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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Subject Index

***R v R.P.*, 2023 SKCA 65**

Caldwell Schwann Kalmakoff, 2023-05-26 (CA23065)

Criminal Law - Appeal - Conviction
Criminal Law - Appeal - Reasons for Judgment
Criminal Law - Evidence - Credibility
Criminal Law - Sexual Interference

The appellant appealed against his conviction of sexual interference contrary to s. 151 of the Criminal Code for sexual contact with a three-year-old child. The appellant argued the trial judge failed to give adequate reasons for rejecting his testimony denying the allegations against him. The Court of Appeal considered whether the trial judge's reasons for verdict were adequate.
HELD: The appeal was dismissed. Sufficient reasons for a decision serve three purposes: enabling the parties to know why a verdict was rendered; permitting effective appellate review; and promoting judicial accountability. Trial judges are not required to

Corporate Law - *Business Corporations Act* - Oppression Remedy

Corporate Law - *Business Corporations Act* - Oppression Remedy

Corporate Law - *Business Corporations Act* - Oppression Remedy - Injunctive Relief

Corporate Law - *Business Corporations Act* - Oppression Remedy - Injunctive Relief - Jurisdiction

Corporation Law - Shareholder Remedies - Oppression

Criminal Law - Appeal - Conviction

Criminal Law - Appeal - Reasons for Judgment

Criminal Law - Application for Judicial Stay - Requirements

Criminal Law - Evidence - Credibility

Criminal Law - Evidence - Identification

Criminal Law - Sexual Interference

Mortgage - Foreclosure - Application for Judicial Sale - Order *Nisi*

Mortgages - Foreclosure - Order *Nisi*

Practice and Procedure - Case Management

Property - Bailment - Onus of Proof

Real Property - Foreclosure - Order *Nisi* for Sale

set out every conclusion in the reasoning process or resolve every inconsistency in evidence raised by the defence. Appellate review of the adequacy of a trial judge's reasons focuses on whether the reasons, read as a whole, explain what the judge decided and why. Credibility findings do not need to be explained with clinical precision. The reasons and evidentiary context permitted effective appellate review in this case. The trial judge noted where an accused provides exculpatory evidence, the presumption of innocence and the corresponding high standard of proof require a particular approach. The trier of fact did not engage in a simple credibility contest between the Crown witness and the accused. The trial judge explained the appellant's testimony at trial was a bare denial. The trial judge explained that it did not stand up to the cogency of the case against him, including the complainant's good memory of the relevant events. The mere fact that evidence given by an accused person can be described as plausible does not automatically mean it will raise a reasonable doubt about guilt.

 Back to top

***Stromberg v Olafson*, 2023 SKCA 67**

Richards Jackson, J.A. Barrington-Foote, 2023-06-02 (CA23067)

Civil Procedure - *Queen's Bench Rules* - Summary Judgment
Civil Procedure - *Queen's Bench Rules*, Rules 3-1, 3-2, 3-49, 7-2, 7-5
Corporate Law - *Business Corporations Act* - Oppression Remedy
Corporate Law - *Business Corporations Act* - Oppression Remedy - Injunctive Relief
Corporate Law - *Business Corporations Act* - Oppression Remedy - Injunctive Relief - Jurisdiction
Corporation Law - Shareholder Remedies - Oppression
Statutes - Interpretation - *Business Corporations Act*, Section 234, Section 241

The appellants, two shareholders of a corporation carrying on a profitable specialty oil business, appealed a decision deciding that a 2017 income allocation constituted oppression and ordering the appellants to purchase the third shareholder's shares for almost $13 million. The plaintiff (respondent on appeal) had filed a statement of claim alleging the appellants had acted in an oppressive and unfair manner and had constructively dismissed him from his employment. The plaintiff then had filed an application seeking interim and final relief in relation to the 2017 income allocation, an event that occurred after statement of claim was filed. The statement of claim had not been amended. The Court of Appeal considered: 1) did the chambers judge lack

Regulatory Offences - Public Health Orders - COVID-19

Statutes - Interpretation - *Business Corporations Act*, Section 234, Section 241

Statutes - Interpretation - *Canada Evidence Act*, Sections 31.1 to 31.8

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

Statutes - Interpretation - *King's Bench Act*, Section 10-11

Statutes - Interpretation - *Public Health Act, 1994*, Section 61

Torts - Conversion

Cases by Name

Farm Credit Canada v 101258391 Saskatchewan Ltd.

