a self-serving attempt [by the appellants] to get while the getting was good". There was not found to be any operational conflict between the April 5 BCR and ss. 67 and 71 of the LPA. The chambers judge also found that the financial bylaw and the LPA could be interpreted in a way that avoided conflict. The chambers judge found that the doctrine of res judicata was not engaged. The chambers judge concluded that ss. 67 and 71 of the LPA were not inoperable as a result of doctrine of paramountcy. The chambers judge found that the doctrine of estoppel did not apply. The case was found to be rare and exceptional such that solicitor-client costs of $20,000 were awarded to the respondent. The issues on appeal were: 1) whether the chambers judge erred in the admission and handling of evidence; 2) whether the April 5 BCR, 2016 retainer or financial bylaw precluded the respondent from making an application pursuant to s. 67 of the LPA; 3) whether the chambers judge erred in referring the invoices for assessment; and 4) whether the chambers judge erred in awarding costs on a solicitor-client basis.

HELD: The appeal and application were dismissed. The appellants were not allowed to file the reply factum. The issues were dealt with as follows: 1) the appellant was not successful in arguing that the chambers judge failed to identify the evidentiary record. The chambers judge also did not err in making adverse credibility findings. The chambers judge was entitled to determine the weight he placed on certain evidence. The application was interlocutory, so hearsay evidence was permissible provided the source was set out; 2) the appellants' arguments under the issue amount to a reiteration of its paramountcy submissions to the chambers judge. The arguments rest on the assertion that the April 5 BCR, the 2016 retainer and the financial bylaw are tantamount to federal enactments in the exercise of Indian self-government under s. 91(24) of the Constitution Act, 1867. The appellants also argued the

Cases by Name

principles of estoppel and res judicata applied. They further said that the respondent contracted out of the assessment provisions of the LPA. The appeal court disagreed that the chambers judge set the April 5 BCR aside. The argument that any judicial review should have been conducted in Federal Court was misplaced. The appeal court also agreed with the chambers judge that the doctrines of estoppel and res judicata did not have application. The appeal court turned to paramountcy. The chambers judge assumed that the April 5 BCR was a federal regulation. The submission that he should have used statutory interpretation to determine its meaning was misplaced. Its terms were straightforward and not in dispute. The chambers judge was found to have correctly applied the law with respect to any operational conflict. The appeal court agreed that the chambers judge was correct in determining that the April 5 BCR and the 2016 retainer read together resulted in the parties intending that there could be an assessment. The appeal court agreed with the chambers judge that there was no operational conflict or frustration of purpose between the April 5 BCR, the financial bylaw and s. 67 of the LPA. The appeal court concluded that none of the April 5 BCR, the 2016 retainer or the financial bylaw precluded the respondent from making an application for an assessment under s. 67 of the LPA; 3) the chambers judge was not required to determine if the accounts were fair and reasonable. Nor did he have to determine that any particular invoice was excessive. The appeal court found that the chambers judge conducted a sufficient review of the evidence before him and to make the determination that he did; and 4) the chambers judge did not err in awarding solicitor-client costs. The respondent also requested solicitor-client costs on appeal. The appeal court found the matter to be one of those rare and exceptional cases where solicitor-client costs were warranted. The appeal court awarded $40,000 of solicitor-client costs to the respondent.

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Royal & Sun Alliance Insurance Co. of Canada v Community Electric Ltd., 2020 SKCA 17

Ottenbreit Schwann Kalmakoff, February 21, 2020 (CA20017)

Insurance – Action on Policy – Appeal
Insurance Contracts – Interpretation – Self–Insurance

The appellant insurance company appealed the decision in chambers that granted summary judgment in favour of the respondent. The respondent claimed against the appellant under an insurance policy for a loss it said was covered. The appellant denied coverage because the policy was not engaged due to a loss that should have been covered by a third party. If the policy were engaged, the appellant argued that the loss fell within an "Other

HCI Ventures Ltd. v S.O.L. Acres

Industrial Properties Regina Ltd. v Midtdal

Kokanee Mortgage M.I.C. Ltd. v Rozdilsky

Kuderewko v Kuderewko

Lowry v Coppola

Papequash v Daniels

Phillips Legal Prof. Corp. v Cowessess First Nation No. 73

R v Mahamud

R v Ratt

R v Sidhu

R v Vandewater

Royal & Sun Alliance Insurance Co. of Canada v Community Electric Ltd.

Schreiner v Saskatchewan Apprenticeship and Trade Certification Commission

Westfield Twins Condominium Corp. v Wilchuck

Insurance" limiting clause. A third party contracted the respondent to carry out electrical work for a construction project. The construction contract required the respondent to obtain a commercial general liability insurance policy. The third party was required to self-insure or purchase "builder's risk" property insurance for the work at the site. The respondent purchased the policy required by the construction contract from the appellant. The third party chose to self-insure. A fire broke out at the work site as a result of the respondent's error. The third party withheld $191,011.40 from its payments to the respondent under the construction contract. The respondent claimed that amount from the appellant. The respondent's summary judgment application was successful, and they were awarded judgment in the amount of $189,127.24. The only loss that the chambers judge found was excluded was the cost to repair the incorrectly performed work that led to the fire in the amount of $1,884.16. The chambers judge did not find that the third party's insurance was "Other Insurance". The issues were whether the chambers judge erred: 1) in determining that the respondent's policy was engaged; and 2 in determining that the "Other Insurance" clause did not apply.
HELD: The appeal was dismissed. The issues were determined by the appeal court as follows: 1) the court found that the chambers judge was correct to conclude that the loss claimed by the respondent fell within the scope of coverage set out in the policy. The appellant argued that general principles of insurance law dictated that a builder's risk policy obtained by the owner of a construction project should be interpreted as being the primary coverage for the risk of damage to the property or project itself. The appeal court did not agree. Builder's risk insurance is not always primary to any other insurance. Also, a covenant to obtain builder's risk insurance is not necessarily a supervening covenant that provides a form of tort immunity. The terms of the construction contract were not irrelevant, but they did not dictate the scope of the respondent's coverage under the policy. To determine the scope of the coverage, the terms of the policy had to be the focus. The policy did not indicate that there were any limits on coverage resulting from obligation the respondent had under the construction contract. The chambers judge also found that the "Your Work" exclusion only applied to the extent of repairing the defective work. The appeal court found the chambers judge's conclusions were correct. The appellant argued that the third party's failure to insure gave rise to some form of tort immunity. The appeal court agreed with the chambers judge that the argument was a backdoor attempt to revisit the argument that the respondent was not obliged to pay the third party under the construction contract. A reasonable settlement can be the underpinning of a legal obligation to pay. The chambers judge found the settlement between the third party and the respondent to be reasonable. The appeal court found no reason to interfere with that finding. The respondent's losses fell within the initial grant of coverage; 2) a clause in the policy indicated that it would be "excess insurance" where there was "builder's risk"

