Case Mail

The Law Society of Saskatchewan Library's online newsletter
highlighting recent case digests from all levels of Saskatchewan Court.
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R v Ballantyne, 2020 SKCA 84

Jackson, July 9, 2020 (CA20084)

Criminal Law – Sentence – Appeal – Application for Court-Appointed Counsel

The appellant applied pursuant to s. 684 of the Criminal Code for an order assigning counsel on his behalf in connection with his pending appeal. He pled guilty to committing assault with a mace contrary to s. 267(a) of the Code. Prior to sentencing, the Crown commenced dangerous offender proceedings under Part XXIII of the Code, and the sentencing judge granted the designation and imposed an indeterminate sentence (see: 2019 SKPC 32). The appellant clarified in his application that he was appealing his indeterminate sentence only on the ground that it was not fair. In his notice of appeal, drafted by him with assistance from his former counsel, he identified that there had been misapprehension of the evidence on record and insufficient weight given to Gladue factors. He was a member of the Montreal Lake Cree Nation and had suffered many hardships during his childhood. His education ended in grade six.

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Civil Procedure – Pleadings – Statement of Claim – Application to Strike

HELD: The application was granted. The court found that it was in the interests of justice to do so because the appellant would not be able to present his appeal effectively without legal representation and there was an aspect of fairness to be considered as a result of the impact of extensive Gladue factors on his life. The indeterminate sentence he received was one of the most serious penalties that can be imposed upon an offender.

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Wilchuck v Westfield Twins Condominium Corporation, 2020 SKCA 85

Whitmore Schwann Barrington-Foote, July 14, 2020 (CA20085)

Civil Procedure – Appeal – Application to Strike
Civil Procedure – Court of Appeal Rules, Rule 46.1

The appellant appealed the decision of a Queen's Bench judge to grant an order nisi for sale which included judgment against him (see: 2020 SKQB 58). He submitted that the judge erred by failing to consider his application for an order that the respondent be required to produce documents identified in a notice to produce. The respondent applied to quash the appeal pursuant to Court of Appeal rule 46.1.
HELD: The application was granted. The court found that the appeal was frivolous and without merit. In numerous actions in Queen's Bench, the appellant had tried to prove that the respondent lacked the authority to impose condominium fees without a vote by condominium owners. The appellant's first application was denied (see: 2018 SKQB 2). Thereafter, the appellant's subsequent actions were dismissed because the matter was res judicata. In his appeal, the appellant was trying to obtain documents for the purpose of proving a defence which he could not assert, as it turned on the issue which had already been decided in favour of the applicant respondent. The judge did not err when he struck the appellant's defence finding that the levies were authorized and the matter was res judicata.

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R v Bear, 2020 SKCA 86

Caldwell Schwann Tholl, July 16, 2020 (CA20086)

Criminal Law – Appeal – Conviction
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Criminal Law – Assault – Sexual Assault
Criminal Law – Assault – Sexual Assault – Corroborative Evidence – Criminal Code, Section 274
Criminal Law – Evidence – Preliminary Inquiry Evidence at Trial

The appellant was found guilty of sexual assault, contrary to s. 271 of the Criminal Code, and of assault, contrary to s. 266 of the Criminal Code, after a Queen's Bench trial. The complainant in both offences, R.C., was the appellant's former domestic partner. The appellant appealed his conviction. The appellant and R.C. had gone to a house party. R.C. left the party to purchase more alcohol and, when she returned, was confronted by the appellant. She testified that the appellant grabbed her tightly around the arms and released her when she said stop. The appellant denied the allegation. R.C. testified that after the appellant grabbed her arms, she went to the bathroom and tried to shut the door, but the appellant followed her into the bathroom. She said the appellant grabbed the front of her sweater and forcefully pushed her against the chest four times. The appellant agreed that he followed R.C. to the bathroom but said that after a discussion he opened the door and they rejoined the party. R.C. fell asleep on the couch and woke up in the hospital. She had a series of seizures causing her to fall on the floor. The appellant picked R.C. up from the hospital and she said she went straight to her basement bedroom to lie down. She testified that the appellant forced her to have sex even though she told him that she did not want to because she was in pain. R.C. left the home two days later and went to an emergency shelter where she reported the allegations to police. R.C. died after the preliminary inquiry but prior to the trial. The Crown successfully applied under s. 715 of the Criminal Code for an order permitting the audio recording and transcript of R.C.'s testimony at the preliminary inquiry to be admitted into evidence at trial. The appellant had three grounds of appeal: 1) whether the trial judge erred in admitting the testimony given by R.C. at the preliminary inquiry into evidence at trial; 2) whether trial counsel was ineffective and, if so, whether it led to a miscarriage of justice; and 3) whether the verdict was unreasonable and not supported by the evidence. The appellant and Crown also applied to introduce fresh evidence.
HELD: The appeal was dismissed. The appellant applied to introduce his unsworn affidavit into evidence. The affidavit listed complaints regarding "how [his] trial was handled." The appeal court was not satisfied that the evidence met the Palmer test or the modified test where ineffective counsel is a ground of appeal. The Crown sought to adduce fresh evidence in the form of an affidavit from Cst. T., who was the lead investigator in R.C.'s complaint. The affidavit addressed why the police did not undertake forensic DNA analysis of R.C.'s clothing or obtain a rape kit. The appeal court found the affidavit to be tendered in direct response to the appellant's argument about the unreasonableness of the verdict. The appeal court denied the application in that

Wills and Estates – Costs – Solicitor and Client Costs

Municipal Law – Appeal – Property Taxes – Assessments
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Statutes – Interpretation – Municipalities Act, Section 225(2)

Municipal Law – Appeal Board – Appeal

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Cases by Name

GFL Environmental Inc. v Edenwold (Rural Municipality)

Hilbig Estate v Pasloski

Ken Wilson Architect Ltd. v 101154620 Saskatchewan Ltd.

Leo v Global Transportation Hub Authority

Moore v Moore

Otte v Regina (City)

regard because the evidence had been available at trial. The appeal court did allow the affidavit for the purpose of responding to the appellant's ineffective counsel argument. The issues were discussed as follows: 1) the appellant consented to the Crown's s. 715 application at trial. The appeal court found the consent to be a complete answer to denying the ground of appeal; 2) there are two components to an allegation of ineffective counsel: a prejudice component and a performance component. If an appellant did not suffer any prejudice by counsel's alleged incompetence, then it is unnecessary to consider the performance part of the test. The prejudice component can be made out in two ways: a) by establishing that the incompetence of trial counsel caused an adjudicative unfairness; or b) by establishing that, had trial counsel performed competently, there was a reasonable probability the verdict would have been different. The appellant did not argue adjudicative unfairness. The appeal court was not convinced that the result would have been different if the appellant's trial counsel had done what the appellant said he should have done. The issue at trial was the credibility of witnesses. On the whole of it, the appeal court was not satisfied a miscarriage of justice occurred in the case; 3) the trier of fact has to make determinations based on the whole of the admissible evidence adduced at trial. Further, corroborative evidence is not required to prove a sexual assault. This is expressly provided for in s. 274 of the Criminal Code. The Crown conceded that it asked an improper question of the appellant. It was improper for the Crown to ask the appellant on cross-examination to explain the testimony of a Crown witness. The appeal court concluded that the error did not have any effect on the outcome of the trial.

