The Law Society of Saskatchewan Library's online newsletter
highlighting recent case digests from all levels of Saskatchewan Court.
Published on the 1st and 15th of every month.

Volume 22, No. 10 **May 15, 2020**

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Zelinski v Pidkowich, 2020 SKCA 42

Leurer, April 15, 2020 (CA20042)

Civil Procedure – Appeal – Application to Amend Notice of Appeal

The appellants, G. and D., applied to amend their notice of appeal. The respondents, J. and K., opposed some of the amendments. The appellants lived on an acreage (acreage) located on land subdivided from a quarter section (subject lands) owned by K. K. proposed to sell the subject lands to J., who was leasing the subject lands. The subject lands were originally owned by K.'s late husband. The subject lands had been foreclosed on. After the foreclosure, K. and her late husband bought the subject lands jointly. K.'s husband died in 2010. The appellants had various complaints against the respondents, including that there was a right of first refusal in favour of the appellants over the subject lands (right of first refusal agreement) and that there was an easement allowing the supply of water from the subject lands to the acreage. A non-mutual easement was registered against the titles to the subject lands (easement). In 2018, J. issued an originating application (2018 application) seeking an order discharging the easement and directing the appellants to remove personal property from the subject lands. The appellants then issued an originating application (2019 application). Their application sought an order that K. "honour the right of first refusal agreement" and sell the subject lands to the appellants as well as a declaration that the easement was valid and must be honoured. The chambers judge granted J.'s application after finding that the easement was invalid. The finding was based on K.'s evidence that she did not consent to the grant of the easement. Costs of $4,000 were awarded to J. The appellants' application was dismissed by the

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chambers judge. Costs of $2,000 were awarded to J. and K. The amendments opposed by the respondents were: 1) an addition to a paragraph identifying an additional portion of the decision that was the subject of the appeal; and 2) the addition of a paragraph identifying an additional ground of appeal alleging the chambers judge ignored evidence that one of the appellants had not been informed of the foreclosure proceedings and of part performance of the right of first refusal agreement.
HELD: The application was granted. The issues with the proposed amendments were determined as follows: 1) the respondents argued that the amendment was made with regards to the 2018 application, which was brought pursuant to The Land Titles Act, 2000. They said that because there is no statutory authority to extend the time limit to an appeal of the 2018 Application, the amendment could not be granted. The respondents argued that the notice of appeal was an appeal of only the dismissal of the 2019 application. The appeal court noted references to the validity of the easement in the unamended notice of appeal. The notice of appeal indicated that the appeal was taken from the "decision to award $6,000 in costs", which the appeal court found to conclusively decide that the appeal included an appeal of the 2018 application decision. The application to amend the notice of appeal was filed less than four weeks after the original appeal expiration date. The appeal court granted the amendment after finding it did not involve a new ground, nor would allowing it otherwise prejudice the respondents; and 2) the appellants argued that the proposed amendment lacked merit. The appeal court found that the respondents confused the direction given in Phillips Legal Prof. Corp. v. Vo. Vo stands for the proposition that a liberal approach should be taken to proposed amendments unless they involve a new ground or argument that may have required new evidence to have been adduced at the court below or unless the respondent would have been otherwise prejudiced. The proposed amendment would assist the court in more clearly identifying the true matters in dispute between the parties. Granting the amendment would not result in unfairness to the respondents. Both proposed amendments were granted. The appeal court did not award costs.

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Crook v Duxbury, 2020 SKCA 43

Caldwell Whitmore Tholl, April 16, 2020 (CA20043)

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Wrongful Dismissal – Mitigation of Damages
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Criminal Law – Motor Vehicle Offences – Impaired Driving – Refusal to Provide Breath Sample
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Family Law – Child Support – Appeal – Fresh Evidence
Family Law – Child Support – Disclosure
Family Law – Child Support – Section 7 Expenses
Civil Procedure – Costs – Family Law

Landlord and Tenant – Residential Tenancies Act, 2006 – Hearing – Standard of Review
Civil Procedure – Appeal – Leave to Appeal – Extension of Time

The respondent was successful in her application for summary judgment against the appellants for wrongful dismissal under a fixed-term contract. The chambers judge awarded the respondent damages equal to her salary payable to her for the remainder of the fixed term. The appellants appealed both the finding of wrongful dismissal and the damages award. The employment agreement employed the respondent as a professional accountant for a period of two years. One of the corporate appellants and the respondent also entered into a Letter of Intent (LOI) to discuss the possibility of the respondent purchasing the business. The respondent started work with the appellants in March 2016 and her employment was terminated in January 2017. The chambers judge held that the appellants did not show that they clearly outlined their expectations to the respondent, nor did they warn her that she had failed to meet expectations and give her time to meet them. The respondent's conduct was not found to be grossly deficient to the extent that it would justify termination without warning. The respondent did mitigate her damages by finding employment within a few months of termination. The chambers judge concluded that fixed-term employment contracts are not subject to mitigation. The chambers judge also allowed the respondent's $14,295.91 claim to offset costs that she incurred because she had to move away from Moose Jaw, Saskatchewan. The respondent was further awarded $16,343.00 for her loss of employment benefits over the remainder of the fixed-term contract. The issues on appeal were: 1) whether the chambers judge erred in determining the appellants did not have just cause to terminate the respondent; 2) whether the chambers judge erred in concluding that fixed-term employment contracts are not subject to mitigation; 3) if the chambers judge found fixed-term employment contracts are not subject to mitigation, whether the chambers judge erred in finding that the respondent's moving expenses were properly recoverable; and 4) whether the chambers judge erred by failing to consider the principle of privity of contract and thereby improperly rendered judgment against all of the appellants.
HELD: The appeal was allowed in part. The appeal court did not interfere with the finding of wrongful dismissal but did vary the amount awarded to the appellant. The issues were determined as follows: 1) the appellants argued that the LOI meant that the respondent was expected to act like an owner. The appeal court found that the chambers judge fully appreciated the existence of the LOI. The appeal court found that the chambers judge concluded that the LOI set out the non-binding terms of an arrangement that was separate from the employment contract. The appellants also argued that the chambers judge relied on specific breaches and whether the appellants warned the respondent rather than taking into account the cumulative effect of all of the breaches. The chambers judge found that the respondent was still working towards buying the business. The chambers judge did not err; 2) the appellants argued that the chambers judge erred when she found it irrelevant whether the respondent mitigated her damages and if not, she erred by awarding the respondent damages for her moving expenses. The

Regulatory Offence – Community Safety Order
Statutes – Interpretation – Safer Communities and Neighbourhoods Act

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Cases by Name

Crook v Duxbury

Director of Community Operations v Goodman

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George Gordon First Nation v Saskatchewan

Heffernan v Saskatchewan Police Commission

Hoffart v Carteri

M.D.L. v C.R.

Oberg v Board of Education of the South East Cornerstone School Division No. 209 of Saskatchewan

Patel v Whiting

Pedigree Poultry Ltd. v Saskatchewan Broiler Hatching Egg Producers' Marketing Board

Premier Horticulture Ltd. v United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service

appeal court found nothing to support the chambers judge's departure from Saskatchewan jurisprudence, wherein wrongful dismissal is addressed as an action for breach of contract regardless of whether the contract is a fixed term or indefinite term contract. The damages are limited to the actual loss. The respondent did not have an obligation to mitigate her loss, but she did mitigate her loss. The appeal court reduced the damages award by the amount the respondent earned at her new employment, $52,017.33; 3) because mitigation was accounted for, the moving expenses were included; 4) the appellants argued on appeal that judgment should only issue against the corporate appellants due to privity of contract. The respondent pointed out that privity of contract was not raised at the summary judgment hearing. The appeal court allowed the argument because it found that the chambers judge did not actually find the personal appellants liable to the respondent for wrongful dismissal. The corporate appellants were found jointly and severally liable to pay the respondent $142,060.25. The court made no order as to costs.

