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***R v Hotomanie*, 2022 SKCA 119**

Jackson Caldwell Leurer, 2022-10-20 (CA22119)

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Criminal Code - Motor Vehicle Offences - Impaired Driving

The Crown sought leave and appealed the sentence imposed on L.H. by a Provincial Court judge (trial court) when L.H. pled guilty to nine offences that included incidents of impaired driving or driving while prohibited from doing so. L.H. was sentenced by the trial court to a term of imprisonment of two years to be followed by three years of probation and a ten-year driving prohibition. L.H. committed the offences over four different days between 2019 and 2021, shortly after he attended the funerals of family members. L.H. has a lengthy record that contains over 40 convictions for driving offences, including a prior three-year sentence for impaired driving: *R v Hotomanie*, 2001 SKCA 65. L.H.'s last conviction for a driving offence was in 2009. A *Gladue* Report was prepared in advance of sentencing; it contained details of significant trauma in L.H.'s

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upbringing that contributed to his addiction to alcohol. After comparing cases where habitual offenders had been sentenced, the trial court reviewed cases related to the application of section 718.2(e) of the Criminal Code and stated it was "beyond question that if the Court does not apply some reduction of sentence based upon the *Gladue* factors, a total sentence in the range of 4 to 6 years would be appropriate." The trial court further found that L.H.'s previous sentences for driving offences had not considered *Gladue* factors. The Crown raised three grounds of appeal that framed the issues for the court to answer: (1) Did the trial court err in the application of s.718.2(e) of the *Criminal Code*? (2) Did the trial court err in balancing the objectives of sentencing? (3) Is the sentence demonstrably unfit?
HELD: The Crown was granted leave to appeal, but the sentence appeal was dismissed. The court established at the outset of its analysis that it was relying on the standard of review affirmed in *R v Friesen*, 2020 SCC 9, 444 DLR (4th) 1 for sentence appeals: an appellate court can only intervene to vary a sentence if it is demonstrably unfit, or the judge made an error that had an impact on the sentence. In considering the first issue raised on appeal, the court held that the trial court had made an error in asserting that L.H.'s previous sentences for driving offences had not included considerations of *Gladue* factors: it was evident from a review of the record that previous sentences of L.H. had included a consideration of trauma from his past that led to his abuse of alcohol. This error did not, however, impact the sentence L.H. received. In dismissing the first ground of appeal raised, the court re-iterated that an error in principle must have a direct impact on the sentence imposed; this was not something identified in the trial court's reasons. The court held that the trial court was correct to identify s. 718(2)(e) factors as directly linked to the offences committed and diminishing L.H.'s moral blameworthiness. In considering the second issue raised by the Crown on appeal, the court rejected arguments that the trial court had erred by emphasizing rehabilitation in L.H.'s sentence instead of the need to achieve the objective of deterrence in the case of habitual impaired drivers. The court referenced authority to support the trial court's conclusion that rehabilitation in L.H.'s case was appropriate given the efforts he had made through receiving counselling, avoiding driving offences since 2009, and showing a commitment to upgrading his education to support a career change. The court summarized the Crown's last ground of appeal as a parity argument, in that the Crown contended that the sentencing of habitual impaired drivers, including L.H.'s previous decision from 2001, reflected sentences greater than two years of incarceration. The court rejected this argument as it found that the trial court's imposition of a lengthy period of probation was intended to serve as state supervision of L.H. that balanced the aims of deterrence and rehabilitation. With all three grounds of appeal rejected, the Crown's sentence appeal was dismissed.

***R v Haque*, 2022 SKCA 124**

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Schwann Leurer Tholl, 2022-10-31 (CA22124)

Criminal Law - Assessment of Credibility - Sufficiency of Reasons - Appeal
Criminal Law - Misapprehension of Evidence - Appeal
Criminal Law - Evidence - Uneven Scrutiny of Evidence
Criminal Law - Admission of Exculpatory Statement - Appeal

The appellant, formerly a physician practising obstetrics and gynaecology, was indicted on 16 counts of sexual assault alleged to have been committed on his patients. He was convicted by a judge of the Queen's Bench (trial judge) of 4 of these: (15 May 2018) Yorkton, CRM 44 of 2016 (Sask QB). He appealed the convictions to the Court of Appeal (court) on grounds which the court reframed into six questions related to alleged legal errors made by the trial judge related to: sufficiency of his reasons; misapprehension of the evidence; misapplication of *R v W.(D.)*, [1991] 1 SCR 742 [*W.(D.)*]; uneven scrutiny of the evidence; using the accused's access to disclosure and his presence at trial to impugn his credibility; and refusing to admit in evidence an exculpatory out-of-court statement of the appellant.
HELD: The court dismissed the appeal in its entirety. It first dealt with the appellant's arguments with respect to the sufficiency of the trial judge's reasons, ruling by reference to *R v G.F.*, 2021 SCC 20, and other judicial authority, that the judge's reasons demonstrated both factual and legal sufficiency, stating that the trial judge clearly made a thorough and reasonable analysis of the evidence necessary to make findings concerning the credibility and reliability of each of the complainants and to satisfy himself he had no reasonable doubt the activity to which the complainants testified had occurred. The court also found the trial judge clearly explained why he rejected the appellant's testimony denying medically unnecessary touching of the complainants; why he had no reasonable doubt from the appellant's testimony of that fact; and his reasons for not having a reasonable doubt of his guilt based on the evidence as a whole. The court recognized the trial judge disbelieved the appellant in large measure because he testified in great detail about such matters as wearing gloves, the use of chaperons in the examining room, never being alone with his patients, and other matters of that kind, when it was highly unlikely he would have had any independent recollection of individual patient visits. The court noted that the trial judge also clearly expressed that due to the appellant's lack of an independent memory, he relied on medical and police records, searching for answers to questions which could not be found in them. Turning to the appellant's submission that the trial judge misapprehended crucial evidence, and by doing so, rendered the trial unfair and a miscarriage of justice, the court relied on *R v Morrissey* (1995), 97 CCC (3d) (*Morrissey*) and cases endorsing it such as *R v Lohrer*, 2004 SCC 80. The court appreciated that the appellant was suggesting the trial judge was in reviewable error for a number of his factual findings, including a finding that he had fondled the complainant's "breasts" when the evidence was he had massaged one of her breasts; that the trial judge misapprehended the

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Statutes - Interpretation - *Divorce Act*, Section 21