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Phillips Legal Professional Corporation v Schenher, 2020 SKCA 87

Ottenbreit Ryan-Froslie Leurer, July 23, 2020(CA20087)

Barristers and Solicitors – Solicitor's Lien
Debtor and Creditor – Priority of Claims
Statutes – Interpretation – Legal Profession Act, 1990

The appellant acted for the respondent, K.S., in a family law dispute involving K.S.'s former spouse. The trial judge ordered the sale of the family home with the proceeds to be divided. K.S.'s share of the proceeds was paid into the appellant's trust account and the appellant claimed a solicitor's lien against those funds. K.S. entered into a common-law relationship with the other respondent, M.S. When that relationship broke down, two decisions emanating from those proceedings impacted the appellant's lien. Two decisions were appealed. The first decision required monies in trust to be paid to M.S. The appellant did not act for M.S. or K.S., and

Patel v Saskatchewan Health Authority

Phillips Legal Professional Corporation v Schenher

R v Ballantyne

R v Bear

R v Littlewolfe

R v Wapass

Racicot v Burnouf

Saskatchewan Government Insurance v Schira

Thibeault v Saskatchewan Apprenticeship and Trade Certification Commission

Wilchuck v Westfield Twins Condominium Corporation

Willows v Key

Yashcheshen v Canada (Attorney General)

Yashcheshen v Canada (Attorney General)

Zhao, Re (Bankrupt)

had no knowledge of the order before it was issued. The second decision resulted from an unsuccessful application by the appellant to set aside the family law judgment and for an order that a portion of the money held in trust be used to satisfy its lien. K.S. and M.S. began living together in July 2013. In September 2014, K.S. signed a $75,000 promissory note in favour of M.S. The trial judgment requiring the sale of the family home of K.S. and her former spouse was rendered in August 2015. K.S. and M.S. separated in March 2016. M.S. commenced an action to realize on the promissory note in October 2016. A default judgment was issued. The judgment was registered with the Personal Property Registry. In March 2017, K.S. commenced an action against M.S. for division of their family property. That same month, K.S. brought an application to set aside the default judgment and registration in the Personal Property Registry. In April 2017, K.S. authorized the appellant to withdraw $35,591.99 from the money held in trust for legal fees and disbursements. The application to set aside the noting for default and default judgment was granted in June 2017. The appellant was directed to hold $76,621.80 in trust. K.S. did not appear at the trial between her and M.S. The trial judge dismissed K.S.'s application for division of family property and granted M.S.'s claim pursuant to the promissory note. In the judgment prepared for issuing, M.S.'s counsel inserted a paragraph that the money held in trust shall be released to M.S. as payment towards the money K.S. owed him. M.S. and his counsel were both aware that the appellant was claiming a lien with respect to the monies it held in trust. The issues were: 1) whether the appellant had standing to appeal the family law judgment; 2) whether the trial judge erred in finding he was functus officio; 3) whether the trial judge erred in finding The Enforcement of Money Judgments Act (EMJA) did not apply; 4) whether the trial judge erred in determining the appellant did not have a valid solicitor's lien; 5) whether the trial judge erred in concluding that M.S.'s claim had priority; and 6) if the trial judge erred, what relief should be granted by the court?

HELD: The appeals were allowed. The issues were determined as follows: 1) the appeal court found that the appellant had a right to appeal the family law judgment. Section 7 of The Court of Appeal Act, 2000 sets out the general right of appeal, which does not limit the right to appeal a Queen's Bench decision to a party. Non-parties may be allowed to appeal. The appeal court found that the appellant had standing to appeal because the judgment ordered the appellant to do something, namely, to pay money it held in trust to M.S. The appellant was denied procedural fairness because he did not have the opportunity to appear and present his position before the family law judgment was rendered. The court set aside the two paragraphs in the judgment providing for payment out of the trust funds to M.S.; 2) it was not necessary to address the question of whether the trial judge erred in determining he was functus officio; 3) the appellant was not successful in his argument that the trust order and the order setting aside default judgment were preservation orders granted pursuant to the EMJA. The trial judge was found not to have erred in concluding that the EMJA did not apply in the circumstances; 4) the appellant claimed a solicitor's lien pursuant to ss. 66(3) of The Legal Profession Act, 1990. There are two types of solicitors' liens at common law: retaining (possessory) liens and charging liens. In Saskatchewan, the common law respecting solicitors' liens has been codified in s. 66 of The Legal

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

Profession Act, 1990. The appeal court found that ss. 66(3) encompassed both retaining and charging liens. The appeal court interpreted ss. 66(3) as automatically creating a charging lien where the property "recovered" or "preserved" is in a lawyer's possession. The priority of such liens must be dealt with by application of the common law. The appeal court found that the trial judge erred in concluding that the appellant did not have a valid lien against the monies it held in trust. The trial judge was incorrect to conclude that the funds came into the appellant's account by virtue of the trust order. They came into the account as a result of the appellant's efforts on behalf of K.S. in obtaining and enforcing judgment against K.S.'s former spouse. M.S. was not a secured creditor. He was an unsecured creditor with no ownership interest in the funds. The funds were owned by K.S. when they went into trust and they continued to be owned by her following the granting of the orders. The trial judge was also found to have erred by not differentiating between retaining liens and charging liens. The appellant's lien was a charging lien, not a retaining lien. All of the required conditions were met for a charging lien; 5) the trial judge erred in determining that M.S.'s claim had priority over the appellant's lien. M.S. was aware of the lien claim, as was his counsel. M.S. was not first in line for the funds due to the promissory note. The appeal court concluded that it would not be equitable for M.S. to receive the funds while the appellant went unpaid for the services rendered to obtain them. Also, at common law, a solicitor's lien takes priority over the claim of an unsecured judgment creditor; and 6) the appellant's fees and expenses should be paid first. The appeal court ordered that $48,352.24 of the money held in trust be paid to the appellant to satisfy K.S.'s outstanding account. The parties were given timelines within which to make written submissions regarding costs.

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Saskatchewan Government Insurance v Schira, 2020 SKCA 88

Richards Whitmore Schwann Leurer Kalmakoff, July 27, 2020 (CA20088)

Automobile Accident Insurance Act – Appeal – Causation
Automobile Accident Insurance Act – Costs
Automobile Accident Insurance Act – Income Replacement Benefits – Appeal
Insurance – Automobile Accident Insurance – Benefits – Income Replacement Benefits
Civil Procedure – Appeal
Statutes – Interpretation – Automobile Accident Insurance Act, Section 191

The appellant sought no-fault income replacement benefits from the respondent in relation to three accidents. She appealed the respondent's decision that she did not qualify for the benefits under The Automobile Accident Insurance Act (Act) to the Court of Queen's Bench, which found that the appellant was entitled to the benefits. The respondent appealed the Court of Queen's Bench decision based on a procedural aspect of an appeal taken pursuant to the Act and also argued that income replacement benefits should have only been allowed at a reduced level due to the appellant's pre-existing psychological condition. The appellant also cross-appealed on the question of costs. In May 2008, the respondent denied the appellant benefits from a March 2005 accident, indicating that her difficulties were caused by psychological problems unrelated to the accident. The respondent rejected the appellant's claims for accidents in March 2010 and March 2011 by letter in April 2015, indicating that there was no objective evidence to support an occupational disability was caused by injuries suffered in these collisions. The appellant commenced a claim against both rejection letters. The parties raised some procedural issues before the Court of Queen's Bench. The appellant questioned the respondent's standing and the respondent raised a question regarding the appellant's right to call evidence. The chambers judge laid out what amounted to a new procedural regime. After applying the regime, he decided that the respondent's decision with respect to the March 2005 accident was "logical and reasonable, and it accorded with the evidence." The chambers judge relied on the expert opinion of a chronic pain expert who concluded that the injuries the appellant suffered in the March 2005 accident had materially contributed to her inability to return to teaching. The chambers judge found that the appellant had established an entitlement to income replacement benefits. The appeal was then resolved in the appellant's favour. The chambers judge also found that the March 2010 and March 2011 accidents had also materially contributed to the appellant's inability to return to work. He did not find that the appellant was entitled to be fully indemnified for the expenses she had incurred. She was awarded party and party costs on column 2 of the Tariff of Costs. The appeals raised three issues: 1) the procedure to be used in an appeal pursuant to s. 191 of the Act; 2) the substantive merits of the appellant's claim for income replacement benefits; and 3) the question of costs. HELD: The appeal and cross appeal were dismissed. The issues were dealt with as follows: 1) the no-fault system is not a formal quasi-judicial proceeding conducted by the respondent acting as an administrative tribunal. It is a claims administration process managed by an insurer. The appeal court addressed the use of the term "true appeal" to describe s. 191 appeals by the court in Terry v Saskatchewan Government Insurance. The court concluded that s. 191 appeals are not appeals on the record. An appeal pursuant to s. 191 is commenced by statement of claim, and all of The Queen's Bench Rules respecting actions commenced by statement of claim must be adhered to. A resulting trial in the Court of Queen's Bench is the equivalent of a trial involving an insured and a first-party insurer. The parties would not necessarily be limited to presenting evidence that was before the insurer when the benefit decision was made. Both parties would be entitled to cross-examine and present argument in the usual way. There were significant legal shortcomings in the chambers judge's approach to the procedural aspect of appeals to the Court of Queen's Bench brought pursuant to s. 191 of the

