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

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The appellant and respondent were married in 1993, separated in 2011, and were divorced by a consent judgment in 2020. They shared parenting of their two youngest children according to a 2011 parenting order. The respondent had the higher income, and paid child support for the children until minutes of settlement were entered into at a pretrial conference. A chambers judge issued a fiat and final order regarding child support. They each paid their proportionate share of s. 7 expenses. The appellant argued that the chambers judge made errors in calculating the parties' income for the purposes of child support. The Court of Appeal (court)

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determined: 1) whether there was an agreement to exclude pension income when calculating child support; 2) whether the chambers judge erred in applying s. 15(2) of the *Federal Child Support Guidelines*, SOR/97-175 (*Guidelines*); 3) whether the chambers judge erred by failing to deduct carrying charges for legal fees; and 4) whether the chambers judge erred by allowing the respondent to deduct an amount for employment-related vehicle expenses. HELD: The appeal was dismissed in its entirety, apart from a minor change to a clerical error. 1) The chambers judge did not make an error in applying the principles of contract interpretation to the facts. The minutes constituted an agreement in writing as to the parties' incomes within the meaning of s. 15(2) of the *Guidelines*. The respondent had already rolled over half of his pension income to the appellant, and they agreed in writing that pension income was not to be included in his employment income. As a general rule, pension income must be counted in employment income. However, the chambers judge excluded pension income because he determined that the minutes constituted an agreement as to the respondent's income within the meaning of s. 15(2). The language in the minutes was not ambiguous. The court referred to *Mosten Investments LP v The Manufacturers Life Insurance Company (Manulife Financial)*, 2021 SKCA 36 and *Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53 for the principles of contract interpretation. The goal in interpreting an agreement is to objectively determine the parties' intention at the time the contract was made. The parties are presumed to have intended what the text of the contract actually says. 2) The chambers judge did not err by giving effect to the agreement to adjust child support based solely on the parties' employment income, and to therefore exclude pension income from the calculation. While a judge can disregard an agreement if it is inconsistent with the obligations of the parents and the rights of the child in relation to support, this does not mean that parties cannot make agreements relating to child support. The law encourages parties to resolve such disputes by agreement. 3) The chambers judge did not err by failing to deduct legal fees incurred by the applicant when calculating her income for child support purposes. The governing principle is that recipients may deduct carrying charges of this kind, but a payor cannot. Legal fees are not deductible where the person who incurred the expense is both a payor and payee of child support. Here, the order provided that each party pay child support to the other. 4) It was not an error to deduct the respondent's vehicle-related employment expenses when calculating his income. Employment expenses of this kind can only be deducted if they reasonably reflect the expenses related to performing job duties. There was sufficient evidence before the chambers judge to confirm that these vehicle expenses were expenses actually incurred and deductible according to the *Income Tax Act*, RSC 1985, c 1 (5th Supp). Here, the court corrected a clerical error in the deducted amount.

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***R v Androsoff*, 2023 SKCA 42**

Caldwell Leurer McCreary, 2023-03-29 (CA23042)

Criminal Law - Assault - Aggravated Assault - Appeal
Criminal Law - Appeal - Assault Causing Bodily Harm
Criminal Law - Lesser Included Offences

The Crown appealed the acquittal of the accused on the particularised charge of aggravated assault by wounding. The trial judge found the accused guilty of the lesser included offence of common assault but was not satisfied that he had caused a "wounding" as particularised in the information. The victim was the accused's domestic partner. At the time of trial, she had already passed away from unrelated causes. As a result, the Crown's evidence from the victim was limited to a 911 call and a video-recorded statement to police. A Crown witness observed the victim after the injuries, took photos, and testified that the victim's face looked "deformed." The Crown argued that even if the wounding element had not been satisfied, the trial judge could have convicted him of the lesser included offence of assault causing bodily harm (s. 267(b)). The Court of Appeal (court) determined: 1) whether assault causing bodily harm is an included offence of aggravated assault by wounding; 2) whether the trial judge misapprehended the evidence and failed to consider it in its totality; 3) whether the trial judge erred by failing to apply the law to the facts as she found them; and 4) whether the complainant's out-of-court statements were improperly excluded.
HELD: The court found that the trial judge erred in failing to convict the accused of the lesser included offence: assault causing bodily harm. The court set aside the common assault conviction, and instead entered a conviction for assault causing bodily harm. The matter was remitted to Provincial Court for sentencing. 1) The trial judge erred when she ruled that assault causing bodily harm was not an included offence of the particularised count of aggravated assault by wounding. The evidence accepted by the trial judge proved beyond a reasonable doubt that assault causing bodily harm had occurred. Assault causing bodily harm is an included offence of aggravated assault by wounding. The broad definition of "bodily harm" in s. 267(b) of the Code sets a low threshold for finding that a victim has suffered bodily harm; it excludes only transient and trifling injuries. The particularisation of "wound" narrowed the scope of the aggravated assault charge itself but did not affect the legal fact that assault causing bodily harm is still a lesser included offence. 2) The trial judge considered the evidence in its totality. The court rejected this ground of appeal because it was not an error of law for the trial judge to find that an element of the offence had not been proven beyond a reasonable doubt based on the evidence she accepted. 3) The court dismissed this ground of

