KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 207**

Date: **2024 11 27**
File No.: KBG-RG-01136-2023
Judicial Centre: Regina

BETWEEN:

MARK GEIGER and RITA GEIGER

PLAINTIFFS

- and -

SASKATCHEWAN POWER CORPORATION

DEFENDANT

Counsel:

Ryan Tulloch	for the plaintiffs
Jason Clayards	for the defendant

FIAT
November 27, 2024

TOMKA J.

BACKGROUND

[1] The plaintiffs, Mark Geiger and Rita Geiger [Geigers], are the registered owners of 211.66 acres of land [Lands] situated in northwest Regina, Saskatchewan. The Lands are adjacent to the Lakeridge Addition and Skyview neighbourhoods and are part of a residential development that is in the planning and approval stage.

[2] In addition to the Lands, the Geigers own two parcels of land, approximately 4.52 acres, which currently have overhanging powerlines with no easement registered against them [Additional Parcels].

[3] The defendant, Saskatchewan Power Corporation [SPC], is a Provincial

Crown Corporation and is Saskatchewan's primary electricity supplier, generating and distributing power to residential, commercial, and business corporations. SPC is incorporated under *The Power Corporation Act*, RSS 1978, c P-19 [*PCA*], and has its head office located in Regina.

[4] The action commenced by the Geigers seeks compensation due to SPC's expropriation of a portion of the Lands for a transmission line [Claim].

[5] SPC acknowledges that certain parts of the Claim – including the value of compensation the Geigers received and whether it was fair – will be determined at the trial of this matter.

[6] However, SPC makes an application to strike portions of the Claim which they say do not disclose a reasonable cause of action or are otherwise frivolous, vexations, or an abuse of process [Application].

[7] The Claim was commenced on or about May 10, 2024. Following that, a Request for Particulars and a Notice to Produce Documents, both dated September 27, 2024, were served on the Geigers.

[8] The Reply to Request for Particulars states:

> **REPLY TO REQUEST FOR PARTICULARS**
>
> Pursuant to Rule 3-71 of *The King's Bench Rules,* the Plaintiffs hereby provide the following response to the Defendant's Request for Particulars dated September 27, 2024:
>
> 1. The Defendant's Request for Particulars seeks further details regarding the particulars in paragraphs 19 and 2 7 (f) of the Statement of Claim. At the time of the Statement of Claim's issuance, these statements were based on the Plaintiffs' understanding of the City of Regina's applicable bylaws, regulatory requirements, and development policies, as communicated to the Plaintiffs through verbal discussions with the City of Regina. The Plaintiffs' knowledge of these requirements was further informed by their experience developing land within the City of Regina. As no specific

documents were relied upon, there are no documents responsive to the Defendant's request under this item.

2. To the extent that the Defendant's Request for Particulars seeks the production of communications or materials protected by litigation privilege and settlement privilege, the Plaintiffs object to such production.

DATED at the City of Regina, in the Province of Saskatchewan, this 7th day of October, 2024.

[Emphasis added]

[9] The Response to the Notice to Produce Documents states:

RESPONSE TO NOTICE TO PRODUCE DOCUMENTS

The Plaintiffs, Mark Geiger and Rita Geiger, hereby respond to the Defendant's Notice to Produce Documents dated September 27, 2024, as follows:

1. The Defendant's Notice to Produce Documents requests documents or correspondence "referred to" in the Plaintiffs' Statement of Claim issued on May 10, 2023, specifically paragraphs 19 and 27(-f). However, these paragraphs do not reference or identify any specific documents. At the time of issuance of the Statement of Claim, paragraphs 19 and 27(t) were based on the Plaintiffs' understanding of the City of Regina's bylaws, regulatory requirements, and development policies. This understanding was informed by verbal discussions with the City of Regina, and the Plaintiffs' experience in land development within Regina. As no specific documents were relied upon, there are no documents responsive to the Defendant's request under this item.

2. To the extent that the Defendant's Notice seeks the production of communications or materials protected by litigation privilege and settlement privilege, the Plaintiffs object to such production.

DATED at the City of Regina, in the Province of Saskatchewan, this 7th day of October, 2024.

[Emphasis added]

[10] The Application requests the following relief:

1. An order pursuant to Rules 7-9(1), 7-9(2)(a), 7-9(2)(b), and 7-9(2)(e) of *The King's Bench Rules*, and the inherent jurisdiction of the Court, striking or dismissing the following paragraphs of the Geigers' Claim [Impugned Paragraphs]:

    a. Paragraph 7;

    b. Paragraph 19;

    c. Paragraph 27(f);

    d. Paragraphs 29-36;

    e. Paragraphs 37-38; and

    f. Paragraph 40(b), (i), (j), and (k).

2. An order for costs payable to the applicant, SPC.

[11] I reproduce the Impugned Paragraphs for easy reference. They state:

> 7. The Additional Parcels are approximately 4.52 acres and are currently burdened by power lines that overhang and are situated above them. Despite the presence of the power lines, no easements have been registered against the Additional Parcels, and they have not been expropriated by the Defendant. Additionally, the Defendant has not provided any form of compensation to the Plaintiffs for the use of their land by the power lines.
>
> …
>
> 19. The Plaintiffs state that the Partial Taking has resulted in the Lands becoming non-compliant with the City of Regina's requirements, as the City mandates the installation of a concrete subdivision fence along the entire length of Armour Road. The Plaintiffs maintain that the expense associated with the required fence, quoted at $170.00 per linear foot by the supplier and installer for 2023, is estimated at over $800,000.00. This expense has arisen directly due to the partial taking by the Defendant. The Plaintiffs state that the exact particulars of the cost of the fence will be proven at trial.

…

27. In accordance with section 35(3)(h) of *The Expropriation Procedure Act* [RSS 1978, c E-16], the Plaintiffs' claim for damages includes but is not limited to the following:

…

f. costs for the construction of a concrete subdivision fence as imposed by the City of Regina due to the Partial Taking;

…

Nuisance

29. The Plaintiffs state that the Defendant has committed the tort of private nuisance by expropriating an easement over the Plaintiffs' Lands, thereby causing substantial interference with the use and enjoyment of the Plaintiffs' Lands.