coverage for damage to the respondent's work on the construction project. The appellant argued that the third party's choice to self-insure constituted "other valid and collectible insurance" in the form of builder's risk insurance within the meaning of the policy between the appellant and respondent. The court found that it was not clear in the jurisprudence whether self-insurance constituted Other Insurance. The court examined the four considerations from Goode: a) the relationship between the respondent and the third party did not closely resemble insurance; b) the terms of the construction contract also did not fit the ordinary definition of insurance or what a layperson would consider to be insurance; c) the definition of "insurer" in The Insurance Act also supported the conclusion that the third party's self-insurance was not Other Insurance. The appeal court was not aware of any statutory provisions that weighed in favour of a finding that the third party's choice to self-insure should be seen as Other Insurance; and d) public policy decisions did not drive the result in the direction that the self-insurance was Other Insurance. The appeal court concluded that the third party's self-insurance was not "other valid and collectible insurance". The chambers judge was correct to conclude that the appellant's obligation to pay was not affected by the self-insurance. The respondent was entitled to costs.

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R v Ratt, 2020 SKCA 19

Ottenbreit Ryan-Froslie Schwann, March 4, 2020 (CA20019)

Constitutional Law - Charter of Rights - Arbitrary Detention

The Crown appealed the acquittal of the respondent after a trial in Provincial Court. The defence made a Charter application alleging that the respondent's ss. 9 and 10(a) Charter rights had been breached as a result of his unlawful detention. The respondent was the subject of a probation order that included that he was prohibited from being in the community of Deschambault Lake. Officers who were on patrol in the town noticed a group of people fighting and went to investigate. One of the people, the respondent, fled the scene as the officers yelled "stop" and that he was "under arrest". The officers eventually found the respondent who had hidden himself and arrested him for breaching his probation order. At trial, the judge ruled that the respondent had been unlawfully detained when the officers yelled at him and that all evidence pertaining to events that occurred thereafter should be excluded. The Crown argued on the appeal that the trial judge erred in law by failing to determine whether the respondent was actually detained within the meaning of s. 9 of the Charter.
HELD: The appeal was allowed and a new trial ordered. The court found that the trial judge had erred in law because she failed to ask

whether a detention had occurred. Before there can be an arbitrary detention within the meaning of s. 9 of the Charter, there must first be a detention. The evidence showed that the respondent was never seized or touched by the officers, nor had he submitted to arrest, prior to the time that they found him in his hiding spot.

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Antoniadou v Saskatchewan Government Insurance, 2020 SKCA 20

Richards Caldwell Tholl, March 2, 2020(CA20020)

Statutes – Interpretation – Automobile Accident Insurance Act, Section 39

The appellant appealed from the decision of a Queen's Bench judge to dismiss her application for the appointment of an umpire pursuant to The Automobile Accident Insurance Act on the basis that there was no dispute between her, the insured, and Saskatchewan Government Insurance (SGI), the insurer (see: 2019 SKQB 138).
HELD: The appeal was dismissed. The chambers judge had not erred in asking whether the matter before him involved a disagreement between the insured and the insurer about an amount payable as per s. 39, condition 9(1) of the Act. On the basis of the record, the judge was entitled to find that the disagreement was between the appellant's vehicle repairer and SGI.

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R v Mahamud, 2020 SKCA 21

Jackson Barrington-Foote Kalmakoff, March 6, 2020 (CA20021)

Constitutional Law – Charter of Rights – Exclusion of Evidence

The Crown appealed the acquittal of the respondent. The trial judge found that the respondent's rights under ss. 8 and 10(b) of the Charter had been violated and granted the remedy of exclusion of the evidence pursuant to s. 24(2) of the Charter (see: 2019 SKQB 115). The Crown argued that the trial judge erred in her s. 24(2) analysis.
HELD: The appeal was dismissed. The standard of review of the judge's s. 24(2) determination is deferential. The judge had considered the proper factors and had not made an unreasonable finding. Those findings were not tainted by palpable and overriding error.

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Kuderewko v Kuderewko, 2020 SKCA 22

Leurer, March 11, 2020 (CA20022)

Civil Procedure – Summary Judgment – Appeal
Landlord and Tenant – Writ of Possession – Appeal

The appellant appealed the decision of a Queen's Bench chambers judge to grant a writ of possession pursuant to s. 50 of The Landlord and Tenant Act (LTA), directing the sheriff to put the respondents in possession of the land (see: 2019 SKQB 206). The appellant argued that the chambers judge erred: 1) in granting the writ on a summary basis; and 2) by granting summary judgment when he found that there was no lease between the parties. The appellant argued that it is a prerequisite to the exercise of the court's jurisdiction under s. 50(1) of the LTA that there be a tenancy agreement between the applicant landlord and a tenant. Since the judge found that he did enjoy a right of possession under a lease, he was precluded from granting the writ.
HELD: The appeal was dismissed. The court found with respect to each ground that the trial judge: 1) had not erred in determining that the dispute between the parties could be fairly resolved without the need for a trial and had made no error in principle in his general approach. He had made no palpable or overriding error in deciding summarily that the appellant was not a tenant under a lease based on the evidence; and 2) may have erred in regarding whether a writ can be granted where no tenancy existed. The question has not been considered by the Court of Appeal and it would not do so in this case. Even if the judge had erred, that was not a reason to allow the appeal. The appellant had acknowledged that under the lease, he would vacate the property on notice of its sale and he could not now assert that the writ should not have been granted because a lease did not exist: that would be an impermissible approbation and reprobation.