Krudzo v Stefanyshyn

Mann v Mann

Patrick 1703 Condominium Corporation v First Degree Developments Ltd.

R v Apodaca

R v R.P.

R v Slastukin

R v Thalheimer

jurisdiction to hear the oppression application; 2) did the chambers judge err by granting final orders on an interlocutory application that was not an application for summary judgment; and 3) did the chambers judge make substantive errors by considering oppression in isolation from the context?

HELD: A majority of the panel set aside the chambers decision and remitted the matter back to the Court of King's Bench, with one justice dissenting with detailed reasons. 1) The chambers judge did not lack jurisdiction because the 2017 allocation occurred after the statement of claim was filed and therefore was not addressed in that commencement document. The appellants (defendants in the court below) had by their conduct consented to the defect and it was not now open to the appellant to allege the defect was fatal. *The Queen's Bench Rules* at rules 3-1, 3-2 and 3-49 codify how an action must be commenced and how an application may be brought during an action. There was no void in the code. Rule 3-49 and s. 241 of *The Business Corporations Act* permit an application to be made in a summary manner, but do not preclude commencement of an oppression action by statement of claim. Section 234 of *The Business Corporations Act* provides for an application for interim or final relief based on allegation of oppression. Once the plaintiff started his action by a statement of claim, he was obliged to bring any s. 234 application during that action in accordance with the rules of court. The rules required an action seeking relief under s. 241 of *The Business Corporations Act* to be commenced by statement of claim or originating notice. The existing statement of claim could have been amended to add a cause of action but was not. No one objected in the court below that the application related to the 2017 allocation could not be made by notice of application. As a result, there was no application to amend the statement of claim. Since the appellants had consented to the scheduling of the application and participated in the process, the defect became a matter of form that did not affect the authority of the court below. 2) The chambers judge erred in law by using enhanced fact-finding powers available only to a judge hearing a summary judgment application and erred by deciding the application despite irreconcilable conflicts in the evidence on material issues. The application for final relief ought to have been brought as an application for summary judgment under rule 7-2 of the Rules, and not under Part 6 of the Rules. Whether summary judgment could properly be granted was a substantive question that must be answered. There were irreconcilable conflicts in the evidence on critical issues. The chambers judge failed to reconcile the conflicting evidence on the valuation of the corporation's shares and also effectively exercised the enhanced fact-finding powers granted by Rule 7-5(2) in preferring the plaintiff's evidence. This was a palpable and overriding error. The chambers judge improperly made credibility findings based on conflicting affidavit evidence. The issue of whether the 2017 allocation was oppression could not be decided in isolation from closely related issues in the statement of claim. 3) Oppression is an equitable remedy that deals with the reasonable

Stromberg v Olafson

Stuart v Canada (Attorney General)

Toronto-Dominion Bank v Clark

expectations in the circumstances and the entire context. The chambers judge erred by deciding oppression had occurred based on a very thin slice of the evidence. The legal principles required the whole context be taken into account regarding oppression and remedy, in particular whether the end of the plaintiff's employment in 2017 affected his 2017 allocation. The chambers judge also failed to consider the relevant factors in an oppression remedy. Regarding whether the requested relief was a fair way of dealing with the situation, the order went no further than necessary: it only vindicated the reasonable expectations of the corporate stakeholders and the general corporate law context. The chambers judge's decision was set aside, and the matter was remitted to the Court of King's Bench for re-determination.

 Back to top

***Mann v Mann*, 2023 SKCA 99**

Caldwell Leurer Tholl, 2023-08-28 (CA23099)

Corporate Law - Appeal - Corporate Officer - Authority - Bylaws - Deadlock
Corporate Law - *Business Corporations Act* - Oppression Remedy

