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highlighting recent case digests from all levels of Saskatchewan Court.
Published on the 1st and 15th of every month.

Volume 23, No. 5 **March 1, 2021**

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Primrose Drilling Ventures Ltd. v Registrar of Titles, 2021 SKCA 15

Caldwell Barrington-Foote Tholl, January 26, 2021(CA21015)

Statutes - Interpretation - Land Titles Act, 1965, Section 153
Statutes - Interpretation - Land Titles Act, 2000

The appellant, Primrose Drilling Ventures (Primrose), appealed the decision of a Queen's Bench judge that found that the respondent, Great West Life Assurance Co. (GWL), was the owner of certain mineral rights (see: 2018 SKQB 290). The decision was rendered as a result of a questions referred by the Registrar of Land Titles (Registrar) to the Court of Queen's Bench pursuant to s. 108 of The Land Titles Act, 2000 (LTA, 2000). Portions of the lengthy history of registrations regarding the title to what eventually became an undivided quarter interest in minerals relevant to the appeal included that: i) In 1947, GWL transferred surface title to a parcel to a bona fide purchaser for value (BFPV), Olney, reserving its title to the minerals. The Master of Titles issued a certificate of title to Olney which mistakenly included the minerals; ii) Olney transferred title to

a quarter interest in all minerals in 1953 to the next BFPV, Funkhouser; iii) Unocal, a BFPV, acquired the title in 1971; iv) in 1973, the Registrar of the Regina Land Titles District (Regina Registrar) filed a caveat under s. 153 of The Land Titles Act, RSS 1965 c. 115 (LTA, 1965) against the certificates of title, providing notice of the error, and warned that any transfer of title was subject to GWL's interest; and v) the Regina Registrar's caveat was never discharged. Primrose purchased the quarter interest in the minerals in question in 1993 and acquired title in 2006. The acquisition of the minerals was subject to the Regina Registrar's caveat. After the title to the disputed interest was issued, the Registrar - whose office, as of 2000, replaced the former offices of the Master of Titles and the registrars of the various land titles offices - refused Primrose's request to remove the caveat and Primrose then refused to surrender its title when asked to by the Registrar. The Registrar then filed the reference, asking five questions, the last being the determination of the ownership of the disputed interest that the chambers judge decided in favour of GWL. In the appeal, the same questions were before the court and it combined the first with the second and the third with the fourth. However, the original five questions were: 1) does an acquirer of mineral title take subject to the notice provided in a duly registered, pre-existing Registrar's Caveat that was registered under the former Land Titles Act; 2) does an acquirer of surface title take subject to the notice provided in a duly registered, pre-existing Registrar's Caveat that was registered under the former Land Titles Act; 3) if the answer to Question No. 1 is affirmed, does the Registrar of Titles have authority under s. 97 of the LTA 2000, to correct an error or omission related to a mineral title issued after the registration of the Registrar's Caveat that provided notice of that error or omission without consent of the new title owner; 4) if the answer to Question No. 2 is affirmed, does the Registrar of Titles have authority, under s. 97 of the LTA 2000, to correct an error or omission relating to a surface title issued after the registration of the Registrar's Caveat that provided notice of that error or omission without the consent of the new title owner; and 5) on the current facts, what is the court's determination pursuant to Part IV of the LTA, 2000, and s. 109 in particular, respecting proper ownership of the subject quarter interest in minerals to the parcel?

HELD: The appeal was allowed. The court found that the appellant was the owner of the disputed interest and the caveat was discharged. As the appeal was made on a question of law pursuant to s. 111 of the LTA, 2000, the standard of review was correctness. The issues raised by the parties in relation to the five questions posed by the Registrar turned on the interpretation of the 1965 and 2000 versions of the LTA. Its answers to each of the reference questions were: 1) Yes, but the caveat filed by the Regina Registrar in this case was not a duly registered caveat; and 2) yes, but the caveat filed by the Registrar in this case was not a duly registered caveat. After combining the first two questions, the court reviewed the relevant provisions of the LTA, 1965 and LTA, 2000 and found that where the principle of indefeasible title is concerned, they remained the same. The appeal rested on the assumption that the caveat was duly registered. The Registrar was not entitled to file the caveat. It was not a "duly registered" caveat that constituted or gave notice of an interest within the meaning of the exception specified in s. 14(a) of the LTA, 2000. The Regina Registrar, like the Registrar, knew Unocal was a

Family Law - Access and Custody
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BFPV and would have removed the Registrar's caveat when asked to do so. The Regina Registrar's authority to register a caveat pursuant to s. 153 of the LTA, 1965 was discretionary and had to be exercised properly. The purpose of a Registrar's caveat is to provide notice of claims that could, if substantiated, affect the title or registered interest affected by that caveat in accordance with the purposes of indefeasibility, reliance on the register and transactional efficiency. Limiting s. 153 to such claims is consistent with the scheme and purpose of the LTA, 1965 and the purposes listed above. Interpreting s. 153 as authorizing the Registrar to file a caveat relating to a claim that, by its nature, could not affect the title or other interest to which the claim relates would undermine all of those purposes. The scope of the authority granted by s. 153 must be read accordingly. GWL's claim was not a clam that could affect Unocal's title. Unocal as the registered owner of an estate in fee simple to the disputed interest had the right, before and after the LTA, 2000, to transfer its fee simple interest in the mineral title free from all interests, exceptions and reservations under s. 13(1)(a) and (b) of the LTA, 2000. The caveat registered by the Regina Registrar could not affect Unocal's right to transfer, and a third party's right to acquire, Unocal's estate in fee simple. This was entirely consistent with the purpose and effect of a caveat; 3) the Registrar does not have that authority if the new title owner is a bona fide purchaser for value; 4) the Registrar does not have that authority if the new title owner is a bona fide purchaser for value. After combining questions 3 and 4, the court interpreted s. 97 of the LTA, 2000 in accordance with its grammatical and ordinary meaning. It reiterated its finding in the previous two questions. As GWL had no claim as against Unocal's title, there was no registered interest that could affect Unocal's right to transfer and Primrose's right to receive a fee simple interest in the minerals. Just as Unocal was entitled to rely on the register when it acquired title to the interest, so too was Primrose when it acquired title to that fee simple interest. GWL's rights could not be asserted against Primrose, a BFPV. Even if GWL had a continuing interest in the land after Funkhouser intervened, notice of such an interest could not affect Primrose's title; and 5) Primrose owned the quarter interest in minerals.

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Phillips v Law Society of Saskatchewan, 2021 SKCA 16

Ottenbreit Barrington-Foote Kalmakoff, January 27, 2021 (CA21016)

Professions and Occupations - Barristers and Solicitors - Discipline - Conduct Unbecoming - Appeal

The appellant, a lawyer, appealed three decisions of the Hearing Committee of the Law Society (LSS) of Saskatchewan pursuant to s. 56(1) of The Legal Profession Act (see 2018 SKLSS 7). The LSS had

Gilmore Masonry Heaters Inc. v Reed

Greyeyes v Greyeyes

Heney v Wilton (RM No. 472)

