Court of Appeal for Saskatchewan

Docket: CACV4154

Citation: *Direct General Partner Corporation v Canadian Pacific Railway Company*, 2025 SKCA 29

Date: 2025-03-11

Between:

Direct General Partner Corporation, Canada Cartage System Limited Partnership, Canada Cartage Diversified GP Inc., ABC Corp, Jane Doe and Thomas Henderson

Appellants/Respondents on Cross-Appeal (Defendants)

And

Canadian Pacific Railway Company

Respondent/Appellant on Cross-Appeal (Plaintiff)

Before:	Kalmakoff, McCreary and Drennan JJ.A.
Disposition:	Appeal dismissed; cross-appeal allowed
Written reasons by:	The Honourable Justice Meghan R. McCreary
In concurrence:	The Honourable Justice Jeffery D. Kalmakoff The Honourable Justice Jillyne M. Drennan
On appeal from:	2023 SKKB 10, Regina
Appeal heard:	February 15, 2024
Counsel:	Steven M. Scarfone and Andrew Johnson for the Appellant/Respondent by cross-appeal Deron A. Kuski, K.C., and Bennet W. Misskey for the Respondent/Appellant by cross-appeal

McCreary J.A.

I. INTRODUCTION

[1] This is an appeal and a cross-appeal from *Canadian Pacific Railway Company v Direct General Partner Corporation*, 2023 SKKB 10 [*Decision*], a decision of a King's Bench judge sitting in Chambers respecting liability resulting from a collision between a transport truck and a train. Among other things, this judgment considers the sufficiency of evidence in a summary judgment proceeding.

[2] Following a collision between a truck and a train, Canadian Pacific Railway Company [CPR] sued Direct General Partner Corporation, Canada Cartage System Limited Partnership, Canada Cartage Diversified GP Inc., ABC Corp, Jane Doe and Thomas Henderson [collectively, the Cartage Parties], alleging negligence by the driver of the truck and claiming significant damages as a result of damage done to CPR's equipment and property. In response, the Cartage Parties filed and served a counterclaim seeking damages for the loss of the truck. The counterclaim alleged that CPR was contributorily negligent because it failed to operate the train in a careful, prudent and reasonable manner, and failed to adhere to the *Canadian Rail Operating Rules* [*CROR*]. However, it was filed after the expiry of a two-year limitation period.

[3] The Chambers judge found that the Cartage Parties were negligent and liable to CPR but declined to determine the issues of contributory negligence and damages on the basis that the evidence was too controverted and was incomplete. The Chambers judge also struck the Cartage Parties' counterclaim as time-barred.

[4] On appeal, the Cartage Parties contend that the Chambers judge erred when he struck their counterclaim and when he admitted and relied upon an affidavit from a certain railway employee to determine that the driver of the truck was negligent. In its cross-appeal, CPR argues that the Chambers judge erred when he declined to determine the admissibility of an affidavit filed by the Cartage Parties in response to CPR's evidence of damages and when he failed to summarily determine the issues of contributory negligence and damages.

[5] For the reasons that follow, I would allow CPR's cross-appeal and exercise this Court's discretion to resolve the remaining issues summarily, finding that CPR was not contributorily negligent and is entitled to damages in the amount it claimed. I would dismiss the Cartage Parties' appeal, except to find that the Chambers judge erred by striking the Cartage Parties' counterclaim. Nevertheless, this error is inconsequential to the litigation because CPR is not contributorily negligent.

II. BACKGROUND

A. Facts

[6] The action giving rise to this appeal stems from a collision [Collision] that occurred in the early morning of January 30, 2018, between a train owned and operated by CPR [Train] and a transport truck [Truck] owned by Direct General Partner Corporation and operated by Thomas Henderson. The Train hit the Truck when the Truck drove through an activated public railway crossing [Crossing].

[7] Prior to the Collision, the Train was travelling south at approximately 5 mph. It was shoving 36 loaded tanker cars, which had been lifted from the Co-op Refinery Complex in Regina, Saskatchewan. The Crossing was protected with crossbucks and an automated warning device with flashing lights on both sides of the highway [Warning Devices]. It was also equipped with two 6'9" cases housing signal electrical equipment on the center median [Signal Cases].

[8] In the moments leading up to the Collision, Mr. Henderson was driving the Truck northwest on Ring Road toward the Crossing. He was hauling freight from Winnipeg, Manitoba, to Saskatoon, Saskatchewan, and, at the relevant time, was passing through Regina on his way to Saskatoon.

[9] Mr. Henderson regularly drove through Regina on Ring Road. He was familiar with the features of the Crossing, which he traversed multiple times a week.

[10] On the day of the Collision, the Warning Devices started flashing red at least 20 seconds before the Train arrived from Mr. Henderson's right at the Crossing. Mr. Henderson saw other vehicles proceed across the tracks in front of him and assumed that the railway lights were malfunctioning. As the Train approached, the Train's conductor, Ryan Olson, was riding on the lead car. He was shining a flashlight and was watching for hazards in or around the Crossing.

[11] When Mr. Olson first saw the Truck travelling northwest towards the Train, he waived his flashlight into the cab of the Truck. Mr. Henderson began to slow down. Mr. Olson told the engineer of the locomotive to "keep going easy" as it appeared like the Truck was going to stop.

[12] Upon slowing, Mr. Henderson looked down the left side of the tracks. Not seeing a train, he looked to his right but was blinded by the glare from the flashing red lights. Despite his diminished vision, he proceeded to enter the Crossing without coming to a full stop. He did not see the Train approaching on his right until he was already on the tracks.

[13] When Mr. Olson observed that the Truck was not going to stop at the Crossing, he told the engineer to stop the Train, and he jumped from the Train just before it collided with the Truck.

[14] No derailment or injuries resulted from the Collision. However, even at low speeds with the brakes applied, the Train dragged the Truck down the railway tracks for approximately 12 to 15 metres. The Collision caused damage to CPR's railway equipment. In particular, the Truck was dragged across the westbound lanes of Ring Road, destroying a signal post with lights and crossbucks. It also tore the Signal Cases from the center median. In addition, while the lead tanker car of the Train did not spill or leak because of the Collision, the Train sustained physical damage to its lead car.

