The Law Society of Saskatchewan Library's online newsletter highlighting recent case digests from all levels of Saskatchewan Court. Published on the 1st and 15th of every month.

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The appellant father appealed an interim parenting order for a six-year-old child. The respondent, who was the child's maternal grandfather, had been appointed as a person of sufficient interest under s. 8(1) of *The Children's Law Act, 2020*, and on an interim basis, the child had been ordered to reside primarily with the grandfather. This interim order reversed an earlier interim order following an application without notice ordering the child be relocated to BC to live with the appellant. The child's parents separated when the child was two. The appellant father relocated to BC, and the child stayed with the mother, who frequently stayed with her parents on a First

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Nation reserve. The mother was transient, had issues with addiction and was in an abusive relationship with another partner. Shortly after the grandfather asked the mother to leave his home, the mother and the appellant agreed the child should reside with the appellant, who would have sole decision-making authority. The grandfather refused to relocate the child because he and his spouse had been the child's primary caregivers for five years. The grandfather's affidavit contained hearsay evidence that the appellant had been violent in his relationship with the mother. The appellant and the mother denied these allegations. The appellant appealed, thus invoking the automatic stay of the order under what was then rule 15 of *The Court of Appeal Rules*. An application to lift the stay was dismissed and the appeal hearing was expedited. The Court of Appeal considered: 1) should the new evidence that the grandfather sought to adduce be admitted; 2) did the chambers judge err in determining what interim parenting order should be made; and 3) if the chambers judge erred, what parenting arrangements were in the child's best interests?

HELD: The application to introduce new evidence was dismissed and the appeal was allowed. 1) Evidence not before the court appealed from may be admitted under Rule 59(1) of *The Court of Appeal Rules* based on the following four criteria: the diligence of the party seeking to introduce the evidence; the relevance of the evidence; the credibility of the evidence; and the capacity of the evidence to have affected the result of the case under appeal. The evidence the grandfather sought to enter regarding the communications between the child and the grandfather since the child had relocated did not satisfy the criteria for admission. It was not relevant and not capable of affecting the result. The evidence demonstrated animosity between the grandfather and the appellant but did not establish whether the child's best interests were served by living with one or the other. 2) In an appeal, the court will intervene in an order only if the judge failed to correctly identify or misapplied the legal criteria governing their discretion, failed to give sufficient weight to a relevant consideration, or made a palpable and overriding error in their assessment of the facts. The chambers judge failed to assess the child's best interests in accordance with s. 10 of *The Children's Law Act, 2020*. The chambers judge could not determine if the allegations of family violence were true on the conflicting affidavit evidence but decided that concerns for the child being exposed to family violence overrode other considerations. The impact of family violence is a mandatory consideration in the best-interests analysis. The appellate court cannot second-guess the weight the trier of fact assigns to evidence, but it was an error to make findings about family violence based on hearsay evidence contradicted by direct evidence. The effect of family violence was prominent in the best-interests analysis, and thus, the chambers judge order was set aside as a result of the chambers judge's error in assessing the evidence. 2) The grandfather, as a person of sufficient interest, had status equal with the parent to seek a parenting order. The closer biological connection of the parent ought not be used as a tiebreaker. Biological ties may be relevant, but generally carry minimal weight in the assessment of a child's best interests. Maintaining the status quo in an interim order is usually in a child's best interests, absent risk or another compelling reason, but judges are not compelled to maintain a status quo

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not in the child's best interests. Where the existing parenting arrangement has come about through the unilateral actions of one party, the principle of deference to the status quo does not apply. The appellant says he was unaware the child was living with the grandfather instead of the mother, and he had no in-person contact with the child for the previous three years because of COVID restrictions. The grandfather and his spouse said they had been the primary caregivers for the child, and even when the child's mother resided with them, the grandfather and his spouse were the primary caregivers. The child's mother said she had been the child's primary caregiver until September 2021 and that she asked the grandfather to look after the child while she moved, and he then refused to return the child to her. It was not possible to determine fully the status quo based on the affidavit evidence. The child had always resided in Saskatchewan, close to her half-siblings and the mother's extended family. The father had lived in BC for most of the child's life, was less involved in the child's care than the grandfather, and was aware of the grandfather's involvement in the child's life. The grandfather had been the child's primary caregiver for at least the previous year, but the father had not agreed to that arrangement. As such, there was no reason to defer to the status quo. Both the father and the grandfather had adequate housing, financial stability, and the ability and commitment to provide for the child's needs. The need for stability supported keeping the child with her grandfather, but the child had already lived with her father and his spouse and his stepchildren for four months and returning her to her grandfather would disrupt her again. The friction between the father and grandfather does not assist either side. The court commented that it was difficult to place determinative weight on the history of care factor. The grandfather and the father are both Indigenous, from different communities and traditions, and the grandfather denied the father's Indigenous identity. The court decided the child's cultural and linguistic needs would be served equally by either caregiver. The evidence the father was involved in family violence was speculative and not a proper basis for analysis of the child's best interests on an interim basis. The child ought to stay with the father on an interim basis until the pre-trial conference or, if necessary, trial. The father and grandfather had joint decision-making responsibility. The child would reside with the father, and the grandfather would have weekend access on a monthly basis, and access for half of school holidays.

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***Englot v Ritchie Bros. Auctioneers (Canada) Ltd.*, 2023 SKCA 27**

Schwann Leurer McCreary, 2023-02-23 (CA23027)

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The appellant engaged the respondent auctioneer to sell two tractors. The chambers judge decided the appellant had intentionally misrepresented the condition of the tractors and granted the respondent auctioneer summary judgment for damages flowing from the misrepresentation and associated breach of contract. The seller and auctioneer signed an agency agreement requiring the seller provide accurate information about the tractors. The seller provided the auctioneer information about the hour meter and odometer readings. After the tractors sold, the buyer informed the auctioneer the hours of tractor operation were much higher than stated. The appellant did not deny having changed the hour meter readings and did not cooperate with the auctioneer or return the money the appellant had received from the sale. The auctioneer paid the buyers the purchase price, took back the tractors, repaired them, and resold them at a subsequent auction for approximately one-third less than the previous purchase price. The Court of Appeal considered whether the chambers judge erred in law by deciding: 1) that the auctioneer was entitled to "cancel" the sales of the tractors, and resell them, without the appellant's consent; 2) that the auctioneer acted in a commercially reasonable manner; and 3) that the *Farm Debt Mediation Act* and *The Saskatchewan Farm Security Act* were inapplicable. HELD: The appeal was dismissed. 1) The contract between the auctioneer and the appellant did not provide the auctioneer the express or implied right to rescind sales and re-sell the tractors as the appellant's agent in the event the appellant misrepresented the goods to be sold. The auctioneer did not refund the tractor buyers the purchase money, which had been paid to the appellant, but instead used the auctioneer's own funds to buy the tractors back from the purchasers in the auctioneer's own name. The auctioneer's title to the tractors was not held on the appellant's behalf. The chamber judge's characterization of this transaction as rescinding the first sale of tractors was in error, but the error did not affect the outcome. The lack of the appellant's consent to the auctioneer's purchase and resale of the tractors was irrelevant to whether the auctioneer could recover damages from the appellant's breach of contract. The breach and causation of damages was not seriously disputed. The appellant argued that the damages were too remote because the auctioneer had no obligation to pay the purchase price to the original buyers. Damages must be either arising naturally from the breach of contract or in the reasonable contemplation of both parties. It was in the reasonable contemplation of the appellant and auctioneer that it might be necessary to offer a refund where consigned goods are materially misrepresented, to save reputation and to avoid litigation, even if the auctioneer may have had a defence to that litigation. A person placed in a difficult situation by a breach of contract has a duty to act reasonably but will not be disentitled to the costs of such measures simply because the party that caused the breach can suggest less burdensome measures that might have been taken. The intentional nature of the breach was relevant to the remoteness question. 2) The appellant argued the auctioneer did not act in a commercially reasonable manner in its repurchase, transport and resale of the tractors, and that the auctioneer was not entitled to its commission for the first sale. The first sale was concluded and therefore the