Jordan v Sears

Luhning v Hnatyshyn

Olson v Hergott

Phillips v Law Society of Saskatchewan

Primrose Drilling Ventures Ltd. v Registrar of Titles

Quadra Properties Ltd. v Gamble

R v Angus

R v Johnson

R v Klassen

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investigated him after it learned of the judgment in a small claims action initiated by the appellant against a former client for unpaid fees (see 2013 SKPC 2). Although the client had not complained to the LSS, the appellant was charged with conduct unbecoming pursuant to The Legal Profession Act, 1990. Prior to the hearing, the LSS applied to admit the small claims decision (SCD) as prima facie proof of the charges it laid. The committee applied the approach set out in Rosenbaum respecting admission of previous civil proceedings as evidence in a professional discipline matter and concluded the SCD could be introduced into evidence as prima facie proof of the allegations set out in the complaint and that the appellant would be entitled to lead evidence to displace the judge's findings of fact made in the SCD (preliminary decision). The two charges relevant to this appeal were that the appellant (1) failed to be frank and candid with the client in relation to the anticipated costs of her legal matter, and (2) charged a fee to the client that was not fully disclosed, fair and reasonable. At the hearing, the parties tendered an agreed statement of facts describing that the client's father had been aware of the appellant's hourly rate. The appellant explained that he had been the father's lawyer for 34 years. The appellant acknowledged he and the client had not discussed his rate but testified he believed she knew it because he had always charged that to her father. Further the client's father was present during the initial meeting and expressed his intention of helping his daughter with legal fees. The committee rejected the appellant's evidence. Although under s. 48(10) of the Act, the committee was not bound by evidentiary rules of law, it did not consider the appellant's evidence appropriate as it was hearsay because it could not be corroborated by the client's father who had died in 2009. The appellant applied to call an expert witness, an experienced family law lawyer, to give evidence regarding the proper handling of a family law file. The committee counsel raised various objections, including that the proposed testimony attempted to displace the findings of the SCD and would amount to a relitigation of those findings. The committee declined to allow the expert testimony because proper disclosure had not been made in violation of rule 432(10) of The Law Society of Saskatchewan Rules. In the committee's hearing decision, it referred to its ruling in the preliminary decision and stated the SCD evidence established that the appellant had not advised the client within a reasonable time of his hourly fee, his billing procedure and what his total bill might be; rounded up the time spent on attendances; and engaged in unnecessary work on the family law file, requiring the client to attend at his office on numerous occasions. The issues on appeal were whether the committee erred: 1) in finding that charges #1 and #2 did not require proof of intention. Although their wording did not explicitly use words such as "knowingly" or "intentionally", the conduct alleged required deliberate or conscious action by the appellant and thus required proof of intention; 2) by accepting the SCD as prima facie proof of each of those charges, thereby improperly placing the burden of proof on him. He argued that although the decision was admissible, that was only with respect to findings of fact and not as prima facie proof of the charges or of conduct unbecoming; and 3) in finding his proposed expert evidence was inadmissible. It declined to allow the testimony of the expert witness because of non-compliance with rule 432(9) and rule 432(10) did not apply. HELD: The appeal was allowed. The guilty charge of conduct unbecoming relating to the two charges was set

for the Courts of Saskatchewan.

aside. The court noted the general standard of review and then identified that the first two issues were to be reviewed on the standard of correctness and the third on the discretionary standard. The court found with respect to each issue that the committee had: 1) erred in its finding regarding charge #1. It had misinterpreted the court's decision in Merchant 2014. The charge required proof of a deliberate or intentional failure to fully disclose the fee. The committee had not erred respecting charge #2 in treating it as a strict liability offence as the allegation was worded differently. The phrase "fully disclosed" does not necessarily import an intention and the words "fair and reasonable" are well-known in the context of lawyers' fees; 2) erred in its preliminary decision by treating the SCD decision as prima facie proof of charges and placing the burden of proof on the appellant. The committee had misinterpreted Rosenbaum v Law Society of Manitoba (1983), 1983 CanLII 3037 (MB CA), which held that a disciplinary tribunal may treat previous court findings as prima facie evidence in support of the disciplinary charge. The court here concluded that findings of fact made in a previous civil proceeding such as the SCD may be admitted as prima facie evidence in support of disciplinary charges and not proof thereof. Once admitted, the evidence must be accorded the weight appropriate in the circumstances and here, the committee failed to determine the weight the evidence should be given in accordance with British Columbia (Attorney General) v Malik, 2011 SCC 18, as it did not analyze the differences between its disciplinary proceeding against the appellant and the previous court proceeding. As a result, it failed to understand and then disregarded the appellant's evidence explaining his relationship with the client's father that went to the issue of candour and frankness; and 3) erred by failing to properly interpret and apply the saving provision in Rule 432(10) and failing to explain why the proposed testimony did not meet the criteria for expert evidence.

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R v Johnson, 2021 SKCA 17

Ottenbreit Leurer Kalmakoff, January 29, 2021 (CA21017)

Criminal Law - Appeal - Sentencing - Armed Robbery

The appellant was charged with robbery, carrying a weapon for a dangerous purpose and failing to attend court. In 2019, just prior to trial, she pled guilty to the charges. The Queen's Bench sentencing judge imposed a sentence of three years for the robbery charge, one year concurrent for carrying a weapon, and six months consecutive for failing to attend court. The self-represented appellant appealed her sentence. The appellant was 20 years old when she held a knife to the throat of a cab driver and demanded his money. The cab driver

suffered a serious injury to his hand during the attack. The appellant was arrested two weeks later but was released without being charged because the police believed further investigation was necessary. Approximately a year later, an information was sworn charging the appellant with robbery and carrying a weapon for a dangerous purpose. The police could not locate her and issued a warrant for her arrest. It was not executed for more than 10 years. In the intervening period, the appellant amassed a criminal record of 15 convictions for Criminal Code offences consisting mainly of breaching court orders but also including robbery in 2013 for which the appellant received a custodial sentence. At the time of the sentencing for the present offences, she failed to appear in court twice after being ordered by the sentencing judge to be personally present and she was eventually arrested on a warrant. At the sentencing hearing, the defence argued that the sentencing judge should treat her as a first-time offender as she had not had a criminal record when she committed the robbery. The appellant had a difficult upbringing as she had been adopted from an orphanage and had been sexually assaulted as an adolescent. When she committed the robbery in 2007, she had problems with addiction and homelessness that had continued. The appellant spoke at the hearing and told the judge that she was three months pregnant and was an excellent candidate for rehabilitation. The Crown objected, saying there was no proof of pregnancy. The matter was not addressed further. The sentencing judge referred to the appellant's criminal history after these offences and that the robbery involved overt violence and caused lasting injuries to the victim who had been working in a vulnerable employment position. He acknowledged the dated nature of the offences and the appellant's difficulties, but found a custodial sentence was appropriate and sentenced her as described above. The appellant's grounds of appeal were that the sentencing judge: 1) should not have presided over her case because he had been a close acquaintance of her late father; 2) imposed too lengthy a sentence in light of the time that had passed since the offences and that she had no criminal record at that time; and 3) had not considered her pregnancy.

HELD: The appeal was dismissed. The court concluded that the sentence was not demonstrably unfit. The standard of review was deferential unless a sentence was demonstrably unfit or the sentencing judge made an error in principle that had an impact on the sentence. If the error has no impact on the sentence, however, the appellate court can intervene only if the sentence is demonstrably unfit. It found with respect to each ground that: 1) the appellant had not raised this issue at the time of sentencing, nor had she applied to lead fresh evidence regarding it; 2) the sentencing judge took into account the length of time that had elapsed between the offences and the sentencing and that the appellant had not had a criminal record at the time of the offences; and 3) the sentencing judge did not appear to have resolved the contested issue of whether or not the appellant was pregnant as required by s. 724(3) of the Criminal Code, and that failure to consider a relevant factor in her personal circumstances was an error in principle. However, the pregnancy would not have altered the gravity of the offence or reduced the identified aggravating factors, particularly that the appellant had committed a violent offence against a vulnerable victim. Consequently, it found that the sentence ultimately imposed was not impacted by the sentencing judge's error in principle.

