SCC File No.: 39533

**IN THE SUPREME COURT OF CANADA**
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

**ASHLEY SUZANNE BARENDREGT**

Appellant
(Respondent)

- and -

**GEOFF BRADLEY GREBLIUNAS**

Respondent
(Appellant)

# FACTUM OF THE APPELLANT
# ASHLEY SUZANNE BARENDREGT

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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## PART I – OVERVIEW AND STATEMENT OF FACTS

### A. Overview

[1] Should appellate courts draw a distinction between the admissibility of "fresh" and "new" evidence? What test applies to the admission of such evidence on appeal from custody decisions? When appellate courts admit such evidence, what deference is to be applied to the trial judgment? These are the central questions raised by this appeal.

[2] At trial, the Appellant, Ashley Suzanne Barendregt, was granted primary residence of her two children and permitted to relocate with them to Telkwa, British Columbia. The Court of Appeal admitted new evidence and reversed the residence decision of the trial judge, holding the children should be in joint residence in Kelowna.

[3] The Court of Appeal drew a distinction between "fresh" and "new" evidence: "[New evidence] is evidence that was not in existence at the time of trial but has arisen as a result of events or matters that transpired subsequent to trial. [Fresh evidence] is evidence that existed at the time of the trial but was not adduced at that time".[1] The Court of Appeal held that different tests apply to the admission of these two types of evidence.

[4] The leading decision on conditions for admissibility of fresh and new evidence remains this Court's decision in *Palmer v the Queen*.[2] The *Palmer* test is slightly more elastic[3] when applied to cases involving a child's best interests. Confusion and uncertainty have ensued as a result of this more flexible application, a situation that can cause emotional turmoil for those involved in custody cases, particularly children.

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[1] *Barendregt v Grebliunas*, 2021 BCCA 11 at para 29 [emphasis added].
[2] *Palmer v The Queen*, [1980] 1 SCR 759.
[3] *Luney v Luney*, 2007 BCCA 567 at para 31; *Jens v Jens*, 2008 BCCA 392 at para 30; *Stav v Stav*, 2012 BCCA 154 at para 31. The term "relaxed" is used in *Riel v Riel*, 2017 SKCA 74 at para 16 and *Bačić v Ivakić*, 2017 SKCA 23 at para 24. The term "flexible" is used in *Barendregt v Grebliunas* 2021 BCCA 11 at para 47 and *Catholic Children's Aid Society of Metropolitan Toronto v M(C)*, [1994] 2 SCR 165 at 188.

[5] In this case, the Court of Appeal (Voith, Newbury and DeWitt-Van Oosten JJA) stated that the *Palmer* conditions only apply to fresh evidence and not to new evidence. This distinction is neither principled nor consistent with the case law of British Columbia and that of other provinces (for example, the appellate courts of Alberta, Saskatchewan, and Ontario have subjected the admissibility of both categories of evidence to the *Palmer* test or to a modified *Palmer*-like conditions).

[6] The test applied by the Court of Appeal in the case at bar calls into question the finality of trial decisions, with distressing consequences. Moreover, the approach of the Court of Appeal highlights the lack of uniformity across the country as to the admissibility of fresh and new evidence in family law cases. Guidance from this Court is required in order to reduce uncertainty and to safeguard the role of trial courts in assessing and protecting the interests of children.

[7] The Appellant submits the following: Although the *Palmer* conditions are applied with greater flexibility in custody cases, this flexibility must be clearly circumscribed to ensure reasonable finality in cases involving children. In the absence of such limits, custody arrangements will always be subject to reassessments by appellate courts admitting fresh or new evidence. Further, there is no meaningful distinction between the admissibility of "fresh" or "new" evidence: the *Palmer* test applies to both, with necessary modifications.

## B. Background facts

[8] The Appellant, Ashley Suzanne Barendregt, and the Respondent, Geoff Bradley Grebliunas, met in Smithers, British Columbia, in 2011.[4] They moved to Kelowna a year later and were married in 2013.[5] Their children, K. and M., were born in 2014 and 2016 respectively, making them now 7 and 5 years old.[6]

[9] The parties separated in 2018, after the Respondent physically assaulted the Appellant. The Appellant left with both children that night to stay with her parents in

[4] *Barendregt v Grebliunas*, 2019 BCSC 2192 at para 3.
[5] *Barendregt v Grebliunas*, 2019 BCSC 2192 at para 4.
[6] *Barendregt v Grebliunas*, 2019 BCSC 2192 at para 9.

Telkwa, British Columbia.[7] The Appellant brought an action under the *Divorce Act*[8] and the *Family Law Act*.[9] During this time, the Respondent continued to live in the family home located in Kelowna, that the parties had purchased in 2013.[10]

### C. The British Columbia Supreme Court held that it is in the best interests of the children that the Appellant be awarded primary residence and be granted leave to relocate with the children

[10] In his trial decision, Justice Saunders made orders regarding, *inter alia*, the primary residence of the two children.[11] After a nine-day hearing and weighing the evidence of eight witnesses and one expert, Justice Saunders ordered that it is in the best interests of K. and M. that the Appellant be awarded primary residence of the children and be granted leave to relocate with them 1000 km away (in Telkwa) for various reasons which go beyond the parties' financial positions.[12] The children have since resided with the Appellant 1000 km away from the Respondent, with the exception of some parenting time with the Respondent (in Kelowna) from time to time, pursuant to the trial judge's order.[13]

[11] There were two central considerations in Justice Saunders' analysis of the children's best interests: a) the parties' financial situation, particularly regarding the family home in Kelowna, and b) the relationship between the parties.[14] Justice Saunders took care to emphasise that he considered the first issue "the less significant of the two".[15] In other words, he considered the relationship between the parties to be the most significant consideration in his analysis.

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[7] *Barendregt v Grebliunas*, 2019 BCSC 2192 at paras 11, 41(b).
[8] *Divorce Act*, RSC 1985, c 3 (2nd Supp).
[9] *Family Law Act*, SBC 2011, c 25.
[10] *Barendregt v Grebliunas*, 2019 BCSC 2192 at para 13.
[11] *Barendregt v Grebliunas*, 2019 BCSC 2192.
[12] *Barendregt v Grebliunas*, 2019 BCSC 2192 at para 49.
[13] *Barendregt v Grebliunas*, 2019 BCSC 2192 at para 53.
[14] *Barendregt v Grebliunas*, 2019 BCSC 2192 at paras 30-31, 41.
[15] *Barendregt v Grebliunas*, 2019 BCSC 2192 at para 31.

[12] Regarding the parties' financial situation, Justice Saunders' findings include the following:

> [31] The first, although the less significant of the two, is the parties' financial situation, particularly as it pertains to the house. […]
>
> […]
>
> [40] In summary, the parties' financial position means that the possibility of Mr. Grebliunas being able to remain in the house, and possibly even being able to remain in West Kelowna, are less than certain.[16]

[13] Regarding the second, most "significant" consideration, Justice Saunders analysed in detail the relationship between the parties and its implications on the children,[17] ultimately making clear, detailed and considered[18] findings of fact:

> [10] I also accept Ms. Barendregt's evidence that Mr. Grebliunas was controlling as to financial issues, questioning her and demanding that she obtain his permission over expenditures and even over her activities, often with abusive language communicated by text messages. Ms. Barendregt's mother and sister testified as to what they observed of the parties' interactions on occasions when they visited the couple, and as to changes in Ms. Barendregt's personality after she began living with Mr. Grebliunas. On the basis of this evidence, I find that Ms. Barendregt was subject to Mr. Grebliunas' overbearing personality during their marriage, and that there is a significant possibility that she suffered from some degree of emotional abuse.
>
> […]
>
> [41] The second issue I find particularly significant is the relationship between the parties, and the implications it has for the children. Although Ms. Barendregt expressed hope that she and Mr. Grebliunas will be able to communicate and work together to promote the children's best interests, I am much less optimistic. I say this for several reasons.

