Court of Appeal for Saskatchewan **Citation: *Seewalt v Saskatchewan*, 2024 SKCA 100**
Docket: CACV4112 **Date: 2024-10-24**

Between:

Johnny Jacob Seewalt

Appellant
(Respondent/Plaintiff)

And

The Government of Saskatchewan

Respondent
(Applicant/Defendant)

Before:	Jackson, Schwann and Tholl JJ.A.
Disposition:	Appeal dismissed
Written reasons by:	The Honourable Justice Lian M. Schwann
In concurrence:	The Honourable Justice Georgina R. Jackson The Honourable Justice Jerome A. Tholl
On appeal from:	QBG-BF-00126-2020 (Sask KB), Battleford
Appeal heard:	March 11, 2024
Counsel:	Johnny Seewalt on his own behalf Justin Stevenson for the Respondent

Schwann J.A.

I. INTRODUCTION

[1] Johnny Jacob Seewalt commenced an action by statement of claim against the Government of Saskatchewan (Parks, Culture and Sport) [Government], Tolko Industries Ltd. [Tolko], Carrier Forest Products Ltd. [Carrier] and Forsite Consultants Ltd. [Forsite] for damages allegedly sustained when the Government terminated his commercial lease. The lease in question covered two hectares of Crown land located within the boundaries of the Meadow Lake Provincial Park [park]. At root, Mr. Seewalt asserted that the Government had no legal right to terminate his lease because it had impermissibly permitted forest harvesting to take place within the park and, in doing so, acted in contravention of provincial legislation and the terms of the lease.

[2] Tolko, Carrier and Forsite successfully applied to have Mr. Seewalt's claim dismissed against them for disclosing no reasonable cause of action. That result was followed by a summary judgment application brought by the Government, pursuant to Rule 7-2 of *The King's Bench Rules*, to have Mr. Seewalt's action against it dismissed in its entirety. A King's Bench judge sitting in Chambers concluded there was no genuine issue requiring a trial and that Mr. Seewalt's action should be dismissed in its entirety with costs in favour of the Government fixed at $2,500: *Saskatchewan v Seewalt* (28 October 2022) Battleford, QBG-BF-00126-2020 (Sask KB) [*Chambers Decision*].

[3] Mr. Seewalt asserts the Chambers judge committed multiple errors of law and fact. Indeed, his 13-page notice of appeal itemizes roughly 45 grounds. For the reasons that follow, I would dismiss his appeal.

II. THE BASIC FACTS

[4] An understanding of the evidence presented to the Chambers judge is most usefully gleaned from the chronology of the key events that led up to Mr. Seewalt's litigation:

(a) The Government entered into a commercial lease agreement [lease] with Tall Timber Trails on July 2, 2015, pursuant to which Tall Timber Trails, as lessee, was permitted to operate a riding-stable business on land located within the park that was described in schedule A:

> Land Location/Description:
>
> The improvements are located on lands designated by the Lessor and situated in the Province of Saskatchewan and defined within the "Lease Boundary" on the plan marked Schedule "A", which is attached hereto and forms part of this Lease Agreement, which said lands are a maximum of 2 hectares in size and located … in Meadow Lake Provincial Park.

(b) Clause 3 of the lease stipulated that it would expire on October 31, 2019, with s. 34(g) providing that, "upon the termination of this Lease Agreement", if the lessee remained "in possession of the improvements" (i.e., the business), only a monthly tenancy would be created "at the rent payable immediately prior to the termination".

(c) Around October 12, 2018, on its website, the Ministry of Parks, Culture and Sport announced a proposed commercial harvesting plan for the park and requested public feedback by November 21, 2018.

(d) On May 19, 2019, Mr. Seewalt, who had an interest in horseback riding and the Old West experience, sent a private investment application to the Government for purposes of developing a business of that sort within the park. A Government official informed him that Tall Timber Trails was already operating a similar business within the park and gave him the contact information for it.

(e) In June of 2019, the Meadow Lake Provincial Park Ecosystem-Based Management Plan [Ecosystem Plan] and the Meadow Lake Provincial Park Forest Conservation Management Plan [Conservation Plan] were formalized [collectively, management plans]. The management plans had been developed as a forest renewal project to address forest insects and diseases, ecosystem management, exotic invasive plant species management, grassland and range management, and as an overarching ecological review and assessment of provincial park lands.

(f) Mr. Seewalt purchased the Tall Timber Trails business from its owner, Howard MacCuish, on July 4, 2019, for $22,000 and, as part of that transaction, Mr. MacCuish assigned the lease to Mr. Seewalt. Other than to provide its consent to the assignment of the lease on July 9, 2019, the Government was not part of that private transaction. As the lease was set to expire on October 31, 2019, less than four months remained on its term at the time of assignment.

(g) Prior to the lease expiration date, Mr. Seewalt expressed an interest in significantly expanding the scope of the existing business and was directed to send a proposal to the Government, which he did on November 29, 2019.

(h) After the lease expired on October 31, 2019, the Government regarded Mr. Seewalt as a month-to-month tenant.

(i) On December 11, 2019, Forsite contacted Mr. Seewalt by email, wanting to consult with him on its forest harvesting plans (including discussing a pre-burn harvest and an upcoming controlled burn). Concerned about this turn of events, Mr. Seewalt promptly contacted Government officials to express his dismay with how the proposed plans would have a negative impact on his business.

(j) Government officials tried to allay Mr. Seewalt's unease by assuring him that his business would not be drastically affected by the proposed harvesting operations and encouraged him to engage in the consultation process with Tolko and Forsite. Mr. Seewalt remained unconvinced and wished to move his business elsewhere in the park. He was advised that if he wanted to relocate his business, he should propose a new location for the Government's consideration.

(k) In a January 27, 2020, letter from Robin Van Koughnett (the park's Northwest Regional Director), Mr. Seewalt was informed that he would be given an opportunity to engage in the forest harvesting consultation process as harvest-specific plans had been deferred to the winter of 2020–2021. Mr. Seewalt was also advised that his relocation request had been denied because his business was "located in an area in which operations can continue as they [had] in the past". As to his request to expand his business, Mr. Van Koughnett indicated that "[n]o further development will be considered until the current business is operational for a minimum of one season". Mr. Seewalt viewed Mr. Van Koughnett's letter as a palpable demonstration of unlawful conduct on the part of the Government.

(l) On February 6, 2020, Mr. Seewalt sent an email to the Government, alleging that it had breached the terms of the lease. That email led to a meeting on February 18, 2020, between Mr. Seewalt, his wife and various Government officials; at which, Mr. Seewalt, again, expressed concern with the Government's management plans and the effects he believed they would have on his business. He was informed of and encouraged to engage in the ongoing forestry consultation process and was told that no commercial tree harvesting had yet taken place.

(m) The meeting did not allay Mr. Seewalt's concerns. He remained adamant that forest harvesting had occurred and was ongoing, that his business was ruined, and that many of the trails within the park were part of his leased area: "my commercial lease areas also include the property, concession and all trails … anywhere in Meadow Lake Provincial Park" (April 1, 2021, affidavit of Mr. Seewalt at para 7). Amanda Currie, Development Coordinator, Business Development and Leasing Unit, had attended the meeting. She averred that, even though Mr. Seewalt "believed the trails were part of his leased area … he was advised that the leased area was only the base camp and not the trails" (December 21, 2020, affidavit of Ms. Currie).

(n) Mr. Seewalt had also been informed that the Government would not support the relocation of his business within the park and that his lease required renewal. In his April 1, 2021, affidavit, Mr. Seewalt maintained that Government officials were untruthful with him at the February 18, 2020, meeting, that the trails in the park were included in his lease and that harvesting had, indeed, taken place. He was not prepared to renew the lease until these alleged contraventions were resolved to his satisfaction.

(o) In further response to the meeting, Mr. Seewalt sent the Government what he termed a *demand letter* on February 28, 2020, in which he accused it of non-compliance with and breach of the lease. The specifics of that letter provided as follows (as written):

> Please be informed that we have delivered repeated email to Ministry of Parks, Culture and Sport ("Park") regarding **BREACH OF CONTRACT** due to the following Park's unlawful actions:
>
> > l. Mis-full Action and Gross Negligence.
> >
> > 2. Mistaken Identify (Fault) by the wrong identification of our commercial lease and concession area as the part of the Park's recreational business as well as the high-risk classification and high impact.
> >
> > 3. Harvesting and/or Forest Management Treatments without any prior caveat information.
> >
> > 4. Harvesting and/or Forest Management Treatments without any prior notification and/or without prior information.
>
> Due to the unsuccessfully negotiation and/or settlement to resolve this case based on the last meeting which held on February 18, 2020 at the Provincial Government Building at 101 Railway Place in Meadow Lake, SK and considering that Park's Harvesting execution currently was still continued on, surrounding and around areas for our business commercial concession with the damages as well as dramatic and/or catastrophic effects without any good faith and factual rectification action from the Park to solve and/or to settle this case urgently.
>
> **WE HEREBY DEMAND THAT PARK SHOULD NOTED THE FOLLOWING NON-COMPLIANCE AND BREACH OF CONTRACT** … .
>
> (Emphasis in original)

(p) By March of 2020, Government officials concluded that matters could not be worked out with Mr. Seewalt and determined that his lease would not be renewed and that the existing, monthly tenancy would be terminated. The basis for the Government's decision, as expressed by Michael Roth, Director of the Park Business Services Branch (Ministry of Parks, Culture and Sport), in his affidavit of December 27, 2020, was as follows:

> 15. … I came to the conclusion that resolution with Mr. Seewalt and the renewal of the Lease Agreement with him no longer appeared possible as he refused to move on from the breach of contract allegation. The decision was subsequently made after internal discussions within the Ministry that the Lease Agreement would not be renewed with Mr. Seewalt and that it would be terminated. The basis of this decision was that it was determined that Mr. Seewalt would not agree to a lease renewal as the Ministry did not breach the contract and would not be admitting to it, termination was permissible pursuant to terms of the Lease Agreement, and that it was not in the best interest of the Ministry to have an ongoing business relationship with Mr. Seewalt due to his conduct.