Act; 2) the appellant's entitlement to replacement benefits, if any, is under s. 113(2)(a) of the Act. The respondent submitted that the chambers judge erred by finding that the appellant was entitled to income replacement benefits, using four arguments: a) the chambers judge improperly used a "material contribution to the risk" test to determine whether the appellant was unable to continue her employment. The respondent argued that the chambers judge should have applied the "but for" test for causation. The chambers judge did not make a reviewable error. He accepted the expert's opinion that the March 2005 accident had been the cause of the appellant's inability to return to work. He essentially decided that "but for" that accident, the appellant would have been able to continue her employment; b) the chambers judge should have discounted the amount of benefits payable either by apportioning benefits to reflect the limited extent to which the accidents contributed to the appellant's inability to work or through the application of the crumbling skull doctrine. The respondent did not argue that the appellant was only entitled to a reduced level of income replacement benefits due to pre-existing conditions until its factum was filed. The appeal court did not deal with the issue; c) the chambers judge erred in relying on the expert's opinion because he was not qualified to give evidence about the effect of pre-existing psychological factors on the appellant's ability to continue her employment. The appeal court did not find an error for numerous reason; and 3) the appellant argued that she was entitled to be reimbursed for "all legal fees and disbursements." The appeal court was not persuaded of same. Subsection 193(11) does use the word "costs" to indicate that the respondent shall reimburse a claimant for the claimant's "costs" in the prescribed amount. The "costs" in the Act are subject to regulation and the prescribed amount, so the Legislature must not have intended all costs incurred to be paid. Further, ss. 193(12) provides the respondent with the ability to tax a claimant's bill. If the Legislature intended that the respondent would always have an obligation, the wording would not be that the bill could be taxed "if" the respondent were ordered to pay the same. Further, a chambers judge does not have to award costs in the same way as if the matter had been before the commission. The appellant was awarded costs in respect of this appeal.

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GFL Environmental Inc. v Edenwold (Rural Municipality), 2020 SKCA 89

Schwann Leurer Tholl, July 28, 2020 (CA20089)

Municipal Law – Appeal – Property Taxes – Assessments
Municipal Law – Assessment Appeal – Notice of Appeal
Statutes – Interpretation – Municipalities Act, Section 225(2)

The appellant appealed its 2018 municipal tax assessment on its commercial property (the property). The Saskatchewan Assessment Management Agency (SAMA) was the assessor for the rural municipality. The cost approach was used to value the property. A value was determined for the land and the improvements separately. The market adjustment factor (MAF) used for the property was 1.72, meaning that the improved property would sell for more than its depreciated cost. The appellant argued that the MAF was too high, resulting in an overstatement of the value of the improvements located on the property. The assessed value of the land was determined to be $597,600 and the value of the improvements was $3,106,200. The overall assessment was $3,703,800. The appellant argued that a recent sale of vacant land was not included in SAMA's calculations. The inclusion of the sale would result in the vacant land value being increased and the improvement value being decreased, with a reduction in the MAF. The reduction in the MAF would result in a decrease in the assessed value of the improvements portion of the property by an amount that exceeded the increase in the assessed value of the land. At the appeal to the Board of Revision (the board), the total assessed value of the property was reduced by $378,600. The appellant's appeal to the Assessment and Appeals Committee (the committee) was not successful. The issues on appeal were: a) whether the committee erred in upholding the board's conclusion that the assessor could make corrections to the assessment model in the context of the appellant's appeal without initiating an appeal alleging errors in that model; 2) whether the committee erred in its interpretation of s. 225(2) of The Municipalities Act (Act); and 3) whether the committee erred in determining the assessor's decision to correct alleged errors in the assessment model was subject to deference.

HELD: The issues were determined as follows: 1) for a taxing authority to change an aspect of the assessment model, it must file its own notice of appeal. Section 225 of The Municipalities Act (Act) requires that only changes specifically sought in a notice of appeal can be granted. The board's role is limited to correcting or changing the aspects of the assessment that are put into issue by the notice of appeal. SAMA was not successful in its argument that changes to decrease the assessed value could be made without its filing a notice of appeal. The appellate body's (the board's or the committee's) remedial authority extends only to correcting specific errors that are raised in a notice of appeal. The specific error alleged by the appellant was the omission of a vacant land sale. The other errors alleged were the direct consequence of that omission. The committee erred in law when it failed to recognize that the issue before the board was whether the model was in error in the manner identified by the appellant, and what change in the assessment flowed from the correction of that error once that error was shown to exist. The appeal court concluded that it was not possible to justify the adjustments SAMA wanted, and the board made, to the MAF on the basis that the appellant had put them into issue in their notice of appeal. The committee erred by failing to recognize that the board's jurisdiction extended only to addressing and correcting for the omission of the vacant land sale from the land analysis and further errors that flowed directly from that erroneous omission. The SAMA changes were a re-analysis of the MAF; 2) the appeal court found that the committee was correct in understanding that s. 225(2) was applicable

in the appellant's appeal. Section 225(2) prohibits a taxpayer from taking advantage of a decrease in a land assessment without having to account for other changes that directly and necessarily flow from that decrease. The appeal court did not, however, agree with SAMA that all aspects of the improvement calculation are in play once an appeal is made concerning the land. The committee erred in law when it interpreted s. 225(2) as providing a reason or justification to expand the scope of the appeal to encompass the changes to the assessment that went beyond the correction of errors identified in the appellant's notice of appeal; and 3) the committee did not err regarding deference. The committee did not determine that the assessor's decision to correct the alleged errors was subject to deference. The committee's decision dismissing the appeal was set aside. The parties argued that the matter should not be remitted back to the committee, but rather should be remitted back to SAMA to make the appropriate calculations. The appeal court did not know where the authority for that order came from. The parties were given leave to return the matter to the appeal court panel if they wished to make submissions in that regard. Costs were awarded to the appellant for both the leave to appeal application and the appeal.