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Brandt Properties Ltd. v Saskatoon (City), 2021 SKCA 19

Ottenbreit Leurer Barrington-Foote, February 1, 2021 (CA21019)

Municipal Law - Property Tax Assessment
Municipal Law - Tax Assessment - Assessment Appeals Committee - Appeal

The owners of warehouse properties (Altus) located north of 51st Street, Saskatoon appealed the Municipal Board Assessment Appeals Committee's (committee) review of the decision of the Saskatoon Board of Revision (BOR) on a number of grounds related to the reasonableness of the parameters used by the property assessor in calculating the mass appraisal of warehouses in the area of 51st Street and, in particular, failed to appreciate the relevance of the evidence of an expert witness called by Altus (Hritzuk), a commercial realtor specializing in the sale of warehouses, to the effect that the assessment model used by the assessor to determine the capitalization rate (cap rate) bore no relation to actual market conditions for valuating warehouse properties in that area, and so was fundamentally flawed because it was not value-driven or equitable as required by The Cities Act (Act). The warehouse owners, as represented by Altus, argued that the BOR failed to act reasonably, a standard of review intended to recognize the specialized nature of the BOR's function, by not appreciating the evidence of Hritzuk to the effect that the stratification of the warehouse properties in the assessment model by location did not bear any relation to the value of those properties in the market, and argued further that the committee erred in law by not recognizing that the BOR had acted unreasonably, and so acted outside of its statutory powers of review.
HELD: The appeal was allowed to a substantial extent. The court accepted the arguments advanced by Altus that the committee erred in law, first, because it should have held that the BOR acted unreasonably in misinterpreting the evidence of the expert, Hritzuk. Altus advanced that the BOR unreasonably found that Hritzuk failed to provide evidence that location was an irrelevant factor in arriving at warehouse values north or south of 51st Street during the relevant period, that is, did not touch on the legislated period before the base date used to calculate the cap rate, by which the mass appraisal model was put into effect, as required by law. The court agreed with Altus that Hritzuk clearly testified concerning the irrelevancy of the location of warehouses for mass assessment purposes during the period leading up to the base date, and so the BOR decided unreasonably, and the committee made an error in law in not recognizing that failure. Secondly, the court agreed with Altus that the committee had erred in law in not finding that the BOR had acted unreasonably by finding that Altus was attempting in its appeal from the assessment to substitute a market-

driven appraisal model for the mass appraisal model legislated by the Act. The appeal court agreed that the effect of the evidence advanced by Altus did no such thing, and agreed that Altus was within its rights to challenge the BOR's mass appraisal model on the basis that the data concerning location used by the assessor to calculate the cap rate was not value-driven or equitable, such that the committee erred in law in not reversing the BOR's decision to that effect. The appeal court set aside the committee's decision and remitted the matter to the committee to correct the identified errors.

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Casbohm v Winacott Spring Western Star Trucks, 2021 SKCA 21

Caldwell Whitmore Leurer, February 3, 2021 (CA20121)

Evidence - Spoliation
Torts - Negligence - Occupier's Liability

The appellant, Casbohm, was the plaintiff in an action for personal injury. The action was dismissed by the chambers judge in a summary judgment application (2019 SKQB 44) brought by the appellant against the respondent, Winacott Spring Western Star Trucks (Winacott), a business that sold tractor trailer trucks, and against its owner GEO Holdings Ltd. (GEO). The grounds of appeal were primarily concerned with perceived errors made by the chambers judge with respect to his treatment of expert witness opinion evidence and in ruling that the plaintiff had not proven on a balance of probabilities that the defendant had breached the duty of care it owed him or that it had proven whether, had a breach of duty been proven, that the breach was the cause of the appellant's injuries. The appeal court used the opportunity presented by the chambers judge's treatment of the doctrine of spoliation to revisit the pronouncement of that doctrine in McDougall v Black & Decker Canada Inc., 2008 ABCA 353 (McDougall), upon which the chambers judge had relied. Casbohm was employed by a company which had contracted with Winacott to haul three tractor trailer trucks to its premises. It was agreed between Winacott and Casbohm's employer that the appellant was required, as part of the hauling contract, to reinstall a number of exhaust stacks onto the trucks, and in doing so needed to use a ladder, which was supplied by Winacott. While the appellant was performing this task, he fell from the ladder. No one witnessed his fall, and when seen post-accident, he did not appear to be severely injured. The ladder was examined, and its right leg was bent inward. Casbohm went on to complete his job with a different ladder. Winacott disposed of the damaged ladder soon after Casbohm's fall. An employee of Winacott took photos of the scene, which included some of the ladder, in case they were needed later. At the time of the injury, the

appellant made no indication of his intention to sue, and the respondent heard nothing further from him until a claim was commenced two years later.

HELD: The appeal was dismissed. The appeal court found no error in principle in the conclusions arrived at by the chambers judge with respect to (1) spoliation, (2) duty of care or (3) causation. First, with respect to (1) spoliation, the appeal court found that the chambers judge made no error in principle in deciding that Winacott disposed of the ladder because it was damaged and unsafe, and not because it believed the ladder might constitute unfavourable evidence in the event of future litigation against it, so that no adverse inference could be drawn against Winacott, i.e., that it knew the ladder was defective. In making that finding, the chambers judge relied on McDougall. McDougall, however, stood for the proposition that an adverse inference can only be made against the person destroying evidence if litigation is existing or pending. In the case before the chambers judge, no litigation existed or was pending, and so he reasoned that no adverse interest could be drawn against Winacott. The appeal court agreed with the appellant that the state of the law concerning spoliation was not as clear as stated in McDougall, and by returning to the root authority for the concept, St. Louis v The Queen (1896), 1896 CanLII 65 (SCC), referred to in McDougall, and other authorities, it was open to a party to litigation to invoke the presumption "when litigation is existing, or in anticipation or with a concern that litigation may be brought." So, the appeal court found that though the state of the law of spoliation was not exactly as stated in McDougall, the chambers judge did examine the reasons given by Winacott in disposing of the ladder and made a finding of fact which it was open for him to make, that the ladder was not disposed of to make it unavailable in the event of litigation against it. With respect to (2) and (3), whether Winacott had breached the duty of care it owed to the appellant in occupier's liability or negligence, or if so, whether the breach caused the fall, the appeal court agreed with the chambers judge that the duty of care in both causes of action was that the premises be "as safe for the purpose as reasonable care and skill on the part of the occupier can make them." The crux of the appellant's case was that the ladder was defective, and the defect caused the ladder to fail and the appellant to fall from it. The respondent denied that there was evidence of a defect in the ladder or that the appellant fell off the ladder other than because of his own actions. Experts were called to give opinion evidence on both sides of the question. The chambers judge did not accept any of the expert evidence because none of the experts had been able to examine the ladder itself and they formed their opinions from the photographs taken at the scene. The appeal court took no objection to this determination. The appellant also argued before the chambers judge that the duty Winacott owed to him was breached because there was no system of inspection of ladders in place at the premises. The appeal court agreed with the appellant that the chambers judge should have found as a matter of law that Winacott had breached its duty of care to the appellant by not implementing an inspection policy for its ladders. This ruling did not end the matter, however, since it was reasonable for the chambers judge to find as a fact that the defect was not discoverable by inspection, so the absence of a system of inspection did not cause the appellant's injuries.

