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Pasiechnik v R, 2020 SKCA 31

Caldwell Schwann Leurer, March 24, 2020 (CA20031)

Criminal Law – Sentencing – Appeal
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Criminal Law – Sentencing – Joint Submission

The appellant pled guilty to four of seven charges that arose on the same day. The Crown stayed the remaining three charges. The appellant forced his way into the complainant's home wearing a black face mask and latex gloves and holding a handgun. The handgun was pointed at the complainant's head and at her 11-year-old son's head. The child returned to his bedroom when the handgun was pointed at him. The appellant required the complainant to perform sexual acts in the kitchen and in her bedroom. The appellant was not charged until a year after the offences when police were able to match his DNA to the DNA found on the complainant. During sentencing submissions, the Crown described the appellant's moral blameworthiness and gravity of the offence as extremely high. There were many aggravating factors. The Crown recommended a global sentence of ten years. The Crown recommended that eight of the ten years be allocated to the break and enter and commit sexual assault. The sentencing judge concluded the ten-year sentence recommended as a joint submission by the parties was a fit sentence in the circumstances. The allocation was as follows: break and enter a dwelling house and commit sexual assault – 8 years; pointing a firearm at the child – one year consecutive; disguise with intent to commit an indictable offence – one year concurrent; and using a firearm while committing an

indictable offence – one year consecutive. The issue was whether the sentencing judge erred in law when he accepted the joint submission on sentence. The appellant argued that the appeal court should intervene because he was misled by trial counsel with respect to the particulars of parole eligibility and because the ten-year sentence was unfit.
HELD: The appellant said that his legal counsel told him that since he had no prior criminal record, one-third of his prison sentence would be automatically deducted. He also said that he was told he could apply for day parole after serving one-sixth of his sentence. The appellant will have to wait for almost three years before he can even apply for day parole. When the Crown indicated that they would take steps to reinstate the stayed charges and proceed to a new sentencing if the appeal were allowed, the appellant indicated that he knew that the sentence was a joint submission, and did not assert any error on the part of the sentencing judge in accepting it. The appeal court was then left with a request to alter the portion of the global sentence that pertained to the s. 348(1)(b) offence. The argument did not succeed because: a) the appellant did not apply to adduce fresh evidence regarding what his counsel told him about parole eligibility; and b) sentencing judges should not lightly reject a joint submission. Joint submissions should only be departed from if their acceptance would bring the administration of justice into disrepute or it would be contrary to the public interest. The sentence would not bring the administration of justice into disrepute, nor was it contrary to the public interest. The sentence that the appellant received for the break and enter offence was within the range and it took into account the appellant's personal circumstances. The sentence was not demonstrably unfit. The sentencing judge did not err in accepting the joint submission. Leave to appeal was granted, but the appeal was dismissed.

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Perrault v R, 2020 SKCA 35

Barrington-Foote, March 25, 2020 (CA20035)

Criminal Law - Appeal - Conviction
Appeal - Leave to Appeal - Extension of Time
Criminal Law – Murder – Second Degree Murder
Criminal Law - Jury Selection - Peremptory Challenge

The proposed appellant (appellant) was convicted by a judge and jury of second-degree murder in October 2019. He was sentenced to life in prison, with no eligibility for parole for 14 years. In February 2020, he applied for an order extending the time to file a notice of appeal of his conviction. The time had expired 30 days after his conviction. Prior to jury selection, the appellant argued that he had the right to peremptorily challenge prospective jurors even though

peremptory challenges had been abolished as of September 2019. The trial judge rejected the argument, finding that the abolition of peremptory challenges applied retrospectively. In January 2020, the appellant became aware of the Chouhan decision from the Ontario Court of Appeal. The Ontario Court of Appeal held that accused had the right to peremptory challenges if his or her right to a trial by judge and jury vested prior to September 19, 2019. The ground of appeal in the appellant's draft notice of appeal was the error of the trial judge in denying peremptory challenges. The appellant had admitted to manslaughter at trial, arguing he was provoked by the victim. He argued that if he had more meaningful participation in jury selection, he might have been able to help select a more dispassionate jury that could have found him guilty of manslaughter.

HELD: The application was dismissed. The appellant said that he should not suffer the consequences of his counsel's failure to notify him of the ground of appeal. The appeal court did not agree. The appellant's lawyer knew the peremptory challenge issue and argued it at trial. There was a decision five days before the appellant's conviction from the Queen's Bench that held that the peremptory challenge amendments were not retrospective. There was no evidence that the appellant did not know he could have appealed nor was there evidence that he lacked the capacity to understand what had happened when he applied to the trial judge. The fact that the appellant did not form the intention to appeal during the appeal period weighed against his application being granted. The only explanation offered by the appellant was that his counsel failed to provide different advice as to an appeal on the ground until he "woke up". The explanation did not excuse the failure to form the intention to appeal in time. It also did not adequately explain the length of the delay. The Crown indicated that there could be prejudice because there could be disruption for the Crown witnesses, the victim's family, and the community. The appeal court did not find the potential emotional impacts extremely important in contemplating the prejudice. The impact considered needs to be on the parties, not on others. As conceded by the Crown, there was merit in the argument that the peremptory challenge amendments were not retrospective. The Crown argued that did not end the issue of merit because even if the appellant were successful on the appeal, it might not change matters. According to the Crown, the appellant was convicted after a fair trial before impartial jurors. The Crown said it had a strong case. The factors weighing in favour of the application were that the appeal was arguable, the Crown's case remained intact, and if peremptory challenges should have been allowed the appellant could demonstrate prejudice. The factors weighing against the application were that the appellant did not form the intention to appeal during the appeal period and did not satisfactorily explain the delay. There was nothing to suggest the jurors were not impartial. Also, the difference in sentences for manslaughter and second-degree murder is not as radical as the appellant's cases suggested. The appeal court concluded that the

importance of finality in the justice system outweighed the importance of the appellant having been denied a jury selection method. The interests of justice did not favour extending the time for the appeal.

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Wyatt v Reindl, 2020 SKCA 36

Richards Schwann Tholl, March 26, 2020 (CA20036)

Family Law – Access and Custody – Interim – Appeal
Family Law – Custody and Access – Best Interests of the Child
Family Law – Custody and Access – Shared Parenting

The parties separated before the birth of their daughter. In 2017, an order was made regarding parenting. The order provided a mechanism to return the matter to the court for a review or to alter parenting time. When the appellant unilaterally reduced the respondent's parenting time in 2019, the respondent applied for an order to set a specified parenting schedule. The chambers judge granted an interim shared parenting order corresponding with the respondent's work schedule. The child would be with the appellant for 11 days and then nine days with the respondent. The child could spend an evening with the appellant at some point during the nine days. The appellant appealed, arguing that the chambers judge erred in ordering shared parenting that required the child to spend extended periods of time away from her as the psychological parent and primary caregiver. She said that the chambers judge also erred by finding a material change of circumstances and using that determination as a basis for altering the parenting arrangement. The appellant wanted three days of parenting in the middle of the respondent's nine-day period. The child was born in August 2016 and had resided with the appellant from birth. The respondent indicated that the parenting was near-shared parenting by January 2019. The appellant was in favour of a shared parenting arrangement, but only if it did not have the child out of her care for longer than three days in a row. In January 2019, the respondent received a new permanent work schedule that required him to fly to Alberta for ten consecutive days and then return to Saskatchewan and be off work for nine full days.
HELD: The appeal was dismissed. Considerable deference is due to the chambers judge in an appeal of an interim order. The length of time with each parent was unusual for a pre-school child, but that did not mean that the chambers judge made a reviewable error by deciding as he did. There was evidence to support the order that was made. There were no concerns with the respondent's parenting of the child. The appeal court did not agree with the appellant that there was significant change to the status quo. The chambers judge only changed the details of the parenting arrangements; he did not

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do so in a manner that conflicted with the existing shared parenting arrangement. The decision was based on the child's best interests. The material change argument had no effect on the decision made by the chambers judge. The 2017 order provided a mechanism to return the matter to court for a review or to alter the parenting regime. A material change in circumstances was not required. The respondent was awarded costs of the appeal, plus costs of the application to lift the stay, fixed at $1,000.