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R v Wapass, 2020 SKCA 90

Caldwell Schwann Tholl, July 29, 2020 (CA20090)

Criminal Law – Break and Enter with Intent to Commit Indictable Offence – Sentencing – Appeal

The Crown appealed against the decision of a Provincial Court judge to sentence the respondent to an 18-month conditional sentence (CSO) after his conviction for breaking and entering with intent to commit an indictable offence contrary to s. 348(1)(a) of the Criminal Code on the ground that, under s. 742.1(c) of the Code, the sentence was illegal. The Crown also sought to adduce fresh evidence that the respondent breached the CSO within a day of its imposition. He failed to abide by the condition that he reside in his sister's residence and to not change his residence without approval. At the hearing for this breach, the respondent had admitted that he never had any intention of living at his sister's house despite his representations to the contrary to the sentencing judge. The respondent had entered a private residence, ransacked it and stolen a number of personal items and heirlooms from the owner. The respondent's criminal record included 70 youth and adult convictions, including multiple convictions for breaking and entering and being unlawfully in a dwelling house. The Crown had recommended a custodial sentence of 18 to 24 months, at the lower end of the range in recognition of the significant Gladue factors present in the respondent's life. Defence counsel argued

that time served on remand followed by a community-based sentence with conditions involving addictions treatment and counselling to support the respondent's return to education would be appropriate. The sentencing judge noted the impact the offence had had on the homeowner and the presence of Gladue factors and decided that any sanctions other than imprisonment were reasonable in the circumstances. Taking into account the time on remand, he imposed an additional 18 months to be served in the community under the CSO.
HELD: The appeal was allowed. The court set aside the 18-month CSO and varied the sentence by imposing a term of 18 months' incarceration. It found that the sentence was demonstrably unfit because it did not include a period of custodial incarceration to reflect the seriousness of the offence and the respondent's criminal record, and because it did not comply with s. 742.1 of the Code. Although the fresh evidence was relevant and credible, the court dismissed the application to adduce it. It could not have affected the sentencing judge's assessment of a fit sentence because it was evidence of post-sentencing non-compliance with the sentence.

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Leo v Global Transportation Hub Authority, 2020 SKCA 91

Richards Schwann Tholl, August 4, 2020 (CA20091)

Statutes – Interpretation – Freedom of Information and Protection of Privacy Act

The appellant, a CBC journalist, appealed the decision of a Queen's Bench chambers judge to dismiss his appeal made pursuant to s. 57 of The Freedom of Information and Protection of Privacy Act (FOIPPA) for access to certain records held by the Global Transportation Hub Authority (GTHA), a government institution, and awarded costs against him (see: 2019 SKQB 150). The appellant filed his access to information requests with GTHA in 2017. The GTHA advised him that some of the requests contained third party information as described in s. 19 of FOIPPA. It then gave notice to third parties, including the respondent Brightenview, of their right to make representations to the effect that access should be denied. After receiving no response from the GTHA within the statutory period of 30 days under s. 7, the appellant proceeded under s. 49(1)(b) of FOIPPA to seek a review by the Information and Privacy commissioner. The commissioner notified GTHA of the review and asked GTHA to explain its failure to respond. The GTHA advised the appellant that it had received third party representations from Brightenview with respect to the records and had revised them to be released so as to remove third party information. The appellant and Brightenview were informed that they had 20 days to request a review by the commissioner of the decision. In response to Brightenview's request for

review, the commissioner undertook a review regarding GTHA's position on s. 19 exemptions. It noted its position that certain records would not be released because of exemptions under ss. 16, 17, 18, 22 and 29 of FOIPPA. The commissioner released his report that dealt with the failure of GTHA to comply with s. 7 and with Brightenview's request for a review of the possible release of the records and found that s. 19(1)(b) or (c) did not apply to those records. The commissioner recommended that GTHA review and prepare the records, except for some exemptions under s. 29, and release them to the appellant. The report said nothing about the possible application of ss. 16, 17, 18 and 22 and expressly noted that only s. 19(1)(b) and (c) were considered. GTHA informed the appellant that it accepted the recommendation to review the records he requested applying exemptions it considered appropriate, but would not accept the finding that s. 19 was not applicable. The appellant appealed this to the Court of Queen's Bench, taking issue with the GTHA's decision to apply the third party exemption to certain records. Before the appeal, GTHA provided the appellant with redacted copies of records he requested and applied ss. 15, 17, 18 and 22 as well as s. 29, but did not invoke s. 19 at all. The chambers judge reviewed all the records under ss. 15, 17, 18, 22, 24 and 29 and found GTHA had properly invoked the exemptions. Regarding s. 19(1), the judge noted that GTHA was not claiming exemptions based on it and it was up to Brightenview to establish them. He did not need to decide whether any of the records fell within its scope, but decided that all of the records withheld by GTHA had been properly redacted on the basis of the exemptions it relied upon. The appellant argued that the chambers judge erred: 1) by considering exemptions raised for the first time on appeal. The only issue before him was whether s. 19 applied to the records requested. Only s. 19 exemptions were raised with the commissioner and because they played no role in GTHA's decision to deny access to them, all of them should be released in their entirety ; 2) by misapplying s. 18(1)(f); and 3) by awarding costs against him. HELD: The appeal was allowed only with respect to costs. The court found with respect to each ground that: 1) it agreed that the chambers judge had no authority to consider the question of whether the s. 15, 17, 18 and 22 exemptions applied to the records in issue but that did not mean that the appellant was entitled to access them in their entirety. Those exemptions had never been found invalid in a procedurally proper process because the proceedings in this case did not respect the scheme of Part VII of FOIPPA. The appellant had initially sought a review by the commissioner under s. 49(1)(b) because GTHA had not responded to his requests. The commissioner then received a separate application from Brightenview under s. 49(3) and then conducted his investigation and made recommendations under s. 55, noting that s. 19 was not applicable to the records in issue. GTHA decided to accept the recommendations under s. 56, applying appropriate exemptions, including s. 19, and it was from that decision the appellant appealed. Before the hearing, however, GTHA provided him with the records in issue using the other exemptions listed above. Inexplicably, the appeal proceeded on the basis that the judge should consider exemptions beyond those found in s. 19. The applicability of ss. 15, 17, 18 and 22 was put before the judge even though the propriety of relying on those provisions had never been the subject of a review by the commissioner. In addition, GTHA had released the records without claiming s. 19 exemptions. Therefore, if

the appellant was concerned about the GTHA's decision to apply the other provisions of FOIPPA in denying access to some of the records, he was required to apply to the commissioner under s. 49 for a review. He could only appeal to the Court of Queen's Bench following that step and the GTHA's response to the commissioner's recommendations; 2) it was unnecessary to deal with this ground in light of the previous finding. However, the court held that judge's application of s. 18(1)(f) was not valid. The individual or entities doing business with a government institution are required to follow the access to information regime prescribed by FOIPPA; and 3) in light of the situation, it was appropriate for all of the parties to bear their own costs in the Queen's Bench appeal because the appellant's lack of success was due to the judge relying on exemptions not properly before him. However, the appellant's appeal had been moot because GTHA had not applied s. 19 to any of the records, and so an award of cost should have been made against him.

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R v Littlewolfe, 2020 SKQB 162

Smith, June 5, 2020 (QB20169)

Criminal Law – Break and Enter with Intent to Commit Indictable Offence – Sentencing
Criminal Law – Aboriginal Offender – Sentencing – Gladue Report

The accused was convicted after trial of breaking and entering and committing theft contrary to s. 348(1)(b) of the Criminal Code, having his face masked with the intent to commit an indictable offence contrary to s. 351(2) of the Code, having a cross-bow in his possession while prohibited from doing so by reason of an order made pursuant to s. 109 of the Code in 2017, contrary to s. 117.01(3) of the Code, and failing to comply with a probation order made in 2017, contrary to s. 733.1(1) of the Code. The accused and two others broke into the house of the victim and robbed him of $65,000 in cash and other items such as coins and stamps, possibly worth $50,000. At the time of sentencing, only the accused had been convicted. The Crown submitted that the accused should receive a sentence of 28 to 30 months on the first count, considering the accused's criminal record and the circumstances of the offence. Prior to this offence, the accused had been convicted of theft under $5,000 and failure to appear as well as assault with a weapon and wearing a disguise with intent. It also argued that the sentences for the third and fourth charges should be consecutive on the basis of R v Sakebow. The defence submitted that an appropriate sentence on the first count would be 12 to 15 months on the basis of the Gladue factors present in the accused's life.
HELD: The accused received a sentence of 25 months' imprisonment on the first charge and two months

concurrent for wearing a mask, one year concurrent for possession of a cross-bow and 30 days consecutive for breach of condition. He was ordered to pay restitution of $65,000 pursuant to s. 738(1) of the Code and was subject to a lifetime firearms prohibition under s. 109 of the Code.