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HCI Ventures Ltd. v S.O.L. Acres, 2020 SKCA 24

Ryan-Froslie Schwann Kalmakoff, March 12, 2020 (CA20024)

Statutes – Interpretation – Farm Debt Mediation Act, Section 21
Statutes – Interpretation – Limitations Act, Section 11

The plaintiff and defendants both appealed from different decisions of two Queen's Bench chambers judges made concerning the same factual matrix and the application of the provisions of the Farm

Debt Mediation Act (FDMA) and The Limitations Act (LA) respectively. The plaintiff, HCI, first applied to the Court of Queen's Bench for summary judgment against the defendants, S.O.L. Acres, G. P. and P.P., for monies owing pursuant to a lease of farmland. The chambers judge dismissed the application on the basis that HCI had failed to provide the defendants with notice as required by s. 21 of the FDMA, rendering the action a nullity (see: 2017 SKQB 264). HCI appealed the decision on the ground that the chambers judge erred in his interpretation of s. 21 of the FDMA and in finding that HCI was a secured creditor for the purposes of s. 21; its action against the defendants was not framed as an action for enforcement of its security but as one for damages for breach of contract, and it was not an action commenced as a proceeding as contemplated by s. 21(1)(b) of the FDMA. In addition to its appeal, HCI gave the proper notice and initiated a second action against the defendants requesting the same relief with the addition of a claim in debt and brought another application for summary judgment. In their statement of defence, the defendants asserted that the claim was commenced outside the two-year period set out in the LA. The chambers judge in the second action found that the defendants had acknowledged HCI's claim, thus extending the limitation period beyond the date the action was commenced. The defendants had failed to pay the rent they owed to HCI under their lease, so the court ordered judgment against them in the sum of $677,000. The defendants appealed that decision on the ground that the chambers judge erred in finding that the limitation period had been extended beyond the date when the action was commenced because the defendants had acknowledged the debt in the written brief that they submitted. The action was a nullity, so the written brief could not be relied upon.

HELD: Each of the appeals was dismissed. The court found with respect to HCI's appeal that it was a secured creditor for the purposes of s. 21 and was thus required to give notice. Its action clearly fell within the terms of s. 21 of the FDMA because otherwise, secured creditors would be able to avoid the operation of the section by framing their actions as a claim for damages. Regarding the defendant's ground of appeal in the second chambers judge's decision, the court found that he had correctly determined that the defendants' brief of law constituted an acknowledgment within the meaning of s. 11 of the LA. While the action was a nullity, that did not mean that documents prepared or used in the course of it were null and void or of no effect.

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Schreiner v Saskatchewan Apprenticeship and Trade Certification Commission, 2020 SKQB 34

Elson, Febrary 10, 2020 (QB20033)

Civil Procedure – Disclosure of Documents – Sealing Orders
Statutes – Interpretation – Apprenticeship and Trade and Certification Act, Section 39

The appellant appealed the decision of the Appeal Committee of the Saskatchewan Apprenticeship and Trade Certification Commission (appeal committee) upholding the suspension of the appellant's electrical licence and certification. The appeal was scheduled to be heard in April 2020. The appellant's journeyman certification was cancelled when the commission alleged that he had committed fraud or misrepresentation in obtaining his certificate. The allegation was that the appellant obtained the examinations prior to taking them. The appellant appealed the commission's decision. The appeal committee denied the appeal and affirmed the commission's decision. The appellant appealed pursuant to s. 30 of The Apprenticeship and Trade Certification Act (ATCA). The respondent, the Saskatchewan Apprenticeship and Trade Certification Commission (commission), applied for an order that a document in the record should not be available to the public. The document was a copy of a redacted examination used to test applicants seeking journeyman certification as electricians in the construction industry. The examination consisted of 100 multiple choice questions. The document was heavily redacted when it was presented to the Appeal Committee. The respondent relied on s. 39 of the ATCA that prohibits conveying or disclosing information respecting the contents of the test or examination. The Commission argued that the application and evidence met the Dagenais/Mentuck test.
HELD: The respondent's application was dismissed. The Dagenais/Mentuck test applies to requests for sealing orders. There is a presumption that the interests of justice, the parties, and the public are best served by an open and reasonably accessible judicial process. The presumption is not lightly rebutted and can only be rebutted by evidence of two things: 1) that the access implied by the presumption creates a risk to the proper administration of justice; and 2) that the benefits of such a limit eclipse the presumed benefits of access. The court found that the respondent's evidence came nowhere close to rebutting the presumption. There was no factual basis for any of the respondent's concerns. Further, the court determined that even if s. 39 of the ATCA were given a liberal and purposive construction, it would not prohibit disclosure other than of "the test or examination". The prohibition was found not to apply to past tests. The Commission's application was dismissed. The matter of costs was not determined.

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Papequash v Daniels, 2020 SKQB 41

Elson, February 20, 2020 (QB20042)

Statutes – Interpretation – Automobile Accident Insurance Act, Section 45

The plaintiff sought an order that the available insurance that Saskatchewan Government Insurance (SGI) was required to pay be applied in or toward satisfaction of the plaintiff's judgment, pursuant to s. 45 of the Automobile Accident Insurance Act (AAIA) that was in force in 2009 (AAIA, 2006). SGI then applied for an order that it be made a third party in the plaintiff's action pursuant to s. 45(6) of the AAIA 2006 and that it be granted the right to contest the liability of the defendants. The background to the applications was that the plaintiff brought an action against the defendants, the driver and the owner of a motor vehicle that struck her in May 2009 and allegedly caused her personal injuries. In that action, the plaintiff also named Saskatchewan Government Insurance (SGI) under s. 104 of the Automobile Accident Insurance Act. SGI denied liability and said that as the driver of the vehicle did not have insurance coverage, the plaintiff had no cause of action against SGI under s. 104 except as may be provided under s. 45(1). The plaintiff brought an application for summary judgment in 2016 and SGI argued that the evidence presented did not justify summary judgment and that the statement of claim did not disclose a specific cause of action against it. At the hearing, the plaintiff discontinued her action against SGI and its counsel did not participate. The application was dismissed by the judge on the ground that insufficient information had been presented. Counsel for the defendants then withdrew from the case but SGI was not served with the withdrawal because it was no longer a party. In April 2018, the plaintiff filed a second summary judgment application that was unopposed. The defendants were served but did not appear and SGI was unaware of the application. The judge concluded that the plaintiff was entitled to damages in the amount of $175,000 and that the defendants were jointly and severally liable. After the plaintiff took out judgment, she made an application for payment of the judgment by SGI pursuant to s. 55(1) of the AAIA, 2006. SGI objected to payment pursuant to s. 55(2). The plaintiff then withdrew her application and replaced it with an application for an order under s. 45(1) of the AAIA, 2006. SGI then applied, asking the court to make it a third party to the claim the plaintiff made against the defendants, notwithstanding the judgment made in favour of the plaintiff. The parties agreed that the matter of liability in the circumstances was governed by ss. 42 to 51.1 of the AAIA, 2006.

