Case Mail

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Subject Index

Yorkton (City) v Mi-Sask Industries Ltd., 2020 SKCA 109

Schwann, September 8, 2020 (CA20109)

Civil Procedure - Appeal - Leave to Appeal
Statutes - Interpretation - Court of Appeal Act, 2000, Section 20
Statutes - Interpretation - Enforcement of Money Judgments Act, Section 5

The proposed appellant, the City of Yorkton, applied for leave to appeal the decision of a Queen's Bench chambers judge that dismissed its application for a preservation order against the proposed respondent, Mi-Sask Industries (Mi-Sask), pursuant to s. 5 of The Enforcement of Money Judgments Act (EMJA) (see: 2020 SKQB 183). If leave were granted, the City then applied for interim relief, firstly in the form of an order preventing Mi-Sask from disbursing funds pending the appeal and secondly, for an order directing it to return funds disbursed following the chambers decision. The City's proposed grounds of appeal were that the chambers judge erred in law in his determination: 1) of the onus of proof required by s. 5(5) of the EMJA and

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the nature and quality of the evidence required to satisfy that burden; 2) that the City had an obligation to prove that Mi-Sask did not have sufficient insurance funds to cover the claim against it; and 3) that a preservation order should not be granted due to his error in identifying the applicable legal principles. HELD: Leave to appeal was granted. The court granted the City's request for a preservation order but denied the application for an order directing Mi-Sask to return the funds it disbursed following the chambers decision. The court found concerning each of the proposed grounds of appeal that they possessed sufficient merit and importance to grant leave. It granted the order preventing Mi-Sask from disbursing further funds under s. 20(1) of The Court of Appeal Act, 2000 (CAA, 2000) and its inherent jurisdiction to preserve the status quo, as the application before the single judge in chambers was incidental to the pending appeal. It found that the City had met the requirements established in RJR MacDonald for it to exercise its discretion to grant injunctive relief. It denied the City's request for the return of funds distributed after the chambers decision and before the appeal period had expired: the recipients of the funds were third parties to the application and the proposed appeal, and none had been named or served with the application. Besides, that aspect of the application was beyond the jurisdiction of the court under s. 20 of the CAA, 2000. It was not incidental to the appeal as it had not been raised in the proceedings before the Court of Queen's Bench. Even if it was within the court's jurisdiction under s. 20 or its inherent jurisdiction, the order would be in the nature of a mandatory injunction, and the City had not satisfied the burden to justify it at this interlocutory stage.

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Harvey v Saskatchewan Legal Aid Commission, 2020 SKCA 110

Ryan-Froslie Leurer Barrington-Foote, September 16, 2020 (CA20110)

Statutes - Interpretation - Legal Aid Act, Section 7, Section 16

The appellant appealed from the decision of a Queen's Bench chambers judge that dismissed her application for an order compelling the respondent, the Saskatchewan Legal Aid Commission, to place her back on its panel of lawyers from the private bar eligible to provide legal services pursuant to The Legal Aid Act (see: 2019 SKQB 191). The appellant, a lawyer, had practiced both in the private bar and as a salaried employee of the respondent since being called to the bar in 1998. In the period of time relevant to this case, she had returned to private practice in 2016, applied to be on and was admitted to the panel. In early 2018, while still on the panel, the appellant accepted two short-term positions as a contract employee of the respondent. Sometime between July 2018 and early August, her name was removed from the panel. When she left her

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contractual position, the appellant contacted the respondent about her removal and was told that she could reapply as a private bar applicant. She asserted her position that she had never withdrawn from the panel and that her status as a member had continued. Eventually the respondent informed her that it had determined that she was not a member of the panel based on the wording of the Act as well as on the procedures that were typically followed by it when lawyers completed their employment with it. Further, leaving such employment constituted a withdrawal from the panel and in response to her recent application, the respondent declined to designate her as a member. The appellant commenced proceedings to obtain an order reinstating her as a member of the panel, alleging that the respondent had violated s. 16(1) of the Act, which requires just cause for removal, and s. 16(2), requiring it to provide notice of removal and its reasons. The appellant later amended her application and sought an order of certiorari quashing the decision of the respondent and an order of mandamus compelling it to place her on the panel. She asserted that the respondent had removed her and refused to grant her application because during the period of her contractual employment, she had written a letter to the Minister of Justice that criticized the respondent and its CEO in July 2019. The respondent replied that its decision not to designate her resulted from her display of animus towards it and that she could not work with the CEO. The chambers judge decided the circumstances concerning the removal of the appellant had been done not for just cause, but for the respondent's administrative purposes in accordance with its standard policy and procedures. Therefore, she had no right of appeal under s. 16(4) of the Act. The respondent's decision was not a public action but a private one and therefore not subject to judicial review and, even it were, it was subject to the standard of reasonableness and he would have found the decision to be reasonable. The issues on appeal were: 1) whether the judge erred in holding that the respondent had legal authority to remove a lawyer from the panel for reasons other than just cause; and 2) and if not, was that decision subject to judicial review?

