**The Law Society of Saskatchewan Library's online newsletter highlighting recent case digests from all levels of Saskatchewan Court.
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***Smith v The Toronto-Dominion Bank*, 2023 SKCA 81**

Richards Tholl Kalmakoff, 2023-07-24 (CA23081)

Civil Procedure - Pleadings - Application to Strike Statement of Defence
Civil Proceedings - Pleadings - Striking Out
Creditors and Debtors - Appeal
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The appellant borrower appealed a chambers decision striking his statement of defence for not disclosing a reasonable defence. The lender had sued the appellant for arrears on a loan and the self-represented appellant had filed a statement of defence pleading he had not entered into an agreement for the amount claimed. The chambers judge struck the denial as not disclosing a reasonable defence. The Court of Appeal considered: 1) what is the standard of review; 2) did the chambers judge err in finding the appellant had not pled a reasonable defence?
HELD: The appeal was allowed. 1) Previous appeal cases about striking pleadings for not disclosing a reasonable cause of action or defence are inconsistent about the applicable

Civil Procedure - Interlocutory Injunction

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standard of review. A few older decisions apply the standard of review applicable to discretionary decisions. The majority of decisions apply a correctness standard of review. The correctness standard of appellate review applies, and contrary decisions are no longer good law. 2) A statement of claim or defence should be struck only if there is no reasonable chance of success assuming the defendant proves everything alleged; the matter is plain, obvious and beyond doubt; and the court has considered only the pleadings, particulars and any document referred to in the pleadings. The statement of defence was not clear but alleged the defendant borrower did not enter into the agreement relied on by the lender. The chambers judge erred by holding the defendant had acknowledged receiving the loan from the lender and only contested the amount owing. The chambers judge also erred by expecting the defendant to produce documents to prove the claim in the context of an application to strike pleadings. Further, it was an error to strike the statement of defence even if the defendant had acknowledged the existence of the debt and only contested the amount owing. In some cases, a reference to the local registrar is the appropriate way to determine the matter. A judge should not go so far as to strike out a statement of defence simply because the only matter that it puts in issue is the amount owing under an agreement. A denial of the amount owing is a reasonable defence, contrary to some earlier lower-court precedents.

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***Greenwood v Greenwood*, 2023 SKCA 87**

Caldwell Barrington-Foote Kalmakoff, 2023-08-10 (CA23087)

Appeal - Family Law
Family Law - Division of Family Property - Division of Pension - Spousal Support
Family Law - Division of Family Property - Appeal

The appellant, D., appealed an order dismissing D.'s application for a share of survivor benefits under her former husband S.'s employee pension plan. D. and S. were married for 27 years and divorced in 1981. In a court order dividing family property, D. received 47% of S.'s pension benefits, whenever received. S. then married C. Five years later, S. retired and elected to draw his pension at 55% of his full entitlement, with a survivor benefit permitting his surviving spouse to continue to have benefits for the rest of her life. S. named C. as the sole beneficiary of the pension survivor benefit. S. and C. were married 37 years. D. applied in 1990 and 2008 for further directions regarding her entitlement to a monthly amount from the pension benefits. S. died and C. began receiving the survivor benefit. D. applied to court for an order requiring C. to pay to D. a share of the survivor benefit. The Court of Appeal considered whether the chambers

Family Law - Spousal Support - Variation

Injunction - Interim - Requirements

Injunction - Interlocutory - Requirements

Municipal Law - Appeal - Property Taxes - Assessments

Municipal Law - Property Tax Assessment

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Statutes - Interpretation - *Controlled Drugs and Substances Act*, Section 4(1), Section 4.1(2)

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Statutes - Interpretation - *Enforcement of Money Judgments Act*, Section 5(5)

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judge erred by: 1) failing to account for the 1981 decision dealing with the pension as a property asset rather than as a maintenance asset; and 2) deciding the 1981 order had been varied or overridden by the 1990 order and 2008 order.
HELD: The appeal was allowed, C. was added as a third party to the action and C. was ordered to pay a percentage of the survivor benefits to D. 1) The chambers judge erred in failing to recognize the 1981 order did not divide an income stream during S.'s lifetime, but instead divided an asset, whenever received. In 1981, federal pension legislation did not allow for a pension to be split at source by the pension administrator. The terms of the pension plan did not allow S. to assign voluntarily any portion of his pensionbenefits to D. In 1981, the value of matrimonial property was to be distributed equally between the spouses, subject to legislated exceptions, exemptions and equitable considerations. Spousal maintenance was payable only if an entitlement was established, and it was tied to the parties' means and needs. Property division was not affected by the death of a spouse. Maintenance obligations did not continue after the death of a spouse. The judge in the 1981 order intended to divide the full value of the pension asset regardless of the form of the benefits or when those benefits were received. 2) The 1990 order only varied the quantum and not the nature of D.'s interest in the pension. In 1990, courts had a narrow power to vary orders for division of family property in substance in the absence of exceptional circumstances. Nothing in the record supported an interpretation of the 1990 order as varying the nature, rather than the amount, of D.'s tenant-in-common share of the pension benefits, whenever received.

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***SBLP Town N Country Mall Inc. v Moose Jaw (City)*, 2023 SKCA 94**

Caldwell Leurer McCreary, 2023-08-15 (CA23094)

Administrative Law - *Municipal Board Act* - Assessment Appeals
Municipal Law - Appeal - Property Taxes - Assessments
Municipal Law - Property Tax Assessment
Taxation - Property Taxes - *Municipal Board Act*

The appellant shopping mall appealed a decision of the Assessment Appeals Committee (committee) of the Saskatchewan Municipal Board that overturned two decisions of the City Board of Revision (BOR) and reinstated 2019 and 2020 assessments for the mall. The Court of Appeal had granted leave and considered three questions of law: 1) did the committee apply the incorrect standard of review to the board's evidentiary findings; 2) did the committee err in its

Wills and Estates - Costs - Solicitor and Client Costs

Wills and Estates – Executor

Cases by Name

101255595 Saskatchewan Ltd. v 101093860 Saskatchewan Ltd.

Arborfield (Rural Municipality) v North East School Division

Gilchrist v Gilchrist

Greenwood v Greenwood

Honeybadger Enterprises Ltd. v Bue

Hunt Estate, Re

Kolodziejski v Maximiuk

M.R. v A.M.

