Civil Appeals in Saskatchewan: The Court of Appeal Act & Rules Annotated

Ongoing Updates

February 2019

DISCLAIMER AND LIMITATIONS ON USE

There are important limitations on the scope and use of this document. First, it includes only issued decisions. Second, it is not intended to be exhaustive or comprehensive with respect to the Court of Appeal's decisions, and it does not contain every decision of the Court of Appeal during the relevant period. It contains only those decisions that, in the judgment of Court staff, appear to be worthy of note. Third, this document does not provide commentary as to the meaning or effect of the Court's decisions. Fourth, the summaries contained herein do not represent the opinion of the Court or any of its members.

This document is intended only to assist counsel and persons appearing before the Court. It should not be quoted directly and reliance on it is not a complete substitute for legal research.

Civil Appeals in Saskatchewan: The Court of Appeal Act & Rules Annotated[1]
Ongoing Updates

I. EXPLANATORY NOTES

This document is intended to provide an update to the cases concerning *The Court of Appeal Act, 2000*, SS 2000, c C-42.1, and *The Court of Appeal Rules* that have been decided since the publication of the Honourable Stuart Cameron's *Civil Appeals in Saskatchewan* in 2014. **This document is current to *Risseeuw v Saskatchewan College of Psychologists*, 2019 SKCA 9.**

This document is divided into two parts: *The Court of Appeal Act, 2000* and *The Court of Appeal Rules*. The decisions under each provision of the *Act* and *Rules* are organized chronologically by date of the decision, with subheadings included where considered necessary. Some decisions are included more than once in this document, with summaries of different aspects of these decisions located in different sections of the document.

[1] The Honourable Stuart J. Cameron, *Civil Appeals in Saskatchewan: The Court of Appeal Act & Rules Annotated*, 1st ed (Regina: Law Society of Saskatchewan Library, 2015), 2015 CanLIIDocs 293 [*Civil Appeals in Saskatchewan*].

TABLE OF CONTENTS

II. THE COURT OF APPEAL ACT

A. Section 2

Interpretation

2 In this Act and the rules of court made pursuant to this Act, except where otherwise provided:

"chief justice" means the Chief Justice of Saskatchewan; *(«juge en chef»)*

"court" means the Court of Appeal for Saskatchewan; *(«Cour»)*

"decision" includes any judgment, order, decree, verdict or finding; *(«décision»)*

"judge" means a judge of the court, and includes a supernumerary judge mentioned in subsection 3(5) and a judge of the Court of Queen's Bench sitting pursuant to section 17; *(«juge»)*

"matter" means every proceeding in the court that is not an appeal; *(«affaire»)*

"northern centre" means any of the judicial centres of Battleford, Humboldt, Melfort, Prince Albert or Saskatoon or a place in Saskatchewan that is nearer to any of those judicial centres than to any other judicial centre; *(«centre judiciaire du nord»)*

"registrar" means the Registrar of the Court of Appeal appointed pursuant to section 3 of *The Court Officials Act, 2012*; (« *registraire* »)

"rules of court" means the rules of court made pursuant to section 22. *(«règles de procédure»)*

Saskatchewan Crop Insurance Corporation v McVeigh, 2018 SKCA 76

Saskatchewan Crop Insurance Corporation [SCIC] appealed the decision of a case management judge of the Court of Queen's Bench, wherein the judge dismissed its claim for want of prosecution. In so doing, SCIC also appealed two other decisions, and claimed a right of appeal from them on the basis they were incidental under s. 9(5) of *The Court of Appeal Act, 2000*, SS 2000, c C-42.1. The first of these was contained in a fiat by the case management judge, where the case management judge had stated he thought that two applications by SCIC (contempt and spoilage) ought to be deferred until after the hearing of the want of prosecution application. The second concerned the striking of two affidavits filed by SCIC by another Court of Queen's Bench judge.

The Court concluded that the first decision was not a "decision" within the meaning of s. 2 of *The Court of Appeal Act, 2000*, SS 2000, c C-42.1. In so holding, Schwann J.A. noted that the case management judge did not render a binding order:

> [39] It is obvious from the way in which he couched his May 17, 2016, fiat that Allbright J. was merely reflecting his preliminary thoughts about the timing of SCIC's request to have the contempt application heard in relation to the delay application. In this respect, I am satisfied that Allbright J. merely offered guidance and direction with regard to the timing of the proposed application, which was completely appropriate for him to do so in his role as case management judge. More to the point, for purposes of this appeal Allbright J. *did not rule* on whether the contempt application should be heard before the delay application and he most certainly did not rule on the substantive application. In short, no binding order had been made by Allbright J. on May 17, 2016.

She then considered s. 9(5) of *The Court of Appeal Act, 2000* and found that, because there was no binding order, SCIC did not have a right of appeal from the case management judge's decision:

> [41] With this, I return to s. 9(5) of *The Court of Appeal Act, 2000*, which permits an incidental "decision" to be appealed in concert with the appeal from the matter in issue. The word "decision" is defined by s. 2 of the *Act* to include "any judgment, order, decree, verdict or finding". Having regard to the content of Allbright J.'s "direction", though cast in the format of a fiat, I am not persuaded that it meets the definition of "decision" contemplated by the *Act* and is thus not capable of being appealed to this Court.
>
> [42] In my opinion, the May 17, 2016, fiat was not a "judgment, order, decree, verdict or finding" and, therefore, is not a decision within the meaning of s. 9(5). This means SCIC has no right of appeal from Allbright J.'s fiat of May 17, 2016. This conclusion is a complete answer to this ground of appeal.

The second incidental decision was considered on its merits.

B. Section 7

> **Right of appeal**
>
> **7**(1) In this section and section 9, **"enactment"** means:
>
> (a) an Act;
>
> (b) an Act of the Parliament of Canada; or
>
> (c) a regulation made pursuant to an Act or an Act of the Parliament of Canada;
>
> but does not include this Act.
>
> (2) Subject to subsection (3) and section 8, an appeal lies to the court from a decision:
>
> (a) of the Court of Queen's Bench or a judge of that court; and
>
> (b) of any other court or tribunal where a right of appeal to the court is conferred by an enactment.
>
> (3) If an enactment provides that there is no appeal from a decision mentioned in subsection (2) or confers only a limited right of appeal, that enactment prevails.

1. Right of Appeal

McNabb v Cyr, 2017 SKCA 27

The respondent in this appeal raised a constitutional challenge to the Court's jurisdiction to hear the appeal, framing this challenge under the constitutional doctrine of interjurisdictional immunity.

The Court found that *The First Nations Elections Act*, SC 2014, c 5, did not confer specific rights of appeal from decisions under its s. 33. Therefore, s. 7(2)(a) of *The Court of Appeal Act, 2000*, which confers a general right of appeal to the Court from decisions of the Court of Queen's Bench, applied.

Saskatchewan v Capitol Steel Corporation, 2018 SKCA 3

Capitol Steel Corporation brought an application to quash the appeal of the Government of Saskatchewan. The Chambers judge's decision was made following an application by the Government to the Court of Queen's Bench under s. 18(9) of *The Arbitration Act, 1992*, SS 1993, c A-24.1, seeking review of an arbitrator's decision. The Chambers judge had found he did not have jurisdiction to entertain the application.

The issue was whether the appeal should be quashed on the ground that the Government had no right to appeal in light of s. 18(10) of *The Arbitration Act, 1992*. The Court found that because the Chambers judge was considering his jurisdiction under ss. 18(8) and (9) of the same legislation, he was determining his jurisdiction to hear the application. Because his decision related to jurisdiction, s. 7(2)(a) applied and provided a general right of appeal to this Court that was not displaced by *The Arbitration Act, 1992*. The application to quash was dismissed.

Felker v Easthill, 2018 SKCA 13

Mr. Felker sought leave to appeal against an order where the Chambers judge varied an earlier order that had granted Mr. Felker exclusive possession of the parties' jointly owned ranch. The Chambers judge awarded exclusive possession to Ms. Easthill.

In considering the application for leave, Caldwell J.A. found that Mr. Felker had sought leave to appeal when such leave was not required, and that Ms. Easthill had also believed he needed leave and approached the application on that basis. Instead, s. 55 of *The Family Property Act*, SS 1997, c F-6.3, gave litigants an unlimited right of appeal to the Court "from any order or judgment made or given on or pursuant to an application pursuant to this Act".

2. Interplay with Other Rights of Appeal

Beer v Saskatchewan (Highways and Infrastructure), 2016 SKCA 24, 476 Sask R 74

The Beers appealed a decision of the Court of Queen's Bench concerning a writ of possession pursuant to s. 55 of *The Landlord and Tenant Act*, RSS 1978, c L-6. This appeal was heard by Lane J.A., a judge of the Court of Appeal in Chambers, and was dismissed. The Beers then sought to appeal Lane J.A.'s decision to the Court.

Richards C.J.S. noted that rights of appeal are wholly statutory and that there are no common law or inherent rights of appeal. The only right of appeal here was that contained in s. 55 of *The Landlord and Tenant Act*. Because that section only gave a right of appeal to a judge sitting in Chambers, there was no further appeal to the Court.

This interpretation was supported by s. 7(3) of *The Court of Appeal Act, 2000*, which provides that limited rights of appeal contained in other enactments prevail over the terms of *The Court of Appeal Act, 2000*. Therefore, the right of appeal conferred by s. 55 of *The Landlord and Tenant Act* trumped any right of appeal arguably contained in s. 20(3) of *The Court of Appeal Act, 2000*. Therefore, the appellants did not have a broad right of appeal and only had the limited right of appeal provided by s. 55 of *The Landlord and Tenant Act*.

Kawula v Institute of Chartered Accountants of Saskatchewan, 2017 SKCA 70

This concerned an appeal from a Chambers decision of a judge of the Court of Queen's Bench. The Chambers decision had sustained a disciplinary decision made pursuant to *The Chartered Accountants Act, 1986*, SS 1986, c C-7.1. The 1986 legislation had been replaced by *The Accounting Profession Act*, SS 2014, c A-3.1.

Jackson J.A. found that, because the 2014 legislation placed no restrictions on an appellant's ability to appeal to the Court of Appeal, Ms. Kawula had a right of appeal:

> [28] In circumstances where the governing legislation is silent, the right of appeal to this Court is governed by s. 7(2) of *The Court of Appeal Act, 2000*, SS 2000, c C-42.1, unless limiting words are used: *Attorney General of Canada v Lees*, [1977] 4 WWR 505 (Sask CA); *Borrowman v Wickens* (1986), 82 Sask R 295 (CA); and *Silcorp Ltd. v KJK Holdings Inc.* (1992), 90 DLR (4th) (Sask CA). Since the *2014 Act* places no restrictions on a registrant's ability to appeal to this Court, Ms. Kawula has a right of appeal.

Pederson v Saskatchewan (Minister of Social Services), 2018 SKCA 4

Plaintiffs in a class action proceeding sought leave to appeal an order made by the designated Court of Queen's Bench judge. The designated judge had made rulings relating to three matters: (i) that the class definition should include those who were "in the custody and guardianship of the Minister" of Social Services; (ii) the respondents would not be required to post notice of certification on their respective websites; and (iii) the applicants (or their counsel) and the respondents would split the cost of the notice programs equally. The plaintiffs sought to appeal each of these.

In declining to grant leave, Herauf J.A. considered the interplay between s. 39 of *The Class Actions Act*, SS 2001, c 12.01, and ss. 7 and 8 of *The Court of Appeal Act, 2000*. While he did not decide the issue on this basis, he did state:

> [10] Section 7(3) specifically states that there is no right of appeal where an enactment excludes such a right or provides a limited right of appeal. Section 39 of *The Class Actions Act* governs appeals that do not require leave and those that do. As already noted, neither subsection provides that leave to appeal can be granted for the three issues referenced. To hold otherwise would basically grant an unlimited right of appeal where the enactment that governs prescribes a limited right of appeal.

3. Appeal of Costs Orders

Holmes v Jastek Master Builder 2004 Inc., 2017 SKCA 50, 11 CPC (8th) 293

The appellant brought an application to amend its notice of appeal regarding a summary judgment decision to add an appeal against the order of costs in the matter. The summary judgment decision was issued January 13, 2017, the notice of appeal had been filed February 10, 2017, and the costs decision was issued March 21, 2017. The notice of appeal addressed the summary judgment decision only.

There were two main issues on this application: (i) whether leave to appeal the costs decision was required, and (ii) whether a separate notice of appeal was required for the costs decision. Ottenbreit J.A. considered the effect of s. 38(b) of *The Queen's Bench Act, 1998*, SS 1998, c Q-1.01, on the leave issue and *Riley v Riley*, 2010 SKCA 88, 349 Sask R 128. He reviewed the history of s. 38, including its historic rationale and the principled exception to its application.

He then summarized how appeals of costs alone should proceed as follows:

> [21] For the purpose of clarity, I will summarize how a party wishing to file an appeal confined to costs should proceed where the costs decision is issued after the substantive decision:
>
> > (a) if a party is already appealing or cross-appealing all or part of the substantive decision, no leave is required under s. 38 of *The Queen's Bench Act*;
> >
> > (b) if the party is not appealing or cross-appealing the substantive decision but only appealing the costs decision alone, leave is required under s. 38 of *The Queen's Bench Act*; and
> >
> > (c) in either event, a separate notice of appeal is required to be served and filed for the costs decision.

4. Law of General Application

McNabb v Cyr, 2017 SKCA 27

The respondent in this appeal raised a constitutional challenge to the Court's jurisdiction to hear the appeal, framing this challenge under the constitutional doctrine of interjurisdictional immunity.

The Court found that *The Court of Appeal Act, 2000* was a provincial law of general application that did not impair the core of the federal government's power:

> [16] Nonetheless, we also observe that *CAA* is a provincial law of general application. Laws of that nature apply to Indigenous persons and their lands within the province, except where the laws touch on a protected core of federal power and apply in a way that significantly trammels or impairs the federal power (*Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 131, [2014] 2 SCR 257). Section 91(24) of the *Constitution Act, 1867* gives Parliament the exclusive jurisdiction to legislate in respect of "Indians, and Lands reserved for the Indians." The Supreme Court has held that none of the ordinary commercial activities on reserve, Treaty rights, or Aboriginal rights fall within the core of s. 91(24) powers (*Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 at para 53, [2014] 2 SCR 447; *NIL/TU,O Child and Family Services Society v B.C. Government and Services Employees' Union*, 2010 SCC 45 at para 80, [2010] 2 SCR 696).
>
> [17] In simple terms then, an appeal against a decision of the Court of Queen's Bench rendered pursuant to s. 33 of *FNEA* does not touch on a protected core of federal power and s. 7(2)(a) of *CAA* does not trammel or impair the core of the federal government's power under s. 91(24) of the *Constitution Act, 1867*.

C. Section 8

> **Interlocutory appeals**
>
> **8**(1) Subject to subsection (2), no appeal lies to the court from an interlocutory decision of the Court of Queen's Bench unless leave to appeal is granted by a judge or the court.
>
> (2) Leave to appeal an interlocutory decision is not required in the following cases:
>
> (a) cases involving:
>
> (i) the liberty of an individual;
>
> (ii) the custody of a minor;
>
> (iii) the granting or refusal of an injunction; or
>
> (iv) the appointment of a receiver;
>
> (b) other cases, prescribed in the rules of court, that are in the nature of final decisions.

1. Final v. Interlocutory

a. Definitions

PCL Industrial Management Inc. v Agrium, 2015 SKCA 55, 457 Sask R 298

This concerned an appeal from a decision of a judge of the Court of Queen's Bench in Chambers regarding a contractor's application for the payment of statutory holdback funds under s. 46 of *The Builders' Lien Act*, SS 1984-85, c B-7.1.

One issue was whether leave to appeal was required. Agrium argued that PCL was seeking to overturn an interlocutory decision and that it was interlocutory because it concerned only the question of whether the holdback funds should be released and did not determine any substantive rights in those funds. The Court, before dealing with the substantive appeal, rejected Agrium's argument on this point. Richards C.J.S. stated that "in order for a decision to be interlocutory, it must be somehow interim or non-final in reference to an underlying proceeding" (at para 20). In the context of this appeal, the Chambers decision was a final decision: there was no larger or underlying controversy and the payment issue was the only live issue between the parties. No other action had yet been commenced, and while Agrium submitted that a larger context may emerge, its submission did not go beyond bare conjecture. The reality was that the Chambers judge's ruling was a final decision on the only live issue between the parties.

Saskatchewan Medical Association v Anstead, 2016 SKCA 143

The Saskatchewan Medical Association was appealing a Queen's Bench Chambers decision, where a Chambers judge had dismissed its application under Rule 3-14 of *The Queen's Bench Rules* to strike a class action claim by Dr. Keith Anstead on the basis that the Court of Queen's Bench lacked jurisdiction over the claim. Dr. Anstead applied to strike the appeal, with one ground being that leave to appeal was required. The Court allowed the application to strike on the basis of the doctrine of abuse of process.

However, Ottenbreit J.A., writing for the Court, also addressed an alternative basis on which the appeal had to be struck because it had a bearing on the process and procedure of the Court. This alternative basis was that leave to appeal was required. He defined final and interlocutory as follows:

> [56] It has long been the law in this jurisdiction that orders which do not finally dispose of the "substantive issue" in an action are not final but interlocutory: *Beaver Lumber Co. Ltd. v Cain*, [1924] 3 WWR 332 (Sask CA), per Martin J.A. (as he then was) at 334. Conversely, an order is final when, if allowed to stand, it finally disposes of the rights of the parties: *Alexander Hamilton Institutes v Chambers* (1921), 65 DLR 226 (Sask CA), per Turgeon J.A. (as he then was) at 228. In *Silcorp Ltd. v KJK Holdings Inc*. (1992), 90 DLR (4th) 488 (Sask CA), this Court approved the view that orders may be final for one purpose but interlocutory for another (per Cameron J.A. at 489).

b. Previous Classifications of Final v. Interlocutory Orders

PCL Industrial Management Inc. v Agrium, 2015 SKCA 55, 457 Sask R 298

This concerned an appeal from a decision of a judge of the Court of Queen's Bench in Chambers regarding a contractor's application for the payment of statutory holdback funds under s. 46 of *The Builders' Lien Act*, SS 1984-85, c B-7.1.

The appeal of this decision did not require leave pursuant to s. 8. In the circumstances of this case, there was no larger controversy and the payment issue was the only live issue between the parties.

Bourelle v Saskatchewan Government Insurance, 2016 SKCA 81

Saskatchewan Government Insurance sought to quash the appeal on the basis that Ms. Bourelle had failed to obtain leave to appeal. Ms. Bourelle had appealed SGI's decision to terminate her benefits under *The Automobile Accident Insurance Act*, RSS 1978, c C-35, to the Court of Queen's Bench pursuant to s. 197 of *The Automobile Accident Insurance Act*. A Queen's Bench Chambers judge made an order requiring Ms. Bourelle to attend on a physician in Winnipeg for the purpose of undergoing an independent medical examination. It was this order that Ms. Bourelle appealed. The Court granted the application to quash on the basis that leave was required.

Ms. Bourelle had conceded that the decision was interlocutory, but contended that leave to appeal was not required for two reasons. First, Ms. Bourelle had argued that the Chambers judge's fiat was a "decision" within the meaning of s. 199 of *The Automobile Accident Insurance Act* such that she had a right of appeal without leave. Richards C.J.S. rejected this argument:

> [9] Ms. Bourelle submits that the fiat of the Chambers judge was a "decision" within the meaning of this provision and, as a result, contends that she has a right of appeal to this Court without obtaining leave. I am unable to accept this argument. The word "decision" in s. 199 is clearly a reference to a decision on the substantive merits of an appeal taken pursuant to s. 197 of the *AIAA*. It cannot reasonably be contemplated that the Legislature intended to create a right of appeal to the Court of Appeal in relation to any and every interlocutory decision made by the Court of Queen's Bench in the course of getting to the bottom line of a s.197 appeal. Any such interpretation would run completely counter to the overall theme of the legislative scheme regulating appeals to the Court of Appeal. That theme is expressed most clearly in s. 8 of the *Act* and is generally *restrictive* of rights of appeal in relation to interlocutory matters.

Second, Ms. Bourelle argued that the order of the Chambers judge concerned an injunction and thus fell within the scope of s. 8(2)(a)(iii). She submitted that the order to command her to attend on a physician was an injunction. Richards C.J.S. also rejected this argument. While he noted that an injunction "can be broadly defined as 'a court order commanding or preventing an action'" (at para 10) and that the order in question here could appear to be an injunction within this definition, he found that approaching s. 8 on this basis "would deny the realities of how this case has unfolded" (at para 11). The notice of application had been based on s. 36 of *The Queen's Bench Act, 1998*, SS 1998, c Q-1.01, and Rule 5-49 of *The Queen's Bench Rules*; neither of these provisions referred to injunctions and the application was never analyzed through an injunction-type lens. Ultimately, in these circumstances, he found the order was not an injunction and that leave to appeal was required:

> [13] The reality is that most, and perhaps all, judicial decisions rendered in the course of trial-type proceedings could be characterized as falling under the broad rubric of orders "commanding or preventing an action." For example, an order excluding witnesses commands them to remain outside the courtroom. An order denying counsel a line of questioning prevents him or her from asking questions. And so on and so on. As a result, the broad approach advocated by Ms. Bourelle would frustrate s. 8 of the *Act* which, as noted, is self-evidently aimed at *preventing* appeals of interlocutory decisions unless leave is granted.

> [14] It is not necessary here to lay down an exhaustive definition of "injunction" for the purpose of s. 8(2)(a)(iii). However, that term should rather obviously be taken as referring to orders secured pursuant to provisions such as those found in *The Queen's Bench Act, 1998* and *The Queen's Bench Rules* that refer expressly to "injunctions." In any event, "injunction" in the context at hand definitely does not comprehend any and every order involving some element of compulsion or prohibition.

Saskatoon (City) v Walmart Canada Corp., 2016 SKCA 123

The City of Saskatoon sought leave to appeal an order of a judge of the Court of Queen's Bench sitting in judicial review of a decision of the Board of Revision of the City of Saskatoon. The City argued that because the judicial review application had sought orders regarding pre-hearing disclosure, the orders that followed were interlocutory to the ultimate action being heard by the Board of Revision.

Whitmore J.A. rejected this argument. Citing *Abouabdallah v College of Dental Surgeons (Saskatchewan)*, 2010 SKCA 129, 362 Sask R 156, and *Reid v Vancouver Police Board*, 2003 BCCA 651, 21 BCLR (4th) 302, leave to appeal to SCC refused, 2006 CanLII 8851, he found that applications for judicial review are final and not interlocutory in nature: "[i]t does not matter how the court's decision affects the hearing and decision of the administrative body, as s. 8 of *The Court of Appeal Act, 2000*, is confined to decisions of the Court of Queen's Bench" (at para 23). Therefore, given that the Court of Queen's Bench had no further jurisdiction to address the disclosure issue or to decide the assessment appeal, leave to appeal was not required. The order in question was a final order.

Saskatchewan Medical Association v Anstead, 2016 SKCA 143

The Saskatchewan Medical Association was appealing a Queen's Bench Chambers decision, where a Chambers judge had dismissed its application under Rule 3-14 of *The Queen's Bench Rules* to strike a class action claim by Dr. Keith Anstead on the basis that the Court lacked jurisdiction over the claim. Dr. Anstead applied to strike the appeal, with one ground being that leave to appeal was required. Ottenbreit J.A., writing for the Court, allowed the application to strike on the basis of the doctrine of abuse of process.

However, he also addressed an alternative basis on which the appeal had to be struck on the basis that it had a bearing on the process and procedures of the Court, namely, that leave to appeal was required. He reviewed jurisprudence dealing with a similar rule and found that the Rule 3-14 decision in this case required leave to appeal as it was not final in the circumstances:

> [57] This Court has treated decisions which decline to strike out an action as interlocutory and requiring leave (*Lockwood v Rollheiser*, 2006 SKCA 57, 279 Sask R 113 (as beyond the jurisdiction of Queen's Bench); *Bartok v Shokeir* (1998), 168 Sask R 280 (CA) (as pleading a novel cause of action); *Saskatchewan Party v Progressive Conservative Party of Saskatchewan*, 2008 SKCA 155 (as disclosing no reasonable cause of action)). This Court has also approached appeals under former Rule 99 of *The Queen's Bench Rules*, the predecessor to Rule 3-14, as requiring leave (*Moldowan v Saskatchewan Government Employees Union* (1995), 126 DLR (4th) 289 (Sask CA); *Pfeil v Simcoe & Erie General*

> *Insurance Co. and McQueen Agencies Ltd.* (1986), 24 DLR (4th) 752 (Sask CA)). Recently, this Court approached an appeal involving the adjournment of a Rule 3-14 application regarding territorial jurisdiction as requiring leave (*Hyatt Hotels of Canada Inc. v Knuth*, CACV2925, October 6, 2016). Likewise, this Court has viewed decisions declining to dismiss an action as misconceived as interlocutory (*Mueller v Dagenais*, 2007 SKCA 31, 293 Sask R 39; *Insurance Company of the State of Pennsylvania v Cameco Corporation*, 2009 SKCA 15, 324 Sask R 46; *Tournier v Ratt*, 2011 SKCA 103, 385 Sask R 41).
>
> [58] In contrast, decisions striking out a cause of action as barred by a limitation period have been viewed as final (*B.(D.) v C.(M.)*, 2001 SKCA 129, 213 Sask R 272) as have been decisions striking out a misconceived claim (*Stadnyk v Saskatchewan (Government)*, 2011 SKCA 30).
>
> [59] On the basis of this jurisprudence, the Rule 3-14 decision in this case does not finally dispose of the substantive issue of the certification and requires leave to appeal. It would have been final if it resulted in the class action being struck. Accordingly, the appeal of SMA is struck on this basis as well.

KKS Holdings Ltd. v Foam Lake Savings and Credit Union Limited, 2017 SKCA 105

KKS Holdings Ltd. appealed the decision of a Court of Queen's Bench Chambers judge declining to add a party to its action. Foam Lake Savings and Credit Union Limited and Mr. Klebeck (the party sought to be added) argued that the decision was interlocutory and required leave.

The Court found that the decision of the Chambers judge was an interlocutory order and leave was required. In so doing, Whitmore J.A. relied on: *Civil Appeals in Saskatchewan: The Court of Appeal Act and Rules Annotated* (Regina: Law Society of Saskatchewan Library, 2015); *Lombard General Insurance Company of Canada v Stomp Pork Farm Ltd.*, 2008 SKCA 146, [2009] 4 WWR 505; *Birrell v Providence Health Care Society*, 2007 BCCA 573 at paras 13 and 16, 248 BCAC 21. He also distinguished *West Central Pelleting Ltd. v Agracity Ltd.*, 2010 SKCA 145, [2011] 3 WWR 683, as follows:

> [7] The appellants argue that the fact they may proceed against Mr. Klebeck in a separate action does not make the order interlocutory and, for this, they rely on the decision in *West Central Pelleting Ltd. v Agracity Ltd.*, 2010 SKCA 145, [2011] 3 WWR 683 [*Agracity*]. *Agracity* does address how a plaintiff's ability to proceed with another action affects the determination of whether an order is final or interlocutory under Rule 3-72 of *The Queen's Bench Rules*, but holds the availability of other proceedings does not change the character of the order. *Agracity* does not concern the nature of an order adding or declining to add a party to an action and is not of assistance in determining the issue before us.

Fiesta Barbeques Limited v Andros Enterprises Ltd., 2018 SKCA 32

Fiesta Barbeques Limited and Wolfedale Engineering Limited sought an extension of time and leave to appeal an August decision declining to add Vomar Industries Limited as a defendant, and leave to appeal a February decision declining to add Vomar Industries Limited as a third party.

Whitmore J.A., relying on *KKS Holdings Ltd. v Foam Lake Savings and Credit Union Limited*, 2017 SKCA 105, and *Sapsford v Fry*, 2010 SKCA 124, 359 Sask R 309, found leave was properly sought from these interlocutory decisions.

Rodgers v Thompson, 2018 SKCA 33

Ms. Rodgers applied for leave to appeal a decision from a Court of Queen's Bench judge sitting in Chambers. The Chambers judge had dismissed her application to add a third party pursuant to *The Contributory Negligence Act*, RSS 1978, c C-31, and her application to amend her statement of defence pursuant to Rule 3-72(1)(c)(ii) and Rule 3-72(3) of *The Queen's Bench Rules*.

Whitmore J.A. noted that leave was required for appeals on applications to add third parties, citing *Sapsford v Fry*, 2010 SKCA 124, 359 Sask R 309.