HELD: The appeal was allowed. The respondent's decision to remove the appellant's name from the panel was quashed and the appellant's membership on it was continued. The court reviewed the Act and found with respect to each issue that: 1) the chambers judge erred in law when he failed to recognize that the respondent did not act reasonably when it concluded that it had the authority to unilaterally remove the appellant from the panel without just cause by interpreting s. 7(d) of the Act so that it provided the respondent with the authority to unilaterally impose its policy or practice on private bar panel members who subsequently become employees. That interpretation could not be reconciled with s. 16(1) of the Act, which restricts the respondent from unilaterally removing a lawyer from the panel for reasons other than just cause. The respondent's decision was unreasonable; and 2) the respondent's decision in this case was subject to judicial review. The judge decided the question on the basis of whether a duty of fairness was owed in connection with the respondent's decision. However, the appeal was not concerned with the appointment of panel members, but rather the respondent's statutory authority to remove a lawyer from the panel.

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Sinclair v North Prairie Developments Ltd., 2020 SKQB 220

Elson, September 2, 2020 (QB20212)

Statutes - Interpretation - Residential Tenancies Act, 2006, Section 8, Section 72
Administrative Law - Statutory Appeals - Standard of Review

The appellant appealed the decision of a hearing officer of the Office of Residential Tenancies pursuant to s. 72(1) of The Residential Tenancies Act, 2006 (RTA) (see: 2019 SKORT 1014). The appellant and the respondent landlord had signed a tenancy agreement in May 2019 whereby the appellant would rent a unit commencing July 1. She decided to cancel the agreement later in May and advised the respondent. It advised her that if it was not able to rent the unit to another tenant, the appellant would be responsible for any rent loss sustained by it. The hearing officer found that the respondent was not able to re-rent the unit without providing an incentive of free rent for the first month, that it had acted reasonably in its efforts to obtain a renter and was entitled to damages equal to one month's rent. The appellant argued on appeal that the respondent had not mitigated its damages in the manner contemplated by s. 8(2) of the RTA and that the mitigation did not rise to the level of the standard stipulated in s. 8(2) of "whatever is reasonable." The appellant filed affidavits in support of her appeal which created an issue as their admissibility and whether an appeal under s. 72(1) of the RTA is based solely on the record.
HELD: The appeal was dismissed. The court found with respect to the issue of whether affidavits could be filed under a s. 72(1) appeal that they were admissible in cases where jurisdiction was in question and their contents addressed the matter of service, as in Starrpass Properties v Wolf. As this appeal did not engage a jurisdictional question, the affidavits were inadmissible and appeals to the Court of Queen's Bench under the RTA were appeals on the record. Regarding the issue of whether the hearing officer erred in law in deciding whether the respondent appropriately mitigated its loss, the court noted that the standard of review for statutory appeals under s. 72(1) was correctness as set out in Vavilov and subject to the limits imposed by the section: questions of law or jurisdiction. The appeal here was a challenge of the hearing officer's conclusion that the facts as found satisfied the test for mitigation of loss under s. 8(2) of the RTA and thus a challenge of the officer's finding on a question of mixed fact and law which is not appealable under the RTA. The only exception to the nature of the appeal is where the legal component of the question is extractable and considered as a separate question of law. However, even if the appellant's argument on the interpretation of s. 8(2) was correct, the success of her appeal depended on the officer's findings of fact, which were not

extractable. If the court was wrong on this point and the question was extractable, the court interpreted the phrase "whatever is reasonable" in s. 8(2) as placing the onus on the innocent party, in this case the respondent, of establishing mitigation and did not require them to do anything exceptional within a range of reasonable behaviours in order to mitigate loss.