McCulloch v Investigation Committee of the Saskatchewan Registered Nurses Association

Mpofu v Mpofu

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SBLP Town N Country Mall Inc. v Moose Jaw (City)

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interpretation and application of *TNC Mall Property Holdings Inc. v Moose Jaw (City)*, 2020 SKCA 99; and 3) did the committee err in its interpretation and application of *Saskatoon (City) v Walmart Canada Corp.*, 2018 SKCA 2?
HELD: The appeal was allowed, the committee decision was quashed, and the 2019 and 2020 BOR decisions were reinstated. 1) The committee misapplied the applicable standard of review by re-evaluating the evidence rather than assessing the reasonableness of the board's fact findings. Sufficient evidence supported the BOR's findings. 2) Under the annual property assessment regime, each appeal for a property will be taken from a different assessment decision based on a different evidentiary record, although much of that record may be identical or similar to the record in another appeal. The annual assessment must be based on the record for each year independently. The committee erred by not deciding the appeal based on the records before it. 3) The BOR relied on the *Walmart* decision to lengthen the relevant timeframe and adding two properties. Boards of revision, assessors and assessment appraisers have the same ability to extend the relevant timeframe when necessary to achieve equity. The committee did not adequately explain how the BOR had erred by misapplying the *Walmart* decision when including data from the two sales in the previous assessment cycle. The Court concluded the BOR's decision to expand the timeframe aligned with the purpose and restrictions identified in the *Walmart* decision. The BOR's expansion of the timeframe was reasonable. The committee erred in its review of the BOR decisions.

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***Kolodziejski v Maximiuk*, [2023 SKCA 103]**

Caldwell Barrington-Foote Kalmakoff, 2023-09-01 (CA23103)

Family Law - Divorce - Spousal Support
Family Law - Spousal Support - Duration of Spousal Support
Family Law - Spousal Support - Determination of Income
Appeal - Standard of Review - Discretionary Decision

The parties appealed and cross-appealed a trial decision deciding spousal support payable pursuant to the *Divorce Act*. The appellant, K., asserted the trial judge erred when quantifying spousal support payable to M. In her cross-appeal, M. asserted errors in the income imputed to her and asserted spousal support should have been indefinite. The parties were married from 1991 to 2012. At separation, K. was 53 and M. was 44 years old. They had one daughter who

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ceased to be a child of the marriage in 2014. M. took a six-month maternity leave when their daughter was born and worked part-time until 2001 in retail or administrative positions. She also cared for K.'s children from a prior relationship when they lived with K. K. sold automotive products and travelled for work and competitive curling. In 2015, the parties reached an agreement that formed the basis for a consent order addressing all issues in their separation and divorce, including a lump sum payment for spousal support up to January 2017, after which either party could apply to review spousal support. The Court of Appeal considered: 1) what was the applicable standard of appellate review; 2) was M. entitled to non-compensatory spousal support; 3) did the trial judge err in imputing income to M.; 4) did the trial judge err in determining K's income; 5) what was the proper duration of compensatory spousal support; and 6) did the trial judge err in awarding costs to M.?

HELD: The appeal and cross-appeal were both allowed in part. The spousal support order was varied to increase by approximately $250 the monthly amount of support payable to M. from October 2021 to October 2022. The end of the spousal support obligation in October 2022 was confirmed. No costs were awarded in the court below or on appeal. 1) Appeals from spousal support orders and costs awards require an appellate review of a discretionary decision. Discretionary decisions involve the application of the law to facts and call for the application of the usual appellate standards. Errors in factual findings attract the deferential standard of palpable and overriding error. Errors related to the identification or application of the legal criteria that govern the exercise of discretion or another matter of law are reviewable for correctness. 2) The trial judge did not misapprehend the evidence or misunderstand the relevant law in the decision to end spousal support in 2022. Non-compensatory spousal support acknowledges spousal economic interdependency from a shared life, by addressing a spouse's inability to meet basic necessities post-separation or a significant post-separation decline from the marital standard of living. The trial judge found the increase of M.'s expenses post-separation resulted from M.'s personal choices made post-separation and she had foregone opportunities to increase her post-separation income. The evidence supported the trial judge's findings of fact. 3) The trial judge imputed an extra $16,598 in income over 13 months to M. because she would have earned more if she had become an insurance broker, and she could have rented her basement suite to her daughter and son-in-law instead of letting them live rent-free. K. argued the extra income ought to have been imputed from 2017 to 2022. M. argued no additional income should be imputed at any time. Scant evidence was available about whether M. was intentionally under-employed, but the evidence was sufficient to support the decision. Testimony supported that M. had been given the opportunity to take an insurance broker course and chose not to. There was no clear, convincing and cogent non-hearsay evidence of the income M. could have earned if she had become an insurance broker. The Court of Appeal rejected average income information compiled by a website as "a figure all but plucked from the air." Therefore, there was no evidentiary basis to support the amount of extra income M. would have earned as an insurance broker. Not all evidence of rental income for a basement suite was inadmissible hearsay, and the evidence was sufficient to support the trial judge's decision to impute $9,000 in rental income to M. over 13 months. 4) The trial judge used K.'s post-separation income to calculate spousal support because M.'s care for their daughter was linked to K.'s success in building a client base for the sales post-separation. The conclusion was not reconcilable with the other evidence and findings. Post-separation, K. started a new position with a new company selling new products to different clientele in a different sales area with a different remuneration structure. There was no suggestion K.'s post-separation career was directly linked to M.'s marital contributions. M. cross-appealed the trial judge's decision to discount K.'s 2021 commissions-based income given a 60 to 70 percent loss of his sales territory. The supporting evidence was thin but uncontradicted and there was no basis to vary the trial judge's conclusion on this point. K. argued his income ought to be

