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.

Vol. 24, No. 14 **July 15, 2022**

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***Barth v McDougall Gauley LLP*, 2022 SKCA 67**

Caldwell Leurer Tholl, 2022-06-02 (CA22067)

Appeal - Assessment of Costs
Appeal - Abandonment - Show Cause
Civil Procedure - Court of Appeal Rule 46(2)

The registrar of the court, pursuant to Rule 46(2) of The Court of Appeal Rules, referred this case to the court requiring T.B., the appellant, to show cause why his appeal should not be dismissed for want of prosecution after not taking steps to progress it for more than one year. Accordingly, T.B. brought an application to continue his appeal. T.B. served a notice of appeal on the respondent, the law firm McDougall Gauley,

Civil Procedure - Costs - Solicitor-Client Costs

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following a decision that did not go in his favour before the deputy local registrar of the Court of Queen's Bench. T.B. taxed the accounts of his lawyer and alleged that he should not pay fees because his lawyer abruptly withdrew, and she was involved in a "conflict of interest". The Court of Queen's Bench, on consent from the respondent, directed two statements of account to taxation. The issue for the court to determine was whether to give T.B. time to perfect his appeal or dismiss the same.
HELD: The court dismissed T.B.'s application and appeal and set costs in the amount of $400.00 payable to the respondent. In its analysis, the court set out that it is the responsibility of the applicant to demonstrate how it is in the interests of justice to allow an appeal that has languished beyond a year to continue. There are two aspects that must be met: first, the court must assess whether the appeal is "manifestly without merit," which was explained in the decision of 6517633 Canada v Norton (Rural Municipality), 2019 SKCA 45. If an appeal is manifestly without merit, that is the end of the show cause hearing. If the matter does have merit, the second step of analysis requires the court to consider how it is in the interests of justice for the appeal to continue. Part of the consideration of this issue requires an explanation for the reason behind the delay and whether parties would be prejudiced by an appeal being dismissed without hearing. T.B.'s appeal was assessed to be wholly without merit, thus not requiring two stages of analysis. The court first identified that T.B. had no statutory right of appeal before it. His right of appeal from the deputy local registrar of the Court of Queen's Bench is an appeal proper to the Court of Queen's Bench. He failed to complete this. Further, T.B. sought a right of appeal from the local deputy registrar's decision that does not extend to the arguments he advances in his appeal. Accordingly, T.B.'s application and underlying appeal were dismissed with fixed costs payable to the respondent.

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***Yashcheshen v Saskatchewan (Ministry of Health)*, 2022 SKCA 68**

Barrington-Foote Tholl Kalmakoff, 2022-06-02 (CA22068)

Administrative Law - Judicial Review - Appeal
Administrative Law - Internal Appeal Board - Standard of Appeal
Constitutional Law - *Charter of Rights*, Section 7, Section 15

A.Y. appealed a decision upon judicial review by a judge of the Court of Queen's Bench (chambers judge) on her separate applications that were denied by the Ministries of Health and Social Services for the funding of cannabis products, which she states help

Criminal Law - Assault - Sexual Assault

Criminal Law - Evidence - Admissibility - Similar Fact

Criminal Law - Sexual Assault - Credibility

Debtor and Creditor - Limitation of Civil Rights

Evidence - Similar Fact Evidence

Foreclosure - Final Order

Judgments and Orders - Final Judgment - *Functus Officio*

Mortgages - Foreclosure - Final Order

Practice - Applications for Summary Judgment - Disposition Without Trial

Practice - Pleadings - Statement of Claim - Application to Strike - No Reasonable Cause of Action

Public Health Order - Breach

Statutes - Interpretation - *Electronic Information and Documents Act, 2000*, Section 5, Section 6, Section 8, Section 9