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M.D.L. v C.R., 2020 SKCA 44

Whitmore Schwann Kalmakoff, April 16, 2020 (CA20044)

Family Law – Child Support – Appeal – Fresh Evidence
Family Law – Child Support – Disclosure
Family Law – Child Support – Section 7 Expenses
Civil Procedure - Costs - Family Law

HELD: The application for fresh evidence was denied and the appeal was dismissed. The appellant's fresh evidence application failed the second and fourth branches of the Palmer test. The issues were discussed as follows: 1) the appellant argued that: the chambers judge contravened s. 13 of the Federal Child Support Guidelines by not stipulating the amount of the child support arrears or the date by which arrears must be paid; that there should have been more detailed instruction regarding the s. 7 expenses; and that the chambers judge should have directed the parties to a pre-trial conference. The appeal court found that the child support order included all of the mandated information. Further, the appeal court did not intervene on the basis that the chambers judge should have ordered a pre-trial. It was within the chambers judge's discretion to determine whether she could make a final order. The appellant's letter to the Registrar could not result in the relief she requested, only a court application could do so; 2) part of the appellant's chambers application requested interpretation of the 2017 agreement with respect to the orthodontic expenses. She argued that they did not fall within the $32,000 lump sum settlement and therefore remained payable. The appeal court found that the

Workers International Union, Local 1-184

Qaisar v Tulloch

R v Masiowski

R v Shingoose

R v Sisokin

R v Wesaquate

Rumbold v Forseth

Satani v Choudhry

T.B. v L.B.

Trafford v TD Life Insurance Co.

Zelinski v Pidkowich

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chambers judge's interpretation of the 2017 agreement did not give rise to palpable and overriding error; 3) the appellant argued that the respondent did not provide full disclosure of his health coverage prior to the application. The appellant argued that the chambers judge erred by relying on the respondent's explanation that he was between jobs and his new health coverage had not started at that time. The appeal court found that the appellant was rearguing the point on the same evidence as she had in the chambers application. Further, the s. 7 arrears were already covered in the 2017 agreement; 4) the appellant argued that the portion of the chambers order dealing with the insurance benefits was unworkable. This argument was found to be aimed at non-compliance with the chambers order, not an error in the order itself; 5) the chambers judge used the 2017 agreement as a frame for the variation application. The appellant wanted complete discretion over s. 7 expense decisions, including tutoring. The appellant argued the chambers judge misapplied the Guidelines and therefore erred in principle. Section 7(1)(d) deals with extraordinary expenses for education programs and s. 7(1)(f) addresses expenses for post-secondary education. Tutoring expenses have been found to be an eligible extraordinary expense. The appeal court did not find that the capping of tutoring expenses contravened the Guidelines. The chambers judge did not err in principle, nor did she misapprehend evidence; and 6) the chambers judge awarded the respondent $500 in costs. The appeal court found that the respondent was primarily successful on the contested parts of the application and was also successful on his notice of objection. The appeal court did not intervene on the costs award. The appeal court did not make a costs award even though the appellant was not successful on her appeal. The respondent acknowledged that he owed arrears but refused to pay them pending the disposition of the appeal.

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Shingoose v R, 2020 SKCA 45

Jackson, April 17, 2020 (CA20045)

Criminal Law – Application for Judicial Interim Release
Criminal Law – Impaired Driving Causing Bodily Harm
Criminal Law – Judicial Interim Release – Medical Condition – COVID-19

The appellant appealed his conviction and sentence for driving a motor vehicle while impaired by alcohol and causing bodily harm, contrary to s. 255(2) of the Criminal Code. He was sentenced to 15 months' custody and one year probation. A four-year driving prohibition was also imposed. The trial judge found that the appellant was the driver of a truck that became stuck in a ditch and at some point, he ran over the victim's leg. The appellant applied for

judicial interim release under s. 679(1)(a) of the Criminal Code pending the hearing of his appeal. He tendered affidavit evidence of his medical condition and the impact of COVID-19 on prison facilities.
HELD: The application was allowed. The appellant had to show, on a balance of probabilities, that his appeal was not frivolous, he would surrender himself into custody, and his detention was not necessary "in the public interest." Section 679(3)(a) was an initial screening device. If the ground of appeal was found to be frivolous, the application would be dismissed without further inquiry. The bar was a low one. The Supreme Court gave s. 679(3)(a) its plain meaning. The appellant's ground of appeal was not frivolous. The appeal court concluded that the standard was met. The appellant presented an expert's report and explained why he believed the evidence was relevant to the issues on appeal. The appellant put forward an arguable ground of appeal. The appellant met the low bar established by the provision in question. The Crown conceded that the appellant would surrender himself into custody if the appeal were not successful. The court next considered whether the appellant's detention was necessary in the public interest. The inquiry required consideration of both public safety and public confidence in the administration of justice. The administration of justice required weighing enforceability and reviewability. The Crown argued that the appellant presented a public safety risk that could not be overcome by any analysis of the public confidence in relation to the release. The 69-year-old appellant had a criminal record dating back to when he was a teenager. He had 43 prior convictions, including numerous driving offences. The appeal court found it clear that the appellant had a major issue with alcohol and other addictive substances. He did have long stretches of sobriety. The appeal court found that the appellant's criminal record did raise public safety concerns, but they were not sufficient to deny release on that ground alone. The appellant was found to present a particular case because he was particularly vulnerable to the risks posed by COVID-19. The appellant was a 69-year-old diabetic whose condition appeared to have worsened in custody. The appeal court did not find any special care was being taken concerning the appellant at the correctional facility. The appellant provided the court with a release plan. He would be quarantined for 14 days on his farm with a family member undertaking to ensure he abided by any terms imposed. In support of his position, the appellant filed an affidavit of a doctor that indicated the population of prisons should be reduced due to the risks of COVID-19 in the living situation there. The Crown argued that the affidavit should not be admitted. In Oland, the court indicated that the factors listed in 515(10)(c) were relevant to the pre-appeal context with certain modifications. The court considered the seriousness of the crime and noted that the appellant was given a sentence at the low end of the Crown's suggested range. The appellant argued that the length of the sentence militated in favour of its being reviewed before it was enforced. The appeal court shared the appellant's view as to the

strength of his case. The appellant was sentenced before Saskatchewan's first case of COVID-19. His comprised immune system was not an issue in sentencing. The appeal court agreed with the Crown that it was not necessary to admit the doctor's affidavit to take judicial notice of the threat of COVID-19 and its implications for someone like the appellant in a prison setting. The Ministry reports as to the precautions taken at Saskatchewan institutions were not found to eliminate the concerns. The reports were directed at the protection of the inmate population as a whole, not at the appellant's specific situation. The appellant's detention pending hearing of the appeal was not necessary in the public interest. A reasonable member of the public would agree that his detention pending his appeal was not necessary in the public interest. The application for judicial interim release was allowed.

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T.B. v L.B., 2020 SKCA 46

Jackson, April 17, 2020 (CA20046)

Appeal – Stay Pending Appeal – Application to Lift
Civil Procedure – Costs – Family Law
Family Law – Child Custody and Access – Interim Order – Appeal

The appellant appealed the variation of an interim order (decision) that awarded sole custody to the respondent and required him to pay costs of $2,000. Rule 15(1) of The Court of Appeal Rules imposed an automatic stay of the Decision as soon as the appellant had filed his notice of appeal. The appellant applied to impose the stay and the respondent applied in Court of Appeal Chambers to lift the stay of proceedings. The respondent filed an affidavit of an employee of the Ministry of Social Services wherein the officer indicated that the Ministry had withdrawn the application for a finding that the child was in need of protection when the court varied the interim order and gave the respondent sole custody. The Ministry assessed that the child was safe in the care of the respondent. The affidavit went on to say that if there were a stay of the fiat, the Ministry would have to reassess the ability of the appellant to safely care for the child.
HELD: The application of the appellant to impose the stay was dismissed. The application of the respondent to lift the stay was granted in part. The court found that the appellant's affidavit and arguments did not address what was in the best interests of the child. He argued for his rights and not the child's needs. The chambers judge found that the child was thriving in the respondent's sole care. The appeal court found that the chambers judge's findings and the evidence upon which they were based were persuasive. The appellant did not challenge the statement that there were no ongoing concerns with the mother's care or treatment of the

child. The Ministry had concerns because the appellant had deliberately not seen the child for over six months when the matter was heard in chambers. He said he had done so because he did not want his access to be supervised. The appeal court found that the arguments pointed decisively in favour of lifting the stay as it related to custody and access. The court also pointed out that the appeal was from an interim order, which is discouraged. The appeal court did not lift the stay with respect to the costs for two reasons: 1) lifting the stay would not be based on serving the best interests of the child, and 2) once costs are paid, they are often difficult to recover in the event that an appeal is successful and costs are varied.