(q) Legal counsel for the Government sent a letter to Mr. Seewalt on May 12, 2020, which provided as follows:

> Please be advised this letter is your notice that on June 30 2020 Parks will terminate the July 2 2015 lease between Parks and Tall Timber Trails which was assigned to you (the "Lease").
>
> You will have 90 days from June 30, 2020 to remove your property and improvements from the leased land pursuant to clauses 20 and 21 of the Lease. Please ensure your property and improvements are removed from the leased land by September 28, 2020.
>
> (Original emphasis omitted)

(r) Mr. Seewalt issued a statement of claim against the Government, along with Tolko, Carrier and Forsite, on June 4, 2020.

III. THE *CHAMBERS DECISION*

[5] The Chambers judge found the Government's application for summary judgment gave rise to two issues: (a) "Is there a genuine issue requiring a trial or can the matter be determined by way of summary judgment?" and (b) "Did [the Government] breach the lease agreement with Mr. Seewalt or ought his claim against [the Government] be dismissed?" (*Chambers Decision* at paras 38 and 53).

[6] In her written reasons, the Chambers judge outlined the legal framework for determining the question of whether there was a genuine issue requiring trial by reference to Rule 7-5 of *The King's Bench Rules* and the governing case law, including *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 [*Hryniak*], *Tchozewski v Lamontagne*, 2014 SKQB 71, [2014] 7 WWR 397 [*Tchozewski*], and *Shermet v Miller*, 2015 SKQB 34, 468 Sask R 228. She also referenced a number of authorities for the general proposition that an applicant for summary judgment bears the initial onus of establishing "there is no genuine issue requiring trial" and that, if that onus is met, the burden then shifts to the respondent to "show that a trial is required" (*Chambers Decision* at para 44): see *Peter Ballantyne Cree Nation v Canada (Attorney General)*, 2016 SKCA 124 at paras 31–32, [2017] 1 WWR 685, leave to appeal to SCC refused, 2017 CanLII 38581 [*Peter Ballantyne*]; *LaBuick Investments Inc. v Carpet Gallery of Moose Jaw Ltd.*, 2017 SKQB 341 at para 25 [*LaBuick*]; *Cicansky v Beggs*, 2018 SKQB 91 at paras 14–16, 25 CPC (8th) 182; *Saskatchewan Power Corporation v All Canada Crane Rental Corp.*, 2019 SKQB 61 at paras 34–36, 90 CCLI (5th) 299; and *Blue Hill Excavating Inc. v Canadian Western Bank Leasing Inc.*, 2019 SKCA 22 at paras 23–25, [2019] 4 WWR 393 [*Blue Hill Excavating*].

[7] The Chambers judge was alert to the fact there was a conflict in the evidence as to whether forest harvesting had commenced prior to the termination of Mr. Seewalt's lease and whether that conflict precluded disposition of the Government's application through the summary judgment process. To address that issue, the Chambers judge took guidance from the following passage in *LaBuick*:

> [29] A genuine issue requiring a trial does not arise simply because there is some conflict in the affidavit evidence. An issue requiring a trial arises if the conflict is such that key aspects of the claim or the defences raised cannot be comfortably resolved on the basis of affidavit evidence alone. That said, a court should not decide an issue of fact or law solely on the basis of preferring one conflicting affidavit over another. Where there is conflict of significance in the affidavits, there must be documentary evidence, evidence of independent witnesses or undisputed evidence that undermines the affidavit of one of the parties on critical issues or some other basis for preferring one affidavit over another: *Brissette v Cactus Club Cabaret Ltd.*, 2017 BCCA 200.

[8] Having reviewed the evidence, the Chambers judge was satisfied that the conflict in the evidence did not give rise to the need for a full trial for the following reasons:

(a) there was independent evidence from the three other defendants confirming the Government's assertion that no forest harvesting had begun prior to the commencement of Mr. Seewalt's action;

(b) the supplemental affidavits from Government officials, which provided an update on the status of forest harvesting, confirmed when it did eventually take place;

(c) "there is considerable documentary evidence", which the Chambers judge found "assist[ed] the court in drawing the necessary findings of fact" (*Chambers Decision* at para 49); and

(d) Mr. Seewalt chose not to cross-examine the Government's affiants.

[9] Taking the above into account enabled the Chambers judge to reach the following conclusion: "On the affidavit evidence available, this court is able to draw the necessary findings of fact and apply the law to those facts. It would not be cost effective to require the matter to proceed to trial" (at para 51).

[10] The Chambers judge next turned to the second issue: whether the Government had breached the lease by terminating it effective June 30, 2020. She rejected Mr. Seewalt's proposition that he was entitled to a renewal based on the history or pattern of renewals that had existed between the Government and Tall Timber Trails and further found that, even if there were a pattern or expectation on the part of Tall Timber Trails, it did not extend to Mr. Seewalt. In any event, as the Chambers judge went on to point out, it was Mr. Seewalt who had insisted that he would not renew his lease until his lawsuit was resolved. Finally, on the question of whether the Government had breached the lease by allowing forest harvesting to take place, she found as fact that the Government had not commenced commercial harvesting and that, in any event, "the harvesting plan may well not have impacted Mr. Seewalt's operations" (at para 57). Accordingly, the Chambers judge concluded, "there was no breach on the part of [the Government] and no grounds for a demand that [the Government] 'admit' to such a breach" (at para 57).

[11] The Chambers judge next examined the question of whether the Government was entitled to terminate the lease on giving Mr. Seewalt one month's notice, determining that it was within its rights to do so based on s. 34(g) of the lease (which created a monthly tenancy). The Chambers judge backstopped her reasoning with s. 18 of *The Landlord and Tenant Act*, RSS 1978, c L-6, and the decision in *Atkins v Lawrence* (1967), 62 WWR (ns) 439 (Sask CA), which held that, generally speaking, where the length of the notice to quit is not fixed precisely, then the length of the notice is equal to the term of the tenancy. The Chambers judge was also alert to the *presumption at law* that provides that a year-to-year tenancy may arise when a lease expires, if the lessee continues to pay yearly rent, remains on the leased property with the landlord's consent and there is no agreement otherwise. However, as she went on to point out, that presumption is rebuttable.

[12] Applying those principles to the circumstances at hand led the Chambers judge to conclude that, even if the foregoing presumption applied, it had been rebutted by the wording in s. 34(g) of the lease and because Mr. Seewalt had not paid the yearly rent for 2020. She found as fact that the rent he had paid in September of 2019 was for the 2019 year and that it was not an advance on his 2020 rent.

[13] The Chambers judge moved on to address Mr. Seewalt's argument that the Government had breached the lease by allowing forest harvesting to take place, thereby causing him considerable damage and economic loss. In response to this argument, she found the evidence "overwhelmingly supports the conclusion that harvesting had not commenced prior to termination of the lease"; as such, she said it consequently followed that "there was not, and could not have been a breach of contract" by the Government (*Chambers Decision* at para 71): similarly, see paragraph 73.