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appeal. While there were flaws in the trial judge's reasoning, there was no legal error in applying the law to the facts as she found them. 4) The trial judge erred in exercising her residual discretion to exclude the victim's out-of-court statements. The court noted if there is no traditional exception to the hearsay rule, the admission of an out-of-court statement depends on proof on a balance of probabilities that its admission is both necessary and reliable. Even if both of those criteria are met, the court still has residual discretion to exclude the evidence if its prejudicial effect outweighs its probative value. The trial judge found that both the necessity and reliability criteria were met. There was no explanation for how the admission of the statements would undermine trial fairness.

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***R v Lachance*, 2023 SKCA 48**

Caldwell Leurer Barrington-Foote, 2023-04-25 (CA23048)

Criminal Law - Appeal - Acquittal - Standard of Review
Criminal Law - Evidence - Admissibility - Hearsay - Principled Exception - Appeal
Criminal Law - Eyewitness Evidence - Appeal

The Crown appealed the respondent, J.R.L.'s, eight acquittals of assault and firearms offences. J.R.L. was arrested after D.S. reported a break and enter in which he was alleged to have participated. D.S. appeared in court on the originally scheduled trial date but left before providing testimony. She had reported that J.R.L. posted a threatening Facebook message on the night of the arrest. When the Crown was unable to secure her attendance for the adjourned trial date, it applied to have her videorecorded witness statement admitted as evidence pursuant to the principled exception to the hearsay rule; a hearsay *voir dire* was held and the application dismissed. Following trial, J.R.L. was acquitted on all counts. The Crown appealed on the grounds that the trial judge erred by: 1) failing to consider J.R.L.'s admission that he had possession of a firearm; 2) failing to find that the evidence as a whole established identity; 3) refusing to consider the Crown's unsworn testimony during the hearsay *voir dire*; and 4) applying the wrong legal test for necessity in the hearsay *voir dire*.
HELD: 1) The court found that the Crown had advanced one theory of liability at trial and J.R.L.'s admission was inconsistent with that theory. The Crown is not entitled to advance a new theory of liability on appeal, so the admission could not help its case. The Crown argued that the trial judge's failure to address certain evidence in his reasons suggested that he had not considered it, but the court could not find reviewable error in his failure to address the

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admissions specifically given their relatively low probative value. The court emphasized that reasons are to be read in context and as a whole, and the Crown should not rely on minor errors in a judge's written reasons to support its arguments. 2) The trial judge's reasons, read as a whole, persuaded the court that he had considered the totality of the evidence. Further, the trial judge accepted J.R.L.'s testimony that he was not in possession of a rifle on the date of the arrest, and the appeal court could not review this finding. The court did not regard grounds 3 and 4 as proper grounds of appeal, because they engaged the trial judge's findings of fact, and must be afforded deference (see: *R v Youvarajah*, 2013 SCC 41; *R v Bridgman*, 2017 ONCA 940; *R v Moir*, 2020 BCCA 116). However, the court addressed them. 3) The trial judge determined that the Crown had not proven D.S. was an unavailable witness such that the necessity test to apply the principled exception to the hearsay rule had been met. The court of appeal found that the trial judge erred in insisting that the Crown would need to submit formal evidence regarding the witness' unavailability. However, the court was not convinced that, had the trial judge accepted Crown counsel's evidence, it would likely have changed the outcome of trial. 4) The Crown argued that the trial judge applied too stringent a test of the necessity of admitting D.S.'s videotaped evidence, and that he had required the Crown to prove conclusively that it would be impossible to secure her *viva voce* testimony. The trial judge indicated in his reasons, however, that found the Crown had failed to take reasonable steps to ensure her attendance at trial. The court found the trial judge had employed the correct test of necessity. All of J.R.L.'s acquittals were upheld.