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R v Angus, 2021 SKQB 13

Hildebrandt, January 6, 2021 (QB21013)

Criminal Law - Assault - Sexual Assault - Victim under 16 - Sentencing
Criminal Law - Assault - Sexual Assault with a Weapon - Sentencing
Criminal Law - Break and Enter with Intent to Commit Indictable Offence - Sentencing
Criminal Law - Sentencing - Aboriginal Offender - Gladue Report

The accused was convicted in February 2020 following trial on six of seven counts of the indictment against him, and one count was judicially stayed in accordance with Kienapple. The five remaining counts were numbered as: 1) breaking and entering with intent to commit an indictable offence contrary to s. 348(1)(a) of the Criminal Code (Code); 2) committing a sexual assault on a person under 16 while carrying a firearm contrary to s. 272(2)(a.2); 3) using a firearm while breaking and entering with intent to commit an indictable offence or the indictable offence of sexual assault contrary to s. 85(1)(a); 6) discharging a firearm with intent to prevent his arrest contrary to s. 244(1); and 7) possessing a firearm without a licence contrary to s. 91(1) (see: 2020 SKQB 32). The accused, carrying a rifle, had entered the home of the 14-year-old victim who was there alone with her younger siblings. He sexually assaulted her and then fled the scene. When the victim's father pursued him, the accused shot at the victim's father. Before this sentencing hearing was held, the court had ordered a Pre-Sentence Report (PSR) to be prepared with consideration given to Gladue factors. The hearing was then adjourned multiple times because the accused: applied for a government-funded Gladue Report which was denied but a supplemental PSR was ordered (see: 2020 SKQB 205); changed his counsel and obtained funding for a Gladue Report; and then discharged his new counsel. Pursuant to s. 720(1) of the Code, the court refused the request of the Gladue Report writer for a further adjournment because she could not conduct in-person interviews due to the pandemic. The writer submitted her report modified by the circumstances and obtained permission to attend the sentencing hearing to provide additional commentary on the Gladue factors. The accused sought a further adjournment that was also denied. The hearing proceeded with the accused representing himself. He provided a prepared statement and the court reviewed with him a factual summary of the sentencing cases submitted by his second counsel and by the Crown. The Crown sought a global sentence of 16 to 18 years. It also expressed its intent to seek a period of parole ineligibility for one half of his sentence or ten years, pursuant to s. 743.6(1) of the Code, because of the gravity of offences and the offence committed against a child. The author of the PSRs indicated that the accused, aged 43 at the

time offences, did not take responsibility for his actions and blamed the justice system. He was described as being at high risk to reoffend. He would have the opportunity of programming available in a federal penitentiary. It also disclosed that the accused had attended a residential day school at which the students were abused and demeaned. The Gladue Report described the tragic circumstances of the accused's mother and his difficult childhood and how these factors might have contributed to him not having a sense of self-worth. HELD: The accused was sentenced to a 19-year global sentence, comprised of, by count number: 1 - 10 years; 2 - 16 years; 3: - 14 years, all to be served concurrently. For count 6, the accused received three years' imprisonment and count 7, a one-year sentence. Both of these sentences were to be served concurrent with each other but to run consecutively to the first three counts. Time on remand reduced the sentence to 15.65 years. The court found that the accused had attempted to delay sentencing and gave credit at 1:1 from mid-April 2020 to the date of the hearing. The Crown's application regarding parole was dismissed. The court reviewed cases submitted by the Crown and the defence to establish parity. It paid particular attention to the Supreme Court's decision in Friesen. The aggravating factors that the court considered in sentencing were: i) the direction in Friesen that under s. 718.01 of the Code, the objectives of denunciation and deterrence were the primary considerations for offences against persons under the age of 18 and in particular, sexual violence against children, especially adolescent girls. In this case, the victim and her family had suffered significant impacts; ii) the minimum punishment of five years under s. 272(2)(a.2) of the Code because of the presence of a firearm during the assault coupled with the victim's young age; and iii) the effect of s. 348.1 of the Code because of the home invasion. The Gladue factors were taken into account but did not diminish the accused's responsibility or moral blameworthiness, particularly respecting the sexual assault.

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Jordan v Sears, 2021 SKQB 6

Elson, January 8, 2021 (QB21007)

Administrative Law - Functus Officio

The appellants, tenants under a residential tenancy, sought to reverse the decision of a hearing officer purportedly acting under the authority of The Residential Tenancies Act (RTA) in favour of the respondent landlord, ordering forfeiture of the deposit as a set-off against damages found by her to be owing to the respondent by the appellants. This decision, Sears v Young, 2020 SKORT 979 (2020 ORT decision), was a full rehearing of the same matter previously adjudicated in Sears v Young, 2019 SKORT 1088 (2019 ORT

decision). The rehearing had been ordered by the director appointed pursuant to the RTA because she had noticed a fundamental error in the calculation of a statutory notice period which affected the amount of the deposit due to the respondent. The issue to be decided was whether the principle of functus officio was applicable such that the hearing officer's decision, made after a full rehearing of the 2019 ORT decision, was null and void because the hearing officer was without jurisdiction to conduct a new hearing at first instance. HELD: The 2020 ORT decision was set aside, and a slightly modified 2019 ORT decision was reinstated. After a consideration of s. 76 of the RTA and the application of relevant case authority concerning the application of the principle of functus officio to decisions made by administrative officials, in particular, Chandler v Alberta Association of Architects, 1989 CanLII 41 (SCC), the appeal court judge applied the more nuanced approach to the principle in the context of administrative decisions. Recognizing that one of the fundamental purposes of administrative boards is expediency of decision-making, the more nuanced approach countenanced a limited reconsideration of the decisions of administrative officers where the underlying enabling legislation could be interpreted to permit it, and where the right of appeal is limited, as with the RTA. Section 76 of the RTA allowed the hearing officer to correct her decision for obvious errors or inadvertent omissions, as in this case. Since the director could have dealt with the error without ordering a full rehearing of the matter, the 2020 ORT decision was functus officio and of no effect.

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Heney v Wilton (RM No. 472), 2021 SKQB 19

Hildebrandt, January 11, 2021 (QB21018)

Administrative Law - Judicial Review
Municipal Law - Judicial Review - Procedural Fairness

Three parties brought an application for judicial review of decisions made by the RM of Wilton (RM) which they believed would harm the Hamlet of Lone Rock, and should be quashed as made without lawful authority, in breach of procedural fairness, and in bad faith. The applicants were two natural persons and the Hamlet of Lone Rock (Hamlet). The RM had been buying property in the Hamlet for several years, but only recently, in 2018, had formed a corporation and bought 25 properties with the assistance of a realtor. The RM had been seeking to reduce the tax burden on its ratepayers for the rising costs associated with the maintenance of the Hamlet's infrastructure and its future capital improvements: in particular, new water and sewer capital projects. The RM had plans to buy properties to assist owners to relocate away from the Hamlet, and to then clean up

derelict properties as part of what it called "The Lone Rock Renewal Project," which the RM argued had not yet been finally decided upon. Also, part of the proposal was that water and sewer services to the Hamlet would be discontinued, and any property owners who did not agree to sell at the appraised value plus 5% would be responsible for their own water and sewer services; additionally, it was proposed that the Hamlet be reclassified as a "country residential subdivision." The RM's website clearly outlined these plans. A meeting of all ratepayers and council was convened as allowed by The Municipalities Act (Act), and a mediation process was in place. At the meeting, the RM explained what it hoped to achieve by the renewal project: to unburden the RM of the costs of servicing the Hamlet and hopefully, to allow it to become a bedroom community, which would require that land become available within it for homes to be built. The RM further sought security for costs pursuant to Queen's Bench Rule 4-22 or s. 358(4) of the Act.
HELD: The court was required to determine, first, who were the persons with standing to bring the application; secondly, whether there was a sufficient record upon which an application could be brought; and thirdly, whether the Hamlet made a final decision which engaged the court's jurisdiction to review. It determined that only one of the parties had standing: the ratepayer from the Hamlet. The Hamlet was itself legislated by the Act to resolve disputes with the RM through a process outlined in s. 77 of the Act and could not go to court. The second natural person had in fact sold her property to the RM and had no standing. As to the matter of a sufficient record, case law indicated that Queen's Bench Rule 3-57, which required that the applicant provide a record of the proceedings and decision sought to be reviewed, did not specify the nature or extent of that record. The court agreed that the material on the RM's website was an adequate record for it to conduct a review of any decisions. Lastly, the court was satisfied that the decisions required to bring "The Lone Rock Renewal Project" into fruition had not yet been finalized, so that no decision existed upon which it could exercise its supervisory power. The court declined to award the RM security for costs. Such an order is discretionary, and the court remarked that the RM's purpose appeared to be to distract from the central issue. Further, the court declined to expand its powers of review and assume jurisdiction since mediation pursuant to the Act was underway, and therefore the applicant was not without remedy.