Statutes - Interpretation - *Limitations Act*, Section 11(2)(a)

with her medical care. A.Y. further argued that her section 7 and section 15 *Charter* rights had been infringed by the denial of funding for her use of cannabis products. In prior hearings, including at the Court of Queen's Bench, A.Y. had not raised constitutional questions concerning her section 15 *Charter* rights. The Ministries of Health and Social Services, in addition to the Attorney General, were respondents on the appeal. A.Y. has various medical conditions, including Crohn's disease, chronic pain, irritable bowel syndrome and drug hypersensitivity syndrome. She is on social assistance and sought approval from the Ministries to pay for her cannabis costs. In January 2018, A.Y. applied to the Drug Plan and Extended Health Benefits Branch of the Ministry of Health and asked for cannabis products to receive exception drug status (EDS) and be paid for through that program. The Ministry of Health denied her request and advised that there was no appeal mechanism in place. The Ministry of Health advised that cannabis is not covered under the Saskatchewan Formulary, or any other provincial or territorial drug plan. A.Y. applied to the Ministry of Social Services for social assistance in May 2018. Eventually, while some social assistance was approved, A.Y. did not receive funding for cannabis. A.Y. appealed and the matter was directed to the Centre Regional Appeal Committee (CRAC). A.Y. lost her appeal: she was advised that her request was for a health-related need, and such are not covered by social assistance. A.Y. further appealed this decision to the Social Services Appeal Board (SSAB). The SSAB upheld the CRAC decision for want of jurisdiction, advising A.Y. that it could only hear matters under the Saskatchewan Assistance Program and not matters that contemplated drug coverage. The decisions from the Ministries of Health and Social Services led to A.Y. filing for judicial review, including a claim that her section 7 rights had been violated. In addition to a comprehensive application for judicial review, A.Y. filed her own affidavit and the affidavit of her family physician. The chambers judge dismissed A.Y.'s application in its entirety. The chambers judge reviewed the various laws applicable, and then turned to a separate assessment from each Ministry. In examining the decision of the Ministry of Social Services, the chambers judge did not find it unreasonable that cannabis was found to be a drug and not a "special food item", regardless of A.Y.'s consumption of it in edible form. In examining the decision of the Ministry of Health, the chambers judge accepted that cannabis was not in the provincial Formulary and that EDS is a discretionary decision that she could not interfere with. The chambers judge also rejected A.Y.'s argument that her section 7 *Charter* rights were violated as there is not a positive obligation on a government to fund specific health care. The issues for the court to determine were (1) whether the chambers judge erred: (a) in upholding the decision by the Ministry of Health; (b) in upholding the decision by

Statutes - Interpretation - *Sale of Goods Act*

Statutes - Interpretation - *Saskatchewan Farm Security Act*, Section 46, Section 66

Statutes - Interpretation - *The Limitation of Civil Rights Act*, Section 18

Statutes - Interpretation - *Trespass to Property Act*

Cases by Name

Barth v McDougall Gauley LLP

Christianson v Christianson

Princess Homes Ltd. v Guenther

R v Keough

R v Ukabam

Ritchie Bros. Auctioneers (Canada) Ltd. v Englot

Scotia Mortgage Corporation v LaBonte

Unified Auto Parts Inc. v George Sterner Trucking Ltd.

VFS Canada Inc. v Friesen

Yashcheshen v Saskatchewan (Ministry of Health)

the Ministry of Social Services; (2) whether the Government of Saskatchewan, through the actions of its Ministries, violated A.Y.'s rights under s. 7 of the *Charter*; and (3) whether this court should adjudicate the alleged violation of A.Y.'s rights under s. 15 of the *Charter*.

HELD: A.Y.'s appeal was allowed in part. The chambers judge had failed to note an error committed by the Ministry of Social Services and the decision was remitted back to the SSAB. The chambers judge did not err by applying the standard of reasonableness in considering the Ministry of Health's decisions related to A.Y. Correctness was identified as the standard of review to be applied to the chambers judge's decisions that the Ministries had acted reasonably in their decisions. The Ministry of Health made its decision not to approve of funding of A.Y.'s cannabis products because cannabis products had not been assessed by Health Canada for safety, efficacy and quality as required under the Food and Drugs Act. The court found the Ministry's decision to be transparent and justifiable in context of the statutory regime in place. The review of the Ministry of Social Services decision required a consideration of the standard of review applicable; given that A.Y.'s appeal was first to an internal board, the standard of review identified in *City Centre Equities Inc. v Regina (City)*, 2018 SKCA 43, 75 MPLR (5th) 179 (*City Centre*) was applicable. City Centre established that the standard of review that internal appeal boards should apply will be discerned from the legislation itself and the intent of the drafters. In examining the statutory regime to which A.Y.'s matter applies, it is evident that the appeals before the CRAC and SSAB allow *de novo* appeals, as there is a right to a full hearing and the right to tender new evidence. The court found that the SSAB should apply a correctness standard of review to an appeal from the CRAC. The SSAB erred when it decided that it did not have jurisdiction to hear A.Y.'s matter. It made this decision in the absence of hearing from A.Y. This was an unreasonable decision and the chambers judge erred by upholding it. The chambers judge did not, however, err by dismissing A.Y.'s arguments concerning section 7 of the *Charter*. Governments are not obligated to fund specific health matters that have not been approved within a statutory context; there is no positive obligation to fund a chosen form of health care. A.Y. raised her section 15 arguments for the first time before the court. The court elected not to consider her argument as it was a wholly new argument on appeal. Accordingly, A.Y. was partially successful in her appeal with the decision of the Ministry of Social Services returned to the SSAB. The court imposed no costs on any party.

