LLM
The Law and Library Monthly

The MBA Legal Research Section's E-Newsletter

Vol. 14, No. 5 **May 2021**

IN THIS ISSUE:

Compiled by Melanie R. Bueckert

Section News

It's hard to believe, but June is just around the corner. Our annual year-end wind-up party will be online this year. It will be held on Tuesday, June 22nd at 5:30pm. Our featured guest this year is Madam Justice Kim Antonio of the Court of Queen's Bench Family Division. ***Register now***!

Did You Know?

- CanLII now has a "**reading pane**" mode?
- **Canadian Human Rights Reporter cases** are now available on CanLII?
- Lexbox can help you keep track of your **CanLII search history**?
- Rangefindr offers a number of **free sentencing-related resources**?
- The University of Windsor has posted information about **accessing court documents** across the country?
- Justice Stratas updated his **paper on judicial review** in mid-May?
- Daniel Urbas maintains a blog regarding **arbitration matters**, including summaries of recent arbitration decisions?
- The Canadian Judicial Council recently launched a series of **handbooks for self-represented litigants**?
- LexisNexis has launched a new product called **Practical Guidance**?
- There are ***lots of tips*** for finding Ontario WSIAT decisions online?

- Transparency information on interest holders of B.C. real estate is available for public search in the **Land Owner Transparency Registry**?
- Ontario's Great Library recently posted some **tips for deciphering regnal years**?
- GlobaLex has updated a number of useful articles, including ***An Introduction to Sources for Treaty Research***, ***Comparative Criminal Procedure*** and ***Comparative Law Research***?
- Congress.gov **expanded its access to the United States Statutes at Large** to include the text of laws from 1951– 1994? The U.S. Statutes at Large contains the laws passed by the U.S. Congress in chronological order. Coverage of full-text legislation on Congress.gov is now available from 1951 (82nd Congress) to present.
- Plans to create the **first single comprehensive repository of England and Wales court judgments** are being considered by the UK government? The service, run by the National Archives, would publish almost every decision made by courts and tribunals, unlike the current selective system run by the British and Irish Legal Information Institute (BAILII).
- The **Lex-Atlas: Covid-19 project** provides a scholarly report and analysis of national legal responses to Covid-19 around the world?
- **Google Scholar has its own Alert system**? Regular Google Alerts do not search Scholar content.
- *The Canadian Style* and *Writing Tips* have been combined to create a new tool called ***Writing Tips Plus***?
- There is an **infographic** to assist you with improving your writing? Check out the **Periodic Table of Figures of Speech**.

Topical Updates

While there are many legal research resources that are relevant to all section members, we recognize that the section is comprised of lawyers working in a wide variety of practice areas. We hope that, over time, interested section members will provide short updates on legal research resources particularly relevant to their practices.

If you would be interested in taking on this task for your area of expertise, please contact **Melanie Bueckert**.

Civil Litigation
Update provided by Andrew Robertson

Manitoba Court of Appeal

***Winnipeg (City) v Caspian Projects Inc.*, 2021 MBCA 33 (Cameron J.A.)**

Seized documents – illegally obtained evidence – civil disclosure

The defendants appealed an order by the case management judge which granted the plaintiff production of documents and data seized by the RCMP in the course of a criminal investigation into the defendants regarding the construction of the new Winnipeg Police Services headquarters. By the time this appeal was heard, the documents had been produced, but certain digital information had not been produced. The defendants argued that under **Rule 30.10**, the documents subject to disclosure must be in the lawful possession of the non-party who was ordered to produce them, and that in this case the documents were not being lawfully detained.

Cameron J.A. first concluded that there existed case law which authorized production in a civil proceeding of evidence which had been illegally obtained by police in a criminal investigation. The illegal obtaining of the documents did not mean they were automatically immune from civil disclosure. The Court was also of the view that the RCMP were required to continue their possession of the documents, in light of **sections 489.1** and **490** of the *Criminal Code* A court order disposing of anything seized can only be granted if there has been an application based on a legal cause of action which allows the court to grant a remedy in that regard, and in this case, there was no court order in effect to require or authorize the release of the documents at the time of the application for production. As such, the RCMP were required to retain possession of them.

Cameron J.A. also found that the defendants had not made an application for the return of the seized documents, despite counsel for at least one of the

defendants indicating that he intended to do so. The defendants argued they made the application orally, but Cameron J.A. found that neither the statement of intent to make an argument, or the brief discussion before the case management judge, constituted such an application.

