The Law Society of Saskatchewan Library's online newsletter
highlighting recent case digests from all levels of Saskatchewan Court.
Published on the 1st and 15th of every month.

Volume 23, No. 18 **September 15, 2021**

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Barth v Ritter, 2021 SKCA 95

Jackson Leurer Tholl, July 5, 2021 (CA21095)

Civil Procedure - Conflict of Interest - Taxation of Accounts - Appeal

T.A.B. appealed the decision of the chambers judge refusing his application to have counsel for his former lawyer, I.R., removed as counsel on the application brought by T.A.B. to have I.R.'s legal accounts taxed pursuant to s. 67 of The Legal Professions Act, 1990 (Act). He alleged numerous instances of incompetency and untruthfulness by her in acting for him in a family law dispute. It was not contested that, to respond to the taxation application of T.A.B., I.R. engaged the services of the law firm acting for T.A.B.'s spouse in the ongoing family law dispute (SGWF); that T.A.B. was never a client of SGWF; nor that T.A.B. claimed a conflict of interest related to the taxation proceeding itself. His concern was that I.R. could pass on confidential information obtained when she acted for him in the family law dispute to the lawyers of SGWF to his detriment. T.A.B. also appealed the chambers judge's decision not to allow the taxation of accounts to

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proceed because it had not been brought within the 30-day limit imposed by s. 67(1)(a)(i) of the Act, though s 67(1)(a)(iii) permitted the chambers judge in his discretion to allow an application to proceed outside the 30-day limit if it was "in the interests of justice to do so," which he found was not the case.
HELD: The court dismissed T.A.B.'s appeal in its entirety. After a review of the well-settled law pertaining to conflicts of interest, such as MacDonald Estate v Martin, [1990] 3 SCR 1235, R v Neil, [2002] 3 SCR 631 and Canadian National Railway Company v McKercher LLP, [2013] 2 SCR 649, the court had difficulty fitting the case before the chambers judge to the principles for determining a conflict of interest as developed in these cases, and in the end concluded that if there had been a conflict of interest with respect to the family law dispute, there was none in regard to the taxation of the accounts. Nothing emanating from the family law proceedings could have any bearing on the application to tax I.R.'s bill. As to the chambers judge's finding that it was not in the interests of justice to allow the application to proceed, the appeal court referred to the chambers judge's thorough review of all 30 of T.A.B.'s complaints against I.R., as well his consideration of the Law Society's letter of exoneration of I.R. from any wrongdoing, and concluded that on the standard of review with respect to discretionary decisions, the chambers judge's decision was one which he was entitled to make.

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Altus Group Limited v Estevan (City), 2021 SKCA 101

Caldwell Leurer Tholl, July 28, 2021 (CA21101)

Municipal Law - Appeal - Property Taxes - Assessments

Two groups of taxpayers (taxpayers) appealed the decision of the chambers judge reported at 2020 SKQB 20 (QB Decision), ruling that ss 33.1, 53 and 54 of The Municipal Board Act (Act) did not give the Court of Queen's Bench (QB) the power to review and direct the Assessment Appeals Committee of the Saskatchewan Municipal Board (committee) to resubmit directions to the Saskatchewan Assessment Management Agency (SAMA) following a successful appeal by the taxpayers to the committee (2020 SKMB 13). The committee required SAMA to correct its tax assessment as it related to a mass appraisal of commercial properties, which included properties owned by the taxpayers, who applied to QB on the ground that SAMA had not properly complied with the committee's initial instructions following the appeal, and so in effect denied the taxpayers the remedy they had obtained on appeal.
HELD: The court dismissed the appeals, agreeing with the chambers judge that no reasonable interpretation of ss. 53 and 54 of the Act could include a right to the relief sought by the taxpayers. The court applied the

Municipal Law - Appeal - Property Taxes - Assessments

Public Welfare Offences - Occupational Health and Safety - Death of a Worker - Sentencing

Regulatory Offence - Animal Protection Act, Section 4
Criminal Law - Kienapple Principle

Statutes - Interpretation - Personal Property Security Act, Section 30(2)

Statutes - Interpretation - Queen's Bench Act, Section 37
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Statutes - Interpretation - Saskatchewan Métis Elections Act, 2007

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Cases by Name

Altus Group Limited v Estevan (City)

Barth v Ritter

Bill v Big River First Nation

Calidon Financial Services Inc. â€“ Calidon Equipment Leasing v Magnes

Esopenko v Meath Park (Village)

EZ Automotive Ltd. v Regina (City)

H&H Holdings Ltd. v Ng

"modern" approach to statutory interpretation, as codified in The Legislation Act and in particular s 2-10(1), which states that the words in the Act are to be "read in their entire context, and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of the Legislature," and reasoned that the Act was intended to apply to a wide variety of orders, and not specifically those arising from the tax assessment process, which were expressly governed by The Cities Act and The Municipalities Act. On a close reading of ss. 53 and 54 of the Act, an enforcement process was intended for this panoply of orders, and not an appeal process, absent specific language capable of expressly providing QB with power to review and to direct the committee to correct any lapse in SAMA's compliance with its initial instructions: any such interpretation would strain the meaning of the provisions. The appeal court did agree with the appellant taxpayers that "the rule of law demands a remedy when a state actor does not comply with the law," and if they could prove that SAMA did not act lawfully in how it chose to proceed following the committee's directions, its actions were subject to the scrutiny of judicial review.

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Richardson International Ltd. v Various Rural Municipalities, Towns, Village and City (Saskatchewan Assessment Management Agency), 2021 SKCA 104

Richards Ottenbreit Ryan-Froslie, July 30, 2021 (CA21104)

Municipal Law - Tax Assessment - Assessment Appeals Committee - Appeal

The appellants, elevator companies, appealed a decision of the Assessment Appeals Committee of the Saskatchewan Municipal Board regarding the assessment of 74 properties, all of which were grain elevators located in rural municipalities and cities in Saskatchewan (see: 2019 SKMB 116). The Saskatchewan Assessment Management Agency (SAMA) had assessed the elevators by taking into account both the building and the grain handling equipment (GHE). The appellants appealed SAMA's decision to the boards of revision (BOR) pertinent to the location of each elevator on the basis that the GHE was not being used to "service" the building and therefore should not be assessed because it did not fall within the definition of improvement. Under both s. 2(1)(q) of The Municipalities Act (MA) and s. 2(1)(p) of The Cities Act (CA), an improvement is defined as a building but not as including machinery or equipment "unless the machinery and equipment is used to service the building or structure." The BORs in some instances allowed the appellants' appeal and in others, dismissed it. The appellants and SAMA each appealed the respective BOR decisions unfavourable to them to the committee. It found that the use to which an elevator was put was the main factor in determining

Kelly Panteluk Construction Ltd. v Canadian Pacific Railway Company

Kish v Facebook Canada Ltd.

Morin v Chief Electoral Officer for the Métis Nation of Saskatchewan

Nicklen Estate, Re

R v Banff Constructors Ltd.

R v N.W.