commission was earned. The appellant's consent was not required for the auctioneer to incur the mitigation expenses. Transportation and repair expenses were reasonably incurred and recoverable. 3) The appellant argued that the auctioneer ought to have given him notice of the sale of equipment and a reasonable opportunity to redeem it under the *Farm Debt Mediation Act* and *The Saskatchewan Farm Security Act*. Both statutes deal with the taking of farm equipment from a farmer. The appellate court did not analyze the chambers judge's reasoning for concluding these statutes did not apply because second sales involved the transfer of the auctioneer's property, and not the taking of the appellant's equipment, and therefore, the two statutes had no application when the auctioneer sold the tractors for a second time.

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***MFI Ag Services Ltd. v Farm Credit Canada*, 2023 SKCA 30**

Leurer Tholl Drennan, 2023-03-06 (CA23030)

Contracts - Formation - Mistake - Rectification
Equity - Remedies - Rectification
Limitation of Actions - Action on Mortgage
Limitations - Statutory Limitation Periods

The appellant farm operators appealed a summary judgment decision that ruled the respondent could still enforce mortgages on farm land. The appellants had defaulted on loans secured by mortgages from the respondent. The respondent had taken steps to collect the debts, including serving notices of intention under s. 12(1) of *The Saskatchewan Farm Security Act* (SFSA), triggering the suspension of the limitation period under *The Limitations Act*. The appellants made some payments, and the appellants and respondent negotiated a repayment agreement. Three years passed without a court application. The appellants defaulted again. The respondent served new notices and issued a statement of claim seeking payment of the loans and foreclosure or judicial sale of the mortgaged lands and rectification of a mortgage registered for the wrong amount in error. The appellants argued the respondent's failure to obtain an order under s. 11 of the SFSA before the first s. 12 notices expired meant that the limitation periodwas, in effect, never suspended, and therefore the limitation period had expired, the debts were uncollectable and the mortgages unenforceable. The chambers judge disagreed. The Court of Appeal considered whether the chambers judge erred: 1) in determining the limitation was suspended for a three-year period; and 2) in rectifying the mortgage.

HELD: The appeal was dismissed. 1) The chambers judge was correct in her interpretation of s. 22 of the SFSA. Section 22 says that the period from the service of a notice of intention under s. 12 until the granting of an order under s. 11 is not included in the calculation of the limitation period. Where there is no order under s. 11, s. 12(16) states the notice of intention expires after three years. Expiration does not mean something never existed. The circumstances of this case are not expressly addressed in the legislation. The court looked to the purpose, history, jurisprudence and academic commentary related to the legislation. Because the limitation period is suspended once the s. 12 notice of intention is served, the parties can negotiate for an extended time. The lender is not prejudiced by a looming limitation period expiry date and the farmer can benefit from extra time to resolve the matter. The common purposes of *The Limitations Act* and the SFSA are served by recognizing the service of a s. 12 notice suspends the running of the limitation period, but if no order is obtained, the suspension ends after three years and the limitation period starts running again. 2) The chambers judge did not err in ordering the mortgage be rectified. The chambers judge rectified one of the mortgages by changing its amount from $185,500 to $270,000. The appellants' lawyers registered the mortgage in the amount of $185,500, despite written instructions from the respondent to register the mortgage in the amount of $270,000. Rectification may be granted when a written instrument fails to correctly record the parties' agreement. The mortgage was a continuing collateral mortgage. The approval unambiguously set out that the mortgage was to be registered with a principal amount different from the amount of the loan.

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***Banilevic v Cairney*, 2023 SKCA 31**

Jackson Barrington-Foote Kalmakoff, 2023-03-08 (CA23031)

Family Law - Appeal - Division of Family Property
Practice and Procedure - Appeal - Final Determination - Premature Application

The parties were former spouses and had been involved in a consolidated action for divorce and property division. The appellants appealed: the trial judge's denial of requests for adjournment (both the appellants and respondent requested adjournments of the trial); the trial judge's finding that a trust agreement was not valid; and the finding that the appellant failed to prove that his property was exempt from division. However, the trial was still ongoing; the trial judge concluded that the trial had to be re-opened because he was unable to identify or determine the value of the family property to make a proper decision about its division. The Court of Appeal (court) determined whether it had jurisdiction to hear and determine the appeal at this mid-trial stage, and if so, whether it was proper to exercise it.
HELD: The court dismissed the appeal because it was premature. The general rule is that appellate courts do not hear appeals from rulings or orders made during a trial while the trial is still ongoing. Such appeals are premature and risk fragmenting the proceedings. An exception to this general rule is that appellate courts may hear an appeal from a mid-trial ruling if there are "exceptional or unusual circumstances, such as where it would be manifestly unjust to one or more of the parties to let the trial continue to its conclusion". While the court declined to exercise its jurisdiction to hear the appeal, it did indicate that it was open to the appellants to apply to the trial judge for an order that in addition to evidence on property valuation, they also be permitted to lead

further evidence on the validity of the trust and the exemptions that the appellant claimed with regards to the division of property, requesting that the judge revisit the decisions made on these issues.