Peter Ballantyne Cree Nation v Saskatchewan, 2018 SKCA 90

Chief Ronald Michel and the other prospective appellants sought leave to appeal from a decision of a judge of the Court of Queen's Bench, sitting in Chambers, allowing the Government of Saskatchewan and Saskatchewan Power Corporation to amend their statements of defence. Caldwell J.A., in refusing leave to appeal, noted that the Court of Queen's Bench decision addressed interlocutory matters and that leave to appeal had been properly sought (at para 2).

Cowessess First Nation v Phillips Legal Professional Corporation, 2018 SKCA 101

Phillips Legal Professional Corporation, Mervin Phillips and Nathan Phillips [Law Firm] appealed the decision of a Court of Queen's Bench judge where the Chambers judge had referred a number of accounts to the local registrar for taxation pursuant to s. 67(1)(a)(iii) of *The Legal Profession Act, 1990*, SS 1990-91, c L-10.1. The Chambers judge had also ordered the Law Firm to pay solicitor-client costs in the amount of $20,000. Cowessess First Nation then brought an application for an order quashing the notice of appeal pursuant to Rule 46.1(1)(a) of *The Court of Appeal Rules*. Cowessess argued that leave to appeal was required because the decision was interlocutory or, alternatively, that it should be quashed under Rule 46.1(1)(b) and (d) for being vexatious and an abuse of the Court's process.

The Court concluded that the Chambers decision was final and that leave to appeal was not required. In reaching this conclusion, Jackson J.A. first noted the decisions in *Saskatchewan Medical Association v Anstead*, 2016 SKCA 143 and *Agri Resource Mgt. 2001 Ltd. v Saskatchewan Crop Insurance Corporation*, 2017 SKCA 35, [2017] 8 WWR 215, leave to appeal to SCC refused, 2018 CanLII 508. She described them as follows:

> [8] *Agri Resource* considered when an *application* is interlocutory for the purpose of determining whether evidence may be admitted on information and belief, and *Anstead* canvassed the Court's recent jurisprudence on when an *order* is final or interlocutory for appeal purposes. On that latter point, Ottenbreit J.A., for the Court in *Anstead*, wrote as follows:

> [56] It has long been the law in this jurisdiction that orders which do not finally dispose of the "substantive issue" in an action are not final but interlocutory: *Beaver Lumber Co. Ltd. v Cain*, [1924] 3 WWR 332 (Sask CA), per Martin J.A. (as he then was) at 334. Conversely, an order is final when, if allowed to stand, it finally disposes of the rights of the parties: *Alexander Hamilton Institutes v Chambers* (1921), 65 DLR 226 (Sask CA), per Turgeon J.A. (as he then was) at 228.
>
> [9] For a general overview of this area of the law see the following: The Honourable Stuart J. Cameron, *Civil Appeals in Saskatchewan: The Court of Appeal Act and Rules Annotated* (Regina: Law Society of Saskatchewan Library, 2015) at 42 to 50 [*CA Annotated*]; William Stevenson and Jean Coté, *Civil Procedure Encyclopedia*, vol 4 (Edmonton: Juriliber, 2003) at 76-123 to 76- 146 [*Civil Procedures*]; John Sopinka, Mark A. Gelowitz and W. David Rankin, *Sopinka and Gelowitz on the Conduct of an Appeal*, 4th ed (Toronto: LexisNexis Canada, 2018) at 18–37 [*Conduct of an Appeal*]. It is sufficient to state that determining whether a particular order is final or interlocutory can be difficult when there has been no prior decision of an appeal court resolving the status of that particular type of order.

Jackson J.A. then turned to the specifics of the case before her and noted it was "common ground that an order *refusing* to refer a lawyer's bill for assessment under s. 67(1)(a)(iii) is a final order", citing authorities from Saskatchewan and Ontario (at para 10). However, the request had been granted in this case and it was necessary to decide, as a matter of first instance whether the order was final or interlocutory.

After reviewing the arguments of the parties, including Cowessess' argument that the test for whether an order is final should be expressed differently, she asked simply: "Does the *Chambers Decision* finally dispose of the rights of the parties" (at para 18). Jackson J.A. answered this question affirmatively:

> [19] Applying this test, I have concluded that the order *does* dispose of the Law Firm's *right to contest the jurisdiction of the local registrar* to assess the bill of fees for accounts rendered after the expiry of the 30-day period mentioned in s. 67(1)(a)(i).

This was because the statutory framework provided only a limited right of appeal from the local registrar's decision; there was no right of appeal from this underlying decision of the Chambers judge. The Chambers decision was not incidental and if it were considered interlocutory, it would be effectively unappealable. The "very nature of an "interlocutory" order [is] that it is subsumed by the resolution of the main dispute between the parties", and this could not be said of this matter: the s. 67(1)(a)(iii) issue was the whole of the dispute before the Chambers judge (at para 25).

Jackson J.A. also rejected Cowessess' argument that it was interlocutory because it was "a step in the process":

> [27] In direct response to Cowessess's arguments, it is not enough to classify an order as interlocutory simply by saying that it is "a step in the process". Not all final orders bring the dispute to an end. A review of the decisions mentioned in *CA Annotated* (at 48) and *Civil Procedures* (at 76-139 to 76-146) make that plain: see, for example, *Saskatoon (Health Board) v Popowich* (1999), 177 Sask R 226 (CA), where, in finding an order requiring disclosure of documents to be final, Vancise J.A. wrote, "In my opinion, the order the appellant is appealing is, as between the appellant and the respondent, a final order. It is not

> interlocutory. It is determinative of the issue, that is disclosure, as between these parties one of whom is not a party to the action. The matter is therefore properly before this court" (at para 3).
>
> [28] Similarly, in *Mitchell v Mitchell* (1996), 144 Sask R 223 (CA), Bayda C.J.S. (in Chambers) confirmed this Court's jurisprudence that an order removing a firm of solicitors from a particular litigation file is a final order. While these two decisions involve what could be considered "non-parties", *Civil Procedures* speaks to this: "the fact that there are outstanding issues for other proceedings does not make a final order interlocutory" (at 76-124 to 76-125), and "the mere involvement of the non-party does not make an otherwise interlocutory order, final" (at 76-126).

Jackson J.A. also dismissed Cowessess' application to quash on the basis that the notice of appeal was an abuse of process. The application to quash the notice of appeal was dismissed with costs in the usual way.

Ayers v Miller, 2019 SKCA 2

The prospective appellants sought leave to appeal a decision of a judge of the Court of Queen's Bench, sitting in Chambers, wherein the judge dismissed an application requesting that he recuse himself. A complaint was made to the Canadian Judicial Council regarding the Chambers judge regarding a schedule set for upcoming applications.

A preliminary issue arose as to whether the Chambers decision was appealable, namely, whether a bare refusal to recuse, as opposed to the appeal of an interlocutory or final decision based on bias or an apprehension of bias, is justiciable. Jackson J.A. first reviewed the Canadian approach to this issue:

> [9] Reservations about the justiciability of a bare recusal order are given concrete expression by Geoffrey S. Lester in "Disqualifying Judges for Bias and Reasonable Apprehension of Bias: Some Problems of Practice and Procedure" (2001) 24 Adv Q 326. The author makes the following point: "The decision to continue or to stand down is in no real sense a 'judgment'. ... [T]here is no exercise of judicial power or adjudication because there is no authoritative and binding decision in a suit between subject and subject or between the sovereign and subject" (at 343).
>
> [10] Several courts have commented upon the persuasiveness of Mr. Lester's observations regarding the justiciability of recusal decisions, but none have held that they are not appealable: see *D.M.M. v T.B.M.*, 2011 YKCA 8 at paras 2 and 31–42, 311 BCAC 146; or *MacPhail v MacKinnon*, 2001 PESCAD 20, 203 Nfld & PEIR 355. Most Canadian courts do not address the appealability issue and either assume or find recusal decisions to be interlocutory, without any detailed analysis: see, for example, *Middelkamp v Fraser Valley Real Estate Board* (1993), 83 BCLR (2d) 257 (CanLII) (CA) [*Middelkamp*]; *R v Curragh Inc.* (1995), 140 NSR (2d) 177 (CA) at para 13; *Samson Indian Band v Canada* (1998), 151 FTR 158 (CA); *Mitsui & Co. (Point Aconi) Ltd. v Jones Power Co. Limited*, 2001 NSCA 112 at para 1, 202 DLR (4th) 499; *Mary and David Goodine Dairy Farm v New Brunswick (Milk Marketing Board)*, 2002 NBCA 38 at para 10, 217 DLR (4th) 708; *Francis v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1141 at para 23, 45 Admin LR (5th) 191; *Cabana v Newfoundland and Labrador*, 2014 NLCA 1, 345 Nfld & PEIR 350 [*Cabana #1*]; *Cabana v Newfoundland and Labrador*, 2014 NLCA 34, 356 Nfld & PEIR 103 [*Cabana*

> *#2*]; *Carbone v McMahon*, 2017 ABCA 384, 64 Alta LR (6th) 246 [*Carbone*]; and *Morse Shannon LLP v Fancy Barristers P.C.*, 2017 ONSC 2135 at para 5.
>
> [11] All of the above decisions concern bare refusals to recuse. (*Cabana #1* is unique in that the Chambers judge granted leave to appeal the recusal decision, but not the underlying substantive decision.) In some of the other decisions, reservations are expressed about the nature of the decision under appeal. For example, in *Middelkamp*, Southin J.A. refers to the recusal decision as a "ruling, if that is the right word for it" (emphasis added, at para 2). Nonetheless, the Court, sitting in a panel of three, granted leave to appeal what they called an interlocutory decision and dismissed the appeal.

She then reviewed the Australian approach, where such orders are considered not justiciable (at paras 12-13). However, in light of the Canadian authority, she determined that the application should be treated as an interlocutory order:

> [14] There is much to commend the *Barton* approach to the justiciability of a bare recusal decision. When a judge decides to continue to sit, there is no "order" as such. Whether the judge writes on the flyleaf of the file, "I refuse to recuse myself", or gives detailed reasons, the result is the same. One can *say* there is a "decision" within the meaning of s. 2 of *The Court of Appeal Act*, but it is incapable of being enforced. If the judge renders a later decision that a party does not accept, the allegation of bias or apprehension of bias is preserved and can form a ground of appeal with respect to the later decision: see *Barakat* at para 13, *Stone* at para 42 and *Cabana #2* at paras 11 to 17). It is at that point that an appeal court can consider the impartiality of the judge.
>
> [15] Unmoored from a decision that is itself challenged on the basis of bias or apprehension of bias, it is difficult to see a role for the Court of Appeal that does not interfere with the independence of the judge whose recusal decision is under appeal. As counsel for the respondents submitted, decisions like *Arsenault–Cameron v Prince Edward Island*, [1999] 3 SCR 851, and *R v Anderson*, 2017 BCCA 154, make it clear that it is for the individual judge to decide whether he or she can judge the parties' dispute impartially. Thus, even in *Carbone*, where the Alberta Court of Appeal heard an appeal from a bare refusal to recuse, the Court did not perceive itself able to order the judge not to sit, but rather respectfully requested that the Chief Justice immediately assign another judge to case manage the matter (at para 12).
>
> [16] However, in light of what I perceive to be the weight of Canadian authority, including this Court's earlier Chambers decision, I have concluded that I should resolve the application before me on the basis the parties originally presented it, which is to treat the *Recusal Fiat* as an interlocutory order and apply the test from *Rothmans, Benson & Hedges Inc. v Saskatchewan*, 2002 SKCA 119 at para 6, 227 Sask R 121 [*Rothmans*]. While the matter is not without doubt, I perceive the Canadian approach is to treat an appeal from a bare recusal as interlocutory, with the nature of the decision being one factor to consider in determining whether leave should be granted.

2. Interlocutory Appeals

a. Application of Rothmans

Wieler and Saskatoon Convalescent Home, Re, 2015 SKCA 8

Ms. Wieler sought leave to appeal from a decision of the Saskatchewan Labour Relations Board dismissing her appeal from the decision of an Occupational Health and Safety Special Adjudicator, that had, in turn, dismissed her appeal from the decision of an Occupational Health and Safety Officer. She sought leave pursuant to s. 4-9(1) of *The Saskatchewan Employment Act*, SS 2013, c S-15.1.

Caldwell J.A. found that the exercise of his discretion to grant leave under s. 4-9(1) was bound by the criteria in *Rothmans, Benson & Hedges Inc. v Saskatchewan*, 2002 SKCA 119, 227 Sask R 121. For merit, he found the proposed appeal was not pre-destined to fail in that it raised a question of law, though the standard of review suggested by the adjudicative framework would weigh against granting leave. The appeal was not apt to delay the proceedings, and a further appeal gave rise to concerns about undue costs due to two unsuccessful appeals in relation to the same issues. Despite this, there was sufficient merit.

Next, while *The Saskatchewan Employment Act* was quite new, it was also an omnibus aggregation of previously existing labour and employment legislation that had received considerable judicial comment in the past. However, the proper interpretation of the occupational health and safety provisions was a matter of general importance. While the proposed appeal did not concern a controversial issue of practice, SLRB's purview over the occupational health and safety regime and an appeal directly to the Court of Appeal were new to the practice. Leave to appeal was granted.

Bulmer v Nissan Motor Co., 2015 SKCA 16

Mr. Bulmer applied for leave to appeal the order by a Court of Queen's Bench Chambers judge dismissing his application for an order appointing a designated judge to hear a class action certification application.

Klebuc J.A. granted leave to appeal, applying *Rothmans, Benson & Hedges Inc. v Saskatchewan*, 2002 SKCA 119, 227 Sask R 121. He found two proposed grounds of appeal had sufficient merit, because it was arguable whether *The Queen's Bench Rules* should be interpreted as incorporating all of the service rules set out in the Hague Service Convention, and importance, because they concerned new or uncertain points of law in Saskatchewan that transcended the particulars in their implications. A third ground concerning whether the Chief Justice of the Court of Queen's Bench had the authority to deny an application for the appointment of a designated judge where there is no proof of proper service upon all defendants was also granted leave – other cases had established the Chief Justice should not consider such an application where there is no proof of proper service, and a decision on this issue would have an impact on the procedure followed in future applications.

Boart Longyear Inc. v Mudjatik Enterprises Inc., 2015 SKCA 15, 451 Sask R 288

Boart Longyear Inc. sought to appeal against a decision of a Court of Queen's Bench Chambers judge, where the Chambers judge dismissed its application for leave to amend its statement of claim to allow it to plead a cause of action based on s. 15 of *The Environmental Management and*

Protection Act, 2002, SS 2002, c E-10.21. The Chambers judge had found that s. 15 did not create a cause of action that was available to Boart. Boart sought leave to appeal on the ground that s. 15 created a cause of action directly applicable to its action for damages.

Klebuc J.A. granted the requested leave. He found that the proposed appeal met the requirements articulated in *Rothmans, Benson & Hedges Inc. v Saskatchewan*, 2002 SKCA 119, 227 Sask R 121, as the interpretation of s. 15 was of sufficient importance to the proceedings, to the state of the law, and to the administration of justice generally so as to warrant consideration by the Court. It involved an uncertain point of law, which had not been fully addressed by the Court, and might also involve a review of the Court's previous decision in *Hoffman v Monsanto Canada Inc.*, 2007 SKCA 47, 283 DLR (4th) 190.

Western Canada Lottery Corporation v Harvey, 2015 SKCA 75, 465 Sask R 1

Western Canada Lottery Corporation sought leave to appeal a decision of a Court of Queen's Bench Chambers judge whereby the representative plaintiffs in a class action proceeding were permitted to file a third amended statement of claim.

Ottenbreit J.A. dismissed the application for leave, relying on *Rothmans, Benson & Hedges Inc. v Saskatchewan*, 2002 SKCA 119, 227 Sask R 121. In so doing, he noted that the merit consideration is informed by the standard of review to be employed on the prospective appeal, and that the decision to allow a plaintiff to amend a statement of claim is a discretionary decision. While the WCLC challenged the Chambers judge's analysis on three issues, namely, the limitation, joinder or cause of action issues, WCLC's argument on each was destined to fail. This was because the Chambers judge made no final decisions on these issues and instead left them for the certification stage. Therefore, the proposed appeal did not have sufficient merit and there was not sufficient importance.

Transwest Air v BNK Heli-Lease Inc., 2015 SKCA 76, 465 Sask R 31

BNK Heli-Lease Inc. sued Transwest Air for damages over a helicopter lease. BNK sought to strike paragraphs from Transwest's statement of defence on the basis that those paragraphs did not provide full particulars. The Court of Queen's Bench Chambers judge found that it was not obvious the paragraphs offended the applicable Rule, but ordered Transwest to provide full particulars to BNK. Transwest sought to appeal the ruling on this point, arguing the Chambers judge's decision was contradictory and inconsistent.

Richards C.J.S. applied the test from *Rothmans, Benson & Hedges Inc. v Saskatchewan*, 2002 SKCA 119, 227 Sask R 121. In so doing, he found that Transwest had demonstrated there was sufficient merit, as there was a legitimate question about whether the Chambers judge could or should have taken the approach she did. However, the proposed appeal failed on the "importance" consideration as the outcome would not make any practical difference to the trial proceedings, other than causing delay and expense. This was because these particulars would come out in the discovery process anyway. He then stated that in the future, if the approach taken by the Chambers judge became generalized or repeated, it might become a question of sufficient importance, but that "for the

moment, it is a "one off" ruling which is of no bottom-line consequence to the trial proceedings" (at para 9). The application for leave to appeal was dismissed.

Safioles v Saskatchewan, 2015 SKCA 122

The representative plaintiffs sought leave to appeal a decision of a judge of the Court of Queen's Bench refusing the certification of a class action against the Government of Saskatchewan. The application for leave to appeal was brought pursuant to s. 39(3) of *The Class Actions Act*, SS 2001, c C-12.01. Jackson J.A., in Chambers, applied *Rothmans, Benson & Hedges Inc. v Saskatchewan*, 2002 SKCA 119, 227 Sask R 121, noting that it has been "invariably" applied to applications under s. 39(3) (at para 2).

Counsel for the representative plaintiffs raised a preliminary issue as to the proper approach to take under s. 39(3) regarding whether it was necessary to consider each ground of appeal in detail to determine individual merit as part of the judgment writing process. Jackson J.A. stated that "[f]rom the early history of *The Class Actions Act*, it is quite clear the Court favoured an approach that addressed the request for leave in a global way; that is to say, whether leave should be granted in relation to the decision as opposed the individual grounds of appeal" (at para 6). She then stated:

> [11] Counsel for the proposed appellants argue that it is not necessary to review each ground of appeal — in written reasons — if leave were to be granted. He submits that such an approach would add delay to the process and overly restrict the Court hearing the matter. In my view, he has correctly stated the overall approach the Court has taken to leave applications under *The Class Actions Act*.
>
> [12] There can be no template for the writing of reasons; but when leave is granted, it is not necessary for the Chambers judge to pass on each ground of appeal. The proposed appellants apply for leave to appeal from the *decision* under appeal (see *Sorotski* at para 17). The grounds of appeal contained in the draft notice of appeal serve to focus the attention of the parties, whose arguments must address the merits of the various grounds of appeal, but it is not necessary in every case for the Chambers judge to subject each ground of appeal to extensive scrutiny in the written reasons. Indeed, to subject each ground of appeal to extensive analysis in the decision granting leave runs the risk of increasing the cost and the attendant delay and may give the appearance of tying the hands of the panel hearing the appeal. Exceptions to this approach exist, notably in *Ross* and *Pederson*; but, as a general rule, the Court's approach has been relatively consistent since *Frey* regarding the level of analysis of the merits of the proposed appeal (see, e.g., *DJO Canada*). Only when the Chambers judge denies leave is it common to provide more expansive reasons explaining why the applicant for appeal has not met the *Rothmans* test for leave (see, e.g., *Brooks*).
>
> [13] Nor, again as a general rule, is the appellant required to return to the Chambers judge to argue that leave to appeal should be further granted if additional grounds of appeal are added or the initial grounds of appeal are restated. Once leave is granted, the appellant proceeds with the filing of the draft notice of appeal and the service and filing of the factum.

She then considered whether the merit requirement had been met. She found that the appeal was not prima facie destined to fail, there would be no significant delay in allowing leave to appeal, and it would not unduly or disproportionately add to the cost of the proceedings.

She then turned to a consideration of whether there was sufficient importance. While the appeal did not raise anything substantially new or unsettled in the law, the representative plaintiffs alleged serious misconduct and abuse on the part of a government institution which persuaded Jackson J.A. to grant leave. She also found that the parallel between the decision under appeal and those for which leave had already been granted supported granting leave, citing *Ross v Saskatchewan*, 2014 SKCA 96, 446 Sask R 6, and *Pederson v Saskatchewan (Minister of Social Services)*, 2015 SKCA 87. Leave to appeal was granted.

Boardwalk General Partnership v Olson, 2016 SKCA 38

Mr. Olson had sought an order under s. 70 of *The Residential Tenancies Act, 2006*, SS 2006, c R-22.0001, requiring his landlord, Boardwalk General Partnership, to pay him the amount he had paid it for rent. His claim had been based on the fact Boardwalk had not provided him with a copy of the written tenancy agreement. The Hearing Officer who heard the application dismissed his claim, but on appeal to the Court of Queen's Bench, the Chambers judge found the Hearing Officer had erred in law. Boardwalk then sought appeal to the Court pursuant to s. 72(2) of *The Residential Tenancies Act, 2006*.

Ryan-Froslie J.A., in Chambers, applied the test from *Rothmans, Benson & Hedges Inc. v Saskatchewan*, 2002 SKCA 119, 227 Sask R 121, and granted leave. The sole issue raised was an arguable issue that merited consideration of the Court, and there were no Court of Appeal decisions addressing the interpretation of the section at issue. Further, the interpretation of that section was of general importance to landlords and tenants, and would add to the body of law in that area.

Bennett Jones LLP v Frank and Ellen Remai Foundation Inc., 2016 SKCA 136

Bennett Jones LLP, the defendants, sought leave to appeal a decision of the Court of Queen's Bench refusing to stay an action commenced in Saskatchewan on substantially the same grounds as an action commenced in Alberta. The Chambers judge had recognized that the continuance of the two actions would constitute an abuse of process, but found an appropriately worded order would address the matter. He then found that Saskatchewan had territorial competence and that Saskatchewan was the most appropriate forum for the litigation. The Chambers judge stayed the Saskatchewan action pending appeal.

Jackson J.A., in Chambers, refused to grant leave. In applying the test set out in *Rothmans, Benson & Hedges Inc. v Saskatchewan*, 2002 SKCA 119, 227 Sask R 121, she emphasized the sufficiency aspect of the test:

> [13] *Rothmans* prescribes two broad criteria — merit and importance — that must be considered in deciding whether leave to appeal should be granted. In applying the test, however, it must be emphasized that the test is one of *sufficient* merit and *sufficient* importance. A simple assertion that a claim is "not *prima faci*e frivolous or vexatious" or is "not *prima facie* destined to fail in any event" does not meet this test. As *Rothmans* makes clear, the various factors "must be shown by the applicant to weigh decisively in favour of leave being granted" (emphasis added, at para 6).
>
> (Emphasis in original)

She then turned to the proposed grounds of appeal. She found that the issue regarding abuse of process was whether the Chambers judge erred in his analysis, but rejected this because counsel overstated how the test applied. While she noted that the law and practice in the area would have to be clarified at some point, she concluded that leave should not be granted in this case. For the issues regarding the choice of forum, she concluded leave should not be granted because the decision had to be reviewed as a discretionary one. All of the issues had been appropriately placed before the Court of Queen's Bench such that the Chambers judge was fully cognisant of the governing law and made a decision in relation to it. The jurisdictional issues raised did not argue that the Chambers judge misstated the law and the parties had been essentially in agreement as to the applicable law. Instead, Bennett Jones LLP was challenging the application of the law to the facts, rather than any errors of law. Lastly, the issue respecting *forum non conveniens* was a discretionary decision that would be reviewable on that standard, and Bennett Jones LLP had not indicated how the Chambers judge erred within that framework.

Ultimately, she concluded that the case for leave was not so compelling that the parties should incur the delay of an appeal before the matter was decided on its merits.

Rodgers v Thompson, 2018 SKCA 33

Ms. Rodgers applied for leave to appeal a decision from a Court of Queen's Bench judge sitting in Chambers. The Chambers judge had dismissed her application to add a third party pursuant to *The Contributory Negligence Act*, RSS 1978, c C-31, and her application to amend her statement of defence pursuant to Rule 3-72(1)(c)(ii) and Rule 3-72(3) of *The Queen's Bench Rules*. Whitmore J.A. considered whether leave should be granted pursuant to the test set out in *Rothmans, Benson & Hedges Inc. v Saskatchewan*, 2002 SKCA 119, 227 Sask R 121, and cited *Sapsford v Fry*, 2010 SKCA 124, 359 Sask R 309, for the deferential standard of review. He granted leave to appeal on the grounds set out by Ms. Rodgers.

Two of Ms. Rodgers' proposed grounds of appeal related to the application of *The Contributory Negligence Act*. Given that leave to appeal had been given recently on similar grounds in *Sound Stage Entertainment Inc. v Burns* (CACV3056), leave to appeal on those grounds was granted.

Her other grounds concerned the Chambers judge's consideration of collateral attack and abuse of process. It was conceded that the Chambers judge had ruled on these matters despite them not being before him, and this was clear from the Chambers decision itself. On this basis, leave to appeal was granted on these grounds.

b. Modification of the Rothmans Test

Saskatoon (City) v North Ridge Development Corp., 2015 SKCA 13, 451 Sask R 265

The City of Saskatoon applied for leave to appeal two decisions of the Assessment Appeals Committee pursuant to s. 33.1 of *The Municipal Board Act*, SS 1988-89, c M-23.2.

Jackson J.A., sitting in Chambers, considered what the proper framework was for determining whether leave to appeal should be granted pursuant to s. 33.1. In so doing, she noted that the

wording in *Rothmans, Benson & Hedges Inc. v Saskatchewan*, 2002 SKCA 119, 227 Sask R 121, had become the preferred expression of the test since 2007. However, she acknowledged that some aspects of that test would apply differently to applications under s. 33.1. For example, she noted that interlocutory appeals envisioned future decisions by the Court of Queen's Bench while the decision of the Assessment Appeals Committee in this context is final.

She modified the applicable test as follows:

> [55] In sum, *Rothmans* establishes the framework to consider applications for leave to appeal made pursuant to s. 33.1 of *The Municipal Board Act*, with minor adjustments. In that regard, it may be helpful to restate the *Rothmans* framework emphasizing the core considerations of merit and importance as they relate to an application for leave to appeal under s. 33.1 of *The Municipal Board Act*:
>
> > First: Is the proposed appeal of *sufficient merit* to warrant the attention of the Court of Appeal?
> >
> > - is it *prima facie* frivolous or vexatious?
> >
> > - is it *prima facie* destined to fail in any event, having regard to the nature of the issue and the scope of the right of appeal, for instance, or the nature of the adjudicative framework, such as that pertaining to the exercise of discretionary power?
> >
> > Second: Is the proposed appeal of *sufficient importance* to the field of practice or the state of the law, or to the administration of justice generally, to warrant determination by the Court of Appeal?
> >
> > - does it materially affect the impugned order or decision?
> >
> > - does it raise a new or controversial or unusual issue?
> >
> > - does it raise a new or uncertain or unsettled point of law?
> >
> > - does it transcend the particular in its implications?
>
> The questions raised under each heading are intended to aid in the assessment of the considerations of sufficient merit and importance, and are not meant to be exhaustive.

She then considered whether leave to appeal should be granted in the case before her. While some of the proposed grounds of appeal raised questions of law, the Committee either did not make the suggested error or the suggested error had no bearing on the Committee's decision. The appeal was not significant to the municipal tax assessment process, and the proposed appeal did not transcend the particulars that the case presented. Leave was refused.

Deer Lodge Hotels Ltd. v Saskatoon (City), 2015 SKCA 105, 467 Sask R 134

Deer Lodge Hotels Ltd. applied pursuant to s. 33.1 of *The Municipal Board Act*, SS 1988-89, c M-23.2, for leave to appeal a decision of the Assessment Appeals Committee of the Saskatchewan Municipal Board.

