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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Boreen v Mosaic Esterhazy Holdings ULC, 2020 SKCA 132

Ottenbreit Barrington-Foote Kalmakoff, November 25, 2020 (CA20132)

Negligent Misrepresentation - Appeal

The appellant appealed the decision of the chambers judge rendered in a summary judgment hearing dismissing her action for damages against the respondent for negligent misrepresentation. The Court of Appeal considered two of the appellant's grounds in deciding the appeal: that the chambers judge erred in law in proceeding with the summary judgment without first adjourning it to allow for mandatory mediation to take place, and that the chambers judge made overriding and palpable errors of fact when considering the elements of the tort of negligent misrepresentation. Lloyd Holmes (L.H.) was a longtime employee of Mosaic Esterhazy Holdings ULC (Mosaic). He was a member of the Mosaic Pension Plan (Plan). The Plan was governed by The Pension Benefits Act, 1992, and its Regulations (the Act). L.H. was legally married to Glenda Holmes (G.H.) and was in a common-law relationship with the appellant, Charmaine Boreen (C.B.). L.H. was diagnosed with

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Bartlett v Carefree Park Corp.

a terminal illness and wished to divide his pension benefits between C.B. and G.H. before he died. He attended Mosaic's human resources department. He spoke to B.M., an employee in that department, about his desire to amend his designation. After consulting with A.H., the Plan administrator, B.M. provided L.H. with a draft declaration of spousal status form (Declaration) for L.H. to complete. L.H. completed the Declaration but falsely declared that G.H. was not entitled to receive his pension benefits due to a court order or interspousal agreement. No such order or agreement existed. A.H. advised B.M. that L.H. was legally married to G.H. and could not designate C.B. as a beneficiary without obtaining a divorce order or G.H.'s consent in writing. L.H. did neither. L.H. received a pension statement prior to his death as required by s.13(1)(b) of the Act, the contents of which C.B. had knowledge. The pension statement erroneously designated C.B. as the beneficiary. L.H. died and the matter of the distribution of his pension was put in the hands of the courts, which determined that the pension was to be distributed to G.H. alone. Subsequently, the appellant C.B. brought an action for breach of contract and negligent misrepresentation against Mosaic, which was proceeded with summarily by consent order. All parties were aware of the requirement for mandatory mediation at the time of the filing of the consent order.

HELD: As to the first ground of appeal, that the chambers judge erred at law by not adjourning the proceedings pending mandatory mediation, the appeal court determined that ss. 42(1.1) to 42(1.4) of The Queen's Bench Act were the governing provisions, ruling that as a result of the filing of the consent order in the chambers proceeding - consented to by all parties, and authorizing a summary hearing - the chambers judge correctly considered the consent order as an exemption from the requirement of mediation as allowed by s. 42(1.2)(a) of The Queen's Bench Act. As to the second ground of appeal, that the chambers judge made an overriding and palpable error of fact in his analysis of the elements of the tort of negligent misrepresentation, the appeal court ruled that the element of damages was not made out, as found by the chambers judge. Regardless of whether the appellant was able to show that the chambers judge made an overriding and palpable error of fact in his analysis of the other four elements of the tort, these being 1) a special relationship between the plaintiff and the defendant; 2) a misrepresentation made by the respondent to the appellant; 3) that such misrepresentation was made negligently, and 4) a reasonable reliance on the negligent misrepresentation by the appellant, the appeal court ruled that any loss suffered by the appellant was not due to the actions of the respondent Mosaic, but those of L.H., who was fully informed by B.M. of what he needed to do to designate the appellant C.B. as beneficiary. For unknown reasons, L.H. failed to take either of the required steps. As the appellant C.B. had not proven she had suffered any damages because of the respondent Mosaic's actions and was required to prove all five of the elements, the appeal must fail on this ground as well. The appeal court went on for the sake of completeness to consider the chambers judge's analysis of the other four elements, finding no reviewable error on the part of the chambers judge. There were concurring reasons by one of the justices as to whether the chambers judge should have referred specifically to the pension statement and he considered whether the error in it naming C.B. as beneficiary could have falsely suggested to L.H. that C.B.

was the beneficiary despite the advice given to him by B.M. The justice agreed nonetheless that the appellant suffered no damages because of Mosaic's actions since, regardless of anything Mosaic did or did not do, the Act disentitled the appellant from receiving any pension benefits from Mosaic.

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J.P. v A.P., 2020 SKCA 134

Jackson Schwann Tholl, December 4, 2020 (CA20134)

Family Law - Custody and Access - Variation - Appeal

The respondent, J.P., applied to vary a consent order made in 2014 by which the mother of the child, A.P., was given sole custody of the child of the marriage, I.P., born in November 2009. J.P. was given specified parenting time. The matter was set down for trial, and the trial was held between September 11, 2017 and November 15, 2017. Both parties were self-represented. After trial, the respondent was awarded sole custody of I.P. A.P. was given extremely limited parenting rights, which consisted of supervised Skype access for ninety minutes per week. A.P. took issue with this limited access before the Court of Appeal. A.P. was also required to undergo psychiatric assessment and treatment, at the end of which a report of the psychiatrist was to be prepared with a conclusion as to her fitness to parent I.P. She was also to provide to the psychiatrist all medical history and records relating to I.P., all Skype session recordings, and copies of all court decisions, both civil and criminal. The judgment made the disclosure provision mandatory, but the detailed fiat prepared by the trial judge made this term conditional at the psychiatrist's request. The trial judgment allowed for variation of the access allowed to A.P. when the psychiatrist was satisfied that she was fit to have increased access to I.P. Costs of $5000.00 were also awarded to J.P. The evidence before the trial judge revealed constant interference with and denial of J.P.'s access to I.P. and of making false accusations concerning J.P.'s treatment of I.P. when he exercised access to her. In particular, she claimed the child showed signs of neglect and sexual assault at his hands, which complaints were untrue. The complaints were made to various agencies, including social services, medical doctors and police, all duty-bound to investigate her claims. She was dogged in these false claims, asking for criminal charges against J.P. on three occasions. No charges were laid concerning the first two, but the third complaint went to trial, resulting in J.P.'s acquittal. A.P. continuously brought I.P. to doctors, where she was intensively examined. As a result of A.P.'s constant complaints, social services intervened, and J.P was not allowed to see I.P. for a time. When it became apparent to the various agencies that A.P. was unable to stop lying and causing harm to both J.P. and I.P., J.P. was given sole custody of I.P., an arrangement