calculated using a seven-year average. The *Guidelines* permit a court to have regard to the spouse's income over the last three years. Using the three-year measure, K.'s income did not increase post-separation. The court used an agreed-upon average annual income, even though the compensatory support claim did not provide a sufficient foundation for an entitlement to share in that income. 5) The trial judge set the total duration of spousal support at just over 10 years after the 21-year marriage. The trial judge did not err in finding indefinite support was not indicated. Both parties worked outside the home throughout the marriage. M. scaled back employment while their daughter was young but returned to full-time employment long before separation. M.'s standard of living at the time of separation exceeded the marital standard of living at the time of separation and could be fully funded by charging rent to her daughter and son-in-law. K.'s post-separation income had not actually increased from the pre-separation average. There was little case for transitional support to cushion a drop in standard of living caused by marriage breakdown. There was no error in not following the so-called rule of 65 or, in other words, indefinite spousal support when years of marriage added to the recipient spouse's age is greater than 65. This so-called rule would only apply where all other factors are neutral. 6) The trial judge's reasons did not justify the costs award. A party who unnecessarily lengthens a proceeding, refuses to admit was should have been admitted or acts improperly opens the door to costs against them, even if they are the successful party. M. was entitled to apply for a review of spousal support and K. was entitled to evaluate and respond to that claim. K. made concessions shortly before trial, but evidence was still relevant on other issues. The concession arguably decreased the duration and expense of litigation, and the timing of the concession was not improper and did not unnecessarily lengthen the review process. K.'s conduct in connection to earlier interim orders had already been dealt with in prior costs awards. There was no principled reason to rely on conduct that had already been censured by the court through earlier awards of costs. The trial costs award was set aside and no order made in its place.

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***R v Wilson*, 2023 SKCA 106**

Schwann Leurer Drennan, 2023-09-08 (CA23106)

Constitutional Law - *Charter of Rights*, Section 8, Section 9, Section 24(2)
Criminal Law - Appeal - Acquittal - Exclusion of Evidence
Statutes - Interpretation - *Controlled Drugs and Substances Act*, Section 4(1), Section 4.1(2)

The appellant was driving with three of his friends in a truck when one of them lost consciousness after using fentanyl. One of the friends called 911 to report the drug overdose. When police arrived, the appellant and his friends were detained and arrested for possession of a controlled substance contrary to s. 4(1) of the *Controlled Drugs and Substances Act*, SC 1996, c 19 (CDSA). Police conducted a search incidental to the arrest for simple possession and discovered firearms and evidence of drug trafficking in the appellant's backpack. The appellant was arrested a second time for drug trafficking and firearm offences. He was charged and convicted of several firearms offences and received a global sentence of eight years. In the end, he was not charged with possession of a controlled substance under s. 4(1) of the CDSA or any other offences under that Act. At trial, the appellant applied for a declaration that his ss. 8, 9 and 10 *Charter* rights had been violated, and for an order excluding the evidence relating to the firearms found in the truck. He argued that the first arrest was arbitrary because s. 4.1(2) of the CDSA prevented him from being

charged with simple possession. The Crown argued that s. 4.1(2) did not apply because it did not prevent the police from conducting an investigative detention or arresting people, and because the appellant was never charged with simple possession or any other offence under the CDSA. The trial judge did not find a Charter violation, finding that the officer had the common law power to detain the appellant for investigative purposes. The Court of Appeal (court) analyzed the *Good Samaritan Drug Overdose Act*, SC 2017, c 4 (*Good Samaritan Act*), which amended the CDSA by adding provisions to it with the intent of reducing deaths associated with drug overdoses. Section 4.1(2) is a medical emergency exemption to s. 4(1) (simple possession). The court determined whether police could arrest someone found committing an offence when that person could not lawfully be charged with that offence. The court considered: 1) why the appellant was first arrested; 2) whether the appellant's ss. 8 and 9 *Charter* rights were violated; and 3) if there was a *Charter* violation, what would be an appropriate outcome?

HELD: The court allowed the appeal and acquitted the appellant of the charges. The trial judge erred in finding that the appellant's ss. 8 and 9 *Charter* rights had not been breached. The court held that because the appellant could not be charged with simple possession of a controlled substance, his first arrest was unlawful. His ss. 8 and 9 *Charter* rights were violated by the search incidental to the unlawful arrest. Admission of the evidence obtained by the unlawful search would bring the administration of justice into disrepute. Without the impugned evidence, there was no case against the appellant. 1) On the evidence, the only purpose for the first arrest of the appellant was to charge him under s. 4(1) of the CDSA. By enacting s. 4.1(2), Parliament prohibited such an action. The court noted that the trial judge did not make an express finding in relation to the first arrest of the appellant. During the trial, two police officers testified that the appellant was placed under arrest for possession of a controlled substance. 2) The appellant's first arrest was unlawful. Therefore, his rights under both ss. 8 and 9 of the *Charter* were violated. In the circumstances of this case, there could have been no purpose for the appellant's first arrest made after the investigative detention other than for the purpose of charging him with simple possession. This was prohibited by the *Good Samaritan Act*. The appellant could not be charged with simple possession because all the evidence supporting such a charge had been obtained or discovered as a result of the appellant and his friends having sought medical assistance. The interference to the appellant's liberty caused by his first arrest was unjustified. The court rejected the Crown's argument that s. 4.1(2) had no application because the appellant was never charged or convicted of simple possession. The only reason for the appellant's arrest was to charge him with simple possession. The Crown also argued that the appellant's arrest was authorized by s. 495 of the *Criminal Code*, meaning that it was authorized by law, and therefore justified and not arbitrary. The court noted that the Crown's reliance on s. 495(1)(b) ignored that all state powers are limited by the principle that they are to be exercised only for the purposes for which they are given. There was no evidence that the arrest was made because officers saw drugs in plain view. The court cited the holding in *R v Tim*, 2022 SCC 12 (*Tim*) that a lawful arrest cannot be based on a mistake of law by the police officer. Police officers are expected to know the law. 3) The court concluded that allowing the evidence to be admitted would bring the administration of justice into disrepute. The court considered: A) whether the evidence of the handgun and the confession were obtained in a manner that breached the appellant's Charter rights; and B) whether the admission of the evidence would bring the administration of justice into disrepute. A) The court cited *Tim* for guidance on when evidence is "obtained in a manner" that breaches an accused's *Charter* right, triggering s. 24(2). The court found that the connection between the appellant's unlawful arrest and the discovery of the guns was "direct and unbroken." The appellant's statement was only obtained because of the discovery of the guns. The statement and the evidence of the guns were obtained in a manner that breached the appellant's *Charter* rights. B) The court referred to the analysis for the exclusion of evidence in *R v Grant*, 2009 SCC 32 (*Grant*) for whether the admission of the evidence would bring the administration of justice into disrepute: i) the seriousness of the *Charter*-infringing state conduct; ii) the impact of that violation on the accused's *Charter*-protected interests; and iii) society's interest in having the charges adjudicated on their merits. The state misconduct was not minor; at best, it was