Ryan-Froslie J.A. applied the modified framework set out in *Saskatoon (City) v North Ridge Development Corporation*, 2015 SKCA 13, 451 Sask R 265, and summarized it as follows:

> [20] *Rothmans* involved an application for leave to appeal an interlocutory (interim) order made in the course of ongoing proceedings in the Court of Queen's Bench. This Court has applied *Rothmans* criteria to applications for leave pursuant to s. 33.1 of *The Municipal Board Act*, albeit, with some modification. Those modifications were described by Jackson J.A. of this Court in *Saskatoon (City) v North Ridge Development Corporation*, 2015 SKCA 13 at paras 49–55, 451 Sask R 265 [*North Ridge Development*].
>
> [21] Based on Jackson J.A.'s comments, the modifications to the *Rothmans* criteria applicable to s. 33.1 applications may be summarized as follows:
>
> > (i) The *Rothmans* analysis contemplates an ongoing proceeding which generally is not the case with respect to appeals pursuant to s. 33.1, hence the question of whether an appeal would unduly delay proceedings in the court below, or add unduly or disproportionately to the costs of the proceedings are not applicable issues when assessing whether leave should be granted pursuant to s. 33.1; and
> >
> > (ii) How importance of the proposed appeal is assessed is also different. It will be measured not with respect to its effect on the ongoing court proceedings, but rather with respect to its effect on the impugned order or decision, and whether it raises a new or controversial issue of practice, or a new, uncertain or unsettled point of law. The focus of this analysis is on whether the issues raised have general as opposed to limited application.

She then applied the modified framework, and found the application should be granted. The appeal was not frivolous, vexatious or prima facie destined to fail and it raised questions of law relating to whether the assessor complied with legislation and the appropriate onus to be applied to the taxpayer. She found the proposed appeal was of sufficient importance to the municipal tax assessment process generally to warrant determination, with issues of how the capitalization rate is to be determined and the proof warranted comment and clarification.

Saskatoon (City) v Wal-mart Canada Corp., 2015 SKCA 125, 472 Sask R 45

The City of Saskatoon applied pursuant to s. 33.1 of *The Municipal Board Act*, SS 1988-89, c M-23.2, for an order granting leave to appeal a decision of the Saskatchewan Municipal Board, Assessment Appeals Committee.

Ottenbreit J.A., in Chambers, granted leave to appeal. In so doing, he considered the test set out in *Rothmans, Benson & Hedges Inc. v Saskatchewan*, 2002 SKCA 119, 227 Sask R 121, as modified by *Saskatoon (City) v North Ridge Development Corporation*, 2015 SKCA 13, 451 Sask R 265, and summarized in *Deer Lodge Hotels Ltd. v Saskatoon (City)*, 2015 SKCA 105, 467 Sask R 134.

Before considering merit and importance, he said the following regarding drafting grounds of appeal:

> [21] As a preliminary matter, I want to address the format of the proposed grounds of appeal. It is important to remember that grounds of appeal are a framework upon which the arguments of the appellant can be safely built. Whenever possible, grounds should be focussed on setting forth the issue or issues upon which argument will be made and be as concise as the case of the appellant will permit. Stream of consciousness grounds are to be

> avoided. Cameron J.A. in *Civil Appeals to the Court of Appeal: Practice and Procedure* (Regina: Law Society of Saskatchewan, 2009), online: Courts of Saskatchewan <www.sasklawcourts.ca> (November 24, 2015) at p 33, gives excellent advice on the proper drafting of grounds of appeal:
>
> > In addition, it is well to present carefully drawn grounds of appeal that are limited to the essentials, tightly stated, and free of embellishment. It does your case no good if it gets off on a lengthy, ill-focussed, rambling, and argumentative set of grounds of appeal.
>
> [22] While I understand that the City is attempting to be precise in its formulation of the grounds of appeal, I note that most grounds are a paragraph long. The 16 grounds and subgrounds sometimes contain argument and in some cases are repetitive. That said, I appreciate the effort made by the City in this application to group its many proposed grounds under main headings or issues which I will now review in turn.

He then turned to a consideration of the merits of the proposed grounds of appeal. The grounds that went to the Committee's jurisdiction were found to have sufficient merit as issues concerning the powers of the Committee and their extent and the statutory interpretation of the powers in the legislation were not destined to fail. The question of the onus in establishing the error in the assessment was not destined to fail, nor were the grounds relating to the Committee's overturning of the assessment or the ground relating to deference to the assessor. However, the issue of whether the Committee was required to provide reasons explaining its request for new evidence was destined to fail and leave was not granted on that ground. Those with sufficient merit were considered to have sufficient importance as they raised questions regarding the interplay of previous jurisprudence and the market valuation standard system of assessment.

Canadian Natural Resources Limited v Campbell, 2016 SKCA 87

Canadian Natural Resources Limited sought leave to appeal, and the Campbells and Wenton Farms Ltd. applied for leave to cross-appeal, a decision of the Board of Arbitration under *The Surface Rights Acquisition and Compensation Act*, RSS 1978, c S-65.

Jackson J.A. stated that applications for leave to appeal on a question of law are assessed according to the analytical framework outlined in *Rothmans, Benson & Hedges Inc. v Saskatchewan*, 2002 SKCA 119, 227 Sask R 121, as modified to take into account the final nature of the order under appeal, citing *Saskatoon (City) v North Ridge Development Corporation*, 2015 SKCA 13, 451 Sask R 265. She then applied the modified framework set out in *North Ridge Development Corporation*, and summarized what an applicant must show as follows:

> [8] In summary terms, this means that an applicant for leave to appeal on a question of law must satisfy the following:
>
> > (a) identify a question of law;
> >
> > (b) demonstrate that the appeal is of sufficient merit to justify leave being granted; and
> >
> > (c) show that the appeal is of sufficient importance to warrant the attention of the Court.

She then addressed each application for leave to appeal in turn, first considering whether CNRL had demonstrated that the proposed appeal had sufficient merit and importance. All five proposed grounds of appeal raised questions of law on their face. Three of the grounds of appeal were considered as a group, and while Jackson J.A. expressed reservations regarding the second and third, she granted leave in relation to the package of grounds as they were "sufficiently linked to each other that leave should be granted" (at para 18). The other two grounds were also granted leave, with CNRL having filed an affidavit attesting to the significance of the issue for its work in Saskatchewan and with the Campbells and Wenton Farms Ltd. having raised a similar issue. Leave to appeal was granted to CNRL.

Next, she considered whether the Campbells and Wenton Farms Ltd. had established the requisite merit and importance. One ground of appeal did not have sufficient merit based on the record and submissions Jackson J.A. had received, and others raised issues that were not questions of law. Leave to appeal was granted on the proposed ground that paralleled the one raised by CNRL and on one relating to the Board's jurisdiction to consider the Campbell's and Wenton Farms Ltd.'s arguments that CNRL was limited to drill one well only and whether the Board could provide a remedy in relation to that question.

Chinichian v Mamawetan Churchill River (Health Region), 2016 SKCA 89, 484 Sask R 76

Ms. Chinichian sought leave to appeal a decision of the Labour Relations Board pursuant to s. 4-9 of *The Saskatchewan Employment Act*, SS 2013, c S-15.1. Her employment with the Mamawetan Churchill River Health Region had been terminated, and she filed a complaint alleging that her dismissal constituted discriminatory action taken against her because she had complained about a manager and the Human Resources Director. An occupational health officer reviewed the complaint and found that the decision to terminate her was not causally connected to her health and safety concerns. She then appealed that decision to the director of occupational health and safety, who referred the appeal to an adjudicator. The adjudicator found she had not established a causal connection, and that the Health Region had established good and sufficient reason for the action taken against her. Ms. Chinichian then appealed that decision to the Labour Relations Board, and subsequently sought to appeal the decision of the Labour Relations Board to the Court of Appeal.

Jackson J.A. considered the application for leave within the framework of *Rothmans, Benson & Hedges Inc. v Saskatchewan*, 2002 SKCA 119, 227 Sask R 121, as modified by *Saskatoon (City) v North Ridge Development Corporation*, 2015 SKCA 13, 451 Sask R 265. Some of Ms. Chinichian's proposed grounds of appeal concerned questions of fact or discretion, which could not be reviewed on appeal to the Court of Appeal on questions of law in the administrative context. Her other grounds of appeal concerned the adjudicator's decision, not that of the Labour Relations Board, and therefore had to be recast in terms of whether the Board erred in law. After a consideration of these grounds, Jackson J.A. concluded that leave to appeal should not be granted because while the issues raised were not frivolous, they were either destined to fail or did not materially affect the outcome.

c. Leave Nunc Pro Tunc

KKS Holdings Ltd. v Foam Lake Savings and Credit Union Limited, 2017 SKCA 105

KKS Holdings Ltd. appealed the decision of a Court of Queen's Bench Chambers judge declining to add a party to its action. Foam Lake Savings and Credit Union Limited and Mr. Klebeck (the party sought to be added) argued that the decision was interlocutory and required leave. Whitmore J.A. found that the decision was interlocutory and that leave was required.

KKS Holdings Ltd. then sought leave to appeal *nunc pro tunc*. Whitmore J.A. relied on the test for the power to grant leave on a *nunc pro tunc* basis as set out in *Grant v Saskatchewan Government Insurance*, 2003 SKCA 17 at para 5, 227 Sask R 316. He found that the submissions and circumstances of the case did not demonstrate that this was a case where such an extraordinary power should be utilized. He declined to grant leave on that basis.

Cowessess First Nation v Phillips Legal Professional Corporation, 2018 SKCA 101

Phillips Legal Professional Corporation, Mervin Phillips and Nathan Phillips [Law Firm] appealed the decision of a Court of Queen's Bench judge sitting in Chambers, where the Chambers judge had referred a number of accounts to the local registrar for taxation pursuant to s. 67(1)(a)(iii) of *The Legal Profession Act, 1990*, SS 1990-91, c L-10.1. The Chambers judge had also ordered the Law Firm to pay solicitor-client costs in the amount of $20,000. Cowessess First Nation then brought an application for an order quashing the notice of appeal pursuant to Rule 46.1(1)(a) of *The Court of Appeal Rules*. Cowessess argued that leave to appeal was required because the decision was interlocutory or, alternatively, that it should be quashed under Rule 46.1(1)(b) and (d) for being vexatious and an abuse of the Court's process.

The Court concluded that the Chambers decision was final and that leave to appeal was not required. Writing for the Court, Jackson J.A. went on to find, however, that had leave to appeal been required, she would have granted leave *nunc pro tunc*. While the Court's jurisdiction to grant *nunc pro tunc* orders is "sparingly exercised, so as not to defeat the general purpose of the leave requirement" (at para 3, citing *Grant v Saskatchewan Government Insurance*, 2003 SKCA 17 at para 5, 227 Sask R 316), she would have exercised it here. Counsel had made a concerted effort to comply with prior authorities, was aware that if he applied for leave he ran the risk of the Court asserting its jurisdiction under *Iron v Saskatchewan (Minister of the Environment)* (1993), 103 DLR (4th) 585 (Sask CA) (leave to appeal to the SCC denied, [1993] 3 SCR vii), and there had been no delay. She also concluded that leave would have been granted under the test set out in *Rothmans, Benson and Hedges Inc. v Saskatchewan*, 2002 SKCA 119, 227 Sask R 121, had she extended to the time to appeal.

3. Application of Iron

Saskatoon (City) v Walmart Canada Corp., 2016 SKCA 123

The City of Saskatoon sought leave to appeal an order of a judge of the Court of Queen's Bench sitting in judicial review of a decision of the Board of Revision of the City of Saskatoon.

After finding that the order in question was a final order, Whitmore J.A. went on to consider *Iron v Saskatchewan (Minister of the Environment & Public Safety)* (1993), 103 DLR (4th) 585 (Sask CA) (leave to appeal to the SCC denied, [1993] 3 SCR vii). He described the case as follows:

> [27] *Iron v. Saskatchewan (Minister of the Environment & Public Safety)* (1993), 109 Sask R 49 (CA) [*Iron*], holds that an application for leave to appeal constitutes an irrevocable election by the applicant to treat the underlying decision as being interlocutory rather than final. As a consequence, an applicant who applies for leave and is refused leave is not entitled to resile from that election and submit that the decision was final and leave is not required. This decision was aimed at discouraging counsel from following the "standard practice" of applying for leave when doubt existed about the nature of the order intended to be appealed as it was the Court's opinion that such practice was unfair to the respondent and a misuse of the Court's process (at para 24).

While the City had sought leave to appeal from a final order, Whitmore J.A. found that *Iron* did not automatically lead to the conclusion that leave to appeal must be refused:

> [28] Clearly, *Iron* does not stand for the proposition that when an applicant applies for leave to appeal from a final order that leave to appeal must be refused. I take it as conferring jurisdiction on a Chambers judge to apply the usual test for determining whether leave should be granted that is applied to interim orders and to final orders (i.e., the *Rothmans* test). Applying the twin test of merit and importance to the final order in this case, I have no hesitation in saying that Saskatoon meets that test. I will leave the matter of the principle in *Iron* to the panel hearing the appeal, which may invite submissions on this issue, if it so desires.

Felker v Easthill, 2018 SKCA 13

Mr. Felker sought leave to appeal against an order where the Chambers judge varied an earlier order that had granted Mr. Felker exclusive possession of the parties' jointly-owned ranch. In a subsequent decision, the Chambers judge awarded exclusive possession to Ms. Easthill.

Caldwell J.A. found that Mr. Felker had sought leave to appeal when such leave was not required, and that he instead had an unlimited right of appeal.

He then went on to consider the application of *Iron v Saskatchewan (Minister of the Environment & Public Safety)* (1993), 103 DLR (4th) 585 (Sask CA) (leave to appeal to the SCC denied, [1993] 3 SCR vii). He found that *Iron* was not applicable because that decision "addressed the difference between a limited *with leave* right to appeal against interlocutory orders and an *as of right* right to appeal against final orders" (at para 9). In this case, s. 55 of *The Family Property Act*, SS 1997, c F-6.3, did not distinguish between interlocutory and final orders, and was instead an unlimited right of

appeal. Because of this, he found the Court did not have the jurisdiction to grant or refuse leave in cases such as this:

> [12] Second, by granting an *as of right* right to appeal to this Court in s. 55 of the *FPA*, the Legislature has decided not to provide this Court with the jurisdiction to grant or refuse leave to appeal from orders such as the *December Fiat*, see: *Iron*. It is not for me to second-guess the wisdom of the Legislature in this regard so as to restrict an unlimited, statutory right of appeal simply because the parties consent to it.

D. Section 9

Appeal periods

9(1) In this section, **"date"** means, with respect to a decision:

(a) the date of filing of the written reasons for the decision with the registrar, local registrar or chambers clerk of the Court of Queen's Bench, as the case may be; or

(b) where the decision has been pronounced in court or chambers with no provisions for written reasons to follow, the date of the oral pronouncement.

(2) Subject to this section, a notice of appeal must be served within 30 days after the date of the decision being appealed from.

(3) Where leave to appeal is necessary, an application for leave must be made within 15 days after the date of the decision for which leave to appeal is being sought or within any time ordered by the court or a judge.

(4) Where a decision is made during or after a trial and the decision is only incidental to the trial, a notice of appeal from the incidental decision must be served not later than 30 days after the date of the judgment at trial, and a party appealing from the trial judgment may include in the notice of appeal of the trial judgment an appeal from the incidental decision.

(5) Where a decision is made during or after the hearing of an application in chambers and the decision is only incidental to the application and does not dispose of the matter in issue, a notice of appeal from the incidental decision must be served not later than 15 days after the date of the judgment on the matter in issue in the application, and a party appealing from the judgment may include in the notice of appeal of the judgment an appeal from the incidental decision.

(6) On the application of any party, a judge or the court may extend an appeal period mentioned in this section where, in the opinion of the judge or court, it is just and equitable to do so.

(7) Where a provision of this section conflicts with a provision of an enactment governing an appeal, the provision of the enactment prevails.

Kowalczyk v Saskatchewan Government Insurance, 2015 SKCA 47

Ms. Kowalczyk applied to set aside a decision of a judge of the Court pursuant to s. 20(3). Ms. Kowalczyk had sued Saskatchewan Government Insurance and General Motors of Canada Ltd.

in Small Claims Court, but did not attend on the date her trial was scheduled to proceed. As a result, Jackson P.C.J. dismissed her claim. She then applied pursuant to s. 37 of *The Small Claims Act, 1997*, SS 1997, c S-50.11, to set aside Jackson P.C.J.'s decision, but this application was dismissed. Next, she appealed to the Court of Queen's Bench and failed to appear the date of the appeal. Her appeal was dismissed.

She then began attempting to file her application for leave to appeal to the Court of Appeal. Section 45 of *The Small Claims Act, 1997*, provides a right of appeal from the Court of Queen's Bench to the Court of Appeal on questions of law, with leave. Section 9(2) of *The Court of Appeal Act, 2000* and Rule 11(1) require that an application for leave be brought within 15 days of the judgment or order sought to be appealed from, or within such time as ordered by the court or a judge. Ms. Kowalczyk's application for leave to appeal was to be served and filed by December 17, 2012. Ms. Kowalczyk tried to file different documents on December 12 and 31, 2012, and on March 8, 2013. Sitting in Chambers, Jackson J.A. had dismissed her application to extend the time to appeal on March 27, 2013. Following this decision, Ms. Kowalczyk sought to have Jackson J.A.'s decision set aside pursuant to s. 20(3).

The Court dismissed her application. Richards C.J.S. stated that the standard approach for discretionary-type decisions, as expressed in *Rimmer v Adshead*, 2002 SKCA 12, [2002] 4 WWR 119, operated here. As a result, "the decision of a Chambers judge on an application to extend the time for seeking leave to appeal should not be 'discharged or varied' pursuant to s. 20(3) unless the judge erred in principle, disregarded or misapprehended a material matter of fact, failed to act judicially or rendered a decision so plainly wrong as to amount to an injustice" (at para 9). The issue, therefore, was whether Jackson J.A. erred.

Richards C.J.S. noted that the factors bearing on Chambers decisions of this nature were those summarized in *627360 Saskatchewan Ltd. v Bellrose*, 2007 SKCA 23, 293 Sask R 164, as follows:

> [6] The considerations usually taken into account in determining whether to enlarge an appeal period include the following: (a) whether there was a *bona fide* intention to appeal within the time limit for the appeal; (b) whether an arguable case has been demonstrated; (c) whether the delay is explained, and (d) whether there is prejudice to the respondent. See, for example: *P.G.R. Films Ltd. v. Sooters Studios Ltd. et al*. (1994), 123 Sask R 301 (C.A.) at 303. Overall, a judge entertaining such an application should balance all of the relevant factors and considerations with a view to achieving a just result. See: *Royal Bank of Canada v. G.M. Homes Inc. et al*. (1982), 25 Sask. R. 6 (C.A.).

Richards C.J.S. noted that due to the fact the decisions underpinning this application were all ultimately rooted in Ms. Kowalczyk's failure to appear at the Small Claims trial, he was not concerned with the merits of her claims or the extent of the injuries she said were sustained as a result of automobile accidents. In the circumstances of the application, she did not have an arguable case and she had not explained the delay in bringing her application for leave to appeal. Her application was dismissed.

Fiesta Barbeques Limited v Andros Enterprises Ltd., 2018 SKCA 32

Fiesta Barbeques Limited and Wolfedale Engineering Limited sought an extension of time and leave to appeal an August decision declining to add Vomar Industries Limited as a defendant, and leave to appeal a February decision declining to add Vomar Industries Limited as a third party.

Whitmore J.A., in Chambers, first considered the application under s. 9(6) to extend the time to appeal the August decision, applying the four-factor test from *Bank of Nova Scotia v Saskatoon Salvage Company (1954) Ltd.* (1983), 29 Sask R 285 (CA). He noted that the factors are to be balanced with a view to achieving a just result, and that one factor may be more important than the others. Further, since the proposed appellants were seeking an extension of the appeal period of an interlocutory decision, they had "the double hurdle of demonstrating that the application for leave should be heard late as well as persuading the Court that leave should be granted at all" (at para 22, citing *Dutchak v Dutchak*, 2009 SKCA 89 at para 13, 337 Sask R 46).

He then turned to a consideration of the factors. First, he found that there would be prejudice to Vomar in these circumstances. While Vomar did not provide any additional evidence as to the prejudice suffered, he accepted that Vomar had based its argument for the February decision on the August decision.

Second, he found that the proposed appellants did not intend to appeal the August decision within the appeal period, given that their argument was that they could not have reasonably manifested such an intention as the *lis* of the August decision did not involve them. The relevant consideration is whether the intention manifested *during* the appeal period, and it clearly did not – though the application to add Vomar as a third party did operate as some excuse for the delay.

Third, the proposed appellants did not have an arguable case. Their proposed appeal concerned only the August decision's determinations insofar as they impacted the February decision, and did not seek to set aside the August decision. They sought to appeal the reasons of the August decision only, rather than its bottom-line conclusion.

In the circumstances of this case, Whitmore J.A. found that the balance of factors indicated that the just result was to decline to extend the appeal period. Given the prejudice faced by Vomar, the lack of a *bona fide* intention to appeal and there being no arguable case, he declined to extend the time to appeal.

Taheri v Vujanovic, 2018 SKCA 40

Mr. Taheri applied pursuant to s. 9(6) of *The Court of Appeal Act, 2000*, SS 2000, c C-42.1, and Rule 71 of *The Court of Appeal Rules* to extend the time for service of his notice of appeal with respect to a January 10, 2018, Court of Queen's Bench Chambers decision. The Chambers decision had struck portions of a statement of claim issued by Mr. Taheri on the basis that it disclosed no reasonable cause of action. There had been three applications before the Chambers judge, and the Chambers judge had rendered three separate decisions issued December 13, 2017, January 10, 2018, and February 1, 2018. Mr. Taheri's proposed appeal concerned only the latter two, with the appeal of

the February decision having been served on time. The appeal concerning the January 10, 2018, decision was the subject of the application for an extension of time.

Ryan-Froslie J.A., in Chambers, allowed his application to extend the time to appeal. In so doing, she considered the factors outlined by Jackson J.A. in *Dutchak v Dutchak*, 2009 SKCA 89, 337 Sask R 46. She noted that Mr. Taheri was not required to establish each of the factors set out in *Dutchak*, but "he must show that, taking those factors into account, it is just and equitable to extend the time for appeal" (at para 22).

She first considered the reason for the delay. The notice of appeal had been served and filed three weeks after the time limit had expired. She found that Mr. Taheri had formed an intention to appeal early in this period, but that legal counsel had advised him to wait until the Chambers judge had rendered his decision on all three applications. This advice resulted in his appeal of the January decision being out of time. The proposed respondents argued that lawyer error does not provide a reasonable explanation for the delay, but Ryan-Froslie J.A. rejected this argument, stating it does not accurately reflect the law in this jurisdiction. In her view, legal counsel's approach had practical merit (and it would have been preferable for the Chambers judge to render one judgment or separate judgments released on the same day), and Mr. Taheri was entitled to rely on his lawyer's advice. In the circumstances of this case, his reliance provided a reasonable explanation for the delay.

Second, she considered whether Mr. Taheri had manifested his intention to appeal. The proposed respondents argued he did not communicate his intention to appeal to them until after the appeal period had expired. She found that this did not adversely affect Mr. Taheri's position – had he communicated his intention, it would have increased the weight to be given to this factor, but not having done so did not detract from the fact he had the requisite bona fide intention.

For the third factor, she also found Mr. Taheri had shown he had an arguable case. The standard for an "arguable case" does not require a proposed appellant to show his or her appeal is likely to succeed, "only that the appeal raises a debateable issue" (at para 40). She concluded Mr. Taheri had shown an arguable case with respect to his claims in negligence and for breach of fiduciary duty.

Fourth, she found there was no identifiable prejudice to the proposed respondents. The proposed respondents had provided no evidence of prejudice, and instead argued that they would suffer prejudice because it would thwart their legitimate expectation of finality with respect to the court process. They also argued that his failure to appeal within the prescribed time period should put an end to the action as their professional reputations were being impugned. Ryan-Froslie J.A. stated that the prejudice is not "what would be incurred in the usual appeal process" (citing *Dutchak*), but rather actual or inferred prejudice that would result if the period of appeal were extended. One example of this was "where a respondent has taken steps to enforce the judgment or otherwise acted in reliance on it such that he or she would be prejudiced if the appeal were allowed to proceed" (at para 49). The length of the delay was key – here, it was relatively short. There was no evidence of actual prejudice, no prejudice could be inferred, and their professional integrity would have been called into question even if the appeal had been initiated within the required time.

After considering all of these factors, Ryan-Froslie J.A. was satisfied it was just and equitable to grant an order extending the time to serve the notice of appeal.

Saskatchewan Crop Insurance Corporation v McVeigh, 2018 SKCA 76

Saskatchewan Crop Insurance Corporation [SCIC] appealed the decision of a case management judge of the Court of Queen's Bench, wherein the judge dismissed its claim for want of prosecution. In so doing, SCIC also appealed two other decisions, and claimed a right of appeal from these decisions on the basis they were incidental under s. 9(5) of *The Court of Appeal Act, 2000*, SS 2000, c C-42.1. The first of these was contained in a fiat by the case management judge, where the case management judge had stated he thought that two applications by SCIC (contempt and spoilage) ought to be deferred until after the hearing of the want of prosecution application. The second concerned the striking of two affidavits filed by SCIC by another Court of Queen's Bench judge.

Schwann J.A., writing for the Court, concluded, that the first decision was not a "decision" within the meaning of s. 2 of *The Court of Appeal Act, 2000*, SS 2000, c C-42.1. Therefore, s. 9(5) did not provide SCIC with a right of appeal:

> [41] With this, I return to s. 9(5) of *The Court of Appeal Act, 2000*, which permits an incidental "decision" to be appealed in concert with the appeal from the matter in issue. The word "decision" is defined by s. 2 of the *Act* to include "any judgment, order, decree, verdict or finding". Having regard to the content of Allbright J.'s "direction", though cast in the format of a fiat, I am not persuaded that it meets the definition of "decision" contemplated by the *Act* and is thus not capable of being appealed to this Court.
>
> [42] In my opinion, the May 17, 2016, fiat was not a "judgment, order, decree, verdict or finding" and, therefore, is not a decision within the meaning of s. 9(5). This means SCIC has no right of appeal from Allbright J.'s fiat of May 17, 2016. This conclusion is a complete answer to this ground of appeal.

The second decision was considered on its merits.

Cowessess First Nation v Phillips Legal Professional Corporation, 2018 SKCA 101

Phillips Legal Professional Corporation, Mervin Phillips and Nathan Phillips [Law Firm] appealed the decision of a Court of Queen's Bench judge sitting in Chambers, where the Chambers judge had referred a number of accounts to the local registrar for taxation pursuant to s. 67(1)(a)(iii) of *The Legal Profession Act, 1990*, SS 1990-91, c L-10.1. The Chambers judge had also ordered the Law Firm to pay solicitor-client costs in the amount of $20,000. Cowessess First Nation then brought an application for an order quashing the notice of appeal pursuant to Rule 46.1(1)(a) of *The Court of Appeal Rules*. Cowessess argued that leave to appeal was required because the decision was interlocutory or, alternatively, that it should be quashed under Rule 46.1(1)(b) and (d) for being vexatious and an abuse of the Court's process.

In dismissing the application to quash, Jackson J.A. noted that a determination under s. 67(1)(a)(iii) could not be characterized as "incidental" under s. 9(5) of *The Court of Appeal Act, 2000*, SS 2000, c C-42.1:

> [24] I recognize that s. 9(5) of *The Court of Appeal Act, 2000*, fixes the time for appealing an incidental order made in Chambers:

> **Appeal periods**
> **9**(5) Where a decision is made during or after the hearing of an application in chambers and the decision is only incidental to the application and does not dispose of the matter in issue, a notice of appeal from the incidental decision must be served not later than 15 days after the date of the judgment on the matter in issue in the application, and a party appealing from the judgment may include in the notice of appeal of the judgment an appeal from the incidental decision.

While the application of this provision has never been particularly clear, it can be said with some certainty that a determination made under s. 67(1)(a)(iii) would not be "incidental" to the local registrar's decision – it fixes the scope of the local registrar's jurisdiction. (Also see Rule 12 of *The Court of Appeal Rules* and pages 53 to 56 of *CA Annotated* for a discussion of s. 9(5)).

[25] Nor could it be considered incidental to the resolution of the originating application made to the Chambers judge. It was the whole of the dispute that was before him. It is in the very nature of an "interlocutory" order that it is subsumed by the resolution of the main dispute between the parties. Here, that is not the case.

E. Section 11

> **Original jurisdiction**
>
> **11** The court may, in its discretion, exercise original jurisdiction to grant relief in the nature of a prerogative writ.

Haug v Warden of Dorchester Institution, 2015 SKCA 135, 472 Sask R 86

Mr. Haug applied to the Court of Appeal seeking relief from the Warden of Dorchester Institution. The relief concerned alleged violations of his ss. 7 and 15 *Charter* rights, and he sought orders under s. 24(1) of the *Charter*.

