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.

Vol. 25, No. 13 **July 1, 2023**

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***Koh v Atrium Mortgage Corporation*, 2023 SKCA 45**

Leurer Tholl McCreary, 2023-04-13 (CA23045)

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Contract - Breach - Non-Payment - Summary Judgment
Contracts - Implied Terms - Good Faith
Corporate Commercial - Appeal

The appellants appealed a summary judgment against them. The appellants were guarantors of a debt that a construction corporation owed to a mortgage corporation in connection with an apartment project. The loan matured and the construction corporation could not pay. The mortgage corporation demanded payment from the guarantors, and when they did not pay, the mortgage corporation obtained court appointment of a receiver-manager and completed the construction project. The completed project was sold to the mortgage corporation through a court-approved receivership process. The sale was for less than the cost the respondent mortgage corporation incurred to complete the project. The mortgage corporation claimed over

Constitutional Law - *Charter of Rights*, Section 10(b), Section 24(2)

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Contract - Breach - Damages - Implied Term - Good Faith

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seven million dollars from the guarantors. The mortgage corporation applied for and obtained summary judgement. The chambers judge rejected the guarantors' arguments that the receiver had mismanaged the receivership process; the respondent had obtained a windfall; the terms of the guarantees were unconscionable; the respondent had breached its duty of honesty and good faith; the terms of the guarantee excluded liability; and the respondent failed to mitigate its damages. The chambers judge found there was no triable issue, and granted judgment to the mortgage corporation. The appellants appealed. The Court of Appeal considered whether the chambers judge erred in finding a trial was not required: 1) to determine the amount owing to the mortgage corporation by the construction corporation; and 2) to adjudicate the appellants' defence that the mortgage corporation breached its duty of honest and good faith contract performance.

HELD: The appeal was dismissed with one set of costs to the respondent mortgage corporation. 1) The chambers judge correctly held the value of the assets was determined by the receivership decisions, and the doctrine of abuse of process precluded relitigating the value of the assets to determine the amount of the debt. The appellants argued that the respondent had not demonstrated it suffered a loss on its loan because the current fair market value of the apartment complex now exceeded the value of the advances the mortgage corporation made. The appellants argued the receivership process did not determine the value of the assets as security for the debt. The Court of Appeal ruled the receivership decisions conclusively determined the value of the assets as security for the debt. Litigating the value of the assets would be a collateral attack. The respondent purchased the assets from the receiver. If the respondent realized a profit from its decision to acquire the assets, it was not at the expense of the guarantors, but because of the mortgage corporation's investment decision. 2) The chambers judge correctly decided there was no issue associated with the duty of good faith and honest contractual performance that required a trial to resolve. The mortgage corporation was required to perform its contractual duties and exercise its contractual rights honestly and in good faith. It was the receiver, not the mortgage corporation, who gathered up and sold the construction company's assets. Therefore, the mortgage corporation's duty to act in good faith was not at play in the receiver's decision to sell the assets. The appellants' attack on the asset price was a challenge to the receivership process. An official from the mortgage corporation did assert to the receiver that the mortgage corporation could complete the construction project for approximately one-quarter the amount that was eventually needed to complete the project. There was, however, no evidence that this representation affected the appointment of the receiver or actions of the receiver. Furthermore, the proper forum for the appellants to have challenged the court approvals in the receivership would be an appeal from those receivership orders.

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Statutes - Interpretation - *Controlled Drugs and Substances Act*, Section 5(2)

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***R v Taylor*, 2023 SKCA 49**

Schwann Leurer Tholl, 2023-04-26 (CA23049)

Constitutional Law - *Charter of Rights*, Section 11(c)
Criminal Law - Appeal - Conviction
Criminal Law - Appeal - Fresh Evidence
Criminal Law - Evidence - Witness
Statutes - Interpretation - *Controlled Drugs and Substances Act*, Section 5(2)

The self-represented appellant appealed a conviction of possession of seven ounces of methamphetamine for the purposes of trafficking contrary to s. 5(2) of the *Controlled Drugs and Substances Act*. The appellant also applied to adduce fresh evidence on appeal. Police had received information from a confidential informant that the appellant was trafficking cocaine and methamphetamine. They approached the appellant's vehicle, and the appellant fled the scene. Police obtained a warrant for his arrest for fleeing the scene. The confidential informant then told police the appellant was trafficking drugs from another vehicle. Police located the vehicle and arrested the appellant inside a gas bar. Police then approached the vehicle. When the driver, B.S., refused to open the door, the police smashed the vehicle window, arrested B.S., and searched the vehicle. Police located drugs packaged in one-ounce bags, a scale and two cellphones. At trial, the appellant had alleged a breach of his ss. 7, 8 and 9 *Charter* rights. The Court of Appeal considered: 1) should fresh evidence be adduced on appeal; 2) was the verdict unsupported by evidence because B.S. was improperly forced to testify, Crown counsel made misleading submissions, or the trial judge misapprehended evidence about the location of the drugs in the vehicle; 3) was circumstantial evidence sufficient to support a conviction; and 4) did the trial judge err by not finding a police witness biased?
HELD: The conviction appeal and application to adduce fresh evidence were both dismissed. 1) The appellant applied to adduce fresh evidence on appeal in the form of his own affidavit and an affidavit from B.S. Neither affidavit was properly sworn. The affidavits stated the Crown had forced B.S. to testify. Fresh evidence on a conviction appeal should not be admitted if it could have been adduced at trial. Fresh evidence must be relevant, credible, and be expected to have affected the result. The appellant's affidavit evidence was argument and speculation and was not admitted for that reason. B.S.'s affidavit could have been adduced at trial, and did not retract her evidence at trial, and thus it was not evidence that could affect the result. 2) The verdict was supported by the evidence. The appellant argued his *Charter* rights were breached by the Crown forcing B.S. to testify against him. Compelling another person to testify does not breach an accused's s. 11(c) right against self-incrimination. The appellant did not point to anything Crown counsel said at trial that was improperly accepted by the trial judge. Even if

Statutes - Interpretation - *Public Utilities Easements Act*

Statutes - Interpretation - *The Pre-judgment Interest Act*, Section 5(3), Section 6(2)

Wills - Estates - Probate - Genuine Issue to be Tried - Solemn Form

Wills and Estates - Capacity - Undue Influence

Wills and Estates - Proof of Will in Solemn Form

Wills and Estates - Testamentary Capacity - Undue Influence

Cases by Name

Affinity Credit Union 2013 v The Lighthouse Supported Living Inc.