Statutes - Interpretation - *Trustee Act, 2009*, Section 7

evidence when he stated that the appellant relied heavily on "records" in his testimony when the evidence was that no medical records were available; and other findings of that kind. The court dismissed this ground on the basis of the reasoning in Morrissey that these factual errors did not play "an essential part in the reasoning process leading to a conviction." As to the trial judge's *W.(D.)* assessment, the court ruled that the appellant had failed to show the judge's decision to convict the appellant "was based on a choice between [the appellant's] and the Crown's evidence", an impermissible application of the trial judge's reasonable doubt burden. Next, the appellant's argument that the trial judge had unevenly scrutinized the evidence as between the appellant and the Crown was rejected by the court because in advancing such, he was attempting to treat the evidence adduced in any count in the indictment as applicable to any other count in the indictment in the absence of a similar fact evidence ruling, which for reasons of trial fairness was not permissible. The court stated that the trial judge was aware of this rule and as the evidence was to be applied individually to each count, the uneven scrutiny argument could not be advanced by the appellant since the trial judge was permitted to place a different emphasis on the evidence adduced with respect to each count. With respect to the last two grounds of appeal, first, the court recognized the principle that it is an error in law for a trial judge to discount an accused's credibility on the sole basis that he had the opportunity to tailor his defence as a result of pre-trial disclosure and his presence at the trial, but that the rule was not a total bar to referencing this fact for other specific purposes such as testing the extent to which an accused's recollection of events is based on individual records he has himself relied on, which is what the trial judge did in this case; and lastly, the court stated that the trial judge properly handled the rule against tendering exculpatory statements of an accused at trial by correctly following *R v Edgar*, 2010 ONCA 529 to the effect that the appellant had failed to show he had satisfied the requirements of the exception to the rule, namely, that the statement must be made at the time of confrontation of wrongdoing; it must be spontaneous and the accused must testify. The court recognized that the trial judge correctly ruled that in this case, the appellant had first been confronted with the allegation by police seven years before receiving the undercover police call he wished to have tendered as an exculpatory statement, and the whole rationale for the exception, that of spontaneity of reaction to the confrontation, was lacking, making the undercover call devoid of probative value.

***R v Eaglevoice*, 2022 SKCA 125**

Caldwell Schwann Kalmakoff, 2022-10-13 (CA22125)

Criminal Law - Sentencing - Joint Submission - Appeal
Criminal Law - Sentencing - *Gladue* Factors - Appeal

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Wills and Estates - Executors - Removal

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O.M.S. v E.J.S. (2023 SKCA 8)

*O.M.S. v E.J.S. (*2023 SKCA 9)

Probe v Sherwood (Rural Municipality)

R v Dorie

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R v Hotomanie

R v Seeman

R v Singharath

T.S. v J.B.

Wilkerson v Marks

The appellant pled guilty to the offence of aggravated assault by stabbing a person six times. She was a young Indigenous woman, had no criminal record, though she did "present… with many *Gladue* factors" including drug and alcohol abuse, and drug-induced psychotic symptoms for which she was admitted to hospital for treatment three times. Crown and defence counsel on her behalf crafted a joint submission aimed at placing her at a federal carceral institution, the Okimaw Ohci Healing Lodge for Aboriginal Women (Lodge), in order for her to access intensive "Indigenous-based programming at the Lodge." For that to happen, a sentence of two years or more in custody needed to be imposed by the court. The Crown and defence jointly proposed to the Provincial Court judge sentencing her (sentencing judge) a sentence of two years in a federal penitentiary. The sentencing judge rejected the joint submission, indicating the proposed sentence was not a fit one. In doing so she did not refer to *R v Anthony-Cook*, 2016 SCC 43 (*Anthony-Cook*), or identify "any test or threshold to be applied in determining whether she could depart from the joint submission." She imposed a sentence of 12 months' custody followed by probation for 18 months, of which the appellant had served 6.5 months at the time of appeal, all at the Saskatchewan Hospital. The Crown applied to the Court of Appeal (court) for leave to appeal the sentence.
HELD: The application for leave to appeal was granted and the appeal was allowed. The court ruled that the sentencing judge erred in law by applying a conventional approach to sentencing to reject the joint submission when she should have applied the test formulated in *Anthony-Cook*, which required her to ask herself whether "the joint submission would bring the administration of justice into disrepute, or [was] otherwise not in the public interest" before rejecting it, and as stated in *Anthony-Cook*, she was to ponder before doing so whether the "submission [was] so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down." As she did not do this, the court concluded she had erred in law. The court appreciated that as the appellant had served 6.5 months of her incarceration, during which she received beneficial programing, and to now transfer her to the federal penitentiary system would increase the time she would be in actual custody, it chose to vary the sentence by increasing her incarceration to 18 months from 12 months, followed by a two-year term of probation on the same terms and conditions initially imposed by the sentencing judge, with a recommendation she continue to serve her sentence at the Saskatchewan Hospital.

***R v Singharath*, 2023 SKCA 6**

Caldwell Schwann Leurer, 2023-01-06 (CA23006)

Criminal Law - Murder - Second Degree Murder - Conviction - Appeal
Criminal Law - Common Sense Inference of Intent - Appeal
Criminal Law - Appeal - Unreasonable Verdict
Appeal - Criminal Law - Sufficiency of Reasons