[15] Following the Collision, Mr. Henderson was issued a summary offence ticket for failing to stop at a flashing red light at a railway crossing, contrary to s. 209(6)(b) of *The Traffic Safety Act*, SS 2004, c T-18.1. He was found guilty of that offence and paid the resulting fine.

[16] CPR incurred costs to perform corrective work to restore the operation of the Warning Devices at the Crossing. These costs consisted of third-party expenses and costs of labour, equipment, material, and other service charges to carry out the remedial activities [Repair Work]. CPR claims for $645,149.25 for the Repair Work, which it says was incurred in direct costs to repair the property damaged because of the Collision.

B. Summary judgment proceedings

[17] In September of 2021, CPR filed an application for summary judgment for $645,149.25 pursuant to Rules 7-2, 7-5 and 3-72 of *The Queen's Bench Rules* [*Rules*] (as then titled). The parties exchanged affidavit materials and cross-examined each other's affiants on their affidavits over the course of the following year.

[18] When this matter was certified as ready to proceed to final hearing, its evidentiary record was considerable, and included the following:

(a) affidavit of Simone Scott, sworn February 14, 2022 [Scott Affidavit];

(b) affidavit of Mr. Henderson, sworn January 20, 2022 [Henderson Affidavit];

(c) affidavit of Katryna Crocker, sworn February 1, 2022;

(d) affidavit of Joel Ramcharan, sworn February 8, 2022 [Ramcharan Affidavit];

(e) reply affidavit of Garry Rosin, sworn March 9, 2022 [Rosin Affidavit];

(f) affidavit of Mr. Olson, sworn April 13, 2022 [Olson Affidavit];

(g) transcript of cross-examination of Mr. Henderson, dated March 31, 2022;

(h) transcript of cross-examination of Mr. Ramcharan, dated March 31, 2022;

(i) transcript of cross-examination of Ms. Scott, dated April 1, 2022;

(j) transcript of cross-examination of Mr. Rosin, dated May 3, 2022; and,

(k) transcript of cross-examination of Mr. Olson, dated September 22, 2022.

[19] The summary judgment application was heard on December 13, 2022. Subsequently, on January 6, 2023, the Chambers judge requested that the parties provide him with a complete copy of the *Canadian Rail Operating Rules* in effect on January 30, 2018. Legal counsel for CPR provided the same.

[20] In the *Decision*, issued January 13, 2023, the Chambers judge granted partial summary judgment in favour of CPR, finding that the Cartage Parties were negligent. However, he declined to summarily decide the issues of contributory negligence and damages.

[21] The Chambers judge framed his analysis by first considering whether the summary judgment procedure under the *Rules* was a suitable mechanism to determine any or all of the issues. He defined the issues as follows:

(a) whether *The Limitations Act*, SS 2004, c L-16.1, barred the Cartage Parties' counterclaim;

(b) whether the Olson Affidavit should be admitted in evidence;

(c) whether the Ramcharan Affidavit should be admitted in evidence;

(d) whether a summary determination could be made that the Cartage Parties were liable to CPR in negligence;

(e) whether a summary determination could be made respecting whether CPR was contributorily negligent; and

(f) if the Cartage Parties were liable to CPR in negligence, whether damages could be summarily assessed and apportioned.

[22] The Chambers judge found that the Cartage Parties' counterclaim should be struck, that the Olson Affidavit should be admitted in evidence, and that no trial was required to determine that the Cartage Parties were liable to CPR in negligence. He concluded that CPR's property would not have been damaged but for the Collision and that its damages were a foreseeable consequence of Mr. Henderson's driving.

[23] However, the Chambers judge determined that a trial was required to decide the issue of contributory negligence and to assess damages, and he declined to rule on the admissibility of the Ramcharan Affidavit. While he found that the issue of whether CPR was contributorily negligent must proceed to trial, the Chambers judge observed that, in circumstances such as those leading up to the Collision, the *CROR* would "seemingly require" that CPR ensure that either "a person must be on the lead car" of a train when going through a crossing equipped with a warning system,

or that "a person must be on the ground to provide manual protection" (*Decision* at para 94). In this regard, the Chambers judge made several findings of fact that he said might "assist the parties, whether in settlement discussions or in an abbreviated trial" (at para 94):

(a) Mr. Olson was on the lead car as it approached the intersection;

(b) Mr. Olson was operating a flashlight from the lead car and remained on the car until just before the Train collided with the Truck; and

(c) there was no CPR employee standing on the ground.

III. ISSUES

[24] The following questions arise from the appeal and cross-appeal:

(a) Did the Chambers judge err in finding that

(i) the Cartage Parties' counterclaim should be struck; and,

(ii) the Olson Affidavit should be admitted as evidence?

(b) Did the Chambers judge err in failing to determine whether

(i) the Ramcharan Affidavit should be admitted into evidence;

(ii) CPR was contributorily negligent; or

(iii) damages could be summarily assessed and/or apportioned?

(c) If the Chambers judge erred in any of the ways alleged in paragraph 24(b), is it in the interests of justice for this Court to determine those issues rather than remitting the matter to the Court of King's Bench?

IV. ANALYSIS

A. The counterclaim was not out of time

1. Overview of the counterclaim

[25] The Cartage Parties argue that the Chambers judge erred by striking their counterclaim. First, they contend that they were not permitted to argue the limitations issue before the Chambers judge and were therefore denied procedural fairness. Alternatively, they argue that the Chambers judge erred by finding that their counterclaim was barred by the two-year limitation period set out in *The Limitations Act* and, pursuant to s. 20 of that Act, the counterclaim should have been permitted to proceed as an amendment to the pleadings made after the expiry of the limitation period.

[26] In turn, CPR contends that the Cartage Parties knew that the limitation period was a live issue in respect of their counterclaim and that they failed to address it; they were not prevented from doing so by the Chambers judge. Respecting the operation of s. 20 of *The Limitations Act*, CPR acknowledges that *Dusterbeck v Beitel*, [1988] 6 WWR 669 (Sask CA) (CanLII) [*Dusterbeck*], established a benchmark for allowing third-party claims as amendments to pleadings after the expiry of a limitation period. However, CPR says that *Dusterbeck* is distinguishable from this case because the Cartage Parties' counterclaim is an attempt to introduce a new action, rather than the graft of a related cause of action onto a pleading already filed.