R v Potoreyko

R v Redwood

R v Roy

Richardson International Ltd. v Various Rural Municipalities, Towns, Village and City (Saskatchewan Assessment Management Agency)

Saskatchewan Government Insurance v Rabb

Saskatchewan Health Authority v Kenny

Wasserman v Saskatchewan (Minister of Highways and Infrastructure)

whether the equipment was used to service the building, pointing to the designation of elevators as special purpose properties in SAMA's Market Value Assessment in Saskatchewan Handbook and s. 39(g) of The Municipalities Regulations. If an elevator is not being used for handling grain, it would cease to be classified as an elevator. The committee concluded that equipment necessary to fulfill the purpose or use by reference to which a building is defined must be considered as being "used to service the building" and upheld the assessment of the GHE in all of the elevators. The appellants were granted leave to appeal on a question of law. The issue was whether the committee erred in law by finding the GHE used in grain elevators to receive, store and ship grain is machinery and equipment used to service the building pursuant to ss. 2(1)(q) and 2(1)(p) of the MA and CA respectively.
HELD: The appeal was dismissed. The court held that the committee had not erred in taking into consideration the purpose of an elevator when determining that the GHE is an improvement under s. 2(1)(1) of the MA and s. 2(1)(p) of the CA and properly found that the GHE was used to service the buildings in issue and was correct to uphold the assessment of the GHE for all of the elevators. In reaching its decision, the court interpreted the provisions of the MA and CA in accordance with s. 2-10 of The Legislation Act and reviewed the applicable cases, all from New Brunswick, that dealt with the term "service" in the context of municipal tax assessment.

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Calidon Financial Services Inc. - Calidon Equipment Leasing v Magnes, 2021 SKCA 106

Caldwell Ryan-Froslie Barrington-Foote, July 30, 2021 (CA21106)

Statutes - Interpretation - Personal Property Security Act, Section 30(2)

The appellant, a business involved in the sale and leasing of farm equipment, appealed the decision of a Queen's Bench chambers judge finding that its perfected security interest (SI) in a tractor had, pursuant to s. 30(2) of The Personal Property Security Act (PPSA), been defeated by sale of the tractor by the respondent, Valley Side Sales Inc. (Valley), to the respondent purchasers, the Magneses. In 2015, the appellant had placed a tractor it had repossessed with Valley for sale. Valley was unable to sell it and entered into an agreement to lease the tractor from the appellant, whereupon the latter registered an SI in the tractor with the Personal Property Registry (PPR). When Valley was approached by the Magneses about buying it, its representative incorrectly advised them that Valley had purchased it from the appellant. The representative prepared and provided the purchasers with a Form B Contract for Sale of Second Hand or Used Farm Implement under The

Agricultural Implements Regulations, 1982, but entered the wrong serial number for the tractor. The Magneses later agreed to purchase it for $235,000 and advised Valley they intended to finance the purchase through Farm Credit Canada (FCC). Valley and FCC already had a pre-existing arrangement to permit the former's customers to have such financing for purchase or lease made available to them. Valley sent a copy of the Form B contract with the incorrect serial number so that when FCC conducted a PPR search using the number, it did not find the appellant's registered SI. It sent Valley the financing documents for execution by the Magneses. They signed the documentation which included a "credit application" and an "Instalment Sale Contract and Security Agreement" (agreement), paid the deposit and took possession of the tractor. Valley executed the assignment portion of the agreement, assigning its interest in the agreement and the tractor to FCC, which then paid the balance of the purchase price to plus a commission to Valley. Valley did not advise the appellant of its transaction nor remit the deposit or proceeds of FCC's financing. Valley continued to make its lease payments to the appellant until October 2018, when it stopped due to financial difficulties that would lead to bankruptcy. The Magneses first learned of the appellant's SI in March 2019 when a bailiff came to their farm to seize the tractor. The appellant applied to the Court of Queen's Bench for a declaration that its SI took priority over the interests of the Magneses and FCC and that it was entitled to the tractor. The issue before the chambers judge was whether the tractor had been "sold" within the meaning of s. 30(2) of the PPSA. The appellant argued that the transaction between Valley and the Magneses was not a sale because, pursuant to the agreement, Valley was to retain title to the tractor until the purchase price was paid in full; as such, it was a merely an agreement to sell the tractor. It relied upon the Court of Appeal's decision in Royal Bank (1986 CanLII 3219). FCC and the Magneses conceded that the agreement included retention of title language in the clause, granting an SI over the tractor, but argued that it was a security device arranged by FCC to ensure the Magneses performed their obligations under the financing aspect of the agreement and did not have the effect of turning the sale transaction into an agreement to sell, and they relied on the decision in Spittlehouse (1994 CanLII 1295, ON CA). As there was no definition of "sale" in the PPSA, the chambers judge focused on the impact of the title retention language and whether it precluded a finding that the transaction was a sale, and held that it did not. She reasoned that Royal Bank and Spittlehouse were not wholly contradictory. The title retention language was a device used to secure the payment of the purchase price and the inclusion of it did not detract from the characterization of the transaction between Valley and the Magneses as a "sale" within the meaning of s. 30(2) of the PPSA. She further found that the tractor was sold in the ordinary course of Valley's business and neither the Magneses nor FCC knew of the appellant's SI at the time sale and, therefore, as all of the requirements of the section had been met, the interests of the Magneses and FCC took priority over the appellant's. The appellant then appealed on the ground that the chambers judge erred in finding that the tractor had been "sold" within the meaning of s. 30(2). It contended that Royal Bank sets out the proper legal approach for determining when goods are sold within the meaning of the section and that the provisions of The Sale of Goods Act (SGA) applied to the question of whether there has been a sale of goods within the meaning of the

PPSA. The agreement was an agreement for the sale of goods and the retention of title language sets out the parties' mutual intention that the title would not pass until the Magneses had paid the purchase price in full. Therefore, the tractor was not sold to them, and s. 30(2) of the PPSA did not apply to the transaction. The respondents said the chambers judge's decision was correct and was consistent with the public policy underpinning s. 30(2). Royal Bank and Spittlehouse are not inconsistent with each other, as the former did not involve consideration of a title retention security device. It was not necessary for the Court of Appeal to reject the findings in Spittlehouse on the basis of Royal Bank. The parties agreed that the appellant had a perfected SI in the tractor, that Valley's dealings with the Magneses were within the scope of its ordinary course of business, and that neither the Magneses nor FCC knew of the SI until the appellant tried to seize the tractor. HELD: The appeal was dismissed. The standard of review pertaining to the chambers judge's interpretation of s. 30(2) of the PPSA was correctness. The court found that the chambers judge had not erred in determining that a "sale" had occurred, and thus the transaction fell within the ambit of s. 30(2) of the PPSA. The decision was founded on the facts and circumstances surrounding the transaction and gave effect to the public policy objects of the section consistent with the intention of the Legislature in enacting it. After reviewing the principles of statutory interpretation applicable to determine the purpose and intent of s. 30(2), it held that was not bound to follow Royal Bank, as that decision had not read the section to give it the large and liberal interpretation now required in statutory interpretation. It could, however, consider the effect of ss. 19 and 20 of the SGA in determining the interpretation of s. 30(2) in this case. Under the s. 2(b) definition of "buyer" in the SGA, the Magneses would qualify as buyers and the transaction would qualify as a "sale" even if they were purchasing under a conditional sale agreement. It found that the purpose of the clause, that Valley would retain title in the tractor until the purchase price was paid in full, supported the respondents' position that it was included in the SI portion of the agreement for the sole purpose of creating evidence of the existence of a purchase money SI in the tractor in favour of the seller and FCC as assignee. evidence or instructed himself on the dangers of convicting an accused on that evidence alone.