Beauchamp v Beauchamp

Bell v Bell Estate

Degagne v Bird

Friesen v Friesen

Giesbrecht v Saskatchewan Government Insurance

Koh v Atrium Mortgage Corporation

Korol v Richardson International Limited

Mercereau v King

R v Bird

Crown counsel did err, the question on appeal is whether the trial judge adopted those errors and, if so, whether the errors had an impact on the verdict. The appellant argued the trial judge misunderstood the evidence about B.S.'s drug use on the day of the offence. Although B.S. did not specifically testify that the drugs she used on the day of the offence were from the appellant, the inference was open to the trial judge based on the evidence she had received drugs from him in the past and she had used drugs on that date. Further, even if this was a misapprehension of the evidence, it was not material to the trial judge's conclusion. 3) There was no basis for appellate interference in the inferences drawn by the trial judge based on circumstantial evidence. In cases of circumstantial evidence, inferences may be drawn in light of all the evidence. If there are reasonable inferences other than guilt, the standard of proof beyond a reasonable doubt is not met. The trier of fact must consider other plausible theories, but not every possible conjecture. Appellate review is not a re-trial. The evidence was reasonably capable of supporting the verdict. The appellant argued that the evidence could have led to an inference B.S. was trafficking the drugs. The trial judge dismissed the alternative inferences identified at trial as speculation. B.S.'s evidence that the appellant had sold her drugs in the past, she saw him bring something into the vehicle which she suspected was drugs, and he was sitting close to drugs, a scale and bags typically used for selling drugs all supported the trial judge rejecting the inference the drugs belonged to B.S. instead of the appellant. 4) The appellant argued the police officer was biased because the officer had testified against him in two previous trials. The argument was not supported by any evidence. Concerns about the independence and impartiality of a proposed witness generally must be raised at the threshold admissibility stage. The existence of an interest or relationship does not automatically render evidence of a proposed expert inadmissible. There was no objection to the admissibility of the police officer's testimony at trial. Nothing on the record supported the suggestion the testimony was partisan, partial or lacking independence, and the mere fact he was a police officer who had provided expert testimony in previous trials did not disqualify him. The Court of Appeal also considered briefly a number of other arguments raised in the appellant's written materials, including whether acquittal on other charges led to inconsistent verdicts, whether weapons were linked with drugs by the trial judge, whether the warrantless search of the vehicle at the time of his arrest violated his *Charter* rights, and whether the trial judge imposed a reverse onus on him. None of these arguments had merit.

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Bell v Bell Estate, **2023 SKCA 53**

Leurer Tholl Drennan, 2023-05-09 (CA23053)

Civil Procedure - *Queen's Bench Rules*, Rule 16-46

R v C.L.

R v Courtoreille

R v Taylor

R v Whitby

Star Processing Ltd. v Canadian National Railway Company

Thomson v Xiao-Phillips

Wilk v Martin-Wilk

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Wills and Estates - Capacity - Undue Influence
Wills and Estates - Proof of Will in Solemn Form
Wills and Estates - Testamentary Capacity - Undue Influence
Wills - Estates - Probate - Genuine Issue to be Tried - Solemn Form

The appellant appealed a chambers judge's decision dismissing his application to have his mother's will proven in solemn form pursuant to Rule 16-46 of *The Queen's Bench Rules*. The appellant argued his mother lacked testamentary capacity and was unduly influenced at the time she executed a will excluding the appellant and his immediate family from the modest estate. The testatrix was 87 years old when she executed the will. The lawyer who assisted her believed she had capacity. The appellant and his immediate family had several personal and legal conflicts with the appellant's late mother and the appellant's siblings. The appellant's siblings opposed the chambers application. The chambers judge ruled the challenges to the will regarding the testatrix's age, possible confusion regarding a loan, possible trouble locating a business, and discussions with the appellant's siblings did not give rise to a genuine issue requiring trial, and there was no need to weigh conflicting evidence or make findings of credibility. The Court of Appeal considered whether the chambers judge erred: 1) by improperly weighing controverted evidence and making credibility findings; and 2) by misapprehending or disregarding evidence.

HELD: The appeal was dismissed. 1) The chambers judge correctly identified an application to challenge a will involves two levels of hearings. The first hearing determines if there is sufficient merit in the challenge to the will to warrant a trial. If needed, the second hearing is a trial of the issues. Where there is an allegation of undue influence, at the first stage an applicant must show some evidence that the testator's free will was overpowered by undue influence. The chambers judge accurately summarized the evidence and arguments and stated he approached the evidence for the limited purpose of determining whether there was a genuine issue for trial, without weighing conflicting evidence. The chambers judge did not determine contested points including whether the appellant's daughter had repaid a loan to the testatrix and whether the appellant had misappropriated assets and funds from a family business. Even if the testatrix had forgotten whether her granddaughter had repaid a loan, forgetting details of the past or being mistaken does not mean the testatrix was incompetent or incapable of executing a valid will. Even if the testatrix had gone in the wrong direction after leaving a shop, this momentary confusion did not negate testamentary capacity. Even if the testatrix was wrong in her perceptions of a conflict between her sons, that was not evidence of undue influence. The evidence from the testatrix's other children and the lawyer who prepared the will that she was sharp and did not lack capacity was uncontroverted. The chambers judge followed the correct process and did not commit a reviewable error. 2) The chambers judge did not misapprehend or disregard material evidence of suspicious circumstances that negated capacity or supported undue influence. The appellant pointed to evidence that the testatrix had executed a different will four months before; the appellant's siblings discussed allegations that the appellant had misused business funds with the testatrix before she executed the will; the lawyer was aware of a family conflict but asked no questions about it to assess undue influence; and one person had earlier expressed concerns about the testatrix's mental state. The chambers judge acknowledged there were evidentiary disputes and differences but the evidence underpinning the genuine issues was not controverted. The appellant did not satisfy the onus of pointing to some evidence that, if accepted at trial, would tend to prove his claims.