[27] As I will discuss, I do not accept that there was any breach of procedural fairness in the Chambers judge's hearing of the limitation issue. However, it is my respectful view that the Chambers judge erred in law when he determined that s. 20 of *The Limitations Act* did not apply to the Cartage Parties' counterclaim. This case falls squarely within the reasoning from *Dusterbeck*, which holds that a third-party claim, and by extension a counterclaim, may be considered an amendment to the pleadings. On that basis, it was an error in law for the Chambers judge to determine that the words "an amendment to the pleadings" in s. 20 of *The Limitations Act* excludes the filing of a counterclaim. Moreover, had the Chambers judge interpreted the provision correctly but declined to exercise his discretion pursuant to it, this too would have been a reviewable error.

2. Procedural fairness

[28] The Cartage Parties point to two portions of the transcript of the summary judgment proceedings as evidence that they were denied procedural fairness. In the first example, there is some discussion of the limitations period issue with the Chambers judge, and he suggests that the parties have not presented much case law on the issue. He then references Graeme Mew, Debra Rolph and Daniel Zacks's analysis from *The Law of Limitations*, 3d ed (Toronto: Lexis Nexis, 2016) at §5.58 [*Mew 2016*], while counsel for the Cartage Parties states that the issue was not fully addressed in the briefs of law. In the second example, the Chambers judge uses a colloquialism to indicate that he believes that the counterclaim is out of time, to which counsel for the Cartage Parties responds, "Yeah".

[29] Considering these two examples, I am not persuaded that the Cartage Parties were denied procedural fairness. From my review of the proceedings, counsel had an opportunity to address the issue in oral argument and was even asked to specifically comment on the topic, including whether the counterclaim should be considered an independent cause of action subject to a limitation period. Where a party knows or ought to know the case it must meet, and where that party is given an opportunity to present its case in both written and oral submissions, then the decision maker is under no obligation to hear varying or sequential arguments on the same topic: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 22. Further, in the circumstances of this case, it was not a breach of procedural fairness for the Chambers judge to rely on authorities not specifically referred to or relied upon by the parties to come to his decision, where each party was given the opportunity to speak to the substance of the arguments and evidence that the other party advanced: *A&K Enns Trucking Ltd. v Elkew*, 2018 FCA 202 at para 4, and *McCunn Estate v Canadian Imperial Bank of Commerce* (2001), 140 OAC 151 (CA) at paras 42–43 (per Feldman J.A., dissenting on other grounds). In short, there was no defect in the procedure adopted by the Chambers judge to hear and consider the matter that warrants appellate intervention.

3. Late amendments to pleadings

[30] The Cartage Parties also contend that the Chambers judge erred in his interpretation of s. 20 of *The Limitations Act* and that their counterclaim should have been allowed to proceed as an amendment to the pleadings made after the expiry of the limitation period.

[31] The provisions of *The Limitations Act* relevant to this question are as follows:

> **Interpretation**
> **2** In this Act:
>
> > (a) **"claim"** means a claim to remedy an injury, loss or damage that occurred as a result of an act or omission … .
>
> …
>
> **Application of Act**
> **3**(1) Subject to subsections (2) to (5), this Act applies to claims pursued in court proceedings that:
>
> > (a) are commenced by statement of claim; or
> >
> > (b) are commenced by originating notice and are not proceedings in the nature of an application.
>
> …
>
> **Basic limitation period**
> **5** Unless otherwise provided in this Act, no proceedings shall be commenced with respect to a claim after two years from the day on which the claim is discovered.
>
> …
>
> **Amendment of pleadings in certain cases**
> **20** Notwithstanding the expiry of a limitation period after the commencement of a proceeding, a judge may allow an amendment to the pleadings that asserts a new claim or adds or substitutes parties if:
>
> > (a) the claim asserted by the amendment, or by or against the new party, arises out of the same transaction or occurrence as the original claim; and
> >
> > (b) the judge is satisfied that no party will suffer actual prejudice as a result of the amendment.

[32] Whether the Chambers judge correctly interpreted *The Limitations Act* is a question of law, reviewable for correctness.

[33] In considering whether s. 20 of *The Limitations Act* could apply to the Cartage Parties' counterclaim, the Chambers judge adopted the analysis from *Mew 2016*, which states as follows (*Decision* at para 19):

5.1.7 Saskatchewan

> **§5.58** Saskatchewan's *Limitation Act* is closely modelled on Ontario's Act. Section 5 provides that "… no proceedings shall be commenced with respect to a claim after two years from the day on which the claims is discovered". The term "proceeding" is not defined in either the Act of the Saskatchewan *Queen's Bench Rules*, however the rules do define a "claim" as "a claim respecting a matter in which a plaintiff, originating applicant, plaintiff-by-counterclaim, third party plaintiff or petitioner seeks a remedy". Rule 3-46(1) provides that a counterclaim is an independent action and Rule 3-48 provides that except when the context or the *Rules* provide otherwise, a rule that applies to or with respect to a plaintiff applies equally to or with respect to a plaintiff-by-counterclaim and a third party plaintiff-by-counterclaim. The Saskatchewan legislation does (unlike its Ontario counterpart) make provision for amending pleadings to add claims or parties after the expiration of a limitation period, which arise out of the same transaction or occurrence as the original claim, where the court is satisfied that no party will suffer prejudice. *It is questionable whether this power to amend would extend to the introduction of a new claim, out of time, by way of a counterclaim or third party proceeding*.
>
> (Emphasis added by the Chambers judge in the *Decision*)

[34] The Chambers judge determined that s. 20 of *The Limitations Act*, which permits late amendments to pleadings, did not assist the Cartage Parties because the introduction of a new claim through a counterclaim did not constitute an amendment to an existing pleading. He further noted that the Cartage Parties had "never brought an application to amend the pleadings" (*Decision* at para 21).

[35] Respectfully, I do not agree that it is correct to interpret s. 20 as excluding a counterclaim from being an amendment to the pleadings. This is clear from the Saskatchewan jurisprudence on this issue, which I discuss below.