***Weremy v The Government of Manitoba*, 2021 MBCA 34 (leMaistre J.A.)**

Class proceedings – identifiable class – hearsay evidence

The plaintiff filed a statement of claim against Manitoba for negligence and breach of fiduciary duty regarding abuse he alleged he and others had suffered at the Manitoba Developmental Centre (MDC) from 1954 to 1977. He filed affidavits which included a number of arbitrators' decisions, reports of the Ombudsman and inquest reports, among other documents. The certification judge found these documents were admissible for the purposes of certification, and ultimately granted certification. Manitoba appealed that order, arguing that the certification judge had relied on inadmissible hearsay.

In order to satisfy the requirement that there is an identifiable class for the purposes of a class action, there must be evidence which supports the existence of others who share a common claim. Courts have regularly considered evidence such as complaint records, official reports and affidavits of counsel as sufficient evidence to establish "some basis in fact" that the class exists as alleged. In this case, leMaistre J.A. concluded that the certification judge correctly concluded that the documents were not hearsay, based on the use to be made of them. For example, in the case of the Ombudsman report, it supported the assertion that a complaint was made and that an investigation was done, which provided some basis in fact supporting the assertion that there were potential class members who resided at MDC after 1977.

***Zaki v University of Manitoba*, 2021 MBCA 35 (Cameron J.A.)**

Interlocutory injunction or stay – request for adjournment – jurisdiction to dispose of or determine appeal

The applicant was expelled from the Undergraduate Medical Education program at the respondent University, and applied for judicial review of that decision, along with a motion requesting a mandatory interlocutory injunction or stay, which would compel his re-enrollment in the program. The motion judge dismissed the motion, and he appealed this dismissal to the Court of Appeal. The respondent sought to adjourn the appeal on the basis that the judicial review was heard one day prior to this motion, while the applicant argued that Cameron J.A. had no jurisdiction to grant the adjournment, as this would, in substance, dispose of or determine the appeal.

Cameron J.A. agreed with the applicant, finding that once the reviewing judge renders a decision, the appeal of the dismissal of the applicant's motion for a mandatory injunction or stay becomes moot, and that to grant the request to adjourn the appeal would "practically be the same as quashing the interlocutory appeal". After learning of this decision, the respondent asked that the motion be deferred to the appeal panel, which request was granted.

***Lockport Taxi Ltd. v The Rural Municipality of East St. Paul*, 2021 MBCA 40 (Steel J.A.)**

Order of mandamus – vehicle for hire bylaws – discretionary vs. mandatory

The applicant had appeared before an application judge asking for an order of mandamus requiring the respondent Rural Municipalities to draft by-laws regarding vehicles for hire under ***The Local Vehicles For Hire Act***, CCSM c L195. It argued that the Act made it mandatory for municipalities to draft such bylaws, and that the four respondent RMs had not done so. The application judge concluded that this power was discretionary and not mandatory, and Steel J.A. agreed with the application judge's reasons and dismissed the appeal.

***Business Development Bank of Canada v Cohen*, 2021 MBCA 41 (Burnett J.A.)**

Valuation of property – summary judgment – assess validity of expert reports

The defendant executed two personal guarantees in favour of the plaintiff to support two corporate loans. The corporate borrowers defaulted on their loans, and the plaintiff took steps to realise on its security. The property was listed for sale, and was ultimately sold for less than listed price/appraisal. The plaintiff demanded payment in accordance with the guarantees, and the plaintiff commenced the action seeking judgment. The defendant argued that the manner in which the plaintiff relied on its security was commercially unreasonable, or amounted to a material change. The defendant argued that the price at which the property was sold did not approximate its true value, among other allegations.

The plaintiff sought summary judgment, which was granted because the motion judge concluded that the evidence established that the property was sold at a fair market price, and that the defendant was therefore liable under the guarantees.

Burnett J.A. found that the motion judge erred in deciding that the summary judgment process allowed him to make the necessary findings of fact, and that the defendant had failed to demonstrate a genuine issue for trial. The motion judge could not determine which valuation of the property was appropriate, given the evidence that the reports were "seriously flawed". He was not in a position to assess the validity of the expert reports or make credibility findings on the basis of the written record before him. As such, the appeal was allowed and the motion for summary judgment was dismissed.