The court considered the authority of a corporate officer to carry on the company's business when the directors were in a deadlock. Brothers James and Jason each owned 50 percent of the shares of a corporation. Jason was president and James was secretary-treasurer. The corporation was a holding company: its only business was to hold the shares of two other companies. Jason and James were directors of both companies but were not the only directors. The corporation was incorporated under *The Business Corporations Act*, RSS 1978, c B-10 (SBCA), since repealed by T*he Business Corporations Act, 2021*, SS 2021, c 6 (SBCA 2021), and the companies were incorporated under the *Canada Business Corporations Act,* RSC 1985, c C-44. Jason signed four resolutions in his capacity as president of the corporation on behalf of the corporation as sole shareholder of the companies. The resolutions purported to amend the bylaws of the companies and to remove the incumbent directors from each of the companies and to substitute James and another person. The corporation's bylaws set out the duties and responsibilities of the president, which included the general supervision of the business and affairs of the corporation. James commenced an action seeking to invalidate the resolutions based on Jason's failure to obtain the express authority of the corporation's directors to sign the resolutions. James' action was dismissed by a Court of Queen's Bench judge sitting in chambers. The chambers judge found that Jason, as president of the corporate shareholder for the companies, had the power and authority to sign and approve the four shareholder resolutions as set out in the bylaws of the corporation. James appealed the chambers decision. The Court of Appeal (court) determined: 1) whether the chambers judge erred in finding that Jason had the legal authority, without a specific authorizing resolution by the corporation's directors, to execute the company's shareholder resolutions; and 2) if Jason had the legal authority to execute the resolutions, did the chambers judge err in not finding Jason's conduct to be oppressive?
HELD: The court dismissed the appeal. The court found no error in the chambers judge's interpretation of the corporation's bylaws. None of the parties offered submissions as to the appropriate standard of review for the court to apply when considering an appeal

from the interpretation given by a court of first instance to a corporation's bylaws. Because the issue was not argued, the court left the issue to another day, and analyzed the chambers decision on the standard of correctness. 1) The chambers judge did not err in finding that Jason had the legal authority, as president of the corporation, to execute the shareholder resolutions even though there was no resolution of that corporation's directors specifically authorizing him to undertake that action. Section 116(a) of the SBCA authorized the shareholders of the corporation to pass bylaws that allowed for the delegation to the corporation's officers the authority to exercise the corporation's rights as a holder of shares of other corporations. While the corporation's directors did not pass a resolution authorizing Jason, as president of the corporation, to execute the shareholder resolution, there was also no directors' resolution prohibiting him from doing so. The directors were deadlocked, preventing the board of directors from making any decision. Jason did not fail to follow the decisions and instructions of the corporation's board of directors, nor did he act in a manner that was contrary to the directions he was given by the board. The chambers judge's reasoning was straightforward – while the directors had not specifically authorized Jason to execute the shareholder resolutions, the power to do so was given to him as a result of his appointment as president and the corresponding authority given to the president by the corporation's bylaws. The chambers judge set out the corporation's applicable bylaws, and no party suggested that they were misquoted. The chambers judge found that the bylaws conferred the power and authority to the president to sign and approve the four shareholder resolutions. Where no specific limitation appears in the statute or corporate constitution, the exercise of managerial power is constrained only by the requirement that directors and officers must exercise their powers in the best interests of the corporation. 2) The chambers judge was not presented with the issue of oppression: this was raised for the first time on appeal. It was inappropriate for the court to adjudicate on the issue as to whether the signing of the shareholder resolutions was oppressive conduct.

 Back to top

***Toronto-Dominion Bank v Clark*, 2023 SKKB 114**

Hildebrandt, 2023-04-25 (KB23105)

Mortgage - Foreclosure - Application for Judicial Sale - Order *Nisi*
Mortgages - Foreclosure - Order *Nisi*

The plaintiff mortgage lender brought an application without notice seeking an order nisi for sale by real estate listing, in relation to a collateral mortgage in default. The court considered whether order nisi should issue.
HELD: The application was dismissed, without prejudice to the plaintiff's ability to apply with better materials. Portions of the appraisal report appended to the affidavit were unreadable. The circumstances of the defendants apparently no longer residing at the property did not justify a seven-day redemption period. The proposed selling officer practiced with the law firm representing the plaintiff, and thus was not an independent selling officer. If a party requests to appoint a non-independent selling officer, the request should be clearly identified along with how the parties' interests may be balanced in the particular circumstances. There were no compelling reasons identified to justify appointing a non-independent selling officer.

 Back to top

***Stuart v Canada (Attorney General)*, 2023 SKKB 108**

Popescul, 2023-05-25 (KB23101)

Practice and Procedure - Case Management
Civil Procedure - *Queen's Bench Rules*, Rule 4-4, Rule 4-5

The self-represented plaintiff applied for appointment of a case management judge pursuant to rule 4-5 of *The Queen's Bench Rules.* The process in rule 4-4 is a request to the local registrar to give the parties quick access to a judge on a "one-off" basis to resolve primarily procedural issues. The process in rule 4-5 is a request to the Chief Justice to appoint a dedicated judge to hear and decide all chambers applications. For complex cases with multiple interim applications, it may be efficient to have a single judge dedicated to hear all interim motions. A single judge can also create delays and scheduling complications. The court drew the plaintiff's attention to General Application Practice Directive #8 "Communication and Correspondence with Judges." There were no outstanding applications and nothing to manage at the time the request was filed. The application for the appointment of a case management order was denied.

