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## *R v C.B.*, 2020 SKCA 65

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The appellant appealed his conviction of sexual interference contrary to s. 151 of the Criminal Code. The complainant was the appellant's niece. She was 11 years old at the time of the incident and 18 at the time of trial. The complainant was staying the night at the appellant's house to visit her cousin, the appellant's daughter. The complainant said that the appellant came into the room that she and her cousin were sleeping in and began touching her. She started to resist and the cousin woke up. The appellant left the room when the girls calmed down. According to the complainant, the girls decided that they would not say anything so as not to cause family problems. The complainant continued to spend nights at the appellant's home. The cousin raised the incident with her parents six months later and a year after that, she disclosed it to a school counsellor. The counsellor referred the matter to the police. The complainant said that she initially lied to the police about the incident because everyone was saying that what had happened had been her fault. Several years later, the complainant said that she was persuaded to reveal the truth of the incident to the police. The appellant did not testify at trial. Crown witnesses included the complainant and the cousin. The appellant argued that the trial judge had erred by saying there was no evidence to explain his

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presence in the bedroom on the night in question. He could have been in the bedroom to deal with the family dog that was in there or to check on the children.
HELD: The appeal was allowed. The trial judge failed to consider evidence that was material to his reasoning and essential to his decision to convict. The trial judge's decision involved a miscarriage of justice within the meaning of s. 686(1)(a)(iii). To determine the appeal, the appeal court considered whether the trial judge misapprehended the evidence and, if there had been a misapprehension of the evidence, whether it was material and essential to the reasoning of the trial judge. The trial judge failed to consider evidence that might have explained the appellant's presence in the room. He erred in interpreting the record in the sense of failing to consider evidence relevant to the question of why the appellant was in the bedroom where the complainant was sleeping. The trial judge said that there was no evidence to offer a rational explanation for the appellant's presence in the bedroom. The next issue was whether the trial judge's failure to consider evidence explaining the appellant's presence in the bedroom was material and essential to his decision-making. The failure to consider the evidence went to substance. The appeal court found that the trial judge's erroneous conclusion about the absence of evidence to account for the appellant being in the bedroom was essential to the trial judge's reasoning. The appeal court also noted that the appellant's silence at trial could not be used to remove the doubt about why he was in the bedroom. The appellant's conviction was set aside, and a new trial was ordered.

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### ***MNP Ltd. v Wilkes***, 2020 SKCA 66

Jackson Caldwell Tholl, May 29, 2020 (CA20066)

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There were three applications under s. 193 of the Bankruptcy and Insolvency Act (BIA) and the Bankruptcy and Insolvency General Rules (General Rules). The principal secured creditor, Corp. A, applied for the respondent to be appointed receiver of K Inc. in November 2016. Corp. A then bought K Inc.'s principal assets, but not two K Inc. lawsuits. In December 2018, the receiver applied for an order approving the sale of the K Inc. lawsuits to Corp. A for $200,000. The sale was approved in April 2019. The applicants (Wilkes Group) were some of the shareholders of K Inc. and some of the guarantors of its remaining debt to Corp. A. They opposed the

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sale of the lawsuits to Corp. A, and they valued these lawsuits at more than $10 million. The Wilkes Group also asserted that Corp. A bought the lawsuits to compromise them, leaving the Wilkes Group with no ability to reduce their liability to Corp. A under the personal guarantees. They further alleged that Corp. A could receive a windfall if allowed to purchase the lawsuits. A notice of appeal was filed by Wilkes Group in May 2019, but not within 10 days as required. The receiver applied to strike the notice of appeal. The Wilkes Group sought an extension of time to file the notice of appeal. The issues were as follows: 1) whether the Wilkes Group had an appeal as of right under s. 193 of the BIA; 2) if not, whether the Wilkes Group should be granted leave to appeal under s. 193(e) of the BIA; and 3) whether leave should be granted to allow the Wilkes Group to file late.

HELD: The application to extend time to appeal was granted and the application for leave to appeal was dismissed as unnecessary. The court discussed the issues as follows: 1) the receiver argued that s. 193(c) must now be construed narrowly so that there is not an appeal as of right. The court deliberated two approaches to interpreting s. 193(c) resulting from the jurisprudence. The applicant relied on the Orpen-Fallis line of authority. The receiver relied on the Fuel-Bending Lake approach. The court discussed how s. 193(c) was affected by the addition of s. 193(e) of the BIA. The court did not believe that the solution was to construe s. 193(c) narrowly. The words of the statute should be construed and applied to the context of a specific case, without applying a narrow or broad interpretation of the statute. The first question to be determined was whether the subject property exceeded $10,000. The court found that an issue can be procedural while also involving more than $10,000 at stake. The recovery of that amount need not be guaranteed or immediate. The Wilkes Group had an appeal as of right under s. 193(c); 2) the applicant appealed on nine grounds. They claimed that the lawsuits were worth in excess of $10 million. The court found that the property involved in the appeal consisted of the lawsuits. The potential loss to the applicants was found to bring their appeal within s. 193(c). It was clear that the appeal involved property that exceeded $10,000; and 3) the appeal was filed late because Wilkes Group's counsel believed that the 30-day appeal period outlined by s. 9 of The Court of Appeal Act, 2000 applied. The applicable appeal period was the 10-day appeal period from Rule 31(2) of the General Rules. The Wilkes Group was found to fall within the criteria from Paulsen & Son Excavating Ltd. The court did not see a reason to depart from the case law, which is to grant an extension of time if it can be done without serious prejudice to the other side. The court accepted that Wilkes Group intended to appeal from the outset. The receiver did not provide any argument or evidence as to any potential prejudice caused by the late filing. The case, being whether the chambers judge erred by not taking into account the factors and issues listed by Wilkes Group, was an arguable one. The court did not make an order as to costs.

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## ***Thomas v Input Capital Corp.***, 2020 SKCA 67

Whitmore Schwann Tholl, June 3, 2020 (CA20067)

Statutes – Interpretation – Personal Property Security Act, Section 50

The appellants, R.T. and his farming corporation, appealed the decision of a Queen's Bench judge in chambers to allow the respondent's application, filed pursuant to s. 50(7) of The Personal Property Security Act (PPSA), to maintain registrations after the appellants had served a demand on it under s. 50(3) of the PPSA to amend and discharge the registrations of the security interests against them (see: 2018 SKQB 72). The appellant and his son, J.T., farmed together but ran their own farm operations separately from a financial standpoint. R.T. deposed that he and his son separately own or lease their own farm equipment but they allow each other to freely use all of the farm equipment. R.T.'s son and his corporations formed an ag-streaming contract with the respondent in 2013. It was uncontroverted that neither of the appellants had entered into the contract. However, during the negotiations, R.T. faxed a document to the respondent that listed all the farm equipment and its value. R.T. stated that he supplied the list because the respondent wanted to know that J.T. had sufficient equipment to perform his contractual obligations. J.T. and his corporation (the debtors) entered into several security agreements with the respondent after the contract was formed, providing a security interest in their personal property that the respondent registered in the Personal Property Registry (PPR). When J.T. failed to perform his contractual obligations, the respondent took enforcement action against the debtors pursuant to the security agreements. As it had problems seizing assets, the respondent reviewed the list sent by R.T. in 2013 and determined that the items were owned by the debtors and subject to its security interest. After conducting an on-site inventory in 2016, the respondent surmised that J.T. had transferred the equipment to R.T. subsequent to entering into the security agreements. It then commenced an action against the debtors and R.T. and his corporation. It made amendments to the security registrations by registering financing change statements pursuant to s. 51(2) of the PPSA, claiming that the appellants were transferees, and later seized some of the equipment. The appellants then brought an action against the respondent with regard to the seizures and served their demand on the respondent to amend its registrations to remove them as debtors. The respondent then applied under s. 50(7) of the PPSA. The chambers judge did not rule on the appellants' preliminary objection to the contents of affidavits sworn by an employee of the respondent for failing to comply with Queen's Bench rule 13-30 because she concluded that the matter