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[16] *Barendregt v Grebliunas*, 2019 BCSC 2192 at paras 31, 40.
[17] *Barendregt v Grebliunas*, 2019 BCSC 2192 at paras 41-50.
[18] *Barendregt v Grebliunas*, 2019 BCSC 2192 at para 28 [emphasis added]: "As to those specific matters of past conduct that I do find relevant, and where I am sufficiently certain to make findings in the face of conflicting testimony, I was in general far more persuaded by the testimony of Ms. Barendregt."

a) As I have described, there was friction during their marriage: likely some element at least of one personality overbearing the other, and possibly some degree of emotional abuse;

b) Given her demeanour while testifying, I largely accept Ms. Barendregt's account of being assaulted by Mr. Grebliunas during the argument that precipitated the separation. At trial she found it extremely upsetting to give her evidence of the assault. It is likely she was assaulted and traumatized emotionally. Further, there is in evidence a medical record of her attendance at the Bulkley Valley District Hospital on November 16, 2018, for assessment of bruising over her left eye. Mr. Grebliunas' evidence of the argument did not account for this bruising, and I do not accept his counsel's argument in closing submissions that the bruising may simply have been caused by them "wrestling". Mr. Grebliunas' continuing blame of Ms. Barendregt for the argument, his portrayal of her as the aggressor, and his insistence that her story of being assaulted was a fiction concocted by Ms. Barendregt and her mother to provide a pretext for the separation, seem likely to be an ongoing source of acrimony;

c) In support of his application to have the boys returned to his care, Mr. Grebliunas swore an affidavit dated January 28, 2019, attached to which were letters – one co-signed by his parents, one from his aunt, and three from his friends who were witnesses at trial – attesting to his character; the letters from his parents, and one from a friend, are entitled "Character Reference". The letters are suspiciously similar in their content, which in each letter was more or less equal parts character reference for Mr. Grebliunas, and criticism of Ms. Barendregt. Mr. Grebliunas Sr. and Mr. Grebliunas' aunt acknowledged in cross-examination that some of the content of their letters, in particular passages critical of Ms. Barendregt, does not in fact reflect their own personal knowledge, but is information provided to them by Mr. Grebliunas. Compounding this deception, Mr. Grebliunas described these letters in his affidavit as "Will Say" statements, falsely implying that they contain admissible evidence the letter writers would be able to give under oath; and

d) Mr. Grebliunas attached to his June 14, 2019 affidavit, filed with the court, an undated nude "selfie" that Ms. Barendregt texted to him in March. Ms. Barendregt testified – understandably – that she was humiliated by the photo being put in court documents. Given her demeanour as she testified concerning this, I have no hesitation in accepting that this was so. She said that after she learned that Mr. Grebliunas had done this, she had no doubt that she needed out of the relationship. This violation of Ms. Barendregt's privacy served no purpose but to humiliate her. It was abusive, and profoundly offensive.

> [42] There is therefore, I find, compelling evidence of Mr. Grebliunas' continuing animosity towards Ms. Barendregt. Three concerns arise from this evidence:
>
> > a) First, I find it more likely that Ms. Barendregt will work to promote in the children a positive attitude toward their father, than the converse. This factor weighs strongly in favour of the children's best interests being promoted through Ms. Barendregt having primary residence;
> >
> > b) Second, if the parties remain in close proximity, there is a greater risk – difficult, if not impossible, to quantify, but still significant – of continuing conflict between the parties spilling over and directly impacting the children; and
> >
> > c) Third, even if the parties were never to engage in open conflict or derogatory behaviour in the presence of the children, I find it doubtful that they will be able, in the near future at least, to surmount the emotional issues between them and work co-operatively to promote the children's best interests, which optimally is one of the desired outcomes of a shared parenting structure.[19]

[14] Months later, Justice Baker of the British Columbia Supreme Court (in her interim order following the trial judgment) noted that communications from the Respondent to the Appellant were "consistent with the finding that […] Ms. Barendregt was subject to [the Respondent's] overbearing personality during their marriage."[20] Justice Baker found "the email and text messages between them were evidence of his desire to control her", and "his positions to be extremely unreasonable in the circumstances."[21]

## D. The British Columbia Court of Appeal admitted new evidence and reversed the trial judge's decision regarding the best interests and residence of the children, finding that the children should relocate with the Respondent

[15] Less than 10 months later, Justice Voith, writing for Justices Newbury and DeWitt-Van Oosten, admitted new evidence, allowed the appeal,[22] reversed Justice

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[19] *Barendregt v Grebliunas*, 2019 BCSC 2192 at paras 10, 41-42 [emphasis added].
[20] Justice Baker's Oral Reasons for Judgment, in Chambers, March 13, 2020 at para 1 [emphasis added] **[Appellant's Record, Tab 1B]**.
[21] Justice Baker's Oral Reasons for Judgment, in Chambers, March 13, 2020 at para 2 [emphasis added] **[Appellant's Record, Tab 1B]**.
[22] *Barendregt v Grebliunas*, 2021 BCCA 11.

Saunders' decision regarding the best interests and residence of the children, and found that they should relocate more than 1000 km away to Kelowna to live under shared parenting. The Court of Appeal underlined that the standard of review is deferential,[23] noting that "it is not for an appellate court to re-weigh the evidence or to interfere on the basis that the appellate court would give more weight than the trial judge did to one factor or another – or, in the words of the Court in *Hickey*, that it would have 'balanced the factors differently'",[24] However, the Court proceeded in doing just that: it reweighed the evidence and balanced the factors differently.

[16] The Court of Appeal's decision was triggered by new evidence, announced at the conclusion of hearing the appeal of the Respondent.[25] Counsel for the Respondent stated that she had just received material indicating that the family home had been refinanced by the Respondent and that he had purchased the Appellant's interest in the family home in order to fulfill the trial judge's order.[26] The Court of Appeal allowed the Respondent's new counsel (another firm had acted for him at trial) to file this material and make a new evidence application.[27] The Court of Appeal stated:

> [26] Mr. Grebliunas filed an appeal. That appeal was heard. At the conclusion of the hearing of the appeal, counsel for Mr. Grebliunas stated that she had just received material indicating that the Family Home had been refinanced by Mr. Grebliunas and that he had purchased Ms. Barendregt's interest in the Family Home. The Court permitted counsel for Mr. Grebliunas to file these materials and to make a new evidence application. It also permitted counsel for Ms. Barendregt the opportunity to respond to that application.
>
> [27] In his new evidence affidavit, Mr. Grebliunas deposes:
>
> > 2. In order to comply with the order of the trial judge I took steps to pay out the respondent for her interest in the family property, including our former family home in West Kelowna.
> >
> > 3. I sold a one-half interest in the home to my parents, Kelly and Heather Grebliunas, who now hold one-half of the home in joint tenancy. The three

[23] *Barendregt v Grebliunas*, 2021 BCCA 11 at para 49.
[24] *REQ v GJK*, 2012 BCCA 146 at para 33 [emphasis added].
[25] *Barendregt v Grebliunas*, 2021 BCCA 11 at para 26.
[26] *Barendregt v Grebliunas*, 2021 BCCA 11 at para 27.
[27] *Barendregt v Grebliunas*, 2021 BCCA 11 at para 26.

> of us refinanced the home and obtained a mortgage from the Royal Bank of Canada.
>
> 4. The completion and possession date for the transfer of the home was October 8, 2020.
>
> 5. As a result of the refinancing and thirty year amortization, my mortgage payment is reduced from $1,930 a month to $1,186 a month.
>
> 6. My parents also increased their personal line of credit by $100,000 to facilitate the completion of renovations on the home.
>
> 7. Since the trial date I have renovated the bathroom and the master bedroom. I've also contracted with Norelco to complete the kitchen renovation. Attached hereto and marked Exhibit A is a copy of the drawings from Norelco for the kitchen renovation.