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***VFS Canada Inc. v Friesen*, 2022 SKQB 133**

Currie, 2022-05-24 (QB22329)

Statutes - Interpretation - *Saskatchewan Farm Security Act*, Section 46, Section 66
Statutes - Interpretation - *The Limitation of Civil Rights Act*, Section 18
Creditor and Debtor - Seizure
Debtor and Creditor - Limitation of Civil Rights

VFS Canada Inc. (applicant) applied for an order allowing it to seize the respondent's 2012 power unit. Three pieces of equipment were involved: a 2012 power unit; a 2016 trailer; and a 2019 power unit. The respondent bought the 2016 trailer from the applicant. Later, the respondent asked to skip some payments on the 2016 trailer. The applicant agreed on the condition that the respondent granted the applicant a security interest in the respondent's 2012 power unit. The respondent provided the written security interest. Then, the respondent purchased the 2019 unit from the applicant. The applicant claimed the respondent orally agreed the 2012 unit would be additional security for payment on the 2019 unit. The respondent denied that he had so agreed. In 2021, the respondent sold the 2016 trailer and paid the applicant all amounts owing on that trailer. The respondent surrendered the 2019 unit to the applicant. The applicant sold the 2019 unit. After the sale, the respondent still owed an amount on the 2019 unit financing. The applicant applied to seize the 2012 unit. The court considered: (1) is the applicant's seizure of the 2012 unit prohibited by s. 18 of *The Limitation of Civil Rights Act* (LCRA) or s. 46 of *The Saskatchewan Farm Security Act* (SFSA); (2) is the 2012 unit exempt from seizure under s. 66 of the SFSA; and (3) did the respondent grant the 2012 unit as collateral for the 2019 unit?
HELD: The application was dismissed because either s. 18 of the LCRA or s. 46 of the SFSA prohibited seizure of the 2012 unit. (1) Section 18 of the LCRA limits a seller's right of recovery for unpaid purchase money to a lien on the article sold, regardless of any other statute or agreement. The seller's remedy is restricted to repossession and sale of the article. This statutory limitation exists notwithstanding protests of unfairness by persons who have relied on contractual promises that the statute renders unenforceable. The applicant had already repossessed and sold the 2019 unit. The 2012 unit was not the article sold. Therefore, if the LCRA applied, the 2012 unit was exempt from seizure. However, the LCRA does not apply where the SFSA applies. The respondent was a farmer. Section 46 of the SFSA applies to personal property bought by a farmer for use in farming, other than land, livestock or articles affixed to land. Section 46 of the SFSA has the same meaning and effect as s. 18 of the LCRA. Regardless of which Act applied, the application must be dismissed. (2) Section 66 prevents seizure under judicial enforcement of farm machinery reasonably necessary for a farmer's agricultural operations during the next 12 months. The farmer has the onus of explaining how equipment meets the statutory requirements. The court accepted the respondent's evidence that he had needed to rent a second power unit to maintain his farming operations as proof that the 2012 power unit was reasonably necessary. Therefore, the 2012 unit was also exempt from seizure under s. 66 of the SFSA. This was another reason the application must be dismissed. (3) The above conclusions rendered moot whether in fact the 2012 unit was collateral to secure payment for the 2019 unit. The court saw problems with the evidence of both the applicant and the respondent. A resolution of those issues likely would have required viva voce evidence, but was not required to determine the overall application. The respondent was awarded costs on column 2 of the tariff of costs.