In dismissing this application in Chambers, Herauf J.A. commented on the Court's original jurisdiction under s. 11:

> [5] A brief word is in order on this Court assuming original jurisdiction. This Court can assume original jurisdiction to hear a matter pursuant to s. 11 of *The Court of Appeal Act, 2000*, SS 2000, c C-42.1. The Honourable Stuart J. Cameron in *Civil Appeals in Saskatchewan: The Court of Appeal Act & Rules Annotated* (Regina: Law Society of Saskatchewan Library, 2015) noted in his commentary on s. 11 at p. 68:
>
> > Section 11 confers this same original supervisory jurisdiction upon the Court of Appeal.
> >
> > Only in exceptional circumstances, however, does the court exercise this jurisdiction: *Geller v Saskatchewan* (1985), 48 Sask R 239 (CA):

> [4] ... This being a court whose primary jurisdiction is appellate, we think that only in special cases, of which this is not one, or in extraordinary circumstances should this court entertain, in the first instance, an application inviting the exercise of its concurrent original jurisdiction. Such applications, generally speaking, are to be made to the Court of Queen's Bench.
>
> [6] In my view, there is nothing extraordinary or exceptional relating to Mr. Haug's application that comes close to convincing me that this Court's original jurisdiction should be utilized to grant the relief requested.

Haug v Dorchester Institution, 2016 SKCA 55, [2016] 10 WWR 484

Mr. Haug appealed from the decision of Herauf J.A. in Chambers, seeking to have the decision discharged or varied pursuant to s. 20(3) of *The Court of Appeal Act. 2000*.

The Court dismissed this appeal. Of s. 11, Caldwell J.A. stated:

> [17] Finally, as the Chambers judge's decision indicates, the Court's jurisdiction to entertain such matters may not be revived or restored by resort to this Court's original jurisdiction under s. 11 of *The Court of Appeal Act, 2000* to grant relief "in the nature of a prerogative writ". That section simply endows the Court with the same original supervisory jurisdiction as is conferred upon the Court of Queen's Bench for Saskatchewan as a superior court of record. It does not negate or displace s. 18 of *The Federal Court Act*, which, as noted, ousts the jurisdiction of all provincial superior courts to issue prerogative relief against a federal board, commission or other tribunal. Moreover, by the terms of s. 11, only the Court — as opposed to a single judge of the Court sitting in chambers — may exercise its original jurisdiction to grant relief in the nature of a prerogative writ.

F. Section 12

Powers of the court
12(1) On an appeal, the court may:

(a) allow the appeal in whole or in part;

(b) dismiss the appeal;

(c) order a new trial;

(d) make any decision that could have been made by the court or tribunal appealed from;

(e) impose reasonable terms and conditions in a decision; and

(f) make any additional decision that it considers just.

(2) Where the court sets aside damages assessed by a jury, the court may assess any damages that the jury could have assessed.

Boardwalk General Partnership v Olson, 2016 SKCA 135, 410 DLR (4th) 357

This concerned an appeal by Boardwalk General Partnership from a decision of a Court of Queen's Bench Chambers judge setting aside a decision of a hearing officer appointed under *The Residential Tenancies Act, 2006*, SS 2006, c R-22.0001. The Chambers judge ordered the landlord, Boardwalk General Partnership, to pay compensation to Mr. Olson equivalent to one month's rent.

Errors were found in the Chambers judge's conclusion such that intervention was required, but the issue concerned remedy. Section 72 of *The Residential Tenancies Act, 2006* was silent as to what powers the Court had; therefore, s. 12 governed. Jackson J.A. stated:

> [23] Since s. 72 of the *Act* is silent as to the powers of this Court hearing an appeal, s. 12 of *The Court of Appeal Act, 2000*, SS 2000, c C-42.1, governs. Under s. 12, this Court has broad powers to make any decision that it considers just, including making any decision that "could have been made by the court or tribunal appealed from" (s. 12(1)(f)). Thus, this Court could remit the matter to the hearing officer to make the necessary findings of fact as to causation or this Court could undertake that exercise, if it were satisfied that it had all the necessary evidence to do so.

However, the Court preferred to dismiss the appeal in the circumstances of the case – the landlord took no real issue with what the Chambers judge awarded and in fact remitted that amount to the tenant; its issue was the Chambers judge's interpretation of *The Residential Tenancies Act, 2006*.

G. Section 14

Powers of court re evidence

14 On an appeal from, or on a motion against, the decision of a trial judge or on any rehearing, the court is not obliged to grant a new trial or to adopt the view of the evidence taken by the trial judge, but the court shall act on its own view of what, in its judgment, the evidence proves, and the court may draw inferences of fact and pronounce the decision that, in its judgment, the trial judge ought to have pronounced.

Zettl v Spence, 2016 SKCA 97, 484 Sask R 193

Mr. Zettl appealed a decision of a Court of Queen's Bench Chambers judge, where the Chambers judge had declined to vary the parenting arrangements established under a consent order. His appeal concerned the dismissal of his application to vary the parenting arrangements.

Caldwell J.A., writing for the Court, dismissed the appeal. In so doing, he stated that in appeals from applications determined on the basis of affidavit evidence alone, allegations of errors of fact are measured against the standard of reasonableness, citing s. 14 and *Valley Beef Producers Co-operative Ltd. v Farm Credit Corp.*, 2002 SKCA 100, 223 Sask R 236. Further, the same standard applies to the issue as to whether there was sufficient uncontroverted evidence upon which to render a decision in an application of this nature (see *Bromm v Bromm*, 2010 SKCA 149, 362 Sask R 190). He described this as follows (at para 54):

> ... That is, this Court will look to the evidence, the issues at play, the relief sought, the arguments — as framed by the parties — and the best interests of the children to determine whether it was *reasonable* for a chambers judge to conclude that "the evidentiary threshold necessary to make a decision based on all the uncontroverted evidence had been reached."

H. Section 20

> **Judge in chambers**
>
> **20**(1) A single judge sitting in chambers may hear and dispose of an application or motion that is incidental to an appeal or matter pending in the court and that does not involve the decision of the appeal on the merits.
>
> (2) A single judge sitting in chambers may hear and dispose of an application for leave to appeal.
>
> (3) An order made by a judge in chambers, other than an order granting or denying leave to appeal, may be discharged or varied by the court.

1. 20(1): Authority of a Chambers Judge

Phillips Legal Professional Corporation v Vo, 2016 SKCA 50

Phillips Legal Professional Corporation appealed against a judgment of a judge of the Court of Queen's Bench who sat on a review under Rule 11-22 of *The Queen's Bench Rules* of an assessment of certain of the Corporation's legal accounts pursuant to s. 67 of *The Legal Profession Act, 1990*, SS 1990-91, c L-10.1. The Corporation now sought an order in the nature of *mandamus* requiring the Registrar of the Court of Queen's Bench to produce for transcript an audio recording of the assessment hearing.

Caldwell J.A., in Chambers, began by reviewing the powers of a Court of Appeal Chambers judge pursuant to s. 20(1). He stated that this is a "broad power": once the conditions for its exercise are met, it is "limited, at least expressly, only by the phrase 'does not involve the decision of the appeal'" (at para 2, citing *Mann v KPMB Inc.*, 2001 SKCA 24 at para 14, 203 Sask R 267).

He then turned to the application before him. He found the application was incidental to an appeal pending in that the relief sought was clearly tied to the appeal, but said he must also be persuaded "that the motion is incidental to that appeal in the sense that it is *parenthetical* to it and that granting the relief sought by the motion would not 'involve the decision of the appeal on the merits'" (at para 3). The appeal itself concerned the supplementary certificate, including the Chambers judge's decision not to have the audio recording of the assessment hearing transcribed. Therefore, he found that ordering the production and transcription of the assessment hearing was not something that was clearly incidental because by granting this order, it was more than likely he would be indirectly affecting a matter at issue in the appeal in a final way by rendering it moot.

Given this, and the absence of any obvious prejudice to the corporation, he declined to make the order requested but did so without prejudice to the Corporation to revisit the application before the panel of the Court hearing the appeal.

Haug v Dorchester Institution, 2016 SKCA 55, [2016] 10 WWR 484

Mr. Haug sought remedies under s. 24(1) of the *Charter* against the Warden at Dorchester Institution in New Brunswick. A Chambers judge of the Court of Appeal dismissed his application because Mr. Haug had failed to establish a legal basis for these claims, and the Court did not have jurisdiction to consider them. Mr. Haug sought have that decision discharged or varied pursuant to s. 20(3), and sought additional relief.

The Court dismissed the application. Caldwell J.A. stated the following regarding s. 20(1):

> [3] To begin, as is evident by the language of s. 20(1) of *The Court of Appeal Act, 2000*, a single judge of this Court sitting in chambers has broad power but is restricted in its exercise to disposing of applications or motions that are "incidental to an appeal or matter pending in the court" and that do not "involve the decision of the appeal on its merits." This power has been interpreted as permitting a Chambers judge to make all manner of orders affecting procedural matters incidental to an appeal or to preserve the *status quo* pending the appeal, provided the order does not, in its effect, decide the appeal or render it moot. See, as examples, *Mann v KPMG Inc.*, 2001 SKCA 24, 203 Sask R 267; *T.E.T. v J.D.L.*, 2004 SKCA 76, 249 Sask R 218; *Sundown Theatre Co. Ltd. v Ro-Edd Agencies Ltd.*, 2009 SKCA 78, 337 Sask R 111 [*Sundown*]; *Affinity Credit Union v United Food and Commercial Workers, Local 1400*, 2014 SKCA 114, 446 Sask R 204; *Beare v Kirby Enterprises Inc.*, 2013 SKCA 44, 414 Sask R 66. On the other hand, it is not open to a single judge of this Court sitting in chambers to make an order that effectively puts an end to an appeal or that addresses in a final way a matter properly left to the panel who will hear the appeal, such as an application to adduce fresh evidence. See, as examples, *Kachur v Lanigan Creek-Dellwood Brook Watershed Association*, 2006 SKCA 81, 285 Sask R 180; *Sundown*; *Clements v Preece*, 2014 SKCA 63, 438 Sask R 222; *He v Chen*, 2010 SKCA 29, 346 Sask R 274; *604598 Saskatchewan Ltd. v Saskatchewan Liquor and Gaming Licensing Commission (Sask)* (1997), 152 Sask R 201 (CA); *Cochet v Cochet* (1989), 74 Sask R 219 (CA); *Owen v Thomas* (1988), 60 Sask R 84 (CA); *Turbo Resources Ltd. v Gibson* (1987), 60 Sask R 221 (CA).

Aquila Holdings Ltd. v Edenwold (Rural Municipality), 2016 SKCA 88, 484 Sask R 67

Property owners sought leave to appeal a decision of the Assessment Appeals Committee of the Saskatchewan Municipal Board pursuant to s. 33.1 of *The Municipal Board Act*, SS 1988-89, c M-23.2.

In determining whether to grant leave, Jackson J.A. stated that it is open to argue that the appeal is *prima facie* destined to fail on grounds other than those put forward by the proposed appellant but that a Chambers judge must not exceed the authority given by s. 20:

> [9] This framework is intended to inform the parties of the matters that guide the Chambers judge's exercise of discretion. Under this framework, it is clearly open to the respondent on a leave application to argue that the appeal is *prima facie* destined to fail on other grounds than those put forward by the proposed appellant, but the Chambers judge must be careful not to exceed the authority conferred by s. 20 of *The Court of Appeal Act, 2000*, SS 2000, c C-42.1.

Dearborn v Saskatchewan (Financial and Consumer Affairs Authority), 2017 SKCA 41, 10 CPC (8th) 1

Mr. Dearborn applied for an order compelling production of a memorandum of fact and law and a decision underpinning an order to investigate, an order pursuant to Rule 59 of *The Court of Appeal Rules* to allow the inclusion of fresh evidence, and an order pursuant to Rule 38 of *The Court of Appeal Rules* to present additional arguments, raise points of law, and cite authorities not mentioned in the factum by way of filing a supplemental factum or additional written argument. During the Chambers hearing, counsel was informed that the latter two arguments were required to be made to the Court, rather than before a judge in Chambers.

Richards C.J.S. found that he had the jurisdiction to order the production of documents relevant to the appeal on the basis of s. 11(3) of *The Securities Act, 1988*, SS 1988-89, c S-42.2, and s. 20 of *The Court of Appeal Act, 2000*, SS 2000, c C-42.1. He ordered that the memorandum of fact and law had to be provided to counsel but declined to do so for the other requested material. He then stated that if counsel wanted to rely on the produced materials during argument, counsel would have to make appropriate application to the Court.

Morin v Matheson, 2017 SKCA 80

Mr. Morin sought an interim stay of notice of continuing seizure and notice of arrears pending appeal pursuant to *The Enforcement of Maintenance Orders Act, 1997*, SS 1997, c E-9.21.

Caldwell J.A. found that first, s. 57 of *The Enforcement of Maintenance Orders Act, 1997* requires a panel of the Court to exercise this power, and that such an order is beyond the authority of a single judge. Second, s. 57(3) arguably supplants Rule 15(1) of *The Court of Appeal Rules* with respect to that order.

Third, Mr. Morin was in effect asking for something in the nature of injunctive relief, which a Chambers judge may grant. However, in the circumstances of this application, Caldwell J.A. was not persuaded to grant such an order and he dismissed the application:

> [6] In effect then, this leaves Mr. Morin asking this Court for something in the nature of injunctive relief prohibiting Ms. Matheson from pursuing enforcement under the notices of continuing seizure and arrears. A Chambers judge of this Court has the power to grant injunctive relief so as to preserve the *status quo* and prevent the frustration of an appeal: *Beare v Kirby Enterprises Inc.*, 2013 SKCA 44, 414 Sask R 66; *Taylor v Eisner* (1989), 80 Sask R 84 (CA).
>
> [7] However, I am not persuaded the circumstances of this matter satisfy the three-part test under *Manitoba (A.G.) v Metropolitan Stores Ltd.*, [1987] 1 SCR 110, which applies where the Court faces a request of this nature: *Kim v University of Regina* (1990), 85 Sask R 166 (CA). I have very little evidence upon which to assess Mr. Morin's request and I make no comments on the merits of his appeal. I conclude Mr. Morin's application must be dismissed chiefly because he has not established that he will suffer irreparable loss if the notices of continuing seizure and arrears remain in effect pending the hearing of his appeal, which should be a relatively short period of time.

Veolia Water Technologies, Inc. v K+S Potash Canada General Partnership, 2018 SKCA 61

Veolia Water Technologies Inc. appealed the decision of a Chambers judge of the Court of Queen's Bench. The Chambers judge had dismissed its application for an interlocutory order enjoining K+S Potash Canada General Partnership from drawing on two Irrevocable and Unconditional Letters of Credit. On this application, Veolia sought an interim order enjoining K+S from drawing on the Letters of Credit until the Court rendered its decision on the appeal.

Veolia argued that s. 20(1) provided the jurisdiction to hear and grant this application, citing *Haug v Dorchester Institution*, 2016 SKCA 55, [2016] 10 WWR 484. It argued that the relief sought was incidental to its appeal and would enable the appeal to proceed and be determined on its merits. K+S argued that a single judge had no jurisdiction to grant the order sought, relying on *Beare v Kirby Enterprises Inc.*, 2013 SKCA 44, 414 Sask R 66, and *Loraas v Loraas* (15 May 2018) Regina, CACV3244.

Ottenbreit J.A. summarized the powers conferred by s. 20(1) as follows:

> [11] In *Loraas*, Ryan-Froslie J.A., citing *Beare*, affirmed that a single judge of this Court has power to hear and dispose of any matter incidental to an appeal that does not involve the decision of the appeal on its merits. A single judge of this Court also has the power to preserve the status quo and prevent the frustration of an appeal as was explained by Caldwell J.A. in *Morin v Matheson*, 2017 SKCA 80 [*Morin*]:
>
> > [6] In effect then, this leaves Mr. Morin asking this Court for something in the nature of injunctive relief prohibiting Ms. Matheson from pursuing enforcement under the notices of continuing seizure and arrears. A Chambers judge of this Court has the power to grant injunctive relief so as to preserve the *status quo* and prevent the frustration of an appeal: *Beare v Kirby Enterprises Inc.*, 2013 SKCA 44, 414 Sask R 66; *Taylor v Eisner* (1989), 80 Sask R 84 (CA).
>
> [12] Whether a judge should exercise the power to determine incidental matters, preserve the status quo and prevent the frustration of an appeal is fact specific. In *Beare* and *Loraas* that power was not exercised. In *Beare*, it was because the relief requested was greater than that at issue in the appeal and granting the relief would have rendered the appeal moot. In *Loraas*, it was because the relief could not be granted without finding that the issues raised in the notice of appeal were correct, effectively deciding the appeal and rendering it moot.

He was satisfied that here, the issues at play in the application were not identical to those on the appeal and that the requested relief was incidental and subordinate to the appeal.

Therefore, he turned to whether he should exercise his discretion and order the relief requested to preserve the appeal and not render it moot. Unlike in *Beare* and *Loraas*, where granting the relief would have made the appeal moot, here the appeal may have become moot absent an order.

Ottenbreit J.A. applied the three-part injunctive relief test used in *Morin v Matheson*, 2017 SKCA 80, and found that he was satisfied K+S should be enjoined from drawing on the Letters of Credit pending appeal:

> [17] Applying this test, I am satisfied that Veolia has made out its case that K+S should be enjoined from drawing on the LOCs pending appeal. Veolia's grounds of appeal, even if they are ultimately unsuccessful, nevertheless cross the low threshold of raising a serious issue to be considered by this Court. With respect to the factor of irreparable harm, there is a high likelihood the appeal will effectively become moot if the relief is not granted. However, to be clear, I am not saying that the prospect of the appeal becoming moot will in all circumstances be conclusive. It is one factor that is relevant to one part of the test (see, for example, *Ulmer v British Columbia Society for the Prevention of Cruelty to Animals*, 2010 BCCA 98, 284 BCAC 162, where the appeal would similarly have been moot but the applicant failed on the balance of convenience part of the test). The balance of convenience is in Veolia's favour. In my view, Veolia will suffer the greater harm if, in the circumstances of this case, its appeal is undercut by K+S drawing on the LOCs. It is a fair observation that any prejudice K+S experiences in the delay in drawing on the LOCs pending appeal will, if Veolia is unsuccessful, be adequately dealt with and be compensated in the claim of K+S against Veolia

Ottenbreit J.A. granted the application.

2. 20(3): Applications to Discharge or Vary

a. Jurisdiction of Court

Beer v Saskatchewan (Highways and Infrastructure), 2016 SKCA 24, 476 Sask R 74

The Beers appealed a decision of the Court of Queen's Bench concerning a writ of possession. Their right of appeal was contained in s. 55 of *The Landlord and Tenant Act*, RSS 1978, c L-6, which provides that an appeal lies to a judge of the Court of Appeal sitting in Chambers. Their appeal was heard by Lane J.A. and he dismissed their appeal as a Chambers judge. They then sought to have his decision reviewed by the Court pursuant to s. 20(3).

The Court found that it had no jurisdiction to conduct the review requested by the Beers. Rights of appeal are wholly statutory, and there is no common law or inherent right of appeal. As s. 55 provided only for an appeal to a judge of the Court in Chambers, there was no further avenue of appeal.

The Beers relied on s. 20(3) and argued it gave them the right of appeal they sought. Richards C.J.S. rejected this argument, finding that s. 20(3) related only to orders contemplated by s. 20(1) and that, regardless, s. 7(3) meant that s. 55 would necessarily trump s. 20(3):

> [7] In our view, s. 20(3) relates only to orders of the sort contemplated by s. 20(1). In other words, it allows the Court to discharge or vary Chambers orders made incidental to an appeal or matter pending in the Court. Section 20(3) does not create a free-standing right of appeal in relation to the rather unusual class of Chambers decision in issue here.
>
> [8] Finally, and in any event, we note s. 7(3) of *The Court of Appeal Act, 2000*. It provides that, if an enactment confers only a limited right of appeal, the limitation prevails over the terms of the *Act*. This is significant because the right of appeal conferred by s. 55 of *The Landlord and Tenant Act* is limited in the sense that it contemplates an appeal to a judge in

Chambers only. As such, it necessarily trumps s. 20(3) of *The Court of Appeal Act, 2000* even if s. 20(3) could be construed as broadly as the Beers suggest.

b. Standard of Review and Application

Kowalczyk v Saskatchewan Government Insurance, 2015 SKCA 47

Ms. Kowalczyk had applied to extend the time to appeal, and Jackson J.A. dismissed this application in Chambers. Ms. Kowalczyk then asked the Court to set aside this decision under s. 20(3).

The Court stated that the standard of review to be applied to Jackson J.A.'s decision was the standard approach to discretionary-type decisions as expressed in *Rimmer v Adshead*, 2002 SKCA 12, [2002] 4 WWR 119, namely, that a Chambers decision should not be "discharged or varied" pursuant to s. 20(3) "unless the judge erred in principle, disregarded or misapprehended a material matter of fact, failed to act judicially or rendered a decision so plainly wrong as to amount to an injustice" (at para 9). Given this standard of review, Richards C.J.S. concluded there was no reason for interfering with the Chambers decision because it not only stood up under the standard of review, but was also clearly correct.

III. THE COURT OF APPEAL RULES

A. Rule 4

Application of the rules

4(1) Where it is in the interests of the proper administration of justice to do so, the court or a judge may waive compliance or relieve against non-compliance with these rules and direct the procedure to be followed.

(2) Non-compliance with these rules may subject the party in default to an order for costs.

Saskatchewan Social Services v Pederson, 2015 SKCA 45, 457 Sask R 309

The Government of Saskatchewan applied to compel Cori Pederson and Bernice McInnes, the representative plaintiffs in a class action to file their memorandum of law for an upcoming hearing. The Government relied primarily on Rule 49(b)(iv) of *The Court of Appeal Rules*.

Jackson J.A. dismissed the application. In so doing, she described how a practice has developed in the Court whereby the Registrar accepts applications for leave to appeal without the accompanying Memorandum. She described how "the *Rules of Court* are an expression of the Court's practice, but they are not designed to address every conceivable issue" (at para 20). Instead, through Rule 4, "the *Rules* permit the Court or a judge to waive compliance in the interests of the proper administration of

justice" (at para 20). She noted the following comment by Culliton J.A. (as he then was) respecting a rule similar to Rule 4(1) in *Coulthard v Coulthard* (1952), 5 WWR (NS) 662 (Sask CA) at 673: "This Rule gives to the court almost complete discretion against any irregularity in complying with the Rules of court. In the exercise of this discretion, the guiding principle must be to see that justice is done."

She found that practice directives may be used pending a change in the *Rules*, but that "a judge or the Court may always waive compliance with the *Rules* as drafted even when no practice directive has been issued" (at para 22).

B. Rule 6

Notice of appeal

6 Unless otherwise provided by statute, all appeals shall be initiated by notice of appeal or cross-appeal. (Forms 1a and 1b)

L.S.O. v S.O., 2016 SKCA 151, 90 RFL (7th) 318

This case concerned an appeal from an order of a Court of Queen's Bench judge declaring that an appeal under s. 63(2) of *The Child and Family Services Act*, SS 1989-90, c C-7.2, should be struck as moot and that the children should be returned to the care of the father. The appeal was brought by the two youngest children, who were represented by counsel appointed on their behalf under s. 6.3 of *The Public Guardian and Trustee Act*, SS 1983, c P-36.3.

The father objected to the style of cause in the appeal, which designated the children as appellants. Generally, Rule 6 provides that all appeals are initiated by the notice of appeal in Form 1a, except where otherwise provided by statute. In this case, Wilkinson J. (ad hoc) found that *The Child and Family Services Regulations*, RRS c C-7.1 Reg 1, passed under s. 80(m) of *The Child and Family Services Act* provided otherwise in this case. Section 80(m) indicates that proceedings are instead entitled "In the matter of *The Child and Family Service Act* and in the matter of … [named children]". She cited *J.N.C.-M, Re*, 2014 SKCA 136, 451 Sask R 117, and *S.F., Re*, 2009 SKCA 121, 343 Sask R 112, as examples of the use of that style of cause, as opposed to that contained in Form 1a.

C. Rule 7

Style of cause in notice

7(1) The style of cause shall set out without abbreviation of names:

(a) the name of the appellant together with the designation "Appellant", followed by the appellant's status in the court appealed from;

(b) the name of each party against whose interest the appeal is taken, together with the designation "Respondent", followed by the respondent's status in the court appealed from;

(c) the name of each party against whose interest the appeal has not been taken, together with the designation "Non-party", followed by the party's status in the court appealed from.

(2) The status of the party in the court appealed from shall be in parentheses.

L.S.O. v S.O., 2016 SKCA 151, 90 RFL (7th) 318

This case concerned an appeal from an order of a Queen's Bench judge declaring that an appeal under s. 63(2) of *The Child and Family Services Act*, SS 1989-90, c C-7.2, should be struck as moot and that the children should be returned to the care of the father. The appeal was brought by the two youngest children, who were represented by counsel appointed on their behalf under s. 6.3 of *The Public Guardian and Trustee Act*, SS 1983, c P-36.3.

The father objected to the style of cause in the appeal on the basis that it designated the children as appellants. Wilkinson J. (ad hoc) found that Rule 7 did not provide any assistance in this context – "[t]he only opportunity to designate a participant in an appeal as a 'non-party' is under s. 7(c) which relates to parties 'against whose interest the appeal has not been taken'" (at para 19).

D. Rule 10

Filing notice of appeal

10(1) The notice of appeal shall be filed, with proof of service, within 10 days after service upon the last of the parties to be served, and in cases where service is not required, the notice of appeal shall be filed within 30 days after the date of the judgment or order appealed from.

(2) A notice of appeal shall not be filed after the expiration of the time period prescribed in this rule without an order of a judge.

Saskatchewan Social Services v Pederson, 2015 SKCA 45, 457 Sask R 309

The Government of Saskatchewan brought an application to compel Cori Pederson and Bernice McInnes, as representative plaintiffs in a class action, to file their memorandum of law for an upcoming hearing, in advance of the hearing date.

Before considering the application of Rules 48 and 49, Jackson J.A. considered the role of "serving" in *The Court of Appeal Rules*. She stressed that *The Court of Appeal Rules* are based on a "'serve and then file system'" and that "[w]hile there is no one rule that states this, the premise upon which the *Rules* are drafted is that a party seeking to file a document will have served the opposing party first (see, for example, Rules 10(1), 16(1)(b), 26, 27, and 48(1)(c))" (at para 12). She described the act of giving notice as follows:

> [13] The act of giving notice, that is to say, "serving" the opposing party, is fundamental to the proper operation of the Court. Occasionally, the Registrar of the Court of Appeal will accept a document without proof of service, but this is done only when the person filing a document indicates it has been served and proof of service will be filed shortly. This practice is a clear exception to the *Rules* and the Registrar exercises her discretion in this regard sparingly. The rule is: a document cannot be filed in this Court in non-criminal matters without it having been served first. Filing without serving is of no effective use to a litigant or to the Court.

E. Rule 13

Amendment to notice of appeal

13 A notice of appeal or cross-appeal may be amended at any time with leave of the court or a judge.

Phillips Legal Professional Corporation v Vo, 2016 SKCA 82, 480 Sask R 311

This decision concerned applications by the Vos to dismiss the lawyer's appeal and an application by the lawyer to amend the notice of appeal. The proceedings were routed in an assessment of bills for legal services presented by Phillips Legal Professional Corporation to the Vos. An assessment of Phillips' accounts proceeded before the local registrar pursuant to s. 67 of *The Legal Profession Act, 1990*, SS 1990-91, c L-10.1. Phillips appealed this to the Court of Queen's Bench, where the Chambers judge upheld the local registrar's decision. The appeal to the Court of Appeal was from the Chambers judge's decision.

Richards C.J.S. considered whether leave to amend the notice of appeal should be granted. This application was governed by Rule 13. He described the approach to such applications as follows:

> [27] In general terms, the Court usually takes a rather liberal approach to proposed amendments of notices of appeal. Speaking broadly, it tends to allow amendments unless they involve a new ground or argument in relation to which it might have been necessary to adduce evidence in the court below or unless they would otherwise prejudice the respondent. See: *R v Perka*, [1984] 2 SCR 232 at 240; *Howell v Stagg*, [1937] 2 WWR 331.

Despite this liberal approach, he rejected the proposed amendments for two reasons: (1) many or most of the proposed additions to the notice of appeal related to matters that were not before the Chambers judge, and (2) the application to amend the notice of appeal was not filed for some six

months after the notice was filed and after counsel for the plaintiffs had indicated he would be insisting on compliance with the timelines prescribed by *The Court of Appeal Rules*, and some six weeks after Herauf J.A. had ordered the appeal be perfected. This delay "occurred in an environment where it was obvious that time was of the essence in moving the appeal forward" (at para 29).