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***R v Merasty*, 2023 SKCA 32**

Schwann Leurer Tholl, 2023-03-14 (CA23032)

Criminal Law - Appeal - Conviction - Sexual Assault
Criminal Law - Conduct of Trial - *Browne v Dunn*
Statutes - Interpretation - *Criminal Code*, Section 271

The offender (appellant) appealed his conviction for sexual assault under s. 271 of the *Criminal Code*, RSC 1985, c C-46. He was found guilty in Provincial Court after a trial of sexually assaulting an acquaintance. The Crown appealed the sentence of six months' imprisonment followed by 12 months of probation, which the Court of Appeal (court) allowed in separate reasons (*R v Merasty*, 2023 SKCA 33). The complainant testified that she slept on a separate bed by herself for a few hours at a residence while she waited for her ride to pick her up. She awoke to discover her pants down and the appellant trying to engage in sexual intercourse with her. Forensic examination of her underwear revealed trace amounts of male DNA, but in insufficient amounts to compare to a known sample. The trial judge concluded that there was no dispute that there was physical contact between the complainant and accused and that it was sexual in nature. The appellant's sole argument was that the encounter was consensual. The trial judge found that there was no consent to sexual activity prior to the complainant falling asleep, and that the complainant was unable to consent during the activity because she was sleeping. The appellant raised the following issues: 1) whether the trial judge erred by misapprehending a key issue in the trial; 2) whether the trial judge failed to resolve inconsistencies between the complainant's account and those offered by other witnesses; 3) whether the judge misapplied the rule in *Browne v Dunn*; and 4) whether the trial judge considered inappropriate matters when rejecting the testimony of a defence witness.
HELD: The court dismissed the appellant's appeal from his conviction. 1) The court rejected the appellant's argument that the trial judge misapprehended the appellant's defence. In his reasons, the trial judge stated that the appellant's defence was that the complainant was not being "truthful" with the court when she denied that she consented. The appellant asserted that at trial, he had argued that the complainant's evidence was not reliable because she was impaired. However, the record demonstrated that the trial judge addressed both the complainant's truthfulness and her reliability. 2) The trial judge provided a comprehensive summary of the evidence, was alert to conflicting testimony, and preferred the "clear, cogent and compelling" testimony of the complainant. Conflicting evidence was immaterial to the ultimate issue, which was whether the complainant consented. There was no error on this ground of appeal. 3) The rule in *Browne v Dunn* concerns trial fairness and requires a party who intends to call evidence contradictory to that of a witness to question that witness about the contradiction, giving him or her an opportunity to address it. Here, the evidence of one of the defence witnesses was not put to the complainant, so the complainant was never given an opportunity to address it. Defence counsel at trial did not request that the complainant be recalled. The court noted that *Browne v*

Dunn is not concerned with fairness to the party who offers a witness and does not thoroughly examine them before or during trial. Here, the trial judge stated that he struggled with the weight to give to the defence witness's evidence because he could not assess it against what the complainant might have said. However, the trial judge concluded that even if the defence witness's evidence were to be believed, it would not have impacted his conclusion about the appellant's guilt. 4) There was no basis to conclude that the trial judge took into account inappropriate considerations when rejecting the testimony of a defence witness. The trial judge was convinced based on the strength of the complainant's testimony that the sexual encounter was non-consensual.

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***R v Merasty*, 2023 SKCA 33**

Schwann Leurer Tholl, 2023-03-14 (CA23033)

Criminal Law - Appeal - Crown - Sentence
Statutes - Interpretation - *Criminal Code*, Section 271

The Crown appealed the offender's sentence of six months' imprisonment, followed by a one-year probation order. The offender was convicted after a trial in Provincial Court of sexual assault contrary to s. 271 of the *Criminal Code* (Code). The offender appealed his conviction to the Court of Appeal (court) as well, but the appeal was denied in separate reasons (*R v Merasty*, 2023 SKCA 32). The sexual assault occurred while the complainant was asleep in a separate bed from the offender. While she was asleep, the offender removed the complainant's pants and tried to engage in sexual intercourse with her. The encounter stopped as soon as the complainant woke up and told the offender to stop. The Crown argued that this was a major sexual assault because the offender attempted non-consensual intercourse with a sleeping woman who trusted him enough to sleep in the same room as him. The Crown submitted that an appropriate sentence was 30 to 36 months given the nature of the assault, the harm caused to the complainant and the offender's personal circumstances. The defence argued for a 90-day intermittent sentence followed by three years of probation, noting that the offender did not have a criminal record and had *Gladue* factors which reduced his moral culpability. The trial judge concluded that this was not a major sexual assault. The court determined whether: 1) the trial judge erred in principle; and 2) if the judge erred in principle in ways that impacted the sentence, what was a fit sentence?
HELD: The court allowed the Crown's appeal, and substituted a term of imprisonment of 20 months, followed by a 12-month probation order with the same conditions, and a *Sex Offender Information Registration Act* (SOIRA) order for 20 years. 1) The court discussed several errors in principle that occurred. The trial judge erred in concluding that the fact the offence was not a major sexual assault was a mitigating factor. Concluding that this assault was not a major sexual assault relates to the principle of parity and sentencing starting points: it is not a mitigating factor. The judge also erred by concluding that the absence of violence in committing this sexual assault was mitigating. On the facts found by the judge, there was violence. A sexual assault is still an assault. The judge did not give "primary consideration" to denunciation and deterrence as required by s. 718.04 of the Code when the victim is "vulnerable because of personal circumstances – including because the person is Aboriginal and female." The fact that

the victim was asleep made the circumstances particularly serious (*R v Bear*, 2022 SKCA 69). The trial judge also erred in requiring the offender to comply with SOIRA for 10 years rather than 20 years. 2) The judge erred in principle, and this impacted the sentence he imposed. Therefore, the court was required to sentence the offender afresh. The circumstances did not rise to the three-year starting point for major sexual assaults, but the range in similar cases where the victim was asleep would normally be between two and three years' incarceration. Here, the judge identified that a probation order would sanction the offender and assist in rehabilitation and restorative justice principles. An order of probation justified a term of imprisonment below the range of two to three years.

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***Windels v Reddekopp*, 2023 SKCA 38**

Whitmore Leurer Barrington-Foote, 2023-03-20 (CA23038)

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The appellant former executive director of a supported-living charitable non-profit corporation appealed an order removing him from the executive director role and barring him from holding office until the end of 2023. The order also required the corporation make bylaw and governance changes. The respondents were board members of the charitable non-profit corporation who had concerns with financial and other actions of the executive director and other board members. The appellant executive director had received loans from the charity and used one such loan to purchase a house, and this transaction was not fully recorded in the financial statements (the Walmer transaction). The chambers judge determined limitation periods did not prevent the court from dealing with the matter. The appellant had objected to the unfair procedures used in the court below and unsuccessfully sought to cross-examine affiants. The appellant argued on appeal he had been denied procedural fairness and the decisions were legally wrong. The Court of Appeal considered whether the chambers judge: 1) breached the duty of fairness by denying the appellant the opportunity to respond to the case against him; 2) erred in law in finding that *The Limitations Act* (Act) did not bar the oppression claim in whole or in part; and 3) erred in law, or in mixed fact and law, in deciding that the Walmer transaction was a purchase and sale rather than a secured loan.
HELD: The order of the chambers judge was set aside, and the matter remitted to the Court of King's Bench for redetermination, without order of costs in relation to the appeal. The appellant would remain suspended with pay from his role as executive director until the matter was redetermined. 1) The appellant was denied procedural fairness. The oppression application should have been commenced by originating application pursuant to Rule 3-49 of *The Queen's Bench Rules*. It was brought by a notice of application in an existing proceeding, which triggered timelines specified in an earlier court fiat. The appellant argued this was not a formal