[14] Although the Chambers judge recognized that Mr. Seewalt had filed an affidavit in which he attached photographs, purportedly showing the harvesting of timber on or near his leased land, she assigned no weight to it, finding the following paragraphs from Glen Longpre's (Director of the Landscape Protection Unit, Parks Division with the Ministry of Parks, Culture, and the Sport), June 15, 2021, supplemental affidavit more persuasive:

> 22. Schedules 12 and 13 in Mr. Seewalt's affidavit, sworn on April 1, 2021, include photographs that he alleges are evidence of commercial harvesting in MLPP [Meadow Lake Provincial Park], which were allegedly taken in December 15, 2019. No commercial harvesting was approved in MLPP in 2019 or 2020. Therefore, these cannot be photographs of commercial harvesting authorized by the Ministry. I do not know what these pictures are of, but they are not indicative of what an area subject to a commercial harvesting operation would look like. From my experience, a commercial harvesting operation utilizes very large equipment and results in substantially more trees being removed from a harvested area. Exhibit "F" attached to my Affidavit, and the area shaded in tan, provides an example of what an area or "harvest block" generally looks like after commercial harvesting has occurred.
>
> 23. Schedules 38 and 39 in Mr. Seewalt's affidavit, sworn on April 1, 2021, include photographs that he alleges are evidence of commercial harvesting in MLPP, which were allegedly taken in October 22, 2020. No commercial harvesting was approved in MLPP at that time. Therefore, these cannot be photographs of commercial harvesting approved by the Ministry in MLPP. However, these schedules include photographs of signage that states Gold Lake and Gold Lake road. Gold Lake is located north of MLPP. It is not located in MLPP. Attached as Exhibit "H" to this my Affidavit is a true copy of a Google Maps printout, which shows where Gold Lake is located compared to MLPP. MLPP is in dark green, whereas Gold Lake is located where the red cursor points. As Gold Lake is not located in a provincial park, the Ministry does not have a role in approving commercial harvesting in that area. It is my understanding that [Tolko] has an active logging operation in this area which has been authorized by the Ministry of Environment.

[15] The Chambers judge buttressed her bottom-line conclusion by noting that, even if forest harvesting had taken place, as Mr. Seewalt insisted it had, it was not contrary to the terms of the lease because of the implied reservations in *The Parks Act*, SS 1986, c P-1.1, notably the following:

> **Implied reservations**
>
> **17** Every disposition of park land is subject to the following implied reservations to the Crown:
>
> …
>
> (e) all trees, standing, fallen or cut and the right to enter on any park land to cut and remove trees … .

[16] The Chambers judge captured the essence of Mr. Seewalt's grievance in the concluding paragraph of her decision:

> [82] Mr. Seewalt was passionate about his expansive plans for the business in MLPP. Regrettably, however, despite such passion, Mr. Seewalt appears to have misapprehended information regarding the timber harvesting plans, failed to diligently review the lease terms before purchasing assignment of the lease, and declined to work cooperatively with [the Government] when opportunity for input and consultation was offered to him. As such, he is the author of any misfortune he may have experienced. While no evidence of actual financial loss was demonstrated, he seemingly experienced the loss of a dream. This does not enable him to sustain an action against [the Government].

IV. ISSUES

[17] Despite the breadth of Mr. Seewalt's notice of appeal, I am satisfied that it can be conveniently structured around three central themes, namely that the Chambers judge erred in concluding that (a) there was no genuine issue requiring a trial; (b) the Government could not terminate the lease on a without cause basis, and as lessor, it was non-compliant with, or in breach of, the terms of the lease or its own legislation (or both); and (c) forest harvesting had occurred prior to the termination of the lease.

[18] Placed in an appellate context, Mr. Seewalt's arguments can be resolved by answering the following questions:

(a) Did the Chambers judge err in determining there was no genuine issue requiring a trial or by improperly relying on conflicting evidence?

(b) Did the Chambers judge err in finding that (i) no forest harvesting had taken place prior to the lease termination and (ii) the Government had the legal right to terminate Mr. Seewalt's lease?

(c) Did the Chambers judge err in her credibility assessment and in rejecting his affidavit evidence?

(d) Did the Chambers judge err in concluding that the Government had not misrepresented its plans for forest harvesting in the park as outlined in the management plans?

(e) Did the Chambers judge err by failing to conclude that

(i) the Government had breached its own environmental and forestry legislation?

(ii) the COVID-19-related blockade of the park infringed Mr. Seewalt's right to quiet enjoyment of the leased land?

(iii) public health orders, made pursuant to *The Emergency Planning Act*, SS 1989-90, c E-8.1, precluded the Government from terminating his lease?

V. ANALYSIS

A. The standard of review

[19] The question of whether there exists a genuine issue requiring trial involves the exercise of discretion: see generally *Deren v SaskPower*, 2017 SKCA 104. More recently, this Court outlined the standard of review for decisions of that nature in *Kot v Kot*, 2021 SKCA 4, 63 ETR (4th) 161:

> [20] In summary, … appellate intervention in a discretionary decision is appropriate where the judge made a palpable and overriding error in their assessment of the facts, including as a result of misapprehending or failing to consider material evidence. Appellate intervention is also appropriate where the judge failed to correctly identify the legal criteria which governed the exercise of their discretion or misapplied those criteria, thereby committing an error of law. Such errors may include a failure to give any or sufficient weight to a relevant consideration.

[20] In both *Stromberg v Olafson*, 2023 SKCA 67, 45 BLR (6th) 171 [*Olafson*], and *MacInnis v Bayer Inc.*, 2023 SKCA 37, this Court emphasized the point that the standard of review does not turn on the nature of the decision. The focus, rather, should be directed to the type of error alleged by the appellant. The appellate standards spelled out in *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 [*Housen*], as articulated in *MacInnis*, apply:

> [38] … Although it is often said that discretionary decisions are entitled to deference, the fact is that an alleged error by a court in arriving at a discretionary decision is subject to appellate review in accordance with the appellate standards of review specified in *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235. As is always the case, the standard of review depends on the nature of the error alleged, not the type of decision that was made. The standard of review in relation to alleged errors of law is correctness, where no deference is called for. An appellate court may intervene in a discretionary decision if there has been an error of law, including an error in the identification or application of the legal criteria that govern the exercise of the discretion: "Such errors may include a failure to give any or sufficient weight to a relevant consideration" (*Kot v Kot*, 2021 SKCA 4 at para 20, 63 ETR (4th) 161).
>
> [39] An appellate court may also intervene if there has been a palpable and overriding error of fact or of mixed fact and law: see also, for example, *676083 B.C. Ltd. v Revolution Resource Recovery Inc.*, 2021 BCCA 85 at para 30, 49 BCLR (6th) 101; *Ernst & Young v Koroluk*, 2022 SKCA 81 at paras 25–26; *Finkel v Coast Capital Credit Union*, 2017 BCCA 361 at para 55, 2 BCLR (6th) 300; *AIC Limited v Fischer*, 2013 SCC 69 at para 65, [2013] 3 SCR 949 [*Fischer*]; and *Lewis v WestJet Airlines Ltd*., 2022 BCCA 145 at paras 30–31, 468 DLR (4th) 713. However, an appellate court is not entitled to substitute its own decision for that of the judge merely because it would have exercised the discretion differently: *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 76–77.

[21] A palpable error is one that is "so obvious that it can easily be seen or known" (*Housen* at para 5), and it is overriding if it "goes to the very core of the outcome of the case" (*Canada v South Yukon Forest Corporation*, 2012 FCA 165 at para 46, 431 NR 286): similarly, see *Benhaim v St.-Germain*, 2016 SCC 48 at para 38, [2016] 2 SCR 352, and *R v Portoreyko*, 2022 SKCA 70 at para 16.

B. Suitability for summary judgment

[22] Mr. Seewalt submits the Chambers judge erred in concluding there was no issue requiring a trial in the face of the conflicting evidence filed by the parties. He asserts that the Chambers judge erred by ignoring his affidavit evidence, even though Rule 7-5(2) of *The King's Bench Rules* required her to consider *all of the evidence* in determining if the claim could be resolved through the summary judgment procedure. Mr. Seewalt claims this error is revealed by the Chambers judge's exclusive reliance on the affidavit evidence tendered by the Government, pointing to paragraphs 15, 19, 20, 26, 30, 55 and 56 of her decision as examples of where this occurred.

[23] Framed in an appellate context, I understand Mr. Seewalt to assert that the Chambers judge erred by (a) failing to follow the direction set out in Rule 7-5(2)(a) for a judge to consider "the evidence submitted by the parties", and (b) deciding an issue of fact, including making credibility findings, by simply preferring one affidavit over another.

[24] Rule 7-5 speaks to the disposition of applications for summary judgment. For purposes of assessing Mr. Seewalt's arguments, the salient provisions are these:

> **Disposition of application**
>
> **7-5**(1) The Court may grant summary judgment if:
>
> > (a) the Court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
> >
> > (b) the parties agree to have all or part of the claim determined by summary judgment and the Court is satisfied that it is appropriate to grant summary judgment.
>
> (2) In determining pursuant to clause (1)(a) whether there is a genuine issue requiring a trial, the Court:
>
> > (a) shall consider the evidence submitted by the parties; and
> >
> > (b) may exercise any of the following powers for the purpose, unless it is in the interest of justice for those powers to be exercised only at a trial:
> >
> > > (i) weighing the evidence;
> > >
> > > (ii) evaluating the credibility of a deponent;
> > >
> > > (iii) drawing any reasonable inference from the evidence.

[25] Summary judgment applications reflect an adjudicative shift towards proportionality in litigation through a *process* that allows litigants to have the merits of their claim or defence determined without the need for a full-blown trial. To invoke the summary judgment process, it is not enough to simply clothe an application as such; the applicant must satisfy the judge hearing the matter that the summary judgment process will achieve a fair and just adjudication.