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Satani v Choudhry, 2020 SKCA 48

Jackson, April 21, 2020 (CA20048)

Landlord and Tenant – Residential Tenancies Act, 2006 – Hearing – Standard of Review
Civil Procedure – Appeal – Leave to Appeal – Extension of Time

The applicant tenant applied for leave to appeal from the decision of a Queen's Bench chambers judge dismissing her appeal from the decision of a hearing officer of the Office of Residential Tenancies (ORT) pursuant to s. 72(1) of The Residential Tenancies Act, 2006. The applicant and the landlord had filed separate claims with the ORT. The applicant claimed that the landlord had threatened her with legal action and eviction notices. The home was unclean and rodent-infested, and many things in the house were broken or deficient. She lost time and money attending to the deficiencies. She claimed damages in the amount of $13,000. The landlord requested payment of damages for $5,890. The ORT advised the tenant that the hearing date had to be rescheduled, but when the hearing proceeded, both claims were heard at the same time. The officer decided that the applicant had breached the lease without the fault of the landlord and dismissed her claim. The landlord's claim was allowed in part, and he was awarded damages of $2360. The applicant argued on her appeal that she had had no opportunity to present her case, nor had she received the evidence the landlord relied upon before the hearing, and that the officer had not provided reasons for his decision. The chambers judge found that there had been no error of law or jurisdiction.
HELD: Leave to appeal was granted. The court found that the application met the test of being of sufficient merit and importance. The applicant had raised questions of law, such as whether the chambers judge erred by finding that she had been granted a fair hearing and by finding the officer's decision met the requirement for the adequacy of reasons of an administrative tribunal. The matter was of importance to the applicant because of the amount of

damages awarded against her, but also of general importance regarding the issue of the standard of review to apply to decisions of hearing officers and the aforementioned questions of law.

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Patel v Whiting, 2020 SKCA 49

Leurer, April 22, 2020 (QB20049)

Statutes – Interpretation – Divorce Act, Section 16, Section 21
Civil Procedure – Appeal – Leave to Appeal – Extension of Time

The respondent father applied for leave to appeal the decision of a Queen's Bench chambers judge to dismiss his application to vary a previous custody order. Under the first order, the court granted the parties joint custody of their three children with their primary residence being with the petitioner. The respondent was given weekly access, but the order did not provide for parenting time during any holiday periods beyond the 2019 summer vacation. In January 2020, the respondent applied for an order for allocating parenting time during holiday periods in that year, but the chambers judge denied it. The issues were: 1) was leave required to appeal the second order; 2) if not, what was the appropriate disposition of the application; and 3) if the court did not grant leave, should the respondent be granted an extension of time to file a notice of appeal?
HELD: The application was dismissed, but the court granted an extension of time to file a notice of appeal. It found concerning each issue that 1) leave to appeal was not required pursuant to ss. 16 and 21 of the Divorce Act; 2) the appropriate order was to dismiss the application when leave to appeal was not required because the judge hearing the application lacks jurisdiction to entertain the request for an order; and 3) the respondent should be granted an extension of time as permitted by s. 21(4) of the Act. The respondent had met the criteria that he genuinely intended to appeal, as shown by the filing of his application for leave, and he had an arguable case. No prejudice was caused to the petitioner by an extension.

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Hoffart v Carteri, 2020 SKCA 50

Richards Schwann Kalmakoff, April 24, 2020 (CA20050)

Civil Procedure – Expert Evidence – Notice
Civil Procedure – Summary Judgment – Appeal
Civil Procedure – Summary Judgment – Hearsay Evidence – Queen's Bench Rules, Rule 7-3(3)

Statutes – Interpretation – Residential Tenancies Act, 2006, Section 49(5), Section 49(6)
Torts – Actions in Tort – Negligence

The appellants rented a house from the respondents. The respondents sued the appellants, alleging that they caused a fire in the house in the course of illegal drug manufacturing. Summary judgment was granted in favour of the respondents. The fire started in the main floor bathroom. There was a large pot of marijuana residue in the bathroom. Also, there was a canister in the bathroom resembling butane canisters found in the garage. The male tenant, H., pled guilty to the possession for the purpose of trafficking drugs and other charges were stayed. The house was demolished in late 2009. The respondents claimed against the appellants in negligence. The respondents did not receive insurance because there was an exclusion clause in the policy excluding coverage for damage caused by the production of illegal drugs. H. provided an affidavit indicating that he was unable to remember the details of the fire or what had caused it. He was the only one present at the time of the fire, and he sustained serious injuries. H. also questioned why the house was demolished instead of repaired. The respondents provided an affidavit indicating that a house builder had advised them that the cost to repair would exceed the cost to demolish and rebuild. The chambers judge noted that the statement of claim pled negligence, but the written brief and oral argument asserted liability pursuant to the maintenance and repair obligations imposed on tenants by ss. 49(5) and (6) of The Residential Tenancies Act, 2006 (RTA). The appellants did not assert any prejudice or misapprehension about the case they had to meet. After concluding that the obligations set out in ss. 49(5) and (6) had been incorporated into the tenancy agreement, the chambers judge concluded that the appellants breached their obligations and were liable to the respondents for the loss. The chambers judge awarded the respondents $171,795 in damages, which he acknowledged was based on "second-hand" evidence, but such was the only evidence before him on the point. The appellants alleged that the chambers judge erred by (1) basing his decision on a cause of action that had not been pled; (2) deciding the summary judgment procedure could be used, and (3) relying on inadmissible opinion evidence. The appellants also questioned the damages awarded.
HELD: The appeal was allowed in part. The issues were determined as follows: 1) the appellants argued that the respondents made a reversible error by finding liability under the RTA when it had not been pled. The chambers judge decided it was open to him to address the RTA issue because the appellants did not raise any concerns about him doing so. The appellants had sufficient notice of the respondents' position because the respondents' brief of law was filed six weeks before the summary judgment proceeding. Further, the appellants did not establish that they were prejudiced by an inability to call evidence or by a loss of opportunity to conduct relevant cross-examinations. 2) The appellants argued that the

chambers judge should have found there were genuine issues to be tried and directed a trial to determine liability and quantum of damages. They said that the chambers judge erred in applying the relevant principles to the situation. There was no palpable and overriding error concerning liability. From the evidence, there were no questions about the root facts surrounding the fire, no conflicting expert opinions, and no questions about credibility. Rule 2-3(1) of the Queen's Bench Rules indicates that defendants cannot only rely on denials in their pleadings to show that there is a genuine issue. There was very little evidence regarding damages. The $171,795 that was awarded was calculated as being the depreciated replacement cost, less the value of the undamaged garage. The chambers judge did not have any evidence about the cost of repairs, so he could not assess the appellants' argument that it was not reasonable or appropriate to demolish the house. The appeal court found that it was a reversible error to award damages based on the hearsay evidence that it would cost more to repair than rebuild. The hearsay evidence of the house builder was also expert opinion evidence admitted without compliance with the Rules. The chambers judge should have exercised his gatekeeper function and declined to base a damage award on the strength of the house builder's opinion. A trial of the issue should have been ordered; and 3) the appellants argued that two affiants provided opinion evidence that should not have been admitted: first, the fire investigation report that was exhibited to the affidavit of the insurance company and second, the engineer's report that was tendered as an expert opinion in the cause and origin of fires. The appellants argued the opinion went beyond the engineer's expertise. The engineer concluded that the circumstances supported the drug manufacturing process as the probable cause of the fire. The appellants did not raise these issues during the summary judgment procedure. The appeal court found that even if the appellants' concerns were found to be warranted, the outcome would not change. The appeal court found that the conclusions would be the same even if the evidence were removed. The court made no order as to costs, given the mixed success on the appeal.