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endorsed by the court on an interim basis, up until the trial. I.P. thrived while being cared for by J.P. A.P. appealed the judgment, claiming fault only with the extent of the clause in the judgment requiring her to disclose the Skype session recordings and the award of costs.
HELD: The appeal was allowed in part. Upon review of the case law as to the standard of review of orders of custody and access, the court reiterated that considerable deference was to be allowed the decisions of the courts below, as these were discretionary and were not to be disturbed except in the case of material error, a serious misapprehension of the evidence or an error of law. The court was not prepared to intervene in this case, finding that the trial judge's decision did not reveal any such errors, and was required in this case given A.P.'s absolute recalcitrance in all her dealings with J.P. and I.P. The court did allow an amendment to the disclosure provision. Both A.P. and J.P. agreed that A.P. needed psychiatric assessment and successful treatment before her access to I.P. was increased. The mandatory condition to disclose all Skype session recordings had the opposite effect to what was intended, since reviewing the volume of material from the Skype sessions delayed the psychiatrist's work with A.P., effectively preventing A.P. from obtaining the assessment. The court resolved this issue by considering the provisions contained in the trial judge's detailed fiat upon which the judgment was based. The disclosure provision in the fiat was not mandatory as far as disclosure of any records was concerned, but in its effect, it gave leeway to produce any records the psychiatrist required. The appeal court amended the disclosure provision by removing it altogether, but reminding A.P. that failure to cooperate with the psychiatrist in providing documents he required could result in an assessment against her interests in gaining increased access to I.P. As to the costs award, the appeal court chose not to disturb it and helpfully reviewed the law of costs in family law proceedings. An order of costs is discretionary and will only be interfered with if made arbitrarily, resulting in obvious injustice. The trial judge rightfully considered A.P.'s delaying tactics and poor trial preparation, in contrast to J.P.'s preparedness and competent conduct of his case. The trial judge also considered any financial harm to A.P. in setting the amount of costs, pointing to the expense of paying the psychiatrist, but weighed against that the financial benefit she gained of having state-funded assistance in advancing her claims. The appeal court ordered costs against A.P. in the amount of $1500.00, finding that although A.P. had some success in the appeal, unnecessary resources were expended on it when A.P. should have concentrated her efforts on complying with the judgment.

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R v Cathcart, 2020 SKQB 270

Currie, October 23, 2020 (QB20250)

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

The accused applied for a stay of proceedings on the basis that unreasonable delay violated his s. 11(b) Charter rights. He had been convicted after trial in February 2018, but on appeal, his conviction was set aside, and the Court of Appeal ordered a new trial in its judgment issued on September 19, 2019 (see: 2019 SKCA 90). His new trial was scheduled for June 15, 2020. However, that date was vacated by the presiding judge in late May after granting the Crown's request for an adjournment. It had been requested because the COVID-19 pandemic prevented two Crown witnesses residing in the Northwest Territories from attending in Saskatoon for the trial. The new trial date was then scheduled for April 2021 in accordance with the court's ability to schedule and reschedule trials in the context of the pandemic. The period that the accused argued was unreasonable was from the date his new trial had been ordered to the rescheduled trial date, a period of 19 months.
HELD: The application was dismissed. The court found that no unreasonable delay had been established. It adopted the approach used in R v MacIsaac and R v J.E.V. to use the date of the appeal court's direction that there be a new trial and the assumption that it could be expected to be conducted within a shorter period than would an initial trial. In this case, the time between the new trial being ordered and the rescheduled trial date was 19 months, well below the 30-month presumptive ceiling. The delay from June 2020 to April 2021 arose from an exceptional circumstance. Therefore the 10 months between the scheduled trial dates must be subtracted, reducing the total delay to nine months, well under the presumptive ceiling and not markedly longer than it should take for a new trial to occur.

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R v Temple, 2020 SKQB 277

Popescul, October 28, 2020 (QB20261)

Criminal Law - Expungement of Guilty Plea

The appellant pled guilty in Provincial Court to a charge of failing to report an accident to police contrary to s. 253(4) of The Traffic Safety Act. He had collided with another vehicle and then left the scene without exchanging information. The other driver took down the appellant's licence plate, and the police discovered that the car was registered to a person other than the appellant. The registered owner had sold the vehicle to the appellant but failed to remove the licence plates. Accordingly, there was no "certificate of registration" associated with the vehicle the appellant was driving at the time of the collision, and that triggered his duty to

report the accident to the police. After entering his plea in Provincial Court, the appellant was fined $500 plus an $80 victim surcharge. Later, Saskatchewan Government Insurance (SGI) imposed a $1,000 surcharge and required him to enroll in the Driver Improvement Program. The appellant then brought this summary conviction appeal, seeking to withdraw his guilty plea.
HELD: The appeal was dismissed. The court found that the appellant had not met the onus of proving that the guilty plea was not voluntary, not informed or not unequivocal. Although the appellant was not aware when he pled guilty that SGI would impose monetary consequences, that fact did not support the argument that he was uninformed. Discontent with consequences flowing from a guilty plea does not take it out of the realm of an informed decision.