Holmes v Jastek Master Builder 2004 Inc., 2017 SKCA 50, 11 CPC (8th) 293

The appellants applied pursuant to Rule 13 to amend their notice of appeal in respect to a summary judgment of a Court of Queen's Bench Chambers judge dated January 13, 2017.

Ottenbreit J.A. dismissed their application in Chambers. In so doing, he found that because the costs decision was a separate decision, a separate notice of appeal was required (at para 20): "[i]t would be somewhat incongruous to graft onto an existing appeal an appeal of a decision which did not exist at the date the existing appeal was filed" and that he was not persuaded "that it is any more efficient to apply to amend the existing notice of appeal than to file a separate notice of appeal for the costs decision within the time allowed by the *Rules* and ask that the substantive decision appeal and costs appeal be heard together".

F. Rule 15

Stay

15(1) Unless otherwise ordered by the judge appealed from or by a judge, the service and filing of a notice of appeal does not stay the execution of a judgment or an order awarding *mandamus*, an injunction, alimony, or maintenance for a spouse, child or dependant adult. Unless otherwise ordered by a judge, the service and filing of a notice of appeal stays the execution of any other judgment or order pending the disposition of the appeal. (Forms 5a and 5b)

(2) Where leave to appeal from an interlocutory order is granted, the judge hearing the application may give directions as to staying proceedings.

(3) Where a writ of execution has been issued but is stayed after being issued because of an appeal, the appellant is entitled to obtain a certificate from the registrar that the execution of the writ has been stayed pending the appeal. On the deposit of the certificate with the sheriff, the execution of the writ is stayed but the execution debtor shall pay the sheriff's fees, and the amount so paid shall be allowed to the execution debtor as part of the costs of the appeal.

(4) Where the execution of a judgment or order is stayed pending an appeal, all further proceedings in the action, other than the issue of the judgment and the taxation of costs under the judgment, are stayed unless otherwise ordered.

1. General Application

Dearborn v The Director of the Financial and Consumer Affairs Authority, 2015 SKCA 99, 465 Sask R 309

Mr. Dearborn applied for stays of orders of different panels established under the administration of the Director of the Financial and Consumer Affairs Authority pending appeals of the orders to the Court. This application was brought pursuant to Rule 15 of *The Court of Appeal Rules* and s. 11(8) of *The Securities Act, 1988*, SS 1988-89, c S-42.2.

Mr. Dearborn claimed that the determination of these appeals would affect the disclosure requirements of the respondent in its investigation and that the decision should be stayed until the issue of full disclosure was determined by the Court.

Lane J.A. found that the application based on Rule 15 was without merit:

> [4] The applicant brought his application for a stay pursuant to Rule 15 of *The Court of Appeal Rules* and s. 11(8) of *The Securities Act, 1988*. The application on the basis of Rule 15 is without merit. The applicant misconstrues the operation of Rule 15 as the rule does not impose a general stay of proceedings bringing to a halt all proceedings in an action as would an order of a court directing a stay of all proceedings. The Rule imposes a stay of only one proceeding: the execution of the judgment appealed from (see *Canadian Pioneer Petroleums Inc. v Federal Deposit Insurance Corp.*, [1984] 3 WWR 765 (Sask CA) and *Saskatchewan Union of Nurses v Sherbrooke Community Centre* (1996), 141 Sask R 161 (CA)).

He instead considered the application under s. 11(8) of *The Securities Act, 1988*, applying the test for an injunction, and dismissed the application.

2. Custody and Access Orders

K.O. v T.O., 2015 SKCA 93, 465 Sask R 238

The mother applied under Rule 15 to lift the stay of execution and the application was heard on August 26, 2015. Following a trial, a judge of the Court of Queen's Bench had determined it would be in the best interests of the children to live with their mother in Indiana as opposed to living with their father on his farm near Swift Current. The father was appealing that judgment, and a stay of execution had been automatically imposed.

Jackson J.A. reviewed and summarized the case law respecting a Chambers judge's discretion to lift a stay in custody and access matters, concluding that "[i]n matters of custody and access, the discretion of the Chambers judge is governed exclusively by the consideration of what is in the best interests of the child" (at para 14). She noted that determining what is in a child's best interests requires weighing how best to minimize disruption to the child in the event of success on appeal (at para 15) and that this involves a consideration of the likelihood of success on appeal (at para 17). As such, the applicable standard of review is a consideration when assessing a child's best interests, but must not be allowed "to play too large of a role" (at para 19).

She then went on to apply these principles to the case before her. The children had been living with their mother in Indiana since the end of June and had been enrolled in school there since it had begun on August 3. The father had not been the primary parent for the children's whole lives, with the mother fulfilling that role prior to her decision to move to Indiana without the children. The trial decision had found it was now in the best interests of the children to be in their mother's care. These

factors, coupled with the reasons why the trial judge had found the children should move to live with their mother and the standard of review, persuaded Jackson J.A. to lift the stay, subject to the condition that generous access terms would be worked out.

C.L.B. v J.A.B., 2016 SKCA 18, 476 Sask R 1

C.L.B. sought to discharge or vary, pursuant to s. 20(3), three decisions of Ryan-Froslie J.A. made in Chambers. The three decisions related to applications to lift the stay, to specified parenting time pending the appeal, to enforcement of parenting time including compensatory parenting time, and to costs.

The Court considered the relationship between s. 20(3) and Rule 15 of *The Court of Appeal Rules*, specifically whether Rule 15 applies on an application under s. 20(3), with Herauf J.A. writing:

> [30] The scope of this provision was touched upon during the submissions of counsel. The substance of the submissions related to whether Rule 15 of *The Court of Appeal Rules* applies to an "application to vary or discharge" under s. 20 a decision of a single Court of Appeal judge sitting in Chambers.
>
> [31] In our view, Rule 15 is not engaged in a situation where this Court is hearing an "application to vary or discharge" a decision of a single Court of Appeal judge sitting in Chambers. The focus of Rule 15 relates to a stay from "a judgment or an order" on appeal from the Court of Queen's Bench.

Morin v Matheson, 2017 SKCA 80

Mr. Morin sought an order pursuant to *The Enforcement of Maintenance Orders Act, 1997*, SS 1997, c E-9.12, s. 57(3), staying a notice of continuing seizure and notice of arrears pending the determination of his appeal against the dismissal of an application to set aside those notices. Mr. Morin had previously applied to the Court of Queen's Bench to vary his child and spousal support obligations. A Court of Queen's Bench judge terminated his ongoing obligations to pay, but set issues regarding cancellation of arrears, quantum of arrears and terms of payment over for trial. The parties then attended a pretrial conference. In the meantime, Ms. Matheson served notices of continuing seizure and arrears on Mr. Morin's employer. Mr. Morin sought to suspend her enforcement efforts, but that application was dismissed. He then sought an interim stay of those notices pending the determination of his appeal.

Caldwell J.A. found that because s. 57 of *The Enforcement of Maintenance Orders Act, 1997*, provides that an order under appeal remains in force pending the determination of the appeal unless the court orders otherwise, it arguably supplants Rule 15 of *The Court of Appeal Rules* (at para 5). Further, in this case, because a Court of Queen's Bench judge dismissed his application, there was no lower court order upon which to impose a stay of execution.

Firkola v Firkola, 2018 SKCA 10, 6 RFL (8th) 7

Ms. Firkola had brought an application in the Court of Queen's Bench to vary an existing support order. A Chambers judge varied that order, addressing ongoing child support, and directed the action

to pretrial on the issue of retroactive child support. Mr. Firkola filed a notice of appeal against the child support component of the varied order. The parties' counsel then attended a conference call with another Queen's Bench judge to determine whether the issue of retroactive child support could proceed to pretrial conference given the pending appeal and Rule 15(4) of *The Court of Appeal Rules*.

The conference judge then issued a fiat (*Firkola v Firkola*, 2017 CarswellSask 715 (QB) (WL)), finding that a Court of Queen's Bench judge could not lift a stay of proceedings under Rule 15(4) so as to allow the parties to proceed to a pretrial conference. Instead, he concluded the Court of Appeal would have to lift the stay and that all issues were stayed pending appeal. Given this decision, the parties went to the Court of Appeal. Mr. Firkola applied for an order partially lifting the stay of execution, but only for the purpose of allowing the parties to proceed to a pretrial conference.

Caldwell J.A. found that there was no stay of execution under Rule 15(1) and therefore, there was no stay of proceedings to lift under Rule 15(4). He first described the application of Rule 15(1) generally and then to awards of child support:

> [5] As can be seen, Rule 15(1) provides that the service and filing of a notice of appeal does *not* stay the execution of a judgment or order awarding maintenance for children or dependent adults, unless otherwise ordered by "the judge appealed from" or a judge of this Court. To be clear, Rule 15(1) is concerned with the execution of judgments or orders *against which an appeal has been taken* (see *Mayrand v Mayrand* (1982), 20 Sask R 263 (CA); see also the Honourable Stuart J. Cameron, *Civil Appeals in Saskatchewan: The Court of Appeal Act & Rules Annotated*, 1st ed (Regina: Law Society of Saskatchewan Library, 2015) at 126).
>
> [6] The order that underpins the appeal in this case is an order awarding a variation of ongoing child support. The order is undoubtedly an *award of maintenance for a child* and the Queen's Bench judge who made it did not stay its execution pending an appeal. That means, by the express terms of Rule 15(1), it is *not* subject to a stay of execution and, therefore, the appeal against it does *not* give rise to a stay of proceedings under Rule 15(4).

He then considered the issue of the Chambers judge having directed the question of retroactive child support to pretrial:

> [7] The matter is, however, complicated marginally because the judge also directed the question of retroactive child support to pretrial. A direction of that nature is not technically an *award of maintenance for a child*, but Mr. Firkola has not appealed against it either. On that basis, the direction is not subject to Rule 15(1) because there is no appeal against it even though it is contained in the same broad *judgment* or *order* as is the award of maintenance. Furthermore, the judge directed the issue of retroactive child support to pretrial if Ms. Firkola pursued her claim to retroactive child support (which she has), but the direction does not actually direct that anything be *executed*. *Mayrand v Mayrand* stands for the proposition that a judgment or order that leaves nothing to be executed is not caught by Rule 15(1).
>
> [8] Finally, the direction to pre-trial in this case is a stand-alone order that is independent of and does not directly affect the ongoing child support order under appeal. This characterisation is important because, if Rule 15(1) had applied simply by reason of the direction having being contained in the same, broad order as the award of maintenance, then, arguably, Rule 15(1) would apply—at least in part—and Rule 15(4) would also then operate to stay "all further proceedings in the action", which would include the pretrial conference on

> the issue of retroactive child support. That result is not in keeping with the principles that underpin Rule 15 in this context (see: *Primeau v Primeau*, 2004 SKCA 149, 257 Sask R 66, *per* Lane J.A. (in Chambers)). On a principled basis, an order directing the matter of retroactive child support to pretrial or trial must either be distinguished from or be treated as if it were an order awarding maintenance for a child, such that the automatic stay under Rule 15(1) does not apply. To do otherwise in such circumstances would encourage delay in the resolution of child support matters, which would undermine the purpose for exempting maintenance orders from the application of the Rule 15(1) automatic stay.
>
> [9] For all of these reasons, I conclude the order under appeal is not subject to the automatic stay of execution under Rule 15(1) and, consequently, further proceedings in the action in question are not stayed by Rule 15(4).

3. Monetary Orders

Anderson v Braun, 2015 SKCA 112, 467 Sask R 199

The plaintiffs, Mr. Braun and a series of his numbered companies, had sued the defendants for negligence arising from acts and omissions in a real estate transaction. The law firm had then issued third party claims. The trial judge had found the law firm was negligent but that Mr. Braun had contributed to that negligence. Mr. Anderson, one of the third parties, filed a notice of appeal and Mr. Braun filed a cross-appeal.

Mr. Braun and the law firm both sought to lift the stay of execution against enforcement of the judgment in their favour. Jackson J.A. first reviewed the parties' positions and then set out the following principles relating to Rule 15:

> [24] Saskatchewan courts have lifted stays of execution imposed on money awards obtained at trial: see, for example, *Tekarra Properties v Saskatoon Drug and Stationery Company Ltd*. (1985), 37 Sask R 286 (CA) [*Tekarra*]; *MacKay Construction Ltd*. v *Potts Construction Company* (1983), 25 Sask R 81 (CA) [*MacKay*]; and *Bank of Nova Scotia v Simonot* (1992), 100 Sask R 257 (CA) [*Simonot*].
>
> [25] In *Tekarra*, a *per curiam* judgment, this Court said the principles guiding the Chambers judge's discretion under Rule 15(1) are "appropriateness and justice" (para. 7). The factors usually influencing the exercise of discretion to lift the stay when the judgment appealed from is a money award is to alleviate the effects of high borrowing costs or the risk of dissipation of assets. On occasion, a Chambers judge will weigh the merits of the appeal on a preliminary basis and order part-payment of the money award to the respondent (see *Vagi v Peters* (1989), 74 Sask R 46, where liability had been admitted at trial, leaving the *amount* only in issue on appeal).
>
> [26] A Chambers judge, lifting a stay of execution from a money award, must, however, be mindful of the consequences of the decision under appeal being successfully appealed, necessitating the recovery of monies already released by the Chambers judge: see *Rieger v Burgess* (1986), 53 Sask R 201 (CA) [*Rieger No. 1*]; *Rieger v. Burgess* (1986), 53 Sask R 202 (CA); and *Rieger v. Burgess* (1987), 53 Sask R 199 (CA). Often, in order to effect justice between the parties where the judgment under appeal is a money award, the amount of the judgment, with or without costs, is paid into court or a letter of credit or other form of guarantee is provided to the court: see *MacKay*, *Rieger No. 1*, and a series of authorities referred to in *Simonot*.

In light of these principles, she allowed Mr. Braun's application to lift the stay and dismissed the law firm's application. She first dealt with Mr. Braun's application, and found that while the two applications were framed as "companions", it was not possible to link the two applications and they had to be treated separately. The success of Mr. Braun's application could not be considered contingent upon him discontinuing his cross-appeal. There was no way for the law firm to resist Mr. Braun's application to lift the stay, as it had not filed a notice of appeal contesting its liability to him; this was a complete answer to his application to lift the stay. She further noted that it was arguable that the judgment as it related to Mr. Braun's claim was not stayed by Mr. Anderson's appeal in any event.

She then turned to whether the stay should be lifted as between the law firm and Mr. Thompson. While Mr. Thompson did not formally contest his liability by filing a Notice of Appeal and this should be a complete answer, the issue was whether she should be concerned about Mr. Anderson's appeal and its effect on the reviewability of the judgment as between the law firm and Mr. Thompson. If Mr. Anderson were successful with his arguments, it would have implications for the judgment for damages that the law firm held against Mr. Thompson. The law firm bore the onus to persuade Jackson J.A. that it was in the interests of justice that it should receive all or some of the fruit of its judgment now as opposed to waiting until the Court heard the matter. The sole basis of the law firm's argument was that Mr. Thompson's liability to the law firm could not be affected by Mr. Anderson's appeal, but Mr. Anderson and Mr. Thompson intended to assert the trial judge erred by not holding the law firm solely liable for Mr. Braun's loss, and whether these arguments could be made had to be decided by a panel of the Court. Therefore, she declined to grant a stay as against the law firm.

Lawson v Rees, 2016 SKCA 37, 396 DLR (4th) 472

Mr. Lawson applied pursuant to Rule 15 for an order staying the execution of spousal support arrears created as a result of an interim order. In an interim order, the Chambers judge had provided ongoing spousal support for Ms. Rees, gave Ms. Rees exclusive possession of the family home, provided for shared parenting of their son, and awarded child support to Ms. Rees. The decision was rendered January 20, 2016 and spousal support was ordered beginning August 2015 such that Mr. Lawson was in arrears of spousal support when the order was rendered. Mr. Lawson appealed only the portions of the decision relating to spousal support and exclusion possession of the family home, and had made all payments required by the order except for the spousal support arrears.

This was an application to stay the proceedings, rather than one to lift the stay. Ryan-Froslie J.A., in Chambers, found that the principles applicable to applications to lift a stay apply when imposing a stay:

> [7] Rule 15(1) of *The Court of Appeal Rules* provides that the service and filing of a notice of appeal *does not stay* the execution of an order for spousal support. Pursuant to Rule 15(2), a judge of this Court has the power to give directions with respect to staying proceedings.
>
> [8] The principles pertaining to applications to lift a stay of proceeding are well-settled. In making decisions with respect to such applications, the Court's objective is to prevent injustice and to ensure the results are as fair and equitable as possible. As stated by Lane J.A. in *Ochapowace First Nation v Araya* (1994), 123 Sask R 311 (CA) at para 11:

> … The purpose [of lifting a stay] is to minimize prejudice pending the appeal and to balance the competing interests of the respondent who has been successful against those of an appellant who ought not to be prejudiced simply by appealing. …
>
> In my view, the same objectives apply when imposing a stay, namely, to prevent injustice, to ensure the result is as fair and equitable as possible for all sides, to minimize prejudice and to balance the competing interests.

A stay was imposed with respect to the enforcement of spousal support arrears. There were arguable issues respecting the Chambers judge's decision, Mr. Lawson may be prejudiced if the order were enforced because there was a real possibility Ms. Rees would not be able to repay any overpayment, and Ms. Rees would not be unduly prejudiced because Mr. Lawson would be paying ongoing support. The imposition of a stay respecting only spousal support arrears balanced the competing interests at stake in the appeal.

Haztech Fire and Safety Services Inc. v M. Thompson Holdings Ltd., 2016 SKCA 146

M. Thompson Holdings Ltd. applied to lift the stay of execution of a Queen's Bench judgment under appeal. The stay was in place by virtue of Rule 15(1).

Richards C.J.S. summarized the principles applicable on such an application as follows:

> [6] The principles to be applied in an application to lift a stay are settled. As noted in *Gerski v Gerski*, 2006 SKCA 66, 285 Sask R 121:
>
> > [11] The principles to be applied in adjudicating an application to lift a stay are well settled. The underlying objective is to prevent injustice and to ensure that the result is as fair and equitable as possible for all sides. As stated by Lane J.A. in *Ochapowace First Nation v. Araya and Shepherd* (1994), 123 Sask. R. 311 (C.A.) at para. 11, "[t]he purpose [of lifting a stay] is to minimize prejudice pending the appeal and to balance the competing interests of the respondent who has been successful against those of an appellant who ought not to be prejudiced simply by appealing".
>
> See also: *Tekarra Properties Ltd. v Saskatoon Drug and Stationery Co.* (1985), 17 DLR (4th) 155 (Sask CA); *Horseshoe Creek Farms Ltd. v Sterling Structures Co. Ltd., Ferguson and Swertz (No. 1)* (1982), 15 Sask R 54 (CA).

M. Thompson argued that the stay should be lifted because it was concerned Haztech might dissipate assets pending the resolution of the appeal. Richards C.J.S. characterized this argument as follows:

> [8] In other words, M. Thompson's application effectively rests on the bare possibility – a possibility present by definition in every appeal from a money judgment – that Haztech might dissipate assets while it waits for the appeal to be decided. This is significant because as Caldwell J.A. observed in *Smysniuk v Stecyk*, 2013 SKCA 106, 423 Sask R 259:
>
> > [7] … the applicant is concerned the inherent duration of the appeal process will afford the respondents time to dissipate assets which might otherwise be used to satisfy the damages awards made in his favour after trial. Of course, this danger is present, to one degree or another, in every appeal

> against an award of damages and the applicant's concern, without more, is not a sufficient reason to lift the stay. …

Further, while M. Thompson argued it was key that Haztech did not dispute liability, this was not considered a decisive consideration at least in relation to the whole of the monies as the root fact was that Haztech disputed the order obliging it to pay some $500,000 in damages. Richards C.J.S. found that "[i]t matters not, for Rule 15(1) purposes, whether that dispute is based on a denial of liability or on allegation of a failure to properly ascertain the amount of damages" because either line of argument could result in Haztech owing M. Thompson less than the amount ordered by the trial judge (at para 10).

Richards C.J.S. dismissed the application, stating the following:

> [12] Considering the competing interests at play here and the overall equities of the situation, I conclude that M. Thompson's application as framed must be dismissed. In order to secure the lifting of the stay of execution of a money judgment, a respondent should normally do something more than point in general and abstract terms to the obvious reality that, pending resolution of the appeal, the appellant might dissipate assets. Unless such concerns are somehow elevated from the abstract to the concrete or particular, it is difficult to find that a case for lifting the stay has been made out. Indeed, if the stay is lifted on the facts here, Rule 15(1) would largely cease to have a meaningful effect, at least in relation to money judgments.

However, one aspect of the trial judge's decision was not under appeal, namely that pertaining to pre-breach damages plus interests. There was $21,000 in damages that would have to be paid to M. Thompson regardless of how the appeal is resolved. Therefore, the stay was lifted to the limited extent of exposing $21,000 to immediate enforcement by M. Thompson.

SGEU v Saskatchewan (Ministry of Environment), 2017 SKCA 31

SGEU applied under Rule 15 of *The Court of Appeal Rules* to lift the stay of execution of an order by a Court of Queen's Bench Chambers judge sitting in judicial review of an arbitrator's decision. SGEU only sought to lift a stay in relation to an uncontested issue in which it was the successful party in the Court of Queen's Bench. Saskatchewan, the employer, did not cross-appeal.

Relying on the principles as set out in *Haztech Fire and Safety Services Inc. v M. Thompson Holdings Ltd.*, 2016 SKCA 146 at para 6, Whitmore J.A. summarized the main consideration as follows:

> [17] It is well established that the main consideration in these applications is prejudice to the parties. As stated by The Honourable Stuart J. Cameron in *Civil Appeals in Saskatchewan: The Court of Appeal Act and Rules Annotated* (Regina: Law Society of Saskatchewan Library, 2015), "The goal is to ensure, to the extent reasonably possible, that the mere act of appealing does not work to the significant advantage or disadvantage of either party to the appeal" (at 126).
>
> [18] The question to consider is "whether the automatic stay creates an injustice against which some relief should be given" (*MacKay Construction Ltd. v Potts Construction Co.* (1983), 25 Sask R 81 (CA) at para 7).

Because the employer did not cross-appeal the issue SGEU sought to lift the stay of, it was difficult to ascertain any prejudice that would result if the stay was lifted. Further, a stay imposed by the Court of Queen's Bench was no longer in effect. Therefore, "the greater injustice would be to leave the stay in place" (at para 22). Whitmore J.A. would have lifted the stay if necessary.

However, because the employer did not cross-appeal on this issue, no stay was in effect. This is because "Rule 15(1) is concerned with the execution of judgments or orders against which an appeal has been taken. As such, the rule only applies to judgments or orders pursuant to which something falls to be executed or enforced" (at para 23, citing *Mayrand v Mayrand* (1982), 20 Sask R 263 (CA)). Because the Chambers judge's order was declaratory in nature on this point, there was nothing to be executed or enforced, so no stay had been imposed.

Saskatchewan v Racette, 2018 SKCA 17, 423 DLR (4th) 532

Mr. Racette applied to lift a stay of execution imposed by Rule 15(1), and the Government of Saskatchewan opposed this application. Alternatively, the Government applied under s. 19(5) of *The Proceedings Against the Crown Act*, RSS 1978, c P-27, to suspend payment under the judgment it had appealed against. Dr. Shaun Ladham, another appellant, took no position on either application. The Government and Dr. Ladham had appealed against a civil jury verdict where the jury awarded Dr. Racette $5,020,760.84 in damages. Dr. Racette sought to lift the stay automatically imposed on the award by Rule 15(1) only in part (as to $1.13 million).

The preliminary question that arose was whether Rule 15 applied. Caldwell J.A. in Chambers noted that this was because the Government had appealed against damages and costs against the Crown in circumstances where s. 19 of *The Proceedings Against the Crown Act* applied. He found that s. 19(5) should be interpreted narrowly and within the overall statutory scheme of s. 19:

> [16] In my assessment, by enacting s. 19(5) of *The Proceedings Against the Crown Act*, the Legislature provided for a statutory process of general application that empowers a court to suspend payment under certified money judgments against the Crown in circumstances where s. 19(4) imposes a positive obligation on the Crown to pay such judgments. That is, the purpose of s. 19(5) is to ensure, regardless of what the rules of court might say, that the Crown may nonetheless seek to obtain a suspension of its statutory payment obligation (i.e., a stay of execution) pending an appeal of the judgment or order to which that obligation pertains. Interpreted in this way, nothing about the scheme the Legislature has set up under s. 19 of *The Proceedings Against the Crown Act* is inconsistent with or contrary to the automatic imposition of a stay of execution under Rule 15(1) or, thereby, a stay of proceedings under Rule 15(4). If anything, s. 19(5) confirms that this Court retains the authority to enact rules, such as it has under Rule 15, that impose automatic stays of execution and of proceedings.
>
> [17] On this basis, Rule 15 and the jurisprudence that has developed under it lay out the framework through which this Court exercises the discretion left to it by the Legislature under s. 19(5) in circumstances when the Crown is a money judgment debtor. This places the Crown on the same level as any other judgment debtor, but also recognises the risks to the Crown, *qua* appellant, of the statutory payment obligation under s. 19(4) of *The Proceedings Against the Crown Act*. This interpretation does not interfere with or alter the Court's approach under Rule 15(1), where the Court attempts to ensure that the mere act of appealing against a judgment or order does not work an undue advantage or disadvantage to either

> party to the appeal. However, the whole of s. 19 serves to remind the parties and the Court that the analysis on an application to lift a stay must take into account the fact that s. 19(4) obliges the Crown to pay certified money judgments—something that does not affect any other judgment debtor.

On this basis, he concluded the automatic stay of execution applied in the circumstances of this case.

Next, Caldwell J.A. considered whether the automatic stay should be lifted, describing the approach as follows:

> [20] The approach set out in the jurisprudence calls for a contextual, fact-based determination of whether lifting a stay or leaving a stay in place would work to the undue advantage or disadvantage of a party to the appeal. In this respect, judges of the Court have looked to a number of factors related primarily to the nature of the prejudice and advantage under either scenario to the appellant and to the respondent but also as to whether undue prejudices or advantages might be mitigated through conditions imposed on the lifting of a stay. In *Ochapowace First Nation v Araya*, Lane J.A. encapsulated the goal of the Court in these terms:
>
> > … The underlying principle is to prevent injustice and to ensure that the result is fair and equitable to all sides. The purpose is to minimize prejudice pending the appeal and to balance the competing interests of the respondent who has been successful against those of an appellant who ought not to be prejudiced simply by appealing. ...
>
> [21] Where circumstances warrant, judges of this Court have left the stay of execution in place under Rule 15(1) but have made orders expediting the appeal proper or lifting the stay of proceedings under Rule 15(4) so as to mitigate undue prejudice or advantage in the interim. Where judges have lifted a stay of execution on awards of damages, they have generally required the appellant (i.e., the unsuccessful party at trial) to pay all or part of the damages award into court to be invested pending the result of the appeal (*Anderson v Braun*). In some circumstances, where an appellant has admitted liability at trial (*Rieger v Burgess* (1986), 53 Sask R 201(CA)), where liability was otherwise not an issue at trial (*Vagi v Peters* (1989), 74 Sask R 46 (CA)), or where the appeal does not engage the appellant's liability to pay aspects of a damages award (*Haztech Fire*), that fact has led to a lifting or partial lifting of a stay of execution accompanied by an order for immediate payment of part of the judgment appealed against. Regardless of the resulting orders, the twin objectives of preventing injustice and of ensuring "that the result is as fair and equitable as possible for all sides" underpin the Court's inquiry: *Gerski v Gerski*.