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***R v C.L.*, 2023 SKCA 58**

Tholl Kalmakoff Drennan, 2023-05-17 (CA23058)

Criminal Law - Defences - *Charter of Rights* - Right to Counsel - Appeal
Constitutional Law - *Charter of Rights*, Section 10(b), Section 24(2)

The accused was convicted after trial of committing sexual interference against his young niece and sentenced to 4.5 years' imprisonment. He had been diagnosed with personality disorders and schizophrenia. He was unable to live independently and moved in with his sister and her three young children. He erroneously believed that a neighbour had sexually assaulted his niece. He became obsessed with investigating this belief, eventually reporting it to police. The niece and the accused went to the detachment to provide statements. When the niece was interviewed, she said that the accused had touched her inappropriately the previous day. The accused was then moved to a locked interview room and detained but was not given any information about his *Charter* rights until an hour and a half later. He indicated he did not understand what the police told him, and his response declining a lawyer indicated he did not know a lawyer would be provided free of charge. He was not interviewed after hearing his *Charter* rights. Instead, he spent the night at the detachment until an officer came to take a warned statement from him the next morning. The officer first read the secondary police caution, explained the offences for which he had been arrested, attempted to clarify the accused's mental disorders and confirmed that the accused had not requested to speak to counsel the night before. During the interview, the accused admitted to inappropriately touching his niece. There was evidence that the police were aware of the accused's mental disorders, and that he was unmedicated and symptomatic at the time of his arrest. At trial, the Crown successfully entered the statement into evidence. The accused argued that he was in a state of psychosis during the statement and that it was unreliable due to his mental disorders. He also argued that the police proceeded even when it was apparent that he did not understand his right to counsel. He appealed both the conviction and the sentence, but the Court of Appeal (court) concluded that the conviction appeal was dispositive of the issue. The court analyzed the issue of whether the trial judge erred in concluding that C.L.'s right to counsel, as guaranteed by s. 10(b) of the *Charter*, was not violated. The court found that there had been a *Charter* breach, and then conducted the s. 24(2) exclusion of evidence analysis under the *Charter*.
HELD: The court found that the trial judge erred by finding that there had been no violation of the accused's right to counsel. There was a s. 10(b) *Charter* breach. It was an error to admit the accused's statement as evidence. The accused's conviction was set aside, and the court ordered a new trial. The court set out the right to counsel under s. 10(b) of the *Charter*, and the positive duties on the police when a person is detained or arrested. Here, the police breached the informational duty, so there was an automatic breach of s. 10(b). The evidence was clear that the accused did not understand his right to counsel, and the officer did not take any steps to clarify or correct the misunderstanding. The breach was not corrected by the officer simply asking the accused to confirm the next morning that he had decided not to speak to a lawyer. The jurisprudence is clear that if a detained person indicates that they are uncertain about the content of the right to counsel, the police must provide the detainee with further and better information to facilitate the detainee's understanding. The court determined that there was sufficient evidence on the record to conduct a s. 24(2) analysis. Evidence obtained in connection with a *Charter* breach will only be excluded when the accused proves that the

admission of the evidence would bring the administration of justice into disrepute. Here, the court found that the *Charter* breach was unintentional, but serious. After being asked whether he understood the right to counsel, the accused clearly stated “I don’t know”. The breach was careless and demonstrated a lack of regard for *Charter* standards given the accused’s clear statement and the police’s awareness of his mental state. There was a strong impact of the breach on the accused’s *Charter*-protected rights because he made highly incriminating admissions that strengthened the Crown’s case. The court concluded that the accused’s statement should be excluded from evidence, given the seriousness of the breach. Accordingly, the conviction could not stand, and the court ordered a new trial.

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***Friesen v Friesen*, 2023 SKCA 60**

Richards Tholl Kalmakoff, 2023-05-19 (CA23060)

Civil Procedure - Appeal - Fresh Evidence - Intervenor
Family Law - Appeal
Family Law - Best Interests of Child - Family Violence
Family Law - Child Custody and Access - Variation - Change in Circumstance
Family Law - Custody and Access - Mobility Rights
Family Law - Evidence - Judicial Notice

The appellant mother appealed from a trial decision refusing her permission to relocate with a child to Alberta and ordering a shared parenting regime with the respondent father. The appellant argued the trial judge erred in assessing the child’s best interests regarding the effect of family violence, failing to analyze relocation in accordance with recent amendments to the *Divorce Act*, determining a material change had occurred and ignoring an interspousal agreement. The respondent was charged with one count of assault arising from four incidents with the appellant and the child around the time the interspousal agreement was reached. The trial judge declined to authorize relocation of the child from Saskatoon, decided that the father was able to care for the child in spite of the family violence concerns, and expanded the parenting plan to a week-on, week-off arrangement with shared decision-making. The Court of Appeal considered: 1) should fresh evidence be admitted; 2) did the trial judge err in finding a material change of circumstances; 3) did the trial judge err in finding the interspousal agreement did not govern the parenting plan; 4) did the trial judge err in his assessment of the child’s best interests regarding the effect of family violence; and 5 did the trial judge err in the approach to relocation?
HELD: The application to admit fresh evidence and the appeal were both dismissed. Issues of statutory interpretation were reviewed on a standard of correctness. Issues of the determination of parenting arrangements were reviewed on a narrow and deferential standard applicable to the review of the exercise of a trial judge’s discretion. 1) The respondent applied to admit two affidavits as fresh evidence. The appellant opposed the application but if admitted, also filed two affidavits in response, and the respondent filed a further two reply affidavits. The respondent’s affidavits described the child as having adjusted well to the new parenting arrangement. The appellant’s affidavits described the child as increasingly anxious and needing psychological help as a result of the