The appellant sought to overturn the guilty verdict rendered by a trial judge of the Queen's Bench Court (trial judge) who convicted him of the offence of second degree murder in the shooting death of T.A. (see: 2020 SKQB 178). His grounds of appeal were that: first, the trial judge erred in law in his application of the common law inference that "a sane and sober person intends the natural and probable consequences of their actions;" second, by s. 686(1)(a)(i) of the Criminal Code, the verdict was unreasonable or could not be supported by the evidence because the trial judge misapprehended material evidence; and third, the trial judge erred in law by not providing substantive reasons for finding the appellant guilty. The Court of Appeal (court) noted that an "admission and agreed statement of facts" was filed at trial and as a result the evidence tendered by the Crown was limited to proving the mental intent element of the charge, which it appreciated the trial judge correctly stated as being whether the appellant "knew the reasonable and probable consequence of his actions would be either to cause [T.A.]'s death or to cause him grievous bodily harm which would likely cause his death, and was reckless whether death ensued or not." The court reviewed the trial judge's findings of fact: due to a previous encounter with the deceased, T.A., and his brother, the appellant and two of "his boys" returned to T.A.'s residence and confronted T.A. while they were four feet away from him on the other side of a fence; one of them said "These are my boys, do you want to go now?"; though unknown to the other accomplices, the appellant was in possession of a loaded sawed-off rifle, a prohibited firearm, which had no magazine so was loaded one bullet at a time, had no safety mechanism, and "required little force to activate the trigger;" the appellant possessed a .22 firearm at least eight days prior to the shooting and was looking for a magazine for it; about one minute into the standoff, the appellant raised the firearm, fully extended his arm, and fired it in the direction of T.A.; T.A. was struck and died of his injury; and the appellant knew the group was intending to confront T.A. and that a serious physical altercation was likely. The court also canvassed the judge's reasons with respect to his finding that the appellant had the requisite intention for second degree murder, observing that the trial judge reviewed the governing judicial authority on the common sense inference of intention, placing great reliance on *R v Walle*, 2012 SCC 41 in particular, and assessed the evidence, satisfying himself that he had no reasonable doubt that the common sense inference was available to him, and that he could come to no other conclusion on the evidence but that by his actions the appellant showed that he knew the probable and natural consequence of his actions was that T.A. would be killed or suffer bodily harm, which he knew was likely to kill him, and was reckless whether death would ensue or not.
HELD: The court dismissed the appeal, ruling that, contrary to the appellant's submissions, the trial judge correctly applied the common sense inference of intent, and did not erroneously place a burden on the appellant by treating the inference as a presumption of intent which the appellant was bound at law to rebut. Having upheld the trial judge on the question of the common sense inference of intent, the court turned to the appellant's ground that the verdict was unreasonable because the trial judge misapprehended material evidence. On this point, the court reminded itself that its role was not to reweigh and reassess the evidence, but to ask whether "the verdict [was] one that a properly instructed jury or a judge could reasonably have rendered." In finding that it was, the court was of the view that it was immaterial to the verdict whether or not the accomplices knew the appellant

had a firearm; that the evidence was capable of supporting the trial judge's finding that the appellant was aware a "serious confrontation" was expected; and that he gave ample consideration to the possibility that the firearm was fired by accident, including that it discharged with very little force and could not be said to have been wrong in concluding that there was no evidence of an accidental firing, only mere speculation to that effect. Lastly, the court could find no reviewable error that the trial judge's reasons were insufficient to allow for meaningful appellate review, stating that "the reasons in this case are sufficient in that they tell [the appellant] what the trial judge decided and why", and "this Court was not hampered from being able to determine whether an error of the sort alleged had occurred."

***R v Dorie*, 2023 SKCA 7**

Caldwell Leurer Barrington-Foote, 2023-01-11 (CA23007)

Appeal from Summary Conviction - Standard of Review
Criminal Law - Assault - Sexual Assault - Evidence - Credibility - Appeal
Criminal Law - Misapprehension of Evidence - Appeal
Criminal Law - Summary Conviction - Leave to Appeal to Court of Appeal

The Court of Appeal (court) granted leave to the appellant to appeal the decision of a judge of the Queen's Bench Court (appeal judge) denying his appeal from the decision of a judge of the Provincial Court (trial judge) convicting him of two counts of sexual assault on inmates at a federal carceral institution for women, the Okimaw Ochi Healing Lodge, while he was the acting deputy director there: 2018 SKPC 67 and (10 January 2022) Swift Current, CRM 18 of 2019 (Sask QB). The appellant appealed to the court on a number of grounds which included that the appeal judge made an error in law by not recognizing that the trial judge misapprehended a crucial piece of defence evidence to such an extent that the trial judge was "mistaken as to the substance of material parts of the evidence and [that] those errors play[ed] an essential part in the reasoning process resulting in a conviction" (*R v Lohrer*, 2004 SCC 80), and as such the trial was rendered unfair and a miscarriage of justice. The treatment of evidence by the lower courts that the court found particularly concerning related to the testimony of the appellant about a sign-in sheet which he testified he was in the habit of filling out assiduously, pointing out to the trial judge that the sign-in sheet was completed by him on the day of the offence against one of the complainants, indicating that he was not on the premises at the time of the offence. HELD: The court allowed the appeal with respect to both counts and ordered a new trial. It ruled that the trial judge relied on a misapprehension of the substance of the appellant's testimony about the sign-in sheet. This error dominated his analysis pursuant to *R v W.(D.)*, [1991] 1 SCR 742 of the appellant's credibility and caused him to find that the accused was not credible on both counts. The court recognized that the appellant did not testify that the sign-in sheet was always completed accurately by others as dictated by policy, but he testified that he completed it as required, doing so on the day of the offence; but the trial judge misinterpreted the appellant's testimony to mean that the sign-in sheet was an inherently reliable document, so that when the appellant admitted in cross-examination that the sign-in sheet contained gaps and was lacking in other ways, he discounted the appellant's credibility so far as to say he had attempted to mislead the trial court. Having found that the trial judge had committed a

fundamental error, it went on to find that the appeal judge also erred in law by failing to “correctly address the trial judge’s misapprehension of evidence.”

***O.M.S. v E.J.S.*, 2023 SKCA 8**

Whitmore Leurer Barrington-Foote, 2023-01-12 (CA23008)

Family Law - Appeal
Family Law - Child Custody and Access - Variation - Best Interests of Child
Family Law - Custody and Access - Wishes of the Child
Family Law - Decision-Making Authority
Family Law - Evidence - Expert
Family Law - Evidence - Judicial Notice
Evidence - Judicial Notice - COVID-19

The mother of a 12-year-old child appealed an order that her child be vaccinated against COVID-19. The child’s parents had been separated approximately 10 years. A previous trial had awarded joint custody with the child residing primarily with the mother. The trial decision had directed both parents follow medical recommendations in the best interests of the children, with the mother having final decision-making authority. The parties litigated disputes over the child’s medical care even before the COVID-19 pandemic. The father had applied for an order to vaccinate the child. The child, her mother and her paternal grandparents opposed vaccination. The chambers judge took judicial notice of the existence of a COVID-19 pandemic resulting in health and other restrictions, of serious health risk of contracting the virus, and of the safety and efficacy of the vaccine generally. A separate decision, 2023 SKCA 9, deals with evidentiary and publication disputes between the same parties. The Court of Appeal considered: 1) did the chambers judge err in concluding that the child’s physical safety, security and well-being would be served by receiving an approved COVID-19 vaccine; 2) did the chambers judge err by failing to account for the child’s emotional and psychological safety, security and well-being; and 3) when proper account was taken of all relevant factors, was it in this child’s best interests that she be vaccinated?
HELD: The appeal was granted. 1) The chambers judge did not err in finding the benefits of vaccination outweighed the risks in terms of physical health only. The chambers judge’s conclusion was supported by two independent lines of reasoning: judicial notice of facts, and evaluation of expert opinions filed. Unlike a judge’s discretionary decision to decline to take judicial notice of a fact, a judge’s decision to take judicial notice of a fact is a question of law, and thus is reviewable on appeal on a correctness standard. Judicial notice applies to facts generally accepted to the point they are not debated among reasonable persons or capable of immediate and accurate demonstration through readily accessible sources of indisputable accuracy. The permissible scope of judicial notice varies according to the nature of the issue. Generally, judicial notice cannot be taken of matters that require expert evidence. The safety and efficacy of the vaccine bore heavily on the central matter in dispute. Expert evidence was required. The fact that government regulators had approved the vaccine was not disputed. The judge could take judicial notice of the fact of regulator approval. Because many products with government approval have been found to be associated with risks, government