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***Métis Nation – Saskatchewan v Saskatchewan (Environment)*, 2023 SKCA 35**

Richards Leurer Tholl, 2023-03-20 (CA23035)

Aboriginal Law - Duty to Consult
Aboriginal Law - Judicial Review
Civil Procedure - Queen's Bench Rules - Originating Applications

The issue in this appeal was whether Métis Nation – Saskatchewan and Métis Nation – Saskatchewan Secretariat Inc. (collectively, MNS) could seek judicial review of the grant of three exploration permits by the Government of Saskatchewan (Saskatchewan). MNS asserted they had Aboriginal title over land in part of northwestern Saskatchewan, but Saskatchewan denied that these rights existed. MNS alleged that there was a breach of the duty to consult about the impact of exploration activities. MNS appealed a Queen's Bench decision that granted an order striking parts of MNS's originating application. There were two

other actions in the background: a 1994 action by MNS against Saskatchewan wherein MNS sought a declaration that Saskatchewan Métis have Aboriginal rights and title over specified land. This action was stayed in 2005 by the court until otherwise ordered. In 2020, MNS started a second action against Saskatchewan, requesting relief from a 2010 government policy which made it clear that Saskatchewan contested MNS's claim to Aboriginal title and commercial use of resources. The 2020 action is ongoing. Three issues were determined in this appeal: 1) whether the order was interlocutory, leaving the Court of Appeal without jurisdiction; 2) whether the inclusion of the struck paragraphs was an abuse of court process; and 3) whether it was appropriate for MNS to use an originating application to commence its claim.

HELD: The Court of Appeal allowed MNS's appeal and set aside the order by the chambers judge. The chambers judge erred in striking paragraphs from MNS's originating application. The court did not consider whether a duty was owed by Saskatchewan but determined that MNS could advance the claims by way of originating application. 1) The court concluded that the order was final, not interlocutory, because its effect was to preclude MNS from challenging the issuance of the exploration permit by way of judicial review. The court provided background on the duty to consult, noting that it arises "when the Crown is contemplating taking actions that have the potential to affect asserted but unproven Aboriginal rights." Supreme Court jurisprudence in *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73 established that Aboriginal groups have a right to seek judicial review pending the resolution of their contested rights. 2) MNS's originating application did not constitute an abuse of process. The chambers judge struck the paragraphs of the originating application, finding that their inclusion would be an abuse of process because it raised the same issues as the 1994 and 2020 actions. The court discussed the doctrine of abuse of process, which is where a party attempts to relitigate an issue that has already been decided, or is currently being decided, in another forum. The court agreed that superficially, the 1994 and 2020 actions related to the same underlying issue of Métis claims of Aboriginal title. However, the duty to consult is still engaged while land and resource claims are ongoing. The court found that the existence of Aboriginal title was not being litigated in MNS's originating application; rather, it was whether the Crown met its duty to consult when faced with asserted Métis Aboriginal title and rights in this specific instance in relation to the grant of the permits. 3) The court found that an originating application was an appropriate commencement document for MNS's claim that Saskatchewan breached its duty to consult with MNS over the issuance of the permit. The chambers judge erred in his conclusion that actions commenced by originating application were intended for matters that could be determined by summary judgment. The court pointed out that originating applications commence an action, including where the remedy claimed is for judicial review of a "decision, act or omission of a person or body" (Rule 3-49(1)(g)), which is what MNS sought here.

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***MacInnis v Bayer Inc.*, 2023 SKCA 37**

Caldwell Barrington-Foote Tholl, 2023-03-20 (CA23037)

Civil Procedure - Class Actions - Certification - Appeal
Civil Procedure - Class Actions - Common Issues
Civil Procedure - Class Actions - Costs
Statutes - Interpretation - *Class Actions Act*, Section 6