defect that could be cured by the court, but instead, the wrong commencement document resulted in an unfair procedure in which the appellant was denied the ability to engage in questioning, cross-examination and document exchange. In the circumstances of this case, the chambers judge did not err in his conclusion that he had the authority to cure the wrong commencement document, provided that the judge ensured the appellant had the same degree of procedural protection he would have had if the action had been properly initiated. Curing defects in form is consistent with the principles in the rules of court. Regardless of the form of application, the real question was whether the appellant received a fair hearing. Correctness is the standard of appellate review on a question of procedural fairness. What makes a procedure fair depends on the circumstances of the particular case. Originating applications and applications for summary judgment are determined on affidavit evidence, but cross-examination and other procedures are contemplated in the rules. The decision to grant an adjournment was discretionary but could be set aside if the decision created an unfair hearing. Filing evidence and argument was not consent to the procedures. The oppression application had complex legal issues. The appellant did not have notice of the issues and did not have the opportunity to make submissions on significant legal issues, such as the doctrine of adverse domination, the creation of a public interest exception to the principle of discoverability and the potential suspension of a limitation period because of concealment. The appellant and respondents were surprised by certain remedies ordered by the chambers judge. The judge was not limited to the form of order sought, but was limited by the issues, evidence, represented interests, and duty of fairness. The chambers judge incorrectly applied the strong *prima facie* case standard of proof, which applied to interim relief, rather than the balance of probabilities standard that applies to final oppression orders. The incorrect standard of proof rendered contested findings of fact unreliable. The matter was not urgent. Deadlines were imposed by the chambers judge and could have been changed to allow for an adjournment, cross-examination and filing further affidavits. As a result of the denial of procedural fairness, it was unclear if the relief orders were appropriate. The whole of the decision was set aside and remitted to the Court of King's Bench for a new hearing and redetermination of all facts and issues. 2) The chambers judge erred in finding an exception to discoverability of the claim. The judge should not have dealt with the issue of whether the doctrine of adverse domination should be imported into Canada or whether there was an exception to the principle of discoverability specified in ss. 5 and 6 of the Act without notice to the parties. The Act does not contain an exception for oppression claims relating to non-profit charitable corporations or, more generally, for claims that would protect or promote a public interest. The chambers judge did not properly interpret the language or take into account the purposes of the Act. 3) The Walmer transaction was not recorded in a way that fully disclosed its character. The absence of written agreement did not change the character of the agreement. The *Statute of Frauds* renders unwritten and unsigned agreements relating to land unenforceable, but it does not void or nullify the oral contract. It was not open to the chambers judge on the evidence to characterize the Walmer transaction as a purchase and sale, rather than a loan.

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***R v MacFie*, 2023 SKCA 39**

Richards Leurer Tholl, 2023-03-27 (CA23039)

Criminal Code - Appeal - Motor Vehicle Offences - Driving/Care or Control with Excessive Alcohol
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Criminal Law - Impaired Driving - Driving Over .08 - Reasonable Grounds - Demand for Breath Sample

The Crown appealed the accused's acquittal on impaired driving charges. The police officer had observed an oddly parked vehicle in the very early morning. The officer discovered the accused slumped over the steering wheel of a running vehicle with an open bottle of beer in the vehicle console. The accused smelled of alcohol, had bloodshot eyes, spoke unclearly, sounded confused and had a droopy face. The accused was arrested. Unsuccessful efforts were made to put the accused in contact with a lawyer. Then the accused failed a breath test. A provincial court judge had dismissed the charges on the basis that the police officer did not have objectively reasonable grounds to demand a breath sample and the accused's right to counsel had been breached. The superior court dismissed the appeal. The Court of Appeal considered: 1) should the court grant leave to appeal; 2) what legal framework applied to the appeal; 3) did the superior court apply the wrong standard of review; and 4) were there objectively reasonable grounds for the arrest and breath sample demand?
HELD: Leave to appeal was granted and the appeal was allowed. The matter was remitted to the King's Bench to address remaining issues in the original appeal. 1) The right to appeal a summary conviction appeal is limited to questions of law alone, with leave of the Court of Appeal. Leave to appeal is granted sparingly when the proposed appeal raises a question of law that is significant to the administration of justice generally or compellingly meritorious on the particulars of the case. Leave was granted because the court could establish another reference point for the kinds of situations constituting objectively reasonable grounds for arresting a person for impaired care and control of a vehicle and demanding a breath sample. 2) For a lawful arrest pursuant to s. 495(1) of the *Criminal Code*, the arresting officer must subjectively believe there are reasonable grounds for the arrest and that belief must be objectively reasonable. Under s. 254(3) (now repealed), a breath sample demand could be made on reasonable grounds. In a summary conviction appeal, the trial judge's findings of fact are reviewable for palpable and overriding error and questions of law are reviewable on the correctness standard. A subsequent appeal to the Court of Appeal is only on a question of law on the correctness standard. The question of whether facts amount to reasonable grounds is a question of law. 3) The appeal judge cited the correct standard of review, but it was unclear whether he applied the correct standard of review. The Court of Appeal must take its own view. 4) The police officer only needed objectively reasonable grounds to believe a person's ability to drive was slightly impaired by alcohol. The inferences drawn by the officer do not need to be accurate, nor provable beyond a reasonable doubt, in order to have reasonable grounds for arrest and breath sample. Indicia of impairment are considered in combination. All incriminating and exonerating evidence must be considered. There is no definitive checklist of impaired driving indicia. There is no minimum time period for observation before a breath sample demand. The court reviewed several cases exemplifying objectively reasonable grounds for arrest for impaired care and control. The officer's observations of the man slumped over the steering wheel of an unusually parked running vehicle with an open bottle of beer beside him and an unlit cigarette in his fingers, combined with the time of day, confused and slurred speech, very bloodshot eyes, a strong breath odour of alcohol and a droopy face, established adequate grounds to conclude objectively that the accused's ability to drive was at least slightly impaired by alcohol. An officer witnessing erratic or improper driving is not a precondition to concluding impairment of driving ability.

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***Kaiser v Baildon (Rural Municipality)*, 2023 SKKB 50**

Megaw, 2023-01-25 (KB23047)

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Municipal Law - Council Members - Disqualification
Statutes - Interpretation - *Municipalities Act*, Section 358

The applicant applied to set aside resolutions of the council of the respondent rural municipality (RM) requiring the applicant to make a public apology, removing him from committees, restricting his access to RM property and personnel and, in a separate resolution, suspending the applicant from council until he apologized. An independent investigator hired by the RM concluded the applicant had engaged in persistent harassing, oppressive, intimidating conduct contrary to the RM's workplace harassment policy and the applicant breached the RM's code of ethics bylaw. The investigator also commented that the applicant genuinely believed his behaviour was appropriate to express his opinions as a citizen in a democratic country, and the applicant was not remorseful for the effects of his conduct. The applicant received notice of a meeting at which specific sanctions against him would be addressed. Later, a separate special meeting of council was scheduled with the stated purpose of a municipal leaders' roles and responsibilities webinar. The applicant was advised of the meeting, but not advised of the possibility he would be suspended from council or otherwise sanctioned at the meeting. The applicant was not present for the meeting when the suspension resolution was put in place. The court addressed the applicant's arguments to the extent necessary to decide the application. The court considered: 1) did the council have the legal authority to pass the resolution suspending the applicant from his role on council; 2) did the RM breach a duty of fairness owed to the applicant; 3) was the RM's public conduct policy in conflict with *The Local Authority Freedom of Information and Protection of Privacy Act* (LAFOIP); and 4) costs.