moderately serious. The appellant was detained for investigative purposes, so the police had sufficient time to reflect on whether the appellant could be charged with simple possession. It was not reasonable for the officers to believe that they had the power to arrest the appellant. The impact of the *Charter* breach was at the very least, moderately intrusive. The appellant's privacy rights were violated because of his arbitrary arrest and the unlawful search conducted incidental to the unlawful arrest. He also had a privacy right in relation to his backpack. The appellant's confession, directly connected to the unlawful arrest, added to the seriousness of the *Charter* breach. Society's interest in the adjudication of the case on the merits weighed heavily in favour of the admission of the evidence, given that illegal firearms were involved. The court conducted a final balancing under the *Grant* test and excluded the impugned evidence. The most important factor for excluding the evidence was because its admission would undermine Parliament's purposes for passing the *Good Samaritan Act*, which was to prevent deaths associated with drug overdoses. The friend was likely only alive because someone called 911. While the charges were very serious, no part of them would have been known had the appellant's rights been respected. This was not a situation where the breach of the appellant's rights simply added evidence to the case against him.

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***Stradeski v Kowalyshyn*, 2023 SKKB 177**

Layh, 2023-08-22 (KB23167)

Wills and Estates - Application for Production of Medical Records

The testator transferred farmland to his neighbours (defendants) right before he died. He made the defendants the sole beneficiaries of his estate and executors of his will. Three years ago, the deceased's sister (plaintiff) commenced an action against the defendants. She alleged that the deceased lacked testamentary capacity and sought to have the will and the transfer set aside. Here, the plaintiff sought an order compelling the production of any medical records in the defendant's possession, and from the Saskatchewan Health Authority (SHA) under Rule 5-15 of *The Queen's Bench Rules* (*Rules*). The defendants cited Rule 16-36 of the *Rules*, arguing that the plaintiff could not compel production of any records until the court ordered that the will be proven in solemn form by a trial. There was affidavit evidence from the attending physician that she had no concerns about the testator's mental capacity, even to the date of his death. The main issue the court decided was whether the plaintiff could compel the production of medical documents from either the defendants or the SHA before she satisfied her onus under Rule 16-46 and compelled a trial to prove the will in solemn form.
HELD: The court refused to order the production of medical records from the defendant or the SHA. The application was premature. The court found that the application to compel production from both the defendants and the SHA ignored the well-established proceedings to have a will proved in solemn form. The issue required the court to balance two principles: the principle of full and open disclosure in civil litigation, balanced against the principle that estates should not be subject to challenges without the challenger raising an initial suspicion of invalidity. There is a two-step procedure for an application to challenge a will on the basis of testamentary incapacity: first, a chambers hearing to determine if there is sufficient merit in the challenge to warrant a trial; and second, a trial to determine the issue itself (*Vout v Hay*, [1995] 2 SCR 876; *Dieno Estate v Dieno Estate* (1996), 147 Sask R 14 (QL)

(QB)). The chambers judge summarily considers the evidence that tends to negate testamentary capacity along with evidence confirming testamentary capacity. Here, the court stated that the case management judge would hear the plaintiff's application to adduce evidence to call into question the validity of the will, and the case management judge would have broad discretion to determine the merits of the plaintiff's application. Permitting challengers to obtain intrusive production before meeting any evidentiary threshold would defeat the purpose of the two-stage requirement. The court accepted that the deceased also had a privacy interest in his confidential medical history. It was uncontradicted that the deceased did not want the plaintiff to know about his medical condition.

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***Arborfield (Rural Municipality) v North East School Division*, 2023 SKKB 178**

Morrall, 2023-08-24 (KB23169)

Administrative Law - Duty of Fairness - Breach
Administrative Law - Education - Schools
Civil Procedure - Interlocutory Injunction
Evidence - Affidavits - Admissibility
Injunction - Interim - Requirements
Injunction - Interlocutory - Requirements