***Jordan v Director, Winnipeg West*, 2021 MBCA 43 (Cameron J.A.)**

Social Services Appeal Board – cohabitating in a common-law relationship – question of law

The applicant sought leave to appeal a decision of the Social Services Appeal Board confirming that she had been overpaid assistance on the basis that she failed to report her common-law relationship. Cameron J.A. found that

the issue of whether two people are cohabitating in a common-law relationship is one of fact, and also found that the Board had thoroughly considered all of the evidence when rejecting the appellant's submissions. There was no evidence that the Board had discriminated against the appellant. As such, the issues raised by the applicant were, at best, issues of mixed fact and law, and did not raise a question of law alone.

Manitoba Court of Queen's Bench

***Christie Building Holding Company, Limited v Shelter Canadian Properties Limited*, 2021 MBQB 77 (Joyal C.J.Q.B.)**

Commercial arbitration – evidentiary record – extrinsic evidence

The parties had a long, contentious commercial dispute that they agreed to resolve by way of final and binding arbitration, which took place over 43 days. Reference was made to an estimated 1500-2000 documents, largely electronically. Printed copies were provided to the arbitrator, but were not marked as exhibits, and as such, a complete record of documents referenced was not created. A digital recording of the proceedings was made for the benefit of counsel, but the arbitrator was not provided with those recordings, and he did not view them as part of his deliberations. Neither party provided a transcript to the arbitrator.

After the arbitration, the applicant filed notices of application seeking leave to appeal the award/supplemental award. Among the filings was an affidavit which included an appended document which purported to be a verbatim transcript of some answers given in the course of the testimony on the arbitration. The applicant took the position that, since leave to appeal could only be granted on a question of law, the record as presented was appropriate as the analysis could not otherwise be conducted on the basis of the arbitrator's decisions alone. The respondent argued that an evidentiary record of the proceeding was not created by design, and that trying to recreate the record after the fact

would invite rehearing of all the issues, and should not be allowed.

Joyal C.J.Q.B. concluded that the selective manner and presentation of the documents could unfairly affect the integrity of the arbitration and the analysis provided by the arbitrator, and by extension the integrity of the court's review, because of the potential to distort and skew the significance of the evidence, the lack of a guarantee that the record would be the same as what the arbitrator reviewed, and the lack of an official transcript of the viva voce evidence. The most foundational concern was that the review not take place on the basis of unjustifiably admitted extrinsic evidence which presents an evidentiary record that was not before the original decision maker.

The applicant took the position that the Supreme Court's decision in ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65, suggested that a record must be more than the reasons for decision. Joyal C.J.Q.B. rejected the argument that the court was required to undertake its own analysis of a now created or reconstructed evidentiary record. Though there was a disagreement in the lower courts across the country as to whether the standard of review analysis in ***Vavilov*** applies to a commercial arbitration decision, it was not necessary to decide this for the purposes of this case.

***Kenerdine v 6068309 Manitoba Ltd.*, 2021 MBQB 85 (Master Goldenberg)**

Compel answers to undertakings – production of financial/accounting records – lacking specificity and clarity

The plaintiffs brought an action against the defendant for a number of causes of action related to the sale of an oil field services business by the plaintiffs to the defendants. The defendants acknowledged default on loan obligations, but denied that the plaintiffs were entitled to any other relief. The plaintiffs filed a motion to compel complete answers to undertakings given at an examination for discovery, as well as for production of complete files held by a number of other companies.

Master Goldenberg found that the plaintiffs did not sufficiently particularize the relief they are seeking regarding the answers to undertakings, and therefore adjourned the request, while instructing the defendants to produce any documents which they had undertaken to produce but had not yet produced.

On the request for production, Master Goldenberg found that **Rule 60.17(2)**, which enables a creditor to examine a debtor, did not apply here as the plaintiffs were not "creditors" within the meaning of the rule. Therefore, the plaintiffs would only be entitled to the documents if they were relevant to the proceeding. The plaintiffs were not seeking specific documents, but were seeking the entirety of the defendants' files at two accounting firms and two financial institutions. This request lacked the specificity and clarity necessary to assess whether the documents were relevant, and thus amounted to a fishing expedition. The motion for production was therefore denied.