new parenting arrangement. Fresh evidence will only be admitted on appeal if it could not have been adduced at trial, if it bears on a potentially decisive issue, is credible and could be expected to affect the result. Although the evidence was about events occurring after the trial decision and thus was not available at trial, the evidence was of the same nature as evidence called at trial and could not have affected the result. The applications to admit fresh evidence were dismissed with costs to the appellant. The Court took judicial notice of several propositions regarding the effect of family violence on children and parents from social science research articles submitted by the intervenors. Social context evidence was distinguished from adjudicative fact evidence. 2) The appellant's argument that there was no material change in circumstances was rejected because the appellant's own application for relocation was premised on the existence of a material change and both parties at trial assumed a material change had occurred. The trial judge supported the finding of a material change with the proposed move and four other factors. 3) The trial judge put no weight on the interspousal agreement regarding parenting arrangements. The appellant argued the trial judge failed to apply the proper criteria. Although the trial judge did not comment on the formality of the agreement in the analysis, the agreement was accurately described earlier in the judgment, and the trial judge focused on the family violence that was dominant at the time the agreement was reached. In the two years since, the father had taken steps to address his violence and anger and the restrictive parenting time was no longer appropriate in light of the change. The trial judge also considered that the appellant mother had not followed the agreement's provision requiring further access time being agreed to because she had not agreed to any additional parenting time for the father in the previous two years. The trial judge identified and applied the correct legal test and there was no basis for appellate intervention. 4) In 2020, s. 16 of the *Divorce Act* was amended to direct consideration of the impact of any family violence on the best interests of the child. The appellant argued the trial judge minimized the family violence aspect of the case. An intervenor argued the amended legislation required the judge to identify specific incidents and patterns of family violence, and considerations of family violence trump other issues. Evidence of verbal and some physical violence was before the trial judge. There had been no physical violence since 2019. The appellant testified to ongoing fear and anxiety around the respondent, and her experience of the child saying the respondent fights. A child psychologist who saw the child 11 times had no safety concerns about the child spending time with the respondent. The Court of Appeal commented that family violence can rob a child of the basic need to be raised in a healthy home environment. The trial judge characterized the four admitted incidents of family violence as not insignificant and resulting in emotional harm to the appellant and physical damage to property. It was not necessary for the trial judge to recite all allegations or resolve every conflict in the evidence regarding family violence. The trial judge found as fact: the appellant continued to experience trauma as a result of the family violence; the respondent had admitted and accepted responsibility for the family violence and the wrongfulness of his actions, taken programming, and refrained from repeating the conduct for over two years; and the respondent was not a threat to the child and the child was not afraid of him. These findings of fact were supported by the evidence. The trial judge did not minimize the effect of family violence and appropriately considered the direct and indirect effects of family violence on the best interests of the child along with all required factors. There was no basis for appellate review. 5) The trial judge took a sequential approach: first determining the best parenting arrangements without reference to a parent's plan to relocate, and then analyzing whether a parent is authorized to move. The intent of the new provisions of the *Divorce Act* is best accomplished by a blended analysis that considers all the factors related to the child's best interests in determining whether a move should be allowed. If the blended analysis determines relocation is not in the best interests of the child, a conditional order should be granted that specifies parenting arrangements in the event a parent relocates without the child. The trial judge's error of not using a blended analysis did not have a material effect on the determination of the child's best interests. Because the appellant had ignored aspects of the interspousal agreement and it was given no weight, the onus to establish the move was not in the best interests of the child did not shift to the respondent father but remained on both parents. There was no basis for appellate intervention.

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***Wilk v Martin-Wilk*, 2023 SKCA 64**

Schwann Leurer Tholl, 2023-05-25 (CA23064)

Appeal - Family Law
Family Law - Support - Child Support - Undue Hardship - Requirements

The appellant and respondent were married and had one child. They separated when the respondent left the appellant with their child. The interim order granted primary residency of the child to the respondent and ordered the appellant to pay child and spousal support. The chambers judge awarded costs of $1000 to the respondent, concluding that the bulk of the notices of objection filed by the appellant were "both unnecessary and contrary to the purpose of *The Queen's Bench Rules*" and awarded the respondent an additional amount of $500 in costs. The appellant appealed the parenting order and the child and spousal support orders. The Court of Appeal (court) decided the following issues: 1) whether the chambers judge erred in dealing with the notices of objection to affidavit evidence; 2) whether there was an error in determining the status quo affecting the interim parenting order; 3) whether there was an error in determining the appellant's income; 4) whether there was an error in setting the amount of child support; 5) whether there was an error in finding the respondent was entitled to spousal support, or in the amount of spousal support ordered; 6) whether there was an error in awarding costs.
HELD: The chambers judge erred in including a lump sum payment as income, so the support amounts had to be adjusted as a result. The court calculated the income amount based on the limited information provided. There was no error in the other arguments on appeal. 1) The chambers judge did not err in dealing with the notices of objection to affidavit evidence. The court upheld the additional cost award of $500. The failure of an opposing party to file a response to a notice of objection does not mean that the objections will automatically be upheld. It is up to the chambers judge to determine how to address the validity of the objections. The chambers judge considered each objection and made a ruling on each. There was no reviewable error. The objections made imply a misunderstanding of the purpose of Rule 15-46 (affidavit evidence). The process is not to be used to object to portions of an affidavit that a party believes are not credible or do not reflect the facts as seen by the objecting party. The appellant argued that he was entitled to file third-party affidavits in response to the respondent's application. These third-party affidavits were struck as an improper reply under Rule 15-41(8) by the chambers judge. The court found that the chambers judge was correct to do so. The respondent's application sought only support; the third-party affidavits offered nothing of relevance on the topic of financial matters and could not be considered as being a reply to the respondent's application for support. The court noted that the bulk of one of the affidavits appeared to be aimed "at simply denigrating [the respondent's] character" and contained egregious examples of highly irrelevant and improper material. 2) The chambers judge did not err in assessing the status quo in making the parenting order. The appellant argued that the chambers judge erred by determining that the status quo was primary residency with the respondent, instead of both parents being equally and fully involved in the care of the child. The respondent averred that the appellant was often gone for long periods of time for work. The appellant did not provide any information regarding his anticipated work schedule or his present ability to parent. The court stated that when a parent wishes to have an equal shared parenting regime put in place, he or she must provide evidence of his or her ability to parent. This is particularly important if the i

ssue is put into question by the other party's evidence. The chambers judge sorted through "diametrically opposed" affidavit material in determining that it was in the child's best interim interests to reside primarily with the respondent. He listed the factors from s. 16 of the *Divorce Act* to determine that the child's best interests were served by continuing to reside primarily with the respondent. The child had already been residing with the respondent for an extended period. 3) The court agreed with the appellant that the chambers judge erred by including a non-recurring amount in current income. The appellant's grievance resolution pay should not have been included to determine current income for calculating interim support. However, the court did note that the grievance resolution pay will need to be accounted for when calculating retroactive child support and spousal support. The court undertook a calculation of the appellant's current income. The court stated that its calculation was a "best estimate" of the appellant's current income based on an extrapolation from his payslips, noting that it was uncertain because the appellant provided very limited information. 4) The appellant was ordered to pay child support in the guideline amount given the reassessment by the court of the appellant's income. The appellant argued that undue hardship applied to him, given his financial situation and the fact that he already had to provide child support for three other children from other relationships. The court re-assessed the appellant's undue hardship claim given that it found a significantly lower level of income for the appellant. After assessing the information the appellant provided, the court agreed with the chambers judge that the appellant did not meet the onus of establishing undue hardship. Mere hardship is not enough to reduce or excuse a payor's obligation: the hardship must be undue, meaning exceptional in the circumstances (*Lonsdale v Evans*, 2020 SKCA 30). The appellant was required to pay interim child support in the full table amount. 5) The respondent was entitled to spousal support; the chambers judge did not err in finding entitlement. The chambers judge found interim entitlement on both compensatory and non-compensatory grounds. The court found that the appellant had the ability to pay spousal support and set the interim amount based on the reassessed income amount. 6) There was no basis to disturb the costs award of $1,000 for the two substantive applications. An order for costs is discretionary (*Tysseland v Tysseland*, 2022 SKCA 39). In addition, the court ordered the appellant pay costs to the respondent in the total amount of $2,000 for the appeal and on his application to impose a stay of execution.