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Krammer v Ackerman, 2020 SKQB 280

Megaw, October 29, 2020 (QB20256)

Family Law - Child Support - Determination of Income

The parties each brought an application for the court to determine their respective incomes from 2016 onwards to finalize child support and what s. 7 expenses could be claimed. They jointly requested that the matter proceed on the basis of affidavit evidence only. The judge hearing these applications had presided at previous applications that involved the question of the parties' incomes. Ultimately, the judge imputed an annual income of $100,000 to the respondent father but could not determine the petitioner's income without a proper application (see: 2017 SKQB 294). The matter had not been resolved until these applications were made. The parties now sought to vary the amounts set at trial (see: 2013 SKQB 247), in the first variation judgment and in 2017 (see: 2017 SKQB 7). The parties participated in a shared parenting arrangement of their two children, and each enrolled them in extracurricular activities, the costs of which were at issue. The petitioner worked 20 to 25 hours per week as a self-employed architectural technologist. She worked during the weeks when the children were living with the respondent. The respondent was employed as a real estate agent and earned his income through a professional service corporation of which he was the sole employee and shareholder. He submitted this corporation's financial statements that had not been before the court at the original variation application in 2017. He asserted that the income imputed to him at that time turned out to be correct and argued that that it should be maintained at that amount. The respondent's spouse was also a real estate agent and property developer with her own personal service corporation, and she worked at the same real estate

agency as the respondent. In 2017 and again in this application, the petitioner had argued that the respondent's wife's earnings should be attributed equally between her and the respondent because the respondent had income hidden in his wife's corporation. His wife then submitted her financial records and deposed as to the details of her business. Regarding the petitioner's income, she attested that the amounts recorded on her income tax returns established her income, but the respondent argued that income of $86,000 should be imputed to her based on what she could earn working full-time. The issues were: 1) should the income of the respondent's wife, personal and corporate, be attributed to the respondent for child support purposes; 2) the income of the respondent; 3) the income of the petitioner; 3) the s. 7 expenses that the parties should share proportionate responsibility; and 4) whether an order for costs should be made.
HELD: The court determined each of the parties' income for the purposes of child support and s. 7 expenses. It found with respect to each issue that: 1) income from the respondent's wife should not be imputed to him as it was not satisfied on the balance of probabilities that the respondent had a stake in the income earned by his wife; 2) the income of the respondent was determined for each year from 2017 to 2019 rather than calculating an average of the three years. Under s. 19 of the Guidelines, it included the pre-tax corporate income, which included amortization expense for real property that the respondent had claimed as deductions, resulting in a total annual income of $237,750, $133,700 and $145,490 for the years in question. 3) Income of $30,000 was added to the petitioner's claimed income for each year from 2016 to 2019, so that her total income was set at; $50,970, $45,000, $64,300 and $58,170 respectively. The additional amount was imputed to the petitioner under s. 19 of the Guidelines because the court found that she was underemployed and had an obligation to seek further employment because the children were in full-time attendance at school. 4) Certain section 7 expenses were identified that should be proportionately shared. One parent could pay other expenses without calling on the other; and 5) it would exercise its discretion not to award costs to either party as each had achieved some measure of success. However, it was appropriate to award costs to the respondent's wife because she was required to provide extensive disclosure and considerable affidavit material, and the petitioner's claim had been dismissed outright.

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R v C.B., 2020 SKQB 285

Mitchell, November 3, 2020 (QB20265)

Criminal Law - Judicial Interim Release Pending Trial - Appeal

The accused applied under s. 520 of the Criminal Code for a review of the decision of a Provincial Court judge that he should remain in custody pending his trial on multiple counts of sexual assault in relation to three complainants. The preliminary inquiry on the two most recent charges was ongoing. The applicant's proposed release plan had provided that he would live in Waterston House operated by the Salvation Army in Regina because the Chief of his reserve had denied his request to live at his uncle's residence there during his release, and he could not live at this mother's house either as one of the complainants was residing there. The judge based her decision to deny bail on the secondary ground in s. 515(10)(b) of the Code because the applicant had shown a pattern of non-compliance with conditions in the past and because she was not persuaded by the proposed release plan. He would be effectively unsupervised, and in a place where he had no connections and no concrete plan for school or work. The applicant argued on appeal that the judge erred by: 1) failing to provide sufficient reasons for judicial review of her decision; 2) determining that the proposed release plan lacked substance due to an unaddressed alcohol problem; and 3) by determining that the applicant would have no support in the City of Regina.
HELD: The application was dismissed. The court applied the criteria set out in St-Cloud in its review of the judge's decision. The court found with respect to each ground that: 1) the judge's reasons, although brief, were succinct and sufficient to meet the standard; 2) the judge had not over-emphasized the fact that the applicant had addiction issues; and 3) the judge's finding that the release plan lacked specificity and that she had concerns about its lack of detail and structure were not inappropriate. The court recognized the points made by the applicant's counsel that he would have to remain in the provincial correctional facility simply because he was homeless and that Gladue factors were present and should be considered in bail applications. Although the court's discretion under s. 520 of the Code did not permit the applicant's situation to be rectified, it hoped that a more workable and substantive release plan could be formulated for him.