***Flette v The Government of Manitoba*, 2021 MBQB 84 (Edmond J.)**

Children's Special Allowance – common issues – most efficient and least expensive manner

Three proceedings were commenced by different parties alleging inappropriate conduct by Manitoba relating to the administration of the Children's Special Allowance (CSA). In November 2020, the ***Budget Implementation and Tax Statutes Amendment Act, 2020***, SM 2020, c 21 (BITSA) came into effect, and retroactively deemed the rates of services paid by Manitoba to agencies providing child welfare services to First Nations to have been reduced by an amount proportional to amounts of CSA funding either remitted by agencies and/or held back. It also required that any proceedings commenced before BITSA came into force be dismissed without costs, including one of the specific proceedings addressed in this motion. Two applications challenging the constitutional of BITSA were then filed. Manitoba submitted that an order should be made to have all the actions/applications related to this issue tried together, with the constitutional of BITSA as a threshold issue. The plaintiffs/applicants

argued that all constitutional issues should be heard together.

Edmond J. concluded that there were common issues of law and fact of sufficient importance to render it desirable that they be heard together. He was not satisfied that limiting the hearing to deal with only the constitutional challenge to BITSA was the most efficient and least expensive manner to hear the dispute, as hearing one constitutional issue first, and the others later, was not an efficient use of the parties' or the court's time. All or substantially all of the constitutional issues should be decided at the first hearing. All parties should file the appropriate factual foundation and have the issues decided at the same time.

***Accurate Dorwin (2020) Inc. v Johnstone*, 2021 MBQB 86 (Abra J.)**

Interlocutory injunction – confidential information – non-solicitation clause

The defendant Johnstone was the former owner of the plaintiff's predecessor company. When he and his family sold their shares, he and his company, the defendant WT Investments, entered into an independent contractor agreement with the plaintiff, which included a confidentiality covenant and a non-solicitation clause. After some time, Johnstone resigned for the plaintiff, and established the defendant Prairie West Glass Inc. The plaintiff alleged that Prairie Glass had been directly soliciting its customers, and sought an interlocutory injunction pending trial to enjoin the defendants from using confidential information from the plaintiff, and soliciting the plaintiff's customers and employees.

Abra J. found that there was virtually no evidence in the plaintiff's affidavit to support the allegation that the defendants had any such confidential information, nor any evidence that the plaintiff had demanded the return of any confidential information or documentation. In terms of solicitation of the employees, there was no evidence that any of the defendants had approached them about leaving the plaintiff, though the plaintiff wanted such an inference drawn from the fact that so many of its employees had

left. There were surveillance reports of Prairie Glass trucks attending former clients of the plaintiff, but no evidence that the defendants took any active steps to solicit them. The injunctions sought were not granted.

***Toromont CAT v Erickson Construction (1975) Ltd.*, 2021 MBQB 75 (Harris J.)**

Security for costs – impecuniosity – stifle an otherwise meritorious claim

The defendant corporation contracted with the plaintiff to provide construction equipment and services for a project on which the defendant was the general contractor. In 2015, the defendant declared itself in default of its agreement on the project with the Province, and the plaintiff filed a Notice of Claim for Lien with respect to unpaid invoices, and subsequently filed a Statement of Claim. The defendant counterclaimed for loss of profit and damages, and the plaintiff filed a motion for security for costs. The Master determined that the issues raised in the counterclaim would account for approximately 60 percent of the costs of the proceeding, and ordered the defendant to pay costs, failing which its counterclaim would be struck. Harris J. denied a request for a stay of the order, and the defendant appealed, saying that the master erred in finding that the "litigation was being funded in some unknown fashion" and rejecting the defendant's claim that it was insolvent, such that security for costs would prevent it from proceeding with the counterclaim.

The defendant sought leave to introduce further evidence on appeal regarding its impecuniosity, which it had not led before the Master. This was denied as the defendant had failed to exercise due diligence in not bringing the evidence before the Master. In terms of the issue of security for costs itself, there was good reason to believe that there would be insufficient assets to pay costs, if the defendant was ordered to do so, and the defendant had not demonstrated that it was otherwise unable to raise the security. There was therefore no evidence that an order for security for costs would stifle an otherwise meritorious claim.

***Stewart v 6551450 Manitoba Ltd.*, 2021 MBQB 76 (Harris J.)**

Summary judgment – factual contradictions – security for costs

The plaintiff and the defendant numbered company entered into a purchase agreement for land, with the closing date to be 90 days after approval by the RM of Rosser for a quarry to be operated on the land. This did not occur, and a new agreement was ultimately made between the plaintiff and the third party 6223291 Manitoba Ltd. ("622"), owned by the third party Peguis First Nation, for purchase of the land. This agreement was also subject to 622 applying for approval from Rosser. Ultimately, the sale was not closed because the condition with respect to approval had not been fulfilled. Litigation commenced, and the plaintiff sought summary judgment against the defendants for $600,000 arising from an alleged loan, summary judgment dismissing the defendants' claim for deposits retained by the plaintiff, and security for costs against the defendants (from both the plaintiff and the third parties).