HELD: 1) The council did not have the authority to suspend the applicant by resolution. Section 358 of *The Municipalities Act* authorizes any voter of a municipality to apply to court to quash a resolution on the basis that it is illegal, or was passed in an illegal way, subject to conditions set out in the section. Section 147 of the Act lists circumstances in which a councillor is disqualified from council. The Lieutenant Governor in Council has the authority to remove a council member from office, provided for in ss. 399 and 402 of the Act. The court reviewed a municipality's imposition of a resolution on a reasonableness standard. An RM only has the powers delegated to it in legislation. The RM suspended the applicant unless and until he did what they outlined, and if he did not, he would remain suspended throughout his elected term. The power to suspend does not include permanently removing the applicant from elected office. The council was only authorized to impose a temporary suspension for a defined period. The administrative act of council cannot defeat the democratic will of the public. The applicant's behaviour was difficult and inappropriate, but the resolution's effect of permanently removing the applicant from council was beyond the council's authority to act under legislation. The resolution suspending the applicant was set aside. As a result of this conclusion, the court did not consider the applicant's Charter arguments. 2) The parties agreed that the RM owed a duty of procedural fairness to the applicant. In the circumstances, procedural fairness required notice of the agenda, the ability to make representations, and reasons in the form of the recorded motions of council. The applicant had notice of the meeting addressing specific sanctions apart from the suspension from council. He had an opportunity to present representations. The applicant had a copy of the investigation report, which, together with the

motion of the resolution relating to sanctions other than suspension, provided adequate reasons for the decision. The applicant had no notice that his suspension was a topic for discussion at the special meeting. There was no reason he ought to have known it would be addressed. He did not attend the meeting. The council's failure to provide notice of the issue denied the applicant's right to make representations or have any sort of hearing. The court found no indication of a reasonable apprehension of the council being biased against the applicant. 3) There was no conflict between the RM's public conduct policy and LAFOIP. Section 5 of LAFOIP provided persons a right of access to records held by the RM, as a local authority. The public conduct policy implemented by the RM did not prevent the applicant from accessing records but put in place requirements to protect RM personnel from harassment. There was no evidence the applicant was impeded in his disclosure efforts. The RM had the legal authority to pass the public conduct policy bylaw. 4) The applicant sought solicitor and client costs. Solicitor and client costs are rare and censure outrageous conduct in litigation. This was not a rare and exceptional case. The RM was dealing with a difficult situation. Nothing in the litigation itself required censure. The court listed the considerations when enhanced costs are awarded. The case had some complexities and was important, both to the applicant and more broadly. Although the RM ought to have acted differently in some respects, there was no finding of bad faith. The applicant was entirely unapologetic for the effects of his conduct. Enhanced costs were denied. Success was divided. The court fixed costs at $1,500 in favour of the applicant.

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***Canadian Mortgage Servicing Corporation v Korf*, 2023 SKKB 27**

Gerecke, 2023-02-06 (KB23030)

Civil Procedure - Civil Trial - Limitation Period - Discoverability
Commercial Law - Debt - Agency
Contract - Interpretation
Corporation Law - Piercing the Corporate Veil
Limitations of Actions - Statement of Claim - Statute-barred

The plaintiff lender claimed against the defendant for $20,124,441.43 plus interest pursuant to a guarantee. The defendant was the sole shareholder, director, officer and controlling mind of a borrower corporation and the defendant had signed documents on behalf of the corporation in respect of a loan and signed an extension agreement in his personal capacity as guarantor. The defendant said the limitation period against him began to run on January 2, 2018, and no intervening event caused that limitations clock to stop running. The plaintiff argued a forbearance agreement signed on behalf of the corporation bound the defendant as personal guarantor and suspended the limitation period until December 31, 2019. The chambers judge considered: 1) was this a matter for summary judgment; and 2) did the plaintiff commence the action before the expiry of the statutory limitation period?
HELD: The limitation period expired before the action was commenced, and thus the action was statute-barred and dismissed with costs to the defendant. 1) Summary judgment was appropriate. None of the facts were controverted. The limitation period issue was

the only remaining issue. 2) The forbearance agreement signed on behalf of the corporation did not suspend the limitation period against the guarantor defendant personally. Ordinary contract interpretation principles apply to guarantees, with modifications as necessary. Saskatchewan limitations legislation is similar to Alberta's and differs from that of other provinces. An agreement to forbear the enforcement of debt suspends the limitation period for the period of forbearance, usually when a borrower is incapable of curing a breach. Lenders usually have leverage in negotiating forbearance agreements. Lenders usually require any guarantor to agree to be bound by the forbearance agreement. Here, the forbearance agreement was signed on behalf of the corporation, and not in the defendant's personal capacity. Nothing in the guarantee agreement made the guarantor a party to the borrower corporation's agreements. Neither side filed evidence of their subjective belief about the meaning of the forbearance agreement, and subjective intentions do not determine the formation or meaning of a contract. There was no evidence the defendant agreed to be bound by the forbearance agreement personally as guarantor. The plaintiff made no offer to the defendant personally. Express agreement was required and did not occur. When a principal debtor affirms a debt, that does not impact the limitation period applicable to the guarantor of the principal debtor's obligations, at least if the limitation period concerning the guarantor has already started to run. The guarantor was not a party to the forbearance agreement, and that forbearance agreement did not re-set the limitation period with respect to the guarantor. The guarantor was also the sole shareholder and operating mind of the debtor corporation. Absent clear evidence to the contrary, a corporation is presumed to act for itself rather than as agent for its shareholder. When the corporation signed the forbearance agreement, the corporation acted only on its own behalf and not as agent for the defendant. The forbearance agreement did not trigger s. 6(1)(d) of *The Limitations Act*, which defines when a claim is discovered including when the claimant first knew a proceeding would be an appropriate means to seek a remedy. Here, the claim had already started running, and s. 6(1)(d) does not suspend an already running limitation period. The guarantee agreement provided the lender the right to treat the principal debtor and guarantor distinctly. There was nothing absurd about being entitled to sue the guarantor but not the principal debtor in these circumstances. The two-year limitation period for the defendant's obligations under the guarantee started to run January 2, 2018. It was not suspended, and thus, expired before the action was commenced on June 2, 2021.