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R v Wesaquate, 2020 SKCA 64

Dawson, March 10, 2020 (QB20086)

Criminal Law – Application for Court-Appointed Counsel – Rowbotham Application

The accused applied for a remedy pursuant to ss. 7, 11(b) and 24(1) of the Charter that would result in him obtaining an order for court-appointed counsel, known as a Rowbotham application. He sought court-appointed counsel because he had been denied Legal Aid, was

indigent and incapable of representing himself at his upcoming trial due to its complexity, and would face significant jeopardy if convicted. He had been charged with six offences that included sexual assault contrary to s. 271 of the Code as well as kidnapping and confinement contrary to s. 279 of the Code. The Crown had asked that counsel be appointed by the court pursuant to s. 486.2(2) of the Code to cross-examine the complainant. Counsel for the Attorney-General for Saskatchewan (Court Services) did not contest the grounds on which the accused made his application except to argue that although he had been denied Legal Aid, the application should be denied on the basis of that he terminated his relationship with the lawyers assigned to him by Legal Aid without reasonable explanation. The issue at the hearing was whether the accused had been denied Legal Aid and whether he had terminated his relationship with lawyers. The accused maintained that he did not terminate his relationship with Legal Aid.
HELD: The application was granted. The court held that the accused had met all of the Rowbotham criteria and that there would be a prospective breach of his s. 7 Charter right unless he had state-funded counsel to assist him with his trial. It observed that the Charter provisions do not constitutionalize the right of an indigent person facing criminal consequences to be provided with a state-funded lawyer, but that ss. 7 and 11(d) have been interpreted as guaranteeing an accused a right to a fair trial and to be tried in accordance with the principles of fundamental justice. It established that Legal Aid had denied the accused its services. Although Legal Aid had done so in reliance on its assertion that the accused had fired his lawyers, the court found that Legal Aid had mischaracterized the accused's conduct, contrary to the ruling of the Law Society of Saskatchewan's Ethics Committee (see: 2019 SKLSPC 11). The accused had not terminated the solicitor-client relationship but rather each of the lawyers had when the accused would not agree to plead guilty as they had advised, whereupon they withdrew.

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Heffernan v Saskatchewan Police Commission, 2020 SKQB 65

Elson, March 10, 2020 (QB20070)

Administrative Law – Judicial Review – Standard of Review
Statutes – Interpretation – Police Act, 1990

The applicant applied for permission to appeal an adverse disciplinary decision made under The Police Act, 1990 (Act). The application was made pursuant to s. 69 of the Act. The applicant sought judicial review of the Saskatchewan Police Commission's (commission) decision to dismiss the application. The court reserved decision pending release of the Supreme Court of Canada's decision

in Vavilov. The applicant was a special constable as a bylaw officer. The hearing officer found that the applicant had made a misleading and inaccurate entry in a dispatch ticket pertaining to an intention to adopt a puppy from the SPCA. The hearing officer accepted a joint submission on penalty and directed that the applicant be reprimanded for his discreditable conduct. The applicant was laid off from his employment, and his employer indicated the lay-off was based on seniority pursuant to the terms of the collective bargaining agreement. The applicant argued that he was "summarily dismissed" with the hearing officer's decision being a factor in his dismissal. He did not grieve the decision. The affidavit attached a form he completed that he said proved his innocence, yet he did not explain why the document had not been presented to the hearing officer. The commissioner accepted the argument made by the police service that the commission lost jurisdiction in any prospective appeal when the applicant ceased to be employed with the police service. Thus, any appeal would be moot. The applicant sought judicial review of that decision, including an order of mandamus directing the commission to hear the appeal. The applicant argued that a correctness standard of review applied because the matter under review related to jurisdictional boundaries between two administrative decision-makers.

HELD: The court in Vavilov revisited the standard of review analysis for judicial review matters. The court in Vavilov recognized the reasonableness review as the presumptive standard. The applicant's brief did not contain any meaningful explanation about the specific nature of the jurisdictional question. He did not identify the two administrative bodies. There was no merit to the applicant's argument. There was only one statutory framework within which the commission exercised its jurisdiction and made its decision, the framework under the Police Act. The court was not persuaded that there were any circumstances to justify a derogation from the presumptive standard of reasonableness. A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker." The court in Vavilov identified seven factors to which a reviewing court should have regard. The applicant had the burden of persuasion to show that the commissioner's decision was unreasonable. The applicant argued that: a) the commissioner unreasonably disregarded that the discipline resulted in his dismissal, which provides for an appeal as of right pursuant to s. 69(4)(b)(i). The matter was not for the commissioner to decide. It could only be addressed through the grievance and arbitration procedure through the collective bargaining agreement; b) the commissioner unreasonably misinterpreted s. 69 to apply only to police service members. The commissioner's approach was not unreasonable. It was logical for the commissioner to give the word "person" a narrow construction, informed by s. 66; c) the commissioner unreasonably disregarded the applicant's concerns supporting a right of appeal pursuant to s. 64(c). The commissioner's approach was not unreasonable. It was

not necessary for him to address s. 69(4)(c) in any specific way. The application for judicial review was dismissed. The respondent police service was given costs fixed at $3,000.

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Premier Horticulture Ltd. v United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-184, 2020 SKQB 77

Scherman, March 23, 2020 (QB20087)

Administrative Law – Judicial Review
Labour Law – Judicial Review – Labour Relations Board
Statutes – Interpretation – Saskatchewan Employment Act, Section 6-111

The applicant employer applied to the court for judicial review and quashing of a decision of the Saskatchewan Labour Relations Board regarding an unfair labour practice (ULP) complaint filed by the respondent union (see: 2019 CanLII 10580). The applicant argued that the board erred in its preliminary decision to admit certain evidence. At the hearing before the board, the union sought to admit into evidence certain communications between the parties from December 2015 to July 2016. The employer took the position that the communications were subject to settlement privilege. As there was no recognized exception to that privilege, the union had no evidence to justify its failure to bring a ULP within 90 days of its knowledge of the same as required by s. 6-111(3) of The Saskatchewan Employment Act. The union argued the litigation privilege evidence should not be admitted into evidence, and the board should refuse to consider the union's application because it was filed after the 90-day limit. In this application, the applicant took the position that the standard of review applicable to the settlement privilege issue was correctness on the basis that it involved a general question of law of central importance to the legal system. The second issue raised by the applicant was that the board's decision was unreasonable, reviewable on the reasonableness standard, on several grounds that included: that the board failed to follow its own principles for determining timeliness issues and the exercise of discretion as set out in Saskatchewan Polytechnic and that the board unreasonably refused to assess labour relations prejudice.
HELD: The application was dismissed. The court reviewed the principles set out in the Supreme Court's decision in Vavilov regarding the standard of review to be used in judicial review. Concerning the first issue raised, it found that the applicant had not rebutted the presumptive standard of review was reasonableness as established in Vavilov. The board has the power to receive any evidence that it considers appropriate under s. 6-111(1)(e) of the Act,

which supported the conclusion the matter was not of central importance to the legal system. The board correctly admitted the communications subject to settlement privilege, not for the contents themselves, but as an exception to settlement privilege only to show that such communications were taking place to explain the union's delay in launching a ULP application. The court also found that s. 6-111(3) gives the board discretion whether or not to hear an allegation of a ULP beyond the 90-day period, and that was not the equivalent of a limitation period. Regarding whether the board's decision was unreasonable, governed by the standard of review of reasonableness, the court dismissed all of the various grounds because the assessment of reasonableness should not be taken on the basis of minute individual criticisms of the board's decision. In this case, its reasons were reasonable, transparent and intelligible and fell within the range of acceptable outcomes. It found that the board: had not failed to follow its own principles regarding timeliness, as it specifically considered its decision in Sask Polytechnic; and had not failed to assess labour relations prejudice, as it stated in its decision that such prejudice was to be presumed. It then held that the evidence led it to conclude that no actual labour relations prejudice resulted from the delay.