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Olson v Hergott, 2021 SKQB 11

Danyliuk, January 14, 2021 (QB21011)

Landlord and Tenant - Residential Tenancies Act, 2006 - Appeal

The appellants appealed the decision of a hearing officer to grant a writ of possession to the respondents, the landlords, pursuant to s. 72(1) of The Residential Tenancies Act, 2006 (RTA) (see: 2020 SKORT 2414). The parties had entered into a written lease for a fixed term of six months. At the conclusion of the term, the respondents decided not to renew the lease but the tenants did not accept the decision and remained in occupation of the rental unit. They continued to tender their rent, which the respondents refused to accept. In his decision, the hearing officer found as a fact that the male respondent did not get along with the male appellant. He concluded that the lease was valid and found that the appellants had not complied with its terms and were overholding, and the respondents were entitled to possession of the rental unit. The officer directed a writ of possession issue in their favour. The issues on the appeal were: 1) the appropriate standard of review; and 2) whether the hearing officer's reasons were sufficient.
HELD: The appeal was allowed and the writ of possession struck out. The matter was remitted to the Office of Residential Tenancies (ORT) and it was directed to hold a new hearing before a different hearing officer. The appellants were to continue to pay rent into court or to the ORT as long as they continued to occupy the premises and while the next hearing or any appeal taken from it remained outstanding. The court found with respect to each issue that: 1) an appeal under s. 72(1) of the RTA was subject to the appellate standard of review; and 2) the hearing officer had not provided sufficient reasons to explain how and why he reached the conclusion he did. The court applied the functional approach to assessing the sufficiency of the reasons set out in R v R.E.M., 2008 SCC 51. The officer gave only a brief recitation of facts but failed to define the issues and address what the evidence was or what he relied upon to reach his conclusion. The file forwarded from the ORT contained numerous documents, but none of them were marked as exhibits or explained what meaning they had had for the hearing officer. The court recommended that hearing officers' decisions should review the evidence, address any evidentiary conflicts, mark document as exhibits relied upon and explain why they decide as they do.

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Ryan v Canadian Broadcasting Corporation, 2021 SKQB 12

Smith, January 14, 2021 (QB21012)

Torts - Defamation - Defences - Qualified Privilege
Civil Procedure - Summary Judgment

The defendant, the Canadian Broadcasting Corporation (CBC), applied pursuant to Queen's Bench rule 7-5 for summary judgment to dismiss the self-represented plaintiff's action against it in defamation and misrepresentation. The plaintiff alleged that the CBC published an article on its website regarding his conviction after trial in Provincial Court for possessing a weapon dangerous to the public peace contrary to s. 88 of the Criminal Code. Before he issued his statement of claim, the plaintiff objected to the article's original sub-headline that referred to him as "acting aggressively" and the CBC amended it to remove the words, but otherwise, the article remained unchanged. The plaintiff then filed his statement of claim alleging that the defendant "published the defamatory and incorrect inference that I was aggressive" and "misrepresented my defence." CBC denied all liability and brought its application on the grounds that: 1) the article was not defamatory; 2) if it was, the defence of qualified privilege applied and absolved it of all liability for defamation; 3) if that defence was not available, the defence of a justification absolved it for all liability for defamation; and 4) it could not be liable for negligent misrepresentation as it did not owe the plaintiff a duty of care; and 5) the article was true and not capable of being a misrepresentation.
HELD: The defendant's application was granted and the plaintiff's claim was struck in its entirety. The court found that it was an appropriate case for summary determination as there was sufficient evidence before it by way of the affidavit filed by the CBC, the article before and after its amendment, the Provincial Court judgment, and copies of relevant correspondence between the parties. The plaintiff did not take issue with the material facts set out in the affidavit. After reviewing the article and the judgment, the court found with respect to each ground that: 1) the article was defamatory. The plaintiff's reputation would be lowered in the eyes of a reasonable person; 2) CBC had the benefit of common-law qualified privilege and it had shown that the article met the requirements of fair and accurate reporting of the judicial proceedings and fairly communicated the gist of the decision; 3) CBC was also covered by the defence of justification. The judgment was true and the article captured the gist of the decision; 4) the plaintiff's claim for negligent misrepresentation was not available to him. The claim was in substance for loss of reputation and was protected by the defences noted above. He could not avoid these defences by dressing up his defamation claim as a claim in negligent misrepresentation.

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Greyeyes v Greyeyes, 2021 SKQB 14

Goebel, January 18, 2021 (QB21014)

Family Law - Access and Custody
Family Law - Procedure - Variation of Final Order

The petitioner applicant, the father of two boys aged 11 and 13, sought to vary a final order governing the parenting arrangement of the boys made pursuant to the Divorce Act by amending it to grant him shared parenting rights with the boys living alternating weeks with each parent. The final order was made on February 22, 2016 and awarded sole custody to the respondent mother with reasonable access on reasonable notice to the petitioner. The within application was heard in February, 2021. The applicant believed his relocation to Saskatoon, the place the children resided with their mother, in the fall of 2019 in what he suggested was a permanent move, was a material change in circumstances which should be endorsed by the court. Though the father had been transient for ten years working as a carpenter, following his relocation he had remarried and bought a home with his spouse. Since then, he had been involved significantly in the lives of the boys. With the consent of the respondent mother, he increased his parenting time and helped with the boy's activities and medical appointments. He showed a settled intention to be active in the boy's lives. The mother had always been the primary caregiver, and in her care, they thrived, and were happy and healthy children. The boys enjoyed being with their father and stepmother. Both parents had suitable housing and put the needs of their children before their own. The respondent mother opposed the variation of the final order, being concerned that such a change in the status quo would be disruptive for the boys and not in their best interests.
HELD: The chambers judge dismissed the application to allow for shared parenting but varied the final order to allow the applicant to make parenting decisions jointly with the respondent. She ruled on three questions: (1) could she make the required determinations by affidavit evidence, or was such evidence too contradictory for that purpose; (2) as a threshold requirement pursuant to s. 17(5) of the Divorce Act, was the relocation of the applicant a material change in the condition, means, needs or other circumstances of the boys since the final order was made; and (3) also a requirement of s. 17(5), if the relocation was a material change, was the applied-for variation in the best interests of the children? The chambers judge referred to and applied relevant case authority to all stages of the analysis, and in particular Gordon v Goertz, 1996 CanLII 191 (SCC) (Gordon) with respect to (2) and (3). As to (1), the chambers judge was satisfied that the affidavit evidence was not contradictory as it pertained to the relevant evidence germane to her determination of the other two questions, and she was satisfied she could render a decision based on that evidence. As concerns (2), she found that the relocation was a material factor as contemplated by the Divorce Act, and fleshed out by Gordon, since the final order had been based on the applicant's transitory lifestyle, and not on his apparent permanent relocation to the community where the boys lived; and (3) though the permanent relocation was found to be a material change, the proposed variation to the final order was ruled not to be in the best interests of the boys because the respondent had provided them with excellent care throughout their lives and had met all their needs and more. To have a fully shared parenting arrangement would be an unnecessary and serious disruption, and one potentially detrimental to their happiness and well-being. In applying the maximum

contact principle, in light of the applicant's increased participation in the children's lives and their expressed desire to be with him, the chambers judge varied the final order to allow the applicant to have joint parental decision-making rights with the respondent.