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R v Redwood, 2021 SKCA 108

Caldwell Tholl Kalmakoff, August 11, 2021 (CA21108)

Criminal Law - Murder - Second Degree - Conviction - Appeal
Criminal Law - Jury Trial - Instructions to Jury - Appeal

The appellant appealed against his conviction after a trial by judge and jury on a charge of second degree murder. He had admitted to causing the death of his spouse after a night of a drinking and agreed that the sole issue on appeal was whether the Crown had proven at trial that he had had the requisite mens rea for murder. His defence was that he had been too intoxicated to form the specific intent for murder. The jury convicted him of second degree murder, finding that he had formed the necessary intent. He appealed on the grounds that the trial judge had failed to properly instruct the jury regarding the: 1) the testimony given by the victim's mother that described her good character. The appellant argued that that testimony was prejudicial because it invited sympathy toward the victim; and 2) the testimony of a police officer who stated that the appellant had "talked aboutâ€¦ hitting her." It too was prejudicial because it was given without context and since the jury did not receive special instruction on it, the jury could have impermissibly inferred that he had a history of abusing the victim.
HELD: The appeal was dismissed. The court found that the jury instructions were legally correct and they functionally equipped the jury to address the legal and evidentiary issues that arose in the trial. It was not persuaded that there was a real likelihood that the impugned evidence would have given rise to prejudice on the part of the jury or would have led it into impermissible reasoning.

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EZ Automotive Ltd. v Regina (City), 2021 SKCA 109

Caldwell Ryan-Froslie Barrington-Foote, August 12, 2021 (CA21109)

Municipal Law - Bylaws - Zoning - Interpretation - Appeal
Administrative Law - Municipal Planning Appeals Committee - Appeal
Administrative Law - Internal Appellate Tribunal - Standard of Review

The appellant, a business involved in the sale and leasing of farm equipment, appealed the decision of a Queen's Bench chambers judge finding that its perfected security interest (SI) in a tractor had, pursuant to s. 30(2) of The Personal Property Security Act (PPSA), been defeated by sale of the tractor by the respondent, Valley Side Sales Inc. (Valley), to the respondent purchasers, the Magneses. In 2015, the appellant had placed a tractor it had repossessed with Valley for sale. Valley was unable to sell it and entered into an agreement to lease the tractor from the appellant, whereupon the latter registered an SI in the tractor with the Personal Property Registry (PPR). When Valley was approached by the Magneses about buying it, its representative incorrectly advised them that Valley had purchased it from the appellant. The representative prepared and

provided the purchasers with a Form B Contract for Sale of Second Hand or Used Farm Implement under The Agricultural Implements Regulations, 1982, but entered the wrong serial number for the tractor. The Magneses later agreed to purchase it for $235,000 and advised Valley they intended to finance the purchase through Farm Credit Canada (FCC). Valley and FCC already had a pre-existing arrangement to permit the former's customers to have such financing for purchase or lease made available to them. Valley sent a copy of the Form B contract with the incorrect serial number so that when FCC conducted a PPR search using the number, it did not find the appellant's registered SI. It sent Valley the financing documents for execution by the Magneses. They signed the documentation which included a "credit application" and an "Instalment Sale Contract and Security Agreement" (agreement), paid the deposit and took possession of the tractor. Valley executed the assignment portion of the agreement, assigning its interest in the agreement and the tractor to FCC, which then paid the balance of the purchase price to plus a commission to Valley. Valley did not advise the appellant of its transaction nor remit the deposit or proceeds of FCC's financing. Valley continued to make its lease payments to the appellant until October 2018, when it stopped due to financial difficulties that would lead to bankruptcy. The Magneses first learned of the appellant's SI in March 2019 when a bailiff came to their farm to seize the tractor. The appellant applied to the Court of Queen's Bench for a declaration that its SI took priority over the interests of the Magneses and FCC and that it was entitled to the tractor. The issue before the chambers judge was whether the tractor had been "sold" within the meaning of s. 30(2) of the PPSA. The appellant argued that the transaction between Valley and the Magneses was not a sale because, pursuant to the agreement, Valley was to retain title to the tractor until the purchase price was paid in full; as such, it was a merely an agreement to sell the tractor. It relied upon the Court of Appeal's decision in Royal Bank (1986 CanLII 3219). FCC and the Magneses conceded that the agreement included retention of title language in the clause, granting an SI over the tractor, but argued that it was a security device arranged by FCC to ensure the Magneses performed their obligations under the financing aspect of the agreement and did not have the effect of turning the sale transaction into an agreement to sell, and they relied on the decision in Spittlehouse (1994 CanLII 1295, ON CA). As there was no definition of "sale" in the PPSA, the chambers judge focused on the impact of the title retention language and whether it precluded a finding that the transaction was a sale, and held that it did not. She reasoned that Royal Bank and Spittlehouse were not wholly contradictory. The title retention language was a device used to secure the payment of the purchase price and the inclusion of it did not detract from the characterization of the transaction between Valley and the Magneses as a "sale" within the meaning of s. 30(2) of the PPSA. She further found that the tractor was sold in the ordinary course of Valley's business and neither the Magneses nor FCC knew of the appellant's SI at the time sale and, therefore, as all of the requirements of the section had been met, the interests of the Magneses and FCC took priority over the appellant's. The appellant then appealed on the ground that the chambers judge erred in finding that the tractor had been "sold" within the meaning of s. 30(2). It contended that Royal Bank sets out the proper legal approach for determining when goods are sold within the meaning of the section and that the provisions of The Sale of

Goods Act (SGA) applied to the question of whether there has been a sale of goods within the meaning of the PPSA. The agreement was an agreement for the sale of goods and the retention of title language sets out the parties' mutual intention that the title would not pass until the Magneses had paid the purchase price in full. Therefore, the tractor was not sold to them, and s. 30(2) of the PPSA did not apply to the transaction. The respondents said the chambers judge's decision was correct and was consistent with the public policy underpinning s. 30(2). Royal Bank and Spittlehouse are not inconsistent with each other, as the former did not involve consideration of a title retention security device. It was not necessary for the Court of Appeal to reject the findings in Spittlehouse on the basis of Royal Bank. The parties agreed that the appellant had a perfected SI in the tractor, that Valley's dealings with the Magneses were within the scope of its ordinary course of business, and that neither the Magneses nor FCC knew of the SI until the appellant tried to seize the tractor. HELD: The appeal was dismissed. The standard of review pertaining to the chambers judge's interpretation of s. 30(2) of the PPSA was correctness. The court found that the chambers judge had not erred in determining that a "sale" had occurred, and thus the transaction fell within the ambit of s. 30(2) of the PPSA. The decision was founded on the facts and circumstances surrounding the transaction and gave effect to the public policy objects of the section consistent with the intention of the Legislature in enacting it. After reviewing the principles of statutory interpretation applicable to determine the purpose and intent of s. 30(2), it held that was not bound to follow Royal Bank, as that decision had not read the section to give it the large and liberal interpretation now required in statutory interpretation. It could, however, consider the effect of ss. 19 and 20 of the SGA in determining the interpretation of s. 30(2) in this case. Under the s. 2(b) definition of "buyer" in the SGA, the Magneses would qualify as buyers and the transaction would qualify as a "sale" even if they were purchasing under a conditional sale agreement. It found that the purpose of the clause, that Valley would retain title in the tractor until the purchase price was paid in full, supported the respondents' position that it was included in the SI portion of the agreement for the sole purpose of creating evidence of the existence of a purchase money SI in the tractor in favour of the seller and FCC as assignee.