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Director of Community Operations v Goodman, 2020 SKQB 80

MacMillan-Brown, March 24, 2020 (QB20078)

Regulatory Offence – Community Safety Order
Statutes – Interpretation – Safer Communities and Neighbourhoods Act

The Director of Community Operations (Director) applied for a community safety order (CSO) with respect to property (property) owned by the respondents. The Director applied for, among other things, the property to be closed from use and occupation for 90 days. The application was made pursuant to s. 8 of The Safer Communities and Neighbourhoods Act. The specified use identified was that in s. 4(1)(f)(iv), namely, the possession, growth, use, consumption, sale, transfer or exchange of a controlled substance (drug activity) as defined by the Controlled Drugs and Substances Act. The respondents opposed the CSO, arguing that the drug activity had ceased so a CSO was no longer warranted. They also argued that the Director did not establish that there was an adverse impact on the community and neighbourhood.
HELD: The CSO was granted. The Director had to establish that the property was being habitually used for a specified purpose and the neighbourhood and community were being adversely affected. A reasonable inference is all that is required. The standard is not high. The specified activity must be currently taking place. There is no

prescribed level of frequency that is necessary to establish habitual use. The court considered whether there was sufficient evidence that the property was being used for the specific purpose of drug activity. The court determined that the inference could be drawn. The respondents did not occupy the property, two tenants did. The Safer Communities and Neighbourhoods program (SCAN) received complaints from two individuals regarding drug and other illicit activity taking place at the property. SCAN undertook an investigation over the course of a year. By the time the investigator swore his affidavit in January 2020, seven different individuals had made complaints. The investigation resulted in seeing at least 450 individuals coming and going from the property. Fifty different vehicles were observed, with 20 of those being registered to owners with drug-related charges or gang affiliation. Many of the visits were of short duration. There was evidence of methamphetamine use at the property. The police service also had reports of attendance at the property throughout 2019. The investigator described some of the activities at the property as consistent with drug trafficking. The court concluded that SCAN conducted a thorough investigation. The court drew an inference that drug activity was occurring at the property. The court next considered whether the property was being "habitually used" for drug activity. The respondents argued that the tenant causing the problems left in September 2019. The surveillance took place until December 2019 and complaints continued into January and February 2020. There was no evidence that the activity ceased after the problem tenant left. The court found that the property was habitually used for the specified use – drug activity – in the present tense. The question then turned to whether the neighbourhood was adversely affected. The investigator said that the complainants found the activity to be unnerving and dangerous. The court placed little weight on affidavits tendered by the respondents from individuals indicating that they felt safe in the neighbourhood. The court concluded that the drug activity had an adverse effect upon the community and neighbourhood. The Director met the requirements to grant a CSO.

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Rumbold v Forseth, 2020 SKQB 84

Brown, March 27, 2020 (QB20080)

Statutes – Interpretation – Powers of Attorney Act, 2002, Section 2

The applicant brought an originating application to seek a declaration that the enduring general power of attorney (POA) granted to him by his father, Eddie Rumbold (E.R.), in June 2016 remained valid and operative and that the 2019 enduring power of attorney executed by E.R., appointing the respondents as his joint personal and property attorneys and revoking the 2016 POA, was

invalid and inoperative. The applicant argued that E.R. did not have the requisite capacity to execute the 2019 POA and revocation on the date of execution. E.R.'s mental faculties were beginning to decline in 2016 and by August 2017, he was moved into an assisted living facility. Many affidavits were submitted by friends and health care workers that deposed to the deterioration of his mental condition. He had become increasingly dependent on and compliant with those who were taking charge of him and directing him. The respondents alleged that E.R. was being maltreated by his second wife and because of their concern for his well-being, they arranged for a lawyer to meet with him. The lawyer knew E.R. and during the meeting, E.R. signed the 2019 POA and the revocation of the 2016 POA. The lawyer signed the independent legal advice and witness certificate, stating that the nature and effect of an enduring POA had been explained to E.R. by him and in his opinion, E.R. had the capacity to understand the nature and effect of the document. The respondents then arranged to have E.R. moved away from his wife to another care home in their town. A physician and a nurse both performed assessments on E.R. in June 2019 and concluded that he had compromised mental capacity and was not able to provide informed consent. The applicant relied upon ss. 2(1)(a) and (b), 4 and 19(1)(b) of The Powers of Attorney Act, 2002 (PAA) and the Court of Appeal's decision in Hrycyna v Hood in this application. In Hood, the court held that the Queen's Bench chambers judge correctly determined that the definition of capacity based upon the provisions of the PAA went well beyond a mere basic understanding of the nature and effect of a document signed by a grantor. Capacity must be assessed on all the evidence and not just on the certificate of the lawyer who witnessed the execution of the POA. The respondents submitted the test for capacity identified in the context of the PAA was established in Buckley v Buckley: that the relevant time to assess must be at the time the document was executed. The definition of capacity in s. 2(1) of the PAA was not intended to apply to ss. 4, 19(1)(b) and 21 of the Act. Buckley, they argued, had not been overridden by Hood.
HELD: The application was granted. The court found that the POA executed in May 2019 could not stand. It held that the Court of Appeal's decision in Hood was the law in Saskatchewan. The interpretation of the PAA requires the grantor to have capacity as stringently defined in s. 2 for any and all grants of authority to a personal and/or property attorney via execution of a POA, whether enduring or otherwise. The evidence showed that in the circumstances that existed at the time of the execution of the May 2019 POA, E.R. did not have the requisite capacity and that the 2016 POA continued to govern his affairs with the proviso that an assessment must be undertaken to assess whether E.R. was able to decide where he wanted to live.

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Trafford v TD Life Insurance Co., 2020 SKQB 68

Robertson, April 1, 2020 (QB20082)

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

The defendant, TD Life Insurance (TD Life), applied pursuant to Queen's Bench rule 5-14 to strike and dismiss the plaintiff's claim for failing to file an affidavit of documents as previously ordered by the court. The plaintiff, in her capacity as executrix of her late brother's estate, had commenced the action to seek payment of the deceased's life insurance benefit by the defendant. The deceased had acquired life insurance on the mortgage loan he had obtained from the Toronto Dominion Bank. When he died as a result of alcoholism, the mortgage was in arrears, and the bank began foreclosure proceedings. When the plaintiff applied for the life insurance benefit, which would pay off the balance of the mortgage loan, TD Life denied payment because the deceased had failed to disclose his pre-existing condition of alcoholism. The plaintiff maintained that the deceased's alcoholism was so well known that TD Life should not be permitted to deny payment for that reason. When the plaintiff's application to consolidate her action with the foreclosure action was denied, the court ordered that the latter would be stayed until the life insurance matter was resolved. A case management conference was held regarding the latter action shortly thereafter. The judge ordered that the plaintiff should serve her affidavit of documents by a specific date and outlined the subsequent schedule of steps in the proceedings. The plaintiff failed to serve it, and three months later, the defendant brought this application. The plaintiff did not appear.
HELD: The application was granted, and the plaintiff's claim was struck without prejudice to her right as a defendant in the foreclosure action to present any defence. The plaintiff's statement of claim had been filed almost two years before, and she had taken no meaningful steps to proceed with the action and had not provided an explanation.