30. The Plaintiffs relied on the Concept Plan, which depicted the residential development layout. As a result of the Partial Taking, the Concept Plan has been significantly altered, and the Plaintiffs' Land has experienced a reduction in value.

31. The Plaintiffs state that the Partial Taking has caused a considerable negative impact on the Plaintiffs' Lands, including:

a. The frontage of the lots on the north side of the Land has been drastically reduced;

b. The number of lots in the overall development has shrunk to accommodate the 15-meter easement; and

c. The proximity of the easement has reduced or eliminated the value of the Plaintiffs' Land for its previous uses.

32. The Plaintiffs state that the Defendant's conduct has caused unreasonable interference with the use and enjoyment of the Plaintiffs' Land. The Plaintiffs further state that the Defendant has failed to act reasonably in its expropriation of the easement, considering the residential character of the Plaintiffs' Land and the sensitivity of the Plaintiffs' use of the Land.

33. The Plaintiffs state that the Partial Taking has caused substantial and tangible damage to the Plaintiffs' Land, warranting the imposition of liability for nuisance.

34. The Plaintiffs state that the Defendant cannot rely on the defence of statutory authority to escape liability for nuisance. The Plaintiffs

submit that the Defendant has failed to prove that the reduction in the value of the Plaintiffs' Land was an inevitable consequence of the Partial Taking. The Plaintiffs further state that the Defendant has not shown that there were no alternative methods or locations for the easement that could have avoided the substantial interference with the Plaintiffs' Lands.

35. The Plaintiffs further state the value of the lots backing onto Armour Road, which are now subject to the 138kV power line, will be less than the value of the south side lots. In order to sell the lots that back onto Armour Road, the Plaintiffs anticipate that they will need to offer these lots at a discounted price to account for the decreased desirability and marketability caused by the proximity of the power line. This loss in value is a direct result of the Partial Taking by the Defendant.

36. The Plaintiffs claim damages for the reduction in the value of their Land, any additional costs incurred in altering the Concept Plan, and any other losses resulting from the Defendant's unreasonable interference with the use and enjoyment of the Plaintiffs' Land.

Disturbance

37. The Plaintiffs state that the Defendant is liable for disturbance costs incurred as a result of the Partial Taking of the Plaintiffs' Land.

38. The Plaintiffs state that they are entitled to recover disturbance costs directly attributable to the Defendant's Partial Taking, including but not limited to:

a. the cost of a new concept plan;

b. amendment fees associated with the new Concept Plan;

c. the cost of any required engineering reports;

d. costs of surveys for the redesign of the development;

e. fencing fees; and

f. any other expenses incurred as a direct result of the Partial Taking.

…

40. The Plaintiffs, therefore, claim from the Defendant:

…

b. compensation for damage to the Lands caused by the

> Partial Taking, including a reduction in the market value of the remainder;
>
> …
>
> i. the additional costs for the construction of a concrete subdivision fence as imposed by the City of Regina due to the Partial Taking;
>
> j. disturbance damages as a consequence of the Partial Taking;
>
> k. nuisance damages as a consequence of the Partial Taking;
>
> …

[12] In responses to the Application, Mr. Geiger has sworn an affidavit dated October 30, 2024 [Affidavit]. SPC takes issue with several of the paragraphs in the Affidavit. Specifically, SPC says that the following paragraphs of the Affidavit must be struck or disregarded: paragraph 7's last sentence; paragraphs 10; 13; 20; 21; 22; 31; 32; and 35.

[13] Also filed for my consideration with the Application were City of Regina's Bylaw No. 9900, *The Regina Traffic Bylaw, 1997*, Bylaw No. 7748, *Subdivision Bylaw*, Bylaw No. 2013-48, *Design Regina*, along with 2022 City of Regina Design Standard General Information and 2024 City of Regina Design Standard Transportation.

ISSUES

[14] The issues of this matter are the following:

1) What evidence can be considered in the Affidavit?

2) Should some, all, or none of the Impugned Paragraphs be struck from the Claim?

    i. The overhead powerline claim

ii. The fence claim

iii. The nuisance claim

iv. The disturbance damages claim

v. The injurious affection claim

LAW

Law Relating to Striking Out the Claim

[15] Rule 7-9 of *The King's Bench Rules* states:

> **Striking out a pleading or other document, etc. in certain circumstances**
>
> **7-9**(1) If the circumstances warrant and one or more conditions pursuant to subrule (2) apply, the Court may order one or more of the following:
>
> (a) that all or any part of a pleading or other document be struck out;
>
> (b) that a pleading or other document be amended or set aside;
>
> (c) that a judgment or an order be entered;
>
> (d) that the proceeding be stayed or dismissed.
>
> (2) The conditions for an order pursuant to subrule (1) are that the pleading or other document:
>
> (a) discloses no reasonable claim or defence, as the case may be;
>
> (b) is scandalous, frivolous or vexatious;
>
> (c) is immaterial, redundant or unnecessarily lengthy;
>
> (d) may prejudice or delay the fair trial or hearing of the proceeding; or
>
> (e) is otherwise an abuse of process of the Court.

> (3) No evidence is admissible on an application pursuant to clause (2)(a).