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Whitehawk v Nahnybida, 2020 SKQB 219

Tochor, September 8, 2020 (QB20203)

Statutes - Interpretation - Traffic Safety Act, Section 257

The parties applied pursuant to Queen's Bench rule 7-1 to determine whether the plaintiffs' action against the defendant was statute-barred. The plaintiffs' son had been killed in a motor vehicle accident caused by the defendant. At trial in July 2016, the defendant was convicted of and sentenced for offences under ss. 294(4) and 255(3.2) of the Criminal Code. He appealed the conviction, and his appeal was dismissed on August 30, 2018. On August 26, 2019, within one year of that date, the plaintiffs issued a statement of claim, relying upon s. 104 of The Automobile Accident Insurance Act. In his statement of defence, the defendant pled that the claim was statute-barred as it was issued more than two years after the date of the motor vehicle accident or, alternatively, because it was issued more than two years after the date of his conviction. The parties agreed that the issue in the application was whether the word "convicted" in ss. 257(1) and (2) of The Traffic Safety Act refers to the date on which the defendant was convicted at trial or the date his appeal from conviction was dismissed.
HELD: The court determined the issue raised by the plaintiffs pursuant to Queen's Bench rule 7-3(c), ruling that their interpretation of the word "convicted" in s. 257(2) of the Act was correct, and their action was not barred by a limitation period. The defendant was ordered to pay them $1,000 in costs under Queen's Bench rule 11-1. The Legislature intended to create a cause of action for non-economic damages in certain circumstances and interpreting the word "convicted" in s. 257(2) to mean the date the defendant's appeal was dismissed was consistent with that intention.

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Gregory v Richards, 2020 SKQB 220

Danyliuk, September 9, 2020 (QB20204)

Landlord and Tenant - Residential Tenancies Act, 2006 - Appeal

The appellant tenant appealed an order of the Office of Residential Tenancies (ORT) made in March 2020 and amended in July 2020. The respondent brought an application under s. 70(6) of The Residential Tenancies Act, 2006 for monetary damages of $318 for rent arrears and losses, cleaning and repair costs. At the hearing in March, both parties appeared. In the decision that followed, the hearing officer stated that he found them both reliable and credible and that he had reviewed all the evidence, but then failed to explain what evidence he had heard. The officer further failed to complete the template form and did not establish the tenant's position respecting the landlord's claim for the security deposit. In addition, the form did not make clear where the security deposit had been paid and was held. The amended decision, issued by the officer after an ORT staff member pointed out problems with the amount of the security deposit held by the office and to whom it should be paid, had not given the parties an opportunity to be heard so the matter could be clarified.
HELD: The appeal was granted, and the matter remitted to the hearing officer to conduct a further hearing to make a proper determination. The court found that because of the deficiencies both in the original and the amended order, the appeal involved a question of law regarding sufficiency of notice and reasons of the hearing officer.

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Elite Property Management v WMCZ Lawyers, 2020 SKQB 221

Scherman, September 10, 2020 (QB20213)

Professions and Occupations - Barristers and Solicitors - Confidentiality - Conflict of Interest - Application for Removal

The plaintiff, Elite Management, sued the defendants, two former employees, whom they alleged were violating the terms of a confidentiality/non-disclosure agreement they had signed and were using confidential information to acquire former customers or clients of the plaintiff. The defendants in the action retained the respondent law firm, WMCZ, to represent them in the suit. The plaintiff then applied for an order declaring the respondent to be in a conflict of interest and barring them from representing the defendants on the grounds that

the respondent was previously its legal counsel and in the course of the relationship, it obtained confidential information. The plaintiff acknowledged that the respondent had not provided legal services or advice to it with respect to either the confidentiality/non-disclosure agreement or the termination of the defendants. The respondent filed an affidavit in which the deponent stated that the respondent's former relationship with the plaintiff/applicant was limited to advice provided to it in its capacity as agent for various condominium corporations, themselves clients of the respondent managed by the plaintiff/applicant. Those matters were closed and the respondent had not done any work for the plaintiff/applicant since 2019. None of the solicitors or staff of the respondent had received confidential information from the plaintiff nor provided legal advice to Elite regarding any employment matters or matters relating to its internal operation.
HELD: The application was dismissed. The court found that this was not an application involving the effective representation concern and bright line rule. The test, therefore, was as set out in CN v McKercher regarding conflict of interest. The respondent had not acted as legal counsel regarding the agreement, nor the termination of the defendants. The defendants' retainer was not sufficiently related to the matters on which the respondent worked for the plaintiff/applicant. Thus, no rebuttable presumption could arise that the respondent possessed confidential information that raised a risk of prejudice. The respondent no longer acted for the plaintiff/applicant, and the bright line rule did not operate.