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Quadra Properties Ltd. v Gamble, 2021 SKQB 16

Danyliuk, January 18, 2021 (QB21015)

Residential Tenancies - Interpretation of Lease Terms
Administrative Law - Appeal - Standard of Review

The appellant landlord appealed the decision of a hearing officer appointed under The Residential Tenancies Act, 2006 (Act) to hear a dispute brought by the landlord about the amount due to the landlord upon termination of the lease by the tenant. The issue before the hearing officer was whether, upon termination by the tenant, the landlord was entitled to be paid an amount by way of damages equal to the rent that would have been payable for the remaining number of months of a fixed term lease of fourteen months or whether, because the tenant had given one month's notice of his intention to vacate the premises, the lease was transformed from a fixed term lease into a month-to-month tenancy such that the landlord was entitled to only one month's rent by way of damages instead of three months'. A term of the lease referred to as clause 21 stipulated the notice period to vacate the premises and not to terminate the lease. Secondarily, the landlord had sought during the hearing to retain an amount by way of damages which represented a discount of rent for the first three months of the tenancy. Finally, the landlord claimed that the hearing officer had ignored evidence and failed to award $150.00 in damages for re-keying locks.
HELD: The ground of appeal concerning the nature of the tenancy and the amount of damages due to the landlord by the tenant was allowed, but the ground of appeal concerning the claim for rent reduction was dismissed. The Queen's Bench judge explained that he was to conduct a review of the hearing officer's decision and the Act allowed an appeal only for errors of law or jurisdiction, which required a standard of review of correctness. He also recognized from binding authority that he was to exercise his reviewing function as though the appeal were being taken from the decision of a lower court, so that where an appeal is to be brought on questions of law or jurisdiction alone, the hearing officer's findings of fact or mixed law and fact, even if palpably or overridingly wrong, could not be overturned unless they amounted to an error of law or jurisdiction. The court found that the hearing officer erred by basing his decision only on his view of the

matter, without reliance on the provisions of the Act or any supporting case authority - which were exactly contrary to his decision - and, in so doing, went beyond a palpable and overriding error such that his decision amounted to an error in law. No interpretation of clause 21, when considered in the context of the whole lease, could have led to the conclusion that the notice to vacate the premises transformed the lease from a fixed tenancy to a month-to-month tenancy. Accordingly, the court ordered the landlord's loss of rent claim increased from $2,900.00 to $4,350.00. As to the landlord retaining the rent credit as damages, the court ruled that the amount claimed was a true credit, and could not be considered damages, but represented a penalty, which was not enforceable. Because the court lacked any evidence to determine the third ground of appeal, it was allowed to the extent that the matter was remitted to the hearing officer for determination.

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R v Klassen, 2021 SKQB 22

Dawson, January 18, 2021 (QB21021)

Criminal Law - Motor Vehicle Offenses - Dangerous Driving - Sentencing
Criminal Law - Sentencing Principles - Mental Illness - Proportionality

The court was called upon to sentence a "genderfluid" twenty-three-year-old transitioning from female to male (Klassen), who was suffering from mental health complications of long standing due to gender identity disorder or gender dysphoria. Along with or as a result of the condition, Klassen suffered from clinical depression, substance abuse, suicidal ideation, self-harm and erratic behaviour. Klassen was being treated with antidepressants and undergoing hormone treatments. The sentencing judge found as a fact that the offending behaviour was a result of Klassen's attempt to commit suicide during a mental health crisis. The facts of the offences of dangerous driving and evading peace officers while operating a motor vehicle were as follows: police attempted to perform a Traffic Act stop of a vehicle operated by Klassen, who, while under the influence of drugs and alcohol, failed to stop and over an extended period evaded police by driving at high speeds in the city, through at least one red traffic light, and into the opposing lane where police were driving. Ultimately, Klassen was boxed in at a 7-11, but refused to stop the vehicle, crashing into two police cars several times, and injuring the arm of one officer not in a vehicle. The incident ended when an officer drew her pistol. The sentencing judge accepted as true the contents of a sentencing report, a psychological report, and support letters, detailing Klassen's mental health problems, and Klassen's thinking process during the events. The sentencing judge found that Klassen was attempting to commit suicide by crashing the vehicle, but the

police were preventing Klassen from doing so. The sentencing judge also found that Klassen was a productive person, who had been steadily employed, had obtained top grades in school, and had been accepted in a sociology degree program at the University of Regina. Klassen was remorseful and embarrassed about the offences, and was glad to be arrested, and work towards long term sobriety. Klassen had a criminal record which had resulted in community-based sentences, and which were generally complied with, including electronic monitoring.
HELD: The sentencing judge imposed a sixteen-month conditional sentence order followed by probation for 12 months. She referenced the principles of sentencing contained in ss.718, 718.1, and s.718.2, and the principle of proportionality as it relates to the moral culpability of a person with mental illness, which she found included Klassen's condition, and which she found mitigated the offender's moral culpability. She also found that Klassen was a low risk to reoffend, was remorseful, and planned to maintain long-term sobriety; had prospects for the future, and that making an example of Klassen for general deterrence purposes would be counter to that principle of sentencing, given Klassen's unique circumstances. In all the circumstances and supported by case law relevant to gender identity disorder, the sentencing judge ruled that though jail would be appropriate because of the seriousness of the offences, the sentence could be served in the community with the appropriate terms, including house arrest, and thereby fashioned an appropriate sentence for this offender and society as well.

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Luhning v Hnatyshyn, 2021 SKQB 17

Danyliuk, January 19, 2021 (QB21016)

Civil Procedure - Pleadings - Statement of Claim - Striking Out - No Reasonable Cause of Action
Civil Procedure - Pleadings - Statement of Claim - Striking Out - Abuse of Process
Civil Procedure - Costs

This was an application by a barrister and solicitor, Mr. Hnatyshyn, to strike a claim against him. He was added as a defendant along with his client, Ms. Hiebert, in an action brought by the plaintiff, Ms. Luhning, alleging that a sale of shares by her to Ms. Hiebert had failed due to unlawful and tortious actions on the part of both defendants against her. The lawyer for the plaintiff, Mr. Busse, who had drafted the pleadings, had also been her lawyer for the aborted sale of shares. In its essence, the claim advanced by the plaintiff was that by imposing a trust condition on Mr. Busse that his client, Ms. Luhning, execute a disputed non-competition