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***Scotia Mortgage Corporation v LaBonte*, 2022 SKQB 130**

Robertson, 2022-05-17 (QB22323)

Foreclosure - Final Order
Mortgages - Foreclosure - Final Order
Judgments and Orders - Final Judgment - *Functus Officio*
Civil Procedure - *Queen's Bench Rules*, Rule 1-6

The bank applied to amend a final foreclosure order to include an additional city lot omitted from the pleadings after the final order was issued. Before this application, the bank obtained leave to start an action for foreclosure or judicial sale for mortgage arrears relating to a house on two city lots. The bank's statement of claim referred to only one of the two lots. The claim was served and noted for default. An order nisi for sale and final order for foreclosure were issued, both referring only to one of the two city lots. The bank attempted to register the foreclosure against both city lots. Information Services Corporation rejected the transfer. The bank made an application to the court to add the missing city lot to the final order. The Court considered: may the court order an amendment to add a parcel of land omitted from the statement of claim when the omission continued through to the final order for foreclosure?
HELD: The application to add the missing lot was heard by the judge who made the final order. The doctrine of functus officio, which promotes finality and stability, means a court usually cannot reconsider a final decision. Limited exceptions to the doctrine exist where there is a statutory basis, where necessary to correct an error in expressing a manifest intention, or where a matter was not heard on its merits. The bank had a valid final order for foreclosure against one city lot, but the order was ineffective because the house was located on two lots. The omission of the second lot was a mistake. The mistake was not misleading. The respondent owner had received documents accurately identifying the full property with both lots. The amendment would not prejudice the owner in the circumstances. Queen's Bench Rule 1-6 supported the court's equitable and supervisory jurisdiction to allow the amendments. The court granted the application.

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***Ritchie Bros. Auctioneers (Canada) Ltd. v Englot*, 2022 SKQB 122**

Gerecke, 2022-05-06 (QB22327)

Contracts - Breach - Misrepres ntation - Fraudulent - Negligent
Contracts - Breach - Damages

The plaintiff, Ritchie Bros. Auctioneers (Canada) Ltd. (RB Group), applied for summary judgment against the defendant, B.E. B.E. agreed that the matter could be determined summarily but sought that the plaintiff's action be dismissed. B.E. engaged RB Group to sell two tractors at auction. The tractors were sold, and the proceeds paid to B.E. RB Group then determined the hours of operation of the tractors to have been dramatically understated. B.E. did not cooperate with RB Group to address this concern. RB Group refunded the purchasers and re-listed the tractors for sale with accurate hours listed. RB Group sought judgment for the difference between the proceeds from the two sets of sales and for the costs incurred in the process. The matter had previously been in chambers when B.E. obtained a fiat to withdraw his filed affidavit: *Ritchie Bros. Auctioneers (Canada) Ltd. v Englot* (9 November 2021) Saskatoon, QBG 103/2020 (Sask QB). RB Group had filed several affidavits in support of its application; B.E. relied on one affidavit from a witness that recounted a conversation between B.E. and an employee of RB Group. RB Group objected to this evidence as hearsay. The court saw limited utility in this affidavit, as the statements made by B.E. were not accepted for the truth of their contents. The court set out the facts relied upon before outlining the issues in dispute. RB Group is an auction company; it does not verify information that a seller provides. B.E. engaged RB Group to sell two tractors in the fall of 2018. An employee of RB Group met with B.E. and forwarded him an auction agreement that was digitally signed, including initials on Schedule A, which listed information about the hours of use of the tractors. B.E.'s representation of the hours of use was 1,945 hours and 1,887 hours respectively. The tractors were sold to separate purchasers for the gross amount of $410,000.00. Net proceeds of $363,222.14 were paid to B.E. One of the purchasers complained that after a mechanical inspection, the hours of use appeared to be inaccurate. B.E. did not cooperate to provide information or work towards any resolution of the complaint. RB Group investigated the history of the tractors and discovered that B.E. had purchased them from a U.S. dealer with much higher hours: 5,681 hours and 7,038 hours. Both purchasers were provided refunds. RB Group sold the tractors in late 2019 for an aggregate amount of $235,000.00. RB Group pled damages suffered in the amount of $191,328.06 being the difference between the respective sales, hauling costs, lien searches and repairs made. The court found that B.E. had intentionally misrepresented to RB Group the hours of use for both trailers. B.E. argued that RB Group had no prospect of success; RB Group had no right to unilaterally cancel the first sale, and then re-list the tractors; the RB Group claimed double commissions; RB Group did not act in a reasonably commercial manner, and as B.E. is a farmer, RB Group was obligated to serve notices *under The Farm Debt Mediation Act*, SC 1997, c 21 (FDMA) and *The Saskatchewan Farm Security Act*, SS 1988-89, c S-17.1 (SFSA) before re-selling the trailers. The issues for the court to determine were: (1) Is this a matter in respect of which summary judgment should be granted? (2) Subject to defences asserted by B.E., has RB Group proven its claim for recovery of the damages amount? (3) Was RB Group required to serve B.E. with notices under the FDMA and SFSA? (4) Was RB Group entitled at law to cancel the first sales of the tractors? (5) Was RB Group entitled at law to re sell the tractors? (6) Did RB Group sell the tractors in a commercially reasonable manner?