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R v F.S., 2020 SKQB 306

Layh, November 13, 2020 (QB20288)

Criminal Law - Assault - Sexual Assault - Consent

The accused was charged with sexually assaulting the complainant, contrary to s. 271 of the Criminal Code. The accused admitted that he intentionally touched the complainant for a sexual purpose but denied that she had not consented. The complainant testified that she attended a party at the accused's apartment and drank

enough alcohol that when the alleged assault took place, she tried to protest but was unable to speak properly due to her inebriation. She stated that before the alleged assault, she requested that the accused plug in her cell phone before going to bed in the accused's bedroom. Some individuals who attended the party testified on behalf of the Crown. They described the complainant's actions on the night in question. They indicated that she had stopped drinking before the time she had stated and that she conversed with them and participated in a game for several hours before the alleged offence occurred. The accused's testimony regarding the complainant's behaviour was similar. The accused testified that when he got into his bed with the complainant, she kissed him first and that she was as sexually aggressive toward him as he was toward her.
HELD: The accused was found not guilty. The court found that the Crown had not proven beyond a reasonable doubt that the complainant had not consented to the accused's sexual touching. It was not convinced that the complainant was so intoxicated as to be capable of consenting. Her actions before the alleged incident, such as asking the accused to plug in her cell phone, indicated a significant level of physical coordination and mental acuity. This raised a reasonable doubt that the complainant lacked the capacity to consent to sexual activity and could not utter any words.

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Northern Edge Wood Products Ltd. v Gerow, 2020 SKQB 305

Rothery, November 19, 2020 (QB20287)

Statutes - Interpretation - Woodmen's Lien Act

The claimant, Northern Edge Wood Products, who had registered a lien pursuant to The Woodmen's Lien Act (WLA), applied to strike the respondent's counterclaim, relying upon Queen's Bench rule 3-46. The rule permits the court to strike a counterclaim without prejudice to the respondent to assert a claim in a separate action. The claimant also sought a declaration that its entitlement to the lien be heard and determined in chambers and for an order that the $231,579 held in court be paid to it. The respondent argued that his counterclaim pertaining to the failure of the claimant to fulfill certain contractual obligations should be tried at the same time as the claimant's hearing under the WLA.
HELD: The application was allowed. The respondent's counterclaim was struck without prejudice to his right to assert a claim against the claimant in a separate action. The claimant's application for payment to it of the monies in court was dismissed as premature. The court held that Queen's Bench rule 3-46 was inapplicable to the proceedings. The discretionary power to strike a counterclaim as provided by rule 3 46 is inconsistent with

the WLA in that counterclaims regarding other causes of action are not permitted under it. Under s. 28 of The Queen's Bench Act, 1998, the rules of court can be expressly excluded by the terms of another act and in this case, s. 34 of the WLA provided that the rules applied only so far as they were not inconsistent with the WLA. Section 6 of the WLA indicated that counterclaims are only calculated in the lien claimant's claim for the amount due to him. As the evidence before the court was insufficient to determine whether the respondent had any rights to the monies paid into court, the matter was to be set down for a viva voce hearing.

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MacInnis v Bayer Inc., 2020 SKQB 307

Elson, November 20, 2020 (QB20289)

Civil Procedure - Class Actions - Certification

The plaintiff applied for certification of her proposed class action pursuant to s. 6 of The Class Actions Act. The action was a product liability claim pertaining to a medical implant product, known as Essure, designed to provide women with a permanent non-surgical form of birth control. The plaintiff alleged that the implanting of Essure had caused her harm or injury and caused similar outcomes for other women in the proposed class. She alleged that the defendants, collectively described as Bayer, manufactured Essure and distributed it in Canada. The claim asserted that Bayer was liable under various causes of action for the direct harm caused to the patients and the indirect harm caused to members of their families, included as a secondary class. The claim's central premise was that Bayer designed and developed the device that, either through design deficiencies or inadequate training of attending physicians, was dangerous to the women who were treated with it. The opinion evidence that was presented was in conflict. The expert witness retained by the plaintiff, an epidemiologist, provided her opinion regarding whether Essure posed an unreasonable risk of bleeding, bloating and other side effects, based solely on her review of relevant peer-reviewed medical and scientific literature. She confined her assessment to positive findings on the studies she reviewed as per the instructions from the plaintiff's counsel. She deposed that, in her opinion, a causal relationship between the implantation of the device and adverse events requiring surgical extraction was supported by 13 studies. Her evidence was challenged in several ways by the defence's various expert witnesses, two of whom were obstetricians who had extensive experience using Essure in treating their patients. They attested to the safety of the procedure and the device. Bayer opposed certification of all the plaintiff's proposed common issues. It pointed to the quality of the plaintiff's evidence to meet the "basis in fact" standard. In particular, it argued that the plaintiff's expert

witness' evidence was unduly one-sided and provided no assistance to the plaintiff's request for certification. She had not provided any evidence of a plausible methodology to assess the reasonableness of the risks associated with Essure or the benefit comparisons between it and the other means of artificial birth control or the standard of care for distributing Essure in Canada. Some of the common issues included in the claim were: 1) did Essure pose an unreasonable risk of bleeding, bloating and other side effects; 2) did Essure have any benefits that were unique to Essure or that exceeded the benefits of other artificial birth control procedures; 3) having regard to the answer to common issues 1 and 2, did the defendants breach the standard of care by distributing Essure for sale in Canada; 4) if the answer to issue 3 was negative and having regard to the answer to common issue 1, did Essure's directions for use provide reasonable instructions for using it and for managing risks of bleeding, bloating and other side effects; did the directions provide a clear, current and complete warning of the risks?