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***R v Whitby*, 2023 SKKB 58 (not yet on CanLII)**

Dawson, 2023-03-21 (KB23050)

Criminal Law - Evidence - Witness - Expert
Criminal Law - Evidence - Admissibility - *Voir Dire*
Evidence - Expert Evidence - Basis for Opinion

The Crown sought to enter expert evidence relating to a brain injury, fractures and bruising. A *voir dire* was held in which the defence challenged the proposed expert's qualifications, her impartiality, and her ability to offer opinion evidence. The trial judge considered: 1) what are the principles applicable to the admission of expert opinion evidence; and 2) was the proposed expert evidence admissible?
HELD: The proposed expert witness was qualified as a general paediatrician able to describe her observations during the examination of the child, but she was not qualified to provide evidence on brain injury, brain trauma, causation, timing, mechanism

of the injury and whether it was accidental or deliberate. 1) The court thoroughly reviewed the law of admissibility of expert evidence. To be admissible, the proposed expert evidence must be relevant, necessary in assisting the trier of fact, not subject to an exclusionary rule, and through a properly qualified expert. The underlying science must be reliable. Even when the threshold requirements are met, the judge has the discretion to exclude expert evidence when it is more prejudicial than probative. The expert owes the court a duty of impartiality, independence and absence of bias. If expert evidence is admitted, the judge must ensure the expert stays within the bounds of her expertise and the proper subject of expert evidence. Criteria relevant to considering an expert's qualifications include: the manner in which the special skill and knowledge was acquired, formal education, professional qualifications, participation in professional associations relevant to the proposed evidence, relevant courses and seminars, experience in the area, teaching or writing in the proposed area, whether the witness has kept up with the literature, whether the witness has been qualified in the past, and whether the subject matter has been a proper area for expert evidence in the past. The admission requirements for expert evidence have tightened over time. 2) The live issues were whether the proposed expert was properly qualified to proffer the opinions the Crown sought to enter, whether the proposed expert was impartial and unbiased, and whether the probative value of the evidence was overborne by the prejudicial effect. The proposed expert was a general paediatrician who treated the child in this case. The defence challenged her qualification to provide expert opinion on whether a brain injury was caused by intentional or accidental force. The proposed witness had a special interest in child maltreatment paediatrics, and had attended conferences and seminars on the topic, but had no published articles or certification in child maltreatment. She had not met the qualifications for the designation of a practice competency in child and youth maltreatment paediatrics. She had given at least ten presentations on child maltreatment and child abuse, but not necessarily involving brain injuries. In her clinical experience, she had seen children where there was concern someone may have hit the child. The proposed expert had experience in diagnosis but did not have sufficient experience to testify to the mechanism that caused the brain injury. A review of medical literature in the area was insufficient to provide the expertise to opinion on the mechanism of brain injury. The proposed expert had no forensic training and had done no research that would have linked her clinical observations in a systematic way to the literature. Although the witness had been qualified as an expert in three cases, there was no evidence her expertise was challenged and no evidence she gave the same type of expert evidence as the Crown sought to enter in this case. The conclusions were based on limited information from the family, with little objective data. Her conclusions ignored important research that did not support her conclusions without explanation for the omission. The probative value of the evidence was outweighed by its prejudicial effects.

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***Korol v Richardson International Limited*, 2023 SKKB 64**

Rothery, 2023-03-23 (KB23063)

Courts and Judges - Jurisdiction
Small Claims - Transfer of Action

The applicant applied to transfer two consolidated actions from the Court of King's Bench to the Small Claims Court, without the consent of the other party. The plaintiff grain company had sued for breach of contract and misrepresentation for failure to

deliver barley and sought payment of $15,952.56 plus interest and costs. The defendant farmer defended claiming the contract was void and unenforceable and countersued for damages for increased costs of seed and supplies from another source. The defendant farmer also filed a claim in Small Claims Court regarding the same issues. On the Provincial Court judge's own motion regarding the overlapping actions and after hearing submissions, the Provincial Court ordered the Provincial Court action be transferred to the Court of King's Bench, and the parties consented to have the actions consolidated. The defendant farmer then sought to have the consolidated claim transferred back to Small Claims Court because it was within the monetary limit, and the defendant wished to represent himself in the less complicated, more expeditious hearing process. The plaintiff grain company argued that the defendant ought to have appealed the Provincial Court transfer order, and the defendant was now barred from relitigating the issue. The chambers judge considered whether the consolidated actions should be transferred to Small Claims Court.
HELD: Application dismissed, with no costs ordered. The judge postponed any requirement to attend mediation under s. 42 of *The Queens' Bench Act, 1998* until the jurisdiction question was resolved. The application was not *res judicata*, and the Provincial Court judge's decision stated the defendant farmer could seek to have the superior court transfer the matters to Small Claims Court. The inherent jurisdiction of the superior court is the authority of the judiciary to uphold, protect and fulfil the judicial function of administering justice in a regular, orderly and effective manner. The Court of King's Bench has the authority to transfer the actions to Small Claims Court without the consent of both parties. The best way to ensure justice between the parties and a fair trial was to continue these actions in the Court of King's Bench because the grain company sought a remedy of solicitor-and-client costs, which is not available in Small Claims Court, and because the defendant farmer required comprehensive disclosure and discovery processes to mount his counterclaim.

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***Star Processing Ltd. v Canadian National Railway Company*, 2023 SKKB 66**

Clackson, 2023-03-29 (KB23064)

Real Property - Land Titles - Miscellaneous Interest
Statutes - Interpretation - *Public Utilities Easements Act*

The applicant landowner applied for an order declaring the respondent railway company had no legal or equitable interest on the applicant's property and that a recently registered easement be discharged. The applicant landowner discovered an easement in favour of the respondent railway company had been removed from the title. The easement had been granted to the railway company by a previous owner and was discharged but not at the applicant's request. Approximately 20 years before, the landowner wrote to the rail company to cancel a siding agreement as they were not using the rail service. The rail company agreed to cancel the siding agreement. The continuation of the easement was not addressed. About four years after that, a now-defunct company applied with the written authorization of the rail company's then manager to discharge the easement interest from the title held by the landowner. After that, the rail company continued to provide rail service over the landowner's land. The landowner demanded to know the legal basis for the railways' continued use of a railway spur line. The application had been previously granted, set aside on

appeal and remitted for determination. The chambers judge considered: 1) was the easement granted pursuant to *The Public Utilities Easements Act* (Act); 2) was the easement mistakenly discharged; and 3) if the easement was granted pursuant to the Act and mistakenly discharged, could it be re-registered?