HELD: Summary judgment was granted against the defendant with judgment ordered in the amount of $191,328.06, along with pre-judgment interest and party-and-party costs. The court was satisfied that pursuant to Rule 7-5(1)(a) of The Queen Bench Rules, there was no genuine issue requiring a trial; the matter was appropriate to be dealt with summarily. On the second issue, the court was satisfied that based on the affidavits filed, RB Group had established the evidence to prove their damages claimed. The court rejected B.E.'s assertion that he was required to be provided notice pursuant to the FDMA and SFSA; he had not filed evidence supporting that he was a farmer. The court further found that even if B.E. were a farmer, notices would not be required, as only a secured creditor is required to serve notice prior to selling collateral. RB Group was entitled to cancel the first sales of the tractors. The court distinguished previous authority presented by B.E on this issue; B.E. had acted deliberately and fraudulently.

Further, the agreement executed between B.E. and RB Group contained an express provision that it could be terminated upon being provided fraudulent information. The agreement expressly provided RB Group the "right to sell or re-sell the Equipment". RB Group was entitled to re-sell the tractors by virtue of language contained within the agreement executed by the parties. RB Group acted in a commercially reasonable manner in selling the tractors – the tractors were priced appropriately, and thorough diligence had been conducted by RB Group. Accordingly, summary judgment was granted against B.E.

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***Christianson v Christianson*, 2022 SKQB 125**

Meschishnick, 2022-05-11 (QB22318)

Adult Guardianship and Co-Decision-Making Act - Personal and Property Guardian

C.C., the applicant, sought an order appointing her the guardian of her twenty-two-year-old daughter. The objector, G.C., was the father. Both parties agreed that their daughter required a guardian. G.C. objected to the suitability of C.C. acting as the guardian. He raised concerns that he would not be permitted access to his daughter if C.C. were appointed guardian. There were concerns raised that C.C. had accessed his funds without permission for personal use in the past to deal with an addiction. G.C. proposed joint guardianship or the appointment of a public trustee. The issues for the court to consider were whether the daughter required a guardian for her property and a guardian for her personal decisions, and whether C.C. is an adequate guardian.
HELD: C.C. was appointed the daughter's personal and property guardian, with limited exceptions from the application brought. The court ordered costs against the objector in the amount of $1,500.00. The application was brought pursuant to ss. 14(1)(b) and 40(1)(b) of *The Adult Guardianship and Co-decision-making Act*, SS 2000, c A-5.3 (Act). This required the court to consider s. 13 of the Act to determine if the daughter required a personal guardian by examining factors such as the ability of the individual to make appropriate physical, psychological, health, and other decisions to meet her needs. The Act also required a consideration of the estate of the individual for whom guardianship in property is sought. The daughter had a modest net worth. She received SAID benefits in the sum of $1,092 per month. The court agreed with the parties that the daughter required a guardian. In considering the issue of whether C.C. was an adequate guardian, the court assessed the individual objections raised by G.C. The court dismissed the arguments of G.C. for joint guardianship or a public trustee being appointed as formal applications for such were not before the court. Mindful of the risk of misappropriation, the court required C.C. to file an annual accounting of her daughter's income and expenditures and to post a bond of more than the daughter's annual income. The court rejected G.C.'s arguments objecting to C.C. being appointed personal guardian as G.C.'s primary concern was possible interference with his parenting time; the court highlighted that section 27 of the Act permitted applications for access. C.C. was appointed the daughter's personal and property guardian with the requirement she complete an annual accounting and file with the court and public trustee a bond without surety in the amount of $25,000.00. C.C.'s success in the application resulted in a cost award against G.C. for $1,500.00.