No Reasonable Cause of Action

[16] The Saskatchewan Court of Appeal recently confirmed the principles to be applied on an application to strike pursuant to Rule 7-9(2)(a) of *The King's Bench Rules* in *Wilson v Saskatchewan Water Security Agency,* 2023 SKCA 16 at para 17, 478 DLR (4th) 170:

> [17] I would first note that, with the one exception discussed below, the Chambers judge correctly identified the law that governs an application to strike pursuant to Rule 7-9(2)(a). The summary of the principles to be applied on such an application that is most often referred to by this Court is found in *Collins v Saskatchewan Rural Legal Aid Commission*, 2002 SKQB 201, which adopts the reasoning in *Sagon* [*Sagon v Royal Bank of Canada* (1992), 105 Sask R 133 (CA)]:
>
> > [11] The principles which apply to an application to strike a plaintiff's claim under Rule 173(a) are the following:
> >
> > (i) The claim should be struck where, assuming the plaintiff proves everything alleged in the claim there is no reasonable chance of success. (*Sagon v. Royal Bank of Canada et al.* (1992), 105 Sask.R. 133 at 140 (C.A.));
> >
> > (ii) The jurisdiction to strike a claim should only be exercised in plain and obvious cases where the matter is beyond doubt. (*Sagon*, at 140*; Milgaard v. Kujawa et al.* (1994), 123 Sask.R. 164 (Sask. C.A.));
> >
> > (iii) The court may consider only the claim, particulars furnished pursuant to a demand and any document referred to in the claim upon which the plaintiff must rely to establish its case (*Sagon*, at p. 140);
> >
> > (iv) The court can strike all, or a portion of the claim (Rule 173);
> >
> > (v) The plaintiff must state sufficient facts to establish the requisite legal elements for a cause of action. (*Sandy Ridge Sawing Ltd. v. Norrish and Carson* (1996), 140 Sask.R. 146 (Q.B.)).

[17] Previously, the Court of Appeal identified in *Harsch v Saskatchewan Government Insurance*, 2021 SKCA 159 at paras 17-19, [2022] 2 WWR 675 [*Harsch*], that a claim will only be struck if it has no reasonable prospect of success, that the law is not static, and that Courts must be generous and err on the side of permitting novel, but arguable, claims to proceed:

> **2. Striking pleadings under Rule 7-9(2)(a)**
>
> [17] The legal principles that govern applications to strike pleadings on the basis that they fail to disclose a reasonable cause of action are well-known. In *Merchant* [*Canada (Attorney General) v Merchant Law Group LLP*, 2017 SKCA 62], Ryan-Froslie J.A. summarized them in this way:
>
> > [18] Chief Justice McLachlin, writing for the Supreme Court of Canada, in *R v Imperial Tobacco Canada Ltd*., 2011 SCC 42, [2011] 3 SCR 45 set out the principles governing such applications:
> >
> > (a) it is incumbent on a plaintiff to clearly plead the facts upon which it relies in making its claim (para 22);
> >
> > (b) such applications proceed on the basis that the facts pled are true, "unless they are manifestly incapable of being proven" (paras 22 and 23);
> >
> > (c) a claim will only be struck if it is plain and obvious it discloses no reasonable cause of action, that is, it has no reasonable prospect of success (para 17); and
> >
> > (d) "[t]he law is not static and unchanging", thus, the approach taken in applications to strike "must be generous and err on the side of permitting a novel but arguable claim to proceed" (para 21).
>
> See also *Sagon v Royal Bank of Canada* (1992), 105 Sask R 133 (CA) at para 16 [*Sagon*]; and *Filson v Canada (Attorney General),* 2015 SKCA 80 at para 19, 388 DLR (4th) 66 [*Filson*].
>
> [19] In deciding an application to strike a claim on the basis it discloses no reasonable cause of action, a judge is limited to considering only the statement of claim, any document referred to therein, and any response to a request for particulars (*Sagon* at para 16; *Filson* at para 20). A judge

> is not permitted to consider affidavit or other extraneous evidence.
>
> [18] The requirement to accept the pleaded facts as true when considering an application to strike means that the plaintiff's claim is to be evaluated in its best light. The task for a reviewing judge in an application under Rule 7-9(2)(a) is to determine, by considering the whole of the statement of claim, whether sufficient facts have been pleaded to establish the essential legal elements of a cause of action (*Harpold* [*Harpold v Saskatchewan (Corrections and Policing)*, 2020 SKCA 98] at para 26; *Reisinger* [*Reisinger v J.C. Akin Architect Ltd*., 2017 SKCA 11] at para 20).
>
> [19] It is also important to bear in mind two other things. First, in the context of an application under Rule 7-9(2)(a), the question is whether the statement of claim pleads sufficient facts to establish a cause of action known at law; the plaintiff does not have to plead facts to negate defences the defendant may have to that cause of action. Second, the refusal of a court to strike a claim does not mean that a plaintiff will succeed at trial. It simply means that the claim may proceed to trial, where the plaintiff will have to prove the claim in the usual way (*Taheri* [*Taheri v Buhr*, 2021 SKCA 9] at para 22).

[18] The requirement to take pleaded facts as true in this type of application is qualified; the Court is not required to take as true pleaded facts that are manifestly incapable of proof or based on speculation and assumptions. In *Saskatchewan Provincial Court Judges Association v Saskatchewan (Minister of Justice)*, [1996] 2 WWR 129 at para 2 (Sask CA), the Court of Appeal stated:

> 2 The law is well settled that only the statement of claim itself, the particulars, if any, and any document referred to in the statement of claim, may be looked at to determine whether the statement of claim discloses a reasonable cause of action. The rule requires, as well, that the material facts in the statement of claim (but not allegations based on assumption and speculation) must be taken as true. (See: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959; *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441.) A copy of the statement of claim appears as an appendix to these reasons.

[19] In considering an application to strike, the Court must also be cognizant that the claim at this stage is usually in the infancy stage of the litigation. As such, the distinction between evidence and facts must be recognized. In *Inland Steel Products Inc. v Higgins*, 2023 SKKB 132 at paras 25, 29-30, Morrall J. held:

[25] In civil law in Saskatchewan, no such right to silence on behalf of litigants exists. A plaintiff may sue a defendant so long as a reasonable cause of action is disclosed in the pleadings or that it does not otherwise run afoul with Rule 7-9. While there must be a nexus between the facts pled in the claim and the cause of action, it initially requires much less than reasonable grounds or specific direct or inferential evidence by the claimant. More specifically, the defendant does not have the luxury of remaining silent in the face of the claim and forcing the plaintiff to prove his case without the defendant being questioned or some documentation being provided on the defendant's behalf.