[26] In *Hryniak*, the Supreme Court observed that fairness and justness in a procedural context will be achieved "when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result" (at para 49). The Supreme Court expanded on those ideas in *Hryniak* as follows:

> [50] These principles are interconnected and all speak to whether summary judgment will provide a fair and just adjudication. When a summary judgment motion *allows the judge to find the necessary facts and resolve the dispute*, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.
>
> (Emphasis added)

[27] This Court, in *McCorriston v Hunter*, 2019 SKCA 106, 33 RFL (8th) 310, expanded on the idea that, in considering whether the summary judgment as a process is suitable in any given case, the judge hearing the matter must answer that question by reference to the evidence and the arguments of the parties:

> [44] … To assess if a trial is required, a Chambers judge must get into the detail of how the issue and evidence interrelate, and then decide if the evidence allows the issue to be fairly resolved. This follows from the idea that no genuine issue requiring a trial exists if facts can be *found*, law applied, and a fair and just determination on the merits achieved.
>
> (Emphasis in original)

Leurer J.A. (as he then was) went on to make the important point that, to resolve the process question, courts may resort to the special powers set out in Rule 7-5(2) in order to sort out the facts:

> [44] … In the course of undertaking this process, the judge has discretion whether, if necessary, to use the so-called "new powers" set out in Rule 7-5(2) (i.e., to weigh evidence, evaluate credibility, and draw reasonable inferences) in order to sort out the facts. However, the fundamental question does not change – the question remains whether a trial is required to reach a fair and just determination of the issue.

Also see *Hryniak* at para 49, *Blue Hill Excavating* at para 41, *Olafson* at para 75, *Ter Keurs Bros. Inc. v Last Mountain Valley (Rural Municipality)*, 2019 SKCA 10 at para 55, 429 DLR (4th) 269, and *Tchozewski* at paras 30–31.

[28] To summarize, Rule 7-5(1)(a) empowers a court to grant judgment using the summary judgment process, provided the court is satisfied there is no genuine issue requiring a trial with respect to a claim or defence. In determining that issue, the judge hearing the application must first decide that question based solely on "the evidence submitted by the parties" (7-5(2)(a)) but may invoke the special powers set out in Rule 7-5(2)(b)(i)–(iii) in "weighing the evidence", in "evaluating the credibility of a deponent", and in "drawing any reasonable inference from the evidence": see *Hryniak* at para 56 and *Tchozewski* at para 31.

[29] Returning to the matter at hand, it is clear from paragraph 37 of the Chambers judge's reasons that she was alert to the need to firstly determine if summary judgment, as a process, was appropriate or if the matter should proceed to trial. In grappling with this issue, she correctly identified Rule 7-5(1) and Rule 7-5(2) as well as the governing jurisprudence on how those rules are to be applied. She also noted that the onus of demonstrating there is no genuine issue requiring a trial is initially on the applicant (in this case, the Government), but once met, "the burden shifts and the respondent [in this case, Mr. Seewalt] must show that a trial is required" (at para 44). The Chambers judge's proposition aligns with case authorities, including *Canada (Attorney General) v Lameman*, 2008 SCC 14, [2008] 1 SCR 372, as discussed by Leurer J. (as he then was) in *Cicansky v Beggs*, 2018 SKQB 91, 25 CPC (8th) 182:

> [16] *Lameman* clearly describes the assessment of an application of summary judgment as a two-step process, with a shifting burden of proof. When summary judgment is sought by a defendant, it requires the applicant–defendant to first present evidence to prove there is no genuine issue requiring trial. If this burden is not overcome, the application is dismissed, without requiring evidence from the respondent–plaintiff. If, but only if, the applicant–defendant presents sufficient evidence to prove no genuine issue requiring trial exists, the burden then shifts to the respondent–plaintiff who must refute or counter the applicant–defendant's evidence.

See also *Peter Ballantyne* at paras 31–32 and *Blue Hill Excavating* at paras 22–25.

[30] Finally, the Chambers judge was alert to the conflicting affidavit evidence that had been filed by the parties and appropriately asked herself if resolution of those conflicts necessitated a trial. Citing paragraph 29 from *LaBuick*, she correctly observed that a court should not decide an issue of fact (including credibility) solely by preferring one affidavit over another. That said, adopting the principles of law set out in *LaBuick* – notably that while some conflict in the evidence should give reason to pause – the Chambers judge went on to emphasize that conflict alone does not inexorably mean there is a genuine issue requiring trial. A trial may be required, as per *LaBuick*, if "the conflict is such that key aspects of the claim or the defences raised cannot be comfortably resolved on the basis of affidavit evidence alone", or where there is "documentary evidence, evidence of independent witnesses or undisputed evidence that undermines the affidavit of one of the parties on critical issues or some other basis for preferring one affidavit over another" (at para 29).

[31] The Chambers judge applied those principles to the Government's application. As mentioned, she was alert to the fact there was a conflict in the evidence about whether forest harvesting had taken place prior to the termination of the lease. That said, for the following reasons, the Chambers judge was not persuaded that a full trial was required:

(a) there was independent evidence confirming the Government's timeline as to when commercial harvesting eventually took place from representatives of the other defendants;

(b) there was circumstantial evidence of a public awareness campaign that had taken place prior to harvesting, which allowed her to draw an inference in favour of the Government's assertion on timing;

(c) Mr. Seewalt was contacted for purposes of allowing him to provide input into the harvesting plan; and

(d) there was uncontested, supplemental affidavit evidence from Government officials who deposed to when the authorizations for commercial harvesting had been granted and when harvesting eventually took place.

[32] Taken together, the Chambers judge found those considerations undermined Mr. Seewalt's averment in his affidavit about the timing of forest harvesting and, more importantly, allowed her to resolve that evidentiary conflict without the need for a trial. While noting that the parties disagreed on the interpretation to be given to various documents, she nonetheless determined that those documents, as written, would be sufficient to assist her in drawing the necessary findings of fact.

[33] Although the Chambers judge did not conduct her analysis in two discrete steps, as envisioned by Rule 7-5(1) and Rule 7-5(2), I am satisfied that she considered all of the evidence before her and operated from an understanding that the parties had opposing views on the harvesting issue. However, by invoking the enhanced fact-finding powers enshrined in Rule 7-5(2) to draw inferences and weigh the evidence, the Chambers judge found herself able to reconcile that conflict. Contrary to Mr. Seewalt's assertion, she did not simply pick one party's version of when forest harvesting had occurred over the other. Her decision to exercise the Rule 7-5(2)(b) powers attracts appellate deference (*Hryniak*):

> [81] … When the motion judge exercises her new fact-finding powers under Rule 20.04(2.1) [Ontario's equivalent to Saskatchewan's Rule 7-5(2)(b)] and determines whether there is a genuine issue requiring a trial, this is a question of mixed fact and law. Where there is no extricable error in principle, findings of mixed fact and law should not be overturned absent palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 36.

[34] Neither do I see any evidence that the Chambers judge merely preferred the affidavit of Mr. Longpre (i.e., about whether commercial harvesting had occurred in the park prior to the termination of Mr. Seewalt's lease) over that of Mr. Seewalt's affidavit. As I discuss below, she found support for the Government's assertions elsewhere in the evidence, notably the voluminous (largely uncontested) documentation coupled with the affidavit evidence of representatives from Tolko, Carrier and Forsite.

[35] To conclude, I see no basis for appellate intervention respecting the Chambers judge's decision to proceed with the Government's application by using the summary judgment process.

C. The lease agreement and its termination

[36] Although Mr. Seewalt's written argument raises a multitude of issues, at its core, he asserts that the Government breached the lease by (a) failing to renew it, (b) terminating it on a without cause basis, and (c) allowing forest harvesting to take place prior to its termination. Mr. Seewalt supplements the latter argument by pointing to how, in his view, the Government had violated a wide array of provincial and federal legislation by permitting the harvesting to take place. Taken together, he says, the Government had no legal right or authority to terminate the lease.

1. The lease agreement

[37] Before turning to Mr. Seewalt's specific arguments, I find it useful to begin with an understanding of some basic legal principles and an overview of the lease in question.

[38] At common law, a lease is "a demise of land under which exclusive occupation is conferred by a landlord on a tenant" (Eran Kaplinsky, Malcolm Lavoie and Jane Thomson, *Ziff's Principles of Property Law*, 8th ed (Toronto: Thomson Reuters, 2023) at 335 [*Ziff's*]). Here, however, the leased land is Crown land specifically designated as *park land* within the meaning of *The Parks Act*. According to *The Parks Act*, all dispositions of land – including a lease – are governed by the terms of that statute.