In applying this approach, he was not persuaded to lift the stay of execution as to the $1.13 million pecuniary damages, but was persuaded that justice, fairness and equity called for a partial lifting of the stay. Dr. Racette's argument was not that Saskatchewan would dissipate its assets, abscond, or otherwise fail to pay, but that the stay ought to be lifted for reasons of his financial circumstance and the cost of responding to the appeals. Caldwell J.A. noted that the financial circumstances of a respondent are relevant considerations (at para 26) but described them as a two-edged sword:

> [28] That being said, a respondent's claims of financial hardship can be a two-edged sword. It cuts both in favour and against lifting a stay because the relief sought to mitigate the hardship tends to be an order for immediate payment of all or part of an award under the trial judgment. In such circumstances, a relevant consideration for the Court is whether the appellant would be able to recover the monies paid out to the respondent if the appeal were

ultimately successful and the trial judgment set aside. In *Anderson v Braun*, Jackson J.A. explained:

> [26] A Chambers judge, lifting a stay of execution from a money award, must, however, be mindful of the consequences of the decision under appeal being successfully appealed, necessitating the recovery of monies already released by the Chambers judge: see *Rieger v Burgess* (1986), 53 Sask R 201 (CA) [*Rieger No. 1*]; *Rieger v. Burgess* (1986), 53 Sask R 202 (CA); and *Rieger v. Burgess* (1987), 53 Sask R 199 (CA). Often, in order to effect justice between the parties where the judgment under appeal is a money award, the amount of the judgment, with or without costs, is paid into court or a letter of credit or other form of guarantee is provided to the court: see *MacKay, Rieger No. 1*, and a series of authorities referred to in *Simonot*.

Dr. Racette claimed he was financially unable to proceed unless the stay were lifted, but the only evidence of this was his general statements to that effect, as he did not aver to his income or expenses and provided no documentary or other evidence to corroborate his statements. As a result, while his claims would have been more persuasive if supported by such evidence, Caldwell J.A. was "not prepared to entirely discount their weight or to conclude that no prejudice would befall him if the stay were to remain in place" (at para 27).

Further, he noted that "[t]he time it takes to bring an appeal to hearing before the Court is also a factor to consider when exercising judicial discretion under Rule 15(1), particularly where financial hardship is alleged", though he cautioned that the Rule would be rendered meaningless "if stays were lifted simply because it usually takes several months to complete the appeal process" (at para 29). This factor was considered neutral in this case because there was no suggestion the appellants were delaying matters and the parties agreed appeal management would sufficiently address concerns as to delay.

Next, he considered Saskatchewan's argument. Saskatchewan had put its liability under the jury verdict at issue in the pending appeal, and sought a new trial. Dr. Racette argued that the merit of his application turned in part on what Saskatchewan had or had not put at issue, which Caldwell J.A. agreed with, citing *Haztech Fire and Safety Services Inc. v M. Thompson Holdings Ltd.*, 2016 SKCA 146 at para 10. Saskatchewan had put the quantum of the awards of both pecuniary and non-pecuniary damages and the costs award in issue. This generally weighed against lifting the stay on the pecuniary damages and costs awards.

Lastly, Caldwell J.A. considered the merits of the appeal, finding that it was not possible to conclude Saskatchewan's appeal is *prima facie* destined to fail:

> [34] An application to lift a stay of proceedings does not entitle a judge of this Court to look at the merits of the appeal in question, other than through general lenses, such as the scope of the right of appeal and the standards of review applicable to the grounds of appeal raised. That is, in determining whether to lift a stay of execution, a judge may have regard to his or her own high level assessment as to whether the appeal is prima facie destined to fail by reason of the nature of the issues raised and the scope of the right of appeal or by reason of the nature of the adjudicative framework and the standard of review. However, in this case, the notice of appeal raises issues that invoke the customary standards of correctness and palpable and overriding error as well as the standard for reviewing discretionary decisions. In terms of the jury's verdict, it is well-settled that an appellate court will not interfere with a

> jury verdict unless the court has been persuaded that the verdict is so plainly unreasonable that no jury, properly instructed and acting judicially, could have arrived at it (*McKinley v BC Tel*, 2001 SCC 38 at paras 59–60, [2001] 2 SCR 161; *Quintal v Datta and Skochylas* (1988), 68 Sask R 104 at paras 64–66 (CA); *Baert v Graham*, 2011 SKCA 21 at paras 12–18, 371 Sask R 1). Nonetheless, given the breadth of issues raised and the fact that the standard of correctness applies to many of them, I find it is not possible to conclude that Saskatchewan's appeal is prima facie destined to fail. This weighs against lifting the stay of execution.

Therefore, there was no basis upon which to lift the stay with respect to the whole or even part of the $1.13 million. However, in the interests of fairness and equity, and with regard for the legislative intent underpinning s. 19(4) and Dr. Racette's current employment, he lifted the stay of execution to permit Dr. Racette to receive up to a maximum of the first $100,000 of the costs awarded to him at trial.

G. Rule 16

Cross-appeal

16(1) If a respondent desires to contend that the judgment appealed from should be varied, the respondent shall:

(a) within 15 days after being served with the notice of appeal, serve a notice of cross-appeal on all parties affected; and

(b) within 10 days after service on all parties, file the notice of cross-appeal with proof of service.

(2) A notice of cross-appeal shall:

(a) identify the part of the judgment sought to be varied;

(b) specify the grounds for variation; and

(c) state precisely the relief sought.

(3) The omission to serve a notice of cross-appeal does not necessarily preclude a party from seeking a variation of the judgment appealed from, as contemplated byRule 58(c) (Powers of the court), but the omission may be grounds for an adjournment of the hearing of the appeal or for a special order as to costs.

Aquila Holdings Ltd. v Edenwold No. 158 (Rural Municipality), 2016 SKCA 88, 484 Sask R 67

Aquila Holdings Ltd. and 101211085 Saskatchewan Ltd. applied pursuant to s. 33.1 of *The Municipal Board Act*, SS 1988-89, c M-23.2, for leave to appeal the decision of the Assessment Appeals Committee. The Rural Municipality of Edenwold No. 158 opposed this application and alternatively proposed its own grounds on which the decision of the Assessment Appeals Committee could be sustained.

Jackson J.A. granted the proposed appellants leave to appeal and then turned to the RM's application. Section 33.2(3) of *The Municipal Board Act* stated that the rules of the Court of Appeal applied to an appeal from s. 33.1 and Rule 16(1) of *The Court of Appeal Rules* provided that "[i]f a respondent desires to contend that the judgment appealed form should be varied, the respondent shall … within 15 days after being served with the notice of appeal, serve a notice of cross-appeal on all parties affected". She found that the RM should not be granted leave because it did not seek to *vary* the judgment appealed from:

> [28] When I heard this matter in Chambers, I was initially attracted to the notion that the RM should be granted leave on the basis of its arguments to sustain the Committee's result, along the lines of what occurred in *L & L Lawson Enterprises Ltd v Regina (City)*, 2004 SKCA 170 at para 3; *GMRI Canada Inc. v Saskatoon (City)*, 2007 SKCA 39 at paras 16–18; or *Saskatoon (City) v Boardwalk Reit Properties Holding Ltd.*, 2007 SKCA 59 at para 3, 293 Sask R 282.
>
> [29] On further reflection, it would seem that the RM is not seeking "*to vary* the judgment appealed from" which is what Rule 16(1) contemplates: *Thatcher v Lindskog* (1983), 1 DLR (4th) 763 (Sask CA); and *Sorotski v CNH Global N.V.*, 2006 SKCA 77, 285 Sask R 125, as cited in *Civil Appeals in Saskatchewan: The Court of Appeal Act and Rules Annotated* (Regina: Law Society of Saskatchewan Library, 2015) at 20.
>
> [30] The RM is seeking to sustain the result and does not require leave. Granting leave or requiring that the RM take any further steps would serve to increase costs only and is not required. The RM may make these arguments to sustain the Committee's decision without leave being granted.

H. Rule 17

Intervention
17(1) Any person interested in any proceeding before the court may, by leave of the court, intervene in the proceeding on the terms and conditions the court may direct.

(2) Any intervenor before the court appealed from shall be served with a notice of appeal and notice of cross-appeal, if any, but shall not have the status of an intervenor on appeal unless leave to intervene is first granted by the court.

(3) An application to intervene shall be made to the court on notice to all parties and other interveners in the proceeding.

Ammazzini v Anglo American PLC, 2016 SKCA 73

Daniel Ammazzini and Olson Goldsmiths Inc. sought leave to an appeal from an order made in the Court of Queen's Bench conditionally staying their proposed multi-jurisdictional class action pending a certification decision in a similar class action commenced in Ontario by Kirk Brant. Mr. Brant applied for status either as a respondent or an intervenor on the leave motion, and sought respondent or intervenor status on the appeal if leave were granted.

Ottenbreit J.A. granted the application for leave to appeal. He then considered Mr. Brant's application for status as either a prospective respondent or intervenor on the leave application and also on the appeal if leave were granted. The respondents supported his application. Ottenbreit J.A. found that the issue of his status on the application for leave or before the Court on the appeal proper was to be left to the panel, and gave him leave to apply to the panel for status upon any basis he deemed advisable:

> [22] The prospective appellants rely on *Wuttunee v Merck Frosst Canada Ltd.*, 2008 SKCA 80, 311 Sask R 146 [*Wuttunee*], for the proposition that Mr. Brant can be neither a party nor an intervenor on the application for leave to appeal or appeal because of the absence of an express statutory provision allowing that and because Mr. Brant was not added as a party in the court below. The prospective appellants submit that simply naming an entity as a third party on a style of cause in the court below does not confer any party status, nor is there any section comparable to s. 5.1 of the *Act* conferring a right upon a person who has received notice of an application for certification pursuant to s. 4(2)(c) of the *Act* to make submissions on appeal.
>
> [23] The prospective appellants argue that the *Wuttunee* decision limits the right of multijurisdictional plaintiffs to participate in a Saskatchewan class action to the Court of Queen's Bench. The prospective appellants submit that leave to appeal should be granted and the question of Mr. Brant's standing on the application for leave and any subsequent appeal should be referred to a panel of the Court for consideration.
>
> [24] It is clear that *Wuttunee*, at first glance, is an obstacle to Mr. Brant's status as a party in this Court. Moreover, Rule 17 of *The Court of Appeal Rules* speaks to intervenor status being granted by the "Court". Apart from the merits of any intervenor application, it is not clear that intervenor status can be granted by a judge in Chambers for a leave application.
>
> [25] The prospective appellants argue that a single judge in Chambers cannot grant the standing motion. The prospective appellants have no objection to submitting the issue of the standing of Mr. Brant to the panel of the Court along with the appeal if leave is granted. Moreover, the issue of standing in this Court arising out of s. 4(2)(c) and s. 5.1 of the *Act* is an important one and should, in my view, be referred to the Court.

I. Rule 19

Agreement as to transcript of evidence

19(1) In every appeal from a judgment after hearing oral evidence, where the evidence has been recorded, each party is responsible for including in the appeal book a transcript of only those parts of the evidence that are relevant to the appeal.

(2) The parties shall make every reasonable effort to reach a written agreement as to those parts of the transcript of evidence required for the appeal, within 30 days after the last party has been served with the notice of appeal.

(3) The parties shall file any written agreement within the 30 day period mentioned in Subrule (2).

(4) If the parties fail to agree, a transcript of the whole of the evidence is deemed to be required.

(5) If the court is satisfied that the costs of the appeal have been increased unduly by the

failure of a party to co-operate in reaching a written agreement, the court may take this into account when awarding costs.

Taylor v St. Denis, 2015 SKCA 1, 451 Sask R 187

Mr. Taylor had appealed three decisions of the Court of Queen's Bench relating to claims of damages for defamation. He then applied for an order that the Attorney General be required to provide the entire trial transcript at no cost on the basis of violations of his ss. 7 and 15 *Charter* rights.

Ryan-Froslie J.A. described the interaction of Rule 19 and s. 14(2) of *The Court Officials Act, 2012*, SS 2012, c C-43.101, as follows:

> [2] Rule 19 of the *Court of Appeal Rules* requires appellants in civil matters to file a trial transcript. If the parties to an appeal cannot agree on the portions of the trial transcript needed for the appeal, then "a transcript of the whole of the evidence is deemed to be required." Pursuant to s. 14(2) of *The Court Officials Act, 2012*, SS 2012, c C-43.101 [the *Act*], persons requiring a transcript are initially responsible for paying for the same. If an appellant is successful on his or her appeal, then the respondent may ultimately be ordered to assume those costs. For ease of reference, s. 14 reads as follows:
>
> > 14(1) A court official who is not a member of the public service is entitled to charge professional fees in an amount not to exceed the prescribed amount for a service.
> >
> > (2) In the case of civil matters, the prescribed professional fees mentioned in subsection (1) are payable by the party requesting the service and are costs in the cause unless otherwise directed by the court.

She then reviewed the positions of the parties before considering the trial judge's alleged breach of the rule of law, the doctrine of necessity, s. 684 of the *Criminal Code*, and ss. 7 and 15 of the *Charter*. She then considered whether requiring Mr. Taylor to pay the transcript fees breached his constitutional right of access to the superior courts, and concluded it did not:

> [56] In the context of a civil appeal between private individuals, there is no statutory authority or rule in Saskatchewan that allows the Court of Appeal or a judge thereof to either "waive" the cost of preparing a transcript or order the provincial government to pay for the same.
>
> …
>
> [58] While a constitutional right of access to this Court exists where an appellant has a statutory right of appeal, in my opinion, that right is not violated in the context of this case.
>
> [59] First, the constitutional right in issue is not an unfettered one. Not everything that limits a litigant's ability to access the courts is unconstitutional. (See: *Christie* at para. 17.) Transcripts are necessary to enable appellate courts to perform their function of reviewing lower court and tribunal decisions, and to do so in an efficient and cost effective manner. While an appellant is required, in the first instance, to bear the costs of his or her transcript, the respondent may ultimately be ordered to pay that cost if the appellant is successful in his

> or her appeal. This approach is reasonable given the necessity of a transcript for the hearing of the appeal; the fact that transcripts are evidence needed to advance an appellant's position; and, the fact that an appellant has already had his or her day in court, and is now seeking to overturn the decision of the trial judge or tribunal.
>
> [60] Second, transcript fees are very different from court fees. In this Province, transcripts are provided by private individuals, not the government. They are costs incurred for services rendered by a third party, not fees imposed by a government to fund court services or dissuade frivolous and/or vexatious claims. Transcripts are evidence and, as such, the cost associated with them, particularly in the context of civil litigation between private individuals, is personal in nature. They serve no "public" or societal purpose.
>
> [61] Third, appellants have some control over what portions of the oral evidence adduced at trial or a hearing must be transcribed for the purposes of an appeal. If the appeal involves only questions of law, no transcript may be necessary. Furthermore, the parties to an appeal can agree on what portions of the trial must be transcribed for the purposes of the appeal. If there is no agreement, an application may be made to determine that issue (see: Rule 22(5)).
>
> [62] Fourth, public funds are not limitless. It is the function of the Executive and Legislative branches of government to decide where such funds will be spent. Generally, it is for them to determine whether the public purse should be used to fund one party in a civil suit involving other private individuals. It is important to remember that respondents in such appeals are often in no better financial position than appellants, yet they must bear the cost of defending the lower court or tribunal's decision.

Even if she were wrong in this, she found that Mr. Taylor had failed to demonstrate his appeal had merit and that he could not pay for the transcript. Ryan-Froslie J.A. dismissed his application.

J. Rule 28

Contents of factum

28(1) A factum shall, except where otherwise provided or otherwise ordered, consist of the following seven parts:

> **Part I. Introduction:** The appellant and respondent shall each briefly summarize the context for the appeal.
>
> P**art II. Jurisdiction and** S**tandard of** R**eview:** The appellant shall state the source of the right of appeal, the basis for the jurisdiction of the court to determine the appeal and the applicable standard of appellate review. The respondent shall state its position with respect to the same matters.
>
> P**art III.** S**ummary of** F**acts:** The appellant shall concisely state the facts. The respondent shall state its position taken with respect to the appellant's statement of facts and any facts it considers relevant.
>
> P**art IV.** P**oints in Issue:** The appellant shall concisely state the points in issue in the appeal. The respondent shall state its position in regard to the appellant's points which the respondent wishes to put in issue. If a respondent intends to contend that the judgment should be upheld, whether in whole or in part, for reasons not found in the judgment and not raised in the appellant's factum, it

shall state that intention.

Part V. Argument: This part shall contain a statement of the argument, setting out concisely the points of law or fact to be argued and the basis for the argument, with a particular reference to the page and line of the appeal book and the authorities relied upon in support of each point. When a statute, regulation, rule, ordinance or bylaw is cited or relied upon, either as much of the statute, regulation, rule, ordinance or bylaw as may be necessary to the determination of the appeal shall be copied as an appendix to the factum or sufficient copies of the statute, regulation, rule, ordinance or bylaw may be filed.

Part VI. Relief: This part shall state the precise order the party desires the court to make, including any special disposition as to costs.

Part VII. Authorities: This part shall contain a table of authorities and statutes that the party has referred to, arranged alphabetically and citing the Supreme Court Reports where possible. Counsel citing decisions from electronic databases in factums and memorandums of authority must also provide the citation from traditional print sources.

(2) Parts I to VI of a factum shall not exceed 40 pages, unless otherwise ordered.

(3) Each paragraph in Parts I to VI inclusive shall be numbered consecutively.

ADAG Corp. Canada Ltd. v SaskEnergy Inc., 2016 SKCA 137

The appellants applied pursuant to Rule 28(2) for leave to file a factum that exceeded the prescribed limit of 40 pages, and filed a draft order that would grant the parties leave to file facta to a maximum of 70 pages each. The respondent did not consent, but sought to file a factum of equal length if the application were granted.

Whitmore J.A., in Chambers, described the role of Rule 28 as governing the length and content of facta: "[i]t requires parties to *briefly* summarize the context for the appeal, to *concisely* state the facts, to *concisely* state the points in issue, and to *concisely* set out the points of law or facts to be argued" (emphasis in original, at para 2).

In considering this application he applied the test as set out in *Ochapowace Indian Band v Saskatchewan (Minister of Justice)*, 2006 SKCA 70 at para 6:

> [6] In argument, counsel for the appellants submitted that the grounds of appeal relating to errors in the application of *The Partnership Act* are novel grounds of appeal for the Court. Counsel also submits that an issue involving the interrelationship between *The Partnership Act* and the indefeasibility provision of *The Land Titles Act, 2000*, SS 2000, c L-5.1, is likewise a novel ground. Counsel for the respondent submits he has some sympathy for the appellants. This was one of the longer trials he has participated in. At the same time, he concedes the issues are matters that were dealt with by the trial judge.

He found that this was not "one of those exceptional cases with unusually involved, complicated or extensive facts" (at para 7). In reaching this decision, he considered the number of grounds of

appeal, whether the grounds were separate or unduly complex, the length of the trial submissions, the anticipated length of the appeal book (as evidenced by an affidavit of an assistant to counsel for the appellants), and the length of the Court of Queen's Bench decision and the supplementary fiat. He then stated the following:

> [8] The rule limiting the length of a factum is a rule that should be departed from cautiously. Something more is required than evidence that the submissions at trial were lengthy. Otherwise, exceptions to the rule would become the norm and concisely stated arguments and submissions would be replaced by unnecessarily long and drawn-out written arguments, leading to a loss of efficiency and cost effectiveness in the Courts. If the parties present their arguments concisely, as required, I see nothing that leads me to conclude they cannot effectively set out their positions within 40 pages.

While there were numerous grounds of appeal, the grounds could be condensed and were not necessarily distinct or unduly complex. The application was dismissed.

K. Rule 34

> **Late filing of factum**
>
> **34**(1) A factum shall not be filed later than the time period prescribed by these rules without leave of a judge.
>
> (2) If any party fails to file a factum within the time period prescribed by these rules, any other party may apply to a judge, on notice to the party in default, for directions, including a direction that the appeal be referred to the court for disposition in light of such failure.

Matovich Estate v Matovich, 2015 SKCA 50

The appellant executrix brought an application under Rule 34(2) for an order requiring the respondent to file her factum within one week, and failing that, for the matter to be referred to the Court for disposition. The respondent had brought an application for security for costs, which was what Lane J.A. primarily addressed in Chambers. However, before concluding, he commented on the Rule 34 application:

> [23] I recognize that there are two applications before me and that the above reasons only deal with the order for security for costs. The appellant has also applied under Rule 34 for directions regarding the respondent's late filing of her factum. My direction is this: upon the appellant's payment into court of $7,748.62 within the time period specified above, I grant the respondent leave to file a late factum and the respondent shall have 30 days following the date of the appellant's payment into court of the above sum to prepare and file her factum. In failing to do so, the matter shall be remitted to the Court for disposition.

L. Rule 38

Raising additional arguments

38 A party intending to present arguments, raise points of law and cite authorities not mentioned in the factum may do so only with leave of the court.

Dearborn v Saskatchewan (Financial and Consumer Affairs Authority), 2017 SKCA 41

Mr. Dearborn applied for three orders before Richards C.J.S. in Chambers. One of these was for an order pursuant to Rule 38 to present additional arguments, raise points of law and cite authorities not mentioned in the factum, by way of filing a supplemental factum or additional written argument to be submitted in advance of the date of the hearing of the appeal. The decision noted that it was explained to counsel for Mr. Dearborn during oral argument that this application must be dismissed as applications under this rule have to be made to the "Court" rather than to a judge in Chambers.

M. Rule 41

Pre-hearing conference

41(1) A party may at any time apply to the registrar who, after consultation with the Chief Justice or the court, may direct the attendance of the parties at a pre-hearing conference.

(2) The court may on its own initiative order a pre-hearing conference.

(3) The purpose of the pre-hearing conference shall be to consider matters that might expedite the hearing and determination of the appeal.

(4) A lawyer who represents the party at the pre-hearing conference shall represent the party on the hearing of the appeal, unless the lawyer obtains leave from the court to withdraw.

Taylor v St. Denis, 2015 SKCA 1, 451 Sask R 187

Mr. Taylor had appealed three decisions of the Court of Queen's Bench relating to claims of damages for defamation. He then applied for an order that the Attorney General be required to provide the entire trial transcript at no cost on the basis of violations of his ss. 7 and 15 *Charter* rights. The respondents requested an order pursuant to Rule 46(1) that Mr. Taylor be ordered to perfect his appeals within a set time and for an order that Mr. Taylor provide security for costs.

In considering the respondents' application, Ryan-Froslie J.A. noted the power contained in Rule 41(3) to order a pre-hearing conference and adjourned the Rule 46(1) application *sine die*:

[71] A judge of this Court has the power, pursuant to Rule 41(3), to order a pre-hearing conference. I find the circumstances of Mr. Taylor's appeals warrant such an order. There shall be an order that the Registrar set *Taylor v St. Denis* CACV2415 and *Taylor v Lamon* CACV2416 for a pre-hearing conference before me. The purpose of the conference shall be to assist the parties in arriving at an agreement as to the contents of the appeal book and, in particular, in determining what portions of the trial transcripts are necessary for the purpose of the appeals and, thereafter, to set time limits to perfect the appeals. Accordingly, the respondents' application to perfect the appeals is adjourned *sine die* returnable on three days' notice by either the appellant or the respondents once the pre-hearing conference has been concluded.

N. Rule 43

Expedited appeal

43(1) In this rule, **"expedited appeal"** means one of the following appeals:

(a) an appeal from a judgment in chambers;

(b) an appeal from a judgment rendered after trial on an agreed statement of facts without additional oral evidence;

(c) an appeal from a judgment relating to the custody of a child or dependent adult or to the appointment of a legal custodian or guardian of a child or dependent adult;

(d) an appeal that the court or a judge orders to be treated as an expedited appeal because of its urgency.

(2) The regular procedure for appeals set forth in these rules applies to expedited appeals subject to the following variations:

(a) no agreements as to the transcript of evidence or the contents of the appeal book are required;

(b) the appellant shall serve and file the appeal book and factum with all appropriate copies:

(i) within 30 days after filing the notice of appeal; or

(ii) in the case of an appeal requiring a transcript, within 30 days after the registrar notifies the appellant that the transcript has been received;

(c) the respondent shall serve and file its factum with appropriate copies within 15 days after receipt by a respondent of the appellant's appeal book and factum.

(3) If a dispute arises over the contents of an appeal book on an expedited appeal, either party may apply to a judge to have the matter in dispute settled.

C.W.S. v M.D.J., 2015 SKCA 94, 465 Sask R 246

C.W.S. applied pursuant to Rule 15(1) for an order lifting the stay arising from an appeal of a custody and access order made following trial. The trial judge had determined that it was in the child's best interests to primarily reside with the mother, and granted the mother sole custody. He also reduced the father's five overnights of access to two nights. Other decisions were made regarding child support, spouse support and division of family property. The father appealed all of these decisions except that related to spousal support.

Jackson J.A. lifted the stay, conditional upon access being provided by telephone, and then ordered that appeal be treated as expedited:

> [14] It is clear that this appeal would benefit from an early hearing. So as to avoid any confusion, I order that this appeal be treated as expedited under Rule 43(1)(d) of *The Court of Appeal Rules* with two modifications. First, if the father continues with his appeal regarding the family property, the mother shall have 30 days to file her factum following receipt of the father's appeal book and factum rather than the 15 days provided for in Rule 43(2)(c). Second, if the mother does not file her factum within 30 or 15 days as the case may be, the appeal is to be set down for hearing in any event.

Maurice Law, Barristers & Solicitors v Sakimay First Nation, 2016 SKCA 92, 484 Sask R 131

The Registrar of the Court of Appeal served a notice to show cause on Maurice Law and Sakimay First Nation pursuant to Rule 46(2). The appellant lawyer then applied to show cause as to why its appeal should not be dismissed as abandoned.

In considering this application, Richards C.J.S. noted that an agreement as to the contents of the appeal book was not needed because the appeal was expedited:

> [7] On February 9, 2015, Maurice Law served an agreement as to the contents of the appeal book on Sakimay. On February 10, 2015, Sakimay's counsel approved the agreement and returned it. (Strictly speaking, an agreement of this sort was not necessary because this is an expedited appeal See: *Rule* 43(2).)

O. Rule 46

Dismissal for want of prosecution

46(1) An appellant shall diligently prosecute its appeal, perfecting the appeal within the time period prescribed by these rules. If an appellant fails to do so, a respondent may apply to a judge for an order requiring the appeal be perfected by a fixed date, failing which the appeal may be exposed to dismissal by the court for want of prosecution. (Forms 6 and 7)

(2) If an appeal has not been set down for hearing within one year after the notice of appeal has been filed, the registrar may, upon notice to the parties, refer the matter to the court to be dismissed as abandoned. Notice shall be given in Form 9, and the parties shall

have 15 days to apply to the court to show cause why the appeal should not be dismissed.

Taylor v St. Denis, 2015 SKCA 1, 451 Sask R 187

Mr. Taylor had appealed three decisions of the Court of Queen's Bench relating to claims of damages for defamation. He then applied for an order that the Attorney General be required to provide the entire trial transcript at no cost on the basis of violations of his ss. 7 and 15 *Charter* rights. The respondents requested an order pursuant to Rule 46(1) that Mr. Taylor be ordered to perfect his appeals within a set time.

After considering and dismissing Mr. Taylor's application, Ryan-Froslie J.A. turned to the respondents' application. She noted that the purpose of Rule 46(1) "is to ensure appeals are dealt with in an expeditious manner" (at para 69). In the circumstances of this case, given Mr. Taylor's attempts to avoid paying the costs of his transcripts, the matter was set down for a pre-hearing conference and the respondents' Rule 46(1) application was adjourned *sine die* returnable on three days' notice by either the appellant or the respondents once the pre-hearing conference concluded.

Maurice Law, Barristers & Solicitors v Sakimay First Nation, 2016 SKCA 92, 484 Sask R 131

Maurice Law had acted as legal counsel for the Sakimay First Nation from 2003 to 2011, and a dispute ultimately arose concerning the interpretation and effect of a retainer agreement. Maurice Law brought an application for an assessment of legal fees pursuant to ss. 64 and 67 of *The Legal Profession Act, 1990*, SS 1990-91, c L-10.1. A Court of Queen's Bench judge, in Chambers, found that the retainer agreement was not fair and reasonable but that the amounts already billed by Maurice Law represented appropriate remuneration for work done by the firm. Maurice Law then filed a notice of appeal to the Court of Appeal in October 2014 and served an agreement as to the contents of the appeal book in February 2015.

On February 23, 2016, the Registrar of the Court of Appeal served a notice to show cause on Maurice Law and Sakimay pursuant to Rule 46(2). Maurice Law applied to show cause as to why its appeal should not be dismissed as abandoned, and Sakimay appeared to oppose the application.