HELD: The application for certification was dismissed. The court reviewed the claim as pled, and the expert evidence tendered by both parties against the criteria set out in s. 6 of the Act. It found that the plaintiff had met the requirements of s. 6(1)(a) and (b) but not those of s. 6(1)(c) and (d) because none of the proposed common issues could be properly identified. Among its findings concerning the common issues that could not be certified with respect to s. 6(1)(c) of the Act, the court found that: common issue 1 was overly broad, lacked commonality in that it called for individual inquiry and the presented evidence failed to demonstrate some basis in fact for the two-part test that the proposed common issue existed and that it could be answered in common across the entire class. Common issue 2 required comparing the benefits between Essure and all other artificial birth control procedures that might be permanent or temporary and designed for one sex or the other. The evidence did not present any basis to permit comparison of different procedures or a methodology by which a comparative measurement could be made. Issue 2 also called for some individual inquiry; common issue 3 could not be certified either because it hinged on resolving common issues 1 and 2 at trial. As well, the evidence had not established any basis in fact that a standard of care issue existed regarding the distribution and sale of Essure in Canada. Common issue 4 could not be certified because of the same problem as common issue 3: it presumed resolution of a trial of common issue 1 that the court had already refused to certify, and it too was overly broad. The court noted that since it had refused to certify numerous proposed common issues, the criterion of preferable procedure under s. 6(1)(d) of the Act had not been met. Had any of the issues been certified, it would have found that the preferable procedure criterion was not met, specifically common issues 1 and 2, because they raised inherently individualistic inquiries. Under s. 6(1)(d) of the Act, it was satisfied that the named plaintiff was capable of representing the class. If it had erred in its findings regarding certification of the common issues, it expressed its view that the proposed litigation plan was too general and suffered from other deficiencies as well.

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Sunrise Foods International Inc. v MGM Specialty Livestock Ltd., 2020 SKQB 312

Currie, November 20, 2020 (QB20290)

Civil Procedure - Summary Judgment
Contract - Formation
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Contracts - Breach - Sale of Goods Act

The plaintiff was a grain company (Sunrise), and the defendants were a farming corporation (MGM) and the principal of that company, R.B. Sunrise brought an action for breach of a contract for the purchase and sale from MGM and R.B. of 30,000 bushels of durum wheat at $7.20 per bushel, to be delivered at R.B.'s farm on August 15, 2014. Sunrise alleged a contract was formed on June 14, 2014, after telephone negotiations between an agent for Sunrise, M.M., and R.B. on his own behalf and as agent for MGM. On June 23, 2014, Sunrise sent a draft written agreement to R.B. which contained additional and amended terms to those in the alleged verbal contract, including a term as to the quality of the durum, delivery between July 1, 2014 and August 15, 2014, and the addition of R.B. as a party to the contract. R.B. also claimed that the written contract was required to be executed before a contract was formed. R.B. took the position that as Sunrise required a specific quality of durum, an altered delivery date, the addition of R.B. as a party to the sale contract, and the execution of the written contract, no verbal contract had been on June 14, 2014. R.B. did not execute or return the draft written contract to Sunrise. In a conversation on the telephone between K.A. for Sunrise and R.B. on August 14, 2014, K.A. asked R.B. whether he would accept delivery within two weeks instead of on August 15, 2014. R.B. insisted on delivery on August 15. Prior to that day, R.B. indicated to Sunrise that he would not accept delivery on any of the durum as he believed there was no contract of purchase and sale of the durum. To fulfill its delivery obligations to others, Sunrise purchased 30,000 bushels of durum where it could, and from many sellers, there being no market in the area because producers were holding their durum in a fast-rising market. Durum came on the market in the fall of 2014 but at much-increased prices. Sunrise was able to purchase replacement durum from five different producers for a total price of $318,000.00, instead of the $216,000.00 it would have paid MGM. All parties consented to the action being decided by summary judgment as allowed by The Queen's Bench Act.
HELD: The action was allowed to proceed to summary judgment. The court reviewed Rule 7-5 of The Queen's Bench Rules, as interpreted by the relevant case law, in particular Hryniak v Mauldin (2014 SCC 7) and Tchozewski v Lamontagne (2014 SKQB 71), and ruled that he was satisfied he was able to decide the relevant issues, including credibility, without the testimony adduced at a trial. As to whether a contract had been

created, from a review of the case law, particularly Jans Estate v Jans (2020 SKCA 61), the court considered whether the parties had come to a meeting of the minds on the essential terms of the contract, having regard to what an objective observer of the dealings between them would conclude about the manifest intention of the parties to contract or not. The parties' manifest intention was to be found by an objective inquiry, not a search for what the parties believed subjectively had occurred. A written contract is only a part of the overall material facts by which the meeting of the minds and the formation of the contract was to be found, or consensus ad idem was reached. The court ruled that the material facts would lead an objective observer to conclude that a contract had been consummated between Sunrise and MGM as the essential terms of that contract, product, price and delivery, were agreed to, and no material facts including the unsigned draft written contract could lead to any other conclusion. The material facts included R.B.'s willingness, expressed to K.A., to accept delivery but insisting on August 15, and his admissions of the binding effect of the terms of product, price and delivery date, indicated in the material before the court. The court was also prepared to find that R.B. had chosen to break the contract because the price of durum was going much higher than he had contracted for. In deciding the amount of damages suffered by Sunrise, the court was required to apply ss. 50(1), (2) and (3) of The Sale of Goods Act, and ruled that as there was no market for durum when the contract was breached, due to producers holding their product in a rising market, pursuant to s. 50(1), he was required to calculate the estimated loss incurred by Sunrise in the direct and natural course of events from MGM's breach, which he calculated by subtracting the price Sunrise would have paid under the broken contract and the price it was required to pay to replace the durum, an amount of $102,000.00.