 Back to top

***Krudzo v Stefanyshyn*, 2023 SKKB 142**

Layh, 2023-06-29 (KB23135)

Contract - Breach - Bailment
Property - Bailment - Onus of Proof
Torts - Conversion

The plaintiff sued for return of a dog based on breach of contract, unjust enrichment and conversion. The plaintiff and defendant both claimed to own a three-year-old dog. During the plaintiff and respondent's visit to the plaintiff's family, the plaintiff's six-year-old sister gave the plaintiff a puppy. The plaintiff took the puppy to the city where the plaintiff lived. The plaintiff's rental accommodation did not permit pets. The plaintiff asked the defendant if he would care for the puppy until she found pet-friendly accommodation. The defendant looked after the dog at his residence for about a year. The plaintiff spent time with the dog on several occasions and took the dog on trips. The plaintiff moved and asked the defendant to return the dog to her. The defendant refused. The dog was well cared for and both were willing to pay for the dog's needs. The chambers judge considered: 1) was summary judgment suitable to resolve the dispute; and 2) if so, who owned the dog?
HELD: Summary judgment was suitable, and the plaintiff was the dog's owner. No costs other than disbursements were awarded as the matter could have been brought in small claims court. 1) There was no material conflict in the evidence and summary judgment was an appropriate means to resolve the dog's ownership. 2) For legal purposes, dogs are personal property. A bailment

is the transfer of possession of personal property from the owner, the bailor, to another person, called a bailee, on the understanding that the bailee will return the property to the bailor. The defendant argued his bond to, exemplary care of and expenses spent on the dog made him the dog's owner. This is insufficient to turn a bailee into an owner. The defendant was ordered to return the dog to the plaintiff within two days of the judgment.

 Back to top

Patrick 1703 Condominium Corporation v First Degree Developments Ltd., **2023 SKKB 151**

Elson, 2023-07-13 (KB23140)

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

In the underlying action, the plaintiff argued that the respondent failed to correct deficiencies in the condominium property and failed to meet its obligations related to the condominium's reserve fund. The plaintiff was a registered condominium corporation and the respondent was a condominium developer and vendor of individual units. The plaintiff sought damages to fix the deficiencies and a judgment to cover the shortfall in the reserve fund. There was no dispute that the respondent was in financial difficulties. Here, the plaintiff applied for a preservation order under *The Enforcement of Money Judgments Act* (EMJA) to prevent the respondent from disposing of any more units. In response, the respondent proposed to pay a sum of money into court after certain expenses were covered, but argued in the alternative that the conditions for a preservation order did not exist because the sale of the units fell within an exception for dispositions of property in the ordinary course of business. The plaintiff was not satisfied with the proposal and rejected the respondent's argument. Neither party provided the court with legal authorities. The court determined whether a preservation order should be granted.

HELD: The court dismissed the application for a preservation order with costs. Preservation orders are the only form of pre-judgment enforcement under the EMJA. The court set out section 5 of the EMJA, noting that while granting a preservation order was a discretionary decision, such an order could only be granted if the court was satisfied that all three conditions in s. 5(5)(a), (b) and (c) were in place. There was no doubt that if the action were successful, the plaintiff would receive a judgment for damages, so s.5(5)(a) was met. The plaintiff was doing what it could to prosecute the action without further delay, so s. 5(5)(c) was in place. However, the plaintiff failed to prove the conditions in s. 5(5)(b). The plaintiff had to satisfy the court that if the preservation order were denied, the plaintiff's enforcement of a future judgment against the respondent would likely be partially or wholly ineffective due to the disposition of the unit. The plaintiff also had to satisfy the court that the disposition of the unit did not serve one of the purposes in the exceptions. There was argument that the ordinary course of business exceptions in s. 5(5)(b)(ii) and (iii) applied, and the plaintiff failed to negate the exception. The respondent argued that the disposition of the unit was for the purpose of carrying on its business in the ordinary course (s. 5(5)(b)(ii)). The respondent also provided uncontradicted evidence that part of the proceeds would be applied to pay counsel in the defence of the action (in s. 5(5)(b)(iii)). The court was also unable to grant a preservation order because s. 5(7) required the plaintiff to provide security sufficient to compensate the respondent for pecuniary loss arising from the order. The requirement for security is mandatory (*2055190 Ontario Ltd. v Zhao*, 2018 SKCA 66). An undertaking to cover

such damages did not satisfy s. 5(7). Here, there was no evidence that the plaintiff made any arrangements to provide security. Even if the plaintiff had met the s. 5(5) requirements, the court could not grant a preservation order without the proper security in place. The court awarded the respondent $3,000 in costs.