> [28] Mr. Grebliunas attached a number of further documents to his affidavit. This included a copy of the RBC line of credit facility that his parents had obtained, documents that were relevant to the transfer of the Family Home between Mr. Grebliunas and his parents, the mortgage that had been obtained by Mr. Grebliunas and his parents, and the relevant Statement of Adjustments and Property Transfer Tax Form. It also included correspondence between counsel representing Mr. Grebliunas and Ms. Barendregt with respect to the agreement of the parties on the terms of the purchase of Ms. Barendregt's interest in the Family Home, as well as payment to her on account of her interest in a truck the parties had owned.[28]

[17] The Court of Appeal admitted the evidence and found that the financial situation as found by the trial judge had improved.[29] It noted that "[c]ircumstances which might permit the admission of new evidence include where the judge made assumptions about future events but new evidence establishes those assumptions to be incorrect."[30] The Court of Appeal then concluded that the trial judge's findings about the Appellant's need for assistance taking care of the children, about the ability of her parents to provide such assistance in Telkwa, and about the Respondent's past and future treatment of the Appellant, could no longer support the trial judge's decision.[31]

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[28] *Barendregt v Grebliunas*, 2021 BCCA 11 at paras 26-28 [emphasis added].
[29] *Barendregt v Grebliunas*, 2021 BCCA 11 at para 65.
[30] *Fotsch v Begin*, 2015 BCCA 403 at para 21.
[31] *Barendregt v Grebliunas*, 2021 BCCA 11 at paras 68-69.

[18] The Court of Appeal reweighed the evidence and factors considered by the trial judge with respect to the relationship between the parties, an issue unrelated to the new evidence admitted on appeal. The approach of the Court of Appeal is striking:

> [63] The introduction of new evidence and the ensuing reconsideration of the determination made by a trial judge is generally either based on the trial judge having misapprehended the evidence or because it is in the interests of justice to do so […].
>
> [64] In such circumstances, it is open to this Court to either make its own determination of the best interests of the children or to remit the matter to the trial court. […]
>
> [65] I have earlier said that the trial judge's ultimate conclusion was based on his concerns about the Family Home and other financial issues, together with his concerns over Mr. Grebliunas's interactions with Ms. Barendregt and her need for some support. The question becomes whether his findings continue to dictate a given result when one of two dominant considerations—albeit the lesser one—no longer applies to his analysis. This is not a question of reweighing the evidence that was before the trial judge. Rather it is a question of revisiting the parties' circumstances, bearing in mind the trial judge's remaining findings, and ascertaining what result would be in the best interests of the children.
>
> […]
>
> [69] There are several reasons that these remaining considerations, standing alone, are problematic and no longer support the ultimate result arrived at by the trial judge.
>
> [70] First, the trial judge's concerns about Mr. Grebliunas's behaviour towards Ms. Barendregt warrant some context. This context takes several forms. First, the proposition that Mr. Grebliunas's hostility towards Ms. Barendregt supported her moving to Telkwa was never argued by Ms. Barendregt at trial. Instead, her evidence was that the parties were getting along better than they had when they first separated. Even after the trial judge asked Mr. Grebliunas's counsel about this issue during his closing submissions, Ms. Barendregt's counsel, in his reply submissions, did not rely on the issue as a matter of any real concern.
>
> [71] I do not say that it was not open to the trial judge to make the findings he did. But the seriousness of the circumstances he addressed are attenuated by these realities. In particular, it is relevant that his dominant concern in support of Ms. Barendregt's move to Telkwa with the children was simply not an issue that Ms. Barendregt or her counsel were significantly concerned about at trial.
>
> [72] Furthermore, many of the issues the trial judge was concerned about had taken place in the past, and there was some support in the evidence for Ms.

> Barendregt's belief that the relationship between the parties was improving. The trial judge considered that Ms. Barendregt had been subject to Mr. Grebliunas's overbearing personality during the marriage and that there was "a significant possibility" that she had suffered from some degree of emotional abuse at that time. He referred to the alleged assault in November 2018, and he was inclined to accept Ms. Barendregt's evidence in relation to this issue. It was this alleged assault, a year before trial, that had caused the parties to separate. He referred to Mr. Grebliunas's false character statements made in late January 2019 and to the fact that an affidavit he made in June 2019 had included a nude selfie of Ms. Barendregt. He was also concerned about the continuing acrimony in Mr. Grebliunas's testimony during trial. I do not diminish the seriousness of these conclusions, but simply note that several of these events occurred at or around the time the parties separated. Furthermore, there was no evidence of any event involving the children, or taking place in the presence of the children, since the parties had separated a year earlier.[32]

[19] The Court of Appeal ultimately concluded that it was preferable that the children return to where their father lives in Kelowna, reversing the trial judge's conclusion that it was in the children's best interests that their primary residence be that of the Appellant, and that she be granted leave to relocate in Telkwa:

> [90] Accordingly, for the various principled reasons and practical considerations that I have described, I do not consider that the trial judge's concerns about the "relationship between the parties," or his concerns about Ms. Barendregt's need for some emotional support, outweigh the benefits to the children of remaining in Kelowna. Instead, I consider that the best interests of the children would be served with their primary residence being in Kelowna and with their being parented by both their parents.[33]

## E. This Court stayed the execution of the Court of Appeal's order

[20] Less than 2 weeks after the Court of Appeal's decision, the Appellant filed a notice of application for leave to appeal and a motion to stay the execution of the Court of Appeal's judgment because the Respondent was hastily seeking its enforcement.[34]

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[32] *Barendregt v Grebliunas*, 2021 BCCA 11 at paras 63-65, 69-72 [emphasis added].
[33] *Barendregt v Grebliunas*, 2021 BCCA 11 at para 90 [emphasis added].
[34] Notice of motion to a judge to stay the order of the British Columbia Court of Appeal on an expedited basis, January 26, 2021 at para 16 **[Appellant's Record, Tab 2C]**; Affidavit of Ashley Barendregt in support of the motion to stay an order of the British Columbia Court of Appeal, January 25, 2021 at para 21 **[Appellant's Record, Tab 2D]**.

[21] In February 2021, Justice Karakatsanis granted the Appellant's motion for a stay of execution.

## PART II – STATEMENT OF QUESTIONS IN ISSUE

[22] This appeal raises the following issues:

(A) How does the *Palmer* test to admit fresh and new evidence apply in the "slightly more elastic" conditions of custody cases? What is the impact of the admission of fresh or new evidence on deference owed to a trial judge's custody decision?

(B) Are different conditions applicable to "fresh" as opposed to "new" evidence?

## PART III – STATEMENT OF ARGUMENT

### A. Standard of Review

[23] Both the proper application of the *Palmer* conditions and whether there exists a distinction between "fresh" and "new" evidence are pure questions of law. The standard of review is correctness.[35]

### B. The *Palmer* conditions govern the admission of fresh and new evidence, including on appeal of custody decisions

#### 1. Fresh and new evidence in an appeal should be admitted only in rare or exceptional circumstances

[24] It is well established that the primary purpose of an appellate court is to correct errors of law in the lower courts, not to reweigh the facts and evidence.[36] The fairness of the judicial system is partly premised on finality: "[f]inality is essential to the maintenance of a fair and effective adjudicative process."[37] As such, courts of appeal are generally reluctant to admit fresh and new evidence:

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[35] *Housen v Nikolaisen*, 2002 SCC 33 at para 8.
[36] *Housen v Nikolaisen*, 2002 SCC 33 at para 1; *R v Sheppard*, 2002 SCC 26 at para 28.
[37] *Toronto (City) v Canadian Union of Public Employees, Local 79* (2001), 55 OR (3d) 541 (CA) at para 79, aff'd *Toronto (City) v CUPE, Local 79*, 2003 SCC 63.

> An appeal is intended to test the correctness of the decision of a trial or motions judge. It is difficult to justify reversing a decision based on evidence that was not presented to the decision maker. For that reason, leave to present new evidence [under the categorization of the British Columbia Court of Appeal the evidence in question was a mixture of both "fresh" and "new"] on appeal is rarely granted.[38]
>
> L'appel a pour but de vérifier si la décision du juge de première instance ou des requêtes est exacte. Il est difficile de justifier l'annulation d'une décision à partir d'éléments de preuve dont la personne qui a rendu la décision ne disposait pas. C'est pourquoi l'autorisation de présenter de nouveaux éléments de preuve [selon la catégorisation de la Cour d'appel de la Colombie-Britannique, la preuve en question était à la fois « *fresh* » et « *new* » (en français, il n'existe pas d'expression propre à chacune des deux catégories développées par la Cour d'appel, les deux étant qualifiées de « nouvelle preuve »)] en appel est rarement accordée.