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Adams Estate v Wilson, 2020 SKCA 38

Ottenbreit Schwann Tholl, March 31, 2020 (CA20038)

Wills and Estates
Civil Procedure – Queen's Bench Rules, Rule 16-46, Rule 16-47

The appellant, the executor of the estate of the deceased, N.A., appealed the decision of a Queen's Bench chambers judge to order that the will of N.A. be proven in solemn form and a trial be held for the purpose (see: 2018 SKQB 245). The respondent, C.W., cross-appealed the decision, arguing that the chambers judge should have determined the will to be invalid and revoked the grant of letters probate without the necessity of directing it be proven in solemn form. Another party, the Salvation Army, a beneficiary of the will, also appealed the decision because the chambers judge had erred by failing to require it to be served with the notice of C.W.'s application before determining it. C.W. had worked for the testatrix since 2001 until she died in 2016, assisting her in running her large cattle ranching operation. He alleged that in return for his work, for which he was only paid $1,000 per month, N.A. promised him that he would inherit her ranch, cattle and equipment. In her will, N.A. appointed the appellant to be her executor and said that she wanted him to distribute her estate to charities such as the Salvation Army and to people who had been helpful and loyal to her at his discretion. C.W. was not named as a beneficiary. Letters probate were granted, and C.W. filed a statement of claim against the appellant and against N.A.'s corporation to enforce his alleged agreement with her and alternatively, claiming that the assets of her estate were subject to a constructive trust in his favour. He filed Certificates of Pending Litigation (CPL) against the lands owned by N.A. and her corporation. The appellant then sought an order vacating the CPL, and C.W. countered with an application to have the will declared invalid and to revoke to the grant of probate or to have it proven in solemn form. The chambers judge ordered that the CPL be discharged and then found, concerning C.W.'s applications, that there was an issue whether he had standing to make them. He found that he did not under Queen's Bench rule 16-47, but found based on the wording of Queen's Bench rule 16-46 that C.W. had

standing because he was a person "who is or may be interested in the estate." A clause in the will vested the appellant with discretion to distribute a portion of the estate to individuals who had been helpful to her, and C.W. could be one of those people. He then determined that the evidence identified suspicious circumstances regarding the will, ordered it be proved in solemn form and deferred the application to revoke the grant until the disposition of the trial. The issue on appeal was whether the chambers judge erred regarding his interpretation of rule 16-46 whereby C.W. acquired standing.
HELD: The appellant's appeal was granted, as was that of the Salvation Army. Wilson's cross-appeal was dismissed. As there would be no trial, the preservation order made by the chambers judge would be set aside. The court found that C.W. did not have standing to make an application under Queen's Bench rule 16-46. It requires having either a legal or a financial interest in the outcome of the matter. The phrase "who is or may be interested" correctly interpreted requires that the interest or possible interest arise from, or intrinsically connect to, the estate and the devolution of the deceased's property. It denied C.W. standing on any of the following bases: 1) as a creditor or potential creditor of the estate, C.W. did not have the kind of interest that would entitle him to challenge the will or require it be proven in solemn form. If his application to set aside the will were successful, creating an intestacy, he would have nothing to gain as a creditor; 2) C.W. had nothing to gain by creating an intestacy if his application succeeded and the will were declared invalid because he would have eliminated any chance he would take under the clause of the will; 3) C.W. had nothing to gain if proof in solemn form resulted in the will being upheld. The possible gift to him in the clause would be unaffected as any possible interest under it would still depend on the discretion of the executor.

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Mehari v R, 2020 SKCA 37

Whitmore Leurer Kalmakoff, March 31, 2020 (CA20037)

Criminal Law – Appeal – Conviction
Criminal Law – Assault – Sexual Assault
Criminal Law – Defences – Honest but Mistaken Belief
Criminal Law – Evidence – Credibility – Appeal
Criminal Law – Evidence – Uneven Scrutiny of Evidence
Criminal Law – Procedure – Cross-examination

The appellant appealed the decision of a Queen's Bench chambers judge to grant a writ of possession pursuant to s. 50 of The Landlord and Tenant Act (LTA), directing the sheriff to put the respondents in possession of the land (see: 2019 SKQB 206). The appellant argued

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

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Saskatchewan (Highways and Infrastructure) v Venture Construction Inc., 2020 SKCA 39

Richards Schwann Kalmakoff, April 7, 2020 (CA20039)

Statutes – Interpretation – Limitations Act, Section 6

The appellant, the Government of Saskatchewan as represented by the Ministry of Highways and Infrastructure, appealed the decision of a Queen's Bench chambers judge to dismiss its application for summary judgment requesting the dismissal of the respondent's action as statute-barred under The Limitations Act (see: 2018 SKQB 293). The respondent contracted with the appellant to repair a highway in 2010. One aspect of the contract involved the construction of subgrade that was required to meet precise specifications, and the appellant delegated oversight and control of the work to an engineer designated by it. The engineer had the authority to approve the work and release payment to the respondent upon satisfactory completion. The respondent subcontracted the subgrade work to another company that performed part of the work between August and December of 2010. After the engineer's inspection established that the work met the standard, the appellant paid the respondent who, in turn, paid the subcontractor. In the spring of 2011, the respondent realized that the

subgrade was not up to standard, so that remediation was required. The appellant took the position that any inadequacy had occurred because the respondent failed to prepare the road for winter, and it was its responsibility to remediate. The respondent did so, but in July 2011, requested that the appellant provide results of testing it had conducted on the subgrade work in 2010, but they did not supply the results until December 2012. The respondent said that they demonstrated that the appellants had not conducted tests properly in 2010. It completed its work under the contract in July 2013 and then made a request for compensation from the appellant for the remediation in December. When the appellant did not respond, the respondent issued its claim in negligence and breach of contract on April 7, 2014. When the appellant applied for summary judgment on the basis the claim was barred, the judge found in her consideration of s. 6(1)(a) of the Act that although the respondent knew it would have to perform remedial work as early as the spring of 2011, the "extra work" clause in the contract made it reasonable for the respondent to believe it might be compensated. It was only when the appellant denied its claim for payment that it became aware of the loss. The judge found under s. 6(1)(d) of the Act that it would not have been appropriate for the respondent to commence legal proceedings in 2011 or 2012 because the contract provided a mechanism by which it could pursue compensation before filing the claim. It was in the public interest for the respondent to complete the work and keep the highway open before filing its claim. These reasons operated to delay the commencement of the limitation period until July 2013. The grounds of appeal were whether the judge erred in her determination of 1) the date on which the respondent knew or ought to have known it had suffered loss under s. 6(1)(a) of the Act; and 2) the date on which the respondent knew, or ought to have known, that court proceedings would be an appropriate means to seek to remedy its loss under s. 6(1)(d) of the Act.