 Back to top

***R v Thalheimer*, 2023 SKKB 156 (not yet available on CanLII)**

Danyliuk, 2023-07-26 (KB23147)

Criminal Law - Application for Judicial Stay - Requirements

The accused was the driver of a motor vehicle when his vehicle collided with a train. The accused was injured and his spouse was killed. The accused was charged with dangerous driving causing death pursuant to s. 249(4) of the Criminal Code. After trial, the accused was convicted. The accused appealed, and the Court of Appeal allowed the appeal, directing a new trial. The issue was a misapplication of the principles set out in *R v W.(D.)*, [1991] 1 SCR 742. Here, defence counsel filed an application requesting the court to determine "the disclosure of evidence, the admissibility of evidence and an expert witness." Defence counsel expressed concerns with the accident report done by a Crown expert witness which relied on data collected seven years before by the original expert, who was now unable to testify. The defence argued that the Crown breached an undertaking in doing so. The relief sought for the breach of an undertaking was a judicial stay. The Court of Appeal had not remitted the matter for a new trial on the basis of any issue with the first Crown expert. The court determined whether it should grant the requested relief prior to the trial commencing. The court determined: 1) the applicable legal principles in this situation; 2) whether an undertaking had been given by the Crown, and if so, whether it had been breached; 3) whether the court could determine the admissibility of expert reports before the trial; and 4) whether an order for costs should be made.
HELD: The court dismissed the application in its entirety. 1) The court set out the two-stage test for determining whether a proposed expert may testify. This process assumes that there is an active voir dire process where witnesses are examined and cross-examined. Here, the purpose of the defence application was to avoid a trial and have the court disqualify the expert from tendering his report or testifying. The court found that this aim did not have a firm grounding in established legal principles. 2) The defence argued that the Crown undertook only to file an expert opinion that was satisfactory to the defence, in that it would be fair, objective, and would not rely upon the expert report from the first trial. The defence argued that the Crown breached that undertaking, making a judicial stay of the charge an appropriate remedy. After reviewing a transcript of the case management conference, the court found that the Crown did not grant any undertaking at all. Even there had been an undertaking, the defence did not show that there had been a breach of it. The court dismissed this aspect of the application. 3) The defence sought a ruling that the expert report was inadmissible on the basis of being an abuse of process due to the Crown's breach of its undertaking or for some other defect. The court agreed that it had jurisdiction to grant the relief sought but found that it was inappropriate to do so. The expert qualification procedure had not taken place, and the new report writer had not yet been qualified as an expert. The court stated that even if there had been an undertaking that had been breached by the Crown, the defence had not established that a stay of proceedings was an appropriate remedy. A judicial stay is only granted in the clearest of cases, generally where the state conduct

compromises the fairness of an accused's trial or undermines the integrity of the judicial process. No ongoing prejudice or unfairness to the accused was made out. There was also no evidence of an abuse of process. This was not one of the rare situations that called out for a stay to be granted before trial. The defence failed to meet its onus on the application – it did not show a *Charter* breach, or some other abuse of process on a balance of probabilities. 4) As the application did not succeed, the court found it would be inappropriate to award costs.

 Back to top

***Farm Credit Canada v 101258391 Saskatchewan Ltd.*, 2023 SKKB 159**

Keene, 2023-07-28 (KB23150)

Mortgage - Foreclosure - Application for Judicial Sale - Order *Nisi*
Real Property - Foreclosure - Order *Nisi* for Sale
Statutes - Interpretation - *King's Bench Act*, Section 10-11