[25] This Court has recognised since 1928 that exceptions to the principle of finality are rare.[39]

[26] The judicially developed conditions to be met in applications to adduce fresh or new evidence are due diligence, relevance, credibility and decisiveness.[40] The leading decision remains *Palmer*. Although *Palmer* addressed a criminal context, it is well established that its conditions also apply in family[41] and other non-criminal matters.[42] *Palmer* lays out four conditions:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases […].
>
> (1) On ne devrait généralement pas admettre une déposition qui, avec diligence raisonnable, aurait pu être produite au procès, à condition de ne pas appliquer ce principe général de matière aussi stricte dans les affaires criminelles que dans les affaires civiles: […]

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[38] *MacCulloch Holdings Ltd v Canada*, 2005 FCA 287 at para 5.
[39] *Varette v Sainsbury*, [1928] SCR 72 at 76.
[40] *May v Ferndale Institution*, 2005 SCC 82 at para 107.
[41] *Hellberg v Netherclift*, 2017 BCCA 363 at para 54.
[42] *May v Ferndale Institution*, 2005 SCC 82 at para 107.

| | |
|---|---|
| (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial. | (2) La déposition doit être pertinente, en ce sens qu'elle doit porter sur une question décisive ou potentiellement décisive quant au procès. |
| (3) The evidence must be credible in the sense that it is reasonably capable of belief, and | (3) La déposition doit être plausible, en ce sens qu'on puisse raisonnablement y ajouter foi, et |
| (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.[43] | (4) elle doit être telle que si l'on y ajoute foi, on puisse raisonnablement penser qu'avec les autres éléments de preuve produits au procès, elle aurait influé sur le résultat. |

2. There is significant uncertainty caused by the application of the *Palmer* conditions to custody disputes

[27] Courts of appeal have taken a "slightly more elastic" approach to cases involving the welfare of children, such as custody proceedings.[44] This is consistent with the purpose of promoting the best interests of the children in such cases. Despite this increased flexibility, however, courts have still applied *Palmer* or *Palmer*-like tests narrowly. As aptly noted by Justice Ottenbreit of the Court of Appeal for Saskatchewan in *Riel v Riel*:

> [19] Given the foregoing, there is some irony that applications for fresh evidence [the Court in *Riel v Riel* referring here to evidence that the British Columbia Court of Appeal in this case would describe as "new" evidence] continue to be made routinely despite that most of the contested applications of this kind, even with the application of the relaxed approach to admissibility, have been unsuccessful.
>
> [20] Admittedly, fluid circumstances and late-breaking developments have often resulted in applications to admit fresh evidence. However, generally speaking an application for fresh evidence must not be a way of re-litigating the same issues on substantially the same evidence that the trial judge has already weighed and determined. That is, the application should likewise not be an attempt to use this Court's concern for the best interests of a child to rebalance or reweigh differently substantially the same evidence dealt with by a trial or Chambers judge. It must also not be in substance a disguised application to vary.[45]

[43] *Palmer v The Queen*, [1980] 1 SCR 759 at 775.
[44] *Stav v Stav*, 2012 BCCA 154 at para 31.
[45] *Riel v Riel*, 2017 SKCA 74 at paras 19-20 [emphasis added].

[28] It is not the role of appellate courts to reweigh evidence and decide for themselves how the lower courts should have decided the case. As noted by this Court, "[t]heir role is not to write better judgments but to review the reasons in light of the arguments of the parties and the relevant evidence, and then to uphold the decision unless a palpable error leading to a wrong result has been made by the trial judge".[46]

[29] An approach that is too elastic will "inappropriately permit the appellant to second-guess decisions made in the court below, effectively allowing a second kick at the can".[47] Within the family law context, there exists a proven, tailor-made mechanism for ensuring that changing circumstances are taken into account and to protect the best interests of the children: variation orders.

[30] Parties may apply to vary a custody or access order[48]: in British Columbia, under section 17 of the *Divorce Act*[49] and section 47 of the *Family Law Act*.[50] As highlighted by the Court of Appeal itself, "[g]enerally speaking, the proper course for the challenge of the order on the basis of events subsequent to the order is a variation application".[51] In British Columbia, as elsewhere,[52] custody orders may be varied as a result of a "material change in circumstances".[53]

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[46] *Housen v Nikolaisen*, 2002 SCC 33 at para 4.
[47] *Killam v Killam*, 2018 BCCA 64 at para 37. See also *SFD v MT*, 2019 NBCA 62 at para 24.
[48] *Divorce Act*, RSC, 1985, c 3 (2nd Supp). These terms have since been updated in March 2021 to refer to "decision-making responsibility" and "parenting time".
[49] *Divorce Act*, RSC, 1985, c 3 (2nd Supp).
[50] *Family Law Act*, SBC 2011, c 25.
[51] *Henderson v Henderson*, 2005 BCCA 277 (*sub nom CRH v BAH*) at para 27; see also *Fotsch v Begin*, 2015 BCCA 403 at para 20.
[52] See for example *Children's Law Reform Act*, RSO 1990, c 12 at s 29; *Règlement de la Cour supérieure du Québec en matière familiale*, C-25.01, r 0.2.4 at s 38; *The Children's Law Act, 2020*, SS 2020 c 2 at s 8; *Children's Law Act*, RSPEI 1988, c C-6.1 at s 53; *Parenting and Support Act*, RSNS 1989, c 160 at s 37.
[53] *Williamson v Williamson*, 2016 BCCA 87 at paras 30-31; *Allen v Allen*, [1998] OJ No 1853 (Gen Div). See generally Julien D Payne and Marilyn A Payne, *Canadian Family Law*, 8th edition (Toronto: Irwin Law, 2020) at 600-601**[Book of Authorities of the Appellant, Tab 1]**.

[31] This Court has been clear as to when an order may be varied:

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|---|---|
| 1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child. | 1. Le parent qui demande une modification de l'ordonnance de garde ou d'accès doit d'abord démontrer qu'il est survenu un changement important dans la situation de l'enfant. |
| 2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them. | 2. Si cette première étape est franchie, le juge qui entend la requête doit de nouveau déterminer l'intérêt de l'enfant en tenant compte de toutes les circonstances pertinentes relativement aux besoins de l'enfant et à la capacité de chacun des parents d'y pourvoir. |
| 3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances. | 3. Cette analyse repose sur les conclusions tirées par le juge qui a prononcé l'ordonnance précédente et sur la preuve de la nouvelle situation. |
| 4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect. | 4. L'analyse ne repose pas sur une présomption légale favorable au parent gardien, bien qu'il faille accorder une [*sic*] grand respect à l'opinion de ce dernier. |
| 5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case. | 5. Chaque cas dépend de ses propres circonstances. L'unique facteur est l'intérêt de l'enfant dans les circonstances de l'affaire. |
| 6. The focus is on the best interests of the child, not the interests and rights of the parents. | 6. L'accent est mis sur l'intérêt de l'enfant et non sur l'intérêt et les droits des parents. |
| 7. More particularly the judge should consider, inter alia: | 7. Plus particulièrement, le juge devrait tenir compte notamment des éléments suivants: |
| (a) the existing custody arrangement and relationship between the child and the custodial parent; | a) l'entente de garde déjà conclue et la relation actuelle entre l'enfant et le parent gardien; |

| | |
|---|---|
| (b) the existing access arrangement and the relationship between the child and the access parent; | b) l'entente déjà conclue sur le droit d'accès et la relation actuelle entre l'enfant et le parent qui exerce ce droit; |
| (c) the desirability of maximizing contact between the child and both parents; | c) l'avantage de maximiser les contacts entre l'enfant et les deux parents; |
| (d) the views of the child; | d) l'opinion de l'enfant; |
| (e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child; | e) la raison pour laquelle le parent gardien déménage, uniquement dans le cas exceptionnel où celle-ci a un rapport avec la capacité du parent de pourvoir aux besoins de l'enfant; |
| (f) disruption to the child of a change in custody; | f) la perturbation que peut causer chez l'enfant une modification de la garde; |
| (g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.[54] | g) la perturbation que peut causer chez l'enfant l'éloignement de sa famille, des écoles et du milieu auxquels il s'est habitué. |