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Zhu v University of Saskatchewan (College of Medicine), 2020 SKQB 308

Gabrielson, November 23, 2020 (QB20283)

Administrative Law - Judicial Review

The applicant, a third-year medical student enrolled in the College of Medicine of the University of Saskatchewan, applied for an order quashing the College's Professionalism Panel's decision and the decision of the Appeal Board to dismiss his appeal of the panel's decision. The Saskatchewan Health Authority (SHA) had complained to the College that there had been an unauthorized release of confidential information connected to health records that were found abandoned in Regina beside a dumpster located adjacent to the applicant's apartment. A notice was sent to the applicant, advising him that a formal complaint of academic misconduct

had been laid against him on behalf of the SHA and that a professionalism panel would be established in accordance with the College's procedures and regulations regarding the professional behaviour of medical students. At the hearing, the applicant admitted that he had breached The Health Information Protection Act when he had taken patients' health records to his apartment and that cleaners had discarded them out without his knowledge. He apologized for his actions. The panel found sufficient evidence to support a finding of professional misconduct in the applicant's breach of the confidentiality of patients with whom he had physical contact. It made numerous recommendations that included sanctions, such as that he would have to repeat the entirety of his core clerkship. As permitted by the College's Procedures and Regulations, the applicant appealed to the board on the grounds permitted by the Regulations. The board denied the appeal and upheld the panel's decision and the sanctions imposed. In this application for judicial review, the applicant presented numerous issues that included: 1) whether the panel had breached the principles of audi alteram partem and nemo judex in causa sua; 2) that the panel's findings as to credibility and sanctions were related to previous disciplinary events involving the applicant. He argued that the panel had not understood his explanation for the breach; 3) whether the board had misconstrued the applicant's ground of appeal that the panel's decision would place the applicant's career in jeopardy because repeating his third year would prevent him from completing his degree within the College's stipulated time frame. The board had not fully considered the ground; and 4) that the board erred when it refused to admit and consider new evidence as permitted under the Regulations. The evidence consisted of a report from a psychiatrist that he suffered from an anxiety disorder that was exacerbated by the panel's sanctions.

HELD: The application was dismissed. The court found concerning each issue that: 1) the respondent had observed the principles of natural justice as they were described in Yao v University of Saskatchewan. The panel followed the proper procedure of advising the applicant of the formal hearing, and he appeared at it with legal counsel. The respondent called witnesses who could be cross-examined, and the applicant was given the opportunity to speak on his own behalf. The sanctions were rationally connected to the complaint; 2) the panel's decision was reasonable, transparent and justifiable. The Regulations authorized its findings of credibility and its sanctions; 3) the board's decision in considering the applicant's ground was reasonable. It correctly found that the panel's decision had not determined the applicant's ability to graduate within the required time frame and that he had the right of appeal if it had; and 4) the board had the jurisdiction and the discretion to decide whether to admit fresh evidence and had applied the proper test to decide the issue as set out in Palmer. The board's finding that the evidence would not have been potentially decisive of any of the issues before it and refusal to admit it was within its discretion and the court could not second guess its ruling.

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Ryan v Saskatoon Star Phoenix, 2020 SKQB 310

Scherman, November 24, 2020 (QB20286)

Torts - Defamation - Defences

The defendants, the Saskatoon Star Phoenix (SP) and the estate of one its columnists, applied to have the plaintiff's defamation action dismissed. The defendants' grounds were that the alleged defamatory words were not defamatory of the plaintiff, since they did not identify him, and even if they were, the words complained of were not defamatory as they were fair comment in the circumstances. The self-represented litigant alleged in his statement of claim that the SP had published an article written by the columnist that damaged his reputation. In the article, the columnist quoted a Twitter post (tweet) describing the person who was removing posters advertising the Fringe Festival as someone who was "mad" and the columnist had described the removal of them as the "crime of vandalism." His claim alleged that the article stated he had committed a crime that contributed to the perception that he was a violent criminal. He argued that an ordinary person paying reasonable attention to the article would understand that it was about him because he had, in the past, put up posters of his art in public locations that were removed by the City of Saskatoon under its poster bylaw because of unacceptable content. In response, the plaintiff had claimed the right to remove posters of others which were not bylaw-compliant. The impugned article related to the subject of posters that had been removed from the Broadway area that advertised various plays at the Fringe Festival in Saskatoon. The plaintiff argued that a number of specific individuals involved with the business improvement district were aware of his practice of removing posters, but he had not provided these alleged facts in his affidavit sworn in September 2019. In response to the defendants' motion to dismiss his claim, he made the same allegation in an unsworn affidavit and failed to provide evidence to show that there were special circumstances that permitted the community to identify him as the wronged party from the publication. At a hearing regarding his unsworn affidavit, the Queen's Bench judge delivered a fiat in which he suggested a solution to the problems that the plaintiff was encountering in having his affidavits commissioned so that he could submit a proper affidavit, but the plaintiff had failed to employ the method and had not submitted a sworn affidavit supporting his allegations of facts relating to the identification issue.
HELD: The application for summary judgment was granted and the plaintiff's claim was dismissed. The court found, pursuant to Queen's Bench rule 7-5, that there was no genuine issue requiring a trial and it was appropriate to grant summary judgment. The defendants had not defamed nor libeled the plaintiff. In the absence of qualifying extrinsic evidence, there was no basis on which it could conclude that a reasonable person acquainted with the plaintiff could identify him as the person said to have committed the crime of vandalism nor that he was person described as "mad" in the tweet. Although the plaintiff was self-represented, he was an experienced litigant. He failed to avail himself of the opportunity provided to him by the court to

lead extrinsic evidence to connect the alleged libel to him and/or show that there were special circumstances that permitted the community to identify him. The defence of fair comment had been made out by the defendants. Using the word "crime" in the description of the poster removal was an expression of an opinion that the conduct was wrongful. The tweet was an expression of the writer's opinion, without identifying any individual, and no ordinary reader would understand from it that he was a violent person.