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Racicot v Burnouf, 2020 SKQB 180

Hildebrandt, June 24, 2020 (QB20178)

Statutes – Interpretation – Land Titles Act, 2000, Section 109

The applicant, the property guardian and personal co-decision-maker for A.E.B., her mother, sought an order pursuant to s. 109(1) of The Land Titles Act, 2000, directing the Registrar of Titles to remove the name of the respondent, her brother, from titles to three properties owned by A.E.B. The applicant deposed in her affidavit filed in support of her application that A.E.B. was in declining health and needed to be admitted to an assisted living facility and expressed concern about her ability to live alone pending such admission. However, because A.E.B.'s monthly income from Old Age Security and Canada Pension Plan was insufficient to meet the cost associated with living in the facility or paying down debt and taxes owed on some of her properties, it was necessary to sell three pieces of real estate. However, in 2017, A.E.B. transferred the title to those properties into joint ownership with the respondent. The transfers coincided with the execution of a trust agreement that stated that the transfers were made to facilitate estate planning. The agreement provided that the properties were A.E.B.'s and would remain so during her lifetime with the right to do with them as she needed. In the six months since he had been apprised of his mother's financial and health needs by the applicant, the respondent had declined to transfer the title to A.E.B.'s house to her. However, at the hearing of the application, he did not claim A.E.B.'s residential property, and by fiat, the court ordered that his name be removed from the title. The respondent asserted a beneficial interest in the other properties. He had previously issued a statement of claim suggesting that he should be declared the sole owner of two of the properties and pending their transfer to him, A.E.B. should be considered as merely holding them in trust for him. He deposed in his affidavit that he signed the trust agreement without knowing what it was and argued that it was inconsistent with A.E.B.'s expressed intentions that she wanted him to have the properties.
HELD: The application was granted. The court ordered the Registrar to remove the respondent's name from the titles and to issue them in the name of A.E.B. as sole owner. It found that regardless of the respondent's

belief or understanding regarding the trust agreement, it did not operate to prevent A.E.B. from using her property to obtain the funds she required to enable her to live in a safe environment.

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Moore v Moore, 2020 SKQB 181

Smith, June 24, 2020 (QB20170)

Family Law – Division of Family Property
Family Law – Summary Judgment

The petitioner wife brought an application for summary judgment respecting family property. The parties had separated in 2018 and the petitioner left the family home with the children. The respondent stopped making mortgage payments in July 2019 and the bank commenced foreclosure proceedings. In order to protect the equity in the home, the petitioner paid property taxes, fire insurance and a mortgage payment. In October 2019 the petitioner applied for an order allowing for the efficient sale of the home because the respondent would not agree to lower the sale price. The petitioner sought to avoid foreclosure proceedings, and in order to be able to afford to pay the mortgage payments, she advised that she would have to move back into the house which would also allow her to keep it in good condition and cooperate with the realtor. The order was granted, permitting the petitioner to have exclusive possession in February 2020 and to have sole control over arranging the sale of the home and to determine any change in the listing price without the consent of the respondent. The petitioner was unable to obtain the respondent's agreement to the impending sale of the house and he refused to sign the transfer. The house sale was also threatened by pending foreclosure and the effect of the pandemic. As a consequence, the petitioner sought and obtained another order that the title of the home be vested into the name of the purchaser and was granted costs against the respondent of $2,500. After the sale occurred, the equity remaining was $5,365. The other family property consisted of household items, vehicles, bank accounts, registered savings plans, and debts. The value of all of the foregoing was established but for a conflict between the affidavits sworn by each of the parties regarding the chattels allegedly converted by the respondent. HELD: The application was granted. The court found that there was authority that supported that summary judgment was available in the context of family law and in this case, it could make the necessary findings of fact and conclude that there was no genuine issue requiring a trial. Regarding the disputed value of the chattels, it found that it preferred the evidence provided by the petitioner, but reduced her valuation of the various chattels. After reviewing the assets and liabilities, it assigned the debts for which each party was

responsible and ordered the respondent to pay $56,000 to the petitioner in equalization within 90 days of the date of judgment except for $5,365 from the sale of the family home which was to be paid to the petitioner immediately.

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Otte v Regina (City), 2020 SKQB 182

Robertson, June 25, 2020 (QB20171)

Municipal Law – Appeal Board – Appeal

The appellant appealed the decisions of the Regina Appeal Board pursuant to s. 329(4) of The Cities Act. A City of Regina Bylaw Inspector had inspected a property owned by the appellant and issued two orders to comply under the authority of the Regina Community Standards Bylaw. The orders were mailed to the appellant by registered mail and indicated that the appellant was required to remove items and junked vehicles from the yard of the property. The appellant filed a notice of appeal with the Board in which he submitted that there were no materials or junk on the property, and that the vehicles parked there were in running order. The board heard the appeals without the presence of the inspector and had as exhibits before it the photographs taken by the inspector and a case summary for each order. The minutes respecting the two appeals were limited to statements that a board member had moved and another had seconded the motion that the orders to comply were confirmed. That was the information conveyed to the appellant by the board in its letter notifying him of the board's decision. The appellant then filed a notice of appeal with the Court of Queen's Bench under s. 329(4) of the Act.
HELD: The appeal was allowed and the orders were quashed. The court found that it was not appropriate to remit the matter to the board. The standard of review for a statutory appeal was correctness, and this was an appeal on the record. The board, as an administrative tribunal, had a duty to give reasons and, in this case, had failed to provide any reasons, let alone adequate ones. That deficiency prevented the court from performing its duty of appellate review.

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Yashcheshen v Canada (Attorney General), 2020 SKQB 185

Mitchell, June 30, 2020 (QB20174)

Civil Procedure – Pleadings – Statement of Claim – Application to Strike
Civil Procedure – Queen's Bench Rules, Rule 6-20, Rule 7-9(2)

The self-represented plaintiff brought actions against the defendants, the Attorney General of Canada and the Attorney General of Saskatchewan, alleging malicious prosecution and conspiracy, based on the alleged tortious actions of the RCMP; two Crown Prosecutors; a probation officer and a Legal Aid lawyer. She alleged that these individuals had breached her rights under ss. 7, 11, 12 and 15 of the Charter. The background to the plaintiff's claim began in 2015 when police charged her for criminal harassment against a complainant. At the time the plaintiff appeared in Provincial Court, she agreed to enter into a peace bond as authorized under s. 810 of the Criminal Code. Shortly thereafter, the plaintiff filed a notice of appeal against the peace bond. Under the belief that she was no longer required to abide by its terms, she failed to report to her probation officer and was then charged with an offence contrary to s. 811 of the Code. A Queen's Bench judge later quashed the peace bond on the basis that the plaintiff's agreement to it was not voluntary, unequivocal and informed. However, the Crown continued to prosecute the plaintiff under the s. 811 charge, and in 2017, a Provincial Court judge found her guilty and sentenced her to an absolute discharge. The finding of guilt was based upon the plaintiff's commission of the offence while the peace bond was in force. The plaintiff appealed her conviction, but it was eventually struck for her failure to perfect it whereupon the plaintiff appealed that decision to the Court of Appeal. The appeal was dismissed, and then the plaintiff commenced her actions against the defendants. The defendants applied to have the plaintiff's pleadings struck without leave to amend, on the basis that they were scandalous, frivolous, vexatious and an abuse of process, contrary to Queen's Bench rules 7-9(2)(b) and (e) or, alternatively, that the claim be dismissed by way of summary judgment pursuant to Queen's Bench rule 7-5(1)(a). At the hearing, the plaintiff requested an adjournment because she had not received all of the Crown disclosure regarding her breach of recognizance charge. The defendants objected. The plaintiff left the hearing when the court raised the matter of awarding costs against her if her request for adjournment were granted. Both defendants requested costs, and Saskatchewan argued that enhanced costs were warranted.