The applicant plaintiffs, a rural municipality, a town and an individual, applied for an interim injunction to stop the respondent school board from no longer offering grades 7 to 12 pending the determination of a judicial review of the school board's decision. Affidavit evidence was filed regarding whether notices were posted and the effect of the closure on students and the community. The plaintiffs had provided the required undertaking to pay damages that may be incurred by the respondent if the injunction was granted. The chambers judge considered: 1) should parts of one affidavit be struck; 2) did the plaintiffs have a strong *prima facie* case; 3) had the plaintiffs demonstrated a meaningful risk of irreparable harm if the injunction were not granted; and 4) what was the balance of convenience between the parties?
HELD: The plaintiff's application for an interlocutory injunction was dismissed, with no order of costs. 1) The plaintiffs applied to strike parts of the affidavit filed by the respondent school board, pursuant to Rule 13-30 of *The Queen's Bench Rules*. In interlocutory applications, the court may admit evidence on information and belief if the source is disclosed. Reports from the principal were provided directly to the affiant and not appended for the truth of the report's contents. Affiant opinions were participant expert evidence and expert notice requirements did not apply. Affidavit evidence about what "some families" prefer was struck as speculative and lacking a proper foundation. 2) The interim injunction involved a public authority representing the public interest, and therefore a higher threshold applied to the first branch of the injunction test. The plaintiffs needed to demonstrate a strong *prima facie* case and not just a serious issue to be tried in the judicial review. The plaintiffs alleged deficiencies in the notice requirements and in the board and committee composition. The Regulations under *The Education Act, 1995* specified the notice and decision-maker composition requirements. Analogous school closure cases decided under the previous legislation continued to

have precedential value. The board clearly did not comply with the notice and committee composition requirements. Considering the relevant factors, the degree of procedural fairness required was not high. The notice provided imperfectly complied with the procedures in the regulations, but notice was provided and input received through modern and more effective methods than the required procedures. The legislation did not contain a provision that noncompliance would nullify the process. There was no substantive evidence of any prejudice caused by noncompliance with formal procedures. While the plaintiff did raise a serious issue to be tried, it was not a strong prima facie case. 3) There was no meaningful risk of irreparable harm in the increased bus time and less time for extracurricular activities. Potential losses to property values and businesses were compensable through damages. 4) The board, a public authority, was not required to wait for the determination of the judicial review before taking steps to implement the decision. Arrangements for affected students to attend school in a neighbouring community were complete. No affected student provided evidence. Inconvenience to families and business owners did not outweigh the impact on teachers. Although there was some potential the secondary school could reopen at a future time, the criteria for an injunction were not present.

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***Gilchrist v Gilchrist*, 2023 SKKB 187**

Currie, 2023-09-06 (KB23176)

Statutes - Interpretation - *Intestate Succession Act, 2019*, Section 8, Section 13
Wills and Estates - Beneficiaries
Wills and Estates - Costs - Solicitor and Client Costs

The executor, G., applied for an order to divide the testator’s estate residue equally between the executor and L., with no part going to W. The deceased, the executor, L. and W. were all siblings. W. had been convicted of indecently assaulting the testator. W. denied the assaults. W. was not named as a beneficiary in the will. The will provided specific bequests to the executor and L., with the residue to the testator’s parents. The parents predeceased the testator. There was no other provision relating to the residue. The testator had no contact with W. during her adult life, and she told L. she wanted to amend her will to leave the residue to the executor and L. but died before the will was amended. Sections 8 and 13 of *The Intestate Succession Act, 2019* state that a portion of the estate not disposed of by will shall be distributed as if the testator died intestate, and if the intestate had no spouse of descendant, the estate shall be distributed equally to the parents or siblings if no surviving parent. The court considered how to distribute the estate residue.
HELD: The residue fell under the provisions of *The Intestate Succession Act, 2019*, which requires the residue be distributed among the descendants of the parents. The court interprets and gives effect to the intention of the testator, as expressed by the language of the will, at the time the will was executed. The court must interpret the will the testator wrote, and not what the testator might have written if she had considered her parents dying before her. There was no testamentary intention relating to an alternate residual beneficiary for the court to ascertain. It was appropriate for the executor to bring the application, and appropriate for the estate to pay solicitor and client costs of each party.

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***Schmidt v Schmidt*, 2023 SKKB 188**

Goebel, 2023-09-08 (KB23177)

Family Law - Costs
Civil Procedure - *Queen's Bench Rules*, Rule 15-96

The petitioner father applied for a hearing to determine costs. The trial judge stated that given the mixed success, the judge was not inclined to make an award of costs, but either party could apply if they wished to pursue a hearing on costs. The court considered what costs, if any, should be ordered.
HELD: No costs were ordered in relation to the trial or the application for costs. The trial focused on parenting issues which, while important to the parties, were not legally significant or complex. No costs were included relating to claims resolved by consent. Both parties were represented by counsel and the consent judgment did not address costs. Mixed success does not equal costs in the cause. The petitioner was marginally more successful than the respondent compared to the positions each party advanced at trial. The petitioner had served a formal offer in accordance with Part 4 of *The Queen's Bench Act, 1998* before trial, as an effort to resolve all matters without trial. The issues did not allow a side-by-side comparison of success about whether the offer was more favourable than the judgment. Enhanced costs were not appropriate. Jurisprudence recognizes a departure in family law from the presumption that a successful party is entitled to costs. Neither party filed sufficient evidence to allow the court to consider a hardship claim.

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***Hunt Estate, Re*, 2023 SKKB 190**

Mitchell, 2023-09-12 (KB23178)

Wills and Estates - Executor

The applicant sought to rescind her renunciation of an appointment as co-executor of her mother's estate. The testator had appointed her two children, the applicant and the respondent, as co-executors. The applicant formally renounced her co-executorship. She changed her mind before any grant of probate issued. The respondent opposed the application. The Court considered whether the applicant should be allowed to rescind her renunciation of the appointment as co-executor.
HELD: The application was granted. Few cases address the question of when an executor may rescind a renunciation. Apparent animosity between the applicant and respondent could impede their joint administration of the estate. Because no grant of probate

had been made, it was permissible for an executor to rescind an earlier renunciation. Allowing the applicant to continue as a co-executor accorded with the testator's wishes as set out in the will. The application was reasonably justified, and the respondent's response was reasonable. No costs were ordered.