approval alone was not a proper basis for judicial notice of the safety and efficacy of the vaccine, although the approval was not irrelevant. A parent is entitled to make health care decisions based on regulatory approvals without an independent safety, efficacy and quality assessment. It is usually both unnecessary and unhelpful to look beyond regulatory approval and reasonable medical advice where there is a court application about medical treatment decisions disputed between parents because the overall issue is the best interest of the child. The father was not required to prove the vaccine was safe and effective because the mother objected to it being administered. The mother asserted that the vaccine was not physically safe or effective despite regulatory approval. The onus was on her to prove material risk to this child and insufficient benefit to outweigh that risk. The chambers judge did not err in his analysis of a particular family doctor having no particular expertise on the effects of COVID-19 on children or the treatments available. The expert evidence did not contain unqualified definitive statements on the safety and efficacy of the vaccine generally. The undisputed evidence was that the vaccine was indicated for children of this child's age, and there was no evidence of a contraindication or material physical risk associated with the vaccine that would be peculiar to this child. 2) The chambers judge erred by only focusing on the physical risks of COVID-19, and not considering the child's emotional and psychological safety, security and well-being. Section 16(2) of the *Divorce Act* directs that, when considering the factors that bear on a child's best interests, "the court shall give primary consideration to the child's physical, emotional and psychological safety, security and well-being." The child had strongly expressed that she did not want to receive the vaccine. The chambers judge failed to take into account the child's mental and emotional interests and failed to account for the implications of a forced vaccination on this child's emotional and psychological safety, security and well-being. The weight assigned to uncertain future events depends on both the chance the event will occur and the severity of consequences if it does. 3) Vaccination was not in the best interests of this particular child. Despite her having type 1 diabetes, the evidence did not establish that she was more vulnerable to serious complications than others her age. Vaccination would further reduce a low risk of serious symptoms or death from COVID-19 infection. The evidence established a small risk that forced vaccination may prompt this child to self-harm and a greater risk of other psychological and emotional harm. Vaccination at the father's insistence would almost certainly further damage the child's relationship with the father. Why or how the child came to be opposed to vaccination was less important than the fact she held the views and the fact relational and mental health risks were associated with forced vaccination of this particular child. On balance, the best interests of this child supported not being vaccinated against her wishes.

***O.M.S. v E.J.S.*, 2023 SKCA 9**

Whitmore Leurer Barrington-Foote, 2023-01-12 (CA23009)

Family Law - Procedure
Family Law - Publication Ban
Family Law - Affidavits
Statutes - Interpretation - *Court of Appeal Act, 2000*, Section 8, Section 9
Statutes - Interpretation - *Divorce Act*, Section 21

The appellant mother appealed a publication ban decision and evidence decision connected to a dispute between the mother

and respondent father about whether a child would be vaccinated against COVID-19 against the child's wishes. The parenting decision was also appealed and addressed in a separate decision, 2023 SKCA 8. The mother appealed the decision to strike parts of affidavits sworn by the child's paternal grandparents and the refusal to strike portions of the father's affidavits. The mother also appealed the chambers judge's refusal to limit the father from communicating publicly about the case. The Court of Appeal considered: 1) should the appeal court intervene in any of the evidentiary rulings; 2) what was the proper appeal procedure; and 3) should the appeal court intervene in the publication ban rulings?
HELD: The appeals were dismissed, with no costs awarded. 1) The chambers judge did not err in striking and allowing various affidavit evidence. The appellate court agreed that evidence relating to whether the father took the children to visit her unvaccinated grandparents was not relevant. Evidence of political and social debates regarding vaccination was not relevant. In the absence of expert medical evidence making a connection, the experience of family members with vaccination was not relevant to whether a court would order the child be vaccinated. The father's evidence regarding the self-harm and other messages he saw on the child's cellphone was highly relevant to the issue before the court. 2) Procedurally, these issues ought to have been appealed with the main vaccination appeal and not as a separate appeal, because the appeals were inextricably linked. The chambers judge's decision about admissibility of evidence was interlocutory to the ultimate matter. Section 8 of *The Court of Appeal Act, 2000* requires leave for interlocutory decisions. Section 21 of the *Divorce Act* permits an appeal from final or interim decisions under that Act. Prior decisions establish that the right of appeal is limited to those judgments arising from a power specifically conferred by the *Divorce Act*. The evidentiary rulings did not arise from such a power. Therefore, leave was required to address the evidentiary rulings as a stand-alone appeal. Under s. 9 of *The Court of Appeal Act, 2000*, the appellant had a right to appeal from the evidentiary ruling as a ground of appeal from the vaccination decision if she wished to advance an argument that the interlocutory evidentiary ruling had an impact on that latter decision. Filing as a separate appeal improperly expanded the pages of written argument and unnecessarily increased the respondent's costs. 3) The decision to grant an order prohibiting the publication of information is discretionary. The review standard for appellate intervention is palpable and overriding error in fact assessment, failing to correctly identify governing legal criteria or misapplication of those criteria. The mother argued there had been a failure to recognize the facts of the harms identified by the psychotherapist and psychiatrist and a failure to balance the interests of the parties, including the privacy interests of the children. The chambers judge erred in concluding the father's social media posts about the child were not inappropriate and detrimental. The correct legal analysis required considering whether there was sufficient evidence of a risk of serious harm, whether alternative measures would prevent the risk, and whether the salutary effects of the publication ban would outweigh its deleterious effects. The appellate court analyzed the father's social medial posts as posing some risk of harm to the child. The evidence suggested the father's television interviews posed a greater risk. The appellant did not appeal the refusal to limit the father's television interviews. The appellate court was not convinced a ban on social media posts alone would materially reduce the risk of harm. Publication bans may be justified in other cases. This appellant's appeal was dismissed.