HELD: The court dismissed each of the applications. With respect to the plaintiff's application for summary determination of her entitlement under s. 45(1), the court found that s. 45(1) did not permit it to make the requested order and foreclose SGI's opportunity to advance a defence against the plaintiff's claim. Regarding SGI's application pursuant to s. 45(6) to be made a third party in respect of the plaintiff's claim, the court found that s. 45(6) only affords it the opportunity to contest the insured's liability to the plaintiff. Unless the parties consented to setting aside the judgment,

the liability and quantum associated with the plaintiff's claim against the insured was no longer contestable.

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R v Sidhu, 2020 SKQB 44

Konkin, February 24, 2020 (QB20043)

Constitutional Law - Charter of Rights
Criminal Law - Motor Vehicle Offences - Driving While Impaired
Criminal Law - Breathalyzer - Refusal to Provide Sample
Criminal Code - Motor Vehicle Offences - Impaired Driving

The appellant appealed his convictions under ss. 253(1)(a) and 254(4) of the Criminal Code. The appellant was driving a vehicle during the early hours of the morning when he struck another vehicle. A witness to the accident testified that he had noticed that the driver, the appellant, had been straddling two lanes prior to the collision and that after it occurred, the appellant tried to exchange information with the other driver and leave the scene prior to the police arriving. He behaved aggressively and seemed "out of it". Although his vehicle had been rendered inoperable, the witness saw the accused trying to drive his vehicle away from the scene. When the police arrived, they found the accused in the driver's seat of his vehicle, revving the engine. He had red bloodshot eyes and smelled of alcohol. The appellant informed the police that he had been driving and as the officer believed that he was impaired, he arrested him, read him his rights and right to counsel and made the breath demand. The accused responded to the question of whether he wanted legal counsel by saying that he didn't have one but maybe would call them later. During his transport to the station the appellant asked the officer not to call his wife and said that he was a good person. When the officer responded that he couldn't drive drunk, though, the appellant said that it was the first mistake he had made and there was no reason to arrest him and that he would pay a ticket. When asked at the station if he wished to speak to a lawyer, the appellant again said no. Although he was instructed twice by the Breathalyzer technician on how to provide a breath sample, the appellant failed six times to provide breath samples and was charged with refusal contrary to s. 254(5) of the Code. On appeal, the accused argued that the trial judge had erred: 1) by admitting his statements made to police. In making the s. 254(3) breath demand on the appellant, the officer had used unlawfully obtained information from him in order to form his grounds to make the demand. The officer relied on statutorily-compelled evidence obtained from the appellant as a result of his perceived obligation to answer the officer's questions pursuant to The Traffic Safety Act; 2) when she found that the officer who made the breath demand had satisfied the criteria in s. 254(3) of the Code for a valid breath

demand; 3) when she found that the appellant's s. 10(b) right had not been infringed and then failed to exclude the evidence obtained pursuant to s. 24(2) of the Charter; 4) in finding the appellant's ability to drive was impaired by alcohol; and 5) in finding that the appellant had refused to provide a breath sample.
HELD: The appeal was dismissed. The court found with respect to each issue that the trial judge had not erred: 1) in admitting the appellant's statements. Any of his statements that the judge relied upon were made subsequent to his arrest and Charter warnings. Even if he subjectively believed that he was compelled to say more after his arrest, it was not objectively reasonable on his part to do so in light of having received his warning that anything he said could be used against him; 2) in her consideration of whether the officer had reasonable grounds to make the breath demand. She referred to and applied the proper law without citing the case of Gunn in particular; 3) in finding that the officer had complied with the informational duties and that the appellant's equivocal response did not invoke his right to counsel and thus the officer's implementational duties were not triggered. Further, there was nothing in the evidence to show that the appellant did not understand his rights due to what he argued was a significant language barrier; 4) in finding that the appellant was impaired and that he had driven. She accepted the evidence of the officer and the witness and did not believe the evidence of the accused; and 5) in finding that the appellant intentionally failed to blow when requested. Although the judge did not directly address on what evidence she relied regarding his intention to fail to produce a sample, she found that the appellant had shown an concerted effort after the accident and while dealing with the police to get out of the situation and from that, inferred a consciousness of guilt.

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A.C.G. v W.L.G., 2020 SKQB 43

Richmond, February 24, 2020 (QB20050)

Family Law - Child Support - Determination of Income
Family Law - Child Support - Imputing Income
Family Law - Child Support - Retroactive
Family Law - Division of Family Property - Dissipation

The parties married in 1996. In 1998, they moved from Regina to Moose Jaw so that the respondent could work in his stepfather's hardware store. He eventually purchased the business. The petitioner worked part-time until they had their son in 2007. She took an online interior decorating course and had a small amount of income. The petitioner stayed home with their son. They separated on April 7, 2014. The petitioner issued a petition in December 2014. The parties attempted to negotiate matters without success. The