The appellant was a proposed representative plaintiff in a class action lawsuit involving the Essure contraceptive device. The certification application was dismissed in its entirety with costs by a Queen's Bench Chambers judge. Of the nine grounds of appeal as restated by the Court of Appeal (court), the main issue was that the chambers judge erred in his: 1) assessment of the common issues and failure to amend the claim and common issues as they could be amended. 2) There was also a discussion about the availability of costs. The court dismissed the fresh evidence application, finding that the *Palmer* test applied to an appeal from a certification decision.
HELD: The appeal was allowed, and the matter was remitted to the Court of King's Bench. The matter was remitted to determine if the common issues that were found to be unsuitable due to issues of lack of commonality, standard of care versus duty of care, and plausible methodology could be suitably modified. The court did note that many of the appellant's grounds of appeal were a result of shortcomings in her own materials and pleadings. 1) The court found that the most contentious portion of the chambers decision was the chambers judge's analysis of s. 6(1)(c) of *The Class Actions Act*, SS 2001, c C-12.01 (CAA), which requires the claim to raise "common issues." The chambers judge rejected each of the proposed common issues as pleaded because he concluded that using the term "and other side effects" to describe the common issues was too broad to be certified. The court noted that the common issue must be stated with "sufficient particularity that it will produce a meaningful answer to a material question that must be addressed to decide the claim." The court determined that the chambers judge could have ordered the term "other side effects" to be deleted, and certified common issues based on the two specific side effects that preceded that term (risk of bleeding and bloating). Amending in this way would not have amounted to rewriting the common issues or fundamentally altering them. The failure of the chambers judge to order that the common issues be modified, or to hear further submissions from the parties regarding different wording, amounted to a palpable and overriding error. A similar issue arose with the use of the phrase "unreasonable risk" in the pleadings: this could have been amended by the judge or after further submissions from the parties. While it was correct to conclude that the phrase introduced a subjective element, this defect could have been cured. 2) There was no error in the exercise of discretion to order costs. However, given that the outcome of the appeal was to set aside the chambers decision, the order of costs was also set aside. The court noted that prior to 2015, Saskatchewan was a no-costs jurisdiction in relation to class actions. Costs could not be awarded against an unsuccessful plaintiff in an action seeking to become a class proceeding, except in specific or exceptional circumstances. The CAA was amended in 2015, allowing discretionary authority to courts to award costs in class action proceedings.

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***Bass Estate, Re*, 2023 SKKB 55**

Bergbusch, 2023-03-10 (KB23055)

Wills and Estates - Formal Requirements
Statutes - Interpretation - *Wills Act, 1996*, Section 37

The applicant sought to admit two documents to probate: a fill-in-the-blank will with handwritten additions, and an entirely handwritten document described as a codicil. These documents did not meet the requirements of *The Wills Act, 1996*, SS 1996, c W-14.1 (Act), but they could be admitted to probate under s. 37 of the Act if the court were satisfied that they expressed the testamentary intentions of the deceased. The court determined: 1) whether the will and/or the handwritten list met the requirements of the Act; and 2) if they did not meet the requirements, whether the court could admit the documents for probate under s. 37 of the Act on an *ex parte* application.
HELD: The *ex parte* application for letters probate was dismissed. 1) The documents did not meet the requirements of the Act. The will was partly typed and partly in the deceased's handwriting. In Saskatchewan, a printed form will with handwritten additions can only be admitted to probate if the handwriting on its own demonstrates testamentary intent [see: *Forest, Re* (1981), 121 DLR (3d) 552 (Sask CA)]. However, this is subject to s. 37, which allows a court to admit a will to probate even if the formal requirements are not met, so long as it demonstrates testamentary intent. 2) The court did not allow an *ex parte* application here. In some circumstances, a s. 37 application can be made *ex parte* to validate a will. However, because there were issues with the documents and the court required additional extrinsic evidence of the surrounding circumstances from when the testator made the will, the court determined that this was not an appropriate case to proceed on an *ex parte* basis. It was not clear if the "enclosed list" referred to in the will was the second handwritten document. However, the executor could bring a s. 37 application with notice to the beneficiaries.

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***Johnson v Witchekan*, 2023 SKKB 61**

Morrall, 2023-03-22 (KB23062)

Civil Procedure - *Queen's Bench Rules*, Rule 5-15
Production of Documents - Relevance - Modern Approach

In her automobile accident action, the plaintiff, N.J., requested that Saskatchewan Government Insurance (SGI) produce documents pursuant to Queen's Bench Rule 5-15. Having been hit by a truck in September 2020, she commenced her action in March 2021 against the driver, S.W.; the registered owner, P.J.; and the owner of the business (SDS) that had allegedly modified the truck, T.S. N.J. contended that those modifications contravened *The Vehicle Equipment Regulations, 1987* (regulations) and had contributed to the accident. S.W. and P.J. jointly filed a statement of defence in June 2021 alleging that the modifications had been made before P.J. bought the truck and that neither of them had been aware the modifications were illegal. T.S. also filed a defence in June 2021 in which he admitted SDS had modified the truck in 2016 at the former owner's request but indicated that it was the owner's responsibility to ensure those modifications complied with applicable laws and regulations. In August 2022, N.J. applied to amend her statement of claim to add SGI as a defendant. That application had not yet been decided. N.J. applied for SGI to produce