***R v Seeman*, 2022 SKKB 232 (not yet published on CanLII)**

Klatt, 2022-10-21 (KB22223)

Criminal Law - *Controlled Drugs and Substances Act* - Possession of Marijuana for the Purpose of Trafficking

Criminal Law - Regulation of Access to Medical Marijuana - Store-Front Dispensaries
Constitutional Law - *Charter of Rights*, Section 1, Section 7

Three owners of store-front dispensaries of marijuana and other cannabis derivatives, such as cannabidiol (CBD oil) (applicants), were charged under ss. 5(1) and 5(2) of the *Controlled Drugs and Substances Act* (CDSA) with possession of marijuana and cannabidiols for the purpose of trafficking between August 24, 2016, and October 17, 2018. At that time, store-front dispensaries for the distribution of these products directly to their customers for medical purposes were illegal by the operation of the *Access to Cannabis for Medical Purposes Regulations* (ACMPR), the *Industrial Hemp Regulations* (Hemp Regulations) and the CDSA. The applicants argued before the judge of the King's Bench (trial judge) that the combined effect of the ACMPR, the Hemp Regulations, and ss. 5(1) and 5(2) of the CDSA was to deprive them and their customers of their s. 7 *Charter* right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice; that the *Charter* breach was not saved by s. 1 of the *Charter*; and that "the ACMPR, the Hemp Regulations and the restrictions on cannabis distribution in s. 5 of the CDSA as they existed from August 2016 to March 2018… should be declared of no force and effect pursuant to s. 52(1) of the *Constitution Act, 1982*."

HELD: The trial judge found that the legislation in issue, except the Hemp Regulations, breached the applicants' rights under s. 7 of the *Charter* and declared the infringing provisions of no force and effect. After a tour of the legislative and regulatory history of the development of medical use exceptions to the CDSA, which she used to assist her in determining the objectives of the legislation in her analysis of s. 7 of the *Charter*, the trial judge reviewed the evidence tendered by the applicants and the Crown, which consisted of viva voce testimony in court and by video link, and affidavits from many witnesses, including the applicants, users of medical marijuana and CPD oil, medical doctors, persons familiar with the legislative framework in issue, and government officials, which was to the effect that: the applicants set up the store-front dispensaries in order to fill what they believed was a need to provide face-to-face sales of medically effective marijuana, which were immediate, less expensive and more reliable than the government online licensed producers (LPs); they testified that the Hemp Regulations prevented them from producing or obtaining CPD oil of a higher THC content because the Regulations required producers to discard the flowers and leaves; persons with various chronic conditions, which included sufferers of epilepsy, chronic pain, and Crohn's disease, whose symptoms were much alleviated by marijuana products, testified that it was essential for their course of treatment that they have dependable and timely supplies, which was not guaranteed by the LPs; they also stated that the LPs were not permitted to sell dosages containing effective THC levels above 30 mg, which the dispensaries did provide; evidence was presented to the effect that homeless and older persons had difficulty ordering online or being able to accept delivery of product; and physicians confirmed that medical marijuana was an effective treatment when their patients had access to a continuous and regular supply. The trial judge then turned to her analysis of s. 7 of the *Charter* and the governing case law, which she understood required her first to determine if the applicants were deprived of liberty or security of the person; second, to identify the objective of the legislation; and third, to determine if the legislation was "grossly disproportionate, overbroad or [had an] arbitrary effect on [at least] one person" and therefore was not in accord with the principles of fundamental justice. She found that, as the applicants risked being imprisoned, they were deprived of their liberty and security of the person. She then went on to the second stage of her analysis. To identify the objective of the legislative provisions, she took guidance from *R v Moriarity*, 2015 SCC 55 especially and her review of the history of the medical exemption, and concluded that the objective of the law should not be confused with the means used to apply it, and in order to prevent that from happening, the objective should not be "articulated in too general terms [or] it will provide no meaningful check on the means employed to achieve it." With this direction in mind, she stated the "undisputed overarching objective of the legislated scheme

remained “public health and safety”. She was next to determine whether the means used to achieve this objective violated the principles of fundamental justice by reference to “three relevant principles,” these being “arbitrariness, overbreadth and gross disproportionality” as these principles were explained in *Canada (Attorney General) v Bedford*, 2013 SCC 72 (*Bedford*). After applying the *Bedford* definition of arbitrariness to the evidence and concluding that there was no rational connection between the restrictions imposed by the ACMPR which made the “in-person dispensaries” illegal and the goal of public health and safety in the delivery of medical marijuana to those who needed it; and neither was there a rational connection between the ACMPR’s imposition of a 30 mg limit on THC concentration in CPD oil since the evidence proved that higher concentrations were beneficial, and no downside to the higher concentrations had been proven by the Crown, she ruled that the applicants had been deprived of liberty or security of the person in a manner not in accordance with the principles of fundamental justice under s. 7 of the *Charter*, and having so found chose not to consider whether the legislative scheme also ran afoul of the principles of overbreadth or gross disproportionality. Her final task was to ask herself whether the legislation could be saved by recourse to s. 1 of the *Charter*, and with the assistance of *R v Oakes*, [1986] 1 SCR 103 (WL) ruled that it could not because “there was more evidence of the harms and significant ill effects of the laws on individuals than the benefit of putting the restrictions in place.”