HELD: The appeal was allowed. The court set aside the chambers judge's decision and granted summary judgment in favour of the appellant on the basis that the respondent's claim against it was statute-barred. Based on the judge's findings, the respondent discovered its claim in tort and contract in July 2011. It found, respecting each issue, that the judge had erred in her determination of 1) the date on which the respondent discovered its loss. She found that it began to suffer the loss identified in its claim as soon as it was required to undertake the remediation work in the spring of 2011; however, in concluding that the loss was not discoverable until the work under the contract was completed and payment denied, she misidentified the nature of the loss, and this constituted an error in principle; and 2) the date on which it was appropriate for the respondent to seek its remedy. The judge's finding was made without evidence or in disregard of relevant and material evidence that the "extra work" provision in the contract relied upon by the respondent would provide a resolution. The provision clearly defined what was required for the respondent to seek compensation

for extra work, but there was no evidence from which to determine that it met those requirements. For example, it had not obtained written authorization to perform the remediation, nor had it sought to invoke any of the provisions of the contract as an alternative process for resolving its dispute with the appellant until it requested compensation in December 2013. Further, there was no evidence before the judge to support her conclusion that if the respondent had issued its claim earlier, it would have had an impact on its ability to complete work on the highway.

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Grover v R, 2020 SKCA 40

Jackson, April 9, 2020 (CA20040)

Criminal Law – Summary Conviction Offences – Appeal
Municipal Law – Bylaw – Offences – Sentencing – Appeal
Municipal Law – Cities Act – Offences – Sentencing – Appeal

The applicant sought leave to appeal the decision of a Queen's Bench judge regarding its sentence appeal from the decision of a justice of the peace (see: 2019 SKQB 190). The applicant had been convicted of two charges: permitting one of its properties to become unsightly contrary to the City of Saskatoon's Property Maintenance and Nuisance Abatement Bylaw and failing to comply with a court order of the justice of the peace to remedy deficiencies on another property, contrary to The Cities Act. The justice of the peace imposed a total fine of $302,400 comprised of $15,000 with a victim surcharge of $6,000 under the bylaw and $201,000 plus a victim surcharge of $80,400 on the charge pursuant to the Act. On appeal, the summary conviction appeal court judge (appeal court judge) reduced the total fines to $45,675. The applicant's proposed grounds of appeal with respect to sentencing were that: 1) the total amount of the fines was disproportionate to the gravity of the infractions; 2) the appeal judge failed to consider relevant circumstances, including that the respondent's demolition costs exceeded the price of the lot and the respondent's officials were biased; 3) the appeal court judge erred in her application of the totality principle; and 4) the appeal court judge erred by not considering that the fines significantly exceeded what the prosecutor requested at trial. The proposed respondent argued that the application should not be granted because the grounds did not disclose a question of law in that the fitness of a sentence was not a question of law, relying on Thue. Thus, the court did not have jurisdiction to grant leave because the applicant could not bring itself within s. 839(1)(a) of the Criminal Code. The applicant submitted that the fitness of a sentence of law alone was a question of law, citing the dissenting reasons of Major J.A. in R v Loughery.
HELD: The application was dismissed. The court considered the

rights of appeal of a person convicted of a summary conviction offence under Part XXVII of the Code. The right of appeal established in ss. 813 and 822 incorporated ss. 683 to 689. Under s. 687(1), a court of appeal was authorized to hear an appeal regarding the fitness of sentence unless it was one fixed by law. Under s. 839(1), an appeal court could hear an appeal on any ground that involves a question of law against a decision of a court in respect of an appeal under s. 822 and again, ss. 673 to 689 were incorporated. It acknowledged that the dissent in Loughery was correct. The adjudicative powers of appeal under s. 822(1) and a court of appeal under s. 839(2) are the same. Both incorporate s. 687 by reference. Regarding the meaning of "fitness of sentence", the court reviewed its decisions following Thue and noted that, although they stated fitness of sentence was not a question of law, the court could assume jurisdiction to consider an appeal from sentence if an appellant identified an error of law that was so bound up with the sentence that it should be held to be inherent in it. However, leave to appeal a decision of a summary conviction appeal court under s. 839 of the Code should be granted sparingly. In applying these principles to the proposed grounds of appeal, the court found with respect to each that leave should not be granted: 1) as a matter of jurisdiction, as no question of law was raised. The fines imposed by the appeal court judge were not illegal and fell within the statutory range set out in s. 61(2) of the bylaw; 2) because the factors identified by the applicant had no application to the quantum of the fine imposed by the appeal court judge; 3) because the appeal court judge had not erred. She directly addressed the proportionality question; and 4) the possible error made by the justice of the peace in exceeding the prosecutor's suggested fines was rectified on appeal and the appeal court judge provided ample reasons for sentencing the applicant in excess of the amount of the prosecutor's original submissions at trial.

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Smith Street Lands Ltd. v KEB Hana Bank of Canada, 2020 SKCA 41

Ottenbreit Ryan-Froslie Leurer, April 13, 2020 (CA20041)

Mortgages – Foreclosure – Judicial Sale – Order Nisi – Appeal

The appellant, Smith Street Lands, appealed the decision of a Queen's Bench judge to grant the application by the respondent, KEB Hana Bank of Canada (KEB), for an order confirming a sale of land. KEB's application was made pursuant to the terms of an order nisi for sale by real estate listing that it had earlier obtained from the court because the owner of the land had defaulted on the mortgage that it had granted to KEB. After the order nisi was made, the listing officer received two offers to purchase the land from Royalty

Developments and JYR Investment Management, respectively. The officer found for various reasons that Royalty's offer was superior and accepted it. The appellant had not been involved in the matter, but upon learning that the selling officer would be in court to seek court approval for the sale of the land pursuant to Royalty's offer to purchase the land, it made an offer higher than Royalty's and filed an application without notice seeking leave to abridge the time for service of a notice of application to be heard at the same time as KEB's application for approval of the Royalty offer with the intent to invite the court to approve its offer in preference to that of Royalty. At the hearing, KEB objected that the appellant did not have standing to present its offer. The chambers judge granted the sale confirmation order, confirming the sale of the land pursuant to the Royalty offer. She determined that in the exercise of her discretion, she was obliged to defer to the officer's recommendation regarding the sale based upon his authority under the order nisi. Besides, prospective purchasers needed to have confidence in the fairness and integrity of the judicial process relating to a sale in accordance with an order nisi. For the same reasons, she rejected the appellant's last-minute bid to have its offer considered because it would upset the court-directed sale process. The appellant argued that the judge erred in principle because she was required to accept the offer that resulted in the highest economic return from the sale.
HELD: The appeal was dismissed. The court found that the chambers judge had not erred. She had correctly exercised her discretion with reference to the principles set out in the Court of Appeal's decision in D & H Farms because she had to maintain the integrity of the sales process. Further, the judge's discretion was limited by the terms of the order nisi, which determined the process to be followed by KEB to enforce its security. The order included a mandatory term that the land be sold under the direction of the officer and when the officer had accepted an offer. Here, the appellant's offer had not been accepted by the officer, so it would have been an error of law for the judge to have approved it. As well, the appellant had no status in the action or rights in connection with the land. It had never been a party to the KEB's action or any of the applications.

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B.B. v E.B., 2020 SKQB 56

Turcotte, February 28, 2020 (QB20069)

Family Law – Custody and Access – Best Interests of Children
Family Law – Custody and Access – Contempt
Family Law – Custody and Access – Travel Out of Country
Family Law – Custody and Access – Parental Capacity Assessment

The respondent applied for an order of contempt against the petitioner due to his overholding the parties' three children from her care. She also applied for an order allowing her to travel to the United States for 14 days with the children. The petitioner applied to vary the parenting terms of the 2018 judgment (parenting judgment) by suspending the respondent's parenting time and directing that she had alternate weekends of parenting pending Social Services closing its ongoing investigation and performing a parental capacity assessment by a doctoral psychologist. The parenting judgment was the result of a consent judgment after pre-trial. No appeal was taken from the parenting judgment. There was an appeal pending in the Court of Appeal in respect of an order granted in June 2019, adjourning the petitioner's application to direct a parental capacity assessment of the respondent. The petitioner's concerns arose out of the respondent consuming alcohol in the early morning hours of January 1, 2020 when she had the children in her care. The respondent acknowledged consuming alcohol at the family event but denied that she was intoxicated. She also pointed out that the alcohol restrictions in the parenting judgment ended December 31, 2019. The court and clerk met with the child after the petitioner indicated that the child wanted to tell someone about what he was experiencing.