HELD: The application was granted and the re-registration of the easement was ordered to be discharged. While the easement was discharged by the railway company in error, the discharge resulted in the easement interest being extinguished and the re-registration must also be discharged. 1) The easement was granted under the Act. The easement in favour of the rail company was created by an agreement with a prior owner of the lands. A common law easement requires: the existence of a dominant and servient tenement; the easement accommodating the dominant tenement; the dominant and servient owners must be different persons; and the easement right must be capable of forming the subject matter of a grant. At the time the easement agreement was reached, legislation required common law easements be registered on the title of both dominant and servient tenements. An easement pursuant to *The Public Utilities Easements Act* created an interest in only the servient tenement. The easement agreement did not mention the Act nor identify a dominant tenement and was registered only against the servient tenement. The agreement does not expressly state the type of easement the parties intended to create. The surrounding circumstances did not demonstrate the parties intended to benefit any particular parcel of the rail company's surrounding land as the dominant tenement. The parties were sophisticated. The law at the time of the agreement prevented registration of a common law easement against only the title of the servient tenement, and therefore the parties must have intended to create an easement under the Act. 2) On the balance of probabilities, the discharged occurred through error. The rail company argued that the easement was discharged in error but there was no direct evidence from the now-defunct company that filed the interest, from any employee or manager involved in the discharge, nor in relation to why other easements were discharged at the same time. The discharge occurred without the landowner's request and the landowner was not aware the easement had been discharged for 10 years. The rail company continued to use the spur line over the landowner's land, and re-registered the interest after the landowner raised the issue of the easement having been discharged. 3) The mistaken discharge extinguished the easement and the easement could not be re-registered. The rail company re-registered the easement without the landowner's consent or approval. Section 13.1(3) of *The Public Utilities Easements Act* states that when a discharge is registered, rights and privileges under the easement end. The intent of the Act is to facilitate the creation of special easement interests that would not otherwise be registerable under *The Land Titles Act, 2000*, and to regulate the discharge of those interests. There was no basis to deviate from the clear intent of s. 13.1(3) of the Act, regardless of the reasons for the discharge. The applicant was entitled to costs of the application.

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***R v Bird*, 2023 SKKB 79**

Labach, 2023-04-19 (KB23073)

Criminal Law - Aggravated Assault
Criminal Law - Defences - Self-Defence - Defence of Property
Statutes - Interpretation - *Criminal Code*, Section 34, Section 35, Section 88(2), Section 268(2)

The accused was charged with aggravated assault by wounding, and with carrying a knife for a purpose dangerous to the public

peace. The matter proceeded to trial, with seven witnesses for the Crown and two for the defence. The accused and his girlfriend were visiting family on the Ahtahkakoop First Nation and were staying at the home of the accused's brother. There was a party at that residence where alcohol and drugs were consumed. The victim was at the party, and he and the accused knew each other. After the party and before going to bed, the accused locked the screen door, but he knew that the main door did not lock. The accused propped it shut with a chair. The door in the room he stayed in did not lock, but sometimes a knife was used to wedge it shut. This evening, the knife was beside the door instead. The victim returned to the residence after the party had ended, looking for his backpack. There was some light in the kitchen. The victim knew that the door to the house did not lock, so he went inside looking for his backpack. The accused heard that someone was in the house, grabbed the knife, and stabbed the victim three times: once each in the hand, the chest, and in the back. The accused conceded that he had wounded the victim, but in closing argument, asserted that he was defending himself, his girlfriend, and the house in which the assault occurred. The court analyzed the defences asserted by the accused.
HELD: The accused was found guilty of aggravated assault. The defences of property and self-defence were not made out, and the accused could not rely on them to excuse his actions in wounding the victim. The weapons charge was stayed. Section 34 of the *Criminal Code* (Code) sets out the three requirements for defence of person: (a) the accused's reasonable belief that force was being used or threatened against him; (b) the purpose of the accused committing the offence was to defend himself from the use or threat of force; and (c) the accused's actions must be reasonable in the circumstances. The Crown acknowledged that this defence had an air of reality, but the accused stabbing the victim three times, particularly in the back as the victim was leaving, was not reasonable. The court found that a reasonable person in the circumstances would not have perceived the victim as presenting a threat of harm to the accused or his girlfriend, so the accused's belief was not reasonable. It was not reasonable for the accused to stab the victim. Section 35 of the Code sets out the four requirements for the defence of property: (a) the accused's reasonable belief that he was in peaceable possession of property; (b) the accused's reasonable belief someone was trespassing on the property; (c) the offence was committed to prevent the trespass; and (d) the accused's action was reasonable in the circumstances. The Crown accepted that there was an air of reality to the defence of property, with the first three requirements being established. However, the court concluded that the accused's actions were unreasonable in the circumstances, and disproportionate to what was required.

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***Giesbrecht v Saskatchewan Government Insurance*, 2023 SKKB 80**

Clackson, 2023-04-19 (KB23077)

Health Information Protection Act - Appeal
Statutes - Interpretation - *Health Information Protection Act*, Section 38(1)(f)

SGI received a confidential report raising a concern about the appellant's fitness to drive. SGI then asked the appellant to provide a medical assessment respecting any medical conditions or treatments that could impair his ability to drive. The appellant submitted the completed medical assessment to SGI, and SGI decided that no further action was necessary. The appellant's license

was not suspended or restricted in any way. The appellant submitted a request to SGI under the provisions of *The Freedom of Information and Protection of Privacy Act* (FOIP) for a copy of the confidential report. The appellant's stated purpose in making the request was to learn who submitted the report to SGI. SGI refused under s. 7(4) of FOIP, arguing that the report was exempt from access under FOIP and refusing to confirm or deny its existence. The appellant sought a review by the Office of the Saskatchewan Information and Privacy Commissioner (commissioner). The commissioner recommended that the report be disclosed under *The Health Information Protection Act* [HIPA]. SGI declined to follow this recommendation. The plaintiff appealed to the Court of King's Bench. SGI relied on s. 38(1)(f) of HIPA as the basis to refuse disclosure.
HELD: SGI was ordered to disclose the report in its entirely to the appellant. SGI did not demonstrate that it was entitled to refuse disclosure under s. 38(1)(f) of HIPA. Under s. 38(1)(f) of HIPA, SGI had to prove that the disclosure of the report could interfere with a lawful investigation, or that disclosure could be injurious to the enforcement of an Act or regulation. SGI could not refuse to disclose the report on the basis of a lawful investigation; the disclosure of the report also would not be injurious to enforcement of *The Traffic Safety Act*. The court undertook an analysis *de novo* in which it reviewed the contents of the report in camera and under seal. There was no evidence of a current or impending investigation relating to the matters in the report. Under the scheme in HIPA, the person to whom the information relates always retains an interest in it and is entitled to know the personal health information in the possession of any of the entities listed in s. 2(t) of HIPA. The default position is disclosure. The appellant was entitled to costs of the appeal.