[39] I find three provisions of *The Parks Act* particularly noteworthy in the context of this appeal. The first is s. 17(e). It provides that "[e]very disposition of park land" is subject to the reservations identified in that section, including "all trees, standing, fallen or cut *and the right to enter on any park land to cut and remove trees*" (emphasis added). Related to s. 17 is s. 18, which stipulates that "[e]very disposition [of park land] is to be read and construed and has effect as if all reservations referred to in section 17 were expressly set forth in the disposition". Finally, s. 19 is also significant. It reads as follows:

> **Implied conditions of dispositions**
>
> **19** Every disposition of park land is subject to the following conditions, whether or not the conditions are set out in the disposition:
>
> (a) unless otherwise prescribed or otherwise set out in the disposition, the minister may, at any time during the term of a disposition, on 30 days' written notice to the holder of the disposition, cancel the disposition:
>
> …
>
> (ii) for the breach or non-performance of any term or condition of the disposition … .
>
> …
>
> (a.1) on the expiration of the thirtieth day following the day on which notice is served on the holder of the disposition pursuant to clause (a), the disposition ceases … .

[40] Setting aside those statutory reservations and covenants, I turn to the specific provisions of the lease in question. Those of most interest to the disposition of this appeal are the following:

(a) the Government agreed to lease the land set out in Schedule A (s. 1(d) and Clauses 2 and 3 of the lease);

(b) the term of the lease ran from the date of execution (July 2, 2015) until October 31, 2019 (Clause 3);

(c) the lessee is permitted to "occupy and use the land … for the sole purpose of the operation of the riding-stable concession" in the park (s. 5(a));

(d) the lessee "may peaceably possess and enjoy the land for the term, without interruption or disturbance from the Lessor" (s. 25); and

(e) the lease is subject to

(i) the applicable laws of Saskatchewan, including *The Forest Resources Management Act*, SS 1996, c F-19.1 [*FRMA*], and *The Environmental Management and Protection Act, 2010*, SS 2010, c E-10.22 [*EMPA*] (s. 32(b)); and

(ii) the provisions of *The Parks Act*, including any "reservations, terms and conditions to which dispositions under that Act are subject" (s. 32(c)) – also see s. 32(b).

[41] Finally, as specified in the lease, the parties agreed that the lease was for a fixed term duration: "This Lease Agreement shall be in effect from the date of execution of this Lease Agreement until October 31, 2019 (hereinafter referred to as the 'term')" (at Clause 3).

2. The parties' relationship after October 31, 2019 (lease expiry date)

[42] While it is fair to say that both Mr. Seewalt and the Government had initially envisioned a long-term lease arrangement, extending well beyond the lease's 2019 expiration date, that result never came to pass nor was the existing lease renewed thereafter. The parties do not dispute these basic facts. However, following its expiration, Mr. Seewalt remained in occupation of the leased premises, presumably with the Government's permission, while it took his expansion proposal under advisement. The evidence discloses that no effort was made to remove Mr. Seewalt from the land. Indeed, the Government appeared content to have him remain while their discussions continued.

[43] However, as mentioned above, the parties eventually reached an impasse over the issue of timber harvesting and, to a lesser extent, the relocation of the leased land. Those points of disagreement came to a head in March of 2020, which eventually gave rise to the Government's decision to terminate Mr. Seewalt's tenancy and not to renew the lease. To that end, formal termination notification was given on May 12, 2020, effective June 30, 2020. Mr. Seewalt was given 90 days to remove his property and improvements following that date.

[44] Given that chain of events, the issues confronting the Chambers judge were twofold:

(a) What was the nature of the relationship and term of the lease after its expiration in October of 2019?

(b) Did the Government have the right to terminate that arrangement and, if so, how much notice was required?

[45] In order to answer the first question, the trial judge was required to review and interpret the terms of the lease. Appellate review of decisions on the interpretation of contracts is generally conducted on the palpable and overriding error standard of review, absent an extricable question of law: *Sattva Capital Corp. v Creston Moly Corp*., 2014 SCC 53, [2014] 2 SCR 633.

[46] The Chambers judge resolved the first issue by reference to s. 34(g) of the lease, which provided as follows: "It is agreed that if upon the termination of this lease agreement the lessor permits the lessee to remain in possession of the improvements and accepts rent, a *tenancy from year to year is not created by implication of law*, and the lessee is *considered to be a monthly tenant only* at the rent payable immediately prior to the termination" (emphasis added). That provision led her to conclude as follows: "In light of the monthly tenancy created by the provisions of para 34(g) of the lease agreement, [the Government] was entitled to terminate the lease on giving one month's notice" (*Chambers Decision* at para 58).

[47] The Chambers judge went on to draw support for her conclusion from s. 18 of *The Landlord and Tenant Act* and case law where that legislation was engaged. However, at the time of the appeal hearing, legal counsel for the Government conceded that *The Landlord and Tenant Act* does *not* apply to Crown land. I agree with the Government's position. *The Legislation Act*, SS 2019, c L-10.2, expressly provides that "[n]o enactment binds the Crown or affects the Crown or any of the Crown's rights or prerogatives, except as is mentioned in the enactment" (s. 2-20). Simply put, as *The Landlord and Tenant Act* does not contain a provision stipulating that the Crown is bound by that statute, it cannot and does not bind or affect the Crown. Even though the Chambers judge erred in concluding *The Landlord and Tenant Act* applied to the matter at hand, I find that error was immaterial to her reasoning and the bottom-line result.

[48] In the further alternative, the Chambers judge also considered the common law presumption that a year-to-year tenancy is created where a lessee continues to pay the yearly rent and remains in possession with the lessor's consent. Noting that this is a rebuttable presumption, the Chambers judge found as fact that Mr. Seewalt had *not* paid the 2020 rent and, as such, that the presumption had been rebutted by the Government. Mr. Seewalt challenges that finding on appeal. He asserts that, as he had paid the full amount of the 2020 rent, the presumption was engaged. The Government had taken a different view. Based on the evidence before her, coupled with the Government's explanation about possible confusion due to its accrual accounting system, the Chambers judge accepted the Government's position.

[49] I find it unnecessary to resolve the question of whether the Chambers judge erred in determining that Mr. Seewalt had not paid the 2020 rent. I say this because s. 34(g) of the lease expressly addresses the nature of the parties' relationship, where the lessee is an overholding tenant. As quoted above, it provides, "if upon the termination of this lease agreement the lessor permits the lessee to remain in possession of the improvements and accepts rent, a *tenancy from year to year is not created by implication of law*" (emphasis added). I am therefore satisfied that even if the Chambers judge's finding was tainted by palpable and overriding error, the common law presumption on which Mr. Seewalt relies was overridden by an express term of the lease.

[50] To conclude, whether assessed as a question of mixed fact and law or as an extricable question of law, I see no basis for appellate intervention. The trial judge did not err in concluding that a month-to-month tenancy arose after the expiration of the lease in October of 2019.

3. The forest harvesting issue

a. Credibility and related findings of fact

[51] Mr. Seewalt asserted that the Government had breached the terms of the lease by allowing forest harvesting to take place prior to the expiration of his lease, thereby causing considerable damage to his business. The Government's affidavit evidence was clear: no commercial forest harvesting occurred until 2021, although some miscellaneous use permits had been issued to individuals for the removal of dead wood and downed wood anywhere in the park for personal, non-commercial use. The Chambers judge accepted the Government's evidence. In her view, the evidence taken as a whole "overwhelmingly supports the conclusion that harvesting had not

commenced prior to termination of the lease" and, in consequence, "[w]ith no commercial harvesting having occurred in [the park] at the pertinent time, there was not, and could not have been, a breach of contract" by the Government" (*Chambers Decision* at para 71).

[52] As I discussed above, for the Chambers judge to have determined there was no genuine issue for trial, it was necessary for her to resolve this conflict in the evidence regarding whether forest harvesting had taken place. Her ability to resolve that question necessarily answers Mr. Seewalt's arguments about whether forest harvesting had occurred. However, given how Mr. Seewalt has structured his appeal, I will respond to his submissions in more detail.

[53] The Government's evidence on this point consisted of affidavits from two Government officials – Trevor Finlay (Park Manager) and Mr. Longpre – as well as confirmatory evidence from Michelle Young (Tolko), Ed Kwiatkowski (Carrier) and Cam Brown (Forsite) sworn in June of 2020. That evidence was unequivocal: those entities had not harvested any timber in the park.

[54] I understand Mr. Seewalt's position on appeal to be that, as his affidavits were supported by photographs that directly contradicted the Government's position, the Chambers judge erred by preferring the Government's evidence over his own. Mr. Seewalt also takes umbrage with paragraph 72 of the decision, wherein the Chambers judge accepted Mr. Longpre's critique of Mr. Seewalt's photographic evidence. On this point, the Chambers judge wrote as follows:

> [72] Mr. Seewalt's evidence not only demonstrates a mistaken belief about the harvesting having commenced but also raises questions regarding his credibility. In this regard, paras. 22 and 23 of Mr. Longpre's supplemental affidavit raise significant concerns about the photographic evidence submitted by Mr. Seewalt … .