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***Mpofu v Mpofu*, 2023 SKKB 192**

Goebel, 2023-09-18 (KB23186)

Family Law - Spousal Support - Variation
Statutes - Interpretation - *Divorce Act*, Section 17

The parties separated after 30 years of marriage. Both worked for the Saskatchewan Health Authority, the husband as a pediatric oncologist and the wife as a midwife. The wife initially postponed her career as a midwife in order to relocate for the husband's career but had worked for the past 16 years in her field. After the separation, she started her own lucrative midwifery business. An interim support order directed that the husband pay $10,000 in monthly spousal support. There was no debate that the wife was entitled to interim spousal support given the difference in their incomes. Later, the court granted a consent divorce judgment which incorporated the terms of the parties' settlement on spousal support. The husband continued to pay $10,000 in monthly spousal support with no set duration, plus a lump sum for retroactive spousal support. The judgment stated that should either party retire, that fact would constitute a material change in circumstances, but the reasonableness of the retirement would remain a live issue. In 2022, the husband retired at age 63 after working for 38 years. He provided advance written notice to the wife of his intention to retire and requested that spousal support terminate on a specified date. The wife rejected the proposal. The husband brought an application under s. 17 of the *Divorce Act* to vary the judgment, requesting that spousal support be terminated. The court determined: 1) whether the husband's retirement constituted a material change in circumstances; and 2) if so, whether the wife had an ongoing entitlement to spousal support.
HELD: The court granted the husband's application to vary the judgment relating to spousal support. The court found that the husband's retirement was reasonable and constituted a material change in circumstances. The non-compensatory and compensatory objectives of the original support award had been satisfied: there was no ongoing entitlement to spousal support. 1) The spousal support judgment explicitly stated that the retirement of either party would constitute a material change of circumstance. The wife did not disagree that there had been a material change in circumstance as a result of the retirement. The court outlined the two-part test associated with s. 17: a) whether there had been a material change in circumstances since the original judgment was granted; and b) if the first stage had been met, determining an appropriate outcome considering the legal principles and objectives. Here, retirement was the sole basis for the change in circumstances, so the court had to determine whether the retirement was "reasonable." Factors for making such a determination included: the age of the retiring person, whether the retirement was voluntary or forced, the length of the marriage, the length of time the support order was in effect, the circumstances at the date of the order, the nature of the payor spouse's work, whether the recipient spouse had also retired, and whether there had been fair warning given

to the recipient spouse of the intention to retire. The wife argued that the husband's voluntary retirement before age 65 was *prima facie* unreasonable. In the alternative, she requested that income be imputed to the husband at his pre-retirement income level for two more years. The court was satisfied that the husband's decision to voluntarily retire at the age of 63 after a "demanding and lengthy career" was reasonable. The last 25 years of his career involved treating children diagnosed with cancer. He deposed to be suffering from general burnout and exhaustion and had been treated for depression and hypertension. During the marriage, he discussed his plan to retire at age 62. There was no evidence to support a finding or even an inference that the husband chose to retire early to avoid paying spousal support. 2) The court went on to determine whether the recipient spouse had an ongoing entitlement to spousal support. The court concluded that the economic consequences of the marriage and its breakdown had been equitably shared by significant support paid and the property settlement, which included a substantial retirement fund. There was no ongoing financial need justifying the payment of support from post-separation assets or previously divided income generating assets. The wife had significant property holdings, a six-figure income and marginal debt.

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***Honeybadger Enterprises Ltd. v Bue*, 2023 SKKB 193**

Richmond, 2023-09-19 (KB23181)

Civil Procedure - Preservation Order
Statutes - Interpretation - *Enforcement of Money Judgments Act*, Section 5(5)

The plaintiff was a seller of cryptocurrency. The defendant authorized the plaintiff to debit his account at a credit union for the purchase of cryptocurrency and made a couple of purchases. Shortly afterwards, the defendant's email address was hacked, and a thief purporting to be the defendant purchased more cryptocurrency. The plaintiff claimed to be authorized to withdraw funds from the defendant's account pursuant to a pre-authorized debit agreement. The plaintiff delivered cryptocurrency into digital wallets, unlikely to be seen again. The defendant notified his credit union, which retrieved $240,000 from the plaintiff's accounts. Now, the plaintiff claimed it was entitled to that money because it followed instructions from someone it thought was the defendant. The main issue was who would bear the loss from the actions arising out of the theft. Here, the plaintiff sought an extension to its previous preservation orders regarding the $240,000 retrieved by the credit union. The plaintiff relied on s. 63(2) of *The Personal Property Security Act, 1993* and Rules 6-41 and 6-42 of *The Queen's Bench Rules*. The court noted that s. 5(5) of *The Enforcement of Money Judgments Act* (EMJA) should be considered. The court considered the elements in s. 5(5) of the EMJA in determining whether to grant the preservation order, including: 1) whether the court was satisfied that the action, if successful, would result in a judgment in favour of the plaintiff; 2) whether a judgment against the defendant was likely to be ineffective due to the defendant's dealings with the funds; and 3) whether the plaintiff would prosecute the action without delay.
HELD: The court was satisfied that the plaintiff should have the preservation order as requested, and therefore renewed the existing preservation order until further written agreement of the parties or court order. 1) The "if successful" part of the test was a low threshold to meet (*Arslan v Şekerbank T.A.Ş.*, 2016 SKCA 77). The court concluded that given the pleadings and the evidence tendered, the action was not groundless. 2) To obtain the preservation order, the plaintiff had to establish that enforcement of a judgment against the defendant was likely to be ineffective. The court noted that the EMJA completely displaced prior law. The court

was satisfied that the plaintiff established a *prima facie* case that enforcement was likely to be ineffective in whole or in part because it showed that the defendant intended to spend the funds, that he had been liquidating assets, and although he had land, it was likely to be subject to an exemption claim. 3) The plaintiff argued it would prosecute the action without delay and the court had no reason to doubt this.