[36] I will, however, begin with a review of *The Limitations Act* and comparable legislation across Canada.

[37] The *late amendment* provision in s. 20 of *The Limitations Act* is somewhat unique among Canadian limitations legislation. Of the other Canadian common law jurisdictions, only Manitoba's statute has a late amendment provision similar to s. 20. Manitoba's scheme is the product of recent legislative reform, coming into force in September of 2022: see the current edition of Graeme Mew, Debra Rolph and Daniel Zacks, *The Law of Limitations*, 4th ed (Toronto: LexisNexis, 2023) at §5.06[1][d]. Manitoba courts have yet to confront the issue of late counterclaims under this new scheme.

[38] The Ontario *Limitation Act, 2002*, SO 2002, c 24, Sch B, differs from the statutes in Saskatchewan and Manitoba. Most materially, Ontario's legislation does not contain a provision allowing amendments after the expiry of a limitation period. On the other hand, the Ontario limitations statute is like that of Saskatchewan and Manitoba in that it does not expressly deal with counterclaims. For their part, Ontario courts have consistently applied the basic limitation period to counterclaims: "Such a conclusion is reinforced, I think, by various decisions which regularly apply the provisions of the *Limitation Act, 2002, supra*, to counterclaims" (*Eftimovski v Faris*, 2014 ONSC 2476 at para 39) – see also *The Law of Limitations* at §5.06[1][a].

[39] Other jurisdictions handle the issue more clearly. Several permit counterclaims to be initiated after the limitation period has passed. For example, British Columbia and Newfoundland specifically permit a counterclaim to be brought past the limitation period, provided it relates to or is connected with the original claim: *Limitation Act*, SBC 2012, c 13, s 22(1), and *Limitations Act*, SNL 1995, c L-16.1, s 11(1). Limitations statutes in Alberta, Nova Scotia and New Brunswick also allow for the addition of a "claim" past limitations periods, but their provisions expressly permit this by way of a new pleading or an amendment, rather than the more ambiguous singular expression "amendment to the pleadings":

(a) *Limitations Act*, SA 1996, c L-15.1 – "either through a new pleading or an amendment to pleadings" (s. 6(1)), with "the added claim must be related to the conduct, transaction or events described in the original pleading" (s. 6(2));

(b) *Limitation of Actions Act*, SNS 2014, c 35 – "through a new or amended pleading" (s. 22); and

(c) *Limitation of Actions Act*, SNB 2009, c L-8.5 – "through a new or an amended pleading" (s. 21).

[40] In Prince Edward Island, Yukon, the Northwest Territories and Nunavut, limitations statutes expressly specify that counterclaims are governed by the same limitation periods as those applicable to originating statements of claim: *Limitation of Actions Act*, RSY 2002, c 139, ss 2 and 10; *Limitation of Actions Act*, RSNWT 1988, c L-8, ss 2 and 10; *Limitation of Actions Act*, RSNWT (Nu) 1988, c L-8, ss 2 and 10. Although I did not identify a reported decision from any of these jurisdictions, the same language was previously in force in Alberta, and the Alberta Court of Appeal interpreted it as precluding counterclaims after the expiry of a limitation period: *Fidelity Trust Company v 98956 Investments Ltd.*, 1988 ABCA 267 at para 15, [1988] 6 WWR 427.

[41] Returning to Saskatchewan, it is my respectful view that the reasoning in *Mew 2016*, as adopted by the Chambers judge, is inaccurate in two ways. First, through borrowing the line of reasoning that has appeared in Ontario jurisprudence, the analysis strays by focusing on the meaning of the word *claim*. Second, and more importantly, the analysis does not contend with the proposition that the words, "amendment to the pleadings", in s. 20 of the *Saskatchewan Act* have been interpreted by Saskatchewan courts as allowing an entirely new pleading through an amendment.

[42] Beginning with the first issue, in Saskatchewan the basic limitation period applies to the commencement of a "proceeding": s. 5 of *The Limitations Act*. The analysis in *The Law of Limitations* (with similar language in both editions) connects the concept of a proceeding with the word "claim". However, the word "proceeding" in *The Limitations Act* must be taken to have a distinct meaning from the word "claim" in that Act. Both words appear in s. 20, and, when the Legislature uses different words in relation to the same subject, it must be understood to have intended each word to have a meaning: Ruth Sullivan, *The Construction of Statutes*, 7th ed (LexisNexis, 2022) at §8.04[2]. Notably, although *The Limitations Act* defines "claim", it does not define "proceeding".

[43] It may be that the term "proceeding" in *The Limitations Act* is synonymous with the word "action" in other legislation. However, the word "action" is not used in *The Limitations Act*. More particularly, a counterclaim is an independent proceeding. This is clear because *The King's Bench Act*, SS 2023, c 28, provides as follows:

> **Definitions**
>
> **1-2** In this Act:
>
> **"action"** means:
>
> (a) a civil proceeding commenced by statement of claim or in any other manner authorized or required by this Act or the rules of court; or
>
> (b) any other original proceeding between a plaintiff and a defendant … .

Accordingly, every "action" is a "proceeding". This conclusion also applies to the *Rules*, which are passed in accordance with s. 6-2 of *The King's Bench Act*, having regard to the rule of interpretation set out in s. 2-27(2)(b) of *The Legislation Act*, SS 2019, c L-10.2. Rule 3-46(1) expressly considers a counterclaim to be an "independent action".

[44] Notably, Rule 3-43(a) states that a counterclaim must "be set forth in the statement of defence under the heading 'Counterclaim'". It follows that to add a counterclaim after the close of pleadings, a defendant must amend what it has already pleaded in its statement of defence. (See also Subrules 3-43(b), (c), and (d)).

[45] Further, the words "amendment to the pleadings" in *The Limitations Act* have been interpreted by Saskatchewan courts to allow a new pleading. Although a counterclaim is an "independent action", the meaning of "independent" is not categorical. In the *Rules*, for instance, while a counterclaim is an "independent action", it is, by default, tried together with the original claim (Rule 3-46(2)). As the discussion of the jurisprudence below will demonstrate, "independence" between a counterclaim and an original claim is a matter of degree. In particular, *Dusterbeck* has interpreted broadly the words in what is now s. 20 of *The Limitations Act* so that a new pleading may be added to "the pleadings" and "may be described as an amendment" within the meaning of that provision (at para 8).