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Morin v Chief Electoral Officer for the Métis Nation of Saskatchewan, 2021 SKQB 197

Scherman, July 9, 2021 (QB21193)

Statutes - Interpretation - Saskatchewan Métis Elections Act, 2007

The applicant, an unsuccessful candidate for the position of Vice-President in the May 2021 Métis Nation of Saskatchewan (MNS) election, applied for a judicial recount. He was one of five candidates vying for the position. A total of 4328 votes were cast. Of these, the Chief Electoral Officer (CEO) for the MNS classified 110 ballots as rejected and a further 11 ballots as spoiled. The applicant lost the election by a margin of 106 votes. Relying on s. 80(2) of the Saskatchewan Métis Elections Act, 2007, the applicant's grounds for a recount were the same as those provided in s. 80(2) of the Act: that an election officer improperly rejected ballots, made an incorrect statement of the number of votes cast for any candidate or improperly counted or added up the votes. No evidence was provided that the provisions of the Act were not generally complied with or that the election officer made an incorrect statement or calculation of the number of votes cast for any candidate or improperly counted or added them but rather, the applicant argued that given the small difference between the 110 rejected ballots and the 106-vote difference between his votes and those of the successful candidate, the court should exercise its discretion to order a recount. The CEO deposed that because the margin of victory of the successful candidate over the applicant was in excess of the two percent threshold specified in s. 79 of the Act, she had not applied for a judicial recount.
HELD: The court declined to exercise its discretion to order a recount. It found there was no good public purpose to be served by so ordering where the only justification was a theoretical possibility of a change in the election result and where that possibility was highly improbable.

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Kish v Facebook Canada Ltd., 2021 SKQB 198

Keene, July 14, 2021 (QB21194)

Civil Procedure - Class Actions - Certification - Evidence
Civil Procedure - Class Action - Evidence - Expert Evidence - Qualifications of Expert
Civil Procedure - Class Action - Application to Strike Affidavit

The plaintiff, acting as a proposed representative of a class, applied for certification of a class action suit against the defendants, Facebook Canada Ltd. and Facebook, Inc. The proposed claim alleged that Cambridge Analytica, while working on behalf of American politicians, obtained personal information about Canadian Facebook account holders and other Canadians who did not have such accounts. The plaintiff's proposed claim alleged breach of contract and privacy legislation, negligence and breach of fiduciary duty against the defendant as well as other causes of action. The evidence consisted of an affidavit sworn by an expert and two

affidavits deposed by the plaintiff. The defendants applied to strike out: the expert's affidavit on the basis that he did not have relevant qualifications, did not verify the accuracy or reliability of the information received from plaintiff's counsel and did not review the defendants' responding evidence; the plaintiff's first affidavit as inadmissible because the articles attached as exhibits were provided by her counsel and not verified by her and the internet materials were unreliable; and the plaintiff's second affidavit as inadmissible because it was not proper reply evidence since it did not respond to the matters raised in the defendants' affidavits, was not verified by the plaintiff and contained improper legal argument. The issues were: 1) the standard for admissibility of expert evidence respecting certification; 2) the standard for admissibility of internet hearsay evidence; and 3) whether the expert's and the plaintiff's affidavits were admissible.
HELD: The plaintiff's certification application was dismissed. The defendant's application to strike the affidavits was granted and thus there was no evidence from the plaintiff before the court. The court noted the proposed claim in this case resembled that made in Simpson v Facebook that had been dismissed by the Ontario Supreme Court and it followed the approach taken in that decision to the evidence. It found with respect to each issue that: 1) the evidentiary burden on a certification motion is the low "basis in fact" test for each of the certification criteria provided in s. 6 of The Class Actions Act and it must be discharged by admissible evidence. The evidence tendered, including expert evidence, must meet the usual criteria for admissibility as determined under the Mohan ([1994] 2 SCR 9) test as restated in White Burgess (2015 SCC 23); 2) the standard for admissibility for hearsay internet evidence was set out in Thorpe (2010 SKQB 39). It must contain sufficient badges of reliability or it will be rejected as worthless and inadmissible; and 3) it would strike the expert's affidavit because, after examining the expert's curriculum vitae, the court found he was not a qualified expert for the matter in question. Further, it found that the research he conducted and the documents he attached as exhibits to his affidavit that included internet searches, legislation and government documents displayed unreliability, were outside his expertise or not necessary to assist the court. The plaintiff's affidavits were also struck. The first affidavit was inadmissible. During her cross-examination, the defendants established that the plaintiff had not verified the accuracy or the truth of her statements in the affidavit. The exhibits appended to it were taken from the internet by her counsel, she had not read them and they were not admissible. It also found that the plaintiff's second affidavit did not reply to the defendants' affidavit evidence. This affidavit also included some of the same exhibits as those appended to her first affidavit, and they were not admissible.

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Saskatchewan Health Authority v Kenny, 2021 SKQB 203

McCreary, July 16, 2021 (QB21199)

Labour Law - Arbitration - Judicial Review
Labour Law - Collective Agreement - Interpretation

The applicant employer, the Saskatchewan Health Authority, applied for judicial review of a labour arbitration award. The arbitration concerned whether the applicant had imposed a disciplinary demotion on a grievor in breach of a collective agreement between it and the respondent union, the Health Sciences Association (HSAS). The agreement required the applicant to use the principles of progressive discipline but the respondent alleged that it had demoted the grievor without taking such steps. At the hearing, the applicant argued that the demotion was non-disciplinary and was a valid exercise of its management rights to reorganize the workplace. The arbitrator upheld the grievance, determining that the demotion was disciplinary and undertaken in violation of the collective agreement. In this application, the applicant argued that the arbitrator's decision was unreasonable. It contended that he conflated the concept of an employee's capability to perform with the concept of culpable conduct.
HELD: The application was dismissed. The court found that the standard of review of the decision of a labour arbitrator was reasonableness, as set out in Vavilov. In this case, the arbitrator's decision and the outcome of the award were reasonable. It found that the arbitrator's analysis respecting capability and culpability was reasonable and correct in law. The evidence demonstrated that the applicant was aware that the grievor was capable of meeting the expectations related to her position and, therefore, her deficiencies were culpable. Consequently, the arbitrator's conclusion that the applicant imposed a disciplinary demotion in violation of the collective agreement was reasonable and his decision to reinstate her to her former position was also reasonable.

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Wasserman v Saskatchewan (Minister of Highways and Infrastructure), 2021 SKQB 204

Mitchell, July 20, 2021 (QB21200)

Statutes - Interpretation - Queen's Bench Act, Section 37
Civil Procedure - Class Action - Application for Stay of Proceedings