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Qaisar v Tulloch, 2020 SKQB 89

Mitchell, April 2, 2020 (QB20088)

Civil Procedure – Costs – Solicitor-Client Costs
Civil Procedure – Queen's Bench Rules, Rule 3-6, Rule 11-22(6)
Professions and Occupations – Lawyers – Fees – Taxation

The applicants appealed against the Registrar's Certificate on Assessment of Accounts issued by an assessment officer (decision) pursuant to s. 72 of The Legal Profession Act, 1990. The impugned account related to legal services provided to the applicants by the

respondent (I.T.) and other members of his law firm (firm) from September 2007 to May 2013 and again from March 2014 to April 2018. The first period was when I.T. was retained to assist with legal matters against SGI. I.T. decided to retire in June 2013. I.T. understood that the applicants would execute a contingency agreement with a lawyer in another firm on the same terms as with his firm. The applicants did not continue with the other lawyer; they returned to the firm. The applicants chose to continue with the contingency agreement signed with the firm in 2007. In 2018, one of the applicants and a disbarred lawyer attended at the respondent's office and suggested that the disbarred lawyer would be the applicants' advocate and representative through the firm. The respondent withdrew from the file. A statement of account totaling $147,684.31 was provided to the applicants. The assessment officer reduced the account to $106,120.38 in the decision. There were three main issues on appeal: 1) whether the assessment officer interpreted the contingency agreement (contingency agreement) correctly; 2) whether the assessment officer erred in determining the appropriate amount for legal fees on a quantum meruit basis; and 3) whether the assessment officer erred in the costs award.
HELD: The appeal was allowed in part. The court followed the principles set out by the Court of Appeal in O'Byrne. The court first addressed whether to admit an affidavit one of the applicants filed for this application. Because the affidavit did not satisfy the Palmer criteria, it was not admitted. The court further noted that its review was deferential to the assessment officer's conclusions so should only be based on the information with which the assessment officer had been presented. The issues were dealt with as follows: 1) the assessment officer found that, pursuant to the contingency agreement, the parties agreed to an hourly rate of $230. The applicants argued that they only retained I.T. and the respondent, so they should not pay for any other lawyers. The assessment officer dismissed the argument because the applicants had met and corresponded with various lawyers throughout the years. The court found that rejecting the applicants' argument was correct. The contingency agreement stated the applicants were retaining the firm, not a specific lawyer. The applicants also argued that they should not be required to pay any fees respecting any legal services provided by the firm they went to right after I.T.'s retirement. The assessment officer interpreted the statement that the move would not cost the applicants anything as meaning the file would continue as was, not that the work of the new law firm would go unremunerated. The assessment officer did not err in construing and applying the terms of the contingency agreements in question; 2) the assessment officer concluded that lawyers billing less than $230 per hour were only entitled to charge at their actual hourly rate and lawyers billing over the $230 would receive the $230 per hour rate. The assessment officer then considered whether the lawyer's bill was fair and reasonable and concluded that it was not. The hours billed by junior counsel and articling students were found to be excessive and there were numerous instances of two counsel

working on the file at the same time. The assessment officer did not commit any error of principle. The assessment officer weighed all the appropriate factors, including: the difficulty of the matter; its importance to the client; the effort required and time spent; the expertise of the lawyers involved in the file; the results achieved for the client; and the client's prior consent to the fee. The appropriate and relevant legal principles were applied. The Court of Appeal decision in Vo does not stand for the principle that the maximum number of hours that can be billed is 46. The court determined that the assessment officer committed a palpable and overriding error in one aspect. The assessment officer omitted hours worked by an articling student and one associate lawyer because he saw no benefit to the clients with respect to that work billed. When the assessment officer set out the amended final account, he included those fees, being $4,375. The final amount was decreased by that amount; and 3) the applicants argued that they should have been awarded costs of between $7,500 and $20,000. They were essentially asking for solicitor-client costs. The court did not find any error in principle or a palpable and overriding error on the assessment officer's part regarding the cost awarded. The assessment officer directed that each party bear their own costs even though the applicants were successful in having the legal account reduced by a considerable amount. The court did award the applicants costs on this application, given their modest success at having the account reduced by $4,375. Costs of $500 were ordered.

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George Gordon First Nation v Saskatchewan, 2020 SKQB 90

Robertson, April 2, 2020 (QB20089)

Aboriginal Law – Reserves and Real Property – Mineral Dispositions – Duty to Consult
Civil Procedure – Summary Judgment

The issue on the summary judgment application was whether the defendant governments owed a duty to consult with the plaintiffs, a First Nation and other named plaintiffs (collectively referred to as the First Nation). The notice sought was a right of notice when there were applications by other persons for mineral dispositions. The notice would allow the plaintiffs the opportunity to acquire surface rights to the land, then have the mineral rights transferred without any compensation paid. The plaintiffs sought consultation from the Government of Canada (Canada) to compel the government of Saskatchewan (Saskatchewan) to oblige. The court reviewed historical events, documents, and constitutional developments. The First Nation signed a Treaty Land Entitlement Settlement Agreement (TLE) in 2008, which is recognized in clause 3(c) of The Saskatchewan Natural Resources Transfer Agreement (Treaty Land

Entitlement) Regulations. The TLE provided the First Nation with $26,662,416.42 in entitlement monies, which were all paid. The Agreement allows the First Nation to purchase up to 115,712 acres of land to have set apart as reserve lands for the use and benefit of the First Nation. The First Nation must purchase 8,960 shortfall acres, which was done in March 2018. By February 2019, 17,040.84 acres of land were purchased. If the First Nation acquired surface rights to land containing undisposed minerals owned by Saskatchewan, Saskatchewan was required to transfer those undisposed minerals to Canada for the benefit of the Band without compensation. Subsurface lands or minerals or both near the First Nation were disposed of by Saskatchewan both while negotiating the TLE and after the TLE was ratified and in effect. Saskatchewan does not notify entitlement Bands of applications by other persons for mineral dispositions. The issues were: 1) what relief the First Nation sought under a duty to consult; 2) whether the First Nation's claim was barred by the terms of TLE; 3) whether Saskatchewan had a duty to consult the First Nation with respect to mineral dispositions before or after the signing of the TLE; 4) if there was a duty to consult, did Saskatchewan breach its duty; 5) whether Canada had a duty to consult the First Nation with respect to mineral dispositions before or after the signing of the TLE; and 6) if there was a duty to consult, did Canada breach its duty?
HELD: The case was determined to be an appropriate one for summary judgment. The plaintiffs' claims were dismissed. The issues were determined as follows: 1) The First Nation sought notice of any applications for mineral dispositions so that it could then assess whether it wanted to acquire those same minerals under a right of first refusal; 2) Saskatchewan argued that the First Nation's claim was barred by the express terms of the TLE. The court found that the treaty land entitlement negotiations and resulting agreements were intended to resolve outstanding land claims by Saskatchewan First Nations. The First Nation entered into the agreement after receiving legal advice. The agreement confirms that the parties agreed to conclude existing claims and bar future claims. There were no express obligations on Saskatchewan to consult with the First Nation; 3) the court did not find a duty to consult on the part of Saskatchewan on the basis of any of the following: constitutional; treaty; honour of the Crown; fiduciary; trust; and contractual. In a trilogy of decisions in 2004 and 2005, the Supreme Court of Canada found that s. 35 of the Constitution Act, 1982 required the Crown to fulfil a duty to consult and accommodate Aboriginal peoples. The three elements required for a duty to consult are: a) an identified treaty or Aboriginal right or claim. There was an identified claim; b) Crown conduct. The First Nation had the same opportunity as anyone else to acquire surface rights and to apply for mineral dispositions; and c) a real potential for an actual foreseeable, adverse impact. The court agreed with Saskatchewan that the First Nation was not "forced" to acquire land elsewhere. The process outlined under TLE was found to have worked. The First Nation was not prevented from acquiring land to

satisfy its entitlement under the agreement. It was not unreasonable for Saskatchewan to continue with its standard practice of first-come, first-served. The First Nation's request for notice of applications for mineral dispositions under a duty to consult was not reasonable. The First Nation did not establish impugned Crown conduct that had an actual foreseeable adverse impact on the plaintiffs' Aboriginal rights. There was no duty to consult as proposed by the First Nation; 4) the court indicated that, if there were a duty to consult, it was satisfied by the procedures followed by Saskatchewan; 5) Canada's duty to consult was met when it consulted on the First Nation's claiming a shortfall of reserve lands. Canada did not have a duty to assist the First Nation in compelling Saskatchewan to do its duty; and 6) Canada could not breach a duty it did not have. Saskatchewan and Canada were individually awarded costs calculated under the Tariff of Costs, Schedule I – "B", Column 3.