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***Affinity Credit Union 2013 v The Lighthouse Supported Living Inc.*, 2023 SKKB 82**

Rothery, 2023-04-21 (KB23080)

Bankruptcy - Procedure

Two board members applied under s. 65(1) of *The Queen's Bench Act, 1998*, SS 1998 and s. 86 of *The Non-profit Corporations Act, 1995* (now s. 8-6 of *The Non-profit Corporations Act, 2022*) to appoint an interim receiver of the assets of a supported housing and homeless shelter corporation, because the corporation could not make next payroll obligations. At the same time, a credit union mortgage holder applied for appointment of an interim receiver pursuant to s. 47 of the *Bankruptcy and Insolvency Act*, and demanded payment on a demand loan, line of credit and arrears owed on eight mortgages. The non-profit corporation owed approximately $2.6 million. The parties agreed to the appointment of a receiver under *The Non-profit Corporations Act*. Certain properties were sold. A board member resigned and the board became deadlocked and unable to provide instructions to legal counsel. The credit union then applied to appoint a receiver-manager over all the assets as provided by s. 243(1) of the *Bankruptcy and Insolvency Act*. Under the interim receivership, the corporation was operating at a deficit of $100,000 per month and would be unable to pay employees. The order appointing a receiver-manager was made. The parties could bring other matters forward at a future set date.

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***Beauchamp v Beauchamp*, 2023 SKKB 88**

Danyliuk, 2023-04-25 (KB23082)

Civil Procedure - Affidavits - Application to Withdraw

The court decided the issue of whether the applicant's counsel could unilaterally withdraw a substantive affidavit sworn by a member of his firm. The affidavit stated: "But if by receiving this my affidavit, the issue of [law firm's] representation of [the applicant] is questioned, then I withdraw the affidavit and it should not be received or considered by this Honourable Court."
HELD: The affidavit remained as part of the record. The court rejected the "conditional filing" of the affidavit. There was no legal foundation for this statement in the affidavit. Evidence cannot be withdrawn as of right and is subject to obtaining leave of the court, with a properly filed application, and then it is up to the court to decide whether it will exercise its discretion. It is a foundational rule that lawyers should not be advocates and witnesses in the same matter. The court did not prohibit the law firm from acting, leaving it open to the opposing party whether they wanted to bring an application to exclude the law firm.

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***R v Courtoreille*, 2023 SKKB 91**

Elson, 2023-05-01 (KB23084)

Criminal Law - Drug Offences - Possession
Statutes - Interpretation - *Controlled Drugs and Substances Act*, Section 4(1), Section 5(2)

Police searched a parked vehicle and found quantities of methamphetamine, hydromorphone, crack cocaine, and a can of bear spray. When police arrived at the vehicle, S.A.C. was in the driver's seat and T.L. was in the front passenger seat. S.A.C.'s girlfriend, J.W., was in the back seat. The car was registered to someone else, but not reported stolen. Both S.A.C. and T.L. were charged jointly with unlawful possession and possession of methamphetamine for the purposes of trafficking under the *Controlled Drugs and Substances Act*, SC 1996, c 19 [CDSA]. At trial, neither co-accused argued against the Crown's assertion that the drugs found were possessed for the purpose of trafficking. Instead, each co-accused testified, presenting an exculpatory defence implicating the other. S.A.C. testified that the car belonged to a friend who would occasionally let him use it in return for cleaning and detailing it. He testified that he would buy crystal meth for J.W. He called T.L. to arrange a purchase of crystal meth, and that was why he and J.W. were parked in front of the house of a woman he and T.L. both knew at 4:00 am. When S.A.C. parked, T.L. exited his own vehicle and climbed into the passenger seat of the car S.A.C. was driving, and J.W. got into the back seat. T.L. had a black bag, which was later seized by police. T.L. testified that he was there at the same time as S.A.C. by coincidence: T.L.'s friend wanted to drive to the woman's residence, T.L. did not know S.A.C. would be there, but when he saw S.A.C. he stopped to chat. However, his voluntary statement to police indicated that he had spoken to S.A.C. before going to the house, and that they agreed to

meet at that location. T.L. denied bringing drugs and denied discussing a drug transaction. The main issue was the element of possession.
HELD: The court found S.A.C. not guilty of the counts of possession for the purpose of trafficking, but guilty of simple possession of cocaine (he admitted to this offence during the trial). The court found T.L. guilty of possession of methamphetamine for the purpose of trafficking, and of simple possession of the hydromorphone. The Crown had to prove four essential elements for possession for the purpose of trafficking: 1) that the substance was a controlled substance; 2) that one or both co-accused were in possession of the substance; 3) that one or both of them knew the nature of the substance; and 4) that one or both of them possessed the substance for the purpose of trafficking. Only the first three elements were necessary for the simple possession charges. The key issue in this case was whether there was possession of the drugs. Possession can be personal or actual possession, constructive possession, and/or joint possession. The judge self-cautioned that testimony in conflict with the interests of the other co-accused should be considered with care, referring to the *Oliver* caution (*R v Oliver* (2005), 28 CR (6th) 298 (Ont CA)). The court found that the Crown made a compelling case that one or both co-accused possessed the drugs. The court found S.A.C.'s evidence entirely believable and was left with reasonable doubt about his guilt on the possession for the purpose of trafficking charge. S.A.C. admitted to the possession of crack cocaine, so he was found guilty of that count. The court found T.L.'s evidence to be neither reliable nor credible. His testimony was very different from the voluntary statement he gave to police after his arrest. He offered no reason or purpose for his 4:00 am meeting on a cold winter morning with S.A.C. The court was satisfied beyond a reasonable doubt that T.L. possessed both the methamphetamine and hydromorphone and possessed the former for the purpose of trafficking.