The applicants, the proposed plaintiffs in a proposed class action commenced in April 2020, applied for an order staying a related civil action brought by the respondents pending the resolution of the certification

hearing, scheduled to commence in April 2022. The application was brought pursuant to ss. 29 and 37 of The Queen's Bench Act, 1998 (QBA) and Queen's Bench rule 1-5. The proposed class action and 16 other civil lawsuits had been filed to date in Saskatchewan and Alberta, all of which related to the deaths or injuries suffered by individuals involved in the collision between a bus carrying the Humboldt Broncos hockey team and a semi-trailer truck in April 2018. The driver of the latter vehicle, Sidhu, pled guilty to 16 counts of dangerous driving causing death contrary to s. 249(4) of the Criminal Code and 13 counts of dangerous driving causing bodily harm contrary to s. 249(3) of the Code (see: 2019 SKPC 19). The applicants and the respondents in this application are, like the plaintiffs in the other actions, the representatives of the individual who died in the collision or survivors of it. The causes of action and remedies sought against Sidhu and other defendants in the multiple proceedings were similar. The applicants argued that allowing one or more of the many related civil actions to proceed contemporaneously with their proposed class action would create problems that the Act and the Queen's Bench Rules are designed to minimize, such as a multiplicity of actions raising the possibility of inconsistent verdicts. The applicants advised that the counsels for the plaintiffs in all other related civil actions, except for the respondents', have agreed to hold their particular action in abeyance pending the disposition of the applicants' certification application. The respondents, the plaintiffs in the case described as "the Herold action," opposed the relief sought the applicants because their action was filed first. They claimed that if the stay were granted, they would suffer various kinds of prejudice, including: a) legal process, because they had selected their own counsel and commenced their action first and sought to pursue it independently. It would be completed before certification was granted. A stay would delay their questioning of Sidhu, who would be deported sometime following his release in November 2021, and of a crucial witness who was in poor health; b) financial, because of the amount of time, effort and already spent in the preparation of their lawsuit; and c) increasing the psychological harm they will suffer if their action does not move forward now. The respondents filed affidavits attesting to their depression, anger and anxiety resulting from the accident. The issues were: 1) what was the applicable standard for staying an individual action prior to the certification of a proposed class action? The applicants argued that it would not be in the interests of justice respecting the values of consistency and judicial economy expressed in the Foundational Rules, especially Queen's Bench rule 1-3, to permit both actions to proceed contemporaneously. The respondents contended that the standard for staying their action was the stringent "clearest of cases," so that it would not be stayed unless it was shown that allowing it to proceed amounted to an abuse of process; and 2) applying this standard, should the respondents' action be stayed pending a decision on the certification of the class action and, if so, what terms should attach to the temporary stay?

HELD: The application was granted. The court ordered a temporary stay of the Herold action until the applicants' class action is certified and opt-out notices delivered by the respondents or the certification is dismissed. It set out the terms of the order, including that during the temporary stay, counsel for the respondents may participate in all pre-certification processes, including oral questioning of Sidhu and any pre-

trial discovery of other relevant witnesses. Prefatory to determining the first issue, the court reviewed ss. 29 and 37 of the QBA and the Queen's Bench Rules as well as s. 15 of The Class Actions Act (CAA) to determine what effect they had on the plaintiffs' application. It observed that s. 15 of the CAA respecting the court's powers to stay or sever any action related to a class action did not apply to this case, as the class action was not yet certified. It found with respect to each issue that: 1) the authority of the court to temporarily stay an action pursuant to s. 37 of the QBA is exercised by taking into account the interests of all the parties and of justice. In Saskatchewan, the authority to stay the Herold action even temporarily pursuant to s. 37 is not determined by employing the "clearest of cases" standard; and 2) the Herold action should be stayed temporarily. It assessed the four factors set out in Hollinger (2004 CanLII 7352) and found that: i) the actions were virtually identical; ii) the actions involved the same factual background; iii) granting the stay would prevent unnecessary and costly duplication of judicial resources and uphold the policy objectives sought to be advanced by class actions; and iv) the temporary stay would not result in an injustice to the plaintiffs in the Herold action because any injustices could be managed and even mitigated in the short term by conditions. It addressed the prejudices described by the respondents and found that it was not persuaded that by granting a temporary stay: a) they would suffer legal process prejudice. Under s. 18 of the CAA, they could opt out after certification. The Herold action was not well-advanced and would probably not be decided any time soon. Prejudice regarding the looming deportation of Mr. Sidhu and the ill health of the witness could be dealt with by allowing their counsel to participate in his questioning in the class action; b) that the respondents' preparation costs would not be wasted, as their work would still be available to them if certification were not granted or if they exercised their right under s. 18 of the CAA; and c) they would experience psychological harm in any event because of the stressful nature of litigation.

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Bill v Big River First Nation, 2021 SKQB 206

Elson, July 22, 2021 (QB21202)

Corporations - Non-profit Corporations - Oppression

The applicants, the Chiefs of the Pelican Lake and Witchekan Lake First Nations, acting as representatives of their respective members, sought an order pursuant to s. 225(2)(a) of The Non-Profit Corporations Act, 1995 (NPCA) directing the respondents, the Chief and other representatives of the Big River First Nation (BRFN), to fulfil their outstanding reporting obligations under the funding agreement (agreement) between the parties

and the Government of Saskatchewan. They alleged that the respondents had engaged in oppressive conduct under the NPCA. The parties had formed an unincorporated association in 1991, the Agency Chiefs Tribal Council (Tribal Council), to promote cooperation amongst themselves, and later incorporated the Agency Chiefs Tribal Council Inc. (ACTC), a non-profit corporation, to assist in meeting that objective. The ACTC entered into the agreement with the province. The funding was to be distributed proportionately between the member nations based on their relative populations. In 2019, the respondent decided to resign its membership in ACTC because it believed that the directors appointed by the applicants had begun using their majority position on the ACTC board to make certain unilateral changes that were prejudicial to its interests. The steps taken by the board in response to the resignation prompted BRFN to bring an application pursuant to the oppression remedy under the NPCA against the ACTC for alleged oppressive conduct. The court found that the BRFN was entitled to the relief it sought under the oppression remedy (see: 2020 SKQB 273). ACTC appealed the decision to the Court of Appeal and it remained under reserve. In this application, BRFN freely admitted that it had not complied with its part of the ACTC's 2019 reporting obligations under the agreement but explained that ACTC had been unwilling to cooperate with it to plan how its proportion of the funding would flow through to it following its withdrawal from the Tribal Council and resignation from ACTC. Because it believed that amounts due to it under the agreement had been improperly reduced in the ACTC's audit, it had agreed to complete the request of reporting if all funds received under the agreement were placed in trust with a law firm on appropriate trust conditions, but the offer was refused. The applicants' position was that the respondents' decision not to fulfil their reporting obligations is indicative of their efforts to coerce and abuse the circumstances of the other nations. They also maintained that the respondents' actions reflected bad faith in that they are trying to force termination of the agreement as part of their goal to benefit BRFN to the exclusion of the other two member nations. The respondents asserted that the issue raised in this application is res judicata, since the decision rendered in 2020 by the Court of Queen's Bench regarding BRFN's application had already decided that its failure to report did not constitute oppressive or unfair conduct. Second, they argued that a remedy for oppressive conduct cannot be imposed where the dispute is simply between directors or members of a non-profit corporation. They claimed punitive costs of $2,000 for the five respondents and solicitor and client costs in favour of BRFN.

HELD: The application was dismissed. The court found that the conflict between the parties was the non-profit equivalent of a dispute between "quarreling shareholders" as described in the decision in Geddes (2014 ABQB 416). The applicants, as members of non-profit corporation, could not employ the oppression remedy as a means of bending the dissenting members to their will. It declined to award costs as requested by the respondents but did award the costs of the application fixed at $10,000.