On the first summary judgment, regarding the loan, Harris J. found that there was much evidence which put into question whether the payment was a loan, but was instead part of the investment in the joint venture. As a result, a trial was required to resolve the factual contradictions and it could not be resolved on a motion for summary judgment.

On the second summary judgment motion, regarding the deposits, Harris J. was satisfied that the plaintiff did not retain any money from the agreement, that the termination agreement was a full release of any claims the defendant had against the plaintiff respecting the initial/amended agreement, and that the plaintiff was entitled to retain the deposit paid to her by 622.

Lastly, on the question of security for costs, a material change in the litigation arose while rescheduling the trial, supporting a limited order for security for costs against the defendant by the third parties. However, the plaintiff was not entitled to security for costs, as the claim against her by the defendant had been dismissed.

***Deputy Minister of Finance v S M Industries Ltd.*, 2021 MBQB 91 (Abra J.)**

Tax assessment – reverse onus – findings of credibility

Manitoba Finance sent the respondent a Notice of Assessment arising from an audit, which was appealed to the Tax Appeals Commission. No hearing was held for the appeal, as instead the Chief Commissioner reviewed all of the relevant documentation related to the assessment. The applicant argued that the TAC erred throughout the decision in failing to apply the correct evidentiary burden of proof.

It was agreed that the standard of review was correctness. The appeal was required to be done on a reverse onus basis, with the taxpayer having the burden to show that Finance was wrong. Abra J. found that the TAC did not apply that onus, but instead blamed Finance for not taking steps to obtain information which could have supported the respondent's explanations. Finance was entitled to make assumptions based on the lack of adequate records kept by the respondent, and if there were records available to rebut those assumptions, the respondent should have produced them. Abra J. rejected the argument that the findings of TAC were findings of credibility which should not be overturned on appeal, given that the explanations were not made in circumstances that a finding of credibility could have been made. The appeal was therefore allowed.

***Martens v Barnhardt; Star v Barnhardt*, 2021 MBQB 92 (Rempel J.)**

Most appropriate forum – presumptive jurisdiction – forum non conveniens

The Martens plaintiffs issued a statement of claim against the defendants with respect to investments they made in the plaintiff Star, which they were asked to invest in by the defendants in order to acquire various security system technologies being developed by the defendants. The Martens plaintiffs subsequently also caused the plaintiff

Star to file another lawsuit against the same defendants. The personal defendants live in Saskatchewan, and the defendant corporations are incorporated pursuant to the laws of Saskatchewan. The defendants argued that the claims should be litigated in Saskatchewan, and that Manitoba was not the most appropriate forum for hearing these actions on the basis of the *forum non conveniens* doctrine, and that the service of the statement of claim violated the rules for service outside Manitoba.

Rempel J. found that the tort alleged was committed in Manitoba, as in cases involving negligent misrepresentation, jurisdiction has been established based on where the consequences or impact of the tort was felt. Here, the representations were received in Manitoba, and their impacts were experienced by the Martens plaintiffs in Manitoba. He was not persuaded that the agreement was a "Saskatchewan agreement" because it included a provision that it be governed and construed according to the laws of Saskatchewan, given that both a later agreement provided the same regarding the laws of Manitoba, and that Manitoba courts can consider and apply the laws of Saskatchewan. The Court therefore had presumptive jurisdiction. On the issue of *forum non conveniens*, he found that while the defendants' witnesses resided in Saskatchewan, those for the plaintiff all resided in Manitoba. The plaintiffs would also not gain judicial advantage by litigating the action in Manitoba. The defendants were unable to persuade Rempel J. that the weight of the relevant factors militates towards Saskatchewan being clearly and exceptionally the more appropriate jurisdiction. The motion was dismissed regarding the Martens litigation. For the Star litigation, the same analysis resulted in the same conclusion, namely that Manitoba had presumptive jurisdiction and that Saskatchewan was not a clearly or exceptionally more appropriate forum under the *forum non conveniens* doctrine.

Criminal Law
Update provided by Bryton Moen

Manitoba Court of Appeal

***R v St. Paul*, 2021 MBCA 31**

This case deals with a sentence appeal where the main issue was whether the initial judge considered ***Gladue*** appropriately.