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***Degagne v Bird*, 2023 SKKB 94**

Zerr, 2023-05-03 (KB23087)

Damages - Damages in Tort - Personal Injury - Motor Vehicles - Impaired Driver
Statutes - Interpretation - *The Pre-judgment Interest Act*, Section 5(3), Section 6(2)

A jury found the defendant liable in negligence for the injuries and losses he caused to the plaintiff when he drove while impaired. The defendant did not defend the case, but Saskatchewan Government Insurance (SGI) was added as a third-party defendant under s. 45(6) of *The Automobile Accident Insurance Act*. The jury found that the plaintiff's damages should be reduced by 20 percent given a pre-existing condition and awarded damages. The court determined the following two issues: 1) in what terms should the judgment issue; and 2) what was an appropriate award of costs?
HELD: 1) The court agreed with the plaintiff that the amount paid for income replacement was to be subtracted from the total amount of damages before further reducing the amount by 20 percent for the pre-existing condition. The court was not prepared to reduce the damage award to reflect any amount previously paid by either the Workers' Compensation Board or SGI for the plaintiff's medical expenses. For pre-judgment interest, the court reviewed *Janke v Cenalta Oil Well Servicing Ltd.* (1997), 143 DLR (4th) 613 (Sask CA) (*Janke*), where the issue on appeal was whether the trial judge erred by awarding interest on an interval, as opposed to a lump-sum, basis. The Court of Appeal concluded that where the measure of damages can be made in terms of lost wages, interest

is calculated based on three-month intervals and not on a lump-sum basis as of the date of injury. However, here it was impossible to know how the jury arrived at their total figure for past loss of income. The verdict sheet did not indicate the date when the plaintiff first lost income, nor did it include the amount of income lost during any three-month interval. The court distinguished this situation from Janke, because here the measure of damages could not be made in terms of lost wages. The court therefore exercised the discretion set out in s. 5(3) of *The Pre-judgment Interest Act* (Act) to calculate pre-judgment interest on the award for past loss of income. For past cost of care, the court calculated pre-judgment interest according to s. 6(2) of the Act. 2) SGI was ordered to pay the assessable costs of the plaintiff on a column two basis, including costs for the plaintiff's second counsel, less any amounts already paid. The case was moderately complex, lasted three weeks, and involved four expert witnesses. However, it was not complex enough to warrant a column three cost award. The court was not prepared to award solicitor and client costs because the case was not so exceptional as to require full indemnification.

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***Thomson v Xiao-Phillips*, 2023 SKKB 96**

Dawson, 2023-05-05 (KB23088)

Civil Procedure - *Subpoena Duces Tecum* - Application to Quash

The applicants brought an application to quash subpoenas duces tecum (subpoenas) issued by the Court of King's Bench. The context was a Law Society of Saskatchewan (LSS) disciplinary hearing, where the allegations against the respondent included that he did not provide a quality of service that was competent by continuing to act for a client when he was not properly retained, and for providing incompetent legal services by advising or failing to advise the client. The subpoena duces tecum only commanded the witnesses to appear at the disciplinary hearing with the requested documents. It did not entitle the respondent to production or discovery of the documents sought prior to the witness taking the witness stand. The respondent sought an *O'Connor* application for the LSS disciplinary panel to determine if the documents should be produced to the respondent prior to the hearing of the complaint. The court noted that the application before it was an application to quash the subpoenas but reviewed the *O'Connor* law to properly orient the application to quash the subpoenas. The court stressed that consideration of the *O'Connor* application was solely within the jurisdiction of the LSS disciplinary hearing panel. The respondent made preliminary arguments in relation to the applicants' application to quash the subpoenas, including lack of jurisdiction, notice, and the proper party status of the LSS for the application. The court rejected these arguments.
HELD: The part of the subpoenas requesting the production of documents and correspondence was quashed by the court, but the applicants were still required to attend the hearing. Where a subpoena is challenged, the burden is on the person issuing the subpoena to establish the evidence sought is material. The issuer of the subpoenas must show the connection between the evidence sought and the issues in the case. Then the challenger must show that the subpoenas were improperly issued. The respondent failed to prove that the documents sought in the subpoenas were relevant to the issues in the respondent's disciplinary hearing. The subpoena was so broad as to be oppressive, amounting to a fishing expedition. The respondent did not provide any evidentiary basis on this application or in the affidavit filed in support of the *O'Connor* application that would identify how the documents would be relevant to the issues. Here, the principle requiring a clear nexus of relevancy had not been met because the

respondent failed to demonstrate any sufficient connection between the issues he faced, and the material requested.

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***Mercereau v King*, 2023 SKKB 99**

Goebel, 2023-05-12 (KB23089)

Family Law - Parenting Agreements - Best Interests of the Child

The court was asked to determine the parenting arrangement that would be in the best interests of the children, taking into account the parenting time provisions set out in a 2018 parenting agreement. The agreement had worked for a time, but then broke down when the father's work schedule changed. The agreement provided a clause where the father had the right to shift to equal parenting time on six months' notice to the mother. When the father's work schedule changed, he gave the mother five days' notice that he wanted to take the children on different (weekend) days, which left the mother scrambling to seek alternate childcare arrangements. The mother did not agree to transition to shared parenting. The father experienced significant financial difficulties after the separation, moved numerous times, and eventually went bankrupt. He fell behind in child support payments for a number of months and had been involved in numerous romantic relationships over the past three years. His situation appeared to have stabilized. The mother had provided stability in the children's lives and took the children to their appointments and extracurricular activities.
HELD: The court adopted the mother's proposal that the father have the children in his care on specified days which suited his schedule, but on alternating weeks. This would enable both parents to have an equitable sharing of weekend days. The court found that the mother's proposal was in the best interests of the children, because it provided both the stability provided by the mother and additional parenting time with the father. The court found that the 2018 provision in the parenting agreement which provided that the parties intended to have "equal time with the children" at some point in the non-specified future to be triggered by the father providing six months' written notice to the mother did not accord with the type of parenting plan contemplated by s. 16.6. of the *Divorce Act*, RSC 1985, c-3 (2d Supp). This provision in the parenting agreement was vague, contradicted other provisions regarding the parenting schedule, and was not child-centred. It was not in the best interests of the children. The court retains discretion to ensure that its orders reflect the best interests of the child, even if doing so means modifying, overriding or ignoring provisions in parenting agreements. The court undertook a best interests of the child analysis, focusing on each child's right to an arrangement that best meets their physical, emotional and psychological safety, security and well-being. Parental "rights" play no role in the best interests analysis.

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