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***R v Ukabam*, 2022 SKQB 128**

Scherman, 2022-05-18 (QB22328)

Criminal Law - Assault - Sexual Assault
Criminal Law - Sexual Assault - Credibility
Evidence - Similar Fact Evidence
Criminal Law - Evidence - Admissibility - Similar Fact

The accused, a medical doctor and gastroenterologist, was charged with seven counts of sexual assault relating to five complainants. Each complainant had been a patient of the accused medical doctor. The accused denied the allegations. He asserted only proper medical procedures and medical examinations occurred. The Crown made a similar fact evidence application to admit evidence of each complainant in the charges arising from evidence of each of the other complainants.
HELD: The accused was found not guilty on each of the charges. The similar fact evidence application was denied. The judge reviewed the twin concepts of the presumption of innocence and proof beyond a reasonable doubt and the principles for assessing credibility and reliability of witnesses. The Crown needed to prove beyond a reasonable doubt the essential elements for each charge of sexual assault: touching of a sexual nature in the absence of consent. The complainant patients had each consented to touching for medical purposes but did not consent to touching of a sexual nature. The defence took the position that no touching of a sexual nature occurred and that touching was for proper medical purposes. Four complainants testified the accused penetrated her vagina with his finger during a physical examination or medical procedure, and one complainant testified the accused touched her breasts during a physical examination. The court analyzed the evidence of each complainant on a stand-alone basis without consideration of similar fact evidence. Speculative reasoning relying on common sense not grounded in the evidence can result in reversible error. The court accepted that each complainant may believe the facts they testified to occurred, but that each complainant's evidence was unreliable because of at least some of the following: medication impaired the complainant's ability to perceive and remember; the inconsistent testimony of other witnesses present during the alleged event was preferred; the complainant admitted to having a poor memory, the evidence was inconsistent with the complainant's prior statements or inconsistent with other facts the judge accepted as true. The evidence did not meet the standard of beyond a reasonable doubt. On the Crown's similar fact application and evidence, the court noted there is an exception to the general presumption against the admissibility of similar fact evidence when the degree of similarity to the offences charged makes coincidence improbable and the probative value outweighs potential for misuse. In this case, the allegations of each complainant had different histories and details. The main similarity was that each complainant alleged sexual assault by their medical doctor. The court had concerns with the reliability of each complainant's evidence. The potential for misuse outweighed any probative value. The Crown's application to admit similar fact evidence was dismissed.

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***Princess Homes Ltd. v Guenther*, 2022 SKQB 141**

Crooks, 2022-06-06 (QB22339)

Civil Procedure - Limitation Period - Extension of Limitation Period
Civil Procedure - Striking Statement of Claim
Civil Procedure - Summary Judgment - Foreclosure Proceedings
Civil Procedure - Costs - Solicitor-Client Costs
Civil Procedure - *Queen's Bench Rules*, Rule 7-2, Rule 7-3, Rule 7-9
Practice - Pleadings - Statement of Claim - Application to Strike - No Reasonable Cause of Action
Practice - Applications for Summary Judgment - Disposition Without Trial
Statutes - Interpretation - *Limitations Act*, Section 11(2)(a)
Statutes - Interpretation - *Electronic Information and Documents Act, 2000*, Section 5, Section 6, Section 8, Section 9