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Saskatchewan Government Insurance v Rabb, 2021 SKQB 207

Mitchell, July 26, 2021 (QB21203)

Civil Procedure - Application to Set Aside Noting for Default of Defence

The defendant applied pursuant to Queen's Bench rule 10-13 to set aside a default judgment obtained by the respondent, Saskatchewan Government Insurance (SGI). The defendant had been the driver of a vehicle whose owner was insured by SGI when it struck a bridge. During his hospitalization following the collision, blood samples were taken from him revealing he had an ethanol level of 15.9 mmol/L. Based on that record, the forensic toxicologist retained by SGI reported that the applicant's blood alcohol concentration at the time of the accident would have been between 101 mg and 157 mg percent. SGI then informed the applicant by letter in March 2018 that it declined payment to him under his insurance policy. It had paid out monies for the damage to the owner's vehicle and the bridge, and it commenced an action to recover these monies from the applicant in July 2019. As personal service of the statement of claim upon the applicant proved difficult, SGI obtained an order for substitutional service. The statement of claim was left at a residence in Medicine Hat in August 2019. When the applicant failed to respond, SGI took out judgment against him in the amount of $95,514. During the autumn months of 2019, SGI sent the applicant three demand letters with copies of the default judgment attached. In July 2020, the applicant discovered that his driver's licence had been suspended and learned from SGI that it was because of the default judgment. He did not commence this application until June 2021. In it, he provided the explanation that when he received the letters from SGI in 2019, a lawyer advised him to call SGI or wait to be sued, and he chose the latter approach. When the statement of claim was left at the residence, he was not living there because he had separated from his wife in July 2019. In August 2019, he did not receive it because he and his wife were on a vacation in an attempt to reconcile. Neither did he receive any of the demand letters that SGI sent later. His wife's affidavit corroborated these assertions. When the applicant learned of the default judgment, he retained legal counsel. He submitted a proposed statement of defence in which he pled that, among other things, he was not impaired by alcohol and drugs and there was no proof that he was under the influence, relying upon s. 66 of The Automobile Accident Insurance Act. At trial, he would provide an expert witness' opinion regarding his level of intoxication at the time of the accident in response to SGI's expert's report.
HELD: The application was granted and the applicant was given two weeks from the decision to file a statement of defence. The court found that the applicant had just met the evidentiary threshold under Queen's Bench rule 10-13 and it would exercise its discretion to set aside the default judgment in accord with the principles of fundamental justice and equity. It reviewed the four factors set out in Desbiens (2020 SKQB 145)

governing applications under Queen's Bench rule 10-13 and found that it accepted the applicant's evidence and reasons for delay, although parts of his explanation were less than compelling. It took judicial notice of the pandemic in 2020 in regard to why the applicant's application was made a year after he learned of the default judgment. The applicant's proposed defence raised a properly triable issue. SGI would not suffer irreparable harm if the default judgment were set aside. In considering whether SGI would suffer serious prejudice, the court noted that although witnesses' memories may have dulled in the four years since the accident, the significance of that might be lessened if the issue at trial were to be the evaluation of expert evidence. SGI's costs would not be thrown away because they could be assessed as part of any costs order issued by a trial judge should SGI succeed. Finally, the applicant should have the opportunity to defend against the judgment for such a substantial sum.

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Nicklen Estate, Re, 2021 SKQB 208

MacMillan-Brown, July 28, 2021 (QB21209)

Wills and Estates - Will - Codicil - Interpretation

The executrix of the estate of Albert Edward Nicklen (the deceased) applied for letters probate regarding a handwritten document that she alleged was a codicil to the will of the deceased, her brother. A judge dismissed her initial application on the basis that it was not clear that the document was testamentary in nature and directed that, if it was to be presented as such, the application for letters probate must go on notice to the individuals named in the will and the document. Apparently, the executrix followed the judge's direction, as the beneficiaries to the deceased's will were represented at the hearing of this application for probate of the codicil. The executrix filed an Affidavit of Plight and Condition in which she deposed that, two weeks before his death in 2020, the deceased had asked her to look at notes he had written on the back of a receipt (the document) that indicated changes he wanted to make to his will. The will to which he referred had been prepared by a lawyer and was properly executed and witnessed in 2013. The major difference between the will and the document was that in the former, the home quarter was left to the deceased's former common-law spouse and her children and in the document, that parcel of land was to be transferred to the deceased's brother, William. The notes on the undated document were in the deceased's handwriting. He did not sign the document, but printed his full name on it. After he showed it to the executrix, she made an endorsement on it, acknowledging that on that date, the deceased had showed her the changes he wished to make to his will. In

her affidavit in support, the executrix deposed that the deceased had advised her numerous times that he intended to change his will to remove as his former common-law spouse as a beneficiary and that he wanted to give land to his brother, William, as they had farmed jointly for his entire life. The executrix explained that she and the deceased tried to contact his lawyer to make the changes to his will in February 2020, but he was not available at that time and her brother died before any consultation occurred. In response to the application, the beneficiaries under the deceased's 2013 will argued that the handwritten document represented only notes the deceased made to himself to make changes to his will but did not get around to before he died. Affidavit evidence was submitted by the deceased's former spouse and one of his friends. They both deposed that in their experience, the deceased always used professionals for legal and financial matters, always signed his name as "Albert Nicklen" in cursive writing and was meticulous with his papers. His habit was to always keep a pad of lined paper with him and not to write on scraps.
HELD: The court issued letters probate in relation to the will alone. The court found that the application by the executrix and the deceased's brother to admit the document for probate failed because they had not met the burden of showing on a balance of probabilities that it was a testamentary document. Based upon a review of it and the extrinsic evidence, it concluded that the notes represented changes that the deceased intended to make but he died before his intention could be fulfilled. The evidence showed that the deceased was meticulous: his habit was to write on a pad of paper he always kept near him. He always used professional services for his legal and accounting needs. His effort to contact his lawyer shortly before his death supported the conclusion that he intended to change his will but ultimately could not do so. The executrix's acknowledgement on the document referred to changes that the deceased wished to make to his will: a future intention. The deceased's notes themselves were unclear, contained a mixture of prospective and retrospective descriptions of his property and did not reflect a fixed testamentary intention.

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R v Potoreyko, 2021 SKQB 212

Robertson, August 10, 2021 (QB21207)

Regulatory Offence - Animal Protection Act, Section 4
Criminal Law - Kienapple Principle

An unrepresented rancher, A.W.P., conducted his own defence at trial before the Provincial Court judge (trial judge) with respect to the Criminal Code offence of causing unnecessary suffering to animals pursuant to s.

445.1(1) of the Criminal Code and the regulatory offence under s. 4 of The Animal Protection Act, 1999 (APA) of causing an animal to be or continue to be in distress. Though commenting that the trial record of the factual findings of the trial judge and her application of the facts to the offences was not extensive, the court found he could meaningfully review her decision, and found no fault with her entering convictions on both offences since the issues he was to decide did not touch on these questions. The relevant facts found by the trial judge were that A.W.P. allowed cattle in his care to become lame due to hoof ailments, causing them distress and pain and suffering over a lengthy period, though he was provided by a veterinarian with a simple, effective, and inexpensive cure to heal his animals which he refused to use. The issues on appeal were: 1) did the trial judge provide the self-represented accused with adequate assistance in conducting his defence so that he received a fair trial? 2) Did the principle in R v Kienapple, [1975] 1 SCR 729 (Kienapple) apply so that both convictions could not be allowed to stand? and 3) What was the fit sentence in this case?
HELD: The summary appeal court judge found that the trial judge's assistance to A.W.P. during the trial struck the correct balance between, on the one hand, instructing the accused on procedural and evidentiary matters so his trial would be fair and, on the other, refraining from becoming his counsel, which she could not do as that would then be compromising her independence. (See: R v Cathcart, 2019 SKCA 90.) He next turned his mind to the applicability of the Kienapple principle, that is, whether the provincial offence was a criminal offence, and whether the two offences arose out of substantially the same delict. If so, entering convictions to both offences would be precluded by the common law. He found first that, as the APA provided for punitive sanctions which included incarceration, s. 4 of the APA was a true criminal offence, and also concluded that both offences were substantially the same, as each prohibited the intentional causing of pain, suffering injury or distress to an animal. In the result, the court quashed the conviction for the provincial offence, leaving the fine and prohibitions imposed for the Criminal Code offence in place.