HELD: The defendants' application to strike the plaintiff's pleadings in their entirety as an abuse of process was granted. The court first found that it had the authority to hear the chambers application in the absence of the plaintiff under Queen's Bench rule 6-20. It denied her request for an adjournment because granting it would condone her abuse of its process. It struck the plaintiff's pleadings under Queen's Bench rule 7-9(2)(e) because it found that she was collaterally attacking her criminal conviction and attempting to relitigate the issues decided in the criminal trial. It was unnecessary to address whether it should grant summary dismissal of the plaintiff's action. In light of the plaintiff's limited means, the court ordered the plaintiff to pay reduced costs of $500 to the Government of Saskatchewan and $250 to the Government of Canada.

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Hilbig Estate v Pasloski, 2020 SKQB 186

Currie, June 30, 2020 (QB20175)

Guardianship – Dependent Adult – Accounting
Guardianship – Dependent Adult – Adult Guardianship and Co-Decision-Making Act
Wills and Estates – Costs – Solicitor and Client Costs

The defendant was appointed personal and property guardian of her mother in 2013. Her mother died in December, 2017 and the mother's husband, W.H., was the executor of her estate. He died a year later, and his executor assumed administration of the mother's estate as well. W.H. had commenced litigation against the defendant and his executor continued it after W.H.'s death. The defendant applied for an order addressing the last few details of guardianship, including an order directing payment to her of a fee for acting as guardian. The estate opposed the payment of a fee because the defendant had indicated that she would not charge a fee when she applied to be appointed guardian.
HELD: The Adult Guardianship and Co-decision-making Act empowers a court to set fees for personal guardians and property guardians. Neither the Act, Regulations, or application form specify that a guardian is barred from being paid a fee in the future if they indicate they do not want a fee on their application. The court had discretion to permit a fee. The court had to consider all of the circumstances to determine the fairness and propriety of permitting the defendant to receive a fee. The defendant was required to devote far more time and energy to the guardianship than she reasonably could have expected when she applied to be appointed. There was no question that the work done by the defendant was necessary, nor was her proposed fee unreasonable. The court concluded that there was fundamentally no unfairness or injustice in a reasonable fee being paid for her reasonable work. There was no unfairness or impropriety arising from the defendant's indication on the application that she did not plan to charge a fee. The substantial change in the circumstances overcame the effect of that indication. Fairness and propriety justified her receiving the fee. The defendant's costs were ordered to be paid by W.H.'s estate on a solicitor-client basis. The estates' costs were also ordered to be paid by the estate of W.H.

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Zhao, Re (Bankrupt), 2020 SKQB 187

Thompson, July 6, 2020 (QB20176)

Bankruptcy – Discharge – High Income Tax Debt
Bankruptcy – Discharge Hearing
Bankruptcy – Income Tax Reassessment – Objection Process
Statutes – Interpretation – Bankruptcy and Insolvency Act, Section 172.1
Statutes – Interpretation – Income Tax Act, Section 128

The creditor objected to the discharge of the bankrupt from bankruptcy. The bankrupt filed tax returns and paid his taxes as required until he received a notice of reassessment requiring him to pay $1,193,367.84 in late 2016. The bankrupt objected to the reassessment. The Canada Revenue Agency (CRA) and the objecting creditor, the Minister of National Revenue (MNR), took the position that the Trustee in Bankruptcy (trustee) withdrew the objection. When the objection was withdrawn, the assessment was construed as certain and, accordingly, a provable claim in bankruptcy. The bankrupt indicated that he declared bankruptcy not to avoid taxes, but due to the collapse of the oil industry. He said that a sheriff was threatening to seize his assets in satisfaction of personal guarantee liabilities that arose with the economic challenge. MNR argued that the bankrupt should pay $5,000 and not be discharged from bankruptcy for two years, given the significant personal income tax liability. The trustee included the reassessed income tax amount in the bankruptcy estate as a proven claim because the trustee was advised that CRA confirmed the assessment. The trustee did express serious reservations about the tax liability in her report to the court. The issues were: 1) whether the bankrupt was honest but unfortunate: a) the objection process; and b) the factors; and 2) disposition.
HELD: The issues were addressed as follows: 1) because the bankrupt had more than $200,000 in personal income tax liability that amounted to 75% or more of the total proven unsecured claims under the bankruptcy, section 172.1 of the BIA governed the bankruptcy discharge process: a) the objection process – the court determined that it was not appropriate for it to ascertain whether the objection was properly closed. A trustee's ultimate obligation is to the creditors, not to the bankrupt. The trustee indicated that she did not send a letter to the CRA withdrawing the bankrupt's objection as wanted by the CRA because she did not have the authority to do so. The trustee also indicated that she advised CRA of the same. The court found that the CRA appeared to assume that the trustee was the bankrupt's legal representative. A CRA representative was not available for the court to question, which was noted to lead to several problems. Section 128(2) of the Income Tax Act (ITA) renders the trustee the bankrupt's agent, without exception, which could lead to CRA's confusion. The agency role would typically mean only with regard to property rights, not rights of defence, but it could nonetheless lead to confusion. The court concluded that the bankrupt should be able to pursue the objection and appeal, notwithstanding his bankruptcy status. The bankrupt did initiate the objection, and there was a

conflict between the ITA's characterization of the trustee's role and that role as contemplated by the BIA. The court proceeded to conduct the s. 172.1 analysis on the basis that the objection process was handled properly; b) factors – circumstances of the bankrupt at the time the debt was incurred - the bankrupt paid all his debts until the bankruptcy. The reassessment resulted from CRA's finding that the bankrupt failed to report income in three tax years. The bankrupt guaranteed the loans of his son, who undertook residential development projects in rural oil rich-communities. In 2014, the economic conditions in Saskatchewan took a sharp decline when the price of oil plummeted. The bankrupt's personal guarantees were called when his son's loans went into default. The bankrupt received the reassessment from CRA around the same time as action was being taken on the guarantees. The bankrupt said that he never earned the income attributed to him by CRA in the reassessment. The court concluded that the circumstances under which the debt incurred remain unclear to the court. Efforts of the bankrupt to pay the personal income tax debt – the bankrupt did not pay any of the reassessed amount because he contested the figure and also because he did not have the funds to do so. Did the bankrupt make payments to other debts – there was no evidence the bankrupt made payments to other debts. The bankrupt's wife purchased a vehicle when the family's previous vehicle had been totalled. The son also made mortgage payments on the bankrupt's house. He lived with the bankrupt at the time. The bankrupt's prospects – the bankrupt was 65 and not employed. He lived with his wife, his son, and his son's family. The bankrupt's wife was disabled when their vehicle was totalled. The bankrupt suffered a head injury in the vehicle accident. The bankrupt was suffering something akin to a concussion that rendered him unable to work; 2) the court ordered the bankrupt to pay $5,000 as a condition of discharge. The order was made as an obligation of the court to render a deterrent measure, not because there was clear evidence of wrongdoing. The court did not order the two-year discharge suspension as sought by MNR.