documents in December 2022, and SGI had since declined to produce the requested registration history and other documents, citing privacy and questioning the relevance of the said documents to the case, and filing affidavits in support of their position. The only issue for determination was whether SGI should be ordered to produce the requested documents.
HELD: The court undertook a review of Rule 5-15 and the caselaw related to it. It found that the definition of "relevance" must include potential relevance and outlined the modern approach to determining whether documents should be produced. The key considerations were proportionality, common sense, fairness, and some degree of genuine relevance. The court decided that it would be inappropriate to order production of the vehicle's claims history. SGI's evidence convinced the court that past damage estimates and similar information would not necessarily help either determine who modified the vehicle or demonstrate that the modifications were a significant factor in the collision. Having made this determination, the only remaining question was whether to order the production of the registration history. The court found that this information may or may not be relevant to N.J.'s case and balanced that consideration against the privacy rights of previous owners of the truck, finding that drivers' privacy rights in vehicle registration are not as sensitive as privacy rights with respect to other documents, such as health records. Furthermore, registration records would only disclose the name and contact details of the previous owner, and this individual would be under no obligation to cooperate with the plaintiff in her research. The breach of privacy would not be particularly intrusive. Finally, it was ordered that SGI must provide the truck's registration records to the court under seal so that the judge could ensure only the necessary information would be disclosed to N.J.

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***Graham-Lockerbie Stanley JV v Ovivo Inc.*, 2023 SKKB 63**

Clackson, 2023-03-23 (KB23058)

Limitations - *Limitations Act*

The plaintiffs were subcontracted to design and construct an upgrade to the wastewater treatment plant in Regina. The defendants agreed to manufacture, supply, and install equipment for the project. In their statement of claim, the plaintiffs alleged negligent design and manufacture and breach of contractual warranties of fitness under the purchase contract. They also claimed for contribution and indemnity from the defendants for losses suffered by named third parties. The defendants asserted that the claims were barred by s. 5 of *The Limitations Act*, SS 2004, c L-16.1 (Act), and applied under Rule 7-1 of *The Queen's Bench Rules* to strike out or dismiss the statement of claim. The court determined whether the claims were statute-barred.
HELD: The claims in negligence and breach of contract were barred by the Act. The court found that these claims were filed more than two years after the plaintiffs knew that they had suffered a loss that was caused or contributed to by an act or omission of the defendant. The court reviewed affidavits filed, transcripts from cross-examination on those affidavits, and briefs to find that there was no serious controversy on the facts to come to this conclusion. The limitation period does not commence until the material facts are actually or constructively known to the claimant (see: *Saskatchewan (Highways and Infrastructure) v Venture Construction Inc.*, 2020 SKCA 39). The limitation period for the claim for contribution and indemnity for losses suffered by a third party had not yet started when the plaintiffs commenced their claim. The claim was not statute-barred. The court did not comment on whether the action was legally maintainable, only on the limitation period. The court noted that the defendants were not parties to a tolling

agreement between the plaintiffs and third parties and that it was odd that the plaintiffs sought contribution and indemnity from the defendants for losses suffered by third parties even though the plaintiffs were not currently at risk of a judgment for those losses.

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***T.P. v Bytedance Ltd.*, 2023 SKKB 65**

Popescul, 2023-03-28 (KB23059)

Civil Procedure - Hague Service Convention, Article 10(b)
Civil Procedure - *Queen's Bench Rules*, Rule 12-5, Rule 12-11
Queen's Bench Rules - Service of Documents Outside Saskatchewan

The plaintiff applied for an order without notice to appoint a designated judge to hear a class action certification. While some defendants had been properly served with the statement of claim, the plaintiff did not file sufficient evidence of service for other corporate defendants. The court assessed whether service was valid.
HELD: The court denied the plaintiff's application because it was not satisfied that the defendants were properly served. The plaintiff was granted leave to file additional material. The onus is on the party serving the document to prove that service was valid. The court expects strict compliance with service rules found in *The Queen's Bench Rules* when assessing whether corporations have been validly served in foreign jurisdictions. The court applied the rules for service of documents on foreign corporations. Rule 12-11(1)(b) permits service in a manner provided for by the law in the jurisdiction were service is effected. Here, the plaintiff did not provide evidence of the service laws in the country where the corporation was located. Next, the court determined whether service was completed according to Saskatchewan law in Rule 12-11(1)(a); whether it was completed according to the provisions for service in the enactment under which the corporation was incorporated or registered. Here, the plaintiff did not provide evidence to indicate the enactment under which the corporation was incorporated, so the court could not assess whether service was valid under Rule 12-5(b). If the enactment under which the corporation is incorporated is silent as to service, Rule 12-5(c) can apply, but here there was no evidence for the court to assess. It also was not clear where the registered office of the corporation was, because corporate profiles had not been filed with the court to establish the proper addresses for service.