[32] This established framework for varying orders based on changed circumstances leaves appellate courts unencumbered by applications for fresh and new evidence. Interestingly, there is no mention of applications for fresh or new evidence on appeal in the leading practitioners' work on family law in British Columbia (only variation orders are addressed).[55]

[33] In sum, the "relaxed" conditions of custody cases are not an invitation to dispense with the *Palmer* conditions in the admission of "new" evidence, thereby allowing appellants to pursue "disguised applications to vary".[56] The *Palmer* conditions have been adapted to the particular context of custody cases and govern the admission of fresh and new evidence. This Court should reaffirm the test's application in the family law context

[54] *Gordon v Goertz*, [1996] 2 SCR 27 at 60-61.
[55] JP Boyd, "Changing Final Orders", in *JP Boyd on Family Law*, John-Paul Boyd and Courthouse Libraries BC at 226-240.
[56] *Riel v Riel*, 2017 SKCA 74 at para 20.

in order to uphold the appropriate roles of trial and appellate courts, and to reiterate the purposes of appeals and applications to vary.

[34] In this case, once the Court of Appeal admitted the new evidence regarding the financing of the family home, a) it concluded that the trial judge's findings having to do with the relationship between the parties could "no longer support the ultimate result arrived at by the trial judge",[57] b) even though the trial judge made extensive findings on that very relationship, which he considered more "significant" than the financing of the family home, and c) despite no new evidence having been adduced regarding the relationship. The Court of Appeal was only able to achieve this result by reweighing many unambiguous findings of the trial judge,[58] for instance that the Respondent was "overbearing", "abusive",[59] "profoundly offensive"[60] and "extremely unreasonable"[61] toward the Appellant.

[35] This case is at odds with other decisions of the British Columbia Court of Appeal,[62] including one that was rendered not long after. In *Johanssen v Janssen*, the mother had asserted at trial that she needed to live in Germany to support herself and her children.[63] The father, the appellant, sought to adduce new evidence showing that the mother and children remained in British Columbia. Despite the mother's claim which the chambers judge had accepted, the Court of Appeal found that her remaining in the province would not have affected the decision of the chambers judge and therefore did not admit the new evidence. The Court of Appeal approached the lower court's judgment holistically and deferentially:

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[57] *Barendregt v Grebliunas*, 2021 BCCA 11 at para 69.
[58] *Riel v Riel*, 2017 SKCA 74 at para 20; *REQ v GJK*, 2012 BCCA 146 at para 33.
[59] *Barendregt v Grebliunas*, 2019 BCSC 2192 at paras 10, 41(d).
[60] *Barendregt v Grebliunas*, 2019 BCSC 2192 at para 41(d).
[61] Justice Baker's Oral Reasons for Judgment, in Chambers, March 13, 2020 at para 2 **[Appellant's Record, Tab 1B]**.
[62] *Jean Louis v Jean Louis*, 2020 BCCA 220; *Falkener v Falkener*, 2020 BCCA 303; *REQ v GJK*, 2012 BCCA 146; *Henderson v Henderson* 2005 BCCA 277 (*sub nom CRH v BAH*).
[63] *Johansson v Janssen*, 2021 BCCA 190 at para 43.

> [44] Does this evidence demonstrate that the judge made an assumption about future events that was fundamental to his conclusions and has since been shown to be incorrect, permitting this Court to intervene? In my view, although it does relate to a future event, that is, where Ms. Janssen and the children have been living since the hearing, the new evidence does not materially undermine the findings or the reasoning of the judge. The judge considered many factors when assessing what was the most appropriate forum. While it is surprising that Ms. Janssen has not yet returned, the evidence does not establish that she has changed her ultimate intention to go back to Germany.[64]

[36] How far should an appellate court go in reviewing a lower court's findings when it grants an application for fresh or new evidence? In this appeal, many of the trial judge's findings were reweighed, including several that had no relation to his conclusions regarding the financing of the family home. Assumptions about future events need to be carefully circumscribed. To be sure, a trial judgment cannot be used as a vessel for a disappointed party to fill with new evidence on appeal.

[37] An example of a finding in the trial judgment that was ignored is the trial judge's concern that the Respondent's father gave him no explanation as to why he waited until the eve of trial to make inquiries about financing the family home.[65] The trial judge was alert to the possibility that the Respondent may alter his financial situation, and found that the Respondent had not explained his inaction.[66] The trial judge's reasons evidence a careful weighing of these very facts in their context. With respect, the Respondent's (new) counsel on appeal seemed to view this finding of the trial judge as an invitation to produce new evidence on appeal. The Court of Appeal held that the *Palmer* conditions do not govern the admission of new evidence,[67] dismissing the concerns of the Appellant that some of the new evidence could have been adduced at trial with proper diligence (*Palmer*'s first condition).

[38] Given what the Court of Appeal did in this case,[68] there is a need to clarify that admission of new evidence is not a license to reweigh findings (let alone when the new

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[64] *Johansson v Janssen*, 2021 BCCA 190 at para 44 [emphasis added].
[65] *Barendregt v Grebliunas*, 2019 BCSC 2192 at para 38.
[66] *Barendregt v Grebliunas*, 2019 BCSC 2192 at para 39.
[67] *Barendregt v Grebliunas*, 2021 BCCA 11 at paras 30, 52.
[68] *Barendregt v Grebliunas*, 2021 BCCA 11 at paras 68-90.

evidence is unrelated to a reweighed factual finding). The finality of trial judgments in custody cases would be protected and this Court's guidance in *Van de Perre* reinforced:

> First, finality is not merely a social interest; rather, it is particularly important for the parties and children involved in custodial disputes. A child should not be unsure of his or her home for four years, as in this case. Finality is a significant consideration in child custody cases, maybe more so than in support cases, and reinforces deference to the trial judge's decision. Second, an appellate court may only intervene in the decision of a trial judge if he or she erred in law or made a material error in the appreciation of the facts. Custody and access decisions are inherently exercises in discretion. Case-by-case consideration of the unique circumstances of each child is the hallmark of the process. This discretion **vested in the trial judge** enables a balanced evaluation of the best interests of the child and permits courts to respond to the spectrum of factors which can both positively and negatively affect a child.[69]
>
> Premièrement, la résolution définitive des litiges n'est pas uniquement un intérêt social; elle est aussi extrêmement importante pour les parties et les enfants en cause dans un litige sur les droits de garde. Un enfant ne devrait pas, comme en l'espèce, rester dans l'incertitude quant à son foyer pendant quatre ans. La résolution définitive des litiges est, en matière de garde d'enfants, une considération peut-être encore plus importante qu'en matière d'obligation alimentaire, et renforce l'obligation de retenue envers la décision de première instance. Deuxièmement, une cour d'appel ne peut intervenir dans la décision du juge de première instance que s'il a fait une erreur de droit ou une erreur importante dans l'appréciation des faits. Les décisions en matière de garde et d'accès sont intrinsèquement discrétionnaires. Elles se caractérisent par l'examen cas par cas de la situation propre à chaque enfant. Grâce à ce pouvoir discrétionnaire, **le juge de première instance** peut procéder à une appréciation pondérée de l'intérêt de l'enfant et prendre en considération l'éventail des facteurs positifs et négatifs pouvant le toucher.

### C. Case law and commentary counsel against distinguishing between fresh and new evidence for purposes of admissibility

[39] As a reminder and for ease of reference, new evidence is evidence that was not in existence at the time of trial but arose as a result of events or matters that transpired subsequent to trial. On the other hand, fresh evidence is evidence that existed at the time of the trial but was not adduced at that time.