[55] There are three points to be made in response to Mr. Seewalt's argument. The first is that Mr. Longpre and the other affiants were clear that no *commercial* harvesting had been approved or taken place within the park prior to February of 2021. I will return to the significance of this point below. Second, as Mr. Longpre points out in his affidavit, the signage depicted in the photographs Mr. Seewalt took in February and March of 2021, refers to Gold Lake and Gold Lake Road, neither of which are within the park. Mr. Seewalt offered no evidence to rebut this statement. Third, Mr. Finlay acknowledged the possibility that miscellaneous use permits may have been issued authorizing the removal of dead and downed trees but indicated that they were for personal, not commercial, use.

[56] As I see it, Mr. Seewalt's complaint boils down to an allegation that the Chambers judge erred by not accepting *his* evidence and in not finding *him* credible. The problem with this argument is that, as mentioned, a credibility finding cannot be overturned absent palpable and overriding error. None was identified nor do I see one. Further, while the Chambers judge was obliged to consider his evidence, she was not required to accept it. I am satisfied from her reasons, and reading the evidence as a whole, that the Chambers judge did not indiscriminately pick and choose whom to believe. She provided cogent reasons why she preferred the Government's evidence on the harvesting issue over Mr. Seewalt's assertions.

[57] Mr. Seewalt also takes issue with how the Chambers judge had characterized him as a dreamer (repeated here for reference):

> [82] Mr. Seewalt was passionate about his expansive plans for the business in [the park]. Regrettably, however, despite such passion, Mr. Seewalt appears to have misapprehended information regarding the timber harvesting plans, failed to diligently review the lease terms before purchasing assignment of the lease, and declined to work cooperatively with [the Government] when opportunity for input and consultation was offered to him. As such, he is the author of any misfortune he may have experienced. While no evidence of actual financial loss was demonstrated, he seemingly experienced the loss of a dream. This does not enable him to sustain an action against [the Government].

[58] Mr. Seewalt contends that the Chambers judge improperly used that comment to find him not credible, but, as he points out in his written submissions, his "character [was] not in the trial and [was] not the issue in this civil case". While I agree with Mr. Seewalt to the limited extent that his character was not on trial, he misperceives what the Chambers judge conveyed. In my view, the Chambers judge did no more than summarize how she interpreted the totality of the evidence in response to Mr. Seewalt's arguments. She concluded that Mr. Seewalt (a) appeared to have misapprehended the information about timber harvesting plans, (b) failed to carefully review the lease before he bought the Tall Timber Trails business, and (c) declined to work cooperatively with the Government when he had the opportunity to provide input. All of those finding were open to her on the evidence. Although the Chambers judge added the observation that Mr. Seewalt "seemingly experienced the loss of a dream", it was simply gratuitous, not material to her decision, and does not give rise to appellate intervention.

[59] There is no basis for appellate intervention.

b. Default not required for lease termination

[60] It was Mr. Seewalt's position that the Government acted without legal authority in terminating his tenancy and the lease because it did not have cause, as defined by Clause 18 of the lease, to take such action. Framed differently, I understand him to assert that, as nothing in Clause 18 permits termination on a without cause basis, the Government did not have the legal right to terminate the lease, and in any event, he should have been given the opportunity to remedy the breach. Mr. Seewalt offers no legal authority to support his proposition.

[61] This appears to be a new argument on appeal. It is a settled rule that this Court is reluctant to entertain a new argument in large measure because "it would be unfair to allow an argument to be introduced on appeal in circumstances where the opposing party would have wanted to introduce additional evidence in the court below if it had been aware of the issue" (*Meier v Saskatchewan Institute of Agrologists*, 2016 SKCA 116 at para 29, 405 DLR (4th) 506). The rule is, however, not absolute and admits an exception where no additional evidence is necessary.

[62] Even if I were to consider Mr. Seewalt's argument, it cannot be sustained for the simple reason that he operates from a misunderstanding of the various ways in which a tenancy may be brought to an end.

[63] Speaking generally, a lessee's breach is not the only way in which a tenancy may be terminated or determined (Christopher Bentley, John McNair and Mavis Butkus, *Williams & Rhodes' Canadian Law of Landlord and Tenant*, 6th ed (Toronto: Carswell, 2017):

> **§ 12:1. Introduction**
>
> A tenancy is determined by the operation of a conditional limitation; … by the expiration of the period for which a tenancy for a fixed period is to endure. It may also be determined by surrender, merger, forfeiture for breach of condition or covenant, by disclaimer or by *notice to quit in the case of periodic tenancies*, or in the various ways noted below with respect to tenancies at will or sufferance. Determination may also be effected by the operation of some statutes or by virtue of the special provisions of a contract.
>
> (Emphasis added)

[64] As I discussed above, this was a periodic, month-to-month tenancy that was brought to an end by the Government's notice. Although Mr. Seewalt disagrees with the idea that the Government could terminate the leasehold arrangement absent a breach, he does not quarrel with the fact that he received the notice nor does he suggest that he was confused by its content. His argument cannot succeed.

D. Negligent misrepresentation

[65] At the appeal hearing, Mr. Seewalt refined his arguments by focussing on a range of issues concerning the Government's consent to the lease assignment process. Succinctly put, Mr. Seewalt asserts that the Government breached the terms of the lease at the time he bought the Tall Timber Trails business and consented to the assignment of lease by failing to disclose its plans for forest harvesting in the park, which, in his opinion, would result in a significant degradation of the standing timber in a way that would undermine his business. He says the Government kept him in the dark about its forest renewal plans, which had a correlative impact on his "existing commercial lease and concession area" as well as his expansion plans.

[66] Mr. Seewalt's argument hinges on a twofold proposition: (a) the Government was in breach of the lease, prior to its assignment, and (b) the Government was legally obliged to consult with him and obtain his permission for third-party forest harvesting before it granted its consent. Mr. Seewalt goes so far as to argue that the Government should be answerable for its failure to inform him of its plans for forest renewal when it knew he was in the throes of purchasing the Tall Timber Trails business and that the Government's silence or non-disclosure amounted to a misrepresentation that caused him to suffer financial loss and a loss of economic opportunity. He asserts the Government was at fault for not informing him of what he calls "liens and/or encumbrances" (statement of claim at para 6). He says the Chambers judge erred in not grasping the essence of his argument in this respect.

[67] An analysis of Mr. Seewalt's allegation must begin with the pleadings. The particulars of this aspect of his claim can be found in the following clauses of that document:

> **STATEMENT OF CLAIM**
>
> …
>
> 6. The Defendant (Ministry of Parks, Culture and Sport) on July 09, 2019 was approved this Assignment of Lease without any caveat and indicated that land title on the condition being free and clear from any liens and/or encumbrances.
>
> …
>
> 11. Considering that the Defendants has executed the Harvesting and/or Forest Management Treatment without any prior caveat information as well without any prior notification and caused damages on and surrounding our existing commercial lease and concession area.
>
> …

AND THE PLAINTIFF CLAIMS:

…

5. A Judgment, Declaration, or Order that the other agreement and/or the other regulation and/or the other operating plan and/or other documents which signed and/or arranged by the Defendants with any third parties which overlapping and/or contravene with the existing Contract which clearly stated in point (2) above should be declare[d] void and unenforceable by the law, including but not limited to the following matters:

- Meadow Lake Provincial Park (MLPP) – Forest Conservation Management Plan – Project Reference Number 1467-1 dated June 29, 2019; and
- Meadow Lake Provincial Park (MLPP) – Ecosystem Based Management Plan dated June 29, 2019.
- Peitahigan Lake; Vivian Lake, Little Raspberry Lake Area **2019–2024 Operating Plan Meadow Lake Provincial Park** which prepared by the Defendants.
- Letter from the Defendants (Ministry of Parks, Culture and Sport) dated March 03, 2020 regarding Update on Forest Operating Plan for Meadow Lake Provincial Park.
- Letter from the Defendants (Ministry of Parks, Culture and Sport) dated May 12, 2020 regarding Notice of Termination of Lease.

(Emphasis in original)

[68] Pleadings are the foundation upon which the parties in a matter proceed to an adjudication of their legal rights, duties and obligations. The importance of carefully drafted pleadings was underscored in the following passage from *Harpold v Saskatchewan (Corrections and Policing)*, 2020 SKCA 98:

> [29] Rule 13-8 reflects the jurisprudence in relation to the purposes of pleadings, which were described in *Ducharme v Davies* (1984), 29 Sask R 54 (CA) [*Ducharme*], in these terms:
>
> > [64] While pleadings are no longer subject to the precise, complex, and occasionally oppressive requirements they once were, nevertheless they remain an important aspect of every lawsuit and must be framed with care. The following passage taken from *The Law of Civil Procedure* – Williston and Rolls (vol. 2, [1970] page 636) illustrates why a careful pleading is still important:
> >
> > > The function of pleadings is fourfold:
> > >
> > > 1. To define with clarity and precision the question in controversy between litigants.
> > >
> > > 2. To give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issues disclosed by them. A defendant is entitled to know what it is that the plaintiff asserts against him; the plaintiff is entitled to know the nature of the defence raised in answer to his claim.

> 3. To assist the court in its investigation of the truth of the allegations made by the litigants.
>
> 4. To constitute a record of the issues involved in the action so as to prevent future litigation upon the matter adjudicated between the parties.