Allied Industrial and Service Workers International Union, Local 8933

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could be determined on the issue of the appellants' standing to issue discharge demands under s. 50(3)(d) of the PPSA. The judge found that a transferee from s. 51(2) cannot be the same person as the debtor in s. 50(3)(d) of the PPSA and that the reference to financing statement in s. 50(3) does not include a financing change statement registered in accordance with s. 51(2) and, therefore, a person who has been registered through the use of a financing change statement under s. 51(2) could not use the process set out in s. 50 to have the registration amended or discharged. The judge ordered that the registrations be maintained until the matter was determined at trial. Among the issues on appeal were whether the chambers judge erred: 1) in determining it was not necessary to rule on the objections to the affidavit evidence; 2) with regard to the standing issue; or 3) in ordering that the registrations be maintained.
HELD: The appeal was dismissed. The court found with respect to each issue that the chambers judge had: 1) erred in failing to make a ruling because of her conclusion that the decision turned on standing and she did not have to rely on any of the impugned evidence. It is necessary for the record to be clear in chambers applications with regard to the evidence that is or is not admitted. In this case, the court undertook to examine the affidavit to strike portions that offended against Queen's Bench rule 13-30; 2) erred in her interpretation of the PPSA. A person who has been added as a debtor to a registration pursuant to s. 51(2) of the PPSA may utilize s. 50(3) to demand the registration be amended or discharged. The effect of the definitions of "debtor" under s. 50(1)(a) and s. 2(1)(m) indicates that the Legislature intended the word to include any person who is named as a debtor in a financing statement and/or financing change statement, regardless of whether that person is a party to a security agreement, owes an obligation to the secured party or is an alleged transferee of the collateral; and 3) not erred in ordering maintenance the registrations, although she had failed to examine the evidence as a threshold consideration of the merits of the case and conducted a balancing of the parties' interests. The court performed those functions and determined that the maintenance of the registrations preserved the respondent's claim to the collateral pending a final resolution of the matter.

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***Poffenroth Agri Ltd. v Brown***, 2020 SKCA 68

Caldwell Leurer Kalmakoff, June 3, 2020 (CA20068)

Civil Procedure – Appeal – Leave to Appeal – Nunc Pro Tunc
Civil Procedure – Court of Appeal Rules, Rule 46.1, Rule 71
Civil Procedure – Appeal – Interlocutory or Final Decision
Statutes – Interpretation – Court of Appeal Act, 2000, Section 8(1)

The appellant appealed from the decision of a Queen's Bench chambers judge to grant the respondent's application to have the appellant's notice of discontinuance struck (see: 2020 SKQB 31). The appellant had commenced actions against the defendant in both the Alberta and Saskatchewan Courts of Queen's Bench. In the former action, the respondent applied to strike or stay proceedings in the Alberta court. The judge stayed the action pending hearing of an application in Saskatchewan as to whether it was the most convenient forum in which to deal with the matter. The appellant then filed a notice of discontinuance of the Saskatchewan action. The respondent applied to have the notice set aside under Queen's Bench rule 1-6(1)(a) and the appellant argued that it could discontinue without leave of the court pursuant to Queen's Bench rule 4-49(1)(a). The judge held that regardless whether Queen's Bench rule 4-49(1)(a) entitled the appellant to file a notice of discontinuance in the Saskatchewan action, such entitlement was not an absolute right. In reliance on Queen's Bench rule 1-4(3), the judge determined that the court retained an inherent jurisdiction to depart from the Queen's Bench Rules in order to prevent an abuse of process. In this case, he found that the discontinuance filed by the appellant was an attempt to evade the order made by the judge in the Alberta action that was improper and an abuse of process. He struck the notice of discontinuance and directed that a hearing be held to determine the appropriate forum for the appellant's claim. When the appellant appealed, the respondent then brought this application to quash it on the basis that the appellant was not entitled to appeal the chambers decision without first obtaining leave from the court to do so, as the decision was interlocutory. The appellant argued that if the decision was interlocutory, then it requested the court to exercise its discretion to grant leave to appeal nunc pro tunc because the appeal was of sufficient merit and importance to meet the Rothmans test for granting leave. The issues were: 1) whether the chambers decision was final or interlocutory; and 2) if it was interlocutory, should the appellant be granted leave to appeal nunc pro tunc?

HELD: The respondent's application to quash the appeal was dismissed and the appellant was granted leave to appeal nunc pro tunc. The court found with respect to each issue that: 1) the chambers decision was interlocutory and leave to appeal was required. It did not bring the dispute between the parties to an end, nor did not deal with the merits of the appellant's claim, affect its ability to pursue the claim, or determine a substantive right in a final and binding way. The appellant could bring another application under rule 4-49 for leave to discontinue at a later date; and 2) the appellant had not acted unreasonably in not seeking leave and had not caused undue delay by its failure to seek leave so that granting leave nunc pro tunc was appropriate. The appeal met the Rothmans test in that it was not prima facie destined to fail and it raised questions of law that had not been addressed by the court before.

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### ***Equinav Financial Corporation v Roesslein Estate***, 2020 SKCA 69

Ottenbreit Schwann Leurer, June 9, 2020 (CA20069)

Statutes – Interpretation – Limitations Act, Section 9

The appellant, Equinav Financial Corporation, appealed the decision of a Queen's Bench judge that granted the respondent estate's executrix an order discharging the mortgage held by the appellant on the basis that the limitation period to enforce the mortgage had expired (see: 2019 SKQB 260). In 2008, the respondent's late husband had granted a mortgage to Transwest Financial Services Corporation (Transwest) to secure the repayment of $250,800, and a portion of the mortgage funds went to prepay insurance on his life. The mortgage had a three-year term and before and after its maturation, the mortgagor continued to make monthly payments until his death in June 2012. Transwest was acting as the agent of the appellant. The agency agreement between them allowed Transwest to put mortgages taken out on behalf of Equinav in its own name, including the mortgage in this case. In 2008, the appellant suspended funding of any new loans for Transwest to administer and required it to report every three months on its progress in collecting payments and collections of outstanding loans. This continued until the end of 2015. After the death of her husband, the respondent took the position that the insurance placed at the time the mortgage was taken out would cover the outstanding balance. Transwest continued to demand payment and threatened legal action. In March 2013, Transwest informed the respondent that the insurance had expired after 36 months. In December 2016, it advised the respondent that legal action would be commenced to recover the funds. However, the legal relationship between Transwest and the appellant had broken down in 2015, and the appellant commenced legal proceedings against its former agent in Alberta for its failure to fulfill the terms of the contract between them and its failure to account for payments received on investments. As a result of the action, the appellant secured information concerning the mortgage in this case and the communications between the respondent and Transwest. The registration of the mortgage was transferred into the appellant's name in 2018. In 2019, the respondent successfully applied pursuant to ss. 107(1)(d) and 109(1)(a) of The Land Titles Act, 2000 for an order vacating the registration of the mortgage. The parties agreed that the limitation period applicable to any claim under the mortgage was two years from the date the claim was discovered in accordance with ss. 5 and 6 of The Limitations Act and that Transwest was possessed of sufficient knowledge that, if it were enforcing the mortgage, its claim would be statute-barred. In deciding whether the appellant's ability to sue were also time-barred, the chambers judge concluded that it had not met the onus