The plaintiff mortgage lender applied to pay money out of court and applied for a new order nisi for sale because the borrower corporation granted a second mortgage and allegedly granted another individual the right to acquire the mortgaged lands, contrary to covenants in the first mortgage. The plaintiff started foreclosure proceedings against the defendant corporation and individuals after they defaulted in required payments under a mortgage and loan. The plaintiff also named two other defendants for having subsequently registered an interest and second mortgage against the mortgaged lands without the plaintiff's approval. A previous order nisi for sale with a redemption period had issued and the defendants had paid arrears into court during the redemption period. The Court considered: can s. 10-11 of *The King's Bench Act* be used to remedy a default not related to payment, but where the mortgagor grants a second mortgage, charge, or encumbrance on their property?
HELD: The new order nisi would be granted, with wording appropriate to the circumstances. The plaintiff argued the full amount of the mortgage was due and payable because the defendant corporation breached a negative covenant by granting a second mortgage contrary to the mortgage agreement. The court considered whether the type of default could be redeemed. A negative covenant restricts the performance of an act. In this case, the title to property remained in the hands of the defendant mortgagor. If the arrears could be brought current and the negative covenant defaults repaired, then the mortgage could be reinstated. Section 10-11 of *The King's Bench Act* does not state a mortgagor is unable to remedy a negative covenant. The court would grant a new order nisi for sale, with a right of redemption if the arrears are brought current, the second mortgage and the unauthorized interest registration were discharged. The matter was adjourned to allow for the drafting of the order.

 Back to top

***R v Slastukin*, 2023 SKPC 34**

Hinds, 2023-05-10 (PC23033)

Statutes - Interpretation - *Public Health Act, 1994*, Section 61
Regulatory Offences - Public Health Orders - COVID-19

The accused was charged with failure to comply with a public health order by being in a private outdoor gathering of more than 10 people, contrary to contrary to section 61 of The Public Health Act, 1994. Questions regarding the constitutionality of the legislation were previously decided by the court and could not be re-litigated. The court considered whether the Crown had proven beyond a reasonable doubt that: (1) the public health order was in place; and (2) the accused failed to comply with the public health order by attending a gathering of more than 10 people.
HELD: The accused was guilty. (1) The public health order was in place. The Crown filed a certified copy of the public health order. The Crown did not file a certified copy of the health minister's order delegating powers to the chief medical health officer. Instead, the Crown relied on the presumption of regularity, which was not rebutted by the defence. (2) The accused participated in a gathering of more than 10 people. Photos taken by a police officer witness showed the accused at a gathering of at least 13 people. Identity was not an issue. Another police witness testified there were between 20 and 30 people at the gathering. The evidence was uncontradicted.

 Back to top

***R v Apodaca*, 2023 SKPC 37**

Hinds, 2023-05-25 (PC23035)

Criminal Law - Evidence - Identification
Statutes - Interpretation - *Canada Evidence Act*, Sections 31.1 to 31.8
Statutes - Interpretation - *Public Health Act, 1994*, Section 61

Ten individuals were charged with failing to comply with a public health order by attending a gathering exceeding ten people contrary to s. 61 of *The Public Health Act, 1994*. One entered a guilty plea before the trial started and was ordered to pay $1,400 in fines and surcharges. Another individual failed to appear, and the court granted default judgment and imposed a $2,800 fine and surcharge. At the close of the Crown's case, the Crown stayed the charges against three accused. The court considered whether the Crown had proven beyond a reasonable doubt that: 1) the public health order was in place; and 2) the accused failed to comply by attending a gathering exceeding ten people.
HELD: The court found two accused guilty and three accused not guilty. 1) Certified copies of the minister's order delegating powers to the chief medical health officer and of the public health order were exhibited at trial. The order prohibited public and private

outdoor gatherings over ten persons and required two-metre distancing between households for permitted gatherings of up to ten persons. A police officer testified that he took photos and videos from the street beside a public park. There was nothing to suggest the photos and videos had been altered. The electronic photos and videos were admitted under 31.1 to 31.8 of the *Canada Evidence Act*. The photos show up to 22 persons situated on the sidewalk or park spread out over an area of approximately 50 feet. Several police officers who were present or ticketed individuals leaving the area testified. One of the accused testified. Twenty-two people came together on the sidewalk near a city part on May 15, 2021. Counsel admitted two of the accused were part of this group when it exceeded ten people. One individual testified she arrived around 4:40 and was in groups of fewer than ten people after the protests was mostly over. Although the police officer who testified to seeing this individual in a larger group at an earlier time was credible, he was using binoculars and did not previously know the accused and could not recall when he saw the accused. Another individual was only seen in groups of seven or eight people. Another accused was not identifiable beyond a reasonable doubt in the photograph and video evidence.

Back to top