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***101255595 Saskatchewan Ltd. v 101093860 Saskatchewan Ltd.*, 2023 SKKB 194**

Robertson, 2023-09-19 (KB23182)

Civil Procedure - Summary Judgment - Destined to Fail
Torts - Actions in Tort - Negligence - Proximity

The engineering firm (defendants) applied for summary judgment to dismiss the action against them. They argued that the claim against them was destined to fail because there was no proximity between them and the plaintiff to support a cause of action. The facts involved the sale of an old apartment building in Regina. The City of Regina issued an order to the owners of the apartment building because of concerns about the building's foundation. The order required repairs to the building and the submission of an engineer's report confirming that the building was structurally sound prior to starting construction work. The order was registered against title to the building. The building owners had an inspection done, which recommended monitoring the foundation to record movement over time. The building owner retained a realtor to try and sell the building and retained the defendants to provide a structural assessment and report on the general condition of the building and recommendations for maintenance. The defendants were not told that the report would be used in the marketing of the building, nor were they told about the previous city order or previous reports. The defendants conducted a visual inspection of the building during a walk-through. They included a disclaimer attached to their report. The plaintiff made an offer to purchase the building, and the realtor provided the defendant's report, including the disclaimer clause. The plaintiff claimed that the defendants were negligent in failing to detect and report foundation problems with the building when they provided the report on which the plaintiff relied in deciding whether to purchase the building. The defendants denied that they were negligent but argued that it did not matter, because there was no duty of care owed to the plaintiffs to support a claim in negligence. The court determined: 1) whether the matter was suitable for summary judgment; and 2) if so, whether the claim against the defendants was destined to fail.
HELD: The court dismissed the claims against the defendants. The claims were destined to fail because there was insufficient proximity to create a duty of care, and the disclaimer clause properly applied to bar the claims. 1) The court found that the materials filed provided the necessary factual foundation to determine the questions of law about proximity in a tort claim and the effect of a disclaimer clause. There was no genuine issue requiring a trial. 2) There was insufficient proximity between the parties to support a duty of care, so the negligence claim was destined to fail. To establish a claim in negligence, the plaintiff had to prove that the defendant owed a duty of care to the plaintiff, the defendant breached that duty of care, and the breach was the proximate cause of

damage or injury to the plaintiff, which was compensable in damages. There could be no duty of care here both because of a lack of proximity and because of the application of the disclaimer clause. Proximity is about whether the relationship between the parties was sufficiently close to justify a duty of care. The court agreed that there was no “close and direct relationship” between the parties. The report by the defendants was commissioned by and paid for by the building owner for the owner’s own purposes. The defendants had no contact with the plaintiff or any of its principals. The defendants were not told about the use of the report in the proposed marketing or sale of the building or about the sharing of the report. The court rejected the plaintiff’s argument that this was a dangerous building case where the duty of care could be extended to third parties. The court concluded that an express disclaimer clause could be an effective bar against a claim by a third party who relied upon the report with knowledge of the disclaimer. The disclaimer clause was clear and unambiguous, and stated that the report was prepared for the client on the basis of information known at the time. It stated that any reliance by third parties was done at their own risk. This was a standard clause.

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***McCulloch v Investigation Committee of the Saskatchewan Registered Nurses Association*, 2023 SKKB 203**

Layh, 2023-09-25 (KB23193)

Administrative Law - Appeal - Professional Misconduct
Professional Discipline Decision - Appeal - Standard of Review

The Discipline Committee of the Saskatchewan Registered Nurses Association (SRNA) found the appellant guilty of eight professional misconduct charges involving failing to properly account for missing narcotics, bringing contraband items into the facility, completing an inmate’s puzzle in his absence knowing that it would be upsetting to the patient, and providing canteen privileges to patients who had lost their privileges. The appellant worked at the Regional Psychiatric Centre (RPC) and at the Saskatchewan Hospital. During her time at the RPC, she was involved in a serious hostage taking, after which she was on leave and diagnosed with post-traumatic stress disorder (PTSD). The College of Registered Nurses of Saskatchewan suspended the appellant until she provided proof that her mental health had been stable for at least 12 months, that she had complied with treatment recommendations regarding her mental health, and that she had undergone a neuropsychological assessment of her cognitive abilities and cognitive functioning at her own expense. Upon reinstatement, the appellant was subject to supervision requirements. Costs in the amount of $50,000 were imposed. The court determined whether the discipline committee erred in law, or in mixed findings of law and fact, or in findings of fact, as well as whether the penalty was reasonable. The court organized its findings by determining whether there was an error in finding the appellant guilty of: 1) providing Q-tips to patients; 2) completing a patient’s puzzle knowing that it would upset the patient; 3) charges involving wastage and failure to properly account for narcotics; and 4) providing canteen products to patients who had lost those privileges. The court also determined: 5) whether the appellant’s mental health diagnosis provided a full defence to the charges.
HELD: The court quashed two of the discipline committee’s findings on professional conduct (providing Q-tips and completing the