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[69] *Van de Perre v Edwards*, 2001 SCC 60 at para 13 [emphasis added].

1. The inconsistent application of the test to introduce fresh versus new evidence in British Columbia

[40] In this case, the Court of Appeal concluded that new evidence is not subject to the *Palmer* test because "[t]here is a material difference between new evidence and fresh evidence."[70] In *Fotsch v Begin*, the Court of Appeal specified that only fresh evidence is submitted to the *Palmer* conditions.[71] Previously, in *Korol (Re)*, the Court of Appeal had held that "[t]he *Palmer* test does not apply to evidence of events that occurred subsequent to the order under appeal".[72] Years earlier, in *Jens v Jens*, the same Court had held that "[w]here the new evidence sought to be admitted is of events that occurred subsequent to the trial or hearing appealed from, the usual rules for the admission of fresh evidence do not apply, and it will be admitted only in rare cases".[73]

[41] Last year, in *Jean Louis v Jean Louis*, the appellant, challenging orders dividing family property and debt, unsuccessfully applied[74] to adduce fresh and new evidence. The Court of Appeal applied the *Palmer* conditions to both types of evidence:

> The admission of further evidence is governed by the test in *Palmer v. The Queen* […]. Four factors are considered to determine whether admitting the evidence is in the interests of justice. The first is that fresh or new evidence should not be admitted on appeal if, by due diligence, it could have been adduced at trial. In *Spoor et al. v. Nicholls et al.*, 2001 BCCA 426 at para. 16, this Court confirmed that the due diligence test should be applied more strictly in civil than in criminal cases. The second and third *Palmer* factors state that fresh or new evidence is not admissible unless it is relevant in the sense that it bears upon an important issue and credible in the sense that it is capable of belief. Fourth, to be admissible, the

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[70] *Barendregt v Grebliunas*, 2021 BCCA 11 at paras 29-30 [emphasis added]. To make this distinction the Court of Appeal relied on *Hellberg v Netherclift* 2017 BCCA 363, *Jens v Jens*, 2008 BCCA 392, *Struck v Struck*, 2003 BCCA 623 and *Scott v Scott*, 2006 BCCA 504.

[71] *Fotsch v Begin*, 2015 BCCA 403 at para 19.
[72] *Korol (Re)*, 2014 BCCA 380 at para 36 [emphasis added].
[73] *Jens v Jens*, 2008 BCCA 392 at para 29 [emphasis added]; see also *Kane v Proffitt*, 2018 BCCA 106.
[74] *Jean Louis v Jean Louis*, 2020 BCCA 220 at para 22.

> evidence must be decisive in the sense that if it is believed it might, along with other evidence from trial, be expected to have affected the result: *Palmer* at 775.[75]

[42] In *Falkener v Falkener*, the appellant challenged a spousal support order by seeking to adduce fresh and new evidence.[76] The Court of Appeal concluded that neither the fresh nor the new evidence satisfied the *Palmer* conditions.[77]

[43] In *Hellberg v Nethercliff* (ironically a custody case relied on by Justice Voith to differentiate "fresh" evidence from "new" evidence), the Court of Appeal declared that "[t]he test to be applied in determining whether to admit new or fresh evidence was set out in *Palmer* […]."[78]

[44] In *Santelli v Trinetti*, the Court of Appeal reiterated that both fresh and new evidence in British Columbia are subject to the *Palmer* conditions.[79]

[45] *Jean Louis* (2020)[80] and *Falkener* (2020)[81] were decided by the British Columbia Court of Appeal last year, and *Hellberg* (2017),[82] *Kane* (2018)[83] and *Santelli* (2019)[84] are recent cases compared to the line of authorities that the Court of Appeal relies on in this case to justify excising new evidence from the application of the *Palmer* test: *Scott v Scott* (2006),[85] *Jens v Jens* (2008),[86] *Korol (Re)* (2014)[87] and *Fotsch v Begin* (2015).[88]

[46] Furthermore, although not in the family law context, the British Columbia Court of Appeal released another decision, merely two weeks after the judgment being appealed in

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[75] *Jean Louis v Jean Louis*, 2020 BCCA 220 at para 16 [emphasis added].
[76] *Falkener v Falkener*, 2020 BCCA 303 at paras 62, 65.
[77] *Falkener v Falkener*, 2020 BCCA 303 at para 67.
[78] *Hellberg v Nethercliff*, 2017 BCCA 363 at para 54.
[79] *Santelli v Trinetti*, 2019 BCCA 319 at paras 38-39.
[80] *Jean Louis v Jean Louis*, 2020 BCCA 220.
[81] *Falkener v Falkener*, 2020 BCCA 303.
[82] *Hellberg v Nethercliff*, 2017 BCCA 363.
[83] *Kane v Proffitt*, 2018 BCCA 106.
[84] *Santelli v Trinetti*, 2019 BCCA 319.
[85] *Scott v Scott*, 2006 BCCA 504.
[86] *Jens v Jens*, 2008 BCCA 392.
[87] *Korol (Re)*, 2014 BCCA 380.
[88] *Fotsch v Begin*, 2015 BCCA 403.

this case, wherein it applied the *Palmer* test and specified that it applies more strictly to new evidence than fresh evidence:

> [22] I have used the terminology "fresh or new evidence" because there is a dispute between the parties as to whether the evidence in question is fresh or new. Fresh evidence is evidence that was in existence at the time of the hearing in the lower court but was not introduced at the hearing. New evidence is evidence that came into existence subsequent to the hearing in the lower court. Appellate courts are less inclined to admit new evidence than fresh evidence.[89]

[47] In sum, several recent cases from the British Columbia Court of Appeal state that the *Palmer* conditions apply to both fresh and new evidence. In the case just quoted, Justice Tysoe explains that to the extent a distinction is to be drawn, the *Palmer* test is to be applied more strictly to the admission of new evidence. In the case on appeal, however, the Court of Appeal took an altogether different approach, finding that the *Palmer* conditions do not govern the admission of new evidence.[90]

2. The approach of British Columbia courts is inconsistent with academic commentary and other jurisdictions

[48] The British Columbia Court of Appeal's conflicting case law has led Prince Edward Island's Court of Appeal to find that a material distinction exists between fresh and new evidence, and that *Palmer* does not apply to the latter:

> [19] As well, the evidence was all new evidence rather than further evidence. The British Columbia Court of Appeal stated this distinction in *Kane v Proffitt*, 2018 BCCA 106:
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> > [50] In contrast, new evidence is evidence that came into existence only after the trial. It is only admitted in rare circumstances, such as where a trial judge has made assumptions about future events and then, before the appeal is heard, those assumptions are discovered to have been incorrect: *North Vancouver (District) v. Lunde* (1998), 1998 CanLII 4205 (BC CA), 60 B.C.L.R. (3d) 201 (C.A.) at para. 26. The rationale for the stringent approach to the admission of new evidence is that it has the potential to undermine the need for certainty and finality of litigation by inviting an appeal court "to apply different laws to different facts than those which

[89] *iAnthus Capital Holdings, Inc v Walmer Capital Limited*, 2021 BCCA 48 at para 22 [emphasis added].
[90] *Barendregt v Grebliunas*, 2021 BCCA 11 at paras 30, 52.