[46] Neither the analysis by the authors in *The Law of Limitations* nor by the Chambers judge appears to have considered *Dusterbeck*. I turn to that next.

4. *Dusterbeck* applies to counterclaims

[47] The connection between a counterclaim and the proceeding initiated by the original claim has been described as follows by the Federal Court of Appeal: "A counterclaim is essentially an independent action that is grafted procedurally onto the existing action" (*Ruhrkohle Handel Inter GMBH v Federal Calumet (The)*, [1992] 3 FC 98 (FCA) at 103 – similarly, see *Sandhu Singh Hamdard Trust v Navsun Holdings Ltd.*, 2019 FCA 295 at para 56, 169 CPR (4th) 325. This Court has adopted an equivalent phrase in relation to third-party claims: "a third party claim is a separate, distinct, and independent proceeding grafted onto the original proceedings" (*Winacott Spring Western Star Trucks v Moore Industrial Ltd*, 2013 SKCA 88 at para 27, [2014] 1 WWR 755 [*Winacott*]). In my view, *Winacott* can be extended to the proposition that a counterclaim, not only a third-party claim, is an independent proceeding grafted onto an original proceeding.

[48] With this analogy to assist in determining the meaning of "independent proceeding", I turn to *Dusterbeck*, which is the leading case that considers whether a third-party claim may be filed as an amendment to a pleading pursuant to s. 20 of *The Limitations Act*, following the expiry of a limitation period. In *Dusterbeck*, a collision occurred on March 21, 1985, between the plaintiff in one vehicle (Carolyn Beitel) and both the defendant (George Banda) and the proposed third-party plaintiff (Mr. Dusterbeck) in the other vehicle. The plaintiff commenced an action on March 13, 1986. In May of 1988, two applications were made. First, the defendant "applied for an order … permitting him to counterclaim to recover the amount of damage to his automobile" (at para 3), which was granted; and second, the proposed third-party plaintiff, who "was a passenger in the Banda vehicle at the time of the accident" and "suffered injuries in the accident" (at para 2), "sought … to be added as a party to the action and to be permitted to assert a claim against Beitel for damages for personal injury" (at para 3). The application to allow the third-party claim to proceed was denied by a Queen's Bench judge in Chambers.

[49] At the relevant time, *The Highway Traffic Act*, SS 1986, c H-3.1, provided for a one-year limitation period. Moreover, in what is equivalent to s. 20 of *The Limitations Act*, at that time *The Queen's Bench Act*, RSS 1978, c Q-l, allowed for the following:

> **Amendment of pleading in certain cases**
>
> **44**(11) Notwithstanding that a limitation period has expired since the commencement of an action, the court may allow an amendment to the pleadings:
>
> (a) asserting a new claim; or
>
> (b) adding or substituting parties;
>
> provided that the claim asserted by the amendment, or by or against the new party, arose out of the same transaction or occurrence as the original claim and the court is satisfied that no party will suffer actual prejudice as a result of the amendment … .

[50] On appeal, this Court determined that the Chambers judge erred by finding "that this section could not apply to Mr. Dusterbeck's [third-party claim] application because his claim could not be described as an amendment to a pleading but was rather an attempt to initiate a new cause of action" (at para 7). Although the Court agreed that the third-party claim was "a new cause of action" (at para 7), it determined that the claim should be permitted by the amendment provision of *The Queen's Bench Act* because "it arose out of the same occurrence (the accident) as the original action" and because the proposed third-party claim could properly "be described as an amendment to Banda's counterclaim" (*Dusterbeck* at para 8).

[51] This Court has said that the rule from *Dusterbeck* remains good law and applies to s. 20 of the current *Limitations Act*: see *The Insurance Company of the State of Pennsylvania v Cameco Corporation*, 2008 SKCA 54 at paras 31–32, [2008] 6 WWR 626; *Fiesta Barbeques Limited v Andros Enterprises Ltd.*, 2019 SKCA 114 at paras 38–39, 443 DLR (4th) 158; and *Winacott* at paras 44–46. I see no principled reason why the rule from *Dusterbeck* should not apply to counterclaims. As noted, if a third-party claim "may be described as an amendment" (at para 8), then a counterclaim may similarly be described as "an amendment to the pleadings", to use the words found in *The Limitations Act*.

[52] Further, the Saskatchewan Court of Queen's Bench (as it then was) has interpreted s. 20 of *The Limitations Act* as applicable to counterclaims. First, in *Cyca v Petrill Golf Company Ltd.*, 2010 SKQB 469, 367 Sask R 149 [*Cyca*], a late counterclaim was permitted pursuant to s. 20. That counterclaim relied upon "the same set of facts and allegations" as the applicant's original statement of defence, and the proposed counterclaim arose "out of the same occurrence as the original claim" within the meaning of s. 20(a) (at para 45). Second, in *101133912 Saskatchewan Ltd. (Hybrid Construction) v First Care Medical Management Inc.*, 2019 SKQB 231, the application to file a late counterclaim through s. 20 was denied, but not because it did not qualify as an amendment to the pleadings. Rather, Currie J. found that the proposed counterclaim met the requirement in s. 20(a) as arising "out of the same transaction or occurrence" (at para 50). However, the application to file the counterclaim late was denied because the proposed counterclaim "would materially alter the course of this action" by adding defendants behind the corporate veil through allegations against them of "serious wrongful conduct" (at para 36) and because the late counterclaim would prejudice those proposed defendants within the meaning of s. 20(b): see paragraphs 46–48.

[53] In sum, my analysis has considered whether a counterclaim is "independent" to the underlying claim and whether it can be cast as an "amendment" to that claim. This inquiry is answered by considering what is expressly laid out in s. 20(a) of *The Limitations Act*: "the claim asserted … arises out of the same transaction or occurrence as the original claim". In other words, when a counterclaim asserts a new cause of action and the counterclaim arises out of the same transaction or occurrence as the original claim, that counterclaim can be allowed as an amendment to the pleadings, notwithstanding the expiry of a limitation period, if the judge is satisfied that no party will suffer actual prejudice as a result.