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***J.L. v T.T.*, 2023 SKKB 35**

Schatz, 2023-02-08 (KB23040)

Family Law - Child Support - Retroactive
Family Law - Custody and Access - Best Interests of Child
Family Law - Custody and Access - Mobility Rights - Primary Residence
Family Law - Custody and Access - Parental Alienation

The petitioner father sought primary parenting of the parties' child, who was three years old at the time of this decision. A 2019 interim order required joint custody and equal parenting time on a five-day rotation. The petitioner refused to have any contact with the child for two months following the interim order, and then resumed shared parenting. The petitioner then moved from Saskatoon to Regina and said he would assume all responsibility for transport of the child, as the respondent did not have a vehicle and lived in

Saskatoon. The parties' relationship further deteriorated, and the petitioner failed to return the child to the respondent in Saskatoon. Six interim court orders required that the petitioner return the child to the respondent. The petitioner repeatedly refused to return the child from Regina to Saskatoon, contrary to earlier assurances and interim court orders. The petitioner raised several concerns about the respondent's ability to parent but did not support these concerns with evidence. The petitioner's mother was very involved in the care of the child from the child's birth, and the respondent felt the petitioner's mother was hostile towards her and interfered with her relationship with the child. The petitioner and paternal grandmother had very different parenting styles to the respondent. Neither approach was contrary to the best interests of the child. The respondent was unemployed, had a total of three children with whom she had a good relationship, had depression and anxiety for which she received adequate treatment, and was a member of a First Nation community. The petitioner had earned between $159,000 and $83,000 in the previous four years and failed to provide verification of income for one of those years. Since the child's birth, the petitioner had paid no child support. The court considered: 1) what parenting arrangements were in the best interests of the child; and 2) what child support was appropriate?

HELD: The court ordered that the child reside primarily with the respondent, with specified parenting time for the petitioner. The petitioner was ordered to pay retroactive and ongoing child support. At the end of her decision, the court also summarized several procedural issues and decisions regarding adjournments, late filing of additional materials, applications for new evidence, numerous conference call requests after the end of trial, and an application to re-open the trial. These applications were described as the petitioner's attempt to delay the parenting decision. The respondent was awarded costs of all applications in which costs had not already been addressed, and additional costs because of the petitioner's delay tactics. 1) The court ordered the parties to share decision-making responsibility, with the respondent deciding if the parties could not agree. The respondent was granted primary parenting and residence in Saskatoon. The petitioner was granted parenting time two of every three weekends from Friday evening to Sunday evening in Saskatoon, unless the respondent agreed otherwise, and the petitioner was solely responsible for all costs of travel. The order specified a holiday parenting time schedule. Sections 12 to 17 of *The Children's Law Act, 2020* (Act) govern the relocation of a child. Decisions concerning parenting and relocation must consider the best interests of the child. The party who intends to relocate a child – the petitioner, in this case -- has the burden of proving relocation is in the best interest of the child. Section 10 of the Act mandates considerations to determine the child's best interests. Both petitioner and respondent demonstrated ability to meet the child's needs, although the conflict between the parties had disrupted the child's short life and stability had been lacking. Stability and lack of conflict were paramount considerations for the court. The petitioner's conduct denied the child a relationship with the respondent. The child had strong bonds with the petitioner and his mother, and those bonds came at the cost of the child's relationship with the respondent. The child also had positive relationships with siblings that needed to be supported. The petitioner was absolutely unwilling to support the child's relationship with the respondent. Contrary to the intentions of interim orders, the petitioner had had primary care of the child during the last three years, due to the petitioner's manipulation, control and refusal to follow court orders. The best interests of this child were served by a relationship with both parents. The three-year-old child was too young to have a preference for appropriate parenting arrangements. The child was of mixed First Nation and Anglo-Canadian heritage. The respondent had a strong ability to foster and support the child's cultural heritage and background. The petitioner had no plan for childcare other than having his mother care for the child while the petitioner was at work. The respondent had a plan including having identified a pre-school, arranged school bus transportation, and assistance for attending appointments and activities. Both parties were able to care for the child, although in different manners. The parties had conflict in communication about

childcare and health care decisions. There were no allegations of family violence. In terms of relocation, the petitioner said he relocated for work, although he was employed before the move, and it appeared his income decreased after the move and the same type of work – automotive sales – was available in Saskatoon. The relocation to Regina allowed the petitioner's parents to be more involved in the child's life, to the detriment of the child's relationship with the child's mother. The move was not in the child's best interest. It caused multiple court applications, increased tensions between the parties, and jeopardized the child's relationship with her mother. The child received good care in her grandparents' home, but that care negatively impacted her relationship with her mother. The child's grandmother provided most of the care because the petitioner needed to work. It was not realistic to require the respondent mother to pick the child up from Regina, as she did not have a vehicle and had limited resources and received no child support from the petitioner. Further, the petitioner had not complied with six court orders. 2) The court rejected the argument that the petitioner was underemployed. His income dropped in 2020 because of illness and childcare. Based on the petitioner's income tax information, the petitioner was ordered to pay retroactive child support of $36,942 and continue to pay $713 per month in 2023 based on his 2021 income rate, to be adjusted in July based on his 2022 reported income. A schedule for payment of retroactive arrears was ordered. The parties must make yearly income disclosure exchange by May 31, with adjustments before July 1. The petitioner received social assistance, and therefore her income for child support purposes was zero. There was no s. 9 set-off. The petitioner was responsible for all s. 7 expenses.

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***International Brotherhood of Electrical Workers, Local 2038 v Stuart Olson Industrial Constructors Inc.*, 2023 SKKB 39**

McCreary (*ex officio*), 2023-02-17 (KB23033)

Administrative Law - Judicial Review - Bias - Apprehension of Bias - Labour Relations Board
Administrative Law - Judicial Review - Standards of Review - Labour Relations Board
Statutes - Interpretation - *Saskatchewan Employment Act*, Section 6-79

The applicant union applied for judicial review of the labour board's dismissal of the union's preliminary application to disqualify a member of the hearing panel and sought to invalidate the decision made by that panel on an application deciding two employers were not "related employers" as defined in s. 6-79 of *The Saskatchewan Employment Act* because the board member was not disqualified and because the decision was unreasonable. The court considered: 1) was the labour board correct that there was no reasonable apprehension of bias; and 2) was the labour board reasonable in its finding that the employers were not "related employers" as defined by the Act?
HELD: The application was dismissed. 1) The board correctly determined there was no reasonable apprehension of bias requiring that the board member recuse himself. The union was a member of a council of unions. The board member was associated with another union and had filed sworn pleadings opposing an application made by the council of unions. Also, other locals of the union with which the board member was associated represented employees of Alberta employers with names similar to those of the

companies involved in the application. There was no reasonable apprehension of bias because the sworn pleadings completed by the board member involved the council and not the union or any of the employers involved in this application. Trade union locals are separate legal entities. There was no evidence the board member or his union could benefit from the outcome of the case. Side nominees are appointed to the labour board to provide practical experience gained by their affiliation or prior history with parties in the labour relations sphere, and are not required to be strictly neutral, unlike the board chair or vice-chair. 2) The board's decision that the entities were not related employers was reasonable. For a successful related employer application, the applicant must prove: there is more than one corporation, association, partnership, or individual and at least one of those entities must be a certified employer; the entities are sufficiently related to a unionized employer through involvement in an associated or related business, undertaking or activity; the entities are operated under common control and direction; and the designation serves a valid labour relations purpose. The designation must protect and not expand existing bargaining rights. The board decided there was insufficient common control or direction and there was no labour relations purpose in the designation. The board followed existing board jurisprudence. While there were common directors, owners, centralized administrative functions and common branding, this was not enough to conclude the entities were operating in common. Some entities were not involved in the active project, or did not perform electrical work, and there was no transfer of employees between the entities on this project. There was also no link between the unionized contractor and the other entities. The board considered the labour relations purpose issue by reviewing the board's past decisions and highlighted that the union's past organizing had been weak, and the non-union entities had long operated. There was no evidence work was diverted from the unionized contractor. The board's analysis was reasonable.