of proving that only Transwest was caught by the limitation period. The limitation period began to run from the date in 2016 that Transwest advised the respondent of the balance owing on the mortgage. The appellant argued on appeal that the chambers judge had erred in impressing it with Transwest's knowledge in circumstances where Transwest was in breach of its obligations to it as agent. The respondent cross-appealed only with respect to the judge's finding that the limitation period began to run in December 2016 rather than 2013. The issues were: 1) whether the appellant was impressed with Transwest's knowledge of the Estate's default and its rights to sue on the mortgage; and 2) whether it was material to the outcome of the appeal if the appellant's cause of action arose in July 2013 or December 2016.
HELD: The appeal and cross-appeal were dismissed. The court found with respect to each issue that: 1) the appellant was bound by Transwest's knowledge pursuant to s. 9(2) of The Limitations Act. In its interpretation of s. 9(2), it held that the deeming effect it creates was intended to be irrebuttable so that the principal's knowledge of the facts set out in s. 6(1) exists once an agent has actual or constructive knowledge and a duty to communicate such matters to the principal. The appellant's argument that a deemed fact could be rebutted in circumstances where the agent was guilty of fraud was rejected. The appellant had agreed that Transwest was its agent regarding the mortgage formation and enforcement and the terms of the agency relationship required Transwest to keep it informed of facts relevant to the enforcement. Transwest's knowledge that allowed for the accrual of the cause of action under the mortgage in accordance with s. 6(1) of the Act fell within the scope of the agency relationship, and Transwest had a duty to communicate those matters to the appellant. Thus, pursuant to s. 9(2) of the Act, the appellant was impressed with Transwest's knowledge and the limitation period began to run against the appellant on the same date it would have begun had Transwest sued in its own right on the mortgage; and 2) there was no basis upon which to allow the cross-appeal. The respondent's application for an order vacating the mortgage registration was granted. The right to appeal exists from an order or judgment, not from the reasons. Since the respondent had not challenged the outcome of the chambers decision and since the question of whether the limitation period began to run in 2013 or 2016 could not affect the outcome of the appeal, it should be dismissed.

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***Crescent Point Resources Partnership v Husky Oil Operations Ltd.***, 2020 SKQB 128

Mitchell, May 5, 2020 (QB20122)

Civil Procedure – Queen's Bench Rules, Rule 4-44
Statutes – Interpretation – Queen's Bench Act, 1998, Section 42(1.1)

The plaintiff's predecessor corporation brought an action in 2014 against the defendant, Husky Oil, alleging that it was responsible for remediation costs of salt water spills that occurred during Husky's operation of a salt water disposal well site from approximately 1956 to 1982. It learned of the spills in 2012 when the Ministry of Energy and Resources notified it. The action was continued by the present plaintiff. The defendant, Husky Oil, applied pursuant to Queen's Bench rule 4-44 for an order dismissing the plaintiff's claim for want of prosecution. When the plaintiff oil company acquired its predecessor's assets in 2014, it amended the statement of claim to change the proper name of the defendant and served it on its counsel. Shortly thereafter the plaintiff's counsel advised the defendant's counsel that it did not require the defendant to serve and file its statement of defence at that time and it would provide reasonable notice to do so before noting the defendant in default. The plaintiff's counsel deposed that it hoped to negotiate settlement of the claim without engaging in litigation. In 2019, the plaintiff informed the defendant that it wanted to proceed with litigation and asked that it file its defence. The defendant then brought this application. The plaintiff argued that because the defendant had not filed its statement of defence and participated in the post-pleadings mediation process mandated by s. 42(1.1) of The Queen's Bench Act, 1998, the application was premature. In the alternative, the plaintiff submitted that because the defendant had been complicit in the lack of progress in the lawsuit, it should not be dismissed for inordinate delay.
HELD: The application was dismissed. The court held that applications under Queen's Bench rule 4-44 raised a threshold question and did not constitute a "further step in the action" for the purpose of s. 42(1.1) of the Act. It then applied the three-question test set out in International Capital Corporation (ICC) and found that: 1) the delay was inordinate. The plaintiff did not press the defendant to file its defence for 50 months, although the latter's failure to file one in a timely way was also a relevant consideration; 2) the delay was inexcusable. Although the plaintiff explained that it wanted to resolve the litigation without proceeding to trial, it had not provided evidence as to how it had tried to do so. Its explanation for the inordinate delay was inadequate; and 3) it was in the public interest for the matter to be determined because of the importance of the environmental issues involved.

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***Nadeau v Nadeau***, 2020 SKQB 136

Crooks, May 15, 2020 (QB20139)

Civil Procedure – Defence – Set-off
Civil Procedure – Limitation Period – Demand Loan
Civil Procedure – Queen's Bench Rules, Rule 3-47(2), Rule 7-1(3)
Debtor and Creditor – Demand Loan
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The father of the parties died in 1994. He left a will naming the respondent and the mother as co-executors. In the will, the mother was granted a life estate in two quarter sections of land (land). The land was to go to the applicant upon the mother's death. The mother died in September 2012, but the land was not transferred to the applicant until September 2015. The applicant claimed that the respondent breached his fiduciary duty by delaying the transfer of the land and continuing to farm the land for his profit in the interim. The applicant also argued that the respondent never accounted for his possession and use of the lands from 2012 to 2015. The applicant sought equitable compensation for the breach, exemplary or punitive damages, and an equitable accounting of the benefits derived from the land. The respondent denied owing the applicant anything and argued that if he did owe anything, the right of set-off applied. The respondent advanced the applicant demand loans totaling $120,400 between 2000 and 2002. The parties agreed that there had been no payment of principal or interest on the demand loans. The respondent indicated that he had demanded payment in August 2016. The issues were: 1) whether the respondent's counterclaim was statute-barred by reason of s. 3(1)(f)(i) of The Limitation of Actions Act and s. 31(5)(b) of The Limitations Act; 2) in the alternative, whether the respondent's counterclaim was statute-barred in any event by ss. 5 and 31(5)(a) of The Limitations Act; 3) whether the indebtedness was a proper matter to plead as a set-off to the applicant's claim in the action; and 4) the orders that the court should make under Rule 7-1(3) of The Queen's Bench Rules.
HELD: The issues were determined as follows: 1) and 2) the court reviewed the relevant provisions of the former Limitation of Actions Act (former Act) and the provisions of The Limitations Act (new Act). The common law authorities said that the cause of action to collect on a demand note accrues as soon as the note is delivered because the demand loan is fully mature and payable when it is made. The new Act changed the date upon which the limitation period begins to run for demand loans. The new Act indicates that the limitation period begins to run when the claim is discovered. Section 10 sets out that the act or omission for a demand obligation takes place on the day that default occurs. Default on a demand loan is when the debtor fails to perform the contractual duty of repayment on demand. A demand is required before the limitation period begins to run. The court determined that commencement of the limitation period for a demand loan is from the date the demand is made. The transitional provisions under s. 31 of the new Act did not apply. If the demand had been made in August 2016, the counterclaim would not be statute-barred. 3) Rule 3-47(2) sets out

the circumstances when set-off may be claimed. There are legal set-off and equitable set-off according to case law. The court determined that there was no basis for legal set-off because the applicant's claim was not in debt. The court did find grounds for equitable set-off. There was a clear connection between the claims: they both arose out of the conveyance of the land. The agreement regarding the debt referred to the encumbrance of land. The respondent claimed for debts that contemplated the transfer of land. The claims arose out of the same relationship between the parties and the land. It would be unjust for the court to allow the applicant to enforce payment without considering the counterclaim. Finally, 4) the litigation was to proceed under the pleadings filed, including the equitable set-off claim. There was no order for costs.