puzzle) and left the remaining findings of guilt undisturbed. The court did not find that there was an error in the committee declining to find a defence in the appellant's mental health diagnosis. The court remitted the issue of determining an appropriate penalty back to the committee. The court cited *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 for the appropriate appellate standard of review from decisions by administrative tribunals, which was correctness for questions of law and palpable and overriding error for questions of fact and of mixed fact and law. The court set out the general principle that disciplinary proceedings are regulatory offences and generally are strict liability offences. In certain circumstances, though, an allegation of professional misconduct may require proof of intention. Where an offence is a strict liability offence, once the wrongful or unprofessional act or omission has been proved, then the alleged wrongdoer may establish a reasonable excuse of having exercised due diligence or having had a reasonable belief in a mistaken set of facts. The respondents cited *Phillips v Law Society of Saskatchewan*, 2021 SKCA 16 for the holding that if a charge (not necessarily the statute) is worded in a manner that hinges on a finding of intention, then intention must be proven before guilt is established. 1) The court quashed the discipline committee's finding of guilt respecting the charge of providing Q-tips to patients because the evidence established that the appellant exercised due diligence. The court found that this was a strict liability offence, declining to accept the appellant's argument that it was a *mens rea* offence. However, the court found that the discipline committee overlooked and misapprehended critical evidence that would have gone to the question of whether the appellant exercised due diligence under the circumstances. The appellant testified that she brought the Q-tips to the unit to clean the med cart and that she gave "one" Q-tip to a patient who then used it under supervision and gave the Q-tip back to the appellant once he was done using it, and that the appellant then put the used Q-tip in the sharps disposal. The court found that the appellant exercised due diligence. 2) The discipline committee erred when it found that the charge of completing the patient's puzzle knowing that it would upset the patient created a strict liability offence. The court set aside this finding of guilt. The charge's use of "knowing that it would be upsetting to the patient" brought in a *mens rea* element. This charge required proof of the appellant's intention – that she knew that completing the puzzle would be upsetting to the patient. There was conflicting testimony on which patient was involved, and the intention behind completing the puzzle. The court found that the discipline committee fell short in its decision because relevant testimony was not mentioned, inaccurate testimony was not identified, and contradictory testimony was not resolved. The court was unable to determine the findings of fact underpinning the committee's decision and to understand the rationale for that decision. The court set out specific examples of professional misconduct enumerated in s. 26 of *The Registered Nurses Act, 1988* (RNA) including verbally or physically abusing a client, misappropriating personal property, abandoning a client, and misappropriating drugs. The court added that allowing a patient to use one Q-tip or for potentially upsetting a patient when completing a jigsaw puzzle was not the type of conduct contemplated by s. 26 of the RNA. 3) The court upheld the findings of guilt for two charges related to missing narcotics and the appellant's failure to provide the proper documentation for wastage. The appellant had to prove that the committee made a palpable and overriding error in that it did not consider her testimony or make appropriate credibility assessments. The court dismissed this ground of appeal because the discipline committee specifically and repeatedly addressed the appellant's testimony. The appellant worked in a highly secure forensic psychiatric centre, housing 178 offenders, some in maximum security. While she did not misappropriate drugs, the appellant admitted in testimony that she made a lot of errors in judgment in handling the narcotics. The court found no fault with the committee's finding that the appellant's handling of the narcotics and her suspect explanation constituted professional misconduct. 4) The court upheld the findings of guilt related to four charges where the appellant provided canteen privileges to two patients who had lost these privileges. There was evidence that the appellant hid canteen products in a glove she had given to a patient. Notes in the patient's chart indicated that he had lost his privileges. The appellant argued that her conduct was too trivial to support a finding of professional misconduct. The court stated that while breaching rules involving the distribution of canteen items would be trivial in many circumstances, in the context of Saskatchewan Hospital and the evidence indicating that the appellant deliberately defied the rules, it found that the committee's

decision that the conduct constituted professional misconduct could not be disturbed on appeal. 5) The court did not accept the appellant's argumentthat the committee failed to properly consider her mental health as a full defence to the findings of professional misconduct. The committee accepted that a PTSD diagnosis could affect the appellant's general performance as a nurse but found that there was no nexus or connection between the appellant's acts and omissions and her mental health. The court found that the committee did not make a legal error in coming to this conclusion.

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***M.R. v A.M.*, 2023 SKKB 210**

Scherman, 2023-10-04 (KB23199)

Children's Law Act, 2020, Section 10 - Family Violence
Statutes - Interpretation - *Divorce Act*, Section 16

The petitioner filed a petition for divorce and also sought relief regarding parenting arrangements and family property. He also filed a notice of application seeking relief related to interim parenting of the children. The respondent left the family home with their five children without telling the petitioner that she was leaving or where she was moving. The respondent's answer and counter-petition opposed the petitioner's application, stating that the petitioner had been charged with sexual assault, sexual interference and invitation to sexual touching of the two eldest children. The Provincial Court ordered a no-contact order with these children. The petitioner denied the allegations, and modified the relief requested from the court. He sought a parenting assessment for both parents, access to the youngest three children including daily access by phone, and parenting time during the week, alternating weekends and on a week-on/week-off basis at an appropriate time. He sought supervised parenting time with the two eldest children. He agreed to the child support amounts set out by the respondent. The court determined whether family violence had in fact occurred or whether the allegations were sufficiently credible to give rise to a level of risk to the respondent and to the children's safety that it affected their best interests.
HELD: The court weighed all evidence to find that the allegations made were sufficiently credible to give rise to a level of risk to the children's safety that affected their best interests. The court cited *J.B. v J.M.*, 2023 SKCA 24 (*J.B.*) for an analysis of allegations of family violence under s. 10 of *The Children's Law Act, 2020*. The chambers judge must be able to conclude that family violence has in fact occurred or, at the very least, that such allegations are sufficiently credible to give rise to a level of risk to the child's safety that it bears upon their best interests. To do so, the court must "assess the totality of the evidence with care and objectivity to determine whether the allegations should be accepted as reliable, true, or probably so, or whether they are based on speculation, conjecture, suspicion or unreliable evidence such that they should be rejected" (*J.B.*). The court found the respondent's evidence to be more credible than the petitioner's and found that it was reliably corroborated by three other affidavits of family violence and controlling behaviour. The respondent's evidence was more appropriately factually based, focused and reliable than that of the petitioner. The petitioner's affidavits in support included opinion evidence and were less reliable. The two oldest children provided statements to police and the petitioner was charged with sexual offences as a result. The court concluded it would not be in the two older children's best interests to order parenting time or access at this time, given the fact that they made statements to police about

the alleged sexual assaults. For the three younger children, the court found that some level of parenting time while supervised by professional staff was in their best interests. The court sought further information from counsel on what kinds of services were available in the area to supervise visits. The court ordered an interim restraining order between the petitioner and respondent. The court waived the requirement to participate in family dispute resolution. The court ordered that the respondent have sole interim decision-making and primary care of all of the children, and that the petitioner pay monthly child support.

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