agreement before the sale proceedings could be released to her, Mr. Hnatyshyn had induced a breach of contract and had conspired with Ms. Hiebert to cause harm to Ms. Luhning. The claim between Ms. Luhning and Ms. Hiebert had been settled some time before the application. The issues to be resolved by the chambers judge were: (1) whether proceeding with an action with knowledge that it was statute-barred was an abuse of process under Queen's Bench Rule 7-9; (2) whether the pleadings in the statement of claim were sufficient to create a cause of action of inducing a breach of contract and in conspiracy to do harm to the plaintiff; (3) whether the imposition of trust conditions amounted to tortious action, and (4) whether the pleadings were frivolous, vexatious, or scandalous, thus amounting to an abuse of process.
HELD: The chambers judge held with respect to (1) that the case law was clear that it was an abuse of process to maintain an action in the face of clear evidence to the effect that the action was statute-barred, as in this case; (2) generally. the pleadings drafted by Mr. Busse were "fractured" and opaque, and any doubt in their meaning was to be interpreted against the party who drafted them. As to the tort of conspiracy, that tort required a wronged party, and at least two other parties in a conspiracy to harm the wronged party; it was pled in the claim itself that Mr. Hnatyshyn was Ms. Hiebert's lawyer acting on her instructions, and so he could not be considered a party separate from her, and further, it was not possible from the pleadings for the chambers judge to discern how it was alleged the applicant was harmed by any supposed conspiracy; similarly, the chambers judge was unable to detect in what manner Mr. Hnatyshyn had induced Ms. Hiebert to breach the sale contract. With respect to issue (3), the chambers judge stated that he knew of no cause of action which could be based on imposing a trust condition on another lawyer; and (4) in putting forward very serious accusations attacking the reputation of counsel with absolutely no substantiation, the action was frivolous, vexatious, and scandalous, and an abuse of the court's process. Costs in the amount of $3,000.00 were awarded against the plaintiff, the amount requested by counsel for the defendants. The chambers judge might have imposed higher costs, or ordered them personally against Mr. Busse, but counsel had not sought that remedy.

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Wushke, Re (Bankrupt), 2021 SKQB 20

Thompson, January 20, 2021 (QB21019)

Bankruptcy - Conditional Discharge

Before the Registrar in Bankruptcy, SGI opposed the absolute discharge of a bankrupt on the basis that his assets did not exceed 50% of the proven unsecured claims against him. He was in debt to SGI in the amount of

$85,000.00, being payments made by SGI as a result of an accident in which the bankrupt had no insurance coverage because he was unable to get insurance due to his driving record, including a drinking and driving offence under the Criminal Code. The Registrar was required to determine whether the bankrupt could show that his bankruptcy arose due to honest misfortune or due to conduct for which he could be held justifiably responsible.
HELD: The Registrar ruled that the bankrupt's explanation for his financial predicament, that he had lost his license because of his illegal driving, then lost his job, which forced him to overextend his credit, was due to conduct for which he was to be held justifiably responsible, so that he was to be discharged conditionally upon payment of $38,291.00 over six years. She decided on this amount by applying s. 172 of the Bankruptcy and Insolvency Act as interpreted in Kozack v Richter, 1973 CanLII 166 (SCC) and other cases citing it. As such, she imposed a conditional discharge under the BIA in that amount and for that period to deter others from using the bankruptcy regime to avoid claims arising from their negligent behaviour, but also to permit the bankrupt and his family to meet their needs and for him to eventually reintegrate into society.

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Akpan v University of Saskatchewan Council, 2021 SKQB 21

Rothery, January 21, 2021 (QB21020)

Administrative Law - Judicial Review - Standard of Review - Reasonableness
Administrative Law - Universities - Academic Misconduct

The court was asked to review the decision of the University of Saskatchewan Appeal Board (board) which upheld the decision of the College of Nursing Academic Integrity Committee (committee) to permanently expel the applicant, a fourth-year nursing student, who had plagiarized portions of an essay she was required to submit as part of her course. The student had been disciplined in the past for academic misconduct. In this case, the faculty member grading the essay noticed ten instances of plagiarism in it and brought her concerns to the programme coordinator of the faculty. The coordinator met with the student, who admitted she had not properly credited her sources in the paper. Following the meeting, he filed a formal allegation of academic misconduct with the committee, which held a hearing about the matter. The paper with the plagiarized portions was part of the record before the committee, as was the record of her prior penalty -- a two-month suspension from the nursing programme -- and evidence of the student's meeting with the coordinator. The committee's decision was to immediately and permanently expel her from the University, finding that, given her prior

academic misconduct, and the need to uphold the College's high standards of honesty and integrity, it had no other recourse but to impose a permanent expulsion. As was her right, the student appealed the decision of the committee to the board, which upheld the committee's decision. The board did not request the student's academic record, and it was not available to be considered as part of the appeal. The student then applied to the court to quash the decisions of the committee and board on the basis that they were not reasonable and were procedurally unfair as a result.

HELD: The court dismissed the application to quash the decision to permanently expel the applicant. It found, in accordance with Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65 (Vavilov), that the committee's ruling could only be overturned if it failed to meet a standard of reasonableness, and if the board on appeal did not meet a standard of correctness in reviewing whether the committee had acted reasonably. The board had directed itself according to the legal standard enunciated in Vavilov. The court was also to review the decisions of the committee and the board on a correctness standard. Regulations governed the board's procedures on appeal from committee decisions, the overarching one being that the committee's decisions were not to be overturned unless it made a "fundamental procedural error that seriously affected the outcome." The board agreed with the applicant that the committee made a procedural error in considering what the applicant had said at the meeting with the programme director, since these discussions were confidential. It did find, however, that this procedural error was not fundamental and could not have affected the decision to permanently expel the applicant because the committee could have come to the same decision without the evidence of the discussion at the private meeting; it could have done so because the essay with the noted plagiarized portions had been put into evidence at the hearing, allowing the board to determine without evidence of the confidential discussions that the applicant had plagiarized portions of her paper. The court ruled that the board was correct in finding that the committee acted reasonably in its decision despite this procedural irregularity. The applicant also argued that the committee made a second procedural error that justified a rehearing of the committee decision, being that the committee did not ask the University Secretary for, nor did it have, a record of the applicant's prior violations to assist the committee in arriving at appropriate sanctions. This ground was not argued before the board. Nonetheless, the court chose to rule on it, and found that not having the record of prior violations was not a fundamental procedural error which could have affected the outcome, since the record was intended to assist the board only and the language used for its provision was permissive and not mandatory, so the board acted reasonably in deciding penalty without it because it was not required evidence in the hearing by which to determine the appropriate penalty.

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Westfield Twins Condominium Corporation v Wilchuck, 2021 SKQB 23

Robertson, January 26, 2021 (QB21022)

Civil Procedure - Queen's Bench Rules, Rule 11-1
Civil Procedure - Costs - Solicitor-Client
Condominiums - Fees - Non-Payment - Foreclosure - Judicial Sale - Costs