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First National Financial GP Corporation v Peterson, 2020 SKQB 222

Danyliuk, September 10, 2020 (QB20205)

Statutes - Interpretation - Land Contracts (Actions) Act, 2018, Section 7
Mortgages - Foreclosure - Leave to Commence Action

The applicant mortgagee applied for leave to commence an action for foreclosure and related relief. The proposed plaintiff deposed that the proposed defendants defaulted on their obligations under a mortgage of their property that secured a loan of $344,470. They made their last payment in June 2019, and a year later, they owed arrears of $22,000. The material filed by the applicant contained a request for leave of the court to waive the requirement under s. 7 of The Land Contracts (Actions) Act, 2018 for further updated affidavits regarding the state of the respondents' account. The applicant advised that, should the respondents make any further payments under the mortgage, the applicant would file a certificate of lawyer describing the amounts paid. Counsel for the applicants argued that s. 7 of the Act applied only to the initial court appearance.

HELD: The court granted the application for leave to commence an action for foreclosure but dismissed the leave application for s. 7 of the Act to be waived. The court interpreted s. 7 to mean that when seeking leave to commence, proposed plaintiffs are obligated to provide "updated information regarding the state of the defendant's account with the plaintiff" every 30 days until leave is granted.

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R v Burns, 2020 SKQB 228

Scherman, September 10, 2020 (QB20215)

Criminal Law - Trial Procedure - Witness Testimony - Videoconference

The Crown applied pursuant to s. 714.1 of the Criminal Code to have the evidence of two witnesses presented via videoconferencing. The witnesses would be testifying in the trial of the accused, Burns, and co-accused, McKay, who were charged with murder and attempted murder. The witness, Meade, was the alleged victim with respect to the attempted murder charge and another witness, Crawford's, testimony would consist of what he heard at the scene on the day in question. Meade resided in Winnipeg and deposed that he would lose his salary for two weeks if he had to quarantine upon his return to Winnipeg from Prince Albert. He was currently on parole and prohibited from leaving Manitoba. Crawford lived in Lloydminster and stated that he would lose two days' pay to attend the trial. Counsel for each of the accused objected to the application on the ground that, as the charges were serious, it would impair the effectiveness of their cross-examination. Testifying by video link would constitute a denial of the right to a fair trial and public hearing and prejudice their defence.
HELD: The application was granted. It was appropriate to order that the witnesses testify by video link at the locations and through the facilities and technology proposed by the Crown. The court considered the financial reasons given by the witnesses to support their wish to give their testimony via video link as only moderately to slightly influencing its assessment, but found that the current risk of COVID weighed in favour of granting the order sought. It found that the charges were serious but that the defence counsels' concerns regarding the effectiveness of cross-examination by video link were no longer valid because of the improvement in technology for video evidence.

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R v Kernaz, 2020 SKQB 223

Tochor, September 11, 2020 (QB20206)

Criminal Law - Motor Vehicle Offences - Driving with Blood Alcohol Exceeding .08 - Conviction - Appeal
Constitutional Law - Charter of Rights, Section 10, Section 24(2) - Appeal