HELD: An abridgement application was granted to allow the court to hear both parties' applications at the same time. The court found that the respondent had consumed alcohol on January 1, 2020, but the consumption term in the parenting judgment had ended. The court accepted the respondent's witness' evidence regarding the respondent's alcohol consumption. There was no issue with the care the children received. The court first considered the contempt application and found that: the petitioner had notice of the parenting judgment; the petitioner had overheld the children; the petitioner believed he had a reasonable excuse for not returning the child and then withholding all three children from the respondent; the petitioner had an obligation to have the two oldest children in counselling; and the parties did not comply with the joint counselling/mediation order in the parenting judgment. The overholding of the children was a clear breach of the parenting judgment with no reasonable excuse. The court found the petitioner's concern was understandable. If the parties had followed the counselling requirements, they and their children may have been better equipped to deal with the respondent's alcohol consumption. The court did not find the petitioner in contempt of the parenting judgment for withholding the children from the respondent. The parties both failed to pursue counselling, so a finding of contempt would only serve to further the parenting conflict. Directions were also given regarding steps the parties had to take to appoint a counsellor for themselves and a counsellor for the children so that the counselling protocols in the parenting judgment were followed. The parenting judgment allowed for changes and extensions to the alcohol conditions. The conditions were extended to June 30, 2020. Either party could apply to the court

after June 30, 2020 if the parties could not agree on the respondent's alcohol consumption after that. The court next considered the respondent's application regarding her travel. The respondent had complied with the 12-month alcohol restriction in the parenting judgment. She had stable housing and was in a stable relationship. The respondent's fiancé was willing to undertake that the respondent did not consume any alcohol during the trip to California. The court ordered that the respondent could take the children to California. She could not consume alcohol for twelve hours before the start of her parenting time. The court accepted the fiancé's undertaking. The court next considered the petitioner's application for variation. The child's reaction to seeing his mother consume an alcoholic beverage did not constitute a material change in circumstances. The fact that the parties had not pursued the required counselling was also not a material change in circumstances. Further, it was not a material change in circumstances that the controls in place on the respondent's ability to consume alcohol ended as of December 31, 2019. The court did not suspend or alter the respondent's parenting time. The court was also not prepared to direct that the respondent undergo a parental capacity assessment. The court was not sure it had jurisdiction due to the pending appeal. Also, there was no new evidence regarding the reasons for the assessment. The court indicated that even if jurisdiction were not an issue, the assessment would not be ordered because it would be of little benefit to the court in assessing whether the parenting arrangements under the parenting judgment should be varied. The respondent was awarded costs of $2,500 to be paid within 30 days.

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R v Bodnariuk, 2020 SKQB 59

Dovell, March 3, 2020 (QB20058)

Constitutional Law – Charter of Rights, Section 11(b)

The accused was charged on October 28, 2016, with five counts of firearm violations contrary to ss. 86(1), 93(a), 94 and 95(a) of the Criminal Code. The original informations containing these charges were sworn on November 3 and 20, 2016, respectively. The informations worked their way through Provincial Court, and the defence requested adjournments of the preliminary inquiry on three occasions, each time explicitly waiving delay because the accused was receiving medical treatment. The Crown filed a direct indictment in the Court of Queen's Bench on November 7, 2018, and the accused's trial date was set to proceed on May 11 to 14, 2020. The defence brought a Charter application for a stay of proceedings due to a breach of the accused's right to be tried within a reasonable time under s. 11(b) of the Charter. It argued that the Jordan date

elapsed on April 28, 2019, being 30 months after the date that the accused was charged. It acknowledged that it had explicitly waived delay for a total of 357 days. Therefore a net Jordan date of April 20, 2020 was 31.1 months, and the delay was presumptively unreasonable. The Crown submitted that the Jordan date had elapsed on May 3, 2019, but that the defence had explicitly waived 465 days, and thus, the presumptive ceiling date would be August 10, 2020. A further 149 days could be attributed to defence delay, thereby extending the period to January 6, 2021.
HELD: The Charter application was dismissed. The court found that after determining that the total defence delay equalled 446 days and subtracting that from the total delay of 42 months, 11 days, the Jordan date would be July 23, 2020, and did not exceed the 30-month presumptive ceiling. It calculated the period as commencing not from the date of the offence, but the date of the charge. Therefore, from November 3, 2016 to the anticipated end of trial, the total delay was 42 months, 11 days. From that total, the court deducted explicit defence delays to be 381 days. The defence had argued that certain explicit waivers were not valid because the Crown was not in a position to proceed until the disclosure of specific evidence in September 2019. However, the court found that the Crown could not have disclosed the evidence earlier because it did not possess it. Regarding other delays attributable to defence conduct, the court found it could deduct only 65 days.

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R v Robb, 2020 SKQB 60

McCreary, March 6, 2020 (QB20059)

Criminal Law - Defences - Charter of Rights, Section 11(b), Section 24(1)
Criminal Law - Defences - Delay - Exceptional Circumstances

The applicant accused applied for a judicial stay of proceedings, arguing that the delay in trying his criminal charges resulted in a breach of his s. 11(b) Charter rights. The applicant was charged on May 16, 2017. He elected to be tried by judge and jury with the trial initially scheduled to begin on November 18, 2019. An adjournment was granted on the morning of the trial date at the request of the applicant. The trial was scheduled for April 13, 2020. The total time from charge to trial was 35 months. The applicant waived 21 days of delay between January 2019 and February 2019. There were other periods of delay that were at issue and required the court's determination on whether the delay was "defence-caused" delay: a) 75 days between the first date offered for the preliminary hearing and when the preliminary hearing was scheduled; b) 13 days from the first date offered to the applicant for the rescheduled trial to the date the trial was set; and c) 4 months and 25 days, which was the

period between when the trial was adjourned and rescheduled. The court considered the following issues: 1) whether the net delay was above the presumptive ceiling of 30 months; and 2) if the delay was above the presumptive ceiling, was it justified by exceptional circumstances?

HELD: The application for a stay was granted. The issues were determined as followed: 1) the 75-day period was not attributed to the applicant. There was no evidence to support the Crown's argument that it could have been available on any date for the preliminary hearing. Defence delay is only caused when the defence is unavailable and the court and Crown are available. The 14-day period was defence delay. The delay in excess of 4 months for the rescheduled trial was not found to be defence delay. The adjournment from the original trial date was required because the Crown changed its position respecting a key witness two days before the trial date. The Crown advised the applicant that one of their witnesses would no longer be called because they believed that the witness was lying about the events in question and was not present at key locations. The witness was a key witness to the applicant's case. The applicant requested a trial adjournment so that evidence could be produced to corroborate the witnesses account of events. The Crown argued that it was not reasonable for the applicant to have relied on the fact that the witness was on the Crown's witness list as a representation that the Crown would not challenge the witness' account of the events in question. The court concluded that it was not reasonably foreseeable for the applicant that the Crown would challenge the witness' credibility. The delay was not attributable to the applicant. The delay was above the 30-month ceiling as articulated by the Supreme Court of Canada in Jordan; and 2) the remaining delay was not caused by exceptional circumstances. Exceptional circumstances can be discrete events or particularly complex cases. The Crown argued that the delay resulting from the original trial dates was caused by an exceptional discrete event beyond its control. The Crown argued that a surveillance video disclosed by the defence to the Crown in October 2019 prompted the Crown to change its position regarding the witness. The Crown argued that it could not reasonably foresee the applicant's disclosure of the video. The court did not agree. The Crown could have changed its position regarding the witness much earlier than it did. The court did not find the disclosure of the video surveillance to be an exceptional discrete event that justified delay in the case. The Crown offered four reasons for not doubting the truthfulness of the witness, only one of which was the video. The other three reasons were within the Crown's knowledge by January 25, 2019. Technical difficulties in initially viewing the video were also not reasonably unforeseen or unreasonably difficult to address. The delay violated the applicant's Charter rights. A stay of proceedings on the indictment was directed.