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### ***Construction Workers Union, CLAC Local 151 v Saskatchewan Labour Relations Board***, 2020 SKQB 137

Konkin, May 13, 2020 (QB20140)

Statutes – Interpretation – Saskatchewan Employment Act, Section 19
Administrative Law – Judicial Review
Labour Law – Judicial Review – Labour Relations Board

The applicants, Ledcor Industrial Limited and Construction Workers Union (CLAC 151), brought applications for review of the decision of the Saskatchewan Labour Board (see: 2019 CanLII 43224). They sought to quash or set aside the decision that dismissed CLAC 151's certification application. Ledcor had been awarded a contract for the construction of a steam generator and commenced work on the project with six employees, of whom five were members of CLAC 151, a trade union within the meaning of The Saskatchewan Employment Act. The project expected to use approximately 115 employees, but eventually employed 207 due to delays. Approximately 90 percent of the employees were CLAC 151 members. It applied to the board to be certified as the bargaining agent for all employees of Ledcor in Saskatchewan excepting office staff, etc., as an all-employee bargaining unit or "non-craft unit." Ledcor took no position on the appropriateness of the unit as it had a longstanding bargaining relationship with CLAC in Saskatchewan and other provinces. The board's registrar mailed the application to the Saskatchewan Building Trades Council (council) and the Progressive Contractors Association of Canada (PCA), both of which then filed applications to intervene. The board granted them intervenor status for the purpose of offering evidence and argument respecting the relevance of the build-up principle to the certification application, if the board determined that the principle was a factor to be determined. CLAC 151 raised a preliminary objection to these

notifications on the basis that the board exceeded its jurisdiction in issuing notice of the certification application as contrary to s. 19 of the Act because the parties notified must have a "direct interest." The board found that it had not exceeded its jurisdiction because s. 20(2) of The Saskatchewan Employment (Labour Relations Board) Regulations applied, rendering the notice proper. While the certification application was pending, Ledcor and CLAC 151 acted in accordance with a voluntary recognition agreement (VRA) and presented the employees with an umbrella collective agreement, which they unanimously ratified. Before the hearing of the application, both Ledcor and CLAC 151 asked the board if the build-up principle would be an issue and requested a ruling indicating its intention before the hearing, but the board did not do so. CLAC 151 had the required support for a certification vote to be held. A secret ballot of the employees of Ledcor in the proposed bargaining unit was conducted pursuant to a direction for vote by the board and the ballot box was sealed. At the beginning of the hearing in August 2018, Ledcor, with the support of CLAC 151, proposed an immediate vote be held among the then-current Ledcor employees, who numbered far more than the original six. The board denied the proposal. At the hearing, a Ledcor employee testified that the employees had "no choice" and a member of the board interrupted the questioning by counsel, attempting to establish that the employee meant they had no choice over the selection of their bargaining agent. The same member interrupted and interfered with the questioning of other witnesses. In March 2019, the board dismissed the certification application on the basis that the proposed bargaining unit was inappropriate for collective bargaining as a result of the application of the build-up principle. The issues were: 1) what was the applicable standard of review? The parties agreed that the standard was reasonableness regarding the substantive decision; 2) was the board's decision unreasonable; and 3) had the board breached the principles of natural justice and procedural fairness?

HELD: The applications were granted and the board's decision quashed. The board was ordered to open the sealed ballots and if CLAC 151 was successful, to issue a certificate naming it to represent all employees of Ledcor in Saskatchewan. The court found with respect to each issue that: 1) the standard of review was reasonableness regarding the board's decision. The standard regarding procedural fairness was correctness; 2) the board's decision was not reasonable. It applied the build-up principle, which is rarely used in the circumstances of the construction industry in Saskatchewan, without explaining why this was a rare and unusual circumstance that justified its application. The board relied extensively on the presence of the VRA as evidence of top-down organizing and proof that the employees did not have a choice over their bargaining agent, but the presence of VRA is irrelevant in determining whether the build-up principle should apply. It also relied upon the Ledcor employee's statement that they had "no choice" but, in reviewing the transcript, the court found

that the board had misinterpreted the testimony because the employee's answer referred to their wages. Ledcor had entered into the contract which specified wages before the employees were hired; and 3) the board breached standards of procedural fairness. It exceeded its jurisdiction by notifying the council, as it did not have a direct interest in the application and is a direct competitor with CLAC 151. It also failed to rule that the build-up principle would be at issue until after Ledcor and CLAC has presented their cases, and they were not given an opportunity to fully canvas the issue. The board should have adjourned the hearing to allow them to make informed submissions. The most egregious breach of procedural fairness arose from the conduct of the board member who interrupted the examination and cross-examination of witnesses in such a way as to raise a reasonable apprehension of bias. He attempted through his questioning to elicit answers to establish that the employees had not voluntarily entered into a collective agreement and had no choice. He was acting as a proponent of the build-up principle.

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***R v Bear***, 2020 SKQB 140

Dovell, May 13, 2020 (QB20141)

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Criminal Law – Sentencing – Conditional Sentence
Criminal Law – Sentencing – Mandatory Minimum Sentence

The Crown appealed the respondent's sentence. He was convicted after trial of sexually assaulting D.S., contrary to s. 271 of the Criminal Code. The respondent was sentenced to an 18-month conditional sentence order followed by one year of probation. The trial judge found that the six-month mandatory minimum in s. 271(b) of the Criminal Code violated s. 12 of the Canadian Charter of Rights and Freedoms because: the six-month mandatory minimum was cruel and unusual treatment or punishment; the Crown proceeded summarily; and the victim was under 16. The respondent was 35 at the time of the offence. The complainant turned 14 before the first incident. There was no suggestion of mistake of age, and because the complainant had been 14, he could not have consented. The trial judge found the complainant to be credible in his testimony in chief. The accused was found to have stopped the assault when the complainant indicated a lack of consent. The Crown listed 10 grounds of appeal in its notice of appeal.
HELD: The first ground of appeal considered was the Charter decision of the trial judge. He determined that s. 271(b) of the