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***R v Holynski*, 2023 SKKB 40**

Labach, 2023-02-17 (KB23042)

Administrative Law - Judicial Review - *Certiorari* - *Mandamus*
Criminal Law - Jurisdiction
Criminal Procedure - Prerogative Writ
Statutes - Interpretation - *Criminal Code*, Section 561, Section 774

The Crown filed an originating application for *certiorari* and *mandamus* to quash a decision of a provincial court judge allowing the accused to re-elect from trial by provincial court to judge-alone without Crown consent and to return the matter to provincial court for trial. The accused opposed the application. The accused was charged with several serious offences and elected trial by provincial court after many adjournments. A trial date was set. The accused changed counsel. The scheduled dates were adjourned. New counsel agreed to a new date for pre-trial motions and a date three months later to start the trial. On the date set for pre-trial motions, the accused indicated he wanted to re-elect a different mode of trial. The Crown argued that pursuant to s. 561 of the *Criminal Code*, re-election required Crown consent, which the Crown refused. The provincial court judge who heard the issue decided the trial had not started and it would be unfair to deny the accused the trial venue of choice and permitted re-election without Crown consent. The court considered: 1) did the Court of King's Bench have jurisdiction to hear the Crown's application; and

2) did the accused require Crown consent to re-elect his mode of trial?
HELD: 1) The provincial court decision was interlocutory and did not grant prerogative relief. No provision in the *Criminal Code* authorized appeal of the decision to grant or refuse re-election made pre-trial. There was no statutory right of appeal. The only way the Crown could take issue with the decision was to apply to the superior court for prerogative relief as set out in Part XXVI of the *Criminal Code*. *Certiorari* is a remedy where a decision is quashed if the court or tribunal has acted without jurisdiction. *Mandamus* is a remedy to compel a court or tribunal to take an obligatory action it has incorrectly failed to take. Both remedies are discretionary. Section 774 of the *Criminal Code* allows these remedies to be requested in criminal matters, and *The Queen's Bench Rules* applied to the application. The Crown properly brought the application to the Court of King's Bench, and the Court had jurisdiction to decide the application. 2) The accused initially elected trial by provincial court, and his right to re-elect was governed by s. 561(2) of the *Criminal Code*, which stated re-election may be made not later than 60 days before the day first appointed for the trial, and after that, re-election may occur with written consent of the prosecutor. The interpretation of "day first appointed for the trial" must use a textual, contextual, and purposive analysis. The analysis must consider the fluidity of the criminal trial process, and the reality that criminal trials do not always proceed as expected. Section 561 balances trial efficiency, avoiding judge-shopping and impact of re-election on witnesses and complainants, and the accused's right to choose the mode of trial. The day first appointed for the trial does not mean any day that the accused's trial is set to, but instead, the day the accused's trial is expected to begin. The accused's new counsel was unavailable and neither party attended court on the date the accused's first counsel had set for trial. That was not the day first appointed for the trial. The Crown was present and expected to proceed with a voluntariness *voir dire* on the date set for pre-trial applications. This was the day when the accused's trial was expected to begin and was the day first appointed for the trial. As a result, the accused could not re-elect on that date without the Crown's consent. The provincial court judge was incorrect to interpret the first day appointed for the trial as meaning the first day that evidence was called. A *voir dire* regarding the admissibility of evidence is part of the trial, even when heard in advance. In response to an argument from the accused, the court confirmed the provincial court judge cannot review a Crown's refusal of consent to re-elect, unless it was demonstrated on the record the Crown's decision was an abuse of the court's process. The Crown's concern for delay was not an arbitrary, capricious or improper motive, and there was nothing improper in the Crown's refusal to consent to the re-election. The provincial court had no jurisdiction to grant the request to re-elect the mode of trial. The *mandamus* order was unnecessary, and the matter was returned to provincial court for trial in the normal way.

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***GHC Swift Current Realty Inc. v BACZ Engineering (2004) Ltd.*, 2023 SKKB 44**

Keene, 2023-02-23 (KB23035)

Civil Procedure - Civil Trial - Limitation Period - Discoverability
Civil Procedure - Summary Judgment
Practice - Application for Summary Judgment - Disposition Without Trial

The defendants applied for summary judgment to strike the plaintiff's claim for being statute-barred by *The Limitations Act*. This case

had earlier been heard and struck as an abuse of process contrary to rule 7-9(2)(e) of *The Queen's Bench Rules*. That earlier decision was overturned on appeal and remitted for determination on whether the claim ought to be dismissed summarily pursuant to rule 7-2. The plaintiff started its claim against the defendants on January 12, 2018, in relation to a construction project that started in 2012 and was completed in 2014. In 2015, the plaintiff was advised of mechanical deficiencies in the construction. In November 2015, the plaintiff wrote the defendants advising that if the deficiencies were not remedied, the plaintiff would sue. The court considered: was summary judgment appropriate?
HELD: The applications for summary dismissal were dismissed, with costs to the plaintiff. The key issue was the application of s. 6(1)(d) of *The Limitations Act* and when the plaintiff knew a proceeding would be an appropriate means to seek a remedy, having regard to the nature of the loss. Ongoing communication is not enough to postpone the start of the limitation period, but efforts to remedy a problem and make litigation unnecessary may be enough. Both parties must put their best foot forward in a summary judgment application. The court was concerned it did not have the full picture. The limitation period may have been tolled or delayed by the conduct of the parties after November 2015. Witnesses in addition to the deponents of the affidavits before the court would likely be required at trial. A trial will permit pre-trial processes including exchange of documents, questioning, pre-trial conference and full testimony at trial. Summary judgment was not appropriate because there was a genuine issue for trial.