After trial, the accused was convicted of second-degree murder for a revenge shooting apparently motivated by a drug dispute. One individual lured the victim out of her home at which point the accused conducted a drive-by shooting which proved fatal. The accused was 24 at the time of the offence and had significant ***Gladue*** factors. He also suffered from substance abuse. While in custody he proved to be a model inmate and took extensive programming to assist in his rehabilitation. The trial judge imposed 15-years of parole ineligibility, noting that it was close to first-degree murder. The accused appealed, asserting that ***Gladue*** factors and rehabilitation were not properly considered.

The Court of Appeal noted that there is an important distinction between a judge abdicating their duty to consider ***Gladue*** and the situation here where the judge conducted a ***Gladue*** analysis but then determined that the accused's background did not bear significantly on the accused's moral culpability. As noted by the Supreme Court, deference is owed to a trial judge's weighting of sentencing factors. Here, the judge did consider ***Gladue***, but nevertheless held that 15 years of parole ineligibility was appropriate. He made no error in doing so.

Accordingly, the Court of Appeal held that the appeal should be dismissed.

Bryton Moen is a Crown Attorney with Manitoba Prosecution Service. Any opinions expressed here are his own and are not representative of the Governments of Canada or Manitoba or any of their departments.

Family Law

Update provided by Shasta Benaim

Manitoba Court of Queen's Bench

***Windsor v Hink*, 2021 MBQB 83 (Master Patterson)**

The matter related to a procedural determination with respect to evidence for an upcoming family property

reference. There was an additional request by the Wife to expunge portions of the Husband's Affidavit.

The Husband sought to have the reference proceed on affidavit evidence only, and without the parties being cross-examined upon their affidavit material. The Husband relied on historical medical evidence from 2017, that examination in the presence of the Wife would be traumatizing for him, and that there were little factual items in dispute. The Wife opposed and expected that the Husband and any other affiant be available for and be subject to cross-examination.

Held: The Husband's motion was not granted. Master Patterson cited ***R v Ostrowski***, 2017 MBCA 80, which considered a request for approval of a witness being excused from testifying at trial for "compassionate reasons". Master Harrison found that the Husband had not met the onus (his medical evidence not being recent and specialized) and that litigants should not be deprived of the opportunity to challenge evidence. Master Patterson also identified that if there were minimal factual issues in dispute, by extension, cross-examination need not be overly long or exhaustive. Further, due to the pandemic, the Master directed that the Reference proceed via video. The parties would not be in the same room and the video screen viewed by the Husband could be adapted so that the Husband would only see counsel for the Wife.

In respect of the expungement, the Master did not expunge those portions of the Affidavit, as they were now irrelevant and assured that only the relevant portions of the Respondent's Affidavit would be considered for the ***FPA*** reference.

The Master summarized general observations respecting expungement at paragraph 40:

1.) With implementation of the new Family Division Case Flow Model, motions to expunge affidavit material in family proceedings are no longer routinely filed for hearing before a master. **Rule 70.24(34)** sets forth the various orders and directions which can be made at a case conference by a justice, with sub-paragraph 16 thereof referring to expungement of all or part of a pleading or document;

2.) The above described change in procedure for family proceedings has not, however, ousted or removed the jurisdiction of a master to expunge affidavit material;

3.) Paragraph 3.4 of the Reference Order (which is the general provision typically included within most reference orders) confirms that "the Master shall make such inquires, hear such evidence, employ such experts as shall be deemed necessary or desirable for the purposes of the reference, assess such costs as may be appropriate, and shall make a report to this Court respecting same";

4.) When read with **Rules 55.01(1) and 55.01(3)**, it is not unreasonable to conclude that the wording "hear such evidence" supports there being authority for a master to make determinations with respect to evidence in connection with a reference, which can include, where considered appropriate, expunging all or portions of affidavit evidence that has been filed; and

5.) It is also noteworthy that in the context of civil proceedings, masters continue to hear motions requesting that affidavit evidence be expunged in whole or in part.

***MCS v YRNJS*, 2021 MBQB 88 (Master Goldenberg)**

This case involves the limited issue of the appointment of a private assessor or an assessor through the Family Resolution Service. The Petitioner requested that an assessment occur privately and would pay for the cost of such an assessment as it could be completed within 2 months as opposed to 10 months through the Family Resolution Service. The Respondent (self-represented) opposed the assessment, but indicated that if it did proceed it should be through the Family Resolution Service due to the cost. Delay was a concern in this case given that the Petitioner was seeing only one of her daughters once a week.