> confronted the trial judge'": *McCaffrey v. Paleolog*, 2011 BCCA 378 (CanLII) at para. 62, quoting from Lambert J.A. in *Lunde* at para. 26. As the Court observed in *Scott* at para. 25, "[a]lthough events that occur after trial may affect the issues between the parties, matters must be reviewed as they stood at the time of trial; to do so otherwise would offend the principle of finality" […].[91]

[49] Academic sources do not support a material distinction between the test to apply to fresh as opposed to new evidence. *Sopinka and Gelowitz on the Conduct of an Appeal* explain:

> A focal point of the test for the admission of fresh evidence in a civil appeal is the requirement that the evidence sought to be adduced is such that it either did not exist at the time of trial or could not reasonably have been uncovered by due diligence prior to trial.[92]

[50] In Daniel Bennett & James Goulden's *Procedural Strategies for Litigators in British Columbia*, the terms "fresh" and "new" are used interchangeably, with no suggestion that different tests apply.[93]

[51] The British Columbia *Court of Appeal Rules* refer only to "further evidence" and do not distinguish between fresh and new evidence".[94] The Court of Appeal's *Guidebook for Appellants* uses the terms "new or additional evidence" and identifies the *Palmer* conditions as determinative.[95]

[52] Legislators use the terms interchangeably. For example, in Saskatchewan, *The Court of Appeal Rules* refer to adducing "fresh evidence",[96] whereas the *Alberta Rules of*

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[91] *Miller v White*, 2018 PECA 11 at para 19 [emphasis added]. This decision suggests that the *Palmer* conditions do not apply to "new" evidence at all, and instead that a more stringent test is to be applied. See also *Dickson v Vuntut Gwitchin First Nation*, 2021 YKCA 5 at para 159.

[92] John Sopinka, Mark Gelowitz and W David Rankin, *Sopinka and Gelowitz on the Conduct of an Appeal*, 4th ed (Toronto: Lexis Nexis Canada, 2018), §2.133 [emphasis added].

[93] Daniel Bennett & James Goulden, *Procedural Strategies for Litigators in British Columbia*, (Toronto: LexisNexis Canada, 2010), chapter 15.

[94] *Court of Appeal Rules*, BC Reg 297/2001, rule 31.

[95] BC Court of Appeal: Guidebook for Appellants, section 3.5 "Introducing New Evidence".

[96] *Court of Appeal Rules*, Sask Gaz (18 April 1997), rule 59.

*Court* speak of applications to adduce "new evidence".[97] The *Nova Scotia Civil Procedure Rules* use the terms "fresh" and "new".[98]

[53] In Quebec, no distinction is made between fresh and new evidence (both are referred to as "new evidence" ("*nouvelle preuve*")). The test applied by the Quebec Court of Appeal is strict: "The Court of Appeal may authorize a party to present indispensable new evidence after giving the parties an opportunity to make representations".[99] New evidence is considered indispensable if its admission is likely to influence the outcome of the dispute and lead to a different result.[100] Consistent case law identifies four *Palmer*-like conditions to adduce new evidence: 1) it must really be considered new evidence; 2) it must be essential to the solution of the appeal; 3) the circumstances must be exceptional; and 4) it is in the interest of justice to grant leave to adduce new evidence.[101] In *RP v RC*, this Court applied the *Palmer* conditions to an application to adduce fresh evidence.[102]

[54] This Court recently heard a motion to adduce fresh evidence (which the Court of Appeal in this case would have classified as "new" evidence) not in the family law context.[103] Both the majority and dissent found that the *Palmer* test applied.[104]

[55] The appellate courts of Alberta, Ontario, and Saskatchewan also subject the admission of new evidence to the *Palmer* conditions without drawing a material distinction. In *Iyad Al-Qishawi Professional Corporation v Alexander v Yeh Profession Corporation*, the Alberta Court of Appeal applied the *Palmer* conditions to an application to admit new evidence.[105] The evidence consisted of two letters received after trial. The

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[97] *Alberta Rules of Court*, Alta Reg 124/2010, rule 12.22.
[98] *Nova Scotia Civil Procedure Rules*, Royal Gaz (19 November 2008), rules 7.28, 11.07.
[99] *Code of Civil procedure*, CQLR c C-25.01, s 380 [emphasis added].
[100] *Gestions Shilaem inc v Agence du revenu du Québec*, 2017 QCCA 1568 at para 38.
[101] *Droit de la famille – 111934*, 2011 QCCA 1237 at para 2; see also *Droit de la famille – 2060*, 2020 QCCA 99 at para 18.
[102] *RP v RC*, 2011 SCC 65 at para 50.
[103] *Bent v Platnick*, 2020 SCC 23.
[104] *Bent v Platnick*, 2020 SCC 23 at paras 49, 270.
[105] *Iyad Al-Qishawi Professional Corporation v Alexander C Yeh Professional Corporation*, 2020 ABCA 372 at para 24.

Court of Appeal dismissed the application, finding that neither the second (relevance) nor fourth (decisiveness) conditions of *Palmer* were met.[106] The Court of Appeal deferred to the chambers judge's findings on relevance and found that the overall result would not have been affected if the evidence had been adduced.[107]

[56] In a custody case, *JWS v CJS aka CJH*, the Alberta Court of Appeal applied the *Palmer* test to new evidence.[108] The mother sought to adduce new evidence regarding a child who had cut ties with her. The Court of Appeal considered this evidence to be relevant (second condition), credible (third condition) and would have affected the result (fourth condition). In admitting the evidence, the Court of Appeal noted that it "goes to this child's very well-being."[109] Nevertheless, the Court of Appeal sent the matter back to the trial judge given his "extensive knowledge of this family and child", finding this to be the best way to achieve finality.[110]

[57] The Court of Appeal for Ontario, in *Sheikh (Re)*, also applied the *Palmer* conditions to new evidence:

> New evidence that was not available at the time of the first proceeding may be introduced on appeal if the evidence is necessary to deal fairly with the issues on

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[106] *Iyad Al-Qishawi Professional Corporation v Alexander C Yeh Professional Corporation*, 2020 ABCA 372 at para 28.
[107] *Iyad Al-Qishawi Professional Corporation v Alexander C Yeh Professional Corporation*, 2020 ABCA 372 at para 31.
[108] *JWS v CJS aka CJH*, 2019 ABCA 153 at para 37.
[109] *JWS v CJS aka CJH*, 2019 ABCA 153 at para 38.
[110] *JWS v CJS aka CJH*, 2019 ABCA 153 at para 40. Indeed, if the new evidence is admitted, remitting the matter ensures that appellate courts do not encroach upon the role of trial judges, which is to consider the totality of the evidence and the best interests of children "in the round" (*Hellberg v Netherclift*, 2017 BCCA 363 at para 72). See also *Hellberg v Netherclift*, 2017 BCCA 363 at para 95 (the Court ordered a full trial to determine the issue of relocation as it was an appeal of a summary trial and made an interim order for joint custody and shared parenting time); *Tedham v Tedham*, 2003 BCCA 600; *Island Savings Credit Union v Brunner*, 2014 BCCA 449; *Bodine-Shah v Shah*, 2014 BCCA 191.

> appeal and to decline to admit the evidence could lead to a substantial injustice in the result: *R. v. Palmer* […].[111]

[58] In *HE v MM*, a case involving both fresh and new evidence, a mother appealed the trial judge's decision declining to assume jurisdiction under the *Children's Law Reform Act* to decide custody questions.[112] A unanimous Court of Appeal for Ontario applied the *Palmer* conditions in deciding not to allow evidence that could have been adduced at trial, but did admit evidence that "was not available at trial" (i.e. new evidence) about the emotional and psychological well-being of the children after trial.[113]

[59] Seized with an application to adduce fresh and new evidence, the Court of Appeal for Saskatchewan noted in *Riel v Riel* that *Palmer* applies to both categories, albeit more flexibly when children are involved.[114]

[60] The custody cases cited above evidence a more flexible approach to the best interests of children, which this Court has described as "commendable" in *Catholic Children's Aid Society of Metropolitan Toronto v M(C)* and not "intended to depart significantly from the test of *Palmer*".[115] That applications to adduce fresh or new evidence should be approached more flexibly in custody cases is not disputed by the Appellant, and aligns with both the case law and academic commentary.

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[111] *Sheikh (Re)*, 2019 ONCA 692 at para 7.
[112] *HE v MM*, 2015 ONCA 813.
[113] *HE v MM*, 2015 ONCA 813 at para 74.
[114] *Riel v Riel*, 2017 SKCA 74 at para 16.
[115] *Catholic Children's Aid Society of Metropolitan Toronto v M(C)*, [1994] 2 SCR 165 at 188. This case was predicated on the legislative framework of the Ontario *Child Welfare Act* that had provisions specifically dealing with the admission of fresh evidence on appeal.