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***Amu-Darko v Joint Medical Professional Review Committee*, 2023 SKKB 48**

McMurtry, 2023-02-24 (KB23038)

Administrative Law - Judicial Review - Standard of Review - Reasonableness
Administrative Law - Statutory Appeal - Standard of Review
Occupations and Professions - Physicians - Billings - Documentation
Statutes - Interpretation - *Saskatchewan Medical Care Insurance Act*, Section 49.2(1)

The applicant physician appealed an order of the Joint Medical Professional Review Committee under s. 49.2(1) of *The Saskatchewan Medical Care Insurance Act* (Act). The committee had reduced the physician's billings for a 16-month period by approximately 40 percent and ordered the physician to reimburse the province. The physician argued the committee did not explain its extrapolations adequately, read in improper limitations, and did not consider the physician's explanations. The court considered: 1) what standard of review applied to the statutory appeal; 2) did the committee improperly impose reassessment because of the frequency of services provided; 3) did the committee improperly impose reassessments for inadequate documentation; and 4) did the committee improperly impose an additional amount of $15,000?
HELD: The appeal was dismissed, with costs to the respondent. 1) Where legislation creates an appeal from an administrative decision to a court, the court ought to scrutinize the decisions on an appellate basis. The questions in the appeal were of mixed fact and law and required a review on the standard of palpable and overriding error. 2) For a physician to be paid for a service, the treatment must have been medically required by the patient, the physician must have had the qualifications to deliver the treatment,

the treatment was delivered or supervised by the physician, the appropriate code was identified, and the assessment criteria in the schedule were satisfied. The physician practiced in a rural community and said he tried to do ongoing and preventative care. He claimed for significantly more “complete assessments” than average, although his overall billings were within range of the average. The physician said he provided more complete assessments than average because of local demand and a lot of new patients, and that his thorough approach resulted in needing to see the patient fewer times. A complete assessment requires taking family and patient history. The comments of the physician at the hearing demonstrated he did not understand the required components for a complete assessment. The committee decided “medically required” is a standard level of care and practice, and not whatever the physician thought was appropriate. The committee’s conclusions for reducing the billings for complete assessments to partial assessments were based on mixed fact and law, and those conclusions were available to the committee on the evidence. The committee did not limit complete assessments to once annually and did not add a requirement to the payment schedule. 3) The committee decided the physician did not document that he had performed all constituent elements of certain billed services. The committee reviewed patient records, and questioned the physician to determine if the service was medically necessary. The record did not correspond to the service billed and the physician could not demonstrate medical necessity when interviewed. The committee did not apply its own view of the medical necessity of a service, but instead, reviewed the documents for whether any medical necessity was recorded. The committee’s decision was reasonable in the circumstances. 4) The committee explained why it imposed an additional $15,000 under s. 49.2(7) of the Act, as a portion of the expenses and costs expended by the committee in the review of the physician’s records, in order to encourage compliance with the Act and payment schedule in the public good. This was not an error in principle, misapprehension of material evidence, failure to act judicially or a wrong decision resulting in injustice.

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***C.S. v K.F.*, 2023 SKKB 45**

Richmond, 2023-02-27 (KB23045)

Family Law - Child Support
Family Law - Child Support - Cost of Access - Undue Hardship

The petitioner and respondent were parents of two children aged 9 and 11. The parties separated about six years before the decision and had been sharing parenting in alternate weeks. The court granted the parties’ divorce in 2017. Three years later, the petitioner brought an application to vary to permit her to relocate with the children from Moose Jaw to Ontario because of her new spouse’s employment. The court refused to permit the petitioner to relocate the children on an interim basis. Before trial, the parties agreed that the children would reside primarily with the respondent in Moose Jaw, with joint decision-making. The petitioner had parenting time in Ontario, with flights paid for by the petitioner, on a schedule during school holidays, and weekly phone or video communication. The petitioner’s income was $55,543 and the respondent’s income was $51,111. The petitioner asked the cost of exercising her parenting time be considered to reduce or eliminate child support payments. The court considered what child support payment was appropriate.
HELD: The petitioner was ordered to pay the *Guidelines* amount. Section 10 of the *Federal Child Support Guidelines* defines what

establishes an undue hardship justifying awarding an amount of child support different from the normal *Guidelines* amount. The payor must establish that paying the normal support amount would result in a situation described in s. 10 and then the court considers whether the payor's household standard of living is lower than the recipient's household standard of living. In this case, the respondent agreed the petitioner suffered undue hardship within the meaning of s. 10 because of the expenses required to exercise parenting time with the children. Neither party filed a financial statement and there were gaps in the evidence. The respondent's income had decreased from approximately $100,000 while working in construction to $51,111. The change was directly connected to the need for regular hours and more flexibility in order to be the primary caregiver for the children. The petitioner argued the respondent could earn more if he returned to a construction job. The respondent provided no evidence that he was searching for a better-paying job. The respondent chose to change his career dramatically. The court imputed to the respondent income for the purposes of a household standard of living calculation at $100,000. The court also included in the respondent's household income his spouse's income of $36,411 and child support received by his current spouse for her two children of $14,400 per year. The petitioner's income of $55,543 and her spouse's income of $95,504 were used to review the petitioner's household income. The petitioner had childcare expenses for a new child in her household. The unusually high access expenses were approximately $12,000 per year. When compared, the petitioner's household had a higher standard of living than the respondent's household. The petitioner did not present evidence of her household expenses, which she claimed exceeded her income – although even if this were established, it is not an independent criterion for consideration of undue hardship. Therefore, no deviation from the *Guidelines* amount was justified. The petitioner was ordered to pay the *Guidelines* amount and s. 7 expenses in proportion to the parties' relative incomes.

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***M.G. v Ministry of Social Services (Saskatchewan)*, 2023 SKKB 59**

Bardai, 2023-03-10 (KB23051)

Family Law - Child Custody - Person of Sufficient Interest
Statutes - Interpretation - *Funeral and Cremation Services Act*, Section 91

The applicant grandmother applied for an order that her 15-year-old deceased grandchild have a funeral service and be buried at the grandmother's First Nation community. The child died when a snow fort he was building collapsed. Thirteen years before, the child had been placed in the indefinite custody of a person of sufficient interest (PSI) under *The Family Services Act*. The PSI was not a member of the First Nation. The PSI had raised the child from a young age. The child's biological parents were dead. The child's connection with extended family members on the First Nation had been maintained. The court considered whether the PSI or the biological grandparent had the authority to decide on the funeral arrangements and burial of the deceased child.
HELD: The PSI, as the deceased child's parent, had priority to control the disposition of the child's body. The child's biological grandparents were not consulted by the Ministry when the child was placed in indefinite custody many years before, and that appeared to have been a mistake. The court expressed disappointment that the Ministry of Social Services neither appeared nor provided its perspective. Section 91 of *The Funeral and Cremation Services Act* sets the priority of the decision-maker authorized to

control the disposition of human remains. A parent or legal custodian of the deceased has priority to control the deceased body before a grandparent. The terms “parent” and “legal custodian” are not defined in the Act. The PSI was granted indefinite custody of the child and had provided day-to-day care of the child for 13 years. The relationship between the PSI and the child is not merely contractual. The PSI had become a parent. *An Act respecting First Nations, Inuit and Métis children, youth and families,* SC 2019, c 24 highlights the importance of considering and safeguarding the cultural identity and cultural continuity of First Nations children in the context of child and family services matters, but the legislation does not specifically address the circumstances of this case. The PSI indicated at the end of the hearing she was willing to have the child buried next to the child’s biological father on the reserve. The PSI was not held to that commitment, and it was not ordered, but the judge encouraged and supported arrangements that would allow all those who loved the child to participate and have a meaningful role in his funeral service.

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