The appellant appealed from her conviction after trial in Provincial Court of driving while her blood alcohol content exceeded the legal limit contrary to s. 253(1)(b) of the Criminal Code. At trial, the appellant brought a Charter application in which she alleged: 1) that she had not been given her right to retain and instruct counsel without delay contrary to s. 10(b) of the Charter because after informing her of her right to counsel, the police waited approximately 20 minutes for a tow truck to arrive. The trial judge reviewed the police's actions and found that the delay was not unreasonable, and no breach had occurred; 2) that her right to privacy when consulting counsel had been breached. She testified that while she was speaking to a lawyer by telephone in the detachment interview room, she could hear voices outside it and looked up to see officers looking through the window of the door and had concerns that they may have overheard her communication with counsel. The officers testified that they were required to observe individuals in the interview room for the detainee's safety and to know when the consultation with counsel was complete and that they did not hear any of the appellant's conversation. The trial judge accepted the officers' testimony and found that the appellant's apprehension had not prevented her from properly instructing counsel, and there had not been a breach; and 3) that her right to counsel of choice was infringed. Upon calling a lawyer's office, a recorded message advised that another lawyer should be contacted. The appellant was able to speak to the alternative lawyer and then told the police that she was satisfied with the advice she received. The trial judge concluded that the police ought to have informed the appellant that they had not completed their efforts to obtain the first lawyer's home number, and this information would have allowed the appellant to express a preference for either the first or the second lawyer. This failure breached her rights to counsel. The judge concluded that she would not exclude the evidence of the appellant's breath tests under s. 24(2) of the Charter after conducting a Grant analysis in which she found that the breach was relatively minor and the impact was minimal. On appeal, the appellant argued the trial judge had erred in each of her findings regarding the Charter breaches and by failing to exclude the evidence after determining that her right to counsel of choice had been violated. HELD: The appeal was dismissed. The court reviewed the trial judge's decisions respecting the alleged Charter breaches and whether the evidence should be excluded and found that, under the standards of review applicable to the trial judge's decisions regarding Charter breaches and the admission of evidence, she had not erred.

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Saskatchewan v Durocher, 2020 SKQB 224

Mitchell, September 11, 2020 (QB20207)

Constitutional Law - Charter of Rights, Section 1, Section 2

The Government of Saskatchewan and the Provincial Capital Commission (PCC) brought an application for relief under s. 3(1) of The Recovery of Possession of Land Act and sought two remedies: possession of the West Lawn of the Saskatchewan Legislative Building and an order compelling the respondent, Durocher, and others, to cease their occupation of that land. The PCC sought an order compelling the respondent and his supporters to comply with the Bylaws of the Wascana Centre passed pursuant to The Provincial Capital Commission Act. The respondent, an Indigenous person of Metis descent, had walked from Air Ronge to Regina for the purpose of bringing public attention to the high rate of suicide of Indigenous youth in Northern Saskatchewan. He did so after Bill 618, entitled An Act respecting a Provincial Strategy for Suicide Prevention, had been defeated in the Legislative Assembly. When the respondent arrived in Regina, he erected a tipi on the West Lawn, surrounded it with pictures of victims of suicide and began a hunger strike, described by him as a ceremonial fast, which he announced would end after 44 days on September 13, 2020. No other encampments had grown up around the tipi. A special constable employed by the PCC posted a Notice of Trespass under The Trespass to Property Act and a copy of an order made by a Queen's Bench judge in September 2018 following her judgment in Dubois v Saskatchewan (see: 2018 SKQB 241). Both applicants sought an order finding the respondent in contempt of clause 2 of the 2018 order, relying upon Queen's Bench rule 11-26. The respondent filed a Notice of Constitutional Question in which he impugned the constitutionality of the Bylaws (Nos. 3(b); 8(e); 27(a)(i),(ii),(iii) and 27(c)(ii)) as well as the Notice of Trespass. He argued the Bylaws and the Notice of Trespass violated ss. 2(a), (b) and (c) of the Charter and that as none of the Bylaws qualified as reasonable limitations under s. 1 of the Charter, each should be declared of no force and effect under s. 52(1) of the Constitution Act, 1982.
HELD: The application was dismissed. The court held that the impugned Bylaws and Notice of Trespass were unconstitutional and declared them to be of no force and effect under s. 52(1) of the Constitution Act, 1982. The declaration was suspended for a period of six months to give the PCC and Wascana Centre Authority to craft new bylaws. It distinguished the Dubois decision on the basis that the respondent's ceremonial fast involved only him and no larger encampment had occurred. The Bylaws and the Notice of Trespass violated s. 2(a) and (b) of the Charter. Respecting s. 2(a), they interfered with the respondent's religious beliefs as the land in question holds significance for Indigenous people. The respondent's right to freedom of expression under s. 2(b), which he exercised in a public square, was infringed. The applicants failed to demonstrate that the

impugned Bylaws and Notice qualified as reasonable limitations upon the respondent's s. 2(a) and (b) rights as the former did not satisfy the inquiries relating to either minimal impact or the proportionality of effects. The Bylaws reposed unfettered discretion in the Wascana Centre Authority to determine what is permissible on public lands of great significance without criteria that could accommodate and regulate the kind of Indigenous spiritual ceremony and political expression at issue here. The deleterious effects of the impugned Bylaws and Notice outweighed their salutary benefit.