Held: The Master ordered the private assessment as the Petitioner had indicated she would pay for the private assessment and that in the circumstances, a delay would be detrimental to the Petitioner, as she was only seeing one of the daughters once a week.

***McFadyen v McFadyen*, 2021 MBQB 82 (Master Goldenberg)**

This is a cautionary case to provide clear concise notice of an individual's intent to separate, otherwise, the parties may be subject to a separation date that satisfies neither party. This matter was heard before a master and was a reference hearing on the date of separation. Until December 18, 2018, the parties lived together in a jointly owned home in Winnipeg. The Husband left the former family home and went to the cottage (owned by the Wife) after a dispute. The Wife asserted that the date of separation was May 21, 2019. The Wife took the position that they did not separate on that occasion. Rather, the Husband went to the cottage because of his alcohol addiction and later to treat his alcohol addiction.

Held: The Master found that there is no evidence that the Husband ever expressed to the Wife an intention to separate in December, even though the Wife did tell the Husband to leave the home in December and did tell him a few days later that she had bagged up some items. The Master found that the first time the Husband expressed his intention to separate was during an altercation on April 8, 2019. At that time, the Husband mentioned a divorce commercial, and said words to the effect of "you will never be able to break me again." The Master found that the Husband's intention which he communicated and acted upon as of April 8, 2019, was sufficient to sever the relationship at that time. The change in residence and the change in the parties' relationship supported this finding. There was also little evidence of the wife communicating an intention to separate during the period under consideration. Costs were not awarded as neither party convinced the Master that their preferred date was correct.

***Director of Child and Family Services v CLO and BJN*, 2021 MBQB 90 (Doyle J.)**

This case addresses child protection law and the principles of criminal justice in the context of a *Watson* Hearing, a

hearing where oral evidence is presented to determine one narrow issue: Did the Director of Child and Family Services (the "Agency") have reasonable and probable grounds to believe that a child was in need of protection at the time of apprehension?

Held: The agency had reasonable and probable grounds to believe the child was in need of protection, taking into account risk factors of future harm existed. These factors included those that had contributed to the initial risk assessment of the probability of future harm as "moderate". Added to these risk factors were those factors arising from the particulars of the criminal offences received from the Crown and implications concerning the judgment and the mental health of the mother.

Immigration Law
Update provided by David H. Davis

The new TR to PR pathway to permanent residence was very popular in the early part of May 2021. The international graduates on work permit class filled up within two business days. It remains to be seen as to whether or not many of the applicants who applied actually completed the forms correctly or not. It is assumed that those applications completed incorrectly will open up new spots for more applicants to submit their applications.

This new pathway is a whole new creation by the IRCC in a public policy notice. It is confirmed that once someone has applied under this new policy for PR pathway, they are not entitled to also submit a PNP application under any of the provincial programs.

Processing delays with work permits and PR applications have really become serious issues. There are some applicants who have been waiting for their visa applications to be completed for over two and three years. The IRCC needs to deal with their antiquated global case management system and bring it into the 21st century in a really big way. Applicants have the right to know what stage their case is at and to know in a reasonable timeframe the conclusion of their application. This is clearly not the case during this past year of the pandemic. It is important as lawyers not to clog the system with unnecessary litigation but the government does not leave

much of a choice in this regard. One option that can be pursued is to bring a mandamus application in the federal court system. Mandamus can be effective as the Department of Justice lawyers must answer the argument on behalf of their client, the IRCC.

The border between Canada and USA remains officially closed to non-essential travel. If an applicant is a business person requiring entry into Canada for an essential service it is best to have regard to NAFTA as there are options within that treaty for the business person to avoid having the need to apply for a work permit. However, it should be noted that all ports of entry work independently of one another. The CBSA officers do not speak with one voice so knowing ahead of time the nuances of various ports of entry can be integral to representing your business client to the best of your ability. The practise of immigration law is a blend of familiarity with federal legislation and understanding the bureaucratic structure of both CBSA and IRCC.

Express Entry pools continue to issue letters of advice to apply in the Canada Experience Class and Provincial Nominee categories. The CRS points level will vary depending on the applicants that appear in that particular pool. The key to success for being picked is to ensure all of your documents are in order in advance of submitting your EOI online. This will save time and expense down the road.