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Elgahwas v Ghremida, 2020 SKQB 311

Megaw, November 24, 2020 (QB20286)

Family Law - Custody and Access
Family Law - Distribution of Family Property
Family Law - Child Support - Adult Child - Adult Student
Family Law - Spousal Support

The parties went to trial for a determination of all the issues between them upon the dissolution of the marriage. The respondent was a plastic surgeon with an annual income of $1,000,000.00, paid through a professional corporation. The petitioner was a full-time homemaker, mother and wife. She spoke little English. Since 2017, by interim order, she had exclusive possession of the family home, valued at approximately $730,000.00. She was receiving $10,000.00 child support and $12,000.00 spousal support per month from the respondent. She received a $50,000.00 payment towards her share of the family property. They had married in Libya in 1997, where they lived prior to immigrating to Canada also in 1997. There were three children of the marriage, two of whom were studying at university full time, and aged 21 and 19. The third was 15 and a high school student. All three resided with the petitioner in the family home. Both parties generously supported the children, who lived a lavish lifestyle. Both had luxury automobiles for their use, fully paid educational costs, and credit cards, which were paid by the respondent. The trial judge was required to resolve a multitude of issues as the parties were diametrically opposed with respect to most of them, and the evidence was generally unreliable or non-existent. On most issues, the parties bolstered their respective positions, not on evidence, but on unsupported statements and dubious testimony. In broad strokes the issues were: whether any parenting orders were required; whether the court could determine that the respondent owned property in Libya; whether the respondent had proven he was indebted to his brother and father, whether he had a legitimate account receivable from a corporation; the value of the family home; the value of jewellery owned by the petitioner;

the value of household goods; whether any property should be exempt from distribution; the availability of a savings account for distribution; the eligibility of the adult children to child support; the income of the respondent for purposes of child and spousal support, including how much corporate income to attribute to him; whether support was payable to the adult children; the applicability of the Federal Child Support Guidelines (Guidelines) and Spousal Support Advisory Guidelines (SSAG) with respect to child and spousal support, when the income of the payor spouse and father is well in excess of $350,000; and the quantum of spousal support.

HELD: The trial judge made a joint parenting order only for the 15-year-old, with the petitioner having sole authority to make parental decisions, including whether the child should travel to war-torn Libya. As to the distribution of family property, the trial judge ruled that on the evidence before the court, he could not find that there was property in Libya to be taken into account, except perhaps one 475-square-metre parcel, but was prepared to allow the parties to investigate further, and if title and value to any of the property other than the 475-square-metre parcel were established, to have the property sold and the proceeds divided equally. The parties were given leave to have the matter remitted before him for further direction. He found that there was no evidence of an enforceable debt owing to the respondent from the father and brother, or that there existed a collectible receivable from the corporation to the respondent. The trial judge found that the respondent failed to provide cogent evidence hat he had title to the 475-square-metre parcel or of its value, so it could not be included as exempt property acquired before the marriage. Other valuations were generally found in favour of the petitioner, who presented less unconvincing evidence. The trial judge endorsed and incorporated into his judgment tables of values prepared by the petitioner, which were appended to the decision. As to the matter of determining the eligibility of the adult children for child support, and the quantum of that support, the trial judge first referenced the provisions of the Guidelines and interpretive case law, in particular, Gould v Gould, finding that, as the parties both willingly paid for the lifestyle the adult children expected while going to university, and the ample resources available to the family for that purpose, Guideline support was not inappropriate, and was ordered to be paid based on the respondent's attributed corporate income of $1,000,000.00 per annum. Eligibility of the petitioner for spousal support was not disputed, but the trial judge was required to determine the quantum of that support. The SSAG provided that for incomes above a ceiling of $350,000.00, the SSAG were no longer applicable and a purely discretionary approach would be more appropriate. The trial judge referred to Potzus v Potzus in his analysis. On that basis and keeping in mind the traditional features of the marriage, and her economic disadvantages resulting from it, the significant child support being paid to her, and the sizable value of her share of the property division, he ordered that she be paid $20,000.00 per month in spousal support.

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Bartlett v Carefree Park Corp., 2020 SKQB 315

Keene, December 3, 2020 (QB20291)

Civil Procedure - Prejudice - Want of Prosecution - Delay

The defendants in an action first commenced in 2012, brought by the plaintiff pursuant to the summary procedure rules of the Court of Queen's Bench, and not advanced beyond the early document disclosure stage, brought this application for dismissal of the action for want of prosecution in September 2020. The plaintiff claimed damages for, among other claims, negligent misrepresentation with respect to a lease of a recreational property, upon which the plaintiff had installed a septic tank, but which he claimed he was barred from using due to deficiencies in title to the property of which he should have been informed by the defendants. The court was required to determine whether the plaintiff's failure to advance the action for eight years was an inordinate, inexcusable delay, which could not be saved by interest of justice considerations.
HELD: Rule 4-44 of The Queen's Bench Rules is a codification of the case law with respect to dismissal of an action for want of prosecution, in particular, International Capital Corporation v Robinson Twigg & Ketilson (2010 SKCA 48) (ICC). The court, upon review of the law in this area, found that the action had been delayed for an inordinate amount of time, since it had been brought as a summary proceeding, and was still at a very early stage; found that the delay could not be excused because no steps of any kind had been taken during the eight years, and no persuasive reason had been provided to explain why; and also found that the action could not be allowed to continue for interest of justice reasons after considering the list of factors enumerated in ICC, in particular, that the defendants would be prejudiced in their defence.

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Shaw v Shaw, 2020 SKQB 320

Robertson, December 4, 2020 (QB20293)