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Esopenko v Meath Park (Village), 2021 SKQB 214

Currie, August 11, 2021 (QB21211)

Civil Procedure - Jurisdiction of the Court - Human Rights Complaint
Statutes - Interpretation - Saskatchewan Human Rights Code, Section 27.1

In two separate but related actions, the defendants, the Village of Meath Park and the Rural Municipality of Garden River, applied pursuant to Queen's Bench rules 7-9(1)(a) and 2(a) for an order striking specific

provisions of the plaintiff's statements of claim against each of them. The plaintiff had been employed concurrently with both of the defendants and she had been dismissed from both positions. In her pleadings in each of the statements of claim, the plaintiff alleged the defendants/applicants had violated the 1979 version of The Saskatchewan Human Rights Code (since rep.) and claimed remedies such reinstatement of employment, monetary losses and human rights damages pursuant to s. 31.4 of the Code. The applicants argued that it is firmly established in Saskatchewan law that the Court of Queen's Bench does not have jurisdiction to determine claims based on the Code and that the plaintiff was required to follow the procedures set out in it to pursue a remedy under it. The procedure does not include making a claim in a civil action. The plaintiff argued that, in the cases relied upon by the defendants, the court failed to consider s. 27.1 of the 1979 Code (now s. 30 of the 2018 Code). The reference to "another proceeding" in that section must be given meaning by acknowledging that the court has concurrent jurisdiction to determine an allegation of a breach of the Code. HELD: The application was granted. The court struck the parts of the statement of claim impugned by the applicants as disclosing no reasonable claim under Queen's Bench rule 7-9(2)(a). It held that the law in Saskatchewan continues to be as described in the Yashcheshen decision (2020 SKQB 209). The court did not have jurisdiction to consider breaches of the Code in the impugned parts of the plaintiff's statements of claim and she could not succeed in the actions on the alleged breaches of the Code.

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H&H Holdings Ltd. v Ng, 2021 SKQB 215

Bardai, August 11, 2021 (QB21212)

Corporate Law - Business Corporations Act - Oppression Remedy

This matter involved cross-applications by two competing camps: one, the Waisman Group, consisting of Roger and Chuan, and the other, the Egger Group, consisting of Martin and Robert. All were sole directors and shareholders of a group of companies which built, owned, and operated hotels in Saskatchewan. They went into business together in 2000. Prior to differences arising between them, the understanding among them was that together they would build and operate hotels and other hospitality-related businesses and would do so on an ongoing basis, which they did, through various operating companies (operating companies). The Waisman Group was in Vancouver and the Egger Group in Saskatchewan. The Waisman Group provided capital, and the Egger Group provided both capital and management expertise through two hotel management companies owned by them, collectively called VJ. No internal mechanism had been put in place to break any deadlocks in

the boardroom should disagreements arise between the four of them. In 2010, Roger and Chuan did not want to build any more hotels and so withdrew from doing so. Martin and Robert continued with the initial plan to build hotels but did so as sole shareholders in new companies. In 2016, Roger and Chuan became dissatisfied with the management of the hotels and the return on their investments, and complained that the Egger group was using operating company assets in their own ventures, taking unauthorized loans from the operating companies without paying interest, paying management fees to VJ for managing hotels not owned by the operating companies, and failing to disclose relevant matters such as the disappearance of $300,000.00 from one of the operating companies, which the Waisman Group suspected may not have been theft. Differences came to a head in 2016, when the Waisman Group brought an oppression application that was resolved just prior to trial by way of minutes of settlement (settlement) on September 22, 2018. Other than judgment for money-related matters, the terms of primary importance in the settlement were the appointment of a fifth director and the hiring of an independent management company. Each camp blamed the other for a failure to consummate these terms and claimed the other camp was being unprofessional and uncooperative. They agreed they were no longer on friendly terms. In the application, the Egger Group sought a liquidation of the assets of the operating companies because of oppression by the Waisman Group and the Waisman Group requested a finding of oppression against the Egger Group and did not want to liquidate, so asked for an order which would facilitate completion of the terms of the settlement.

HELD: The hearing judge found that, even if he found oppressive behaviour by the Waisman Group towards the Egger Group, he would not at this time order liquidation of the operating companies because the application was fatally flawed. The evidence presented did not provide for a qualified liquidator with a sound liquidation plan, and as such, the judge could not fairly and equitably make such an order on the materials before him. He also reasoned that, on a reading of ss. 207, 213, and 234 of The Business Corporations Act (Act) and the relevant and binding case law elucidated in Gilliss v Phillips, 2008 SKCA 120, Cooper v Cooper, 2021 SKQB 140 and Gordon v White, 2020 SKCA 129, in order to obtain a remedy for oppression pursuant to the Act, the applicant must show that he had a reasonable expectation about the course of events and dealings in the business activity in which he was engaging, and that these reasonable expectations were thwarted by the corporation by conduct which could be characterized as falling within the terms "oppression," "unfair prejudice" or "unfair disregard of a relevant interest." The hearing judge found on the evidence that the actions of the Egger Group as described did amount to oppression. As to what remedy to impose, he recognized that liquidation of a corporation's assets was intended by the Act to be a measure of last resort, and s. 234 of the Act provided him with recourse to numerous less draconian remedies which might solve the differences between the two camps. As such, he ordered mechanisms to allow the settlement to move forward, and in particular, appointed a committee from one member of each group and an unaligned third person to select a fifth director, and set out a process for choosing a new manager for the operating companies.

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Kelly Panteluk Construction Ltd. v Canadian Pacific Railway Company, 2021 SKQB 223

McMurtry, August 19, 2021 (QB21216)

Contract Law - Interpretation - Holdback Clause
Statutes - Interpretation - Builders' Lien Act, Section 13

The applicant, Kelly Panteluk Construction Ltd., sought payment to it of the holdback by the respondent, Canadian Pacific Railway Co., and the latter responded that it was entitled to retain the holdback as a set-off on damages claimed in a different action that it had initiated against the applicant and others arising out of contract. Both parties agreed that the issues in the application could be resolved summarily without trial. They and others entered into a construction services contract in 2015 that provided for the construction of a spur line in Saskatchewan. The complete background to this application was set out in a previous decision of the Court of Appeal (see: 2020 SKCA 123). A clause in the contract established a 10 percent holdback on monies payable to the applicant. Problems emerged due to a foundation failure on a portion of the line that increased the value of the contract substantially. When the respondent issued a Certificate of Completion of Work in 2017, certifying the work under the contract had been completed as at December 17, 2017, the certificate triggered another clause in the contract that stated that the holdback became due and owing no later than February 5, 2018. However, in August 2017, the applicant filed an action for damages based in contract, quantum meruit an unjust enrichment against the respondent relating to the project and the respondent, and in December, 2017 commenced a claim against the applicant for damages for breach of contract and in negligence. The respondent asserted a right of set-off against any amounts owing by it to the applicant in respect of its work on the project and did not release the holdback. The applicant then applied for an order under ss. 17 and 38 of The Builders' Lien Act (BLA) directing the respondent to immediately pay the holdback. The matter was dealt with by the Court of Appeal in 2020 in the decision noted above. It held that as a result of its determination therein, the holdback was not governed by s. 38 of the BLA and an application should proceed in the Court of Queen's Bench. This application proceeded to resolve the issue of whether the respondent was entitled to retain funds held back pursuant to the contract between the parties by virtue of claim to set-off in contract or otherwise. The clause that the respondent relied upon stated that it had to pay the holdback within a certain period after the certificate of completion issued, "providing that [it] may retain out of such hold back monies any sums in accordance with the terms of this Agreement, or required by law or otherwise to satisfy any claims against [it] or the Work or other monetary claims against the Contractors and