The government has high expectations to approve over 425,000 cases this year. That is a very high target to reach. It is anticipated that further public policies will be announced in the coming months where the threshold for applicants will be lowered further in order to see more talented applicants enter the pool.

Tech Law – Privacy & Cybersecurity Matters
Update provided by David H. Davis

There have been discussions of late about the possibility of individuals in Canada being able to purchase a passport that contains proof you have been vaccinated for COVID-19. There are many legal issues that arise with such a possibility.

The western economies are way ahead of less developed nations in getting vaccinations distributed to the wider population. The idea of creating a new passport that contains a special identification for vaccination will create a higher level of security for the rich and wealthy in the world. Is that something that we want to accomplish?

Further, the privacy implications are huge as well. Airline companies may put a lot of pressure on the government to implement such a passport so that airlines know ahead of time that passengers are safe from COVID-19. It is going to create further division and different classes of passengers going through airports.

The new ***Bill C-11*** (*Digital Charter Implementation Act, 2020*) will have to deal with the new idea of a special type of passport.

AI Algorithms & Policing

Various police agencies have turned to AI for assistance in identification of assailants. The problem is that the algorithms that have been created are not being well designed to take into account the unique facial features of non-whites. There have been known cases where the wrong person has been identified by AI and as a result the wrongly accused have hired lawyers to sue the police agency that perpetrated the wrong arrest. It is one thing to turn to technology and utilize algorithms in an attempt to enable law enforcement to expeditiously arrest the accused but it is a completely other story where technology is blatantly used to replace normal police investigations to arrest suspects.

AI should not and ought not replace investigative techniques employed by police agencies for hundreds of years. AI can be faulty. In order to improve upon it, one must ensure that a greater part of our community is properly identified in a fair and judicious manner. Otherwise, such AI implementation is going to create a whole new class of human rights violations which will end up costing the taxpayer millions of dollars in wrongfully accused litigation. Another question arises from where do they catalogue a person's photo ID into evidence? It is

one thing to have a database of past offenders but it is quite another to take photo ID of the average citizen who has never committed any criminal act and save that person's ID into a large database housed by enforcement authorities.

Proclamations

Provincial (April 22 – May 26, 2021)

***The Advocate for Children and Youth Act*, SM 2017, c 8**

Section 1 insofar as it enacts clauses (b) to (d) of the definition "reviewable service" in force on June 1, 2021

Federal (April 29 – May 26, 2021)

Nothing new to report.

Law Reform Update
Provided by Elizabeth McCandless

Manitoba Law Reform Commission

In May 2021, the MLRC released a consultation paper on ***Presumed Consent Organ Donation***.

Manitoba currently has an "express consent" or "opt-in" system of organ donation. Under Manitoba's current system, Manitobans may indicate their intent to become an organ and/or tissue donor by registering their consent. Without this express indication of consent, Manitobans will not become organ or tissue donors after death.

The MLRC is reviewing recent developments in other Canadian jurisdictions that are moving away from the "opt-in" model of organ donation toward a presumed consent model. Under the presumed consent model, when there is no record of a person's decision on organ and tissue donation, the person's consent is considered to have been given. The MLRC is therefore examining the

legislative considerations if Manitoba were to amend ***The Human Tissue Gift Act*** to implement a system of presumed consent organ donation. The Commission is not making a recommendation with respect to the question of *whether* Manitoba should adopt of presumed consent model, which is a political decision, but rather will limit the scope of this project to the various legislative changes that would be implicated if Manitoba were to move toward a presumed consent model.

The MLRC encourages you to provide your comments and suggestions concerning this aspect of Manitoba's law. Comments should reach the MLRC by July 30, 2021.

All MLRC publications can be found at http://www.manitobalawreform.ca/

British Columbia Law Institute

No recent publications.

All BCLI publications can be found at http://www.bcli.org/

Alberta Law Reform Institute

No recent publications.

All ALRI publications can be found at http://www.alri.ualberta.ca

Law Reform Commission of Saskatchewan

No recent publications.

All Commission publications can be found at http://lawreformcommission.sk.ca/

Law Commission of Ontario

No recent publications.

All LCO publications can be found at http://www.lco-cdo.org/en

Institut Québécois de réforme du droit et de la justice

No recent publications.

All IQRDJ publications can be found at **https://www.iqrdj.ca/**

Access to Justice and Law Reform Institute of Nova Scotia

No recent publications.

All Commission publications can be found at http://www.lawreform.ns.ca