Criminal Code violated s. 12 of the Charter. The court determined that the standard of review was "correctness". The court found that the trial judge erred in law in concluding that the s. 271(b) mandatory minimum of six months violated s. 12 of the Charter. The error became evidence when the mandatory minimum framework test was properly applied. The court found that this was not one the "clearest of cases" where punishments legislated into existence by Parliament should be found unconstitutional. The trial judge was required to apply the mandatory analytical framework with regard to a s. 12 Charter challenge. The trial judge had to first determine what a proportionate sentence would be considering the objectives and principles of sentencing. The first error in law occurred when the trial judge determined that the appropriate sentence was an 18-month conditional sentence followed by one year of probation. The court found that the appropriate proportionate sentence would have been five months in jail at the very lowest end. Crimes against children are particularly grave. The Supreme Court of Canada has stated that sentences for crimes against children must increase and has directed courts to impose sentences proportional to the gravity of sexual offences against children and the degree of responsibility of the offender. Offences where the offender abused a position of power, as here, should result in even lengthier sentences. LGBT2Q+ children like the complainant are especially vulnerable because of the continued marginalization they experience. Once the trial judge determined what he thought was an appropriate sentence, he should then have decided whether the six-month mandatory minimum would result in a grossly disproportionate sentence for the respondent. The trial judge's second error was concluding that the mandatory minimum of a six-month jail sentence was "grossly disproportionate" to the proportionate sentence he determined. When the starting point of five months' incarceration is compared to the mandatory minimum of six months, it is not grossly disproportionate, applying the proper framework and standard of correctness. The court concluded that the six-month mandatory minimum was not only not disproportionate, but entirely appropriate. The court continued to conduct a reasonable hypothetical inquiry that was not conducted by the trial judge. The court found that the trial judge erred by not considering s. 742.1(b) of the Criminal Code, whereby a conditional sentence is not available if the offence is punishable by a minimum term of imprisonment. The sentence appeal was allowed. New submissions on sentencing would be heard from the parties at a later date.

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***Saskatchewan Mutual Insurance Company v United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied***

***Industrial and Service Workers International Union, Local 8933***, 2020 SKQB 149

Danyliuk, May 20, 2020 (QB20142)

Administrative Law – Judicial Review – Labour Relations Board
Administrative Law – Judicial Review – Standard of Review – Reasonableness – Appeal
Employment – Labour Relations – Collective Bargaining Agreement
Labour Law – Collective Agreement – Classification of Employees
Labour Law – Collective Agreement – Duty to Negotiate
Labour Law – Judicial Review – Labour Relations Board

The applicant (employer) applied for judicial review of the decision made by the Saskatchewan Labour Relations Board (board) in favour of the respondent union (union). The employer argued that the standard of review was reasonableness and that the decision was unreasonable. The application to the board arose when the union said that the employer improperly declared a new position for the IT Department as being out of scope. The union argued that the position was not managerial or otherwise out of scope of the bargaining unit and filed an unfair labour practice application with the board. At the time of posting the job advertisement, the parties were in contract negotiations, with the union potentially going to strike. The union said the employer created the position to ensure IT services if there were a strike. The board found that the employer had committed an unfair labour practice. The new IT supervisor position was within the scope of the bargaining unit and would remain so unless the parties negotiated a different result. The issues were: 1) the appropriate standard of review; 2) whether the board erred in any of the following ways: a) by concluding the IT supervisor position was not already excluded under the collective bargaining agreement's scope clause; b) by determining that the union was not estopped from disputing the scope of that position; c) by refusing to consider the employer's alternative arguments that the IT supervisor position was excluded due to managerial or confidential policy; d) by refusing to deem the position out of scope as it was a "supervisory employee" position pursuant to The Saskatchewan Employment Act; or e) by ordering a remedy that excluded its jurisdiction. HELD: The application was dismissed. The issues were examined as follows: 1) the parties agreed, as did the court, that the appropriate standard of review was reasonableness; 2) a) the Employer argued that the bargaining unit was not an "all employee" unit and that only 45 to 50 of the 70 to 75 were unionized. The board found that the employer had not followed the "Battleford principle" in declaring the new IT position out of scope. The employer argued that the board was unreasonable in applying the Battlefords principle because some out of scope exclusions were in both the original certification order and the collective agreement. The court did not find any support for the proposition that the number of existing exclusions from scope somehow determined the nature of the bargaining unit. The court examined the board's

reasoning process in determining why the Battlefords principle applied and why it was an "all employee" bargaining unit. The court did not find fault with the board's reasoning. The employer also argued that the Battlefords principle was misapplied. It argued that it was under no onus to bargain on the exclusion of the new IT supervisor position or to obtain a board order. The board found that there should have been bargaining regarding the new position. The employer's argument that the union had always agreed to out of scope positions after negotiation in the past was not successful. The board's ruling was found to be reasonable; b) the recording secretary of the union was interested in applying for the new position. He assumed that the position was out of scope, as advertised. The recording secretary's concern was whether he could fairly apply for that new position while there was ongoing bargaining. The board determined as a fact that the recording secretary did not speak for the union in a binding sense. The court concluded that the board assessed the estoppel argument methodically and reasonably. The elements of estoppel were not proven; c) the employer argued that if the new position were not excluded for its other arguments, then it was excluded due to its nature as a managerial or confidential capacity employee. The employer relied on ss. 6-1(1)(h)(i)(A) and (B) of The Saskatchewan Employment Act, wherein managers and employees in a confidential capacity are excluded from the statutory definition of "employee." Contrary to the employer's argument, the court found that the board did deal with this argument. The board concluded that it was a prerequisite to comply with the Battlefords principle and bargain about the scope of the position. Failing successful bargaining, an application to amend was required. The board gave thoughtful reasons as to why it could not engage in the statutory interpretation exercise the employer desired; d) the employer argued that the board failed to consider whether the position should be deemed out of scope because it was a "supervisory employee". The board did not ignore the argument, rather it referred to precedent and held it was not appropriate to make such a ruling. The court concluded that there was nothing unreasonable about this aspect of the board's decision; e) the board sent the remedy back to the bargaining unit rather than making its own determination. The court found that remedy to be reasonable. The board determined that the employer had a duty to bargain with the union. The employer's application for judicial review was dismissed and the union was awarded costs.

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***Saskatchewan Municipal Board v Cottenden***, 2020 SKQB 150

McCreary, May 21, 2020 (QB20143)

Civil Procedure – Application to Strike Statement of Claim
Employment Law – Contract of Employment
Employment Law – Constructive Dismissal
Municipal Law – Municipal Board – Employment Relationship

The Saskatchewan Municipal Board (board) applied to strike out any claims against it in the plaintiff's statement of claim. The plaintiff claimed that she was constructively dismissed by the board from her position as full-time member of the board. The board argued that it was not a suable entity and that there was no contractual relationship between it and the plaintiff. The plaintiff had been appointed to the board by the Lieutenant Governor. HELD: The court concluded that it was not plain and obvious that the claim disclosed no reasonable cause of action against the board. The court agreed with the board that it was an administrative tribunal that could not be sued in tort to challenge its decisions. It was not plain and obvious that the board could not be sued to enforce an employment agreement to which it is a party. The Municipal Board Act gives the board authority to hire and retain employees in section 11. The Act provides the board with the authority to enter into employment relationships. The plaintiff was appointed by the Lieutenant Governor to be a member of the board; she was not an employee. The plaintiff pled that her relationship with the board had sufficient characteristics of an employment relationship to establish that the board was a party to her contract of employment. The Supreme Court of Canada has held that government appointment to a public board is a form of employment. It was not plain and obvious that the law of contract as it relates to employment law could not apply to this situation. The application was dismissed with costs in the cause.