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***Bloski v Nosib*, 2023 SKKB 68**

Rothery, 2023-04-03 (KB23066)

Statutes - Interpretation - *Limitations Act*, Section 20
Torts - Negligence - Duty of Care

Civil Procedure - Addition of Defendants - Pleadings - Amendment

In 2016, J.B. commenced a lawsuit against Dr. N., Dr. P. and the Saskatoon Regional Health Authority (SRHA) for negligence in the care of her late husband, P.B. P.B. had attended at the emergency department of Saskatoon City Hospital in 2014 due to chest pain. He was examined by the proposed defendant, Dr. W.H., who referred P.B. to Royal University Hospital in the afternoon, where he died that evening. In 2019, J.B.'s counsel received an expert report expressing the opinion that Dr. W.H. had not met the standard of care required of an emergency room physician, and J.B. commenced a separate action against Dr. W.H. Dr. W.H.'s counsel filed a statement of defence denying liability and arguing the separate action should be struck as it has not been commenced within the applicable limitation period, and later filed an application under Queen's Bench Rule 7-9 that J.B.'s claim be struck as frivolous or an abuse of process. J.B.'s counsel, in turn, applied to amend the statement of claim in the initial lawsuit to have Dr. W.H. added as a defendant, pleading s. 20 of *The Limitations Act*. Both counsel agreed that this application ought to be decided before the court considered the application to strike.
HELD: Section 20 of *The Limitations Act* empowered the judge in this case to allow the addition of Dr. W.H. as a party if: (a) the claim against Dr. W.H. arose out of the same transaction or occurrence as the original claim; and (b) no party would suffer actual prejudice as a result of the addition. The court reviewed jurisprudence commenting on the purposes of that provision and defining the term "actual prejudice." The affidavit evidence established that the Canadian Medical Protective Association contacted Dr. W.H. approximately two weeks after P.B. died, and following their recommendation, in December 2014, Dr. W.H. wrote several pages of notes describing his interaction with P.B. and the decisions he made in relation to his care in great detail. In February 2022, Dr. W.H. was preparing to move offices, he came across these notes, and he destroyed them. At the time, he had received letters from the College of Physicians and Surgeons and the SRHA indicating that he was not implicated in incidents relating to the death of P.B. and he was not aware of any legal action. J.B. had commenced her separate action one day short of the limitation period and had not served Dr. W.H. with the claim until over four months later. The court was satisfied that Dr. W.H. would suffer actual prejudice if he were added as a defendant, and exercised its discretion to refuse J.B.'s application.

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***L.T. v R.U.*, 2023 SKKB 74**

Robertson, 2023-04-10 (KB23065)

Family Law - Child Support - Variation Application
Family Law - Variation Application - Material Change in Circumstances

The respondent, R.U., applied to end his child support obligations effective June 1, 2019 and fix arrears at $7,300. R.U. had been ordered after trial in 2016 to pay to the petitioner, L.T., $743 per month based on their respective incomes of $88,500 and $13,600; he was to pay 86% of all ss. 3.1 and 7 expenses pursuant to the *Federal Child Support Guidelines*; and his arrears were set at $4,951.61. The parties had not exchanged income tax information every year as ordered after trial, and R.U.'s arrears as of January 23, 2023 were $50,656.08. R.U. did not allege any material change in circumstances with respect to his relationship to the

child or L.T. but argued that his income had decreased since 2018. R.U. was a journeyman plumber and gas fitter who had lost his job in 2019 when the Maintenance Enforcement Office (MEO) seized his passport.
HELD: Citing *Colucci v Colucci*, 2021 SCC 24, the court observed that a decrease in income necessitating a reduction in child support "must be real and not one of choice" (para 61). R.U. had chosen not to pay child support and allowed his arrears to accrue such that the MEO was empowered to seize his passport. Travel to the U.S. had been necessary for his job, but he had nevertheless found employment and the court inferred from the evidence that R.U. was either intentionally under-employed or had failed to report all of his income. L.T. provided evidence that R.U. worked "under the table" as well as documentation of his lakeside cabin in Manitoba and two vacations he had taken that contradicted his claims of financial difficulty. Although it was not necessary to do so, the court reviewed several factors enumerated in *Nkwazi v Nkwazi*, 2013 SKQB 264 (aff'd 2014 SKCA 61) regarding whether to cancel arrears and found there would be no basis to do so even had the material change test been met. R.U.'s application was dismissed with $1,000 of costs awarded to L.T.