The sole issue before the Court was whether Maurice Law's appeal should be dismissed pursuant to Rule 46(2). Richards C.J.S. reviewed jurisprudence from other jurisdictions and noted that the bottom-line inquiry "is a question of whether it is in the best interests of justice to do so", as informed by considerations "such as the reasons for the delay, the merits of the appeal and the prejudice to the parties from striking the appeal or allowing it to proceed" (at para 13). He then established the general approach to determining whether to dismiss an appeal as abandoned in Saskatchewan:

> [14] In my view, the general kind of approach used by other appeal courts in this area recommends itself in Saskatchewan as well. The root question in deciding whether to dismiss an appeal as abandoned pursuant to Rule 46(2) should be whether it is in the interests of justice to make such an order. In coming to this determination, the Court will want to weigh

> and consider the full range of relevant factors. These will generally include, but not necessarily be limited to:
>
> > (a) the adequacy of the appellant's reason for the delay in moving matters forward;
> >
> > (b) the extent, if any, that the respondent has expressed concern about the delay or attempted to have the appellant advance the appeal;
> >
> > (c) the progress, if any, the appellant has made in preparing the materials necessary to perfect the appeal;
> >
> > (d) whether, and the extent to which, the respondent has been prejudiced by the appellant's failure to move the appeal forward or will be prejudiced if the appeal is allowed to proceed; and
> >
> > (e) whether the appellant has the willingness and the capacity to comply with the deadlines that might be imposed by the Court in relation to the perfection of the appeal.
>
> [15] At least in normal circumstances, no single one of these factors should be considered to be wholly determinative. I should note as well that, given the wording of Rule 46(2), the appellant has the onus of persuading the Court it is in the interests of justice that the appeal should not be dismissed as abandoned, *i.e.*, that it should be allowed to proceed.
>
> [16] Finally, let me say that this clarification of the basis on which an appeal will be dismissed as abandoned should not have the effect of transforming show cause hearings into major proceedings. As has historically been the case in this jurisdiction, there is no reason that such hearings cannot continue to be both to the point and expeditious.

He then turned to the application of this approach in the case before him, and found it was not in the interests of justice that the appeal be dismissed. First, Maurice Law's decision to move forward slowly while awaiting the outcome of Sakimay's election was reasonable, though there was a five-month period Maurice Law had not explained. Second, Sakimay had expressed no concern regarding Maurice Law's lack of progress in moving the appeal forward. Richards C.J.S. provided the following guidance on this point:

> [21] That said, it may be useful to offer some clarification on this issue. To begin, by referring to Sakimay's silence in response to Maurice Law's delay, I do not mean to suggest a respondent somehow bears the burden of moving an appeal forward. That obligation, of course, rests on the shoulders of the appellant. Nor do I intend to ignore the fact that a respondent who is unhappy with the pace at which an appeal is advancing can bring an application to have the appeal perfected. Rather, my point is simply that, in the present circumstances, Maurice Law's delay is somewhat less troubling than would have been the case if it had failed to move the appeal forward in the face of expressions of concern from Sakimay.

Third, Maurice Law indicated the appeal book and factum were very near finalization. Fourth, while good band government may be undermined by plaintiffs delaying litigation to find a friendlier band government, this did not translate into any meaningful prejudice in this appeal. Fifth, Maurice Law advised it was prepared to proceed forthwith with its appeal. Overall, Richards C.J.S. concluded it was in the interests of justice that the appeal proceed, though it was close to the line and he was "somewhat troubled" by Maurice Law's lack of explanation for the delay following the election.

P. Rule 46.1

> **46.1**(1) On application by any party to an appeal, the court may make an order quashing an appeal on the ground:
>
> (a) it discloses no right of appeal;
>
> (b) it is frivolous or vexatious;
>
> (c) it is manifestly without merit; or
>
> (d) it is otherwise an abuse of the process of the court.
>
> (2) Before an order is made under Subrule (1), the appellant shall be given an opportunity to be heard in accordance with Part XIV.

Jardine v Hyggen, 2018 SKCA 38, [2018] 7 WWR 713

Two applications were before the Court – one by Mr. Jardine to amend his notice of appeal and one by Ms. Hyggen to quash Mr. Jardine's appeal and, in the alternative, for an order for security for costs.

Ms. Hyggen applied to quash Mr. Jardine's appeal pursuant to Rule 46.1, focusing on the merits of his appeal and arguing his appeal was so lacking in strength as to be manifestly without merit as per Rule 46.1(1)(c). Richards C.J.S. noted that this Court had not previously considered applications pursuant to Rule 46.1(1)(c), and explained the policy rationale underlying it as follows:

> [16] The basic policy concern underpinning Rule 46.1(1)(c) is self-evident. The Rule reflects the idea that a respondent should not have to endure the expense and delay involved in playing out an appeal in the usual way if the appeal is destined to fail. But, this concern must be moderated by two somewhat competing considerations. The first is that the right to put a case before the Court of Appeal is an important aspect of the litigation process and, as such, it should not be denied to an appellant except in the clearest of circumstances. The second consideration involves the reality that applications to quash can easily lead to duplications of effort and to inefficiencies. This is so because much of the time and resources expended on an application to quash will have to be re-expended on the appeal proper if the application is unsuccessful.

He then reviewed the jurisprudence of other appellate courts including British Columbia, Ontario, Nova Scotia, Newfoundland and Labrador, Prince Edward Island, and New Brunswick (at para 17). From this review, he concluded there were three key points that control the application of the Rule:

> [19] First, the threshold for quashing an appeal as being manifestly without merit is high. The *Shorter Oxford English Dictionary*, 6th ed, defines "manifestly" as meaning "evident to the eye or to the understanding" or "plainly revealed". In the present context, an appeal that is manifestly without merit is one where it is entirely clear the appeal is destined to fail and where, conversely, there is no possibility that any ground of appeal might succeed.

> [20] Second, and relatedly, the authority to quash an appeal as being manifestly without merit should be exercised only exceptionally.
>
> [21] Third, the Court must guard against being drawn into a practice where applications to quash become a substitute for hearing appeals on their merits. More particularly, the Court must be cautious about quashing an appeal in circumstances where the required assessment of its merits involves being drawn into transcripts or other aspects of the evidence.

He then considered each ground of appeal in Mr. Jardine's notice of appeal. The ground of appeal alleging prejudice by the Chambers judge and the one concerning the Chambers judge's consideration of a criminal harassment allegation were found to be manifestly without merit such that it was entirely clear that his appeal would fail to the extent it was based on these arguments. However, Mr. Jardine's ground concerning the Chambers judge's finding of credibility respecting Ms. Hyggen was not manifestly without merit because while such a finding attracts a significant level of appellate deference, any diligent consideration of this ground would require reviewing the transcript, which "is not the sort of issue where an application to quash is appropriate" (at para 25). Further, the transcripts had not been put before the Court. Ms. Hyggen's application was dismissed.

Cowessess First Nation v Phillips Legal Professional Corporation, 2018 SKCA 101

Phillips Legal Professional Corporation, Mervin Phillips and Nathan Phillips [Law Firm] appealed the decision of a Court of Queen's Bench judge sitting in Chambers, where the Chambers judge had referred a number of accounts to the local registrar for taxation pursuant to s. 67(1)(a)(iii) of *The Legal Profession Act, 1990*, SS 1990-91, c L-10.1. The Chambers judge had also ordered the Law Firm to pay solicitor-client costs in the amount of $20,000. Cowessess First Nation then brought an application for an order quashing the notice of appeal pursuant to Rule 46.1(1)(a) of *The Court of Appeal Rules*. Cowessess argued that leave to appeal was required because the decision was interlocutory or, alternatively, that it should be quashed under Rule 46.1(1)(b) and (d) for being vexatious and an abuse of the Court's process.

The Court dismissed the application to quash the notice of appeal on both grounds. With respect to the first, Jackson J.A. concluded that the order under s. 67(1)(a)(iii) was a final order. As for the second, she noted that Cowessess did not seek to quash the Law Firm's appeal for being devoid of merit but instead argued it was "so lengthy and disorganized that Cowessess would be prejudiced if the appeal proceed[ed] and it [was] required to respond to it" (at para 36). The notice of appeal contained 53 grounds of appeal and 39 sub-grounds, and was over 13 pages. Jackson J.A. noted that "[l]ength and disorganization alone have not, to date, been sufficient to quash an appeal as frivolous and vexatious" (at para 38). Counsel for the Law Firm had not drafted the notice of appeal and assured the Court that the factum would clarify the arguments. Jackson J.A. relied on this assurance in declining to quash the appeal and noted that her decision in this regard would not "constrain a future panel of the Court from exercising its discretion to control its own process, including with respect to costs" (at para 38).

Q. Rule 47

Re-hearing

47(1) There shall be no re-hearing of an appeal except by order of the court as constituted on the hearing and determination of the appeal.

(2) An application requesting a re-hearing shall be by notice of motion, served and filed before the formal judgment is issued.

(3) The notice of motion shall state the grounds for the application and shall be supported by a memorandum of argument.

(4) The notice and memorandum shall be served on all other parties that appeared upon the appeal.

(5) Within 10 days after the service of the notice and memorandum, the other parties to the appeal may serve and file a memorandum in writing in response to the motion.

(6) The formal judgment shall not be issued until an application requesting a re-hearing has been disposed of.

Borowski v Stefanson, Prisiak, and Emerald (Rural Municipality), 2015 SKCA 140, 472 Sask R 257

Mr. Borowski sought reconsideration of the Court's earlier judgment allowing his appeal from a Court of Queen's Bench Chambers judge's decision dismissing his challenge to the validity of a municipal election. The Court had allowed Mr. Borowski's appeal from the Chambers judge's decision and spelled out the various procedural steps that had to be taken to get the question of the validity of the election before a Court of Queen's Bench judge for consideration of its merits. In Appendix A of its decision, the Court had set out the form of recognizance that Mr. Borowski was required to provide pursuant to the terms of *The Controverted Municipal Elections Act*, RSS 1978, c C-33, if he wished to pursue his challenge to the election.

Mr. Borowksi's application concerned the content of Appendix A, and requested "reconsideration" of Appendix A, but not a "rehearing". Richards C.J.S. first noted that this application was highly unusual, as the Court has no jurisdiction to reconsider a decision:

> [7] As explained to Mr. Borowski during oral argument, this application is highly unusual. When a party is unsatisfied with a decision of the Court of Appeal, the normal course of action is to seek leave to appeal to the Supreme Court of Canada. In the circumstances here, the only *possible* way in which this Court could alter the substance of its June 19, 2015 decision would be by way of a rehearing. It simply has no jurisdiction to "reconsider" the decision.

He then characterized Mr. Borowski's application as being one for rehearing per Rule 47 of *The Court of Appeal Rules*, despite Br. Borowski's position. He then stated:

> [9] That said, rehearings are not granted for the asking. Considerations of cost and finality dictate that a rehearing should be granted in only special or unusual circumstances. An

> allegation that the decision is wrong is not enough to trigger a rehearing. See: *Storey v Zazelenchuk* (1985), 40 Sask R 241 (CA) at 243–44; *HDL Investments Inc. v Regina (City)*, 2008 SKCA 59 at para 3.

He dismissed Mr. Borowski's application on the basis that there were no special or unusual circumstances to justify a rehearing.

Peter Ballantyne Cree Nation v Canada (Attorney General), 2017 SKCA 5, [2017] 5 WWR 84

Peter Ballantyne Cree Nation and SaskPower both applied for a rehearing under Rule 47 of *The Court of Appeal Rules*. A Court of Queen's Bench Chambers judge had, on an application, for summary judgment, dismissed the claim of the Cree Nation in its entirety. The Court of Appeal dismissed the appeal other than the claim against Saskatchewan and SaskPower.

Herauf J.A. reviewed the law relating to applications for rehearing:

> [3] Before proceeding to identify and analyze the grounds of the applications for a rehearing, it is important to mention that all parties agree the decision of this Court in *Storey v Zazelenchuk* (1985), 40 Sask R 241 [*Storey*], sets out the test a court must consider on an application for a rehearing. The majority reasons in *Storey* state that:
>
> > [5] …The guiding principle in rehearing applications in civil matters where the judgment has not been perfected seems to be that a Court of Appeal will reconsider its judgment only in special or unusual circumstances…
>
> [4] The determination as to what circumstances are to be considered special or unusual is left to be decided on a case-by-case basis. (See also *Borowski v Stefanson, Prisiak, and Emerald (Rural Municipality)*, 2015 SKCA 140 at para 9, 472 Sask R 107; *Whatcott v Canadian Broadcasting Corporation*, 2016 SKCA 51 at para 1, 395 DLR (4th) 294.)

The application was then dismissed on the basis that neither party had demonstrated special or unusual circumstances that would warrant a rehearing.

Leave to appeal to the Supreme Court was dismissed: 2017 CanLII 38581.

R. Rule 48

Form of applications

48(1) Unless otherwise provided, an application to the court or a judge shall:

> (a) be by notice of motion in the form provided in the rules or in accordance with Subrule (2);
>
> (b) have attached all material upon which the applicant relies to support the application; and
>
> (c) be served and filed at least three clear days before the day set for hearing the application.

(2) Where no form is provided by the rules for a particular motion, the notice shall:

(a) state the basis for the motion;

(b) set forth the grounds upon which the motion is made; and

(c) state precisely the relief sought by the applicant.

(3) An application to a judge shall be made returnable on a regular chambers date and the hearing of any application may, from time to time, be adjourned upon such terms, if any, as a judge shall think fit.

(4) Regular chambers sittings are to be held:

(a) in Regina on the second and fourth Wednesdays of each month; and

(b) in Saskatoon on the first day of each regular court sitting.

(5) A party intending to oppose an application shall:

(a) serve a copy of each affidavit upon which that party intends to rely at the hearing on every other party to the application; and

(b) file each affidavit with proof of service at least one clear day before the day set for hearing the application.

(6) If a party files a brief of law with respect to an application, the brief:

(a) must be concise and must address the legal aspects of the case; and

(b) must be served on every other party to the application and filed at least one clear day before the day set for hearing the application.

(7) If a judge or the registrar is satisfied that the matter is urgent, the judge or registrar may arrange a special chambers sitting.

(8) Where the parties agree, an application in chambers may be determined on the basis of written submissions.

(9) Where the parties agree or the registrar directs, an application in chambers may be made by telephone conference.

Saskatchewan Social Services v Pederson, 2015 SKCA 45, 457 Sask R 309

The Government of Saskatchewan brought an application to compel Cori Pederson and Bernice McInnes, as representative plaintiffs in a class action, to file their memorandum of law for an upcoming hearing, in advance of the hearing date.

Jackson J.A., in Chambers, dismissed the application. She described Rule 48 as follows:

> [14] Rule 48 is the general rule pertaining to all applications. Since Rule 48 applies to all applications, including an application for leave to appeal, the omission of the words "and serve" in Rule 49 is of no consequence. Rule 48(1)(c) makes it clear that an application must "be served and filed at least three clear days before the day set for hearing the application".
>
> [15] The Court of Appeal adopted Rule 48 in 2014 (replacing the old Rule 48) in response to the promulgation of the new *Queen's Bench Rules*, but the new Rule 48 makes little change to the practice. Rule 48 requires that the application must be filed at least three clear days before the day set for hearing the application; and a brief of law must be filed at least one

clear day before the day set for hearing the application. These time periods may be found in the old *Queen's Bench Rules*, which formerly had been adopted by old Rule 51 of *The Court of Appeal Rules*.

S. Rule 49

Applications for leave to appeal

49 Where an application is made for leave to appeal, the applicant shall:

(a) provide the registrar with the file of the court appealed from; and

(b) file with the application:

(i) the judgment or order issued by the court appealed from;

(ii) the reasons for the judgment or order, if any;

(iii) a draft notice of appeal; and

(iv) a memorandum specifying the grounds for seeking leave. (Forms 4a and 4b)

Saskatchewan (Minister of Social Services) v Pederson, 2015 SKCA 45, 457 Sask R 309

The Government of Saskatchewan applied to compel Cori Pederson and Bernice McInnes, the representative plaintiffs in a class action to file their memorandum of law for an upcoming hearing. The Government relied primarily on Rule 49(b)(iv).

Jackson J.A. considered Rule 49, and how the memorandum of law is "intended to indicate precisely how the test from *Rothmans, Benson & Hedges Inc. v Saskatchewan*, 2002 SKCA 119, 227 Sask R 121, applies to the particular application for leave to appeal" and that the length and complexity of the memorandum can vary depending on the nature of the order or decision for which leave to appeal is requested (at para 16). She noted there is no obligation to file a memorandum under Rule 49 and then a brief of law under Rule 48.

She then described the general practice in this jurisdiction and the reasons for it:

> [17] As counsel for the respondents indicates, the practice in this jurisdiction has been (for some time) to accept an application for leave to appeal without the accompanying Rule 49 Memorandum. The filing of the application for leave to appeal is a place-marker, and the Memorandum follows later. There are good reasons for this.
>
> [18] Subsection 9(3) of *The Court of Appeal Act, 2000*, SS 2000, c C-42.1 establishes the general rule that an application for leave to appeal must be made within 15 days after the date of the decision for which leave to appeal is being sought or within any time ordered by the court or a judge; other statutes allow a 30- day time period (see, for example, s. 33.1 of *The Municipal Board Act*, SS 1988-89, c M-23.2).
>
> [19] Given these short time periods, if the Registrar were to reject applications for leave to appeal because they were not accompanied by a Rule 49 Memorandum, one of two things would happen. Most applications would be out of time, necessitating an application to extend

> the time, thus increasing litigation costs unnecessarily, or the Memorandum would be so brief as to be of little help to the Chambers judge. Furthermore, some parties applying for leave, particularly self-represented litigants, never file a brief of law of any sort, preferring to make oral submissions. This latter practice is not encouraged as it may not lead to the best outcome, but it is tolerated.
>
> [20] In light of these considerations, a practice has developed in this Court whereby the Registrar accepts applications for leave to appeal without the accompanying Memorandum. In that regard, it is important to note the *Rules of Court* are an expression of the Court.s practice, but they are not designed to address every conceivable issue. Thus, the *Rules* permit the Court or a judge to waive compliance in the interests of the proper administration of justice:
>
> > **Application of the rules**
> > **4**(1) Where it is in the interests of the proper administration of justice to do so, the court or a judge may waive compliance or relieve against non-compliance with these rules and direct the procedure to be followed.

She described the interaction of Rules 48 and 49 as follows:

> [23] The Registrar accepts an application for leave to appeal under Rule 49, even if it is not accompanied by the Memorandum mentioned in Rule 49(b)(iv), on the understanding that the party applying for leave will ensure the Memorandum is served and filed as part of the application "at least three clear days before the day set for hearing the application," which is 4:00 p.m. on the Thursday before a Wednesday Chambers date in Regina, and 4:00 p.m. on Tuesday before a Monday Chambers date in Saskatoon. This is what Rule 48(1)(c) requires.

Ultimately, Jackson J.A. dismissed the application. The issue before her was whether she should make an order compelling counsel for the representative plaintiffs to serve and file the memorandum for leave earlier than "at least three clear days" before the hearing of the application. Assuming, but not deciding, that authority could be found for such an order, Jackson J.A. decided against doing so for three reasons:

(1) there was no principled basis for so ordering as nothing set this application for leave apart from any other complex application for leave;

(2) Chambers applications are intended to be as summary as the circumstances will allow and such an order could lead to unintended consequences such as applying to file a reply memorandum, serving to increase litigation costs; and

(3) though counsel wanted to receive the Memorandum at an earlier time to be able to respond, "the primary goal of the opposing party's written brief in relation to an application for leave to appeal is an independent examination of the application of the *Rothmans* criteria to the particular circumstances of the appeal at hand" and opposing briefs of law may be filed independently (at para 27).

She then described the role of timely filing in Chambers applications as follows:

> [28] Having concluded thus, it is important to stress that the *Rules* provide minimum time frames designed to accommodate all types of applications. However, the effective operation of the Chambers system depends on materials being filed within sufficient time to allow the Chambers judge and opposing counsel to review the materials. If the materials are not filed

> in sufficient time for proper preparation, delay and increased costs are the inevitable result. This is particularly so in complex matters. If the Chambers judge does not have sufficient time to prepare to hear the application, the matter will be reserved. If unexpected submissions are made, the opposing counsel may need an adjournment. These are considerations that counsel appearing in Chambers must bear in mind in determining when to file materials in support of a requested order.

T. Rule 53

> **Security for costs**
>
> **53**(1) The court or a judge may in special circumstances order that security be given for the costs of an appeal.
>
> (2) Where a judge makes an order under this rule and the order is not complied with, the party in whose favour the order was made may apply to the court on 10 days notice to have the appeal dismissed.

Taylor v St. Denis, 2015 SKCA 1, 451 Sask R 187

Mr. Taylor had appealed three decisions of the Court of Queen's Bench relating to claims of damages for defamation. He then applied for an order that the Attorney General be required to provide the entire trial transcript at no cost on the basis of violations of his ss. 7 and 15 *Charter* rights. The respondents requested an order pursuant to Rule 46(1) that Mr. Taylor be ordered to perfect his appeals within a set time and for an order that Mr. Taylor provide security for costs. The respondents argued Mr. Taylor did not have sufficient resources to pay their costs if they were successful.

In considering the respondents' costs application, Ryan-Froslie J.A. considered whether there were "special circumstances" to justify ordering security for costs, relying on the four principles outlined by Richards C.J.S. in *Farmers of North America Inc. v Bushnell*, 2013 SKCA 65, 417 Sask R 91. In that decision, Richards C.J.S. had ordered security for costs because the appellant had been delinquent with respect to court orders and difficult during the course of the appeal.

Given the principles, she concluded that at this juncture in the proceedings, she could not find special circumstances to warrant an order for security of costs:

> [75] In the appeal at hand, I cannot find special circumstances exist that warrant an order for security of costs at this juncture. Given Mr. Taylor's financial situation and the fact he lives in British Columbia, the respondents may have difficulty collecting costs if they are successful on the appeal, but that alone is not sufficient to warrant an order for security of costs. Because transcripts have not yet been filed in this appeal, it is difficult to assess whether the appeal has merit. I am satisfied, however, on the limited information before me, that the appeals are neither vexatious nor frivolous. In my opinion, they are not "doomed to failure." There are arguable issues of law and, accordingly, Mr. Taylor's appeals may have merit. Given Mr. Taylor's financial circumstances and the estimated cost of the transcripts, I

> am satisfied an order for security of costs would have the effect of rendering Mr. Taylor unable to proceed with his appeals. In the circumstances, the respondents' application for security of costs is dismissed, with a right to renew it if Mr. Taylor does not pay for the trial transcripts, there is undue delay in perfecting his appeals or on any other ground a judge of this Court deems reasonable.
>
> (Emphasis in original)

Matovich Estate v Matovich, 2015 SKCA 50

The decision in the Court of Queen's Bench dismissed an action for partition or sale of the home quarter, owned jointly by the two parties. The trial judge had refused to exercise his discretion to grant the application for partition and sale, had dismissed the application, and had awarded the respondent all disbursements and costs on a party-and-party basis.

There were now two applications before Lane J.A. in Chambers regarding the pending appeal. One was by the respondent, who sought security for costs pursuant to Rule 53(1). The other was by the appellant, who sought an order pursuant to Rule 34(2) requiring the respondent to file her factum within one week, and providing that if she failed to do so, the matter be referred to the Court for disposition. Before considering the two applications, Lane J.A. noted that while neither party had cited decisions from the Court where it had decided two applications of this nature at the same time, there was authority from British Columbia "for the proposition that security for costs can be ordered against the appellant with directions to the respondent to file his or her factum in a specified time period following the provision of security for costs" (at para 18), citing *Toch v Grove*, 2010 BCCA 351, 293 BCAC 236.

Lane J.A. found that given the facts, justice and equity in these circumstances required an order for security of costs. He described such an order as "a discretionary order which should be made sparingly" (at para 19) and one which requires the Court to balance the interests of both parties, citing *Farmers of North America Incorporated v Bushnell*, 2013 SKCA 65 at paras 8–12, 417 Sask R 91. He stated the following regarding why it should be ordered:

> [21] In my view, this is a circumstance where security for costs should be ordered. The evidence that the appellant executrix has sufficient assets to pay a costs award on appeal is unsettled, and the appellant executrix has failed to pay the costs that were ordered against her at trial. I will refrain from commenting on the merits of the appeal at this stage of the proceedings, except to state that the trial judge's decision to decline to order partition and sale is a discretionary decision, and it attracts a deferential standard of review: *Phillips v Phillips*, 2010 SKCA 117 at para 10, 324 DLR (4th) 534. This standard of review establishes a high hurdle for the appellant to clear in order to succeed on this appeal.

The amount was fixed at $3,500, with the amount of the taxed costs below being added, for a total of $7,748.62, and Lane J.A. required that this be paid within 30 days, failing which the respondent could apply to strike the appeal. All further steps were stayed until the amount was paid into court. If the amount was paid, the respondent had leave to file a late factum, with 30 days following the payment to do so, and if the respondent failed to do so, the matter would be remitted to the Court for disposition.

Jardine v Hyggen, 2018 SKCA 38, [2018] 7 WWR 713

Two applications were before the Court – one by Mr. Jardine to amend his notice of appeal and one by Ms. Hyggen to quash Mr. Jardine's appeal and, in the alternative, for an order for security for costs.

The Court dismissed Mr. Jardine's application to amend his Notice of Appeal, and Ms. Hyggen's application to quash Mr. Jardine's appeal, before turning to Ms. Hyggen's application for an order for security for costs pursuant to Rule 53. Ms. Hyggen sought an order requiring Mr. Jardine to post security in the amount of $6,000.00 because there was a poor prospect Mr. Jardine's appeal would be successful and that she would have a challenge in recovering any costs ultimately awarded in her favour.

Citing the principles set out in *Farmers of North America Incorporated v Bushell*, 2013 SKCA 65, 417 Sask R 91, Richards C.J.S. concluded he was not persuaded the case involved the sort of "special circumstances" required by Rule 53. While two grounds of Mr. Jardine's appeal were manifestly without merit, he was unable to conclude the remaining ground was so weak as to warrant his appeal being quashed. As to whether there was a meaningful risk costs awarded in Ms. Hyggen's favour would not be recoverable or would be recovered only with significant difficulty, title searches demonstrated Mr. Jardine was the registered owner of four parcels of land and the value of each property when title was issued; they did not reveal whether, and to what extent, the value of the property had appreciated or depreciated. It was unclear what assets or financial resources Mr. Jardine had, and there was no suggestion Mr. Jardine was unemployed. Ms. Hyggen had also referenced the Chambers judge's order for costs against Mr. Jardine, but the only document demonstrating this was a draft Bill, and while he "appreciate[d] Queen's Bench assessment officers may be reluctant to act when a case is on appeal, there is simply no suggestion here that Ms. Hyggen has taken any steps to collect her Queen's Bench award of costs, or, relatedly, that Mr. Jardine has resisted any such efforts" (at para 40).

U. Rule 54

Taxation of costs

54(1) Unless otherwise ordered:

(a) the costs of an appeal or application shall be taxed as between party and party by the registrar in accordance with the fees set out in the appropriate column of the 'TARIFF OF COSTS IN THE COURT OF APPEAL' which is attached as Schedule 1 to these Rules; and

(b) Column 2 of Schedule 1 applies to the taxation of costs where non-monetary relief is involved.

(2) The court or a judge may direct that the costs of an appeal or application be taxed as between solicitor and client.

(3) A party entitled to costs shall:

(a) take out a Notice of Appointment for Taxation of Costs in Form 11a by first

obtaining a date and time for taxation from the registrar;

(b) prepare a proposed bill of costs in Form 11b;

(c) serve the Notice of Appointment for Taxation of Costs and proposed bill of costs on the party against whom costs were imposed; and

(d) file the Notice of Appointment for Taxation of Costs, proposed bill of costs and proof of service with the registrar.

(4) If a party entitled to costs fails or refuses to take out an appointment for taxation in Form 11c within a reasonable time, any party liable to pay costs, or any party whose costs depend on the determination of another party's costs, may obtain a notice to take out an appointment for taxation on filing proof of:

(a) a written demand for the taxation made to the party entitled to costs; and

(b) the failure or refusal to take out the appointment for taxation by the party entitled to costs.

(5) The party that obtains a notice to take out an appointment for taxation in Form 11c pursuant to Subrule (4) shall serve it on every party interested in the taxation.

(6) If the party entitled to costs fails to take out an appointment for taxation within 14 days after being served with the notice pursuant to Subrule (5), the registrar may proceed to tax the costs of that party in that party's absence.

(7) On a taxation, the registrar may do any of the following:

(a) take evidence by affidavit, administer oaths or affirmations and examine witnesses, as the registrar considers appropriate;

(b) require production of records;

(c) require notice of the taxation to be given to all persons who may be interested in the taxation or in the fund or estate out of which costs are payable;

(d) give any directions and perform any duties that the registrar considers are necessary for the conduct of the taxation;

(e) refer a matter requiring direction to the court or a judge.

(8) After a taxation, the registrar may do any of the following:

(a) if parties are liable to pay costs to each other:

(i) adjust the costs by way of set-off; or

(ii) delay the allowance of costs a party is entitled to receive until that party has paid or tendered costs that the party is liable to pay;

(b) award the costs of a taxation to any party and fix those costs.