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Zwarych v Lalonde, 2020 SKQB 68

Scherman, March 13, 2020 (QB20071)

Civil Procedure – Expert Evidence – Notice
Civil Procedure – Summary Judgment
Torts – Defamation – Damages
Torts – Defamation – Defences – Mental Illness

The plaintiffs, all police officers, brought an action against the defendant claiming defamation and seeking damages and an injunction restraining him from further defamation. The plaintiffs applied for summary judgment. The defendant acknowledged that the allegations of sexual assault were not true, but said that at the time he had clear memories of the assault and honestly believed the allegations. The defendant described himself as a person with mental illness. The defendant made numerous complaints to the Civilian Review and Complaints Commission (CRCC) of the RCMP. He said he had been repeatedly arrested and charged without cause. To support his allegations, he said that several criminal charges had been dismissed or did not proceed. He also posted YouTube videos alleging assault and corruption. The allegation of sexual assault against two of the plaintiffs resulted in the defendant being charged twice with public mischief. He was convicted. Aside from the sexual assault allegation, the defendant maintained that what he said was true. The defendant sought admission of a letter from his psychiatrist, outlining that he suffered from generalized anxiety disorder and some paranoid personality traits. The psychiatrist indicated that the defendant was prone to perceive events inaccurately when he was under extreme stress. The issues were: 1) whether there was a genuine issue requiring trial and whether a fair and just determination could be made on the merits based on the affidavit evidence; 2) whether the defendant defamed the plaintiffs as alleged, or whether the defendant established the defences of a) justification or truth of the alleged defamatory statements; b) qualified privilege; and c) fair comment; 3) if defamation were proven, what damages were the plaintiffs entitled to, and whether mental illness of the defendant could reduce the damages; 4) whether the plaintiffs were entitled to an injunction restraining the defendant from future publications or statements in respect of the plaintiffs, and 5) whether costs should be awarded.
HELD: The court accepted the letter of the psychiatrist even though the defendant did not follow the Queen's Bench Rules to admit expert opinion testimony. The issues were determined as follows: 1) the court was satisfied that a summary trial and judgment was a fair process that would result in just adjudication of the dispute. There was no genuine issue requiring a trial. A fair and just determination on the merits could be made based on the affidavit evidence and oral evidence of the defendant; 2) defamation is a strict liability tort, so the plaintiffs did not need to prove the defendant intended harm.

The plaintiffs proved defamation on a balance of probabilities: the words were defamatory; the words referred to the plaintiffs, and the words were published by being communicated to at least one person other than the plaintiffs. 2) a) To establish justification or truth of the alleged defamatory statements, it was not enough for the defendant to have believed the statements to be true. The defendant had to prove on a balance of probabilities that the statements he made were true in fact. He did not discharge the burden; b) qualified privilege may protect a communication that is not based on real facts. The complaints of the defendant to the CRCC were found to be occasions of qualified privilege. The court determined that the plaintiffs did not meet the burden of proving on a balance of probabilities that the dominant purpose or motivation of the defendant's complaints was malice or to harm them. The court found that the defendant held mistaken beliefs due to mental illness. The court accepted the defendant's testimony that he believed the sexual assault allegations to be true when he made them. There was no actual malice. The defendant had a defence of qualified privilege concerning the sexual assault allegation and the CRCC complaints. The defence of qualified privilege was not available to the defendant's YouTube postings, and c) the defence of fair comment was not available to the defendant for the YouTube postings. Most of what he said were allegations of fact, not comment. Therefore, the YouTube postings and subsequently posted comments were found to have defamed the plaintiff M. The defences of justification, qualified privilege or fair comment did not apply; 3) general damages were presumed once defamation was established. The plaintiffs also claimed aggravated and punitive damages. The YouTube postings were found to be a product of the mental illness suffered by the defendant. He believed what he said, so there was no actual malice or outrageous and egregious conduct necessary to support awards of aggravated or punitive damages. Because defamation is a strict liability tort, mental illness could not operate to relieve the defendant of liability. The court did conclude that mental illness should be considered when assessing general damages and for the other relief granted to the plaintiffs. The court concluded that the defendant's indication that he was mentally ill within the YouTube posts resulted in viewers regarding the statements with a very significant degree of skepticism. Therefore, the damage to the officer's reputation was significantly reduced. The mental illness was found to mitigate the situation and decrease the defendant's responsibility. The court awarded judgment in favour of the officer who was the subject of the YouTube videos in the amount of $10,000; 4) injunctions follow findings of defamation. There was no defamation found concerning the defendant's CRCC complaints or sexual assault allegation. Injunctions could thus not be granted regarding them. The court did issue a permanent injunction concerning the YouTube postings. The court did not award the defendant costs against the plaintiffs regarding the unsuccessful claims. The plaintiffs could not have reasonably

foreseen the defendant's success due to his mental illness. The successful plaintiff was awarded costs.

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R v Thalheimer, 2020 SKQB 76

MacMillan-Brown, March 16, 2020 (QB20065)

Criminal Law – Motor Vehicle Offences – Dangerous Driving Causing Death – Sentencing

The accused was convicted of dangerous driving causing death (see: 2019 SKQB 168). While driving towards a railroad crossing, the accused ignored the warning signs, including a speed limit sign indicating a maximum speed of 50 km per hour. The court accepted the evidence of an accident reconstruction expert who testified that the accused was driving 123 km per hour just seconds before he applied the brakes and the vehicle struck a train. The accused suffered severe injuries, and his passenger, his common-law spouse, was killed. The accused, who was 50 at the time of the offence, did not have a criminal record and was assessed by the author of the Pre-Sentence Report as being at a low risk to reoffend. However, he had a history of driving infractions dating back to 1996. Five of the infractions involved driving without a seatbelt, and three were for speeding. After the offence, the accused was convicted of using a cell phone while driving. He was self-employed and operated a vacuum service truck business. He expressed remorse for causing the death of his spouse but did not acknowledge criminal responsibility for it, maintaining that it had been an accident. The children of the deceased provided their victim impact statements. The defence argued that the accused should receive a conditional sentence, a suspended sentence or an intermittent sentence.
HELD: The accused was sentenced to 18 months in prison, followed by one year of probation. He was prohibited from driving for two years following release. The principles of parity, denunciation and deterrence required a custodial sentence, and the court followed the sentencing decisions in Dunford, Reynolds and Higginbotham in determining the sentence. It noted that amendments to the Criminal Code removed the option of a conditional sentence. The mitigating factors were that the accused expressed remorse and had accepted general responsibility for the offence. He had no criminal record. Neither alcohol nor drugs were a factor in the collision. He was at low risk to reoffend and had the strong support of his family. The aggravating factors were that the accused's actions – specifically, that he was travelling at more than twice the speed limit – caused the death of his spouse and had a devastating impact on her family. He had not accepted criminal responsibility for his actions. In its consideration of aggravating factors, the court included the number of traffic infractions pre-dating the collision followed by the

accused's committing the offence of distracted driving after the collision.