5. The Cartage Parties' counterclaim is an amendment

[54] *Dusterbeck* stands for the proposition that where a party seeks to counterclaim in relation to damages arising from the same events that are the subject of the original action, this readily meets the s. 20(a) amendment requirement. In the instant case, the proposed counterclaim expressly "repeats the allegations made and contained in the Statement of Defence" (28 April 2020 counterclaim at para 2). Further, the particulars of CPR's alleged negligence are identical in both the Cartage Parties' counterclaim and statement of defence: see paragraph 10 of the counterclaim and paragraph 9 of the statement of defence (both dated 28 April 2020):

> 9. … the Collision was wholly, or in part, caused by the negligence of the plaintiff, the particulars of which include but are not limited to:
>
> a. failing to have a crew member on the lead car of the Train …;
>
> b. failing to have a crew member in a position to warn persons crossing or about to cross the track …;
>
> c. failing to have a crew member provide manual protection at the Crossing …;
>
> d. failing to have a crew member or other qualified employee on the ground ahead of the reversing Train, in a position to stop traffic before vehicles entered the Crossing …;
>
> e. failing to have a crew member use a light or lighted fusee to signal vehicles to stop at the Crossing;
>
> f. failing to repair in a timely manner the continued activation of the Warning Devices at the Crossing;
>
> g. failing to take extra precaution while reversing the Train;
>
> h. failing to keep a proper lookout given the existing circumstances … .

[55] Thus, given the legislation and jurisprudence noted above, the Chambers judge erred by concluding that s. 20 of *The Limitations Act* did not apply to the counterclaim. Further, as CPR did not argue that it would be prejudiced by the filing of the counterclaim, there was no principled basis upon which the Chambers judge could refuse to exercise his discretion to allow the Cartage Parties to continue with their counterclaim, notwithstanding the expiry of the limitation period.

[56] Despite my conclusion on this issue, as I discuss below, I have determined that the allegations pleaded in support of CPR's contributory negligence can be summarily dismissed. It follows that the Cartage Parties' counterclaim must be dismissed for substantially the same reasons. As a result, the limitation period issue is ultimately moot in this litigation.

B. Olson's Affidavit properly admitted into evidence

[57] The Cartage Parties argue that the Olson Affidavit filed by CPR should not have been accepted into evidence or relied upon by the Chambers judge because it was filed late, after cross-examinations on affidavits had occurred.

[58] As noted, the Train's conductor, Mr. Olson, was riding on the lead car of the Train and was shining a flashlight from that car just prior to the Collision. In his affidavit, Mr. Olson said that he saw a semi-trailer truck moving towards the crossing (later to be identified as the Truck that Mr. Henderson was driving), he shone his flashlight into the Truck's cab from the lead car, and, upon determining that Mr. Henderson was not going to stop at the Crossing, he told the engineer to stop the Train and jumped from it just before it collided with the Truck.

[59] The Cartage Parties contend that the late filing of the Olson Affidavit unfairly allowed CPR to "shore up a faltering position with evidence that should have been adduced in the first place" (quoting, out of context, *Mars Canada Inc. v Bemco Cash & Carry Inc*., 2015 ONSC 8078 at para 14, 86 CPC (7th) 198). In turn, CPR says that the Cartage Parties' objection to the admissibility of the Olson Affidavit is simply a complaint that it was filed outside the timelines of a consent order respecting the filing of materials, to which neither party had strictly adhered. Further, CPR points out that when the Olson Affidavit was filed and served, there were still five months until the summary judgment hearing was scheduled, providing the Cartage Parties with ample time to respond to the Olson Affidavit and to cross-examine Mr. Olson, which they did.

[60] I see no error in the Chambers judge's decision to admit the Olson Affidavit into evidence. While the admissibility of evidence is a question of law, reviewable on a correctness standard, whether an otherwise admissible document should be excluded on the basis that a party will be prejudiced by its admission involves an exercise of discretion. The Cartage Parties have not argued that the Olson Affidavit is *prima facie* inadmissible; rather, their complaint is that it was unfair to admit it. It follows that the Chambers judge's decision to admit the Olson Affidavit was discretionary and the standards of appellate review that bear on discretionary decisions apply here, as set out in *Kot v Kot*, 2021 SKCA 4, 63 ETR (4th) 161 [*Kot*]:

> [20] In summary, these cases confirm that appellate intervention in a discretionary decision is appropriate where the judge made a palpable and overriding error in their assessment of the facts, including as a result of misapprehending or failing to consider material evidence. Appellate intervention is also appropriate where the judge failed to correctly identify the legal criteria which governed the exercise of their discretion or misapplied those criteria, thereby committing an error of law. Such errors may include a failure to give any or sufficient weight to a relevant consideration.

[61] The Cartage Parties contend that while the Chambers judge correctly identified the legal criteria that governed the exercise of his discretion on this issue, citing *Studio Pyramid v Raffan*, 2020 ONSC 1476 [*Studio Pyramid*], and *Winkler v Hendley*, 2021 FC 498, 184 CPR (4th) 1 [*Winkler*], he failed to turn his mind to whether the evidence contained in the Olson Affidavit was available earlier, which should have been a key consideration in deciding whether it was in the overall interests of justice to admit the affidavit.

[62] In *Studio Pyramid*, the Ontario Superior Court of Justice considered what test should be applied to determine whether leave should be granted for a party to file additional evidence on an application following the completion of cross-examinations. The test adopted by the Court asks as follows:

> [26] The parties agree that the following test applies …
>
> a. Is the evidence relevant?
>
> b. Does the evidence respond to a matter raised on the cross-examination, not necessarily for the first time?
>
> c. Would granting leave to file the evidence result in non-compensable prejudice that could not be addressed by imposing costs, terms, or an adjournment?
>
> d. Did the moving party provide a reasonable or adequate explanation for why the evidence was not included at the outset?