(9) The registrar shall:

(a) if a party specifically objects to items on the taxation before the registrar, note those objections in the certificate as to taxation of costs; and

(b) if requested to do so by a party interested in the taxation, provide written reasons for the decision.

McNabb v Cyr, 2018 SKCA 51

The appeal concerned the costs awarded in the Court of Queen's Bench and the determination of what costs to award with respect to an appeal in the Court of Appeal in the context of the *First Nations Elections Act*, SC 2014, c 5. The George Gordon First Nation had held a general election, with Mr. McNabb elected Chief, and Mr. McMaster acting as the Chief Electoral Officer. Mr. Cyr applied as an elector to set aside the election pursuant to s. 31 of the *First Nations Elections Act.* A Court of Queen's Bench Chambers judge set aside the entire election, and the Court of Appeal reversed this decision in respect to the election of the councillors, but upheld the decision setting aside the election of the Chief.

The Court first dismissed the appeal respecting the costs awarded in the Court of Queen's Bench, before turning to the costs arguments relating to the appeal. In the Court of Appeal, Mr. Cyr sought costs on a solicitor-client basis against the George Gordon First Nation. Mr. Cyr argued this on the basis that there was a presumption Mr. McNabb's, or the councillors', legal expenses had been paid by the George Gordon First Nation, relying on *Memnook v Wapass*, 2012 FC 1307 at para 43, [2013] 1 CNLR 215, and *Knebush v Maygard*, 2014 FC 1247, [2015] 4 FCR 367. Whitmore J.A. reviewed this jurisprudence as well as *Bellegarde v Poitras*, 2009 FC 1212, aff'd 2011 FCA 317, and *Michel v Adams Lake Indian Band Community Panel*, 2017 FC 835 at paras 57–61. He summarized this jurisprudence as follows:

> [53] While subsequent jurisprudence has interpreted *Bellegarde* as establishing a presumption that a First Nation has paid legal costs, in *Bellegarde*, itself, there was evidence that the First Nation was paying the respondent's legal costs. See also *Shotclose v Stoney First Nation*, 2011 FC 1051 at para 18, where the respondents' costs were being paid by a First Nation, and the applicants' costs were ordered to be paid on the same basis.
>
> [54] The principles behind a First Nation paying costs of the parties are set out in *Knebush*:
>
> > (a) the promotion of "First Nations governance law" (at para 57);
> >
> > (b) the recognition of the "imbalance between an individual member of a First Nation who brings a judicial review to have a First Nation's laws be observed and the respondents who are the governing body of the First Nation" (at para 59); and
> >
> > (c) the avoidance of the "inference of winners and losers" (at para 60).

He noted there was no evidence George Gordon First Nation had paid the costs of Mr. McNabb or the elected councillors, and found it was not appropriate to award such costs against George Gordon First Nation here:

> [52] In the circumstances of this case, I do not think it is appropriate to award costs of any of the parties against George Gordon FN. George Gordon FN was not named as a party to the proceedings and did not participate in the proceedings. Costs were not sought against George Gordon FN in the originating application but were only raised in final argument before the Chambers Judge. George Gordon FN was not named as a party to the appeal and Mr. Cyr did not apply to join George Gordon FN for the purpose of seeking costs against it in the appeal. After costs had been sought against it, and this Court sought its submissions, George Gordon FN responded, opposing costs being assessed against it. This distinguishes this case from *Memnook*, where that First Nation took no position on costs and from *Knebush*, where the

> respondents were named parties, both in their personal capacity and in their capacity as Band Councillors of the First Nation.

Further, ordering George Gordon First Nation to pay costs would not achieve the goals suggested in the jurisprudence, would penalize the councillors, and seemed somewhat of an ambush to raise this issue without naming George Gordon First Nation in the application. In so stating, Whitmore J.A. acknowledged that "[a]s a general rule" it seemed "it would be appropriate that a chief electoral officer be indemnified for his costs by the First Nation", but that Mr. McMaster had not sought costs here (at para 58).

V. Rule 55

Payment of costs by lawyer

55 The court or a judge may direct that costs be paid by a lawyer without recourse to the lawyer's client.

McNabb v Cyr, 2018 SKCA 51

The appeal concerned the costs awarded in the Court of Queen's Bench and the determination of what costs to award with respect to an appeal in the Court of Appeal in the context of the *First Nations Elections Act*, SC 2014, c 5. The George Gordon First Nation had held a general election, with Mr. McNabb elected Chief, and Mr. McMaster acting as the Chief Electoral Officer. Mr. Cyr applied as an elector to set aside the election pursuant to s. 31 of the *First Nations Elections Act.* A Court of Queen's Bench Chambers judge set aside the entire election, and the Court of Appeal reversed this decision in respect to the election of the councillors, but upheld the decision setting aside the election of the Chief.

After dismissing the appeal respecting costs in the Court of Queen's Bench and declining to award costs against George Gordon First Nation in the Court of Appeal, the Court considered whether to award costs against Mr. Phillips, counsel for Mr. Cyr, personally. Whitmore J.A. noted the troubling conduct of Mr. Phillips, both in the Court of Queen's Bench and the Court of Appeal, which involved his allegations of fraud against Mr. McMaster despite the Chambers judge's finding there was nothing that pointed to fraud, bad faith or corruption by Mr. McMaster and cautions from the Court of Appeal that such allegations were of no assistance. Whitmore J.A. turned to the following excerpt from The Honourable Stuart J. Cameron, *Civil Appeals in Saskatchewan: The Court of Appeal Act and Rules Annotated* (Regina: Law Society of Saskatchewan Library, 2015) at 221–222 (at para 68):

> Only where there has been "a serious dereliction of duty" by the lawyer does the court have jurisdiction to order the lawyer to pay the costs of proceedings personally. Mere error of judgment, even if it constitutes the equivalent of negligence, is insufficient; there must be something that amounts to a serious even gross, dereliction of duty, though normally it is

> unnecessary to establish *mala fides*: *Boyko v Sitter; Re Hawrish* (1964), 49 DLR (2d) 464, 50 WWR 616 (Sask CA).
>
> An order for costs against a lawyer personally is essentially compensatory not punitive and, having regard to the "entirely satisfactory analysis" of principle in *Young v Young* (1990), 75 DLR (4th) 46, 50 BCLR (2d) 1 (CA), an order of this nature may be made against a lawyer if the proceedings are characterized by repetitive and irrelevant material, excessive motions, and bad faith on the part of the lawyer in encouraging this abuse. The court must be "extremely cautious", however, in awarding costs against a lawyer in these situations, given the duty of lawyers to respect the confidentiality of their instructions and to pursue even unpopular causes with courage. A lawyer should not be placed in a situation where "fear of an adverse order of costs may conflict with these fundamental duties of his or her calling" and, assuming that costs might, in certain circumstances, "be imposed for contempt of court", no such finding had been against the lawyer: *Young v Young*, [1993] 4 SCR 3 (per McLachlin J. at 135-6).

He concluded he was not persuaded Mr. Phillips' conduct amounted to a serious dereliction of duty, though it was close to the line (at para 69).

W. Rule 59

> **Fresh evidence**
>
> **59**(1) A party desiring to adduce fresh evidence on appeal shall, in accordance with existing law, apply to the court for leave to do so by notice of motion returnable on the date fixed for hearing the appeal.
>
> (2) The notice of motion shall be served on all parties and filed not later than 10 days before the date fixed for hearing the appeal.

1. Civil

Pederson v Saskatchewan (Minister of Social Services), 2015 SKCA 87, 465 Sask R 107

The plaintiffs were former wards of the province. They had applied for certification of a class action under *The Class Actions Act*, SS 2001, c C-12.01. This application was dismissed by a Chambers judge of the Court of Queen's Bench. The plaintiffs were now seeking leave to appeal that decision, and were also applying to extend the time for seeking leave to appeal and to file fresh evidence on this application. The fresh evidence was an affidavit of an individual who alleged he was a member of the class and proposed to act as a representative plaintiff in the class action.

Ottenbreit J.A., in Chambers, granted the extension and also granted leave to appeal. However, he found that he did not have jurisdiction to consider the affidavit material as fresh evidence: "With respect to the filing of fresh evidence, Rule 49 only allows such applications to be made on appeals.

However, this application is not an appeal. I determine that I lack the jurisdiction to consider the affidavit material as fresh evidence" (at para 14). He dismissed the application to file fresh evidence.

Ardila v Renas, 2016 SKCA 15, 472 Sask R 292

Mr. Ardila and his holding company had applied pursuant to s. 234 of *The Business Corporations Act*, RSS 1978, c B-10, alleging Mr. and Mrs. Renas and their holding company had acted in an oppressive manner by removing Mr. Ardila as a director of Maximum Poly Inc. and by refusing to buy back his shares at "fair market value". A Court of Queen's Bench Chambers judge dismissed this application.

Mr. Ardila and his holding company sought to adduce fresh evidence. This application was denied:

> [17] The fresh evidence application must fail. It is questionable whether the material was admissible in any event, or rather simply an opinion by an individual who was not qualified as an expert. Further, it was clearly available to be presented to the Court below. Mr. Ardila averred in an affidavit before the Chambers judge that he did not place the Kijiji ad in December 2014. On receiving the affidavit material from the Respondents which exhibited the ad, the Appellants could have moved in the Queen's Bench to determine its authenticity at that time. Assuming, however, the evidence is admissible, it simply does not meet the test as set out in *R v Palmer*, [1980] 1 SCR 759, and as recently restated by this Court in *Walmart Canada Corp. v Saskatchewan (Labour Relations Board)*, 2006 SKCA 142, 289 Sask R 20, because with diligence it could have been placed before the Chambers judge.

The appeal was dismissed.

Holt v Saskatchewan Government Insurance, 2018 SKCA 7

Ms. Holt appealed a decision of a Court of Queen's Bench Chambers judge pursuant to s. 194(1) of *The Automobile Accident Insurance Act*, RSS 1978, c A-35. The respondent objected to paragraphs 57 and 58 of her factum on the basis they were fresh evidence that were not before the trial judge. The paragraphs were left in:

> [33] The respondent objects to paragraphs 57 and 58 of the appellant's factum, arguing they amount to fresh evidence that was not before the trial judge. Paragraph 57 is a chart that purports to depict the historical percentage of CPI from 2007 until 2016. Paragraph 58 depicts the appellant's actual income replacement benefit in 2017, the income replacement benefit for a hypothetical student who had been injured in 2016, and the difference between the two. This chart is presumably intended to illustrate the point that it would take ten years for the appellant to reach the present level of the hypothetical 2016 student utilizing an annual CPI value of 1.64%. (The 1.64% annual CPI adjustment represents the average of the CPI over the past 10 years.)
>
> [34] Clearly, if paragraphs 57 and 58 purported to be "evidence" intended to be accepted by this Court for the truth of their content, or for fact-finding purposes, the respondent has a valid point (*Oleskiw Estate v Oleskiw*, 2000 SKCA 134, 199 Sask R 271). As I understand it, the purpose of these charts is simply to illustrate how a student's income replacement benefit varies depending on the year of his or her accident, and how that gap is perpetuated by annual CPI indexation, using historical figures.

> [35] Since the respondent did not press its position in the course of oral argument, and, given that it makes no bottom-line difference to the outcome of this appeal, we are prepared to leave it in.

Onion Lake Cree Nation v Stick, 2018 SKCA 20, [2018] 5 WWR 111

Ms. Stick and the Canadian Taxpayers Federation brought an originating application in the Court of Queen's Bench seeking an order that Onion Lake Cree Nation disclose and publish its 2014 and 2015 audited consolidated financial statements and the schedule of remuneration and expenses paid to its Chief and Band councillors for those years. The application was made pursuant to the *First Nations Financial Transparency Act*, SC 2013, c 7, and, for Ms. Stick, pursuant to the common law and s. 8(2) of the *Indian Bands Revenue Moneys Regulations*, CRC, c 953. Onion Lake applied to the Court of Queen's Bench to stay this application on the basis it had challenged the constitutional validity of the *First Nations Financial Transparency Act* in the Federal Court of Canada. The Chambers judge heard the two applications together, and dismissed the request for a stay and granted an order for disclosure and publication. Onion Lake then appealed the decision not to grant a stay.

In this appeal, Onion Lake sought leave to file fresh evidence on appeal, including certified copies of the pleadings in the Federal Court, sworn affidavits of Okimaw Fox, and two letters from the lawyers to the Court of Queen's Bench. Ryan-Froslie J.A. cited the test as set out in *Maitland v Drozda* (1983), 22 Sask R 1 (CA), and found the fresh evidence should not be allowed. Certain of the documents had already been before the Chambers judge and would result in duplication. The sworn affidavits of Okimaw Fox were included in Onion Lake's book of authorities only and Onion Lake's general reference to all pleadings and materials filed could not reasonably be seen as including these affidavits as they were filed in the Federal Court and did not form part of the Queen's Bench pleadings:

> [35] Identifying what a party intends to rely on in a Chambers application serves two key purposes. First, it provides notice to the responding party of the case that must be met and, second, it identifies the material relevant to the court's consideration of the issues raised. Court actions can, depending on their nature, involve reams and reams of paper and documents. Accordingly, indicating in a notice of application that a party intends to rely on "the pleadings and other materials filed" in the action does not properly identify the material to be relied upon. Neither a responding party nor the court should be put to the task of reviewing each and every document on a court file in preparation for a Chambers application because a party **might** rely on something not specifically mentioned. As indicated, in some actions, that would be a daunting task. Moreover, it is highly unlikely every pleading and document on a court file will be relevant to any given Chambers application. In short, a party bringing an application has an obligation to identify, with some specificity, the evidence and materials he, she or it intends to rely on.
>
> [36] Moreover, Onion Lake's general reference to all pleadings and materials filed cannot reasonably be seen as including the Fox affidavits as those affidavits did not form part of the Queen's Bench pleadings. Rather, they were filed in the Federal Court. Neither the respondents nor the Queen's Bench judge had access to the Federal Court file. Including an affidavit from another court proceeding in a "book of authorities" does not make that affidavit evidence a court should consider; nor would such an affidavit automatically become part of the court record for appeal purposes. On this point, I agree with the Alberta Court of Appeal's statements in *Brewer v Fraser Milner Casgrain LLP*, 2008 ABCA 435 at para 15, 306 DLR (4th) 171, and *Langan v Watson*, 2007 ABCA 94 at para 5, 404 AR 98, to the

> effect that evidence may not be included in a book of authorities. That Onion Lake refiled its book of authorities as a "book of documents" does not change the fact that the affidavits in issue had not been properly tendered as evidence before the Chambers judge and thus did not form part of the court record.

Further, the affidavits were in existence at the time of the hearing, were only marginally relevant, were not credible because the exhibits referred to were missing, and it could not be said they could reasonably be expected to have affected the result. The two letters from the lawyers were not relevant to the appeal, including their attachments, and would have had no effect on the Chambers judge's decision. The Court went on to dismiss Onion Lake's appeal.

Olson v Skarsgard Estate, 2018 SKCA 64, 39 ETR (4th) 182

Ms. Olson appealed a decision of a Court of Queen's Bench Chambers judge concerning the estate of her brother, Mr. Skarsgard. The Chambers judge had discharged a caveat Ms. Olson had registered against title to certain lands and had ordered the immediate issuance of letters probate as had been requested by Ms. Skarsgard, the wife of Mr. Skarsgard. Ms. Olson also applied to adduce fresh evidence, with the fresh evidence being a copy of an application to amend the birth certificate of Mr. Skarsgard's daughter to add him as her birth father and copies of land titles searches and transfer documents.

The Court considered the application to adduce fresh evidence pursuant to Rule 59 as a preliminary matter, citing the well-known test from *Maitland v Drozda*, [1983] 3 WWR 193 (Sask CA), *Turbo Resources Ltd. v Gibson* (1987), 60 Sask R 221 (CA), and *Gritzfeld v Zuidema Farms Inc.*, 2009 SKCA 51, 331 Sask R 63. Caldwell J.A. found that while the evidence was credible, it failed in all other regards:

> [9] Applying the admission criteria in this case, I find the proffered evidence is credible but it fails to satisfy in all other regards. As to the first batch of information, the birth certificate evidence could have been obtained prior to the Chambers hearing through the exercise of due diligence. In fact, Ms. Olson had requested it prior to that hearing but apparently not far enough in advance to ensure receipt of it before the hearing. Moreover, as I will explain in detail below, a question as to whether the Testator was the biological father of his daughter had little bearing on the result of the application before the Chambers judge. As to the second batch, the land titles evidence was readily-obtainable at any time prior to the hearing by means of an electronic search of land titles records, but Ms. Olson did not seek to obtain this evidence until seven months after the hearing. Furthermore, the proffered information shows the Testator transferred farmland to a third party just nine days after he had executed his Will. Given the Chambers judge's reasons for granting letters probate, I am unable to conclude the proffered evidence is practically conclusive of a decisive issue in the hearing before the Chambers judge or that it could reasonably be expected to have affected its result. As such, I would deny Ms. Olson's application to adduce fresh evidence.

The Court denied Ms. Olson's application and ultimately dismissed the appeal.

Risseeuw v Saskatchewan College of Psychologists, 2019 SKCA 9

Ms. Risseeuuw appealed a decision of a Court of Queen's Bench judge dismissing her application for judicial review from a decision of the Saskatchewan College of Psychologists dismissing her application for membership. The Court of Queen's Bench Chambers judge dismissed her application based on undue delay and other various bases. Ms. Risseeuw sought to set aside that decision and also applied to adduce fresh evidence.

The Court dismissed both her application to adduce fresh evidence and her appeal. Writing for the Court, Schwann J.A. reviewed the applicable principles for applications to adduce fresh evidence:

> [19] As a preliminary matter, Ms. Risseeuw applies to this Court pursuant to Rule 59 of *The Court of Appeal Rules* to adduce fresh evidence in relation to her appeal. The governing principles with regard to the introduction of fresh evidence on appeal are well known. In *Wal- Mart Canada Corp. v Saskatchewan (Labour Relations Board)*, 2006 SKCA 142, 289 Sask R 20 [*Wal-Mart*], Vancise J.A., referring to *Maitland, Maitland, and Maitland v Drozda*, [1983] 3 WWR 193 (Sask CA), set out the following requirements:
>
> > [4] The test for the admission of fresh evidence is well known and was articulated by this Court in *Maitland v. Drozda*. The Court identified four factors which must be satisfied before fresh evidence would be accepted. Those factors are:
> >
> > (a) The evidence will not be admitted, if by due diligence it could have been used at trial;
> >
> > (b) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the action;
> >
> > (c) The evidence must be credible in the sense that it is reasonably capable of belief; and,
> >
> > (d) It must be such that if believed could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.
> >
> > (Footnote omitted)
>
> [20] This Court's approach to fresh evidence has been affirmed on a number of occasions subsequent to *Wal-Mart* (see, for example: *Haug v Haug (Estate)*, 2017 SKCA 92 at para 12, 32 ETR (4th) 189; *Pederson v Saskatchewan (Minister of Social Services)*, 2016 SKCA 142, 408 DLR (4th) 661; *Onion Lake Cree Nation v Stick*, 2018 SKCA 20, [2018] 5 WWR 111; *Gadd v Busse*, 2011 SKCA 32, 366 Sask R 291).

Ms. Risseeuw sought to adduce an assortment of 31 documents, emails or letters. As her appeal turned on the undue delay issue, Schwann J.A. limited the analysis to the documents pertaining to this issue and found that the fresh evidence proposed did not meet the test for admission. Most of the documents existed at the time of the judicial review application, were in the possession of Ms. Risseeuw, and the additional documents were capable of production with due diligence. Further, the documents "would not have decisively affected the bottom-line result" (at para 36).

2. Custody/Access

C.L.B. v J.A.B., 2016 SKCA 101, 484 Sask R 228

The mother appealed an interim access order to this Court. A Queen's Bench Chambers judge had granted the father unsupervised access to their son, as well as increasing the amount of access. She also sought to adduce fresh evidence on the appeal. The fresh evidence included a transcript of approximately 345 pages of conversations she had had with the children (which she had edited), six affidavits sworn by her, and one sworn by another individual.

The Court dismissed both the application and the appeal. In considering the fresh evidence application, Ottenbreit J.A. noted the principles which usually govern Rule 59(1) applications as well as the flexible approach taken where the best interests of the child are involved, citing *B.L. v Saskatchewan (Ministry of Social Services)*, 2012 SKCA 38, [2012] 12 WWR 468. He then noted that s. 63(4) of *The Child and Family Services Act*, SS 1989-90, c C-7.2, specifically allows the Court to receive further evidence:

> [23] It should be noted that s. 63(4) of *The Child and Family Services Act*, SS 1989-90, c C-7.2, specifically allows this Court to receive further evidence. There is no practical difference in the ability of the Court to accept fresh evidence under s. 63(4) and Rule 59(1). The articulation in *B.L.* of the test for admission of fresh evidence is in substance almost identical to one applicable to Rule 59(1) applications. In my view, the slightly more flexible articulation in *B.L.* is appropriate whenever fresh evidence is sought to be adduced concerning custody, access and the best interests of the child under Rule 59(1). That said the overarching principle is that this court has all the necessary authority to admit further evidence it determines to be relevant to the best interests of the child.

He then considered the four elements from *B.L.* In so doing, he specifically noted that some of C.L.B.'s proposed fresh evidence showed she appeared to have disregarded a prior court order. Whether she was in contempt of that order was not before the Court, and even if she had breached the order, that was not "in itself conclusive of whether the fresh evidence should be admitted given that the best interests of the children take precedence" (at para 25). He found the fresh evidence should not be admitted because it did not meet the test set out in *B.L.* as it did not substantially advance the appeal and was more of the same subject matter and content that had already been investigated and had been before the Chambers judge.

Bačić v Ivakić, 2017 SKCA 23, 409 DLR (4th) 571

Ms. Bačić appealed the decision of a Court of Queen's Bench Chambers granting an order that Ms. Bačić be required to return the child to Croatia. Mr. Ivakić had applied under *The Ineternational Child Abduction Act, 1996*, SS 1996, c I-10.11 for such an order, while Ms. Bačić opposed it.

The Court allowed the appeal, finding that though the child was wrongfully removed from Croatia, she was now settled in Weyburn and Canada such that the idea she should be returned to Croatia has been displaced. In so doing, Richards C.J.S. considered Ms. Bačić's application to admit fresh evidence. Citing the test for admitting fresh evidence as set out in *Ackerman v Ackerman*, 2014 SKCA 137 at para 17, [2015] 6 WWR 626, he found that on a straightforward application of

this test, Ms. Bačić's application must fail. However, he noted that the Court of Appeal had softened the rules in other contexts:

> [24] Nonetheless, some consideration must be given here to the question of whether the standard test for the admission of fresh evidence should be relaxed because this appeal is ultimately about a child and will affect the welfare of a child. I note, for example, that this Court has softened the rules for the admission of fresh evidence when dealing with child protection matters under *The Child and Family Services Act*, SS 1989-90, c C-7.2. In this regard, and following *Catholic Children's Aid Society of Metropolitan Toronto v M.(C.)*, [1994] 2 SCR 165, we have said the overarching principle in child protection cases is that "a court has all the necessary authority to receive further evidence in the best interests of the child". See: *B.L. v Saskatchewan (Ministry of Social Services)*, 2012 SKCA 38 at para 71, [2012] 12 WWR 468. This somewhat more flexible approach to the introduction of fresh evidence has also been applied in cases involving the best interests of a child in the context of custody and access proceedings. See: *J.P. v J.P.*, 2016 SKCA 168 at para 24; *A.O. v T.E.*, 2016 SKCA 148 at paras 115–117; *C.L.B. v J.A.B.*, 2016 SKCA 101 at paras 21–22, 484 Sask R 228.

While an application pursuant to the *Convention on the Civil Aspects of International Child Abduction* is not directly concerned with traditional notions of the best interests of the child as it operates at one step removed, the situation is more nuanced than this as considerations overlapping with a typical "best interests" analysis seep in. He concluded the following regarding the standard for fresh evidence:

> [27] In the end, and regardless of the foregoing subtleties, I believe that, given the aspects of the *Convention* at issue in this appeal, the standard rules for admitting fresh evidence on appeal can be relaxed if some flexibility is necessary to deal adequately with the issues raised by the *Convention*, especially the issue of whether returning the child will put her at risk or in an otherwise intolerable situation.

However, in these circumstances, Ms. Bačić's application was denied. What she sought was in effect a *de novo* hearing and her evidence would not make any practical difference to the outcome of the appeal. She was allowed to file the evidence that she and the child became permanent residents of Canada in February of 2016 because it confirmed evidence that was before the Chambers judge, who had proceeded on the basis that her immigration status was uncertain.

Riel v Riel, 2017 SKCA 74, 99 RFL (7th) 367

Ms. Riel appealed the Court of Queen's Bench decision awarding joint custody of the children to her and Mr. Riel, with primary residence to Mr. Riel as well as the trial judge's order for child support. Ms. Riel had applied for an order allowing her to move the children, and Mr. Riel had opposed that application. Ms. Riel also sought to adduce fresh evidence on the appeal.

In considering the application for fresh evidence, Ottenbreit J.A. reviewed decisions out of the Court concerning applications for fresh evidence, and noted that few reported cases have admitted the fresh evidence:

> [16] Despite the more relaxed approach taken in cases involving the best interests of children, fresh evidence is not as a matter of course accepted in family law matters. Over the last four to five years there are few reported cases where this Court, having applied the

> flexible approach in a contested application, admitted the fresh evidence. For the most part, such applications consisted of evidence post-trial. For example, in *Ackerman v Ackerman*, 2014 SKCA 86 at para 21, [2014] 10 WWR 429, the fresh evidence not admitted was of a criminal charge that had been laid against a parent. In *A.O. v T.E.*, 2016 SKCA 148 at paras 114–135, 88 RFL (7th) 34, the evidence consisted of affidavits of the child's behaviour post-trial as well as extensive psychological reports on the child prepared post-trial. The application was dismissed because the evidence was found to be not potentially decisive of the child's best interests.
>
> [17] In *C.L.B.*, at paras 16–24, the fresh evidence consisted of 345 pages of post-trial conversations with the children, six affidavits detailing their post-trial behaviour and further evidence of a sexual abuse allegation dealt with in the court below. This Court, in dismissing the application, commented that the fresh evidence was nothing new and was substantially a continuation of the same material that was before the Chambers judge and, therefore, not potentially decisive based on the test for its admission (at para 27). In *Aalbers v Aalbers*, 2013 SKCA 64 at para 16, 417 Sask R 69, applications by both parties to admit fresh evidence of what had transpired with the child after trial were dismissed. In *Senchuk v Senchuk*, 2016 SKCA 167, the mother's application to adduce fresh evidence was dismissed because the material she sought to file was not relevant (at para 23).
>
> [18] In two cases the evidence was admitted. In *Howe v Whiteway*, 2015 SKCA 72, 460 Sask R 253, Caldwell J.A. noted that fresh evidence had been adduced and was considered (at para 4). It is unclear whether the application was consented to or disputed. In *J.P. v J.P.*, 2016 SKCA 168, 89 RFL (7th) 92, the mother was awarded primary care of a special needs child. The father appealed. The mother applied to admit fresh evidence regarding the child's ongoing medical needs, the status of the allegations made by the eldest child (which concerned sexual interference allegations against the father) and Christmas access. The evidence was received by the panel, applying the relaxed rule for admission of evidence relating to a child's best interests (at para 24). In both of these cases the decision being appealed was sustained or substantially sustained.
>
> [19] Given the foregoing, there is some irony that applications for fresh evidence continue to be made routinely despite that most of the contested applications of this kind, even with the application of the relaxed approach to admissibility, have been unsuccessful.
>
> [20] Admittedly, fluid circumstances and late-breaking developments have often resulted in applications to admit fresh evidence. However, generally speaking an application for fresh evidence must not be a way of re-litigating the same issues on substantially the same evidence that the trial judge has already weighed and determined. That is, the application should likewise not be an attempt to use this Court's concern for the best interests of a child to rebalance or reweigh differently substantially the same evidence dealt with by a trial or Chambers judge. It must also not be in substance a disguised application to vary.

He then turned to the specifics of Ms. Riel's proposed fresh evidence. He compared the evidence to that in *C.L.B. v J.A.B.*, 2016 SKCA 101, 484 Sask R 228, finding it was not significant because it touched on no different factors than those considered by the trial judge, it did not concern issues that be potentially decisive in determining the parenting regime and the children's best interests, and it invited the Court to reweigh the same factors as those considered by the trial judge on substantially the same evidence.