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Yashcheshen v Canada (Attorney General), 2020 SKQB 188

Mitchell, July 7, 2020 (QB20177)

Civil Procedure – Pleadings – Statement of Claim – Application to Strike
Civil Procedure – Queen's Bench Rules, Rule 6-20, Rule 7-9(2)
Statutes – Interpretation – Limitations Act, Section 5, Section 18

The defendant applied for an order pursuant to Queen's Bench rule 7-9(2)(b) striking the self-represented plaintiff's claim in its entirety on the ground that all the events giving rise to her alleged causes of action

happened or were discoverable more than two years prior to the issuance of the statement of claim in 2018. The application had been adjourned three times previously at the request of the plaintiff. At the time of hearing, the plaintiff requested another adjournment because she was unwell. She left the courtroom because she objected to the judge hearing the application as he had been involved in a heated exchange with her during another application to strike her pleadings in another action in which she had also requested an adjournment (see: 2020 SKQB 185). The application proceeded in her absence and the defendant presented its case that the material facts underlying the plaintiff's claim were discoverable from 2005 through 2011 but she had not initiated her statement of claim until 2018. Consequently, the two-year limitation period set out in s. 5 of The Limitations Act had expired and the claim was statute-barred.
HELD: The application was granted and the plaintiff's claim was struck in its entirety. The court found that it could proceed with the application in the absence of the plaintiff under Queen's Bench rule 6-20 and it denied her request for an adjournment because of her contemptuous behaviour. Regarding the defendant's application, it found that based on the plaintiff's own admissions and pleadings in both the statement of claim and amended statement of claim, the two-year limitation period set out in s. 5 of the Act had plainly expired. Moreover, she failed to satisfy her burden under s. 18 of the Act to demonstrate that the claim was not statute-barred. Consequently, the claim could not succeed at trial and was therefore the very definition of a vexatious pleading under Queen's Bench rule 7-9(2)(b). Costs in the amount of $2,000 were awarded to the defendant and the plaintiff was given 120 days from judgment to pay. Although her fee waiver certificate would not have insulated her against a costs award, the certificate had recently been cancelled in any case (see: 2020 SKQB 160). The award of heavy costs was made against the plaintiff because of her conduct and contempt for the court's process.

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Thibeault v Saskatchewan Apprenticeship and Trade Certification Commission, 2020 SKQB 192

Scherman, July 20, 2020 (QB20179)

Statutes – Interpretation – Apprenticeship and Trade Certification Commission Regulations, Section 40

Pursuant to s. 30 of The Apprenticeship and Trade Certification Act, 1999, the appellant appealed from the decision of the Appeal Committee of the Saskatchewan Apprenticeship and Trade Certification Commission

that had upheld the decision of the commission to suspend his journeyperson certificate to carry on the trade of an electrician on the grounds of "fraud or misrepresentation" in connection with an examination he wrote to obtain his certificate. The initial decision to suspend the appellant's certificate was made by an authorized official of the commission pursuant to s. 40(2)(a)(i)(B) of The Apprenticeship and Trade Certification Commission Regulations on the grounds that he obtained his certificate by "fraud or misrepresentation." During the investigative phase of the commission, the appellant acknowledged that he had gained access to training and exam materials from a Dropbox account and shared such materials with other electrical apprentices. He stated to the investigator that the materials he accessed had not included the examination that he subsequently wrote to obtain his certificate. The exams in question were described as "compromised," meaning that they had been used in the past for interprovincial examination and had been intended to be kept securely so they could be reused, but as the security had failed, they were labelled "compromised" and after 2017 no longer used in the examinations. The commission took the position that the appellant knew or ought to have known that he should neither have accessed nor shared the materials from Dropbox. The appellant appealed and his statements were presented in evidence during the de novo hearing before the Appeal Committee. The commission argued that the appellant was in the best position to provide information about what exam materials he accessed and what he knew or understood when accessing them. As he chose not to testify at the de novo hearing before the committee, this failure permitted the committee to draw an adverse inference against him. His access to these materials gave him an advantage when writing his exam and this constituted fraud or misrepresentation. The committee made express findings of fact that prior to writing his exam, the appellant gained access to compromised exams and materials and shared them with other apprentices. The majority then concluded, without stating reasons for its conclusion, that the commission's decision would be upheld and the appeal dismissed. The issues on appeal were whether the committee: 1) erred in law in its conclusion that he obtained his certificate by fraud or misrepresentation: 2) lost jurisdiction by failing to provide reasons; or 3) should be disqualified because all the members of the committee had received a report prepared by the commission prior to the de novo hearing that stated the appellants and others had been properly suspended for fraud and misrepresentation for accessing the materials, and this raised a reasonable apprehension of bias.

HELD: The appeal was allowed and the committee's decision quashed. The court noted that as this was a statutory appeal, the standard of review was correctness. It interpreted the meaning of "fraud or misrepresentation" in s. 40(2) of the Regulations as unambiguously meaning a false statement, that is, known to be false or made recklessly as to whether it was true or false, intended to induce a party to rely on it to his or her detriment. As the appellant had been granted his certificate pursuant to s. 29(2), the right was vested and if there were any ambiguity in the meaning of "fraud or misrepresentation," it would be resolved by the presumption against interfering with vested rights. It found with respect to each issue that: 1) the appeal committee had erred in law in its decision. Accepting its factual findings, those facts did not constitute "fraud

or misrepresentation" within the meaning of the Act and Regulations. The committee had not undertaken any analysis of the grammatical or ordinary meaning of the phrase. The Regulations existing at the time did not permit a journeyperson certificate that had already been granted to be cancelled for academic dishonesty. To find fraud, the committee would have had to have before it evidence of, and a finding of, actual knowledge on the part of the appellant that what he was doing was wrong or prohibited. A finding that he ought to have known did not constitute fraud. 2) The appeal committee lost jurisdiction by failing to provide adequate reasons and the decision could be quashed on that ground as well. Finally, 3) the committee erred in deciding the appeal only on the basis of the evidence presented to it in the de novo hearing and the fact that it acquired knowledge or information contained in the report raised concern that the committee may have entered the hearing with predetermined views. In light of the court's decision on the first ground, it was unnecessary to deal with this issue. It awarded party and party costs to the appellant but declined his request for damages because s. 53 of the Act barred such relief in the absence of bad faith. The court also denied his request for solicitor-client costs as there was no evidence that there had been scandalous or reprehensible conduct on the part of the committee.

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Patel v Saskatchewan Health Authority, 2020 SKQB 194

Scherman, July 22, 2020 (QB20181)

Civil Procedure – Judge – Apprehension of Bias – Application for Recusal
Administrative Law – Apprehension of Bias – Recusal
Civil Procedure – Queen's Bench Rules, Rule 13-30

The plaintiff applied to the case management judge to recuse himself from presiding in legal proceedings on the basis of a reasonable apprehension of bias or, alternatively, that he exercise his discretion to do so, even though not legally disqualified. The background to the application involved the plaintiff's dispute with the Saskatchewan Health Authority (SHA), formerly the Regina Qu'Appelle Regional Health Authority. The SHA had suspended the plaintiff's privileges to work as an orthopedic surgeon and he brought an action against it founded on numerous causes. The plaintiff later commenced another action against the SHA's lawyer, Watson, and his law firm, Miller Thomson, in which he made various allegations of wrongdoing on their part and then filed an application seeking to remove Watson as SHA's counsel. In this application, the plaintiff argued that because the case management judge had previously been a partner in the same law firm as Watson and had in

the past acted for the Regina General Hospital, these factors gave rise to a reasonable apprehension of bias with respect to his application to have Watson removed as SHA's counsel. In addition, the case management judge had made a number of rulings against the plaintiff, erroneously, in the opinion of the plaintiff, that aggravated the taint of judicial partiality.
HELD: The case management judge recused himself based upon an abundance of caution and not a finding of disqualification. He found that the plaintiff had not met the burden of establishing a reasonable apprehension of bias. In reviewing and applying the test for reasonable apprehension of bias to justify disqualification, the judge addressed the plaintiff's evidence. The judge initially ruled that the plaintiff's affidavit evidence submitted was contrary to Queen's Bench rule 13-30 as prolix and irrelevant to the issue and struck inadmissible portions as speculation and argument. Regarding whether the plaintiff had satisfied the test for reasonable apprehension of bias, the judge ruled that that a reasonable and right-minded person would not conclude that he should disqualify himself either because he was "probably" friends with Watson, based on the fact that they had both been partners in the same firm 20 years earlier, or that he would have to adjudicate matters of serious potential impact on a former client, the SHA. The plaintiff had not presented a legal or factual argument that would support the conclusion that the SHA should be viewed as a former client on the basis that 40 years previously, the judge had acted for the Regina General Hospital. It did not disqualify the judge that he had made decisions against the plaintiff on another action or allegedly erred in his rulings that the plaintiff had appealed. Regarding the plaintiff's request for a discretionary recusal by the judge, he assessed the weight that should be given to the fact that the dispute was of great significance to the plaintiff and decided that if he continued to act and made decisions contrary to the plaintiff's interests, it could raise concerns about the impartiality of justice.