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***Green v Arthurs*, 2023 SKKB 75**

Elson, 2023-04-10 (KB23076)

Landlord and Tenant - Residential Tenancies - Hearing - Adjournment - Appeal
Administrative Law - Boards and Tribunals - Jurisdiction

The appellants appealed a decision of the Office of Residential Tenancies (ORT) following an award of damages to the landlord. The appellants' sole ground was that the hearing should have been adjourned at their request. Two dispute resolution facilitators (DRFs) had denied the adjournment before the scheduled hearing. The appellants' tenancy ended in June 2022, and shortly thereafter the landlord applied for an order that the appellants pay damages. On September 20, 2022, the appellants were served with a notice of hearing for October 4, 2022. One of the appellants responded by email to indicate they would be both be in Jamaica on that date and to request an adjournment. The court admitted the appellant's affidavit to this effect, noting that while affidavit evidence is generally inadmissible in statutory appeals, the rule did not apply where the appellant alleged an absence of jurisdiction, as was the case here.
HELD: The court discussed the duty of procedural fairness to which the ORT and other administrative bodies are subject, citing *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 among numerous other decisions confirming that principle. The court emphasized, however, that "there is no absolute right to an adjournment at common law" (para 20) and that both hearing officers and DRFs enjoyed discretion regarding adjournment requests either before or at a hearing. The evidence strongly suggested that the DRFs did not see the appellants' absence from Canada as a barrier to participating in the hearing by telephone, and therefore, their request was denied twice. Significantly, the evidence showed that the appellants booked their trip after having received notice of the hearing. The court found that it was within the ORT's discretion to deny the request and dismissed the appeal.

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***R v A.I.Z.*, 2023 SKKB 76**

Klatt, 2023-04-11 (KB23071)

Criminal Law - Sexual Touching - Victim under 16
Criminal Law - Sexual Assault - Victim under 16
Statutes - Interpretation - *Criminal Code*, Section 715(1)

These were the King's Bench judge's written reasons for her oral decision of January 5, 2023 regarding whether to admit into evidence a video-taped statement the complainant had given to police. The criteria to be applied to this decision are enumerated in s. 715.1(1) of the *Criminal Code*: i) the witness or victim must have been under the age of 18 years at the time of the offence; ii) the recording must have been made within a reasonable time after the alleged offence; and iii) the witness or victim's testimony must adopt the contents of the statement. Only the question of whether the video-recording had been made within a reasonable time was at issue, as the accused argued that the evidence was not clear on the dates of the alleged events.
HELD: The court provided interpretation of section s. 715.1(1) of the Code, a mechanism for allowing the introduction of evidence from children. It directs that the period of time between an alleged offence and a recording not be unreasonable, but the passage of time alone would not determine what constituted a reasonable delay in the circumstances. A lengthy delay may raise issues of reliability; however, it is also common for a child to hesitate to report an incident of sexual touching or assault. There are numerous factors that can lead courts to admit video-taped evidence even years after the alleged offence. In this case, where multiple incidents were alleged over time, the last offence had taken place, at most, approximately one and one-half years before the complainant gave her statement to police. The child's trauma and continuing distress was obvious in her testimony. The accused was her father. The offences had occurred with some regularity over time. The court ruled that threshold reliability had been met. Regarding the question of whether the admitting the statement would interfere with the proper administration of justice, the court turned to the list of factors in *R v F.(C.C.)*, 1997 CanLII 306 (SCC), to bear in mind after determining the statutory requirements are satisfied and found no basis to conclude that the admission would violate the rules of evidence or operate unfairly against the accused. The video-taped statement was admitted into evidence.

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***J.E.T. v Y.M.H.*, 2023 SKKB 83**

Richmond, 2023-04-24 (KB23075)