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George Gordon First Nation v Saskatchewan, 2020 SKQB 91

Robertson, April 2, 2020 (QB20090)

Civil Procedure – Queen's Bench Rules, Rule 9-34
Civil Procedure – Request for Recording of a Proceeding
Civil Procedure – Summary Judgment

The matter dealt with public access to recordings of proceedings of the court, including transcripts of those recordings. The summary judgment application dealt with whether or not the respondent governments breached a duty to consult with the plaintiffs, a First Nation and other named plaintiffs. The decision was reserved after it was heard. The plaintiffs' counsel and other plaintiffs requested a copy of the transcript of the hearing. The plaintiffs' counsel indicated that other members of his firm shared an interest in the application and subject matter and would benefit from the opportunity to review the transcript.
HELD: Queen's Bench Rule 9-34 excludes chambers applications from the types of proceedings for which a recording can be applied because a chambers application does not form part of the court record. The summary judgment application in this case was not heard in regular civil chambers court. The court determined that Rule 9-34(2) applied to a summary judgment application heard outside of regular civil chambers. The nature of the hearing was the determining factor, not whether it was heard in regular chambers. The nature of the chambers hearing was one not based on vive voce evidence but on affidavits such that the decision speaks for itself. The request for the transcript was denied.

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Oberg v Board of Education of the South East Cornerstone School Division No. 209 of Saskatchewan, 2020 SKQB 96

McCreary, April 3, 2020 (QB20091)

Administrative Law – Judicial Review – Procedural Fairness – Breach of Duty
Statutes – Interpretation – Education Act, Subsection 215(3)
Civil Procedure – Queen's Bench Rules, Rule 3-56
Professions and Occupations – Teachers – Conduct – Discipline – Appeal

The applicant applied for judicial review of two decisions of the respondent, the Board of Education of the South East Cornerstone School Division, that demoted him from his position as principal of a high school by removing his duties. He sought an order quashing or setting aside the decisions. The applicant asserted that the respondent owed him a duty of procedural fairness in making the decisions and breached that duty and that the respondent's decisions were substantively unreasonable. Prior to the incidents that led to decision to demote the applicant, he had had a 27-year teaching career, 25 years of which were with the respondent. In 2007, he became vice principal and in 2008, principal of the high school until November 2017 when the demotion occurred. He had never been the subject of any disciplinary proceeding prior to his demotion. The respondent's administrative staff commenced an investigation after receiving reports of an incident in October 2017 that involved the applicant attempting to use his position to advance his own interests as they related to his daughter playing on the high school's sports team and involved his being disrespectful to the coach, parents and students on the day of the incident. The investigation also included an incident wherein the applicant allegedly left students unsupervised during a school trip. The investigators interviewed the applicant and asked him to provide his account of what had occurred but did not reveal to him every allegation made against him to permit him to respond to them. The investigators' report concluded that the applicant had used his position inappropriately, demonstrated significant lapses in judgment, failed to conduct himself as an appropriate role model and damaged the reputation of the School Division, and that the failings constituted misconduct that justified removing him as principal. The investigators did not give the applicant their report nor an opportunity to respond to it. The respondent accepted the report's conclusions and removed the applicant's duties as principal citing the reasons given in the report. The applicant exercised his right pursuant to s. 215(3) of The Education Act, 1995 to have a show cause hearing. Afterwards, the respondent confirmed its initial decision in December 2017. It did not provide the applicant with its reasons for its decision or why it had rejected his submissions and informed the applicant of the second decision by a telephone call. In

March 2018, the respondent permanently filled the applicant's position. The applicant issued his originating application for judicial review in January 2019. The issues were whether: 1) the application should be dismissed for undue delay; 2) the board breached a duty of procedural fairness to the applicant; and 3) the board's decisions were reasonable.
HELD: The application was granted. The respondent's decisions were quashed as void ab initio because it breached the duty of procedural fairness. It reached an unreasonable decision. The applicant's duties as principal were reinstated. The court found with respect to each issue that: 1) the there was no undue delay under Queen's Bench Rule 3-56(3). It considered that the complexity of the issues in this case warranted time to bring the application properly and because the applicant's request to the respondent pursuant to The Local Authority of Freedom of Information and Protection of Privacy Act had taken nine months to produce. Even if the delay had been undue, there was no evidence that it had caused prejudice; 2) regarding the breach of the duty of procedural fairness, it was a legal question to be answered by the court and did not involve an assessment of the standard of review. It determined that the respondent breached its duty by failing to provide the applicant with sufficient particulars of the allegations, a fair opportunity to respond and sufficient reasons for a decision that affected him significantly. The respondent owed the applicant a high degree of procedural fairness because the matter involved his employment and the Act did not oust common law requirements for natural justice protections. Further, the respondent's own policies required a high standard of procedural fairness regarding decisions respecting employees' employment contracts. Further, the respondent committed multiple breaches in the investigation phase and it owed a high degree of fairness in its conduct, as it had adopted the policies found in the Saskatchewan School Board Association's investigation manual and because the respondent's initial decision relied solely on the findings of the investigation report and there was no opportunity to test the evidence unless the applicant requested a show cause hearing; and 3) the disciplinary penalty imposed by the respondent was unreasonable and did not fall within the range of reasonable alternatives. The decision as to penalty was not proportional to the misconduct and the respondent failed to consider the mitigating circumstances of the applicant's lengthy exemplary service and that the misconduct consisted of one incident for which the applicant had apologized. The appropriate remedy here was not to refer the matter back to the respondent: the only possible solution was to reverse the demotion and reinstate the applicant's duties.

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Pedigree Poultry Ltd. v Saskatchewan Broiler Hatching Egg Producers' Marketing Board, 2020 SKQB 100

Barrington-Foote (ex officio), April 3, 2020 (QB20094)

Torts – Misfeasance in Public Office

The plaintiffs' action was the subject of an earlier non-suit application by the defendants that was dismissed (see: 2016 SKQB 366). The trial then proceeded. The plaintiffs were each involved in the business of chicken farming, specifically, the production and marketing of broiler hatching eggs. Their supply is managed under provincial legislation, which, at the time that the alleged cause of action arose in 1998, was The Broiler Hatching Egg Marketing Plan Regulations passed under The Natural Products Marketing Act, which governed the production and marketing of eggs to those with licences issued by the regulator. The producers produced and sold eggs in the amount specified in their quotas. The plaintiffs, Pedigree Poultry, owned by James Glen and Ron Dubois, who owned a company, RD, each became a licenced producer in 1986 and 1992, respectively. One of the defendants in this case, the Saskatchewan Broiler Hatching Egg Producers' Marketing Board, was the regulator. During the period in question, the other defendants, Mervin Slater and Victor Loewen, were members of the board. These defendants were producers and experienced industry leaders. Slater was the board's representative on the Broiler Industry Committee (BIC) that had been established by the government to work with chicken marketing boards to realize on the opportunity to increase the production of breeders and broilers offered to Saskatchewan producers by the Chicken Farmers of Canada (CFC) in 1997 and 1998. In early 1998, Slater advised all of the chicken producers that the province needed more eggs, and the CFC was prepared to increase its quota. He inquired as to their interest in building barns in the next year to increase production. Both plaintiffs responded that they were interested in expansion, as did seven other producers. Before this development, the plaintiffs had each conflicted with the board on numerous occasions, apparently because it, and particularly Slater, had formed the opinion that Dubois was a "sham producer" not actively involved in operating his unit and Pedigree operated RD in contravention of the board's orders. Although this opinion had been challenged and refuted by the plaintiffs in various appeals they had taken against the board's decisions, the plaintiffs asserted that the board continued to believe that they were acting illegally. For two years following the advertisement of the quota increase, the problems each of the plaintiffs had with the board worsened. Their claim was for damages arising from the misconduct of the defendants carrying out their regulatory functions. They submitted that the defendants committed the intentional tort of misfeasance in public office, acting recklessly or knowingly in a fashion they knew to be unlawful and which they knew would damage the plaintiffs. In their claim, the plaintiffs pointed to three incidents that they alleged constituted