[63] As noted by the Chambers judge, a similar test was adopted in *Winkler*, where the Federal Court stated as follows:

> [23] In assessing whether to admit evidence after the conduct of cross-examination, the Court will consider (i) the relevance of the proposed affidavit; (ii) the existence of prejudice to the opposing party; (iii) whether the affidavit will assist the Court; and (iv) the overall interests of justice including whether the evidence was available or could have been anticipated earlier: *Canmar Foods Ltd v TA Foods Ltd*, 2019 FC 1229 at paras 11–12, applying *Pfizer Canada Inc v Rhoxalpharma Inc*, 2004 FC 1685 at para 16.

[64] In Saskatchewan, the leading case respecting the late filing of an affidavit is *4 Star Ventures (2012) Ltd. v 1983283 Ontario Inc. (Secure Digital Markets)*, 2024 SKCA 82, where Caldwell J.A. set out the factors a judge should consider to determine whether late filed evidence should be allowed. He stated as follows:

> [16] It is trite to say that the interests of justice presumptively require that all relevant information be placed before the court. Therefore, a judge assessing a party's request for leave to late file an affidavit should take into account more than simply the fact that the affidavit was filed out of time. Judges should consider several factors including the reasons for the delay, the extent or seriousness of the delay, the intrinsic worth of the evidence, any prejudice that might befall the opposing party by late admission of the affidavit into evidence, and how anticipated prejudice might be remedied or mitigated. By intrinsic worth, I mean the relevance, admissibility and potential use by the court of the evidence in question. Of course, the weight to be given to any of these factors in the balance of determining whether it is in the interests of justice to admit a late-filed affidavit would depend on the context in which the request for leave is made.

[65] The Chambers judge clearly considered the Cartage Parties' argument that the Olson Affidavit should be rejected because the evidence had been available all along and need not have been filed late. Nevertheless, the Chambers judge found that the Olson Affidavit contained "highly relevant evidence" and that the substance of that evidence was "already before the court (and more importantly, before the [Cartage Parties]) without his affidavit" (*Decision* at para 42). The Chambers judge expressly noted that CPR had previously filed the affidavit of Christine Krushel, which exhibited Mr. Olson's initial witness statement to the police shortly after the Collision (the report was later also exhibited in the Scott Affidavit). On this basis, the Chambers judge found that the late filing of the Olson Affidavit did not prejudice the Cartage Parties, because the information it contained was also contained in the police report that had been exhibited earlier.

[66] This finding directly addresses the issue of whether it was in the overall interests of justice to admit evidence that could have been proffered earlier: the Chambers judge found that it was fair to do so because the Cartage Parties had earlier notice of the evidence. I am not persuaded that the Chambers judge erred in his exercise of discretion. He correctly identified the legal principles governing the admission of late evidence and reasonably applied them.

[67] Finally, the Cartage Parties argue that had the Olson Affidavit been excluded, the Chambers judge would not have been able to conclude, as he did, that Mr. Henderson proceeded through the intersection when it was unsafe to do so. They say that, absent Mr. Olson's affidavit, there would be no first-hand evidence to contradict Mr. Henderson's evidence that he did not see the Train or Mr. Olson riding on the lead car, waiving a light.

[68] Respectfully, if anything, this argument supports that the Olson Affidavit was properly admitted. The *Rules*, and specifically Rule 1-3, exist to support fairness, justice and the good and expeditious administration of justice. They are not to be relied upon to deprive a judge of evidence relevant to resolving important matters that bear directly on key issues – in this case, liability.

[69] In any event, I am not persuaded that the Chambers judge would have been unable to conclude that Mr. Henderson proceeded through the intersection when it was unsafe to do so in the absence of the Olson Affidavit. To the contrary, the Chambers judge expressly stated, "I would have reached the same conclusion" on the Cartage Parties' liability for negligence regardless of "whether or not Mr. Olson's affidavit was admitted" (*Decision* at para 48). Further, the Chambers judge determined that Mr. Henderson negligently caused the Collision based largely on a review of Mr. Henderson's own evidence. In this regard, he found that Mr. Henderson gave multiple conflicting statements as to whether he slowed to a rolling stop or came to a complete stop. Ultimately, the Chambers judge found that Mr. Henderson's earlier statement – that he came to a rolling stop, which he had said immediately after the Collision – was more likely to be accurate than the later statements in his affidavit. The Olson Affidavit simply corroborated the finding that the Truck did not stop. Further, the Chambers judge went on to find that regardless of whether he came to a complete stop, Mr. Henderson's own statements revealed that he proceeded into the intersection before it was safe to do so, which the Chambers judge found was negligent.

[70] In conclusion, the Olson Affidavit was properly admitted into evidence, and I would dismiss this ground of appeal.

C. Sufficient evidence for a summary disposition

[71] In my respectful view, the Chambers judge erred when he failed to decide whether CPR was contributorily negligent; the evidence in that regard was sufficient for summary disposition.

1. Overview on summary judgment

[72] While the Chambers judge determined that the Cartage Parties' were liable to CPR in negligence as a result of the Collision, he concluded that he could not summarily determine whether CPR was contributorily negligent in its operation of the Train leading up to the Collision.

[73] The Chambers judge decided that the evidence before him, which included what he viewed as an inadequate exhibition and analysis of the *CROR*, did not permit him to establish the applicable standard of care for CPR. As a consequence, he concluded that he could not make a finding respecting whether CPR was contributorily negligent. However, he did find the following facts which inform the contributory negligence issue (*Decision*):

> [94] Although I decline making a finding respecting contributory negligence, the [*CROR*] seemingly require one or both of two safeguards: a person must be on the lead car with a warning device, or a person must be on the ground to provide manual protection. To the extent that my finding may assist the parties, whether in settlement discussions or in an abbreviated trial, I find that Mr. Olson was on the lead car as it approached the intersection, that he was holding a flashlight and that he remained on the car, jumping off moments before the train collided with Mr. Henderson's truck. As well, I find that no CPR employee was providing manual protection by standing on the ground in a position to warn Mr. Henderson.

[74] As I will discuss, the Chambers judge erred by declining to summarily determine the issue of whether CPR was contributorily negligent. I come to this conclusion even while acknowledging that the submissions of the parties before the Chambers judge could have been better developed and supported. Nevertheless, the interpretation of the *CROR* that is necessary to determine the standard of care involves a question of law. Had the Chambers judge decided that question of law, he would have been able to decide whether CPR had met the standard of care, given the facts that he did find summarily.