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***Mus v Kozakowski***, 2020 SKQB 152

Tochor, May 27, 2020 (QB20144)

Torts – Civil Assault – Damages

The plaintiff filed a statement of claim in 2008 that sought damages from the defendant for the injuries that he had suffered as a result of being assaulted by the defendant in 2006 when the plaintiff was 17 years of age. The defendant was convicted of aggravated assault and served a sentence of 30 months' imprisonment. He had been served with the statement of claim but failed to file a defence, and default judgment was entered against him. Various pre-trial and management conferences were held in subsequent years and of them, the defendant only attended two conferences. The plaintiff applied for an assessment of damages and the defendant was aware of the trial date but advised the office of the local registrar that he

would not be present. Therefore, liability was determined and the only issue to be adjudicated was the quantum of damages. Evidence was presented regarding the brain injuries that the plaintiff sustained and the medical interventions and treatments that followed. The plaintiff eventually recovered his ability to walk but his cognitive impairments were permanent. He had lived with his mother since 2007 so that she could provide care to him. A neuropsychological assessment conducted by an expert explained that because he was child-like, he was socially vulnerable and his mother's presence protected him. He was likely to develop depression and other disorders. Over time, his mobility had declined, his speech had worsened and his condition would likely continue to deteriorate. The plaintiff claimed damages under numerous heads that included: 1) general or non-pecuniary loss of $380,000 based upon the upper limit of $100,000 established by Andrews and adjusted for inflation since 1978; 2) loss of interdependency/marriage benefits of $586,350 relying upon Biletski for the proposition that his significant personal injury would reduce his chances of entering into an economically-advantaged personal relationship; 3) past cost of care, composed of the cost of his gym memberships ($36,000) and travel costs to attend them ($27,360), damages of $20,000 to reimburse his mother for the loss of income and benefits she incurred while caring for him and an additional amount for the period following when she missed work to take him to appointments; 4) future cost of care including gym membership and travel expenses at $267,300, the future cost of physiotherapy at $190,500 and the future cost of structured supervision, after his mother was no longer able to provide it, in the amount of $80,700; 5) loss of housekeeping capacity at $200,000; 6) past loss of income from 2007, when the plaintiff completed high school, to the date of trial based upon the evidence of a millwright's earnings for that period in the amount of $1,350,800; and 7) loss of income based upon two scenarios: $5,055,375 employment earnings of an ironworker or $4,697,120 based upon the earnings and pension benefits of a millwright; and 8) the subrogated amount claimed by the Minister pursuant to s. 19 of The Health Administration Act of $185,524.

HELD: The court awarded damages to the plaintiff in the global amount of $6,719,039. Pre-judgment interest was to be calculated from 2006 to the date of the trial for general, past cost of care, past loss of income and future loss of income heads of damage. It reviewed each of the heads of damage and found with respect to them that: 1) the plaintiff was entitled to an award of general damages of 90 percent of the upper limit, or $342,000; 2) the claim was denied because the plaintiff had not provided the evidence required for the claim for loss of interdependency/marriage benefits established by Belyea; 3) the claim for memberships and travel should be allowed only in the amount of $18,000, but a total of $30,000 was awarded to reimburse his mother; 4) the costs for the memberships and travel were reduced by 50 per cent to $18,000 by the court as it had done respecting the claim under past cost of care.

The claim for future physiotherapy costs was allowed, as was the cost of supervision; 5) the amount claimed was allowed; 6) the claim was allowed in the amount of $1,350,800 less $275,790 as the value of the income earned by the plaintiff notwithstanding his injury; 7) the appropriate scenario was the future earnings of a millwright model. The court reduced the amount by five per cent to $4,462,264 after considering the with-contingencies reduction for the future due to the accelerating deterioration of the plaintiff's condition as he aged; and 8) the abrogated amount claimed by the Minister was allowed.

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***Wessing v Kunitz***, 2020 SKQB 153

Tochor, May 27, 2020 (QB20145)

Statutes – Interpretation – Stray Animals Act, Section 34

The third-party defendants, the Rural Municipality of Kellross (RM), applied for an order dismissing the third-party claim brought by the defendants. Its application pursuant to Queen's Bench rule 7-2 was made on the basis of the operation of the immunity clause found in s. 34 of The Stray Animals Act or, alternatively, on the basis that because the defendants failed to provide answers to their undertakings made at questioning, their claim should be dismissed pursuant to Queen's Bench rule 5-36. The plaintiffs commenced their action against the defendants for damages caused to their crops by the defendants' cattle. The defendants denied that their cattle had caused the damage and alleged that the plaintiffs restrained 49 of their cattle, but failed to round them up in a timely fashion and then failed to notify them of the restraint. They made their third-party claim against the RM, alleging that it had not informed them of any deadlines for the payment of fines or poundage fees for the lodging of the restrained cattle, and that it unlawfully and negligently caused the cattle to be sold without notice and at below market prices, thereby causing them economic loss. The RM pled that s. 34 of the Act exempted any person acting in good faith under the authority of the Act from liability. The RM's administrator deposed that that she impounded the 49 cattle with the RM's poundkeeper after receiving the plaintiffs' complaint. The defendants were notified. She met with them in July 2016 and advised them to contact the poundkeeper to find out how much they needed to pay to release the cattle. The defendants did not arrange for the release of the cattle within 14 days in keeping with Act and she then prepared a notice of sale of impounded animals and forwarded it to the defendants and the poundkeeper. One of the defendants swore in her affidavit that they had met on July 7 with the RM administrator, who told them to repair their fences and pay their fines to obtain the return of their cattle. On July 8, they received the notification of impounded animals by mail from the

administrator. On July 19, they returned to the RM office to pay the fees and the administrator advised them to consult with the poundkeeper to find out how much they had to pay. On August 9, they were informed that the cattle had been sold. She stated that they had not received the notice to sell the cattle prior to the sale. HELD: The application was granted and the third-party claim was dismissed. The court found that there was no genuine issue requiring trial. The evidence provided by the defendant's affidavit established that the defendants knew or ought to have known on July 7 that their cattle could be sold after 14 days' impoundment and it was not a requirement under s. 22 of the Act for them to be notified of the sale. Regarding the immunity clause, there was no evidence of a lack of good faith on the part of the RM and therefore the operation of the clause prevented a successful action against it. The RM's request for costs of $4,500 was reduced to $2,000 by the court in the exercise of its discretion under Queen's Bench rule 11-1(4).

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### ***Director under The Seizure of Criminal Property Act, 2009 v Nauzinor***, 2020 SKQB 154

Mitchell, May 28, 2020 (QB20146)

Criminal Law – Drug Offences – Forfeiture
Statutes – Interpretation – Seizure of Criminal Property Act, 2009, Section 7, Section 10.01