See also *Reisinger* [2017 SKCA 11]; *Rieger v Burgess*, [1988] 4 WWR 577 (Sask CA) (leave to appeal refused, [1988] SCCA No 209 (QL)); *National Bank Financial Ltd. v Barthe Estate*, 2015 NSCA 47 at para 281, 359 NSR (2d) 258; and *Thirsk v Saskatchewan (Public Guardian and Trustee*), 2017 SKQB 66 [*Thirsk*].

[69] Where a party's pleading relies on an allegation of misrepresentation, Rule 13-9 requires that the full particulars be stated therein.

[70] As is evident from Mr. Seewalt's statement of claim, he did not plead misrepresentation or the facts said to give rise to it. Taking his pleadings at their highest, Mr. Seewalt alleges the Government had an obligation to inform him of "liens and/or encumbrances", which he construes as the Ecosystem Plan and the Conservation Plan. Implicit in his assertion is the idea that he would not have purchased the Tall Timber Trails business had he known of the existence of these plans. Given the state of his pleadings, the Chambers judge understandably did not address Mr. Seewalt's misrepresentation argument.

[71] In any event, even if Mr. Seewalt had properly pleaded the cause of action he asserts on appeal, I do not find any support for it in the evidence or in the law.

[72] By way of background, the Government "plans" Mr. Seewalt alludes to are the broad-based management plans. The Ecosystem Plan provides information about the nature of the ecosystem within the park, identifies ecological issues and provides recommendations for future park management. The Conservation Plan sets out the strategic direction for park management over a 20-year span, including suggested treatments to maintain and conserve forest biodiversity and viability. The management plans were approved by the Government in June of 2019, as deposed to by Mr. Longpre in his December 16, 2020, and June 15, 2021, affidavits.

[73] Both plans recommended forest harvesting as the preferred method for improving forest health and mitigating wildfire risk.

[74] To implement the necessary forest harvesting recommended by the management plans, the Government sought public bids for commercial harvesting within the park. Tolko was selected by the Government in September of 2019 to harvest 3,120 hectares of standing timber over a five-year period. This amount comprised roughly 1.8% of the park. However, prior to commercial harvesting taking place, Tolko was required to develop a forest operating plan containing the specifics of when and where the harvesting would occur. Further, Tolko's commercial harvesting plan was subject to Government review and approval, which, in turn, required it to engage in public consultation. Even though those discussions took place in November of 2019, the Government deferred the implementation of Tolko's plan, pending a further round of public consultation. Tolko's forest operating plan (subsequently assumed by Mistik Management Ltd.) was approved by the Government in February of 2021 for the period 2020 to 2025.

[75] The important points to be drawn from all of this is that the management plans were high-level documents identifying the Government's analysis of and intentions for how it would manage the ecosystem within the park in the decades to come, with the overarching goal of improving forest health and mitigating wildfire risk. The management plans did not constitute an express disposition permitting Tolko, or any other person, to harvest timber within the park. My interpretation is consistent with s. 25.1 of *The Parks Act*, which prohibits any person from conducting forest harvesting without "a disposition issued pursuant to this Act" or "a term supply licence or forest product permit issued pursuant to *The Forest Resources Management Act*" (s. 25.1(a) and s. 25.1(b)). The management plans were not those sorts of dispositions nor were they "regulations", as maintained by Mr. Seewalt. Furthermore, the evidence reveals that a disposition of that sort was not granted to Tolko until after the lease had been terminated in 2020. Thus, contrary to Mr. Seewalt's assertion, commercial forest harvesting did not take place until February of 2021.

[76] With that context in mind, I return to Mr. Seewalt's core arguments that he was not advised about the management plans before he acquired the Tall Timber Trails business and that the Government failed in its obligation to inform him of the forest harvesting that was to take place.

[77] There are several reasons why Mr. Seewalt's arguments must be rejected.

[78] First, the premise of Mr. Seewalt's argument is that the Government was legally obligated to inform him about the management plans. However, there is nothing in the lease agreement that imposed that obligation on the Government nor, for that matter, has Mr. Seewalt identified any legislation or other source of common law authority that supports his assertion. On his own accord, Mr. Seewalt chose to purchase the Tall Timber Trails business and assume the rights and obligations conferred on a lessee under that lease for the remainder of its term. This transaction was a private arrangement between Tall Timber Trails and Mr. Seewalt, which did not involve the Government beyond the limited role it played in determining whether to provide its consent to the vendor's assignment of lease. This is consistent with Mr. Roth's June 15, 2021, supplemental affidavit, where he deposed, "My office did not play a role in the negotiations between [Tall Timber Trails] and Mr. Seewalt, including having no role in the negotiation of the lease assignment fee of $22,000". He also said this:

> 7. To the best of my knowledge, Mr. Seewalt did not ask my office any questions nor seek out any other information from it while negotiating with [Tall Timber Trails] and prior to agreeing to have the Commercial Lease Agreement assigned to him. Further, I have no knowledge of how the negotiations preceded between [Tall Timber Trails] and Mr. Seewalt.

[79] Second, even if some amount of forest harvesting had taken place – as Mr. Seewalt claims it did – his argument must be assessed in light of the provisions in *The Parks Act* and the lease agreement itself. As noted above, the land in question is *park land* within the meaning of that Act and, as such, must be administered in accordance with the provisions of that statute. In this regard, s. 17 of *The Parks Act* (quoted above) provides that "every disposition" (which includes leases) "is subject to" the listed "implied reservations" in favour of the Crown, including "all trees, standing, fallen or cut and the right to enter on any park land to cut and remove trees" (s. 17(e)). Section 32(c) of the lease parallels this legal reality by providing that "this Lease Agreement is subject to all provisions of *The Parks Act* and regulations thereunder, including … the implied reservations, terms and conditions to which dispositions under that Act are subject".

[80] Read together, the lease agreement and the operative legislation allowed the Government to harvest timber on park land. Therefore, even if some amount of timber harvesting had, in fact, taken place, the Government would not have breached the lease.

[81] Third, Mr. Seewalt's complaint – that he was caught off-guard by the management plans, and did not learn about them until December 11, 2019 – is incongruent with the evidence. While the Government's evidence does not suggest that any of its officials specifically informed Mr. Seewalt of the existence of the management plans at the time of the lease assignment, neither were the plans a secret. According to Mr. Longpre, prior to assignment of the lease in July of 2019, the Government had publicly announced its intention to harvest timber within the park and had initiated a campaign to raise public awareness of that objective in the following ways:

(a) holding open houses in December of 2018, which were advertised through a number of media outlets;

(b) making the draft plans available on the Government's website in 2018;

(c) engaging in communications with various cottage owner associations in November of 2018; and

(d) placing the final approved plans on the Government website and making them publicly accessible in November of 2019.

[82] Fourth, as discussed above, the Chambers judge made a finding of fact that commercial forest harvesting was *not approved* until after the Government had terminated Mr. Seewalt's lease.

[83] Fifth, there was no evidence before the Chambers judge that the trees on the *leased land* had been harvested. While Mr. Seewalt had maintained that his lease effectively encompassed the entire park, because horseback riding takes place on various trails within it, and thus not self-evidently restricted to the compound where his horses were kept, the Chambers judge rejected that proposition. Given the express terms of his lease agreement, she did not err in doing so.

[84] Finally, on appeal, Mr. Seewalt argues the Government had a *duty to consult* with every person who occupies Crown land, including him. In my view, Mr. Seewalt's reliance on this principle is misplaced. When a proposed action or decision of the Crown has the potential to adversely affect existing or asserted Indigenous and treaty rights, the duty to consult is engaged. The basis for this duty is the *honour of the Crown* principle emanating from s. 35 of *The Constitution Act*, 1982, Schedule B to the *Canada Act 1982* (UK), 1982, c 11. Plainly, the duty to consult does not apply to Mr. Seewalt.

[85] To conclude, I see no error in how the Chambers judge dealt with Mr. Seewalt's misrepresentation allegation.

E. Remaining arguments

[86] Mr. Seewalt raises an assortment of other arguments or alleged errors. While none of them are material to the result on this appeal, for the sake of completeness, I will briefly touch on them.

1. Non-compliance with provincial law

[87] Mr. Seewalt makes a complex web of arguments to the effect that the Government acted in breach of environmental and forest management laws that, in turn, caused the Government to fail to exercise due diligence before it approved the lease assignment. Ultimately these errors, he says, manifest themselves in paragraph 79 of the *Chambers Decision*, where the Chambers judge wrote as follows:

> [79] In Chambers, Mr. Seewalt stated that the "plaintiffs nature of business is entirely dependent on the nature and majesty of the trees in the boreal forest". The trees on his leased property, however, were not harvested. Further, the harvesting that ultimately occurred in [the park] was not done without consultation or in the absence of consideration regarding the ecosystem of [the park], as outlined in the initial affidavit of Mr. Longpre, particularly at paras. 2 through 6. Thus, Mr. Seewalt's submissions that environmental concerns have not been addressed are inaccurate, as well as irrelevant in the context of these proceedings.