…

[29] As noted in the case law, there is a difference between evidence and facts in the context of pleadings. While Mr. Higgins may complain that there is no evidentiary basis for Inland's claim, that does not necessarily mean that the appropriate facts to support their claim were not pled. In the case at bar, Inland stated in their claim that Mr. Higgins solicited an employee contrary to the release document and employment contract. This is the allegation of fact upon which the claim is based. As noted in *Harpold* [*Harpold v Saskatchewan (Corrections and Policing)*, 2020 SKCA 98] and other decisions, in an application to strike under Rule 7-9(2)(a) I must assume all allegations of fact to be true. While I am aware of the results of the demand for particulars which demonstrate that Inland presently has no specific evidence of this allegation, I must scrutinize this part of the application without regard to the lack of specific evidence on Inland's part. I must determine whether the claim is certain to fail.

[30] In reviewing the pleadings, including the demand and response to the demand for particulars, I have come to the conclusion that the claim is not certain to fail. Simply because Inland does not presently have the evidentiary basis to succeed at trial or summary judgment at this point does not disentitle them from making this claim. Through questioning and document production, they may obtain the necessary building blocks for their claim to be successful. I find that the nexus between Mr. Dusaniuk joining Mr. Higgins at his employment at Robertson is not so remote that no cause of action could succeed as a result of the breach of the non-solicitation clause. It is possible as a result of that alleged fact that Mr. Higgins could have solicited Mr. Dusaniuk to quit Inland and work for Robertson. The timing of the events leading to Mr. Dusanuik's employment at Robertson allow for that allegation to be possible. During questioning of either Mr. Higgins or Mr. Dusanuik, they may provide details and/or documents related to a fact of solicitation. As I mentioned previously, the civil process does not provide a right to silence in this situation. Inland is entitled to make this claim and ask questions related to the allegations they propound.

[20] Lastly, the Court should be mindful that neither the improbability of proof, nor novelty, justify striking a claim. See: *Bourgault Industries Ltd. v Graham*, 2024 SKKB 153.

Scandalous, Frivolous, Vexatious

[21] Upon an application to strike a claim based on it being scandalous, frivolous, or vexatious, the Court can consider a broader range of evidence. In *Siemens v Baker,* 2019 SKQB 99 at paras 23-25, [2019] 5 CTC 129, the Court outlined the following:

> [23] Although these terms are often used interchangeably, it is helpful to differentiate among them. A pleading will qualify as "scandalous" if it levels degrading charges or baseless allegations of misconduct or bad faith against an opposite party. See: *Paulsen v Saskatchewan (Ministry of Environment)*, 2013 SKQB 119 at para 45, 418 Sask R 96 [*Paulsen*] and the authorities cited there. Courts in British Columbia, for example, have described a scandalous pleading as "one that is so irrelevant that it will involve the parties in useless expense and prejudice the [pursuit] of the action by involving them in a dispute apart from the issues". See: *Turpel-Lafond v British Columbia*, 2019 BCSC 51 at para 23, 429 DLR (4th) 131 [*Turpel-Lafond*] quoting from *Woolsey v Dawson Creek (City)*, 2011 BCSC 751 at para 28.
>
> [24] A pleading will qualify as "vexatious" if it was commenced for an ulterior motive (other than to enforce a true legal claim) or maliciously for the purposes of delay or simply to annoy the defendants. See: *Paulsen*, at para 46. Put another way, it is vexatious if it does not assist in establishing a plaintiff's cause of action or fails to advance a claim known in law. See: *Turpel-Lafond*, at para 23.
>
> [25] A pleading will qualify as "frivolous" if it is plain or obvious or beyond reasonable doubt the claim it advances is groundless and cannot succeed. See: *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959 at 980; *Paulsen* at para 47; and *Wayneroy Holdings Ltd. v Sideen*, 2002 BCSC 1510 at para 17.

Abuse of Process

[22] The Saskatchewan Court of Appeal has succinctly outlined the law as it relates to striking out a claim under Rule 7-9(2)(e) of *The Queen's Bench Rules* (now

The King's Bench Rules) in the case of *GHC Swift Current Realty Inc. v BACZ Engineering (2004) Ltd.*, 2022 SKCA 38 at paras 25-26, 29 CLR (5th) 294 [*Swift Current*]:

> [25] Striking a claim under Rule 7-9(2)(e) is not a remedy to be lightly granted. A claim should be struck under that subrule only "where it is 'plain and obvious' that allowing an action to proceed would amount to an abuse of process" (*Nelson v Teva Canada Limited*, 2021 SKCA 171 at para 4 [*Nelson*]; see also *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959), or where "it is obvious the claim is devoid of all merit or cannot possibly succeed" (*Sagon v Royal Bank of Canada* (1992), 105 Sask R 133 at para 18 (CA) [*Sagon*]; *Mann Family Trust (Trustee of) v Hawkins*, 2011 SKCA 146 at para 20, 385 Sask R 59 [*Mann*]). In a case where the expiry of a limitation period is at issue, this standard will be met where, at the time of issuing the claim, "the plaintiff had knowledge of all the facts that would cause the plaintiff's claim to be statute barred" (*Walker* [*Walker v Mitchell*, 2020 SKCA 127] at para 25). Conversely, where there is an arguable issue as to whether the claim is statute barred, it is an error in principle for a Chambers judge to strike the claim under Rule 7-9(2)(e) (*Nelson* at paras 17–18; see also *CPC Networks Corp. v McDougall Gauley LLP*, 2021 SKCA 127 at para 92).
>
> [26] A judge faced with an application to strike a pleading under Rule 7-9(2)(e) is entitled to consider affidavit evidence to assess the merits of the claim or defence (*Sagon* at para 18). However, the requirement to apply the "plain and obvious" standard at this stage means that it is not appropriate for the judge to weigh the evidence or determine legitimate triable issues (*Paulsen v Saskatchewan Ministry of Environment)*, 2013 SKQB 119 at para 42, 418 Sask R 96). Where only one side has filed affidavit evidence on a material point in a strike application, the facts stated in that affidavit are generally to be taken as true (*Mann* at para 21; *Robin Hood Management Ltd. v Gelmich*, 2014 SKQB 347 at paras 41–42, 459 Sask R 183; *Landry v Rural Municipality of Edenwold No. 158*, 2020 SKQB 218 at para 20). Where both sides have filed affidavit evidence, a strike application is not the appropriate place to resolve conflicts in the evidence or make credibility findings. The presence of conflicting evidence on a material point means it is not plain and obvious that the claim is devoid of all merit and, where that is so, an application to strike the claim cannot succeed (*Mann* at paras 31–33; *Bank of Montreal v Schmidt et al.* (1989), 75 Sask R 157 at paras 9–10 (CA); *Shinkaruk v Neufeld Building Movers Ltd.*, 2014 SKQB 12 at para 25, 432 Sask R 255; *Marciano v Landa*, 2005 SKQB 58 at para 47, 1 BLR (4th) 281).