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Sun Mortgage Corp. v Malik, 2020 SKQB 58

Layh, March 18, 2020 (QB20072)

Civil Procedure – Costs – Foreclosure
Foreclosure – Procedure – Leave to Commence
Statutes – Interpretation – Land Contracts (Actions) Act, 2018

The plaintiff sought leave to commence its action against the mortgagor defendant. As of March 1, 2020, the amount owing on the mortgage was $174,249.05. The defendant made payments in December, January, and February towards outstanding property taxes and made a payment on March 1, 2020 that was "attributed toward account receivables owing…for the administration of the Mortgage." The value of the property was estimated at between $414,000 and $461,000. The issue for the court was to determine whether the non-compliance with The Land Contracts (Actions) Act, 2018, the Forms, and The Queen's Bench Rules was material. HELD: The Land Contracts (Actions) Act, 2018 applied to the proceedings because they occurred after September 1, 2019. Three documents must be served on the mortgagor and the Provincial Mediation Board: 1) the Notice of Application for Leave to Commence Action; 2) the Notice to Respondent; and 3) the Affidavit Regarding State of Respondent's Account under the Mortgage. The plaintiff also has to provide the mortgagor and court with updated information regarding the state of the account between 5 days and 25 days before the hearing date. There is no form prescribed for that update. The plaintiff served the Notice of Application for Leave to Commence Action, in the prescribed form. The Affidavit Regarding the State of Respondent's Account under the Mortgage was not served in Form 10-39B, as required. The court found that the form used by the plaintiff missed several mandatory statements of significance to the mortgagor, the Provincial Mediation Board, and the court. The plaintiff did not file proof of service regarding the Provincial Mediation Board. The affidavit of service stated that the Notice to Respondent was served upon the mortgagor, but no proof of service was filed with the court. The court denied leave to commence given the non-compliance as well as considering the substantial equity in the mortgagee's favour. The plaintiff was required to comply with the requirements of the regime introduced on September 1, 2019. The court also directed that the mortgagee shall not charge any costs of the proceedings to date, nor shall any claim for solicitor-clients costs be made and further, that in any future proceedings, the mortgagee had to justify the attribution of the payment made on March 1, 2020.

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Bank of Montreal v Dumaual, 2020 SKQB 72

Layh, March 19, 2020 (QB20074)

Mortgage – Foreclosure - Application for Judicial Sale – Order Nisi
Mortgage – Foreclosure – Mortgagor Payments

The Bank sought an order nisi for judicial sale of the mortgagors' residence. The principal amount of the mortgage was $174,605.45. This action was the third proceeding against the mortgagors. The mortgagors reinstated the mortgages in the previous two actions, so they were discontinued. The bank served a notice of intention on the Provincial Mediation Board in November 2018 and in January 2019, the bank applied for an appointment, as was then required under The Land Contracts (Actions) Act. The bank submitted an affidavit valuing the property between $235,000 and $268,000. An appointment date was set for March 5, 2019. The outstanding amount owing on the mortgage was $153,804.13. The matter was adjourned numerous times. Leave to commence the action was granted on September 12, 2019. The statement of claim was issued in October 2019 and the action was noted for default of defence in November 2019. The date of return for the order nisi for judicial sale was February 25, 2020. The matter was adjourned to March 17, 2020 for the bank to look into payments made by the mortgagors. No further material was filed. One of the mortgagors indicated that she had provided a money order directly to the bank's legal counsel, but that it had been returned. The bank admitted this was the case and said that payment was not accepted because the mortgage had matured. The mortgagor made the payment directly to legal counsel because the bank branch advised her that the branch could not take the payment because the mortgage was in default.
HELD: The court commented on the bank's refusal to accept the payment: 1) the mortgagors had considerable equity in the property, so any payment would have reduced the mortgage debt and benefitted the bank; 2) mortgagees are usually not concerned with whether a mortgagor's payment netted gain or loss to the mortgagor; and 3) the mortgagor indicated that the bank had agreed to extend the mortgage for a further 6 months from February 1, 2019 so it matured on August 1, 2019. The mortgagor made the payment on that day. The court was troubled by the developments. An order was made with the following terms: 1) within 10 days, the bank was to provide the mortgagors with a statement of the mortgage for the past three years; 2) the mortgage account should be credited with a payment of $2,100 effective August 1, 2019; 3) the mortgagors shall be able to make payments at the Bank branch; 4) the Bank shall accept any payments the mortgagors wish to make; and 5) the fiat shall be brought to the court's attention in any later assessment of costs against the mortgagors. The court made the orders on the

principle that the court will exercise equitable considerations in matters of judicial sale. The matter was adjourned, returnable on ten days' notice by the bank after complying with the first two terms of the order.

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K.A.V.D. v G.W.S., 2020 SKQB 73

Robertson, March 19, 2020 (QB20075)

Family Law – Custody and Access – Joint Custody – Decision-Making Authority
Family Law - Custody and Access - Minutes of Settlement
Family Law - Child Custody and Access - Shared Parenting

In 2018, the parties entered into minutes of settlement (minutes) and now sought to confirm the terms through court order. The minutes provided for joint custody with shared parenting. The petitioner requested a change to the minutes. She sought greater decision-making authority than the respondent with respect to the children and she asked for costs. The parties were married in 2003 and they had two children. They separated in 2016. The application was pursuant to ss. 15(2) of the Divorce Act. The respondent did not agree with the petitioner's suggested terms that she have decision-making authority with respect to counselling, medications, dentist appointments, and extracurricular activities for the children, and those matters could override the respondent's parenting time. He also disputed that costs should be awarded to the petitioner.
HELD: The application was granted without the terms that would reduce the respondent's right to participate in decision-making. There was no order as to costs. The court was not prepared to take away the respondent's right to participate in decision-making on the matters suggested. The child's best interests must govern the analysis. The court was not persuaded that there was an insurmountable inability to communicate or evidence of indifference or abusive behaviour to justify removing or reducing the respondent's right to participate in decision-making. The court did revise the Easter Break and Spring Break parenting terms so that neither parent had the children for three consecutive weeks because of the week the holidays fell on. The revision was at the direction of the parties. No costs were ordered.

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Westman Estate v Stumborg, 2020 SKQB 74

Elson, March 19, 2020 (QB20076)

Civil Procedure – Summary Judgment
Contract – Interpretation – Ambiguity – Extrinsic Evidence
Power of Attorney – Authority – Enduring Power of Attorney
Trusts and Trustees – Resulting Trust – Family Transactions