issues were: 1) divorce; 2) division of property; 3) child support; and 4) spousal support.
HELD: The issues were determined as follows: 1) the divorce was not finalized given the parties' hesitancy regarding possible tax planning while the parties were still married; 2) the property consisted of family home, household goods, investments, and business interests. The family home was valued at $366,000 (the May 2014 value) because that was the best and only value available. The court found that the household goods and vehicles had been equalized at source and the court would make no further division. The court did not include a $25,000 inheritance received by the respondent in January 2014 in the property division because there was no evidence that it was still in existence at the date of petition other than in existing bank accounts and/or property already included in the division of family property. The court-ordered division of RRSPs used the petition date values, which were the only values provided. The court valued the petitioner's business at $4,719, which was the amount in the bank account. Two corporations were established for the respondent to purchase the hardware store in 2009. The respondent was the sole shareholder of the holding company that owned 11,039 shares in the hardware company. Two experts were qualified regarding the valuation of the respondent's shares in the holding company. The court preferred the calculation of the petitioner's expert, which valued the shares between $4,144,000 and $4,443,000. The court concluded that the higher value should be used given the time that had passed from the date of petition to current date. The court ordered a tax discount on the sale of shares because the petitioner conceded to the same. If the parties decided to divide the shares in specie, the tax discount would not apply. The respondent owned one seventh of the shares in the numbered company that owned 25,761 shares in the hardware company. In December 2013, the respondent sold his share in the numbered company to the company bookkeeper for $339,000. The court ordered that the petitioner receive all of the remaining sale proceeds of $339,000 rather than the half, after tax reduction, that the respondent proposed paying. The spouses of the partners that originally owned the hardware store were the partners in the partnership that owned the Moose Jaw hardware store building (D Properties). The petitioner received $154,912 for her interest in D Properties. The taxable capital gains were $23,060. The court preferred the respondent's evidence that the petitioner netted $148,517.65 on the sale. The court next determined whether there should be an unequal division. There were no extraordinary circumstances to justify an unequal division of the family home. The court concluded that the respondent's share sale did not amount to dissipation. The court concluded that there was not enough evidence provided to return the share to the respondent as outlined in s. 28 of The Family Property Act (FPA). The respondent's actions in transferring the share to the bookkeeper at less than fair market value justified an unequal division of property; 3) the respondent agreed that the pre-tax income from the holding company should be

attributed to him, but disagreed with the petitioner's argument that he should also be attributed a portion of the pre-tax income of the hardware store. The petitioner argued that income from the hardware store should be attributed to the respondent because dividends were periodically declared to the shareholders. The interim consent order was made in July 2015 requiring the respondent to pay child support and to pay the petitioner annual spousal support of $71,000. The parties continued to share the joint account until the making of the interim consent order. No retroactive support was ordered prior to that time. It was found to be fair and reasonable in the circumstances to impute income to the respondent because there were monies held in the holding company and there was money due to the holding company from the hardware store. The court set the respondent's income at $500,000. The child support was set at $4,000 per month. The respondent was ordered to pay retroactive support, so the total paid per month was $4,000 commencing the date of the first child support order. The parties were to share the s. 7 expenses proportionately. For 2020, the proportionate share was based on the respondent's income of $500,000 and the petitioner's income was to include the spousal support amount; 4) the petitioner was still in high school when the parties started dating and they married before she was 20. The relationship centered around the respondent's career. The petitioner was entitled to compensatory spousal support. The court did not agree with the respondent that it was realistic for the petitioner to have an income of $60,000 per year. The petitioner was also entitled to non-compensatory spousal support. The Spousal Support Advisory Guidelines suggested a range of support between $12,400 and $14,909 with a duration of between 9.25 and 18.5 years. The court ordered spousal support of $12,400 per month for an additional 12.5 years. The court ordered the support retroactive to the date of the first order for support with credit given for payments already made. The parties could arrange a date and time with the Local Registrar to speak to the issue of costs.

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Bittman v Consumers' Co-operative Refineries, Ltd., 2020 SKQB 46

Robertson, February 25, 2020 (QB20045)

Employment - Labour Relations - Collective Agreement
Administrative Law - Judicial Review

The respondents, Consumers' Cooperative Refineries (CCRL) and three members of a committee appointed to administer a savings plan set up for contributions to be made to it by unionized and non-unionized employees of CCRL, applied for an order dismissing or striking an application brought by Kevin Bittman, the President of

the union. CCRL locked out its unionized workers in December 2019 after the union served strike notice. The collective agreement remained in place regardless, pursuant to s. 6-39(1)(b) of The Saskatchewan Employment Act, and included in the agreement was a Letter of Understanding (LOU) that established the voluntary savings plan for CCRL employees. In-scope employees applied for a withdrawal and CCRL's manager of labour relations advised the union on December 31, 2019 that CCRL's contributions would not be included in the withdrawal amounts. Bittman brought the application personally and behalf of all trust beneficiaries against the respondents requesting the court to provide an opinion regarding the rights of beneficiaries under the plan. Bittman argued that CCRL was interfering with the administration of the plan and using its influence to prevent locked-out employees from withdrawing funds to which they were entitled in an effort to put pressure on them to return to work and accept CCRL's proposals for a new collective agreement. CCRL objected to the application on the ground that the court did not have jurisdiction as such a dispute was governed by the statutory scheme for resolution of labour disputes involving collective agreements.
HELD: The respondents' application to strike the originating application was granted. The court declined to hear Bittman's originating application. The court treated the originating application as one for judicial review. It found that the proper forum for the determination of the question of whether the employees were entitled to a payout under the LOU was by grievance under the collective agreement. Costs of $1,000 were awarded to the respondent union representative, who was represented by independent counsel, and CCRL and Bittman were each ordered to pay $500 of the award.

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Industrial Properties Regina Ltd. v Midtdal, 2020 SKQB 47

Klatt, February 25, 2020 (QB20046)

Civil Procedure - Pleadings - Statement of Defence
Civil Procedure - Application to Set Aside Noting for Default of Defence

The defendant applied under Queen's Bench rule 3-21 to set aside the noting for default by the plaintiff. The defendant was the sole president and chief executive officer of Midtdal Developments & Investment Corp. (Midtdal Developments), Copper Sands Land Corp. (Copper Sands), and Prairie Country Homes Ltd. In May 2015, the plaintiff entered into a loan agreement with Copper Sands and Midtal Developments by way of commitment letter in the amount of $3 million for the benefit of Copper Sands and the funds were advanced. In addition to the loan agreement, a mortgage and

promissory note were executed by Copper Sands in favour of the plaintiff. As security for the loan to Copper Sands, the defendant provided a guarantee in her personal capacity. In May 2015, the defendant also signed another personal guarantee in respect of a loan made in March 2015 whereby the plaintiff would lend $250,000 to Midtal Developments and Prairie Country Homes. No payments were made on the $3 million loan agreement or the $250,000 loan and they both went into default. The companies owned by the defendant sought protection under The Companies' Creditors Arrangement Act. The defendant failed to comply with the plaintiff's demand for payment under both guarantees and did not file her statement of defence after the plaintiff filed its statement of claim. It noted her for default. For the purposes of this application, the defendant disputed that the $250,000 loan remained outstanding and asserted that she only owed under the $3 million loan agreement.
HELD: The defendant's application was granted only with respect to opening up the noting for default on the defence to the plaintiff's action on the $250,000 loan guarantee, on the condition that the defendant pay costs to the plaintiff in the amount of $1,000 within 14 days of the judgment. The application to open up the noting for default with respect to the plaintiff's action on the defendant's personal guarantee for the $3 million loan was dismissed. The court found that most of the defendant's arguments were not defences to the statement of claim.