enforceable against [the respondent]." The applicant conceded that the respondent's claim was an outstanding claim within the meaning of s. 13 of the BLA.
HELD: The court found that the respondent was entitled to retain the holdback as set-off against its claims for breach of contract and damages, based upon s. 13 of the BLA and the decision in Swagger (2000 BCSC 1839). The contract between the parties did not clearly and expressly remove the right to set-off and the clause in dispute was not clear in specifying when the respondent might retain monies out of the holdback in certain circumstances. However, s. 13 of the BLA permits an owner who is in the position of trustee in relation to the holdback to retain the holdback, as trust property, in an amount equal to outstanding debt, claims or damages.

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R v N.W., 2021 SKPC 36

Schiefner, July 28, 2021 (PC21030)

Criminal Law - Sexual Assault - Reasonable Doubt

The trial judge was required to determine whether the Crown had proven beyond a reasonable doubt the essential elements of the offence of sexual assault, and reviewed the evidence. The Crown alleged that N.W., a 14-year-old male resident of Eagle's Nest group home, entered the room of S.P., a 14-year-old female, without invitation by her and had non-consensual sexual intercourse with her. S.C., a staff member at Eagle's Nest, testified that he performed a check of N.W.'s room at 12:00 am, and believed he was in his room at that time. He checked again at 1:00 am and N.W. was missing. Clothing had been stuffed and placed in the bed. S.C. searched every room in the facility, and when he came to S.P.'s room asked her if she had seen N.W. S.P. said she had not seen him. During his search of the entire building, he learned that N.W. might be in S.P.'s room. He then returned to the room, found N.W. hiding under the blankets in S.P.'s bed and told him to leave. In her examination-in-chief, S.P. denied arranging for N.W. to come to her room later that night and testified that when he arrived there, she was surprised. She testified that N.W. forced himself on her and though she repeatedly told him not to, he had sexual intercourse with her for 15 minutes against her will. In cross-examination, she agreed that N.W. was in her room from 1:00 am to 2:30 am, when S.P. found him there and told him to go back to his room. When confronted with her evidence in cross-examination that N.W. was in her room for two and a half hours, and that the sexual assault had lasted only 15 minutes, and asked what they did during the remaining two hours, S.P. for the first time said that the first assault lasted 15 minutes, but that N.W. had sexually assaulted her a second time for 45 minutes. Her evidence was also inconsistent with the evidence

of S.C., which the trial judge fully accepted and used as a benchmark to gauge S.P.'s credibility, in particular her denial that N.W. was in her room when he was. N.W.'s testimony was more consistent with that of S.C. He testified to stuffing clothes in his bed, as observed by S.C., and that he hid in S.P.'s room when discovered by him. He said he and S.P. had arranged for him to come to her room. He then described sexually forward behaviour on her part, including fellatio prior to consensual sexual intercourse.
HELD: The trial judge referred to the seminal cases R v Ewanchuk, 1999 SCC 711, and R v Barton, 2019 SCC 33 in ruling that the Crown had failed to prove beyond a reasonable doubt one of the essential elements of the actus reus of the offence, that S.P. had not consented to the sexual intercourse. He ruled the unexplained inconsistencies in her evidence in essential areas of the Crown case when compared to S.C.'s evidence and that of D.W., whose evidence could be believed, compromised her credibility to such an extent that he had a reasonable doubt that she had not consented to the sexual activity.

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R v Roy, 2021 SKPC 39

Agnew, July 29, 2021 (PC21029)

Criminal Law - Sentencing - Joint Submission
Criminal Law - Sentencing - Long-term Offender

It was uncontested that during the Part XXIV Criminal Code hearing to determine whether G.C.R. met the criteria to be designated a long term offender (LTO), and in which the Crown and defence put forward a joint submission that G.C.R. met all the requirements to be designated as such, the sentencing judge ruled that he was prohibited by case law, in particular, R v Anthony-Cook, 2016 SCC 43, from considering the joint submission and was bound by law to perform a complete analysis of the question himself in spite of the joint submission, and ultimately decided that G.C.R. did not satisfy the requirement of treatability (see: 2021 SKPC 4). As this course of events took counsel by surprise, they requested that pronouncement of sentence be adjourned until they had a chance to consider their respective positions, and the sentencing judge allowed the adjournment for that purpose. In the interval, G.C.R. decided he would apply to call evidence in favour of the LTO designation, in particular, an independent psychological assessment, which had not been prepared because he thought the joint submission made it unnecessary. He in fact called no evidence during that phase of sentencing. The Crown and defence came before the sentencing judge on the adjourned date and both took the position that G.C.R. should be permitted to have sentencing adjourned to allow for the preparation of the

independent psychological report. They argued for calling of evidence on behalf of G.C.R. because he had relied on the joint submission in the conduct of the hearing, and it would advance the administration of justice to allow the additional evidence. HELD: The sentencing judge decided that he would not adjourn the sentencing hearing to allow for G.C.R. to call evidence. In doing so, he considered, first, whether he was functus officio, and secondly, if not, whether it was "appropriate to re-open the hearing and allow defence to call evidence." After an extensive review of the important policy objectives protected by the concepts of both functus officio and res judicata, among other reasons, the sentencing judge recognized that the matter of the LTO designation was but one phase of the sentencing hearing and that until the sentence was pronounced, his task was not at an end, and he was not functus officio. However, though he found he could allow the evidence to be tendered, he nonetheless declined to do so, finding that the evidence purporting to be called did not satisfy the principles for adducing fresh evidence during a trial and on an appeal from conviction, as set out in R v Dirksen, 2021 SKCA 6, and Palmer v The Queen, [1980] 1 SCR 759, namely, that as the evidence did not yet exist, he was unable to assess its relevance, credibility, or whether it would be expected to "have affected the result."

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R v Banff Constructors Ltd., 2021 SKPC 44

Klause, August 6, 2021 (PC21033)

Public Welfare Offences - Occupational Health and Safety - Death of a Worker - Sentencing

The accused, Banff Constructors Ltd., was sentenced pursuant to s. 3-79 of the Saskatchewan Employment Act. One of its employees had been killed on the construction site for the building of the Pattison Children's Hospital, a major project. He had been crushed when a piece of equipment collapsed on top of him. The evidence at trial indicated that the equipment was put together on site without proper training and then substantially altered to raise it to a new height without any input by the manufacturer. The Crown submitted that the accused should be fined $1,000,000.
HELD: The court found that the accused should pay a fine of $250,000 in regard to each charge, inclusive of surcharge. This find would serve the purpose of general deterrence. The accused was a large and sophisticated employer with over 400 employees. It did not have a previous history of infractions under the Act and had many safety protocols in place. It employed safety specialists to make the workplace as safe as possible. It had made significant reparations to the family of the victim.

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