[88] In advancing this argument, Mr. Seewalt points to s. 2(gg) of the *EMPA*, which defines the term *site assessments* to mean "any activity to determine the cause, nature or extent of a potential or existing adverse effect". That concept, he says, plays into s. 13 of the *EMPA*, which empowers the minister to "require a person who is or may be a person responsible to conduct a site assessment". Mr. Seewalt builds on the need for site assessments being required by drawing on the term *adverse effect* contained in s. 2(b) of the *EMPA*, which is defined to mean an "impairment of or damage to the environment or harm to human health, caused by any chemical, physical or biological alteration or any combination" thereof. Also, he points to non-compliance with s. 9, which imposes a duty to report a discharge.

[89] Putting all of this in context, I understand Mr. Seewalt to argue that the Government breached its own laws by not undertaking a site assessment prior to approving the management plans or consenting to the lease assignment. He makes a similar argument respecting alleged

violations of the federal *Impact Assessment Act*, SC 2019, c 28 (which he refers to as the *Environmental Assessment Act*), and the *FRMA*.

[90] Like the Chambers judge, I am not persuaded by this line of argument. The obligation to conduct a site assessment is triggered where there exists a "person responsible" within the meaning of s. 12(2) of the *EMPA*. Broadly speaking, that term refers to someone who causes or contributes to the discharge of a *substance*. There is no allegation in Mr. Seewalt's pleadings of any discharge of a substance into the environment having occurred or of the Government (as owner of the land in question) having consented to or permitting a third party to discharge a substance into the environment. That being so, it follows there is no authority to direct the preparation of a site assessment pursuant to s. 13 or to report a discharge under s. 8 or s. 9 of the *EMPA*.

[91] The Chambers judge addressed Mr. Seewalt's argument in this way (*Chambers Decision* repeated here for ease of reference):

> [79] … Further, the harvesting that ultimately occurred in [the park] was not done without consultation or in the absence of consideration regarding the ecosystem of [the park], as outlined in the initial affidavit of Mr. Longpre, particularly at paras. 2 through 6. Thus, Mr. Seewalt's submissions that environmental concerns have not been addressed are inaccurate, as well as irrelevant in the context of these proceedings.

While the Chambers judge did not dig deeply into his argument (i.e., that the management plans failed to address broader environmental concerns), there are several reasons why it was unnecessary for her to do so and thus why it does not amount to a reversible error.

[92] First, contrary to his extensive submissions on appeal, Mr. Seewalt's pleadings do not contain an assertion that the Government breached federal or provincial environmental or forestry legislation. As pleaded, his complaint is with forest harvesting proceeding without notifying him in advance, in spite of the Government's knowledge of his leasehold interest and that the consent to assignment of the Tall Timber Trails lease was "on the condition being free and clear from any liens and/or encumbrances". That said, I recognize that in the remedy portion of his claim he sought to have the management plans "declare[d] void and unenforceable by the law" (emphasis omitted). In doing so, he appears to be seeking a remedy without a factual foundation for the relief that is sought.

[93] Second, compliance with environmental legislation was not the central issue before the Chambers judge. She was asked to resolve the narrow question of whether the Government was prevented from terminating Mr. Seewalt's lease because forest harvesting had allegedly taken place. The answer to that question did not require her to drill down into whether the Ecosystem Plan or Conservation Plan were compliant with the *EMPA*, *FRMA* or federal legislation. At best, his argument amounts to a collateral attack on those management plans, absent proper pleadings.

[94] Third, much like Mr. Seewalt's allegation that the Government had breached its covenant of quiet enjoyment (as discussed below), even if it had acted contrary to the provisions of the *EMPA* or *FRMA* in how it assessed and approved the management plans or, more narrowly, how it proposed to manage the park land on a go-forward basis, any act of commission or omission did not preclude the Government from terminating his lease. Mr. Seewalt does not cite any case law that suggests otherwise.

[95] Fourth, although the Crown is bound by the *EMPA*, s. 91 offers a complete answer to Mr. Seewalt's claim for damages. That section declares the Government immune from "any loss or damage suffered by a person by reason of anything *in good faith done*, caused, permitted or authorized to be done" in the "exercise of any power … or in the carrying out … of any function or duty" (emphasis added) under the *EMPA*. Again, nowhere in his pleadings does Mr. Seewalt allege that the Government or its officials acted in bad faith. To similar effect, see s. 95 of the *FRMA*.

[96] To conclude, I see no error with the Chambers judge's determination that the alleged breach of environmental and forestry law had an impact on the Government's decision to consent to the assignment of lease or subsequently terminate it.

2. Quiet enjoyment and road blockages

[97] Mr. Seewalt submits that his right to quiet enjoyment of the leased premises included the right to be on the leased land free from Government interference. This allegation is in reference to certain road blockades the Government had put in place from April 15, 2020, to June 1, 2020, in response to the COVID-19 pandemic.

[98] As a matter of general principle, a tenant is entitled to peaceful occupation of a leased premises: "A tenant has the right to take possession and to be protected against substantial interference with the use and enjoyment of the premises by the landlord or others claiming under the landlord. Included is protection against direct physical interference" (footnote omitted, *Ziff's* at 351). See also *LaBuick* at paras 52 and 53.

[99] Mr. Finlay deposed that after the Government had declared a state of provincial emergency due to the COVID-19 pandemic on March 18, 2020, he was instructed to close all facilities in the park. As Mr. Finlay averred in his supplemental affidavit, "While access into the [park] always remained open, to ensure that individuals did not camp at the closed campgrounds, access was restricted to them". Mr. Finlay acknowledges that the Government's action had the effect of temporarily blocking Mr. Seewalt's access to his leased lands.

[100] The Chambers judge saw no breach of Mr. Seewalt's right to quiet enjoyment by implicitly concluding that the blockade did not have an impact on his business because, as she found, Mr. Seewalt did *not* operate the riding-stable business. I take the Chambers judge to have found that he had not operated his business at any time between the date of assignment until lease termination. This was a finding of fact that cannot be overturned on appeal, absent palpable and overriding error. Further, there was no evidence from Mr. Seewalt that his right to be on the property was denied, beyond the temporary period of the blockade or that he had sought entry to the leased land in spite of it. Finally, even in the face of this temporary interference, for the Government to be in breach of this covenant, "the interference with the tenant's enjoyment must be substantial. Mere temporary inconvenience is not enough; the interference must be of a grave and permanent nature" (*LaBuick* at para 53). The blockade did not rise to that level.

3. COVID-19 Measures

[101] Mr. Seewalt claims several orders made by the Government under *The Emergency Planning Act* prevented the termination of his lease. There is no merit to this argument for the simple reason that neither of the orders he alludes to applied to his circumstance.

[102] In June of 2020, the Government issued a ministerial order that provided temporary commercial eviction protection for small business tenants. As described in the Government's press release, "The moratorium on evictions applies to landlords that are eligible to apply for the Canada Emergency Commercial Rent Assistance (CECRA) program but chose not to". As is evident from the policy, it was restricted to commercial landlords who were eligible but did not apply for the Canada Emergency Commercial Rent Assistance program. The Government, as lessor, was not an eligible landlord within the meaning of that order.

[103] The Government also suspended eviction hearings under *The Residential Tenancies Act, 2006*, SS 2006, c R-22.0001, where the basis for lease termination was the lessee's failure to pay rent. This order did not apply to Mr. Seewalt's situation because he was not a residential tenant under the lease nor was his lease terminated for late or non-payment of rent.

4. Cross-examination errors

[104] Mr. Seewalt appears to take issue with the Government's affiants not being cross-examined. This argument overlooks the fact that, pursuant to an order made by Currie J. on November 24, 2021, Mr. Seewalt was granted leave to cross-examine the Government's affiants. He chose to forgo that opportunity. While that left the Chambers judge without a cross-examination that might have benefited Mr. Seewalt, he alone opted not to act on the court order.

5. Damages and loss

[105] Mr. Seewalt identified an assortment of damages and losses he claims to have suffered because of the Government's actions. It is not entirely clear whether, in advancing this argument, Mr. Seewalt considers an appeal to this Court as an opportunity to reargue his case afresh (which it is not) or if he is asserting that the Chambers judge erred by not considering the scope of his loss. Regardless, he says that, had she done so, she might not have readily accepted the Government's argument on liability.

[106] There is no error here. The Chambers judge concluded that the Government did not breach the lease and that Mr. Seewalt's action should be dismissed in its entirety. Having reached that conclusion, it was unnecessary for her to delve into the question of damages.

VI. CONCLUSION

[107] The appeal is dismissed.

[108] At the hearing of the appeal, the Government informed the Court that it would not be seeking costs of the appeal. Accordingly, there will be no order as to costs.

"Schwann J.A."

Schwann J.A.

I concur.

"Jackson J.A."

Jackson J.A.

I concur.

"Tholl J.A."

Tholl J.A.