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Ken Wilson Architect Ltd. v 101154620 Saskatchewan Ltd., 2020 SKQB 195

MacMillan-Brown, July 23, 2020 (QB20182)

Statutes – Interpretation – Builders' Lien Act, Section 16

The plaintiff, the professional corporation of the owner architect, commenced an action against the defendants, 101154620 Saskatchewan Ltd. (620 Sask.), S.B., K.S., N.S., G.G. and N.G. The five individual defendants were directors and shareholders of 620 Sask. The action related to unpaid invoices for architectural services provided by the plaintiff to 620 Sask., a land development company, regarding a condominium project. Before

trial, the plaintiff discontinued its action against 620 Sask., K.S. and N.S. and reached a settlement and consent judgment requiring S.B. to pay $12,500. The trial proceeded against G.G. and N.G. The owner of the plaintiff corporation testified that after providing a range of services in connection with the project, he submitted invoices to S.B. for those services in the amount of $63,900 for payment by 620 Sask. G.G. and N.G. denied that they had ever seen the invoices and there was no evidence that the plaintiff sent the invoices to G.G. and N.G., nor any evidence that they received them. G.G. testified that he recalled that the plaintiff called him once in relation to paying a bill and that he contacted S.B. regarding it. Both N.G. and G.G. testified that notwithstanding the fact each shareholder of 620 Sask. owned 10 shares, it was S.B. who had effective control over the corporation and that they had no say in the business or decision-making of 620 Sask. Within a year of the invoices being rendered, 620 Sask. sold the property associated with the project and the net proceeds were paid out to N.S. and K.S. G.G. and N.G. stated that they were not involved in the sale and did not know of it until it had closed. They did sign resolutions allowing the sale to proceed. The plaintiff did not learn of the sale until he instructed his lawyer to file a builders' lien. By that time, the sale had closed and the sale proceeds disbursed. The plaintiff submitted that the proceeds of sale constituted a trust fund in the hands of 620 Sask. pursuant to s. 6(3) of The Builders' Lien Act (BLA) and its failure to pay the plaintiff constituted a breach of trust contrary to the BLA. The plaintiff argued that G.G. and N.G. assented to or acquiesced in conduct that they knew or ought to have known constituted a breach of trust: G.G. was aware of the invoice that had not been paid because the plaintiff phoned him about it, and G.G. and N.G. signed the resolution authorizing the sale of the property. The issue was whether the statutory liability of 620 Sask. attached to G.G. and N.G. pursuant to s. 16(1) of the BLA.
HELD: The plaintiff's claim was dismissed. The court interpreted s. 16 of the BLA relying on the jurisprudence associated with the identical provision found in Ontario's Construction Act. It found that the plaintiff had not met the burden of proving on a balance of probabilities the requirements set out in s. 16. It was satisfied that G.G. and N.G. did not have day-to-day involvement in the operations of 620 Sask. and characterized them as passive directors. It concluded that neither of the factors that the plaintiff relied upon were sufficient to elevate the involvement and knowledge of G.G. and N.G. to the level necessary to satisfy s. 16(1)(b).

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Willows v Key, 2020 SKPC 29

Demong, July 15, 2020 (PC20026)

Barristers and Solicitors – Compensation – Small Claims Court
Barristers and Solicitors – Fees
Small Claims – Costs

The plaintiff, a law firm, commenced the action to recover the balance of legal fees in relation to a criminal conviction appeal and interim judicial release pending the appeal. The total amount owing as per the claim was $7,015.07. The defendant defended and counter-claimed. The defendant argued that the amount charged was excessive, unfair, and unreasonable. He said the arrangement was for him to be charged a fixed fee of $5,000. The defendant counter-claimed for return of the $5,000 arguing he should have been advised up front that his application would ultimately be found to be without merit, and because he derived no value for the services provided. The defendant had been convicted of driving while his blood alcohol was over .08 and of failing to attend court. He was sentenced to a global sentence of 13 months plus a driving prohibition of three years and surcharges totaling $200. The lawyer was retained one week prior to the deadline to appeal, so he filed a pro forma Notice while he waited for the trial transcripts. The Crown vigorously challenged the application for judicial interim release and filed a comprehensive brief. The judicial interim release application was not successful because it was not established that the grounds of appeal were not frivolous. The judge also concluded that he could not accept that the defendant's release would be without significant risk to the public due to numerous previous drinking and driving and other driving convictions. The defendant abandoned the remainder of his appeal after the decision on his judicial interim release. The issues were as follows: 1) whether the arrangement between the parties was a fixed-fee agreement or a fee-for-service agreement; 2) if the arrangement was a fixed-fee agreement for the sum of $5,000 and no more, was the plaintiff automatically entitled to retain the $5,000 already paid, or could the court nevertheless assess the reasonableness of that fee and reduce it; and 3) if the agreement was a fee-for-service agreement, was the amount that was billed to the defendant fair and reasonable, and if not, what was a fair and reasonable value for the disbursements incurred and time spent on the file?
HELD: The issues were determined as follows: 1) There was no written retainer agreement. There was an email from the lawyer to the defendant's partner that reinforced that the defendant knew there was no guaranteed result and that it was a fee-for-service arrangement. The court found it highly unlikely that the partner would not have shared the information with the defendant. The court concluded that the arrangement was a fee-for-service arrangement; 2) the court determined that it could nonetheless assess the reasonableness of the bill whether the arrangement was fixed-fee or fee-for-service; and 3) the court reviewed each of the statements of account. The court accepted a nominal global charge of $50.00 for general office charges because no evidence was led or tendered on those charges. The plaintiff was entitled to a total of $739.49 in disbursements. The court found that it could determine what a typical lawyer with 17 years of experience might charge as an hourly rate. The court did not take issue with the lawyer's hourly rate of $275.00. The court

did find that the number of hours charged, which was 36.5, was excessive. The total charged was not fair and reasonable. The legal services were not particularly complex, nor particularly difficult, from an experienced criminal lawyer's perspective. There was no special skill required. A criminal lawyer would be familiar with the procedural rules. The defendant's partner undertook the responsibility of seeking and obtaining letters of support, which decreased the additional time usually required when a client is incarcerated. The lawyer participated at the hearing by phone. No evidence was tendered regarding the charges of other solicitors of the same standing at the bar for similar services. Two additional factors militated towards a reduced fee: (1) the defendant's ability to pay. The defendant lost his job when he was incarcerated, and he was the income earner of the family; and (2) the results obtained. The success on the appeal was a long shot, which was found to militate in favour of a reduced fee, but this was set off somewhat by the importance of the matter to the defendant. There was evidence presented that if the defendant's application for judicial interim release had been successful, he would have been able to participate in a contract that would result in a large income to him. Three general tasks were found to be excessive: the conversations and communications that the lawyer and the defendant and his wife had; researching and preparing the form of appeal notice, both pro forma and as amended; and research on the substantive law in relation to the matter. The court reduced the fees by 15 hours, $4,125.00. The resulting fee was $6,228.68, which the court found was at the high end of the spectrum for the type of services rendered. That fee would not give consideration for the results obtained, the client's prior consent to the fee, or the ability of the client to pay. Those factors were found to be reason to reduce the fee further. The court reduced the fee by a further 25% to $4,671.51. The total account with fees, disbursements, and taxes was $5,924.86. The plaintiff was entitled to judgment of $924.86 because $5,000 had already been paid. The court did not make an award of costs in the matter of the defendant being successful in setting aside the original default judgment. The parties filed sealed offers that had been made between the parties, to be opened following the decision. The court declined to make an order of costs.

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