***T.S. v J.B.*, 2022 SKKB 246**

Goebel, 2022-11-17 (KB22243)

Family Law - Interim Order - Child Custody and Access
Family Law - Child Custody and Access - Shared Parenting - Variation
Family Law - Child Custody and Access - Variation - Change in Circumstance
Family Law - Custody and Access - Parental Alienation
Family Law - Decision-Making Authority
Family Law - Parenting - Conflicting Affidavit Evidence
Statutes - Interpretation - *Children's Law Act, 2020*, Section 8(4)

The mother applied pursuant to s. 8(4) of *The Children’s Law Act, 2020*, to vary a parenting order. The parties had two children together. Agreements were reached in two pre-trial conferences addressing child support and parenting arrangements. The mother had primary custody and the father had parenting time and paid the mother child support. No judgment or order incorporating the terms of the agreement was made. The father and his partner then made several unsubstantiated allegations accusing the mother of child abuse. The father sought shared parenting and an end to child support payments. The unrepresented mother consented in hope that the allegations would cease. The court granted the consent order in 2020. The father and his partner escalated unsubstantiated abuse complaints. In 2021, the mother applied to vary the parenting order seeking sole decision-making authority and primary care of both children and supervision of the father’s parenting time, on the basis of continued unfounded complaints and alienating behaviour. A private parenting assessment report was completed. The father said he gained insight from the report and he had resolved problematic pre-assessment behaviour and attitudes. The court considered: 1) has there been a material change in circumstances since the last order was made; 2) can a fair and just final determination be made based on the

affidavit evidence; and 3) what interim order is in the best interests of the children pending agreement or further court order? HELD: There was a material change in circumstances, but the evidence did not permit the chambers judge to make a final order. An interim order set out communication between the parties, interactions with the children and counselling. 1) There was a material change in circumstances. A material change is an unforeseeable change that fundamentally alters the child's needs or the ability of the parent to meet those needs. Material change is a high threshold to avoid re-litigating and to provide stability and predictability. After the consent order, the father and his partner escalated unfounded allegations of sexual abuse, which resulted in the children being subjected to police interviews and medical examinations. It was not reasonably foreseeable that unfounded abuse reports would continue and escalate after the consent shared parenting order. About a year after the order, the ministry substantiated concerns that the father and his partner were engaging in emotional abuse of the children arising from repeated unsubstantiated complaints. The co-parenting relationship had been deteriorating and the parties were modeling an unhealthy, toxic way of dealing with conflict. The eight- and four-year-old children reported that their father and his partner told them they were supposed to say their mother was mean and abused them. The relationship between the children and their mother was deteriorating. The children also had problematic behaviour at school and both had started trauma counselling. The father's argument that the situation was foreseeable and therefore not a material change was untenable. Shared parenting would not have been consented to or ordered if this level of conflict was foreseen or in the reasonable contemplation of the parties. 2) Conflicting affidavit evidence and evidentiary gaps did not permit a fair and just final order. Eleven affidavits with hearsay evidence appended, including the private parenting report and redacted documents from the Ministry of Social Services (ministry), were before the court. The parties agreed the court could admit the documents, notwithstanding unsworn and untested hearsay. Queen's Bench rule 15-46(3) specifies hearsay evidence is not admissible when final relief is pursued. The judge accepted the information in the reports and notes regarding when reports were made, actions taken by the ministry, observations about the mother, father, father's partner and children except where contradicted by sworn evidence. The children made casual allegations of abuse, called their mother "babysitter" or her first name, acted out at school, and had no friends. The controverted and incomplete evidence left unclear what was behind the children's behaviour. The behaviour was too unusual and the evidence too contentious to confidently determine a parenting arrangement that would meet their best interests based on affidavit evidence alone. The determination of the parenting arrangement that best meets the interests of the children was directed to an expedited pre-trial conference and, if necessary, to trial. 3) Interim orders should try to preserve stability for children unless the children are at risk or another compelling reason necessitates change. The focus is on the best interests of the children. The father has said he was prepared to change. The ministry had closed all files, including their concerns about the father and his partner. The parties were directed to engage directly with timely and respectful communications about parental decision-making and information, use a parenting app, reinforce the mother's role, and go to counselling.

McKay v Wheaton Automotive Ltd., **2022 SKKB 280**

Robertson, 2022-12-21 (KB22261)

Practice - Appeal - Small Claims
Appeal - Standard of Review

This matter was an appeal under s. 44 of *The Small Claims Act* (SCA) to a judge of the Court of King's Bench (appeal judge) from the decision of a judge of the Provincial Court (Civil Division) (trial judge) dismissing the appellant's claim against a vehicle dealership and one of its salespersons for allegedly selling him a vehicle whose odometer they had rolled back, which induced him to purchase a faulty vehicle. The record before the appeal judge and in particular the transcript of the evidence revealed that the trial judge dismissed the claim for lack of any evidence pertaining to liability or damages, or that the appellant had attempted to mitigate his damages by allowing the dealership to inspect the vehicle while under warranty and make any necessary repairs.
HELD: The appeal judge dismissed the appeal, and in doing so chastised the appellant for making "a serious allegation of both civil and criminal fraud that ought not be tolerated, given the lack of evidence in support." In rendering his decision, the appeal judge reiterated the standard of review applicable to civil appeals pursuant to the SCA with reference to *Premium Fire Protection Ltd. v Moffatt*, 2021 SKQB 121, stating that a trial judge is entitled to deference with respect to findings of fact; an appellate court will not overturn findings of fact except where a palpable and overriding error is found; questions of law are to be scrutinized on a standard of correctness; and questions of mixed fact and law will be examined on a palpable and overriding standard if the trial judge "considers all the evidence but still reaches the wrong conclusion", but will be reviewed on a standard of correctness "if the error relates to the trial judge's characterization of a legal standard." He went on to find that the trial judge committed no error in this case in ruling that the appellant provided no evidence as to liability or damages, and in ruling he did not take steps to mitigate his damages.

***Wilkerson v Marks*, 2022 SKKB 278**

Brown, 2022-12-20 (KB22266)

Courts and Judges - Jurisdiction - Family Court - Custody
Family Law - Child Support - Enforcement
Family Law - Custody and Access - Mobility Rights
Family Law - Custody - Jurisdiction - Residence
Judgments and Orders - Enforcement of Foreign Judgments

The applicant father applied under rule 15-33 of *The Queen's Bench Rules* and ss. 9(3), 25(b) and 27(b) of *The Children's Law Act, 2020* to enforce orders of an American court. The parties divorced and entered into a separation agreement with a parenting plan providing the father weekly child access. A divorce judgment was issued. The parties resided in the USA at the time of the divorce judgment. The mother relocated with the children to Saskatchewan approximately two years after the divorce judgment issued. The father said he was not informed where they moved. He objected to the move. He had not seen the children since the move. He hired a private investigator who located the mother and children. The father commenced court proceedings in the USA to obtain access to the children. An American judge granted the access motion, commented that the mother's evidence was not credible, and ordered the mother pay a fine, participate in counselling, pay set expenses to the father, and provide access to the 17-year-old child. The mother resisted the application on the basis that the father had been an angry, abusive, alcoholic drug user during their relationship and the American judge did not adequately consider her side. The mother said the child had no interest