Two individuals (defendants) signed a mortgage in favour of the plaintiff for $50,000. The defendants did not make any payments under the mortgage. Five years later, the plaintiff mortgage lender made a formal demand for full payment. Three years after that, the plaintiff filed a notice of application to commence this foreclosure action. The defendants relied on *The Limitations Act*, SS 2004, c L-16.1. After a date for hearing was scheduled, the defendants filed a notice of application to strike the statement of claim for not disclosing a reasonable cause of action. The court considered: (1) should the claim be struck for disclosing no reasonable cause of action; and (2) was summary judgment appropriate in the circumstances? Consideration of the suitability of summary judgment included whether the limitation period expired before the application for leave to commence an action, and whether the defendants' bankruptcy discharged the mortgage debt or triggered an earlier start of the limitation period.
HELD: The court dismissed the application to strike the statement of claim and granted summary judgment with solicitor-client costs in favour of the plaintiff. (1) The threshold to strike a pleading for not disclosing a cause of action is high. It must be plain and obvious the action cannot succeed. Facts pleaded are assumed to be true unless the facts are manifestly incapable of being proven. The statement of claim did not specify any formal demand for payment. The mortgage was due either 6 months after advance of funds or upon demand, whichever comes last. The statement of defence stated that the plaintiff had made demand for payment and that the action became statute-barred two years later, before the plaintiff applied for leave to commence the current action. The parties were aware of the basis for the claim. The issues in the claim were whether the defendants breached the terms of the mortgage and whether the proceeding was statute-barred by operation of a limitation period. The pleadings disclosed a question that was not doomed to fail, was capable of being proven, and had a reasonable prospect of success. The claim was not struck. (2) Summary judgment was granted. There was no genuine issue requiring a trial. The plaintiff had previously attempted to start an action for foreclosure and that action was declared a nullity by the Court of Appeal. In text messages and emails in the two years before the application to commence the action, a defendant and a mortgage broker acting as the defendants' agent had acknowledged the debt. The text message identified the defendant by name, contained the telephone number, and the defendants did not contest its authenticity. The email contained the agent's name and confirmed her role and the defendants did not contest its authenticity. The Limitations Act requirements for a signed written acknowledgement were satisfied. The acknowledgements extended the limitation period. The defendants claimed that the plaintiff filed a proof of claim with the defendants' trustee in bankruptcy, that this triggered the limitation period before the formal demand, and that the limitation period ought to run from the earlier date of proof of claim. The bankruptcy was not referred to in the defendants' pleadings or evidence. Only one bankruptcy

document was appended to the defendants' brief of law. The record in a summary judgment application should contain all evidence the parties would bring at trial. The plaintiff's lawyer conceded the plaintiff had filed a proof of claim in bankruptcy. The mortgage terms specified becoming bankrupt triggered default of the mortgage. Regardless, the subsequent acknowledgements of the debt preceded expiry of the earlier limitation period and indicated the defendants' belief that this debt survived their bankruptcy. The court drew an adverse inference against the defendants because the defendants' lawyer failed to tender relevant evidence about the bankruptcy. The court concluded the bankruptcy did not discharge the mortgage debt and nothing further would assist the defendants in a trial. The plaintiff's action was not statute-barred. Application for summary judgment was granted. The terms of the mortgage provided for solicitor-client costs incurred in enforcing rights under the mortgage. Counsel for the defendants unnecessarily complicated matters. This was a rare circumstance where solicitor-client costs, in favour of the plaintiff, were justified and were so ordered.

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***Unified Auto Parts Inc. v George Sterner Trucking Ltd.*, 2022 SKPC 22**

Daunt, 2022-05-16 (PC22023)

Commercial Law - Contract
Statutes - Interpretation - *Sale of Goods Act*

For 25 years, the defendant, George Sterner Trucking Ltd. (Sterner) maintained a corporate charge account with Unified Auto Parts Inc./NAPA (UAP) at their Prince Albert and Melfort locations. Unknown to both the plaintiff and defendant, D.F., a third-party litigant named by Sterner into the action, made purchases using the charge account without Sterner's authorization from UAP. Upon learning of anomalies in the billing from UAP, the principal of Sterner refused to pay invoices for November 2019 and December 2019. The relationship between Sterner and UAP was one of trust: UAP issued bills that Sterner paid promptly, often without reviewing the detailed invoice. Sterner maintained a practice of notifying UAP of the employees authorized to purchase orders. D.F. was not an employee and never authorized by Sterner to do business with UAP. D.F. was the son of a former employee of Sterner; the principal of Sterner expressly did not want to associate with D.F. The issue for the court's determination was who should bear the burden of D.F.'s malfeasance: the one who trusted him (UAP) or the one who did not (Sterner)?
HELD: Sterner was not obligated to pay for the items charged by D.F. to its charge account. The court identified in its analysis that the plaintiff had the onus of establishing that the requirements of section 6 of *The Sale of Goods Act*, RSS 1978, c S-1 (Act) are satisfied. One of three requirements must be met under the Act: the buyer must accept part of the goods sold and actually receive them, or the buyer must give something by way of earnest or in part payment, or there must be some note or memorandum signed by the party to be charged or its agent. The court's focus was whether D.F. was an agent of Sterner. The court reviewed jurisprudence and cited Toronto-Dominion Bank v Currie, 2017 ABCA 45, 48 Alta LR (6th) 40 in finding that D.F. was not authorized or held out to be an agent by Sterner at any time to UAP. D.F. never had ostensible authority on behalf of Sterner. The court concluded that D.F. is liable for his fraudulent purchases and ordered as such. There were some legitimate items in the November 2019 and December 2019 invoices and Sterner was obligated to pay those amounts. The court issued costs against D.F., but ordered damages and pre-judgment interest against the defendant for legitimate items on the invoices.