The Director under The Seizure of Criminal Property Act, 2009 applied pursuant to ss. 3, 10 and 10.7 of the Act for an order directing that $19,520 seized from the defendant and held by the Saskatoon Police Service (SPS) be forfeited to the Crown. The property was seized when officers of the SPS stopped a vehicle for the purpose of checking for its registration and the driver's licence. The police knew the driver and that he was subject to various court-imposed conditions, one of which was submit to a search on demand. They discovered that the driver had almost $4,000 in cash on his person. Acting on the belief that the passenger in the vehicle, the defendant, was someone with whom the driver was not supposed to have contact, the officers arrested both men. They searched the defendant and found bundles of bills totaling $19,520. Each bundle had been sorted by denomination and secured by elastic bands. The defendant advised that he had received the money as his wages but subsequently said that the cash belonged to his girlfriend who worked as an escort. Later when he was cross-examined on an affidavit he had sworn, he stated that the she had given him $9,000 for the purposes of paying for her plastic surgery and the remaining amount was the proceeds from the sale of two vehicles. Two affiants, the defendant's girlfriend and a business

associate, filed affidavits that supported this version. The Director swore in her affidavit that the defendant gave an undertaking to provide the particulars regarding the defendant's ownership and sale of the vehicles, but he had not done so. SGI had no records relating to the sale that confirmed the defendant's explanation. The Deputy Director, a former RCMP officer who had conducted extensive drug investigations, swore in his affidavit that the multiple contradictory statements given by the defendant, the amount of cash he carried and the fact that it was rolled and secured by elastics were all consistent with the practice of drug traffickers. HELD: The application was granted and an order for forfeiture issued. The court found that it was satisfied that the money was the proceeds of unlawful activity. It did not believe the evidence provided by the defendant, his girlfriend and his business associate. The defendant had failed to comply with the undertaking he made pursuant to s. 10.01(e) of the Act which supported the Director's submission that the defendant had waived his asserted right to the property. The court also rejected the defendant's submission that it should invoke the interests of justice exception to civil forfeiture set out in s. 7(1) of the Act. He contended that because the police had engaged in racial profiling when he was arrested by mistaking him for another individual who was also black, to authorize the forfeiture of the property would condone illegal police conduct and violate his Charter rights. The court found that racial profiling had not occurred because the police stopped the vehicle only to check the driver's licence.

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### ***R v Douglas***, 2020 SKQB 155

Scherman, May 28, 2020 (QB20148)

Criminal Law – Motor Vehicle Offences – Dangerous Driving – Sentencing
Criminal Law – Assault – Assault Peace Officer with Weapon

The accused was charged with six offences. They were: 1) committing an assault on a peace officer using a weapon, his vehicle, contrary to s. 270.01(1)(a) of the Criminal Code; 2) committing the same offence with respect to another officer; 3) committing the same offence with respect to another officer; 4) operating a vehicle in a manner dangerous to the public contrary to s. 249(1)(a) of the Code; 5) failing to stop after being involved in vehicular accidents, with intent to escape civil or criminal liability, contrary to s. 252(1) of the Code; and 6) operating a vehicle while being pursued by a peace officer operating a vehicle, failing to stop and thereby causing bodily harm to the officer contrary to s. 249.1(3) of the Code. The evidence regarding the case was presented in an earlier voir dire with the agreement that it would apply to this trial (see: 2020 SKQB 57).

During his testimony in the voir dire, the accused admitted that he was guilty of the crimes charged in counts 4 and 5 but disputed that he had at any point used the vehicle he was driving as a weapon or committed assaults on various officers, or that his operation of the vehicle while being pursued caused bodily harm to the officer as charged. The defence argued that the Crown had not proven beyond a reasonable doubt the causation element of the sixth charge, that the officer's injuries resulted from the collision between the accused's and the officer's vehicles, in that the injuries could have been the result of the officer's head hitting the roof of his vehicle earlier during the pursuit and, further, there was no medical evidence establishing the nature and extent of the injuries. The Crown submitted that s. 249.1(3) of the Code does not require proof of the injury and that the causation element is proven if the bodily harm occurred at any time during the pursuit of the accused. Under the provision, bodily harm is required, not injury.
HELD: The accused was acquitted of counts 1 to 3 on the indictment and found guilty of the remainder of the charges. The court found that with respect to the first three counts, the accused had provided exculpatory evidence that he had not intended to use his vehicle as a weapon and the video record provided evidence that was consistent with efforts to evade the police while travelling at excessive speeds in a vehicle that was damaged and had control problems. Regarding the sixth count, it found that the officer suffered bodily harm on the basis of his evidence and it was unnecessary to prove it with medical evidence. The harm suffered resulted from the collision of the vehicles while the accused was engaged in dangerous driving and attempting to evade the police. The harm would not have occurred but for the failure of the accused to stop as soon as was reasonable.

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### ***S.P.K. v V.M.S.***, 2020 SKQB 157

Richmond, May 29, 2020 (QB20147)

Family Law – Custody and Access – Mobility Rights

The parties separated in 2018 after four years of marriage and two children, a daughter currently aged 12 and a six-year-old son. The petitioner wife petitioned in 2019 for divorce, custody, and child support and applied concurrently for orders granting her sole custody of the children, child support and permission to relocate with the children from the family's home in Swift Current to Saskatoon. She also sought costs. A chambers judge refused to permit the petitioner to move on an interim basis and ordered that the parties proceed to pre-trial. She also ordered joint custody on an interim basis with the children having their primary residence with the petitioner and the respondent having parenting time on

alternating weekends. The respondent was ordered to pay child support of $582 per month based upon income of $41,961. The parties were unable to resolve their differences at pre-trial. At the trial, the petitioner maintained her request to be permitted to relocate with the children to Saskatoon. Her new partner resided there and had a well-paid position that he would not be able to duplicate if he moved to Swift Current. The petitioner was currently earning $14 per hour as an accounting technician. She believed that she would have better employment prospects in Saskatoon. The children and her new partner were fond of each other and they accepted him. The respondent was currently unemployed. He had started his own business but it went bankrupt. He had not filed income tax returns for some time and feared that he owed a large tax debt. He expected to be able to return to work in the near future. The respondent lived with his new partner and was supported by her income as well as assistance from his mother. The children and his new partner were close. Both the extended families of the petitioner and the respondent lived in Swift Current and their mothers helped with childcare and financial support. The issues were whether the petitioner should be permitted to move to Saskatoon.
HELD: The court granted a divorce and ordered that the parties should have joint custody and that the petitioner should be allowed to move to Saskatoon. The respondent would have parenting time every other weekend and during holidays. He was ordered to pay $582 per month in child support. The court found that it would be in the best interests of the children to allow them to move with the petitioner to Saskatoon after considering all the factors set out in Chepil. The petitioner had been the children's primary caregiver throughout their lives and to change that would not serve them well. Her reasons for moving were not unreasonable and the children would benefit if she had the opportunity to pursue personal happiness and financial stability. As the respondent was unemployed and had been able to pay $582 per month, the court imputed income to him of $41,961 which would result in the continuation of the same amount of monthly payments. The parties would share s. 7 expenses on an equal basis.

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### ***Saskatchewan v Yashcheshen***, 2020 SKQB 160

Krogan, June 3, 2020 (QB20150)

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

The defendant, Teva Canada, a drug manufacturing company, applied for orders striking the plaintiff's claim in its entirety pursuant to Queen's Bench rule 7-9; striking out two affidavits filed by the plaintiff in support of her claim pursuant to Queen's Bench