in a relationship with the father and the child refused to attend counselling. The mother argued the father ought to have commenced proceedings in Saskatchewan by issuing a petition and not notice of application. The court considered: 1) was the applicant required to issue and serve a petition to obtain an order enforcing a registered extraprovincial parenting order; and 2) what was the proper order?
HELD: 1) Section 24 and 25 of *The Children's Law Act, 2020* provide for recognition and enforcement of extraprovincial parenting orders as orders of the court in Saskatchewan if the technical requirements are met. It was not disputed that the technical requirements were met. None of the reasons why the Saskatchewan court could refuse to recognize the American order were established. The mother participated in the American proceedings. Section 25 of the Act requires an application be brought for enforcement of a recognized extraprovincial parenting order. The application was the extension of proceedings already instituted, as countenanced by rule 15-45, rather than a new petition. The application ought to have been styled as an application for enforcement of a recognized extraprovincial parenting order, rather than an application for substantive interim relief. The procedural defect did not prejudice the mother. The court had authority to cure the defect inherently and under Queen's Bench rule 1-6. 2) The order sought to begin the groundwork to repair a relationship severed by time and distance. The American order was recognized in Saskatchewan. The mother was ordered to provide an affidavit detailing past efforts to have the daughter take counselling, and to advise of her own counsellor regarding re-establishing the relationship between the father and daughter, to pay costs of counselling and to pay costs to the father. The father was given 10 days to apply for an order to cure the procedural irregularity.

***Nagy v Graves*, 2022 SKKB 257**

Layh, 2022-11-24 (KB22245)

Wills and Estates - Estate Administration - Executor - Removal
Wills and Estates - Executors - Removal
Statutes - Interpretation - *Administration of Estates Act*, Section 14.1, Section 35
Statutes - Interpretation - *Trustee Act, 2009*, Section 7

The applicant applied to be appointed as sole executor of her mother's will and to have the existing executors removed.
There were nine siblings, two of whom were the existing executors. Their mother had died 10 years before. Letters probate had been issued. The will divided the estate equally among seven of the nine siblings. The court considered: 1) had the existing executors failed to administer the estate in a reasonable and prudent manner; and 2) would removal be in the best interests of those persons interested in the estate?
HELD: 1) The existing executors had failed to administer the estate in a reasonable and prudent manner. The court inferred from s. 14.1 of *The Administration of Estates Act* (Act) that an executor acting reasonably would have applied for letters probate within 60 days of the death of the testator. The executors did not apply for letters probate for over eight years. An existing executor said she did not take immediate steps to probate the will because a bank employee said probate was not necessary to release the funds in the deceased's bank account, and because her siblings did not complain for seven years. The executor did not show prudent or reasonable attention to the administration of the estate. Section 35 of the Act requires the executor render an accounting of the

executorship within two years after the grant of letters probate. No tax returns were filed and regular records were not kept of the farmland third-party lease revenues or the farmhouse expenses while occupied by an executor, apparently rent-free. The existing executors provided inadequate and approximated accounting to the court. The lack of an estate account and lack of filing estate tax returns did not fulfil the duties of a trustee in s. 7 of *The Trustee Act, 2009*. All of the beneficiaries except one consented to the removal of the existing executors and appointment of the applicant. 2) Removal was in the best interests of the beneficiaries. The farmland, the most significant estate asset, was sold in 2021 and the proceeds distributed to the beneficiaries. The existing executors, however, continued not to understand what they needed to do. The future administration of the estate included providing beneficiaries with a full estate accounting, filing of estate income tax returns and dealing with potential income tax liability. Based on their past actions, the existing executors were unlikely to complete the remaining estate administration competently. The court does not lightly interfere with the expressed wishes of the deceased person's choice of persons to administer the estate. The applicant had established removal was necessary and in the best interests of the estate. The applicant was appointed executor. The court directed application costs paid out of the share to be received by the removed executors.

***Probe v Sherwood (Rural Municipality)*, 2023 SKKB 7**

Morrall, 2023-01-09 (KB23003)

Interpretation - Words and Phrases - "may"
Municipal Law - Council Members - Disqualification
Municipal Law - Liability
Municipal Law - Powers of Municipality
Torts - Negligence - Public Authorities - Public Duty - Vicarious Liability

The plaintiff applied for summary judgement of his claims pursuant to legislation, contract, negligence and fiduciary duty against the defendant municipality for legal fees and failure to pay an honorarium due to a councillor. The parties filed a statement of agreed facts. The plaintiff had been a councillor for the defendant municipality. The plaintiff was involved in many legal proceedings connected to his role as a councillor for the municipality, including a public inquiry, judicial review of a bylaw, ombudsman complaint, application disqualifying the plaintiff from continuing as a councillor and criminal charges. The plaintiff stated he had acted in good faith throughout and the defendant did not dispute the assertion, except as inconsistent with findings of fact made in prior judgments. The parties agreed a final determination could be made under Queen's Bench rule 7-5. The court considered: 1) was summary judgment appropriate; 2) did the municipality owe the plaintiff a duty of care; 3) was the municipality in a fiduciary relationship with the plaintiff; 4) was the municipality required to pay the plaintiff his councillor honorarium until January 18, 2018; 5) was the municipality required to pay the plaintiff his legal fees for his representation at the public inquiry, in a statement of claim issued against him, the court case disqualifying the plaintiff from council, or his various criminal proceedings?
HELD: The defendant municipality was ordered to pay the plaintiff the honorarium until January 2018 and all other claims were dismissed, with costs set at $1,000 in favour of the plaintiff. 1) The parties agreed summary judgment should be used to resolve all