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Director under The Seizure of Criminal Property Act, 2009 v Pritchard, 2020 SKQB 48

Robertson, February 25, 2020 (QB20047)

Criminal Law - Drug Offences - Forfeiture

The Director under The Seizure of Criminal Property Act, 2009 (director) applied for an order of forfeiture of $1,185 in cash found on the person of the respondent after his arrest by the police. The director claimed that the funds were proceeds of unlawful activity and filed a number of affidavits sworn by police officers and the deputy director, who deposed that the evidence gathered during the arrest indicated illicit drug trafficking, in support of her application. The director pointed to the following circumstances as justifying a reasonable inference that the funds were proceeds of unlawful activity because the respondent: had a lengthy criminal record and attempted to flee when the vehicle he was travelling in was stopped; pleaded guilty to charges arising from the firearms found in his possession at the time of his arrest; had a bag of drug paraphernalia that was found in the vehicle as well as a cell phone with messages showing that he was about to meet with his drug supplier. The

respondent disputed the forfeiture and explained that the cash found on his person was obtained by gambling and from his family to help him while he was unemployed.
HELD: The application was granted. The court found that there was significant evidence supporting the director's position that the cash was the proceeds of illegal activity.

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B.P.T.F. v J.H., 2020 SKQB 50

Tochor, February 26, 2020 (QB20049)

Family Law - Child Custody and Access - Mobility

The parties' relationship ended in 2016 and the respondent became the primary caregiver of their one-year-old daughter with the petitioner having parenting time with her. In July 2019, the respondent and the child relocated to Nova Scotia to be closer to her extended family. The respondent deposed that she believed that the move was in the child's best interest and that the petitioner agreed and had signed a written "relocation agreement" in March 2018 after the parties discussed the matter. The petitioner denied having signed the agreement, opposed the child's move to Nova Scotia and disputed most of the assertions made by the respondent in her affidavit. He sought an order for joint custody and shared parenting and applied for interim orders providing that the respondent should return their daughter to him in Regina and that the police enforce the order. The respondent sought an order permitting her to remain in Nova Scotia with the child.
HELD: The respondent's application was granted. The court found that it was in the best interests of the child to remain with the respondent in Nova Scotia. It made an interim order that the parties would have joint custody and the primary residence of the child would be with the respondent, with the petitioner having reasonable parenting time. Although the affidavit evidence provided by the parties in this case was in conflict, the court was satisfied that it could resolve the issues in this interim application. It examined the issue of the credibility of each of the deponents in order to assess whether the petitioner signed the relocation agreement, although the existence of such an agreement was not determinative of whether the child's best interests were served by the move. It found that the petitioner's evidence and allegations were not corroborated in general and specifically regarding the relocation agreement.

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Lowry v Coppola, 2020 SKQB 51

Klatt, February 27, 2020 (QB20051)

Civil Procedure - Application to Strike - Want of Prosecution

The defendant brought an application pursuant to Queen's Bench rule 4-44 to have the plaintiffs' claim dismissed for undue delay in prosecuting it. The plaintiffs commenced their claim in 2009, alleging that the defendant failed to perform work on the house they purchased from him contrary to their agreement. The chronology of actions taken by the parties over the course of the next 11 years showed that at various times, each side had caused delay. The defendant's counsel often did not reply to inquiries and requests made by the plaintiffs' counsel, who regularly pressed the defendant to return to mediation. The plaintiffs, however, did not pursue matters for as long as a year after serving their claim and then again from early 2017 through 2019. They explained that the two-year period of delay was caused by one of them becoming seriously ill. Following that plaintiff's recovery, counsel for the plaintiffs served a notice of intent to proceed and advised the defendant's counsel that they would be bringing an application for determination by way of summary judgment. The defendant's counsel responded four months later, advising that he would be bringing this application.
HELD: The application was dismissed. The court reviewed the history of the proceedings against the framework set out in International Capital Corp. v Schafer. It found the delays caused by the plaintiffs were not inordinate and were satisfactorily explained. The delays caused by the defendant were numerous and unexplained. It was in the interests of justice for the plaintiff's action to proceed and no reason had been identified as to why the matter could not proceed to summary judgment immediately.

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Kokanee Mortgage M.I.C. Ltd. v Rozdilsky, 2020 SKQB 52

Danyliuk, February 28, 2020 (QB20052)

Civil Procedure – Evidence – Affidavit Evidence – Argument and Opinion
Mortgage - Foreclosure - Application for Judicial Sale - Order Nisi
Civil Procedure - Costs - Foreclosure
Foreclosure - Procedure

The plaintiff requested an order confirming the sale of real property pursuant to an order nisi for sale by judicial listing. The defendant granted the plaintiff a mortgage in three parcels of land: 37 acres; a cabin; and a house. The plaintiff applied for an order nisi for sale by real estate listing in March 2019. The application was granted with a

90-day redemption period. The defendant made no effort to sell the properties during the redemption period. Reserve bids were set for each parcel, as follows: $112,000 for the 37 acres; $224,000 for the cabin; and $308,000 for the house. The court did not approve an offer of $115,000 on the 37 acres because it was received early on when the list price was $194,000. An unconditional offer of $185,000 was confirmed in October 2019. The defendant appealed the confirmation order and the appeal was dismissed. The Court of Appeal awarded the plaintiff costs of the appeal on a solicitor-client basis. An offer was accepted on the cabin for $242,900 in January 2020. It was anticipated that there would be equity remaining available for distribution of approximately $222,567.54, less solicitor-client costs after the sale costs of the cabin were deducted. The defendant opposed the confirmation of the sale of the cabin for the following reasons: the price was too low; the plaintiff and realtor did not adhere to "best commercial practices" because the list price was reduced too soon and no counteroffer was made; the property was being sold to cover the remaining debt of no more than $60,000, and such putative prejudice would be exacerbated by his liability for capital gains tax; and he had refinancing pending to save the property since the cabin had been in his family for fifty years. The issues were: 1) whether the sale of the cabin should be confirmed; 2) if so, what was the proper disposition of costs?