3. The *Palmer* test should apply to the admissibility of fresh and new evidence; *if* a distinction is to be drawn, new evidence should be approached more strictly

[61] *Palmer*'s four objectives are due diligence, relevance, credibility, and decisiveness.[116] The bulk of the case law and commentary support a single approach to the admissibility of fresh and new evidence. The Appellant asks that this clear and stable approach be endorsed by this Court.

[62] There should not be a material difference between the admissibility of fresh and new evidence. Applications to adduce either type of evidence on appeal are applications to introduce evidence that the trial judge did not consider. The importance of finality is not lessened in either case. Appellate courts must afford considerable deference to trial judges and only in exceedingly rare instances should they attempt to reweigh the evidence.[117]

[63] When it is properly new evidence, i.e. evidence that was not in existence at the time of trial, the first condition (due diligence) should be eased in instances where it was impossible to adduce the evidence at trial.

[64] However, if a distinction is to be drawn between the admissibility of fresh and new evidence, the principle of finality requires that the test for the latter ought to be stricter than for the former, contrary to the Court of Appeal's approach in this case.

[65] Fresh evidence is evidence that could have been before the trial judge, whereas new evidence, by definition, could not. New evidence concerns "matters that have transpired subsequent to the trial",[118] and therefore its admissibility must be strictly controlled (to protect the finality of the judicial process[119]) yet not rendered impossible (given the best interests of the children). The principle of finality benefits all, especially

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[116] *Palmer v The Queen*, [1980] 1 SCR 759; *May v Ferndale Institution*, 2005 SCC 82 at para 107.
[117] *Van de Perre v Edwards*, 2001 SCC 60 at para 13; *Hickey v Hickey*, [1999] 2 SCR 518 at para 12; *REQ v GJK*, 2012 BCCA 146 at para 33.
[118] *Fotsch v Begin*, 2015 BCCA 403 at para 20 [emphasis added].
[119] *Jean Louis v Jean Louis*, 2020 BCCA 220 at para 19.

children. As noted by the British Columbia Court of Appeal almost a decade ago, "[a]llowing [fresh or new] evidence without structure or limits takes an appeal beyond the record of the trial, and beyond the error-seeking function of the Court, with attendant uncertainty and expense [… and] has the potential of giving a party the opportunity to make up for deficiencies in his or her case at trial".[120]

## D. Application to this case

[66] Had the framework elaborated in this factum been applied to this case, the Court of Appeal would have applied the *Palmer* conditions to the new financial evidence the Respondent sought to adduce.

[67] Some of the "new" evidence in this case would not have met *Palmer*'s first condition, since "by due diligence, it could have been adduced at trial",[121] for instance in the form of a "commitment letter from a bank dictating the terms on which that bank would offer financing in relation to the Family Home",[122] and therefore would not have been admitted. This argument was explicitly raised by the Appellant but rejected by the Court of Appeal because it found the *Palmer* conditions did not apply at all.[123] Moreover, in its reweighing exercise, the Court of Appeal afforded no deference to the trial judge's sceptical conclusion regarding the Respondent's omissions vis-à-vis the financing of the family home, and subsequent eleventh-hour inquiries.[124]

[68] More significantly, the new evidence in this case would certainly not have met *Palmer*'s fourth condition, since "[i]t must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the

[120] *Stav v Stav*, 2012 BCCA 154 at para 32.
[121] *Palmer v The Queen*, [1980] 1 SCR 759 at 775.
[122] *Barendregt v Grebliunas*, 2021 BCCA 11 at para 53.
[123] *Barendregt v Grebliunas*, 2021 BCCA 11 at para 52.
[124] *Barendregt v Grebliunas*, 2019 BCSC 2192 at para 38.

result."[125] This fourth condition requires a holistic and deferential approach to the trial judge's findings, as emphasised by this Court.[126]

[69] The Court of Appeal should have taken great care to defer to the trial judge's findings regarding the relationship between the parties, which he found more "significant" than his findings about the financing of the family home.[127] In his reasons, the trial judge took pains to describe and justify his fears about the relationship, and notably its past and future negative impact on the children.[128] Troublingly, these findings were downplayed by the Court of Appeal in its reweighing, for instance that the Appellant had been assaulted by the Respondent and that the relationship was one-sided and overbearing.[129]

[70] In considering whether new evidence fulfills *Palmer*'s fourth condition, the Court of Appeal should have taken extreme care not to "give more weight than the trial judge did to one factor or another".[130] A deferential approach "promotes finality in family law litigation and recognizes the importance of the appreciation of the facts by the trial judge".[131] It is of particular significance regarding the best interests of the children.[132]

[71] In this case, the Court of Appeal should not have admitted the new evidence regarding the financing of the family home as it would not have reasonably affected the result at trial. Even if the new evidence had been adduced, the Court of Appeal should not have been so cavalier in reweighing the trial judge's clear conclusion, following a nine-day hearing, that the relationship was more "significant" than the financing of the family

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[125] *Palmer v The Queen*, [1980] 1 SCR 759 at 775.
[126] *Van de Perre v Edwards*, 2001 SCC 60 at para 13; *Hickey v Hickey*, [1999] 2 SCR 518 at para 12; see also *Johansson v Janssen*, 2021 BCCA 190 at para 44.
[127] *Barendregt v Grebliunas*, 2019 BCSC 2192 at para 31.
[128] *Barendregt v Grebliunas*, 2019 BCSC 2192 at para 41(a).
[129] *Barendregt v Grebliunas*, 2019 BCSC 2192 at para 41(b). In *Barendregt v Grebliunas*, 2021 BCCA 11, the Court of Appeal refers to this incident as "alleged" at para 72.
[130] *REQ v GJK*, 2012 BCCA 146 at para 33.
[131] *Hickey v Hickey*, [1999] 2 SCR 518 at para 12.
[132] *Van de Perre v Edwards*, 2001 SCC 60 at para 13.

home to the children's best interests.[133] In the alternative, if the new evidence was going to be admitted, the matter should have been remitted to the trial judge because, as the Alberta Court of Appeal did in *JWS v CJS aka CJH*, he had "extensive knowledge of this family and child".[134]

[72] Generally, "[t]he proper course for a challenge of an order on the bases of events subsequent to the order is a variation application."[135] In this case, if the trial judge's primary residence order was going to be altered on account of new evidence of last-minute financing of the family home, an application to vary the order in the court of first instance would have been preferable to a complete reweighing of nine days of evidence by three appellate judges. Variation orders are more fitting and proportional given the best interests of children than appeals such as this one, years later in the apex court, which could have the consequence of relocating K. and M. 1000 kilometres away. More generally, this approach "avoids giving the parties an incentive to appeal judgments and incur added expenses in the hope that the appeal court will have a different appreciation of the relevant factors and evidence."[136]

**PART IV – SUBMISSIONS ON COSTS**

[73] This Court granted leave to appeal with costs in the cause. If the appeal is allowed, the Appellant submits that costs of the appeal to this Court should follow the event. The Appellant also seeks costs of the proceedings in the courts below, pursuant to section 47 of the *Supreme Court Act*.[137]

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[133] *Barendregt v Grebliunas*, 2019 BCSC 2192 at paras 31, 41-42. Less deference may be waranted when new evidence is admitted on an appeal of a summary trial: see *Hellberg v Netherclift*, 2017 BCCA 363 at paras 91-104.

[134] *JWS v CJS aka CJH*, 2019 ABCA 153 at para 40.
[135] *Fotsch v Begin*, 2015 BCCA 403 at para 20.
[136] *Hickey v Hickey*, [1999] 2 SCR 518 at para 12.
[137] *Supreme Court Act*, RSC, 1985 c S-26.

## PART V – ORDER SOUGHT

[74] The Appellant respectfully asks this Court to allow this appeal, reinstate Justice Saunders' primary residence order, and award the Appellant costs in this court and the courts below.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of August 2021.

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