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

The defendants each applied to strike the self-represented plaintiff's statement of claim pursuant to Queen's Bench rule 7-9. The plaintiff inherited nine quarters of farmland upon the death of her husband in 2000. One

of the defendants in this action, the plaintiff's son R.S., took over the farm operations in 2000. In 2014 or 2015, the plaintiff transferred a half-share to him in the presence of a lawyer. In her claim, she alleged that she had not understood the implications of the transfer. She denied signing other documents under which the defendant, Affinity Credit Union (ACU), advanced mortgage loans to R.S. in 2015, although her signature appeared on the documents. The plaintiff alleged criminal fraud against ACU. Regarding the other named defendant, Information Services Corporation (ISC), the plaintiff alleged that it should not have registered any of the instruments based on an unidentified duty of care. R.S. and the ACU each filed their application to strike the claim pursuant to Queen's Bench rule 7-9 and requested solicitor and client costs and costs according to Queen's Bench rule 11-8 respectively. The ISC applied to be removed as a defendant under Queen's Bench rule 3-84 as the proper defendant to be named was the Registrar of Land Titles. The plaintiff should have pursued her statutory remedies under The Land Titles Act, 2000 regarding registration issues.
HELD: The defendants' applications to strike the statement of claim were granted and the claim struck in its entirety. The court gave the plaintiff leave to issue a new claim provided it complied with The Queen's Bench Rules. It found that the claim was poorly drafted and prolix and failed to plead the causes of action or the necessary facts. Although the courts give self-represented litigants some degree of latitude, they must familiarize themselves with and follow the rules and procedures of the court. The claim was struck under each of the grounds enumerated in Queen's Bench rule 7-9(2)(a) to (d), and consequently, it was unnecessary to rule on the issue raised in the ISC's application. It did not find this an appropriate case to award solicitor-client costs, but all of the defendants were entitled to costs under Queen's Bench rule 11-8. However, since the plaintiff possessed limited income, the court ordered that she pay each defendant costs at $300.

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R v Ackegan, 2020 SKPC 52

Harradence, November 26, 2020 (PC20046)

Constitutional Law - Charter of Rights, Section 8, Section 9

The accused was arrested and charged with committing 30 offences. He brought a Charter application alleging that his ss. 8 and 9 Charter rights had been violated and requesting the evidence obtained during a search be excluded. A police officer had received a tip from a confidential informant that they had seen the accused in possession of guns at a certain address. The officer testified that he had received information from the source on eight occasions in the past. On three occasions, charges had been laid and on one, a conviction obtained.

The source had a criminal record, including crimes of dishonesty. The informant had been paid for the information in this case. The officer had also arrested the accused in the past for possession of a firearm to which he pled guilty and on another occasion for breaching his parole by associating with known gang members. As a result of the tip, the police conducted surveillance of the house where the accused was believed to be for three hours. They observed him come out of the building and load bags into a vehicle which he entered as a passenger. When the driver stopped the vehicle at another residence, the officer testified that he believed he had reasonable grounds to arrest the accused because in his experience, guns were often concealed in bags and he knew that the accused was prohibited from possessing firearms. After the accused was arrested, a search of the bags revealed guns, ammunition and a variety of drugs. The defence argued that the tip in this case was not sufficiently compelling to form the basis of reasonable grounds to arrest the accused. The issues were: 1) whether the accused had standing to challenge the search of the vehicle; and 2) whether the police had reasonable grounds to arrest the accused without a warrant and to conduct a warrantless search on the authority of s. 495(1)(a) of the Criminal Code?
HELD: The Charter application was dismissed. The court found that the accused's s. 8 and s. 9 Charter rights had not been breached because the arrest and subsequent search were reasonable and lawful. It found with respect to each issue that: 1) the accused had standing as a passenger of a vehicle to challenge the validity of the search. He had a reasonable expectation of privacy in the bags that were searched; and 2) the officer had reasonable grounds to arrest the accused. The tip was compelling. It noted that the reasonableness of the officer's belief that the accused should be arrested was based upon his experience as an investigator of crimes involving gangs, guns and drugs, personal knowledge of the accused's history with illegal firearms and association with gang members, and the information that he had received from the source in the past as well as the fact that the informant had seen the accused in possession of guns at the house in question.

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R v Power, 2020 SKPC 47

Green, December 3, 2020 (PC20047)

Criminal Law - Robbery

The accused was charged with five offences: robbery; committing an indictable offence with his face masked; defrauding Roger's Wireless of currency less than $5000; possession of currency the property of the Royal Bank, less than $5000, knowing it was obtained by the commission of an indictable offence; and breach of

probation. In January 2020, a branch of the Royal Bank was robbed of $2,500 when a man handed a note to a teller that said he wanted cash and had a gun. The man then left the bank and was seen heading in the direction of a nearby mall. The Crown submitted as evidence a substantial amount of surveillance video footage taken at the time of the robbery in the bank and in the interior of the mall that included photographs of the alleged robber purchasing cell phones at two kiosks in the mall and visiting the bathroom, as well as a video taken inside a taxi when the individual left the mall for another destination. The witnesses testifying on behalf of the Crown included the bank employees who had seen the man, an employee of Roger's and an employee of another cell phone provider from whom the man purchased cell phones in the mall. In the case of each of their testimony, the witnesses could only formulate a general description of the height and weight of the person in question. While in the bank, the man wore a toque and scarf but the tellers said that he wore dark-rimmed glasses and had a mustache. One teller noticed that the man had a small tattoo on the side of his neck that was similar to one the accused had. A police officer investigated the offence located clothing in the garbage bin in the mall's bathroom that matched the description of what the robber had been wearing, but DNA analysis had not been able to confirm that it had been worn by the accused. The police watched the video surveillance tape filmed outside the bathroom and saw the accused enter the bathroom wearing those clothes, but none of the people who left it were garbed similarly. The money used to purchase the Roger's cell phone was still in the cash register and found to be some of the bills marked by the bank. The employee was able to identify the accused as the person whom he had seen. The accused testified and said that he had never entered the bank on the day in question and denied robbing it. He admitted that he had walked to the mall on that day. As he suffered from colitis, he entered the mall's bathroom and the time he spent an hour in it due to his health problem. He admitted purchasing the cell phones and later taking a cab.
HELD: The accused was found guilty of the charges of robbery but not guilty of having his face masked. Although he was found guilty of the third and fourth charges, subsumed as part of the robbery, they were conditionally stayed pursuant to the Kienapple principle. The accused was found guilty of breach of his probation. The court did not believe the accused's evidence and after considering all of the other evidence concluded that the robber and the accused were the same person.

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