HELD: The application was granted. The issues were determined as follows: 1) the court reviewed the defendant's affidavit and disregarded portions of opinion and argument. The defendant's counsel had a duty to the court to act as a filter in terms of what was included in an affidavit being filed before the court. The first two arguments that the defendant had for opposing the sale (that the price was too low and the plaintiff and realtor had not adhered to best commercial practices) were dealt with together. The 2016 appraisal was too dated to be persuasive. Also, the 2016 appraisal was before the court when the order nisi for sale was granted. It was contemplated at that time that a sale might occur at less than the estimated fair market value. The defendant's argument amounted to a collateral attack on the order nisi for sale by judicial listing. The offer was at the full list price, so a counteroffer was not necessary. There was no evidence of wrongdoing on the realtor's part by acting in the dual agency capacity on the cabin sale. The price drop did not occur until after the initial 90-day listing period. The accepted offer was also $20,000 above the upset price. There was also no clear acceptable evidence that early spring through summer would have been the best marketing period for the cabin. The defendant did little or nothing for 16 months so could not now expect the plaintiff to wait further. There was also no verification of the tax the defendant would have to pay because of the sale. The final argument of refinancing pending was also lacking evidence. The commitment that the defendant submitted was only signed by him and was subject to 19 conditions. One of the conditions in the private financing required the defendant to pay almost $20,000 to the broker when there was no evidence that he even had that to pay.

It was ultimately concluded that this was not an appropriate case for the court to invoke its discretion to refuse to confirm the judicial sale of the cabin; and 2) the law is clear that a clause in a mortgage calling for payment of solicitor-client costs is valid and enforceable. The plaintiff claimed $18,443.26 for the Queen's Bench and Court of Appeal applications. The costs in this court were $9,075.46. The starting point for an ordinary foreclosure is $4,500. The court found that this case was more difficult than usual. The sum requested by the plaintiff for the Queen's Bench Court costs was reasonable. The court concluded that it did not have the jurisdiction to assess costs awarded by the appellate court. The plaintiff would have to go back to the Court of Appeal to have those costs assessed.

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Bank of Nova Scotia v Nieswandt, 2020 SKQB 53

Danyliuk, February 28, 2020 (QB20053)

Foreclosure - Evidence
Foreclosure – Procedure – Extension of Order Nisi

The plaintiff applied for an extension of time for the listing of property under an order nisi for sale by real estate listing. Leave to commence was granted in July 2018. The defendant was noted for default on September 14, 2018. This was not a purchase-money mortgage, so the plaintiff pursued a deficiency judgment. The property was a low-rise apartment-style condominium. A local realtor opined that the market value of the property was $165,000. The value was calculated using "data comparison", not a personal inspection of the property. The order nisi for sale was granted in September 2018 with a 30-day redemption period. A 90-day listing followed. After no sale, a realtor offered an opinion that the value of the property was $125,000. The two comparable sales used by the realtor were in the same building and were sales of $131,750 and $110,000. An order varying the initial order nisi for sale was granted to allow a further listing for 90 days with an initial list price of $129,900 and an upset price of $115,000. The plaintiff applied to the court for a further variation of the sale order with another 90-day listing at an initial price of $117,500 and an upset price of $100,000. The realtor again provided his estimate as to market value indicating it was now $115,000.
HELD: The plaintiff's request for an extension of time was not granted. The court found that there was no real explanation given by the listing agent as to why 90 more days would result in a sale this time. There was no explanation as to why the property had not sold in the 180 days on the market so far. Also, there was no real explanation for why the property was now valued lower when he had used the same information to indicate the market value was $125,000. The court required better evidence when it was being

asked to reduce the floor price for a second time. The plaintiff needed to provide better evidence as to the current value and an explanation as to why the changes of value had been suggested without any changes in the supporting documentation of that opinion. The court suggested that an accredited appraiser should be involved. Drive-by appraisals and realtor's opinions were found to be sufficient for leave applications on residential properties, but not in situations such as these.

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Bank of Nova Scotia v Avramenko, 2020 SKQB 54

Elson, Match 2, 2020 (QB20054)

Bankruptcy – Undischarged Bankrupt – Judgment Renewal Application
Civil Procedure – Application to Renew Judgment – Limitations Act, Section 71
Civil Procedure – Application to Renew Judgment – Queen's Bench Rule 10-12

The defendant was an undischarged bankrupt. The applicant bank applied for an order to renew a judgment. The defendant argued that the judgment could not be renewed while he was an undischarged bankrupt. The bank argued that the renewal of the judgment was unaffected by the defendant's bankruptcy status, especially before the bankrupt's discharge and after the trustee's discharge, which was the case here. The bank obtained a default judgment on January 21, 2019 in the amount of $104,641.31. The amount owing as of October 31, 2019 was $161,018.61. The bankrupt made a consumer proposal three years after the default judgment. When the unsecured creditors refused the proposal, the bankrupt was deemed bankrupt pursuant to s. 57(a) of the Bankruptcy and Insolvency Act (BIA). In 2017, the Registrar's final hearing for discharge of bankruptcy proceeded. The bankrupt was required to pay $120,000 to the bankruptcy estate as a condition of his discharge. The trustee was discharged by court order in September 2019. The bankrupt had not satisfied the conditions at the time of hearing of the application.
HELD: The judgment may be renewed. The application was timely and within the requirements of s. 71 of The Limitations Act. The bankrupt argued that the conditional discharge rendered the judgment essentially unenforceable, but subject to whatever recovery the bank would receive when the bankrupt complied with the conditions. The bank relied on s. 69.3 of the BIA. The court concluded that the bankrupt's failure to comply with the conditions of his discharge left him as an undischarged bankrupt. He could only benefit from the stay of proceedings as long as his trustee in bankruptcy remained undischarged. A creditor could renew a

judgment once the trustee was discharged. The court noted that the renewal would have been granted even if the trustee had not been discharged because the stay of proceedings does not apply to steps a judgment creditor takes to preserve its position. The bank was awarded costs fixed at $300.