rules 13-30 and 13-33; and declaring the plaintiff a vexatious litigant pursuant to Queen's Bench rule 11-28. The Government of Saskatchewan applied for an order pursuant to s. 6 of The Fee Waiver Act to cancel any fee waiver certificate held by the plaintiff. The plaintiff applied to have Queen's Bench rule 11-28 declared unconstitutional. The plaintiff's claim against the defendant indicated that she was prescribed two "off-label" medications by physicians who were treating her for Crohn's disease, and alleged that her use of these drugs may have resulted in the plaintiff developing chronic pancreatitis and other ailments. She alleged that the defendant owed her a duty of care to ensure that the drugs were fit for their intended purpose, to conduct proper testing and to warn her that they carried risks in treating people with Crohn's disease, although her pleadings acknowledged that they had not been approved for the purpose for which she took them.
HELD: The defendant's applications and that of the Government of Saskatchewan were granted. The plaintiff's constitutional challenge was dismissed. The court struck the self-represented plaintiff's action in its entirety as it had no reasonable chance of success. She had made various allegations regarding negligence regarding product liability but failed to distinguish between the types. She had failed to plead material facts as required by Queen's Bench rule 13-9(1)(c) and failed to plead sufficiently regarding her claim for damages. The affidavits sworn by deponents on behalf of the plaintiff were struck because they were not confined to facts as required by Queen's Bench rule 13-30. The affidavit provided by the doctor did not comply with the requirements of Queen's Bench rule 5-37 in that it offered opinion evidence without identifying the doctor's particular area of expertise and did not comport with rule 5-39 regarding the contents of an expert's report. The court declared the plaintiff to be a vexatious litigant under Queen's Bench rule 11-28 and she would be required to seek leave of the court to initiate any future proceedings. She had commenced 23 actions or applications throughout the province between November 2011 and December 2019. The actions have been commenced against individuals, organizations, institutions and companies. Two actions have been wholly discontinued. Five actions have been struck or dismissed. Four decisions from this Court had been appealed to the Court of Appeal. The plaintiff had habitually, persistently and without reasonable grounds instituted vexatious proceedings. Queen's Bench rule 11-28 did not violate s. 15 of the Charter. The plaintiff's waiver certificates were cancelled under s. 6 of The Fee Waiver Act and s. 12(5) of The Fee Waiver Regulations because her actions had been frivolous and any future fee waivers would be allowed only with the permission of a Queen's Bench judge.

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***GHC Swift Current Realty Inc. v BACZ Engineering (2004) Ltd.***, 2020 SKQB 161

McCreary, June 4, 2020 (QB20151)

Civil Procedure – Queen's Bench Rules, Rule 7-9
Statutes – Interpretation – Limitations Act, Section 5

The defendants, Lesmeister Construction (LCL) and Starks Plumbing and Heating (Starks), each brought applications to strike the plaintiff's statement of claim pursuant to Queen's Bench rule 7-9 on the ground that the action was statute-barred under s. 5 of The Limitations Act. The third defendant, BACZ Engineering (BACZ) did not bring its own application*, but at the hearing of the other defendants' applications, it also argued that the claim was statute-barred. The plaintiff commenced an action against the three defendants in January 2018. The defendant, LCL, had entered into a construction management contract with the plaintiff and LCL arranged agreements with the other defendants to provide heating and plumbing. The building was completed in 2014. In the spring of 2015, the plaintiff complained about excessive noise coming from the heat pump and engaged the services of an engineering firm to investigate the problem. It discovered numerous deficiencies. The plaintiff advised LCL of 28 alleged mechanical deficiencies in July 2015. LCL and the other defendants denied liability, and in November 2015, the plaintiff sent a demand letter to LCL asking that the alleged deficiencies be remedied at LCL's expense and indicating that a formal claim would be issued against it if a compromise were not reached. The defendants continued to work with the plaintiff to address the alleged deficiencies until June 2017 but then refused to offer further assistance. The parties never entered into a tolling agreement or agreement to suspend or postpone the applicable limitation period.
HELD: The application was granted and the plaintiff's claim was struck in its entirety. The court found that Queen's Bench rule 7-9(1) may be used to strike a statement of claim pursuant to Queen's Bench rule 7-9(2)(b) because it was issued after the limitation period expired. On the evidence, it noted that the plaintiff discovered the claim in July 2015 and had learned by December 2015 that the defendants denied liability. The court rejected the plaintiff's argument that the limitation period in a construction dispute did not run until it discovered that the defendants would not remedy the deficiencies at their cost. The fact that the parties engaged in negotiations respecting the deficiencies was irrelevant to the discovery of loss in this case.

*In the decision rendered by fiat in this matter, the court mistakenly stated that BACZ Engineering had not brought an application to strike the plaintiff's statement of claim, when it had in fact done so. HELD: The court's conclusion remained unchanged: the plaintiff's claim was struck as being statute-barred. All three defendants were

awarded costs. (See addendum also dated June 4, 2020: 2020 SKQB 163)

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***Heffernan v Prince Albert Board of Police Commissioners***, 2020 SKPC 22

Stang, May 22, 2020 (PC20017)

Employment Law – Collective Agreement – Interpretation – Indemnification Clause
Small Claims – Costs

The plaintiff was a former Special Constable with the Bylaw Unit of the respondent Police Service (PS). In June 2016, a public complaint was made against the plaintiff, eventually resulting in three formal discipline charges pursuant to The Police Act, 1990 (Police Act). The plaintiff was represented by counsel at the formal hearing before a hearing officer. He was charged $10,411.73 for the services. The hearing officer found the plaintiff guilty of the third discipline charge. The plaintiff argued that he was entitled to indemnification for the legal costs in relation to the two charges for which he was found not guilty. He said that those charges were the more serious charges and that he was found guilty of the less serious charge. The PS argued that the plaintiff was not entitled to indemnification because clause 12.10(a)(ii)(d) of the collective agreement only provided for indemnification for defending charges when "the member is found not guilty, or where the matter is dropped, stayed, or dismissed." Because all three charges were brought about due to the same circumstances and there was a guilty finding on the third charge, the PS said that situation did not fall within the indemnification clause. The PS also said that the conduct resulting in the charge was willful or wanton disregard or dereliction of duty, which did not lead to indemnification. Further, the PS argued that the plaintiff's claim was premature because all avenues of appeal had not yet been exhausted, as they said was required in clause 12.10(a)(vi). The last argument of the PS was that the plaintiff was not entitled to the indemnification because the plaintiff had not yet incurred the legal expenses since he had not paid anything to the lawyer.
HELD: The court was guided by the modern principle of interpretation to interpret the collective agreement. There was no relevant jurisprudence. The court considered the general purpose of indemnification clauses. Clause 12.10(a)(i) set out that employees would be indemnified for defending themselves against alleged wrongful acts. The court had to determine whether there needed to be a finding of not guilty on all of the charges for them to be included in the definition of "alleged wrongful act" so that there would be indemnification. The indemnification provision was

within the employee benefits section of the collective agreement. There can be limitations to any benefit. If there is ambiguity, it should be resolved in favour of the general intention to provide the employee with a benefit. The court determined that the indemnity provisions ought to be interpreted and applied separately to each charge under The Police Act that resulted from each separate wrongful act committed, or alleged to have been committed, by the plaintiff or other employee. The court found that more than one charge could result from a single act because of the use of the plural "charges". The third discipline charge pertained to a different alleged wrongful act than the first two discipline charges. The facts of the third charge were completely different from those of the first two. The court found that the plaintiff was entitled to the benefit of indemnification for reasonable costs, including legal costs, for defending himself against the first two discipline charges. The PS's argument that all appeals must be concluded relating to the third charge had to fail: the indemnification provision can be relied upon for the first two charges separately and there was no appeal from the decision relating to those charges. The PS was not successful in arguing that the plaintiff was not entitled to any indemnification because the conduct underlying the third discipline charge constituted wanton or willful dereliction of duty. The evidence at trial was insufficient to establish that the plaintiff's conduct constituted willful or wanton disregard or dereliction of duty. The court found that $10,411.73 was a reasonable amount for three reasons. The plaintiff's claim for interest was dismissed. The court awarded the plaintiff the $100 he spent to file his claim. Further, the court awarded final costs to the plaintiff in the amount of $500, which was slightly less than 5% of the primary amount awarded.

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