[23] Abuse of process is a flexible doctrine that can be applied in a wide

variety of cases. See: *Walker v Mitchell*, 2020 SKCA 127 at para 24, [2021] 4 WWR 555 [*Walker*].

[24] A claim that is statute barred can be an abuse of process if the right evidence is before the Court. See: *Markus v Saskatchewan*, 2008 SKQB 394; and *Walker* at paras 25 and 27. See also: *Swift Current* at paras 24 and 25, where the Court of Appeal determined, in the face of evidence of an arguable case, a claim should not be struck due to a limitation issue under a Rule 7-9 application.

***The Expropriation Procedure Act,* RSS 1978, c E-16**

[25] In considering this Application, it is helpful to be mindful of the overall statutory scheme at the heart of the Claim. The statute that governs the compensation available for the expropriation by SPC in the Claim is *The Expropriation Procedure Act*, RSS 1978, c E-16 [*EPA*]. Section 21 of the *EPA* calls for the Act to apply to expropriations of easements by the Crown. Section 35 of the *EPA* provides the framework for an action to determine compensation under the *EPA*. It reads:

> **Commencement of action to determine compensation**
>
> **35**(1) An owner may commence an action for the determination of the amount of compensation to be paid by serving on the expropriating authority a statement of claim in accordance with subsection (3) and shall file a copy thereof, with proof of service, in the office of the local registrar acting at the judicial centre nearest to the land to which the action relates.
>
> (2) Within twenty-one days after the service of the statement of claim, or within such further period as may be agreed to by the parties to the action, or as may be allowed by the judge sitting at the judicial centre at which the action is pending, the expropriating authority shall serve on each of the other parties to the action a statement of particulars in accordance with subsection (3) and file a copy of the statement with proof of service in the office of the local registrar acting at the said judicial centre.
>
> (3) There shall be set forth in the statement of claim and in the statement of particulars the material facts on which the party intends to rely at the trial of the action with respect to the following matters

where applicable:

> (a) the best use that can be made of the expropriated land;
>
> (b) any zoning laws applicable to the expropriated land;
>
> (c) designation of land that may be claimed to be comparable to the expropriated land the sale of which could form a basis for an opinion of the value of the expropriated land;
>
> (d) damage caused by the severance of the expropriated land from the other land;
>
> (e) the cost of replacing the land, less depreciation, and the rate of depreciation where depreciation is considered as a factor in fixing the cost of replacement;
>
> (f) capitalization of income attributable to the expropriated land where such income is considered as a factor in valuing the expropriated land;
>
> (g) the fair market value of the parcel of land from which the expropriation was made, both before and after expropriation;
>
> (h) the sum or each of the several sums claimed by the owner as damages.

[26] Pursuant to s. 42 of the *EPA*, the right to compensation shall stand in the stead of the land. It reads:

> **Compensation to stand instead of land, etc.**
>
> **42** The right to compensation and the compensation agreed upon or awarded in respect of any land acquired or taken by an expropriating authority in the exercise of its statutory powers of expropriation shall stand in the stead of the land; and any claim to or charge or encumbrance upon the land shall be deemed to be converted into a claim for the amount of compensation or to a proportionate part thereof.

[27] What the Court can consider in determining compensation is found in s. 49 of the *EPA.* It states:

> **Compensation by expropriating authority**
>
> **49**(1) An expropriating authority shall make due compensation to the owner of land expropriated by the expropriating authority in the

> exercise of its statutory powers beyond any special advantage that the owner may derive from any public improvement for which the land was expropriated.
>
> (1.1) Subject to subsection (1), in an action for compensation the judge, in determining the value of the land expropriated, shall not take into account:
>
> > (a) any anticipated or actual use by the expropriating authority of the land expropriated at any time after expropriation; or
> >
> > (b) any increase or decrease in the value of the land expropriated resulting from the anticipation of expropriation by the expropriating authority or from any knowledge or expectation, prior to the expropriation, of the purpose for which the land was expropriated.
>
> (2) Compensation for land expropriated shall be ascertained as of the day on which the expropriating authority takes possession of the land or dedicates the land or the day on which the declaration of expropriation respecting the land is submitted to the Land Titles Registry pursuant to section 10 or 12, whichever is the earliest.
>
> (3) **Repealed.** 2017, c P-30.011, s.10-1.
>
> (4) The expropriating authority may, before the compensation is agreed upon or determined, undertake to make alterations or additions or to construct any additional thing or to abandon part of the land expropriated or to grant other lands or rights or privileges, in which case any such undertaking shall be taken into account in determining the compensation; and where the undertaking has not already been carried out, the judge trying an action for compensation shall order that the owner is entitled to have such alterations or additions made or such additional thing constructed or such part of the land abandoned or such grant made to him in addition to the amount of compensation, if any, payable to him.

ANALYSIS

1) What Evidence Can Be Considered in the Affidavit?

[28] On an application to strike affidavit evidence, a chambers judge is required to articulate "which portions of a contested affidavit are not in conformance" with *The King's Bench Rules,* and to "identify what portions are struck from the record." See: *Wongstedt v Wongstedt*, 2017 SKCA 100 at paras 38-39, [2018] 4 WWR 82;

Thomas v Input Capital Corp., 2020 SKCA 67 at para 34, 82 CBR (6th) 9; and *S.G. v K.B.*, 2021 SKCA 133 at para 23

[29] Following this methodology, my rulings on the passages of the Affidavit in issue are set out in Appendix "A" to this fiat.