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Douglas v R, 2020 SKQB 57

Scherman, March 4, 2020 (QB20056)

Criminal Law – Arrest – Use of Excessive Force
Constitutional Law – Charter of Rights, Section 7, Section 12, Section 24(1)

The accused was charged with three counts of assaulting police officers contrary to s. 270.01(1)(a) of the Criminal Code, one count of dangerous driving contrary to s. 294(1)(1)(a) of the Code and other charges arising from a chain of events that occurred after a police officer stopped his vehicle. After fleeing the stop, the accused drove through Prince Albert at high speed while the police pursued him. After he abandoned his vehicle, the accused was tracked by a police dog and his handler. The dog bit his arm to hold him. When the accused was taken to the police cruiser, he alleged that two constables assaulted him while he was handcuffed. They slammed his body against the back of the vehicle and his head into the vehicle's window and punched him in the head and stomach. The accused brought a Charter application alleging that his ss. 7 and 12 Charter rights had been violated and asked the court to impose a judicial stay of proceedings under s. 24(1) of the Charter by reason of the excessive force used by the police. A voir dire was held and the Crown and defence agreed that the evidence presented would apply to the Charter challenge. If a stay were not imposed, the evidence would also be used in the trial proper. The Crown conceded that the police had used some measure of excessive force. HELD:The application for a judicial stay was dismissed and the trial would proceed. The court held that the application under s. 24(1) of the Charter fell under the "residual category" of cases where state conduct risks undermining the integrity of the judicial process and should be determined under the three-pronged test set out in R v Babos. It found that the conduct of the police officers was a matter of personal responsibility and was not state misconduct. Neither the accused's right to a fair trial nor the integrity of the justice system was prejudiced. There were alternative remedies available to the accused, including initiating civil proceedings or criminal prosecutions against the officers. A stay was not warranted and it was in the interests of society to have a final decision on the merits. With respect to the allegation that the accused's s. 12 Charter right was breached, the court found that it was not applicable in these

circumstances. Although there had been excessive use of force by the police, it did not constitute cruel or unusual punishment. Regarding whether there had been a breach of the accused's s. 7 Charter rights, it found that the use of or the actions of the police dog did not constitute excessive use of force. There was some excessive use of force by the police officers. However, the officers were reacting to the danger that the accused had created and the harm that he had inflicted on them when they were pursuing him. The accused suffered only superficial injuries as a result of the force used.

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R v Vandewater, 2020 SKQB 55

Scherman, March 5, 2020 (QB20055)

Criminal Law – Murder – Defences – Self-defence

The accused was charged with the murder of his cellmate in the Saskatchewan Penitentiary. He admitted that he inflicted the wounds that caused the death of the victim but stated that when he inflicted the wounds, he was acting in self defence. The Crown took the position that the accused did not mean to cause the victim's death but rather that he committed murder as provided in s. 229(a)(ii) of the Criminal Code: he meant to cause the victim bodily harm, knowing that he was likely to cause his death and was reckless whether death ensued. In the agreed statement of facts submitted by the Crown and defence counsel, the circumstances of the victim's admission to the penitentiary and to the cell of the accused were explained. The victim and the accused knew each other and consented to sharing the cell. There was no known history of hostility between them. During the first night that they were in their cell, the victim suffered blunt force trauma to his head and 60 stab wounds. The accused testified that the victim began acting paranoid and expressed concerns that he was being plotted against by some individuals. He asked the accused to return a blade that he had left with him before he was released on parole. Once he had the blade, the victim attacked him with it. The accused then punched the victim in the face and while they were wrestling on the floor, he began stabbing the victim. Another inmate who occupied the cell next to the accused testified for the defence that he believed that the victim was high on cocaine when he arrived at the cell and was probably paranoid.
HELD: The accused was found guilty of murder. The court found that the Crown had proven all of the elements set out in s. 229(a)(ii) of the Code. It also found that the Crown had proven beyond a reasonable doubt that the required elements of self-defence did not exist in this case. Although there was an air of reality to the accused's defence, the court found that it did not believe his

evidence. The victim did not have a history of violence at the penitentiary and had been on friendly terms with the accused. The prison officials who had returned the victim to the penitentiary had not found him to be paranoid and he had not expressed any concerns about going into the cell range. The accused and the prisoner in the cell next to him were both members of the Terror Squad and the latter gave evidence on behalf of the accused because of that relationship. The accused did not believe on reasonable grounds that the victim was using or threatened to use force against him, nor that the acts he committed were for the purpose of protecting himself, nor were the acts reasonable in the circumstances. There were no defensive injuries on the victim's arms or hands to indicate that he had been attacked suddenly. The accused suffered no physical injuries at all.

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Westfield Twins Condominium Corp. v Wilchuck, 2020 SKQB 58

Robertson, March 3, 2020 (QB20057)

Condominiums - Condominium Property Act - Foreclosure - Non-payment of Fees

The plaintiff sought an order nisi for sale by real estate listing of the defendant's condominium unit, an order of immediate possession upon expiry of the redemption period and judgment against the defendant. The defendant sought a trial of the issue, assessment of the final amount outstanding and a stay of the foreclosure proceedings. The parties had been involved in numerous proceedings in the past and in the antecedent to this proceeding, the plaintiff had issued a statement of claim in February 2019 that identified arrears of common and/or reserve fund condominium fees as the basis of its claim. The defendant's application to strike the statement of claim was dismissed and the plaintiff's application to strike the defendant's statement of defence was granted (see: 2019 SKQB 173). The defendant was unsuccessful in his appeals of that decision in Queen's Bench and in the Court of Appeal. The defendant applied in this case to have the proceedings stayed and a trial held to determine the amount outstanding.
The plaintiff's application was allowed and it was granted judgment and order nisi for sale by real estate listing and for possession of the condominium unit upon expiration of a 90-day redemption period. The defendant's application was dismissed. The court found with respect to the plaintiff's application that it had remedies under The Condominium Property Act, 1993 to look both to the unit owner and to the condominium unit to satisfy the debt owed to it by the defendant for non-payment of condominium fees under ss. 57(2) and 58(4) and ss. 63 through 63.2 respectively. The defendant's

liability for the arrears had been determined and confirmed by successive decisions. The plaintiff could realize on the lien by obtaining judgment against the defendant and by taking and selling the real property through both The Land Titles Act, 2000 and The Land Contracts (Actions) Act. With respect to the defendant's application, it found that the question of liability had been dealt with by the court previously and it was res judicata. There was no need for a trial to determine the amount of the debt as it was ascertainable by reference to the draft order nisi filed by the plaintiff in its application.

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