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JTL Industries Ltd., Re (Bankruptcy), 2020 SKQB 209

Elson, September 14, 2020 (QB20214)

Bankruptcy- Action Against Trustee
Contracts - Bankruptcy

The applicant, Evergreen Co-Operative, applied pursuant to s. 37 of the Bankruptcy and Insolvency Act (BIA) for an order that the respondent, the trustee in bankruptcy for JTL Industries, pay it damages from the bankrupt estate. The applicant was one of the dealers that sold grain bins it manufactured through JTL. The arrangement was governed by a written agreement entitled: "JTL Deal Program 2018 - smooth wall bins" and was said to cover the period November 1, 2017 to October 30, 2018. In August of 2018, the applicant arranged for the manufacture of six bins. It was notified by JTL on October 6 that they were complete. Unbeknownst to the applicant, JTL assigned in bankruptcy on October 31. It made two payments to JTL for the purchase of the bins on November 7 and 14. After learning of the bankruptcy, the applicant claimed possession of the bins from the trustee, which the trustee approved. After receiving the bins, the applicant discovered a number of missing components and when informed of this, the trustee advised that they were released on an "as is" basis. As the applicant could not sell the bins it determined the amount of the cost of their repair. It then sought return of the total payments made in November 2018 or, in the alternative, an order pursuant to s. 215 of the BIA granting leave to bring an action against the trustee. The applicant maintained that the trustee affirmed the contract between it and JTL, first when it demanded payment of the remaining balance in November 2018 and second when the trustee permitted it to take possession of the bins. Having affirmed the contract, the trustee then breached it by delivering unfinished items. The trustee asserted that there was no affirmation of the contract. It noted that the agreement between JTL and the applicant had lapsed on October 30, 2018 and thus was no longer an executory contract that was capable of being affirmed.

HELD: The application was dismissed. The court found that the applicant had not met the burden of proving that at the time of the alleged confirmation, the trustee was aware of the bankrupt's contract. As well, the agreement and its ongoing obligations had expired by the date of the bankruptcy. By the time that the applicant took possession of the last bins, neither it nor the trustee had reason to suspect that any of them were incomplete. When JTL had given notice of the bins' completion, property had passed to the applicant under s. 20 of The Sale of Goods Act. The only thing that remained was for the applicant to take possession and in this regard JTL bore no obligations under the agreement that the trustee was faced with either affirming or disclaiming.

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Poole v Dailey, 2020 SKQB 226

Richmond, September 15, 2020 (QB20208)

Wills and Estates - Wills - Interpretation

The parents of the applicant and the respondent had died in 2015. They had made mirror wills in 2012 that included the provision that in the event either predeceased the other, their daughter, the respondent, was to be the executrix and receive their home, provided she took physical possession of the property within three months of the date of death of the surviving parent and occupied it as her residence. The residue of the estate was to be shared equally between the applicant and the respondent. The date of death of the parties' father was August 1, 2015. The applicant had not been informed of the will's contents, and as the house made up the bulk of the estate's value, he and the respondent became estranged. He believed that the respondent had not met the conditions of the will imposed on the gift of the home because he drove by the property every day, and observed in a diary he kept that she was not present at it continuously before the expiration of the three months. He also checked the water meter for usage. Although he was not qualified as an expert, he testified that according to the internet's description of how much water the normal person uses daily, the respondent's consumption was quite limited. The respondent said she was quite careful about the amount of water she used because she knew that the septic tank might overflow. The applicant first obtained an order compelling the respondent to apply for probate, which she did and then applied to the court to determine whether or not she had taken physical possession of the property to allow her to absolute title to it. After a hearing in chambers, the judge directed that the matter should proceed to trial.
HELD: The respondent was entitled to absolute title to the property and her taxable costs from the applicant.

The court found that it was satisfied on the evidence that she occupied it as her residence within the time frame described in the will.

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