2) Issue 2: Should Some, All, or None of the Impugned Paragraphs be Struck from the Claim?

[30] As I heard the extensive arguments on the Application, I was struck by the thought that many of the arguments presented more aptly apply to an application for summary judgment. I had to remind myself that my role on this Application was not to do a deep dive in the law and come to conclusions regarding the proper interpretation of city bylaws, statutory provisions, and City of Regina design standards for land development in the face of arguments suggesting diverging interpretations. Indeed, SPC made compelling arguments. However, in the end, for the most part, I could not conclude that there was no reasonable cause of action pleaded, that it was plain and obvious there was no arguable case, or the claims were devoid of merit and/or an abuse of process.

[31] It may very well be that SPC's arguments are successful in this litigation, but in my view it is too early to make that determination definitively given the principle I must apply to this type of application.

i. The Overhead Powerline Claim: Paragraph 7

[32] SPC argues that paragraph 7 of the Claim is either irrelevant or is barred by s. 33 of the *PCA*. Therefore, it cannot succeed and ought to be struck.

[33] Section 33 of the *PCA* provides:

Powers re land adjoining power lines

33(1) In this section:

(a) **"pipeline"** means a pipeline within the meaning of Part III;

(b) **"power line"** means a power line within the meaning of Part III;

(c) **"right of way"** means a right of way acquired by the corporation for the purposes of its power lines, poles, structures, wires, conduits or pipelines.

(2) The corporation may enter on any land on either side of its power lines, poles, structures, wires, conduits or pipelines or any of its rights of way, for the purposes of:

(a) doing anything necessary for the construction, operation, maintenance, repair or replacement of any power line or part of a power line, pole, structure, wire, conduit or pipeline; or

(b) trimming or removing any trees or shrubs or removing other obstructions to the extent that, in the opinion of the corporation, is necessary to protect its power lines and any cross arms, wires or other attachments to power poles.

(3) Any cross arms, wires or other attachments to power poles may project over any land adjoining a highway, road allowance, road, street, lane or other public place vested in the Crown.

(4) In the trimming of a tree or shrub pursuant to clause (2)(b), every care is to be taken to ensure that no damage is done to the tree or shrub other than damage that is unavoidable.

(5) The owner of land described in subsection (2) is not entitled to compensation with respect to the trimming or removal of a tree or shrub or the removal of an obstruction, and the owner of land described in subsection (3) is not entitled to compensation with respect to the overhanging of a cross arm, wire or other attachment to a power pole.

[Emphasis added]

[34] There was little argument on this paragraph during submissions, however, I agree that paragraph 7 is irrelevant and/or barred by s. 33 of the *PCA* and should be struck. This paragraph, as pleaded, indicates that the Geigers are claiming for overhanging portions of a power line over the Additional Parcels. If the Claim is

something more than that, it is not apparent in the pleadings. Therefore, paragraph 7 should be struck as it does not disclose a reasonable cause of action and/or is an abuse of process.

[35] Of course, as there has been no defence filed, it is open to the Geigers to amend this claim without leave. As I do not have any proposal for an amendment, and leave is not required at this stage, I am not prepared to grant leave to amend this paragraph. My decision to not grant leave is without prejudice to the Geigers' right to amend under *The King's Bench Rules* if they deem it necessary in the future.

ii. The Fence Claim: Paragraphs 19, 27(f), and 40(i)

[36] The Claim alleges damages relating to the necessity of building a concrete subdivision fence along the entire length of Armour Road [Fence Claim]. SPC seeks to strike out those portions of the Claim relating to the Fence Claim.

[37] Turning to the adequacy of pleading the Fence Claim, the Claim identifies the nature and basis for the fencing requirements. The Geigers pleaded that the partial taking "has resulted in the Lands becoming non-compliant with the City of Regina's requirements, as the city mandates the installation of the concrete subdivision fence alone the entire length of Armour Road" (Claim at para. 19).

[38] If these pleaded facts are taken as true, I note ss. 35(3)(d) of the *EPA* seems to make it arguable that this is a potential claim for damages because of the expropriation.

[39] However, SPC argues that to the extent that the concrete fence is required because of the powerline on the Lands or SPC's use of the Lands, any such claim is barred by virtue of s. 49(1.1) of the *EPA* which states:

> **Compensation by expropriating authority**
>
> …
>
> **49**(1.1) Subject to subsection (1), in an action for compensation the judge, in determining the value of the land expropriated, shall not take into account:
>
> (a) any anticipated or actual use by the expropriating authority of the land expropriated at any time after expropriation; or
>
> (b) any increase or decrease in the value of the land expropriated resulting from the anticipation of expropriation by the expropriating authority or from any knowledge or expectation, prior to the expropriation, of the purpose for which the land was expropriated.

[40] In my opinion, it is debatable at this stage whether s. 49(1.1) of the *EPA* should be interpreted in the manner suggested by SPC. I note SPC did not provide any authority for their interpretation, and I am not confident it is plain and obvious it will be successful.

[41] In the alternative, SPC suggests that the facts pleaded in support of the Fence Claim cannot be proven as they are based on the Geigers' assumptions and/or speculation, and there are no documents to establish the City of Regina requires this kind of fence.

[42] The Geigers' responses to the Demand for Particulars and the Notice to Produce suggests the pleaded facts are supported by experience gained in developing land in the City of Regina, verbal discussions with the City of Regina, and their understanding of City of Regina's applicable bylaws, regulatory requirements, and development policies.

[43] Taking aside the Geigers' interpretation of the applicable bylaws, regulatory requirements, and development policies, to the extent that the pleaded facts are based on what the Geigers have been told by the City of Regina and further informed

by their experience, those facts cannot be said to be mere speculation or assumptions. Of course, they may be proven to be incorrect during this litigation, but that determination is for a later stage in the process. At this point, I conclude that this is not a case where the facts pleaded are manifestly unable to be proven. Therefore, there are sufficient facts pleaded to conclude there is a reasonable cause of action for the Fence Claim.