issues before the court. The court concluded a fair and just determination could be made based on the facts as filed by the parties. 2) The plaintiff argued the municipality had a duty to reasonably interpret *The Municipalities Act* to pay his legal fees and honorariums, and breached the duty by improperly interpreting the Act. No authority supported the argument. The court rejected the idea of a tort of negligent interpretation, which would undermine the legislative intent of sections providing a legislative body with discretion. Under existing negligence principles, the court ruled the council's decision not to cover the plaintiff's legal costs was a policy decision relating to economic, social and political factors. Therefore, no duty of care existed. There was no allegation of bad faith or negligent misrepresentation. 3) The plaintiff argued the municipality owed him a fiduciary duty because they had a discretionary statutory power to decide to pay legal fees and honorariums, and thus, a power to affect his legal and practical interests. No authority supported the argument. The municipality did not have a fiduciary duty towards the plaintiff. The municipality was more vulnerable to the plaintiff's actions as a councillor, rather than the other way around. 4) The plaintiff claimed he should have been paid honoraria from October 2016 to January 2018. Section 82(1) of *The Municipalities Act* states members of council are paid remuneration, benefits and reimbursements for expenses that may be fixed by the council. The municipality had applied to remove the plaintiff from office after he was disqualified due to conflicts of interest. The plaintiff failed to voluntarily resign. In January 2018, a court declared him disqualified from council and his position vacant under s. 148(2)(b)(ii) of *The Municipalities Act*. The declaration was effective immediately but not retroactively. The municipality was obligated to pay the plaintiff's honoraria until January 18, 2018, the date of the declaration, in the amount of $27,150. 5) The plaintiff was represented by counsel at a public inquiry into issues related to decisions made by the municipal council. During the hearing, the municipal chief administrative officer agreed the municipality would pay the plaintiff's legal fees. A bylaw was enacted to require the municipality to cover the legal fees, and the fees were paid. The bylaw was subsequently quashed by another decision of the court. A delegate of council cannot make agreements that the council has the sole discretionary power to authorize. The agreement was not enforceable against the municipality. Section 355 of the Act provided that the municipality may pay the costs of defending an action against a member of council. The word "may" can sometimes convey obligation, but in s. 355(3), "may" is discretionary. It would not be wise to have the ratepayers mandatorily fund every single legal issue arising from a councillor's service, good faith or not, as not every issue facing a councillor will be worthy of funding and the democratic nature of council will involve disparate views. Despite the agreed facts filed by the parties, the court commented the plaintiff's conduct in connection with the legal proceedings was overall closer to bad faith than good faith. Section 356 means the municipality is vicariously liable for claims against officers, volunteers or agents of a municipality in certain circumstances. A councillor was not an employee or officer of the municipality and was not an agent of the municipality. Section 356 did not apply. *The Municipalities Act* did not require the municipality to pay the plaintiff's legal fees. The municipality had already paid the plaintiff for the public inquiry legal fees, and there was no valid legal proceeding to pay again sums already given. The plaintiff had participated in a settlement of the statement of claim against the plaintiff and municipality, and to seek repayment of sums paid by the plaintiff in that settlement would overturn the earlier settlement agreement. Section 151 of the Act precluded the municipality from paying the plaintiff's legal costs for the disqualification application because the plaintiff was not successful and could not remain a member of council. Sections 355 and 356 of *The Municipalities Act* contemplate reimbursement for civil liability and not criminal offences. The plaintiff was not entitled to recovery of his criminal legal costs.

***Canadian Pacific Railway Company v Canada Cartage System Limited*, 2023 SKKB 10**

Layh, 2023-01-13 (KB23006)

Civil Procedure - *Queen's Bench Rules* - Summary Judgment
Practice - Application for Summary Judgment - Disposition Without Trial
Civil Procedure - Limitation Period - Counterclaim
Limitations - *Limitation of Actions Act* - Negligence
Tort - Negligence
Tort - Standard of Care

The plaintiff rail company applied for summary judgment of its claim for damages against the defendants, a truck company and truck driver. The defendants opposed proceeding by summary judgment. A transport truck had proceeded into a rail intersection while the red lights were flashing. The truck was struck by a railcar and dragged down the tracks, causing damage to the truck, the railcar and railway infrastructure. The rail company claimed the truck driver's negligence caused $645,149.25 of damage. The defendants denied negligence and counterclaimed for damages to the truck, alleging failure to properly warn of the approaching train. The rail company denied breach of a standard of care and argued The Limitations Act barred the defendants' counterclaim. A chambers judge set deadlines for filing affidavits. The defendants objected to an affidavit served after cross-examinations were complete. The rail company objected to another affidavit on the basis the affiant was not a qualified expert to proffer opinion evidence. The chambers judge considered: 1) was summary judgment suitable; 2) was the defendants' counterclaim barred by *The Limitations Act*; 3) was an affidavit served after cross-examinations admissible; 4) could the alleged negligence of the defendant truck driver be summarily determined; 5) could the alleged contributory negligence of the plaintiff rail company be summarily determined; and 6) could damages be summarily determined?

HELD: 1) The judge determined three of six issues in a summary determination. Summary judgment is not generally appropriate to resolve factually complex lawsuits. The summary process can be as time-consuming as proceeding directly to trial. Affidavits often have a ring of inauthenticity. The parties may have been better served to proceed to trial on all issues rather than have a bifurcated procedure. 2) The counterclaim against the rail company for damages to the truck was struck for being commenced three months after the expiration of the two-year limitation period. The counterclaim was an independent action alleging a tortious wrong, and was not an amendment to an existing claim. 3) The rail company filed an affidavit from the train conductor after cross-examinations were complete and well after the deadlines. The affidavit contained relevant first-hand evidence, but repeated evidence that was already before the court in another affidavit. The defendants were not prejudiced by the late filing. The affidavit added irrelevant details to the information already in a police report appended to an earlier affidavit. The affidavit, and the cross-examination of the affiant, were both admitted into evidence. 4) The truck driver was negligent. The judge considered whether the summary judgment process would allow necessary findings of fact; would allow application of the law to the facts; and would be a proportionate, more expeditious and less expensive means to achieve a just result. The defendant argued the evidence was conflicting and could not be determined without trial. Only the truck driver and the train conductor witnessed the crash, and each had sworn an affidavit and been cross-examined. No further evidence was likely to be available at trial. A reasonable semi-truck driver with an attached trailer faced with flashing red lights at an awkwardly angled railway intersection in the dark would stop completely and not proceed until it was safe to do so. The truck driver breached the standard of care. The breach caused the property damage suffered by the rail

company, and the damage was not too remote a consequence of the negligent driving. 5) The defendants' allegation of contributory negligence could not be summarily determined. The rail company unquestionably owed a duty of care to motorists. The standard of care could not be established based on the evidence before the court. It was agreed that the Canadian Rail Operating Rules established the appropriate standard of care. Only a portion of the rules was provided to the court. The rail company initially did not refer to the rules at all in its arguments, and the arguments before the court were insufficient to assist the court. A number of concepts embedded in the rules required contextual evidence for an appropriate interpretation. The train conductor was on the lead car as it approached the intersection and he was holding a flashlight and jumped from the railcar moments before the collision with the truck. There was no one standing on the ground to warn the truck driver. 6) The issue of damages could not be summarily determined. The evidence was too conflicting and vague. Costs of the application were to be determined in the cause by the trial judge.