Family Law - Parenting Time and Access
Family Law - Child Support - Interim

Having separated in November 2016, some five months after the birth of their twins, the petitioner father, J.E.T., and respondent mother, Y.M.H., both sought a divorce and orders for parenting time and child and spousal support. In spite of two past interim orders, the parties had not been able to agree on parenting time for the children. J.E.T. argued that Y.M.H. was controlling, overprotective of the twins and did not trust him to parent. Y.M.H. raised concerns for the well-being of the children in J.E.T.'s care. Each parent called witnesses to attest to their parenting ability. Y.M.H. had been primarily responsible for the care of the children since separation, and she had limited the children's time with J.E.T., particularly during the first months of the COVID-19 pandemic when he only had remote contact with them. Y.M.H. argued that J.E.T. had a history of family violence: he could be verbally abusive and she referred to incidents such as his kicking in a door. J.E.T. had stopped making support payments and had accrued arrears of $18,540.42. His income for 2022 was $33,806, down substantially from 2020 and 2021. Y.M.H. also claimed spousal support. She was unemployed and had filed no financial particulars, and her counsel suggested imputing a minimum wage income.
HELD: The divorce was granted. The court took allegations of family violence seriously but opined that J.E.T.'s angry outbursts appeared to be limited to times when he feared losing contact with his children altogether. The court did not condone the behaviour but found he was entitled to parent the twins half the time. The parenting schedule would minimize contact between the parents, since they could not communicate easily, and the children should not be exposed to their fighting. J.E.T. would pick the children up from and drop them off at school. The parties would continue to share responsibility for decision-making. An income of $26,000 was imputed to Y.M.H. for the purpose of calculating s. 7 expenses. J.E.T. would provide Y.M.H. set-off payments of $103 per month until further order as well as 57% of any s. 7 expenses. He would pay his arrears in instalments of $500 per month. There was no evidence to show that the parties had not expected Y.M.H. to return to work after her maternity leave; she had not provided evidence that she could not work; the record of her financial situation was scant; and she had not pursued spousal support until the twins were five years old. Given all of this, the court dismissed the spousal support application.

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***Taylor v Berger*, 2023 SKPC 25**

Demong, 2023-03-17 (PC23022)

Courts - Provincial Courts - Small Claims
Torts - Conversion Damages - Conversion
Torts - Wrongful Conversion

The plaintiffs initially brought an action for the return of their truck, alleging that the defendant stole it. When they learned the truck was destroyed by fire, they sought damages in lieu, plus interest and court costs. The court found that the evidence did not establish the defendant personally stole the truck but did find that he wrongfully interfered with the plaintiffs' quiet use and enjoyment of it.
HELD: The court found that the defendant wrongfully interfered with the plaintiffs' use and enjoyment of the truck. The plaintiff's claim was drafted broadly enough to include conversion. The court set out the law on conversion, citing *Boma Manufacturing Ltd. v Canadian Imperial Bank of Commerce*, [1996] 3 SCR 727. The measure of damages for wrongful conversion is equal to the full value of the truck at the time it was wrongfully converted. Each party provided a witness to quantify the amount of the damages. The

plaintiffs were entitled to damages, pre-judgment interest from the date of the loss, and court costs under s. 36(1) of *The Small Claims Act, 2016*, SS 2016, c S-50.12 (Act). The court also awarded general costs of 10 percent of the amount of the judgment received under s. 36(3) of the Act.

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***Apodaca v Regina Police Service*, 2023 SKPC 26**

Hinds, 2023-03-21 (PC23023)

Criminal Law - Disclosure
Criminal Law - Disclosure - Third Party Records
Criminal Law - Disclosure - *O'Connor* Application

Here the court dismissed an application for third-party records. The applicant was charged with the strict liability offence of failing to comply with a public health order by attending a gathering with more than 10 people, contrary to section 61 of *The Public Health Act, 1994*, SS 1994, c P-37.1. The applicant served a notice of application for third-party record production on the Regina Police Service (RPS) following *R v O'Connor*, [1995] 4 SCR 411 (*O'Connor* application) along with an affidavit of the applicant. The record sought was disclosure of the RPS's "operational plan" during one of the anti-mask protests in Regina. The court decided whether: 1) this was an application for first-party records pursuant to *Stinchcombe* and *McNeil*, or whether it was third-party record application under *O'Connor*; and 2) if it were an *O'Connor* application, was the application supported by evidence showing that the operational plan was likely relevant?
HELD: The court dismissed the application. 1) Counsel for the applicant conceded in oral argument that this was an application for third-party disclosure pursuant to *O'Connor*. The court referred to the law as set out in *R v Gubbins*, 2018 SCC 44. Here, the "operational plan" was described by the RPS as being a "template, an internal, investigative document, that was intended to assist police members in ensuring public safety," and the court determined that it should be considered under the third-party disclosure regime in *O'Connor*. 2) The onus was on the applicant to prove that the operational plan sought was "likely relevant." In *O'Connor*, this standard was described as meaning there is "a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify." The applicant's affidavit only established the existence of an operational plan; there was no evidentiary foundation to support that it was likely relevant, or that it was logically probative of an issue at trial.

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