[44] In addition, SPC argues that when the Court considers the bylaws and design standards that are relevant, the Fence Claim is destined to fail. I take this portion of their argument as relying on Rule 7-9(2)(c)(e) of *The King's Bench Rules,* specifically, the Fence Claim is frivolous or an abuse of process.

[45] In essence, SPC argues that the Geigers are wrong at law, and a fence is not required because of the expropriation. Instead, they argue the fence is required because of other city requirements.

[46] Specifically, they rely on Bylaw 9900 that sets the speed limit of 60 kilometers per hour on Armour Road and s. 3.28 of the 2024 City of Regina Design Standards Transportation which requires a fence along Armour Road because of the speed limit on that road. In short, they say the fence is required irrespective of the expropriation.

[47] Section 3.28 of the 2024 City of Regina Design Standards Transportation states:

> **3.28: Security Fence**
>
> 3.28.1. <u>All roads constructed adjacent to residential land use with a posted speed limit greater than 50 kilometres per hour shall be fenced</u>.
>
> 3.28.2. Security fencing shall be installed along roads with a posted speed limit greater than 70 kilometres per hour

> 3.28.3. Gaps in security fencing may be introduced where a formal active transportation connection is provided or where users can be safely directed to an intersection crossing.
>
> 3.28.4. Security fencing shall be installed adjacent to all railways.
>
> 3.28.5. Security Fence shall be either a 1.83 metres high chain-link fence, a noise wall as per the City Noise Attenuation Policy, a concrete subdivision wall, or any other material as approved by the City.
>
> 3.28.6. Chain link security fences may be installed on public property.
>
> [Emphasis added]

[48] It appears clear that as the Lands are adjacent to Armour Road, a fence is required under Bylaw 9900 and s. 3.28.1 of the 2024 City of Regina Design Standards Transportation. However, in my mind, that does not end the matter. Section 3.28.1 does not specify what kind of fence is required. In other words, there is some question as to the minimum type of fence required due to speed as there are several different alternatives for fencing. I agree with SPC that these sections require a fence, and that the required fence is not as a result of the expropriation; however, the section 3.28.1 does not indicate that a concrete subdivision fence is required due to the speed of Armour Road. As such, I do not see how these specific provisions support SPC's general argument that the city does not require a concrete subdivision fence due the expropriation. It only supports the proposition these sections do not require a concrete fence.

[49] In addition, SPC says that ss. 15(6) and 19(2) of Bylaw 7748 provide that either a buffer strip or a fence is required due to the new double frontage lots that are now being alleged as being required due to the expropriation. Sections 15(6) and 19(2) read as follows:

> 15(6) Where in the opinion of Council or the Development Officer, buffer strips are not required, Council or the Development Officer may require that all or any of the following conditions be met instead:
>
> i) Satisfactory landscaping be provided at the applicant's cost within the road rights-of-way or within the boulevard

> portion of road rights-of-way;
>
> ii) Satisfactory fencing at the applicant's cost be provided on private property;
>
> iii) Restrictive covenant agreements be registered in the land registry pursuant to section 235 of the Act against the titles to double frontage lots; and
>
> iv) The applicant's compliance with any other pertinent conditions that Council or the Development Officer may specify.
>
> …
>
> 19(2) Through lots or double frontage lots shall not be permitted unless a registered buffer strip is provided continuously between the lots and abutting right-of-way or that the conditions of Section 15, Subsection 6 are met.

[50] SPC opines that the 15-meter-wide expropriation land would satisfy the bylaw's requirement of a buffer strip, as the buffer strip is not residential land use. As a result, they suggest that no fence would be required by either the bylaw or the design standards, and the Fence Claim must fail.

[51] However, SPC's interpretation of the bylaw assumes that the City of Regina accepts the expropriated land as being an appropriate buffer strip and as such the city will not require satisfactory fencing – *i.e.* potentially a cement subdivision lot – because of it. This is, in my mind, an issue for trial as I have no evidence that is conclusive that the expropriation will create a buffer strip satisfactory to the city and that the city will not require a fence.

[52] Further, SPC's position fails to account for s. 1.5 of the 2022 City of Regina Design Standards General Information, which states:

> **1.5. Revisions**
>
> 1.5.1. The City reserves the right to alter, revise, or update the Design Standards from time to time. Any such change proposals shall be in accordance with section 1.5.

> 1.5.2. Comments related to Design Standards may be submitted at any time by contacting Service Regina. Contact information is available on the City of Regina website.
>
> 1.5.3. Design Standards are published as they become available and are effective immediately. Design and Construction activities must adhere to the current version of the Design Standards.
>
> 1.5.4. Any proposed changes to the Design Standards shall be accompanied by the *Design Standard Change Request.*

[53] Section 1.5 codifies that design standards are not static, and changes do occur. Therefore, even if SPC is correct and the design standards at this point do not require a cement subdivision fence, the door is open for that to change. Indeed, if one reviews the history of this development and the necessity to change the concept plan from the original direction due to the expropriation of the Lands, it seems clear land development is flexible and subject to new conditions and requirements as the project progresses.

[54] In the context of a fluid land development process and in the context of the differing interpretations of several bylaws and design standards by the parties, it is my view there is room for the Geigers to at least argue for the fence requirement. Thus, I cannot conclude that paragraphs 19, 27(f), and 40(i) of the Claim relating to the fence – when considered as part of the overall concept of fair and due compensation under the *EPA* – is devoid of merit, scandalous, vexatious, and/or an abuse of process.

iii. The Nuisance Claim: Paragraphs 29-36, and 40(k)

[55] There is no issue that the Geigers have pleaded the material facts that support a nuisance claim, thus SPC's dispute with these paragraphs cannot be based on Rule 7-9(2)(a) of *The King's Bench Rules*.

[56] However, what is in dispute is whether s. 3(2.2) of the *PCA* bars the Claim in this case, which in my view amounts to an argument the nuisance claim is frivolous or an abuse of process.