The plaintiff estate (estate) sought specific performance of an agreement between the deceased and one of her daughters, the defendant. The specific performance sought was the obligation of the defendant to execute all documentation required to dispose of certain property (property) that the deceased transferred to herself and the defendant as joint tenants. Alternatively, the estate sought damages for breach of contract. The defendant argued that the deceased intended her to receive title to the property in consideration for the work she and her husband did to care for and maintain the property. She said that there was no presumption of a resulting trust. Alternatively, if the presumption did exist, the defendant argued that the circumstances rebutted the presumption. The defendant also counterclaimed for relief that included a declaration that she was entitled to full legal and beneficial ownership of the property. The estate applied for summary judgment. The property was a cabin. The property was transferred to the deceased and the defendant as joint tenants in 2001. The defendant said that the deceased told her that she wanted to transfer the property to joint names so that the defendant would acquire the property on her death. There was a written agreement with a term (Article 3) that required the defendant to execute necessary documentation if the deceased desired to sell, transfer, mortgage or otherwise encumber the property. The deceased prepared her will (will) in 2006. The lawyer that prepared the will deposed an affidavit. In the affidavit, the lawyer indicated that the deceased told him that he had transferred the cabin into the defendant's name because she was the only child to regularly use the property, pay its related expenses, and maintain its upkeep. In May 2009, the deceased granted an enduring power of attorney (POA) to G.M. and the defendant. The attorneys were to act successively (i.e., in order of appointment), with G.M.'s position as attorney taking priority over the defendant's. The deceased continued to handle her own affairs until 2012. In 2016, G.M. sought to have the property sold under the POA. G.M. commenced the claim in 2016 and the style of cause was amended to the estate after the deceased's passing in late 2016. The issues to be determined were: 1) whether the POA granted to G.M. authorized her to enforce or pursue rights that she believed the deceased possessed under the 2001 agreement; 2) whether there was an ambiguity in the 2001 agreement for which extrinsic evidence was admissible to determine the true intention of the parties; and 3) whether the defendant breached Article 3 of the 2001 agreement by refusing to cooperate in the sale of the property. HELD: There was no genuine issue for trial and the action was appropriately determined through summary judgment. The estate's action was dismissed, and the defendant was successful on the declaration sought. The issues were determined as follows: 1) the

POA did not provide G.M. with the authority to enforce her interpretation of the 2001 agreement. The POA did not afford G.M. the authority to pursue her understanding of the deceased's rights under the 2001 agreement. The POA only authorized G.M. to place the deceased's interests in the hands of counsel, who could assess a possible claim and determine whether it could be pursued through a person described in Rule 2-18. The statement of claim was not properly authorized and should not have issued; 2) the court was satisfied that there was ambiguity in Article 1 where it was stated that the transfer was "solely for estate planning". The court found that the clause was capable of two conflicting interpretations: a) the deceased was transferring the interest to the defendant, in trust, for the benefit of the deceased and her estate; or b) the deceased intended the transfer as consideration for her efforts for the property. The court found the defendant's interpretation to be extremely persuasive; and c) the court determined that Article 3 made it clear that the deceased's right to sell or otherwise dispose of the property was predicated on her having the desire to do so. There was no evidence that the deceased desired to sell the property when G.M. decided she would do so. The deceased lacked capacity at that time so could not desire anything with respect to the property. G.M. said that she desired to sell the property because it was in the deceased's "best interest." The court determined that any presumption of resulting trust was rebutted. Further, because the matter involved real property, no presumption would apply. The defendant was awarded taxable costs.

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Delnea v Vanhouwe, 2020 SKQB 79

Mills, March 24, 2020 (QB20077)

Real Property – Easement – Compensation
Statutes – Interpretation – Improvements under Mistake of Title Act

The court determined that the applicants were entitled to an easement under The Improvements Under Mistake of Title Act and that the respondents were entitled to compensation for that easement. The parties were given 30 days to file additional affidavit evidence and argument on the issue of compensation. The applicants argued that nominal compensation should be awarded. The applicants' septic tank encroached onto the respondents' property. The respondents filed an affidavit that provided values for the property with the septic tank encroaching and with the septic tank relocated. They argued that the difference in property value was $20,000.
HELD: The court found that the appraisal provided by the respondents was of little value because it was not a value of the property with the septic tank and without it. The $20,000 was the

cost to remove the septic tank as was noted in the appraisal. Relief under the Act is based on equitable principles. The encroachment likely resulted from an error by the surveyor when the existing cabins were subdivided into individual lots. The septic tank was used for 24 years without issue. The encroachment was only realized when the respondents decided to rebuild their cabin and had to have the lot surveyed. The design of the new cabin provided for a walkway below grade level of the old cottage that required passing by the exposed tank. The court found that both parties shared equal blame for the situation. The respondents had gone ahead with their construction without the septic tank issue being determined. Neither party was prepared to have a meaningful discussion. The encroachment would benefit the applicants on a long-term basis from both a cost and convenience standpoint. The encroachment would continue to cause access problems for the respondents given the construction of the cabin. The court listed factors to consider: 1) any day-to-day inconvenience caused by the practical impact of the encroachment on the easement property; 2) the length of time the easement would be in existence; 3) the impact of marketability of the property with the easement registered; 4) the approach by each party to resolving the encroachment issue; and 5) the cost of any corrections needed to allow the impacted party to reasonably enjoy their property. Because of factors 1 through 3, nominal damages were not appropriate. The applicants provided evidence that the unsightly situation could be remedied by covering the tank and bringing up the grade. They estimated the cost to do so would be $5,000. The court determined that the appropriate amount of compensation would be $6,000. The applicants were responsible for the easement preparation and registration. The easement would only last as long as the septic tank was being used for the purpose of sewage storage. Costs were not awarded.

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Brown v Meadow Lake (City), 2020 SKQB 83

Hildebrandt, March 25, 2020 (QB20079)

Municipal Law – Bylaw – Nuisance – Order – Judicial Review

The applicant brought an originating application for an order setting aside the respondent city's order to remedy. The respondent had received complaints regarding the state of a residential property owned by the applicant. He began constructing a house on the lot in late 2015 through early 2016, but then work slowed. The building permit issued by the respondent lapsed because work was suspended for six months. After neighbouring property owners complained to the respondent in 2017 that the house was infested with pigeons, that its exterior was unsightly and that it could attract squatters and vandals, it confirmed the condition of the house. It

contacted the applicant in August 2016 requesting that he address the concerns, but he took no action. Over the next two years, the applicant did not carry out any work, and an engineering report advised that the foundation had heaved. A later engineering report recommended the steps that would need to be taken to deal with the condition of the house. The respondent issued its order to remedy dated September 5, 2018, pursuant to Part XII, Division 4 of The Cities Act and served it on the applicant on September 7. The order required the applicant to complete the home or demolish it within 30 days. The lawyer representing the applicant at the time wrote a letter to the respondent, received on September 27, requesting a three-month extension to complete the remediation work. After retaining a new lawyer, the applicant negotiated an agreement for an extension with the respondent if he paid it $4,000 and would able to apply for a building permit and complete the work by December 31, but the applicant was unable to secure the funds and negotiations broke down. The respondent's attempt to demolish the house was stayed after the applicant obtained an order prohibiting it, and then he brought this application. He argued that the order to remedy should be set aside on various grounds. The issues were: 1) whether the applicant had commenced an appeal of the order by means of the letter; 2) the appropriate standard of review; 3) whether the order was properly based on the respondent's Nuisance Abatement Bylaw, and 4) whether the respondent had complied with its duty of procedural fairness toward the applicant.
HELD: The application was dismissed. The court found concerning each issue that: 1) the applicant had failed to file an appeal in accordance with the 15-day limitation period for appeals set out in s. 329 of the Act. Further, the letter itself did not constitute an appeal of the order. In it, the applicant only requested an extension of time to complete the remediation order, and the respondent was entitled to decline the request; 2) the applicant had not filed an appeal and proceeded with an application for judicial review, which it would deny. If incorrect, the court found that the standard of review for the application, as it was not an appeal, was that of reasonableness; 3) the order to remedy was properly based on the respondent's bylaw, and it acted within its jurisdiction in issuing the order. Considering the evidence, the condition of the property fell within the definition of nuisance in the bylaw; and 4) the applicant was not denied procedural fairness. None of the applicant's objections to the procedures conducted by the respondent had merit.