malfeasance: 1) Slater, in his capacity as chair and member of the board, attended a BIC meeting on April 17, 1998 regarding CFC's offer to expand Saskatchewan's quota. In pursuance of its belief that its allocation would increase, Pedigree made arrangements with Sunnyland, a provincial hatchery, to obtain a large placement of chicks in June 1998. However, at the April meeting, Slater advised Sunnyland's representative that there was a problem with Pedigree's quota to make the June placement. Sunnyland cancelled the placement because of the statements. 2) In May 1998, the board sent a letter to Pedigree but not to Dubois, stating that it was cancelling a portion of Pedigree's quota and transferring Dubois' quota to Pedigree, without providing notice to be heard as required by the Act, Regulations and orders; and 3) in September 1998, the board held a meeting at which the expansion quota was allocated to seven of the existing producers who had requested expansion quotas, but not Pedigree or Dubois. Pedigree sought damages for the loss of profits it would have realized from the June placement. Both Pedigree and Dubois claimed damages for loss of profits resulting from the board's failure to allocate them expansion quota. They claimed that absent misfeasance by the defendants, their quota allocations would each have been increased substantially.
HELD: The court found each of the defendants liable for misfeasance in public office in relation to both plaintiffs and all of the defendants were liable in general damages for specific amounts awarded to each plaintiff that included loss of the June placement, the loss of income caused by the failure to receive expansion quota and loss of the capital value of quota not allocated by the board. The court determined that Slater's conduct warranted punitive damages, and it awarded $50,000 to Pedigree and $25,000 to Dubois. The court found concerning: 1) the June 1999 placement, that Slater was guilty of category B misfeasance as described by the Supreme Court in Odhavji, and that such misfeasance caused the cancellation of the placement. He was acting as a public officer carrying out public functions and knowingly or recklessly misrepresented Pedigree's status as a licenced producer which had a remaining quota and thus the legal right to make the placement. Acting in the same capacity, Slater failed to correct the misinformation. Although the board may not have authorized Slater to do what he did, the court determined that the other members of the board knew what had happened and failed to act appropriately. Therefore, Loewen and the board were liable as well for the damage suffered by the plaintiffs; 2) the May 24 letter, that the two elements of misfeasance in public office had been demonstrated concerning each of the defendants against both plaintiffs. Slater and Loewen knew that they and the board could not take the actions outlined in the letter without giving Pedigree and Dubois the right to be heard and knew that cancelling a licence or reducing quota would cause the plaintiffs to suffer damages; 3) the September 9, 1998 board meeting, that the two elements of misfeasance in public office had been made out against all of the defendants as to both plaintiffs. They had asked to receive the expansion quota, but they were not notified of the meeting, nor were

they granted an allocation of the expansion quota. Each of the defendants knew or were reckless as to whether they could not do what they did respecting the allocation of quota, just as they had tried to do in relation to the cancellation of licenses and quotas.

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R v Sisokin, 2020 SKPC 15

Green, April 3, 2020 (PC20012)

Criminal Law – Motor Vehicle Offences – Impaired Driving – Refusal to Provide Breath Sample
Constitutional Law – Charter of Rights, Section 7, Section 12, Section 24(1)

The accused was charged with impaired driving and failing to comply with a demand for a breath sample. The defence brought a Charter application alleging that the accused's s. 7 Charter rights had been had violated because an RCMP officer had used excessive force against the accused. A trial proceeded through a voir dire on the Charter issue. The charges had arisen after the accused had failed to stop at a four-way stop and narrowly missed hitting another vehicle. An off-duty police officer witnessed the driving infraction and followed the vehicle. When the accused left it, the officer noted that he was unsteady on his feet. After she called the local detachment, two RCMP officers arrived and located the person described to them by her. Both officers testified that they could smell alcohol coming from the accused and see that he had glassy bloodshot eyes. They arrested him for impaired driving on the belief that he was under the influence and had been operating a vehicle and informed him of his right to counsel. The accused was belligerent and refused to identify himself, and when one officer made the breath demand, he was unresponsive. At the detachment, the accused was allowed to call a lawyer from the interview room and when the consultation was completed, the officer entered the room to go over both the reasons for his arrest and the breath demand. The accused continued to be obstreperous and when the officer tried to leave, the accused put his foot in the door and prevented the officer from closing it. When the accused refused to move his foot, the officer performed a judo trip and both men fell to the floor. The officer then picked him up and put him into a chair and left. A video recorder was turned on and when the officer returned, he explained that he had acted to regain control of the situation because the accused was not listening to him and posed a danger to himself and others. He then tried to read the breath demand to the accused who continued to be belligerent and after 15 minutes, the officer charged him with refusal. The issues were whether: 1) the accused's s. 7 Charter rights had been breached and the charges should be stayed or the evidence of refusal be excluded

from evidence under s. 24(1) or s. 24(2) of the Charter respectively; 2) there was proof of a refusal; and 3) there was proof of impairment.
HELD: The Charter application was dismissed and the accused was found guilty of both charges. The court found with respect to each issue that: 1) there had been no breach of s. 7 of the Charter. The officer's actions were taken to maintain order in the detachment and to control the accused, and he had not used force that was likely to cause harm to him; 2) it could infer from the accused's conduct that he did not intend to comply with the breath demand; and 3) there was sufficient evidence to prove beyond a reasonable doubt that the accused was impaired. The court invited submissions from counsel whether Kienapple applied and if so, which charge should be conditionally stayed.

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R v Masiowski, 2020 SKPC 17

Robinson, April 6, 2020 (PC20013)

Criminal Law – Driving over .08 – Certificate of Analysis – Qualified Technician
Constitutional Law – Charter of Rights, Section 11(b)
Criminal Law – Blood Alcohol Level Exceeding .08 – Applicability of New Requirements – Transitional Case

The accused was charged with driving while his blood alcohol exceeded .08, contrary to s. 253 of the Criminal Code. The trial judge acquitted the accused after finding that the certificate of qualified technician could not be relied upon by the Crown. The trial judge found that the certificate was inadmissible because the Crown did not prove that the accused had been given reasonable notice of the Crown's intention to rely upon the certificate at trial. On appeal, the appeal court found that the trial judge had erred in finding the certificate of qualified technician was inadmissible. The matter was returned to Provincial Court for determination with the inclusion of the certificate of qualified technician in evidence. The accused argued that: 1) his rights under s. 11(b) of the Charter were breached; and 2) the case was transitional so was covered by the new drinking and driving provisions of the Criminal Code that came into effect on December 18, 2018, and the Crown failed to prove compliance with new subsection 320.31(1).
HELD: The accused's arguments were dealt with as follows: 1) the accused was first charged in May 2017 and the trial decision was made in March 2018. The appeal was allowed in June 2019, but the matter was not heard right away because the Crown had filed an appeal in the interim. The appeal was abandoned in October 2019. The total delay was two years, 10 months, and eight days. After deducting defence delay, the court found that the period of time

from charge to acquittal at trial was 180 days. If the 21 days between argument and decision were deducted, the delay was 159 days. The delay clock was stopped during the initial appeal period. The court distinguished cases wherein a re-trial was ordered after appeal and the matter was remitted to a lower court for continuation. The delay clock started running again when the appeal court allowed the Crown's appeal against acquittal. The Crown's second appeal was not found to stop the delay clock because it did not change the accused's status of being a "person charged with an offence" within the meaning of s. 11(b) of the Charter. There were an additional 163 days of delay. The total delay was 322 days, just under 11 months. The length of delay was well below the presumptive ceiling in Jordan. The accused did not show that the delay was unreasonable. The accused's application for a stay of proceedings was denied; and 2) the accused argued that the Crown should have to meet the new requirements set out in subsection 320.31(1). The accused said that the certificate of qualified technician did not set out the required information. The Crown argued that the case was not transitional because the accused's trial came to an end in October 2017, before the new requirements were law. Section 32 of Bill C-46 dealt was entitled "Transitional Provisions" and dealt with the transitional cases. A plain reading of the section led the court to conclude that the subsection had no application to the accused's case. The certificate of qualified technician was proof of the accused's blood alcohol concentration being over .08. The accused was found guilty.

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