[57] Section 3(2.2) of the *PCA* states:

> **3**(2.2) The corporation is not liable in an action based on nuisance, or on any other tort that does not require a finding of intention or negligence, for any loss or damage arising, directly or indirectly, from:
>
> (a) its land, buildings, machinery, plant or other works, including any of its transmission and distribution lines, apparatus, equipment or other facilities; or
>
> (b) its operation or non-operation as a public utility.

[58] SPC argues the Geigers' Claim of nuisance arises from the expropriation. Following, the purpose of the expropriation was the construction of a power line. Ergo, SPC argues that since SPC uses power lines in its role as a public utility, the immunity provision of s. 3(2.2) of the *PCA* applies and bars the nuisance claim. As such, they say it is plain and obvious a claim in nuisance is destined to fail.

[59] However, the immunity clause that SPC relies upon is arguably not absolute. This Court in *McIlwaine v Saskatchewan,* 2000 SKQB 326, 195 Sask R 221 [*McIlwaine*], considered and commented on a claim of nuisance arising out of an expropriation in the face of the statutory immunity clause. At para. 150, Dawson J. held:

> [150] In this case the defendant acted pursuant to statutory authority in expropriating the property and altering the access. If a nuisance has been legislatively authorized, no liability is imposed. However, if the legislative mandate can be fulfilled without interfering with private rights, the defendant is granted no immunity if a nuisance is found. In other words, if the damage inevitably flows from the exercise of legislative power, there is no liability, but not otherwise. The onus of proving inevitability rests on the defendant.

[60] There is no issue that SPC is empowered by legislation to build a transmission line and, as part of the process, has the legislative authority to expropriate land for that purpose. However, whether the trial judge will find that the legislative mandate relating to the actual route of the powerline could not be fulfilled in this case without interfering with private rights is arguable based on the evidence before me. Specifically, Exhibit D to the Affidavit is a letter from SPC dated March 4, 2020, which

outlines that there were several options for the route of the transmission line that resulted in the need to expropriate the Lands. Whether the other options were viable without impacting private rights is arguable on SPC's own acknowledgment of the existence of other potential routes for this transmission line.

[61] As such, I cannot conclude that it is plain and obvious the nuisance claim is devoid of merit at this stage, or that the Geigers are left with no argument in relation to this Claim. It ought not be struck at this time.

iv. The Disturbance Damages Claim: Paragraphs 37-38, and 40(j)

[62] SPC argues that the Claim for disturbance damages should be struck as there are no reported decisions awarding disturbance damages considering the current version of the *EPA*. As compensation for expropriation claims must be based on statute and there does not appear to be a basis to claim disturbance damages under the *EPA*, SPC argues such a claim must be dismissed at this stage.

[63] SPC's position is not quite correct. To counteract SPC's argument, the Geigers rely on *Ratner Realty Ltd. v Saskatchewan Telecommunications*, 1982 CarswellSask 527 (WL) (QB) [*Ratner*], to suggest that development-related expenses can be compensable when they are "reasonably incurred in the course of a practical undertaking": *Ratner* at para 29.

[64] Although *Ratner* can be distinguished on its facts, that still does not negate the fact that this Court has awarded disturbance damages in an expropriation claim under the *EPA*.

[65] SPC further argues that under the predecessor legislation to the *EPA*, disturbance costs were only recognized where it is necessary for an ongoing revenue-generating activity to relocate because of expropriation of a fee simple title. See: *R v Ilnicki*, 1978 CarswellSask 381 (WL) (Dist Ct); *Norman Real Estate Ltd. v*

Saskatchewan Province of (1979), 8 Sask R 124 (CA).

[66] SPC says there has been no construction on the Lands, and the development is in the planning and approval stage, thus it is not a revenue-generating initiative at this point. Again, the relied upon cases indicate – generally – disturbance damages may be awarded in expropriation cases. Despite difference in circumstances where there were disturbance damages found in the past, this does not necessarily mean the law is static and will not evolve to allow claims for disturbance based on the facts of this case.

[67] I am cognizant of the Court of Appeal's decision in *Harsch* that a claim will only be struck if it has no reasonable chance of success, and the Court must be generous and err on the side of caution. Despite the difference in the legislation and the factual difference to previous cases outlined by both parties, I am not convinced the door for the Geigers is completely closed on this issue at this stage. Indeed, there is case law that at least generally recognizes disturbance damages as being compensable in expropriation cases under the current and past versions of the *EPA*. Thus, I conclude there is at least an arguable case that such damages could be awarded in this matter.

v. The Injurious Affection Claim: Paragraph 40(b)

[68] SPC categorizes the Geigers' claim for compensation in paragraph 40(b) of the Claim as injurious affection damages relating to the expropriation. Following, they argue it is clear, based on *McIlwaine,* that such a claim cannot be allowed under the *EPA*.

[69] Even though SPC's proposition appears correct in law, I am cognizant that, in addition to a cause of action under the *EPA,* the Geigers have also pleaded a cause of action in nuisance. It is arguable the types of damages claimed may be available in nuisance. Neither party made submissions in this regard. Thus, all I will

say is that at this stage, based on the causes of action that still stand after this Application, there is no merit in striking paragraph 40(b) from the Claim.

CONCLUSION

[70] SPC's Application for the most part has been dismissed, save for paragraph 7 of the Claim, which is struck.

[71] Considering the minimal success of the Application, I award no costs.

J.

M.E. TOMKA

Appendix "A"
Rulings on Objection to Affidavit

Affidavit of Mark Geiger sworn October 30, 2024.	
Para.	**Decision**
7 last sentence	Admissible as statement of facts as perceived by the affiant; not for the truth of the contents
10	Admissible as statement of facts as perceived by the affiant
13	Admissible as statement of facts as perceived by the affiant
20	Admissible as statement of facts as perceived by the affiant
21	Admissible as statement of fact as perceived by the affiant
22	Words "As a result of the Easement" is struck as opinion the remainder is admissible
31	Admissible. This is statement of fact as perceived by the affiant or information that is within their own knowledge
32	Admissible as statement of fact as perceived by the affiant
33	Admissible as statement of fact as perceived by the affiant