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***R v Keough*, 2022 SKPC 23**

Marquette, 2022-05-20 (PC22022)

Constitutional Law - *Charter of Rights*, Section 2(b), Section 7
COVID-19 - Public Health Orders - Statutory Framework
Public Health Order - Breach
Statutes - Interpretation - *Trespass to Property Act*

In response to the COVID-19 pandemic, the Government of Saskatchewan made Public Health Orders (PHOs). This was accomplished in part by an amendment being made to *The Disease Control Regulations* pursuant to *The Public Health Act, 1994* (Act). The accused, R.K., was charged with violating PHOs and trespassing. The Crown alleged that R.K. attended the Foam Lake Co-op (Co-op) food store on several occasions without a face covering, and he further trespassed at the Co-op on two occasions: February 26, 2021 and March 17, 2021. Prior to the trial date, R.K. filed a notice pursuant to *The Constitutional Questions Act, 2012*, challenging the validity of the PHOs in force on the date of the alleged offences. R.K. alleged that mandatory face coverings violated his rights under sections 2(b) and 7 of the *Charter*. R.K. sought a declaration that the PHOs were invalid and to have no application to his case. The trial proceeded by blended *voir dire* on all ticket matters. The Crown called six witnesses at the *voir dire*. The Co-op manager testified, as did four RCMP officers, and the Crown called an expert witness, a respirologist. R.K. also testified in his own defence. R.K. acknowledged that on the dates in question he did attend the Co-op without a face covering. The Crown's expert witness testified that a fundamental principle in a pandemic is to disrupt the transmission of disease between infected and uninfected members of the community. The court accepted the expert's testimony that face coverings serve a two-fold purpose: they reduce the transmission of the virus between those infected from those who are not and the provide a barrier of protection to the wearer. In addition to the question of whether R.K. committed trespass, the court considered the following issues: (1) Did the PHOs in question exist in law? (2) Did the PHOs infringe R.K.'s section 2(b) *Charter* rights? (3) Did the PHOs deprive R.K.'s right to liberty or security of the person as set out in section 7 of the *Charter* and, if so, was the deprivation contrary to the principles of fundamental justice? (4) If the PHOs violated section 2(b) and/or section 7 of the *Charter*, were the PHOs a reasonable limit on R.K.'s Charter rights prescribed by law as can be demonstrably justified in a free and democratic society pursuant to section 1 of the Charter? (5) If R.K's application for relief pursuant to section 24(1) of the Charter is unsuccessful, had the Crown proven beyond a reasonable doubt that R.K. violated a public health order contrary to section 61 of *The Public Health Act, 1994*? Is the defence of necessity available to R.K.?

HELD: The court rejected all of R.K.’s defences and he was convicted of the offences alleged. (1) The PHOs were found to be valid, lawful orders. (2) The court dismissed the argument that the PHOs violated section 2(b) of the *Charter* on the basis of the test in *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927. The first step of the *Irwin* test is to ask whether the plaintiff's activity fell within the sphere of conduct protected by the guarantee, and the court decided that there was no credible evidence before it to support the argument that covering his face was a breach of R.K.’s freedom of expression. (3) The defence bore the burden of proving that the PHOs deprived R.K. of his section 7 rights and the court found it had failed to prove that the PHOs breached natural justice. (4) No section 1 analysis was necessary. (5) The court found the Crown had proven that R.K. violated a public health order and committed trespass beyond a reasonable doubt.

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