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K.B. v K.K., 2020 SKQB 86

Tochor, March 31, 2020 (QB20081)

Family Law – Child Custody and Access – Variation
Civil Procedure – Court of Queen's Bench – Directive Respecting

Family Law and Child Protection Proceedings – COVID-19

The petitioner father requested a determination of urgency so that his application to vary the primary residence of the two children of the marriage could be argued and decided in accordance with the Directive and Advisory issued by the Chief Justice of the Court of Queen's Bench. An order had been made in July 2018 that the parties' two young children should reside with the respondent mother and that the petitioner would have parenting time every second weekend. The petitioner's application in November 2019 to change the primary residence was denied, but the court ordered the respondent to provide clean drug screens on a weekly basis until the pre-trial conference. After the parties were unable to resolve their issues at the pre-trial conference in early March 2020, the petitioner filed an application to vary the earlier order. The petitioner submitted that the respondent had not submitted to the weekly drug screens. The respondent replied and explained that she was unaware of the November order and when she learned of it, she had submitted to weekly drug screens and the results would be provided. She also advised that as of mid-March, she and the children were living with her retired parents in their home. The petitioner responded with a list of his concerns about the respondent's parenting ability, advising of his willingness to comply with safety protocols in relation to the COVID-19 pandemic and suggesting problems with the respondent's living arrangements with her parents.
HELD: The application was dismissed. The court found that it was not urgent and therefore adjourned it to the chambers list for June 2020 in accordance with the Court of Queen's Bench Directive. Speaking in general terms, the court noted that during the COVID-19 crisis, parents should not presume that its existence would automatically result in an urgent hearing regarding parenting arrangements and children should continue to see both parents. Regarding this application, it confirmed the terms of the November 2019 order and extended the requirement for the respondent to provide clean drug screens until the trial. There was no evidence here that the respondent was acting contrary to any COVID-19 precautions. The petitioner had not shown there was any reason to change the children's primary residence. There was no evidence that they were in any imminent harm or danger, the respondent had adequately explained her earlier failure to have weekly drug screens, and she was now complying.

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R v Boudreau, 2020 SKQB 88

Danyliuk, April 2, 2020 (QB20083)

Criminal Law – Judicial Interim Release Pending Trial – COVID-19

The self-represented accused applied for judicial interim release pending trial for offences committed in Saskatoon. He also applied for judicial interim release pending an appeal of his conviction and sentence regarding a number of offences committed in Maidstone (see: 2020 SKQB 92). The accused had been on release after committing the Maidstone offences when he committed the Saskatoon offences. The Saskatoon charges were based upon the accused allegedly driving in a dangerous manner in a stolen vehicle whereupon he was chased by the police and the vehicles crashed. The accused's subsequent application for bail in Provincial Court was denied and the judge ordered he be detained on the second ground, that he might fail to appear in court because his criminal record included many convictions for failure to attend court and failure to comply with court orders. He applied for a bail review in the Court of Queen's Bench which was dismissed on the same ground as well as on the primary ground that he might reoffend. He then applied for interim judicial release pursuant to a number of different sections of the Code and swore an affidavit that the reason for his application was that he was suffering from lung disease and asthma and that he was at risk of dying from COVID-19 if he remained in remand.
HELD: The application was dismissed and the remand order was confirmed. The court treated the application as if it were correctly brought pursuant to s. 520 of the Code. It found that that the Provincial Court judge had not erred in making the previous remand order. The accused had not provided a new release plan, nor had he dealt with the concerns emanating from the primary and secondary grounds. Regarding the risk posed to him by COVID-19, there was poor evidence from the accused regarding his alleged lung disease. His continued detention was justified because he was likely to reoffend and unlikely to show up for court.

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R v Boudreaux, 2020 SKQB 92

Hildebrandt, April 2, 2020 (QB20084)

Criminal Law – Judicial Interim Release Pending Trial – COVID-19

The self-represented accused applied for judicial interim release pursuant to s. 813 of the Criminal Code. He had been charged with theft and breach of probation in Maidstone and failed to appear but remained on release. Before his trial, the accused was charged with five more serious offences that he committed subsequently in Saskatoon. He was held in custody and denied bail. He later applied unsuccessfully for a review of his detention. He was found guilty after his summary conviction trial in Provincial Court on the Maidstone charges and sentenced to six months' incarceration for possession of stolen property, two months for breach of probation to

be served concurrently and 38 days to be served consecutively for his failure to appear. The accused then appealed his conviction and sentence to the Court of Queen's Bench and filed an application for release pending appeal. The application was denied because the accused was being held on the Saskatoon charges. When another application was denied because he was ineligible to seek interim release as a serving prisoner, the accused brought this application on the Maidstone charges and another application seeking release pending trial on the Saskatoon charges (see: 2020 SKQB 88).
Regarding the former, the accused deposed in his affidavit that as he suffered from lung disease and asthma, he should be released from the Correctional Centre in Saskatoon because of the risk of contracting COVID-19 as the institution was not taking proper precautions to prevent the spread of the virus.
HELD: The application was dismissed. The court found that the appellant had not met the criteria required to grant release pending his summary conviction appeal in that it was not satisfied that he would surrender himself into custody and that his detention was not necessary in the public interest. In addition, he had failed to demonstrate a health concern pertaining to COVID-19 which would justify his release. He had not submitted evidence of his medical conditions and he had not provided any release plan.

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Trenker v Trenker, 2020 SKQB 94

Brown, April 2, 2020 (QB20085)

Family Law – Spousal Support – Interim

The petitioner made an application for interim spousal support after separating from the respondent after 26 years of marriage. Her income at the time of application was expected to be $25,000, derived from employment insurance that might end within months. The petitioner submitted that her total expenses were $60,700 for rent, insurance, utilities and food. Her debt repayment obligation was $6,700 annually and she claimed that her shortfall was $25,000. She acknowledged that because she was unemployed, she would not have to pay income tax, EI premiums or Canada Pension Plan contributions. The respondent had recently changed his position and was earning $78,000 per annum, approximately $25,000 less than what he had been paid in his previous employment. He submitted that his total expenses were $89,500, including $10,400 for mortgage payments on the family home, property taxes, insurances and utilities. He was also responsible for payment of family debt that cost him $11,500 in annual payments and estimated his shortfall at $12,500. Based upon each party's current income, the Guidelines indicated spousal support should be in the range of $1,650 to $2,100. However, the respondent argued that due to his carrying the

mortgage, related payments and much of the jointly-incurred family debt, he could not afford spousal support. The petitioner's position was that an average of the past three years of the respondent's income should be used for the interim calculation of support, resulting in him having $96,604 in annual income. With her income being under $25,000, the Guidelines indicated support in the range of $2,296 to $2,955. She argued that her entitlement to spousal support was based on a non-compensatory needs-based analysis that would place her in the middle of the range at $2,678. The issue was whether the petitioner had established entitlement to spousal support and if so, what was the appropriate amount?
HELD: The petitioner was awarded interim support in the amount of $1,600 per month in accordance with the Guidelines. The respondent's payment of debt prevented any higher amount being awarded. The court found that the petitioner was entitled to non-compensatory support because of the length of the marriage that had left her economically disadvantaged and her much lower income. Any entitlement to compensatory support would be left for pre-trial or trial. It found that the petitioner's income was $25,000 but it would reduce her expenses by $11,000 to take into account that her costs were lower due to unemployment. It accepted the respondent's current income was $78,000 as there was no intentional underemployment. He should be given credit for some aspects of carrying the additional family debt and house expenses but it was also necessary to consider that he lived in the family home and benefitted from all of the related payments in that respect. Some of his discretionary expenses might have to be reduced.

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