The plaintiff, a condominium corporation, had successfully enforced a condominium lien for the defendant's arrears of condominium fees through a foreclosure action followed by judicial sale of the unit. It applied for an assessment of the solicitor-client costs that had been ordered by the court when it granted an order for foreclosure and distribution of the sale proceeds (see: 2020 SKQB 58). It claimed legal costs of $33,000. It argued that it was a unique action which merited full or substantial indemnity of costs on a solicitor-client basis. It filed invoices from its law firm to support its claim. The defendant condominium owner, Wilchuk, brought three actions and filed three appeals against decisions of the Court of Queen's Bench arising from his actions, all of which were dismissed. The plaintiff initiated the foreclosure action. However, the leave to commence the foreclosure action on November 13, 2018 did not address the question of pre-leave costs. The defendant mortgagee, B2B Bank (B2B), had a mortgage loan secured against the unit and the amount owing was $109,126.00 as at January 2020. It had not participated in the foreclosure proceedings and was noted for default of defence after the action for foreclosure was commenced. It opposed the application on the basis that assessment of costs should be consistent with the principles of foreclosure practice that would include denying pre-leave costs unless awarded at the leave stage and limiting solicitor-client costs to the standard amount of $4,500. Further, the plaintiff had been awarded specific costs at some stages of the foreclosure action and should not be permitted to seek more than had been awarded then. As it had not been under any obligation to pursue judicial sale, it could have relied on registration of its lien, avoiding the cost of litigation. The plaintiff responded that if it had not pursued enforcement through judicial sale, the unit owners would have had to bear the burden of higher fees to make up for Wilchuk's default.
HELD: The plaintiff was awarded solicitor-client costs of $19,000 plus the amount of $3,085, representing the total of previous costs awarded separately to it. The remainder of the proceeds from sale of the unit were to be paid to B2B. As the court's order awarding solicitor-client costs at the order nisi stage had not been appealed, the decision was not subject to review. The court held that the reason for awarding solicitor-client costs in this case was not based on contract but on the exceptional circumstances present. As recognized in Canterbury Lofts Condominium Corporation v Dureau, 2016 SKQB 410, there are obvious differences between condominium corporations and mortgage lenders. In exercising its supervisory jurisdiction over judicial sale, that difference was a relevant consideration in exercising its discretion in assessing costs because condominium corporations have the right to levy fees, and if an individual unit owner fails to pay their share, the burden falls upon the other unit owners. When the corporation takes enforcement action to compel payment, the common good is the purpose, not recovery of a secured loan made by voluntary agreement. The

costs claimed here were reasonable and not excessive. The court declined to award pre-leave costs and reduced the invoice for legal fees to establish legal costs at $19,000. It would not be appropriate to limit the award to the standard foreclosure costs because the circumstances of this foreclosure action were unique in that it was the first enforcement action by a condominium corporation to proceed to judicial sale and the costs of the action were caused by the persistent opposition of the defaulting owner. These factors warranted a full or substantial indemnity of solicitor-client costs.

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Black & McDonald Limited v Evraz Inc. NA Canada, 2021 SKQB 24

Mitchell, January 26, 2021 (QB21023)

Civil Procedure - Queen's Bench Rules, Rule 1-3, Rule 5-40, Rule 7-9

The plaintiff launched an action against the defendant for payment of $8.1 million for work it had completed on a construction project commenced in March 2017. The defendant disputed the claim, arguing that the invoices in dispute exceeded the budget estimates the plaintiff had originally provided, and counter-claimed for substantial losses allegedly caused by the plaintiff's breaches of contract and negligence. The plaintiff contended that the slow progress of the action was caused by the defendant's persistent failure to comply with filing deadlines, some of which were court-imposed. The trial was scheduled for September 2021 but a judge had yet to be assigned. The defendant applied in Queen's Bench chambers, pursuant to Queen's Bench Rules 1-3 and 5-40, for leave to serve and file additional expert reports for use at trial. The plaintiff then applied pursuant to Queen's Bench Rule 7-9 for an order striking the notice of application as an abuse of process and alternatively, for orders compelling the defendant to file the affidavit of its Vice-President of Engineering, and for it to identify in its application the reasons for the delay in seeking to file new expert evidence, the identity of the expert and areas in which they would provide an opinion. The defendant complied and the affidavit described two questions it would ask the expert and advised that he would complete his report five months before trial. The plaintiff revised the relief it sought in its notice of motion, asking that the defendant's application be amended to alter the questions to be asked of the expert. The defendant argued that it was unnecessary for the court to grant any of the relief sought by the plaintiff because it was not "plain and obvious" that its application would fail and that it was adequate for the designated trial judge to determine whether the expert report, focused on the issues identified in the affidavit, might be filed under Queen's Bench rule 5-40(4). It submitted that the plaintiff's application should be dismissed and its notice of motion should be

left to be addressed by the trial judge, once appointed. The parties agreed that the trial judge should decide whether to permit the defendant to file an additional expert report but disagreed on whether the rather open-ended notice of motion should be replaced by the amended notice of motion proposed by the plaintiff.
HELD: The plaintiff's application was granted. The defendant's notice of motion was ordered to be amended, without prejudice to the plaintiff's right to oppose the relief sought by the defendant in the amended version. The court relied upon its inherent jurisdiction and Queen's Bench Rule 1-4(3) to permit the amendment rather than Rule 7-9. The amendment would assist in streamlining any pre-trial applications the trial judge might have to decide prior to trial. Although a chambers judge may be able to adjudicate an application to admit an expert report after the conclusion of a pre-trial conference and prior to the assignment of a trial judge under Queen's Bench rule 5-40(2), it should only be done in exceptional circumstances.

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Gilmore Masonry Heaters Inc. v Reed, 2020 SKQB 29

Mitchell, February 2, 2021 (QB21026)

Contract Law - Breach - Damages

The plaintiff, a masonry company, brought an action against the defendant for alleged breach of contract. It claimed the defendant owed it $24,000 in payment for its building of an outdoor fireplace at the defendant's home in 2013 pursuant to an oral contract. The company existed when the agreement with the defendant was created, at the time it rendered its invoice, and when the statement of claim was issued in 2015, but it was dissolved in 2017. It was revived in 2019 because of the legal proceedings. The defendant contacted the plaintiff in 2012 to ask him to build the fireplace because of his reputation, training, experience and holding the red seal qualification for masons. The parties eventually agreed that the plaintiff's hourly fee was $65 per hour, that of his assistant would be $35 per hour, and the total number of hours would be open-ended. Upon completion the plaintiff submitted his invoice, broken down into charges for all supplies ($4,788) and time expended ($18,681) for a total of $24,642. The defendant challenged the amount, questioning the number of hours, and requested documentation regarding the supplies purchased and the hours billed by the plaintiff and his assistant. The plaintiff testified that he had not kept a record of the time worked but had receipts for the materials purchased. Although the defendant had regularly used the fireplace since it was built and did not dispute that it was functional, his principal complaint was with its appearance. He counterclaimed for damages to compensate him for the cost of replacing the structure. Each of the parties retained the services of an expert

to assess the fireplace, including the quality of the workmanship and well as aesthetics. Each expert was a red seal stone mason with many years' experience. The plaintiff's expert testified that he found some issues with the structure but that it was aesthetically pleasing both from a subjective and objective point of view and that the cost for the labour was well within the appropriate range. The defendant's expert advised that the structure looked good from a distance but upon inspection, he found some of the work was substandard. He recommended that the fireplace be dismantled and replaced at a cost of approximately $23,000. The defendant based his counterclaim upon this information. He also argued that the action was a nullity due to the dissolution of the corporate plaintiff after the proceedings commenced and prior to trial under s. 275(1) of The Business Corporation Act (BCA).

HELD: The plaintiff's action for breach of contract was allowed and damages awarded in the amount of $22,216. The defendant's counterclaim was dismissed. The court found that: there was an enforceable oral agreement; the action could continue even after the corporate plaintiff's dissolution based upon s. 219 of the BCA; and the plaintiff had demonstrated on a balance of probabilities that the implied terms of the agreement were met. It assessed both the parties as credible witnesses. Regarding the expert witnesses, it preferred the evidence given by the plaintiff's as being more balanced and objective. The only explicit terms in the agreement were the hourly fee charge. The implied terms were that the work would be done in a workmanlike manner and that the plaintiff possessed the requisite skill but not that the plaintiff would keep accurate records regarding work performed or regarding the aesthetics of the finished product. The evidence of the plaintiff's expert witness indicated that the structure was not perfect but it had been constructed in a workmanlike fashion. The plaintiff was entitled to damages but in an amount less than was claimed because of discrepancies in the invoices for the materials. The labour charges were confirmed, despite the deficiencies in the plaintiff's record-keeping. The defendant's counterclaim was dismissed based upon the finding of breach of contract.

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