2. Failure to analyze the *CROR*

a. Standard of review on appeal

[75] The standard of review in an appeal from a decision made in relation to a summary judgment application is set out in *Hess v Thomas Estate*, 2019 SKCA 26, 433 DLR (4th) 60, where Justice Barrington-Foote said as follows:

> [29] Absent an error of law, the exercise of powers under the summary judgment rules attracts deference: *Hryniak v Mauldin*, 2014 SCC 7 at para 80, [2014] 1 SCR 87 [*Hryniak*]. A decision as to whether there is a genuine issue for trial on a summary judgment application is a mixed question of fact and law. Where there is no extricable error in principle, it should not be overturned absent a palpable and overriding error: *Deren v SaskPower*, 2017 SKCA 104 at para 41; *Hryniak* at para 81. It is an error in principle to misapprehend or overlook material evidence: *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 [*Housen*]. Questions of fact are assessed on the palpable and overriding error standard and questions of law on the correctness standard: *Housen*.

[76] With the greatest respect, the Chambers judge erred in principle in his treatment of the *CROR*.

[77] The *CROR* sets out certain operating requirements for employees involved in the movement of trains operated by federally regulated railway companies in Canada. The *CROR* is amended from time to time and approved by the Minister of Transport in accordance with s. 19(1) of the *Railway Safety Act*, RSC 1985, c 32 (4th Supp). The parties agreed that the version of the *CROR* in effect on January 30, 2018 (which was approved on December 14, 2016, and expired on May 18, 2018) was the version of the *CROR* that applied to CPR at the time of the Collision.

[78] While it is my view that the *CROR* should be treated as evidence, the distinction respecting whether the *CROR* is evidence or law is not important in this case. If the *CROR* is evidence, then the Chambers judge erred by misapprehending or failing to consider relevant evidence (see *R v Zatrepalek*, 2024 SKCA 27 at para 40, 435 CCC (3d) 443, and *Boreen v Mosaic Esterhazy Holdings ULC*, 2020 SKCA 132 at paras 75–76, 58 CCPB (2nd) 17); and if the *CROR* is law, then the Chambers judge erred by failing to decide a legal issue raised in the application: see, for example, *Genesis Fertility Inc. v Yuzpe*, 2021 BCCA 420 at para 36, 55 BCLR (6th) 213, and *Madill v Alexander Consulting Group Limited* (1999), 176 DLR (4th) 309 (Alta CA) at para 29.

[79] The Chambers judge did not interpret the *CROR* because, as he said, (a) only a portion of the *CROR* had been provided to the court, when the entirety of it should have been provided; (b) the only source of the *CROR* was as an exhibit to the Ramcharan Affidavit, which was not admitted into evidence because the Chambers judge declined to rule on its admissibility; (c) the parties did not make a sufficiently detailed or helpful argument to assist the court in interpreting the *CROR*; and (d) the parties failed to provide assistance in determining several concepts embedded in the *CROR*: see the discussion in paragraphs 90 to 93 of the *Decision*.

[80] I am sympathetic to the Chambers judge's finding that the parties did not assist him adequately during the summary judgment proceedings. However, the parties agreed that the *CROR* was relevant to CPR's standard of care. There was also no issue respecting which version of the *CROR* applied, and it was common ground that the *CROR* was sanctioned pursuant to federal legislation and approved by the Minister of Transport. Accordingly, even though the *CROR* was not exhibited or otherwise provided in its entirety until after the hearing, when the Chambers judge

requested that counsel do so, it was within his authority to take judicial notice of the existence of the relevant version of the *CROR* and to proceed to interpret it. This is because, in light of the foregoing, the *CROR* could properly be seen as something that was "capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy" (*R v Find*, 2001 SCC 32 at para 48, [2001] 1 SCR 863). It was also within the Chambers judge's authority to require counsel to file further submissions respecting the correct interpretation of the *CROR* and its impact on CPR's duty and standard of care, if he believed that the submissions received were deficient.

b. Standard of care and the *CROR*

[81] CPR submits that the standard of care, which informs whether its actions in respect of the Collision were contributorily negligent, is prescribed by the *CROR*, specifically Rule 103, which governs public crossing of a railway track at grade. It says that no trial was required to apply the law to the facts found by the Chambers judge to conclude that CPR complied with Rule 103(a) of the *CROR* and fell within the exception to the manual protection requirement created by Rule 103(b):

> **103. Public Crossings at Grade**
>
> (a) Where a railway track and a public road share the same roadbed and there is no fence or other barrier between them, moving rail cars not headed by an engine or when headed by a remotely controlled engine must be protected by a crew member on the leading car or on the ground, in a position to warn persons standing on, or crossing, or about to cross the track.
>
> (b) When required by special instruction or when cars not headed by an engine, snow plow or other equipment equipped with a whistle and headlight, are moving over a public crossing at grade, a crew member must provide manual protection of the crossing until the crossing is fully occupied.
>
> EXCEPTION: Manual protection of the crossing is not required provided the crossing is equipped with automatic warning devices and a crew member is on the leading car to warn persons standing on, or crossing, or about to cross the track. This exception does not modify the application of Rule 103.1(a).
>
> …
>
> **103.1 Public Crossings at Grade with Warning Devices**
>
> (a) When a movement passes over any public crossing at grade equipped with automatic warning devices, it will be necessary, before reversing over the crossing, for a crew member to provide manual protection of the crossing.

[82] In turn, the Cartage Parties argue that whether CPR was contributorily negligent was an issue for trial and that the exception to the manual protection requirement did not apply in the circumstances because the Train was "reversing" within the meaning of Rule 103.1(a), indicating that CPR failed to meet the required standard of care by not providing manual protection. The Cartage Parties say that the Train was "reversing" because a train with cars not headed by an engine, snow plow or other equipment equipped with a whistle and headlight is necessarily "reversing" within the meaning of Rule 103.1(a) of the *CROR*. For its part, CPR says that the term "reverse" is not used to describe "cars not headed by an engine" but, rather, is used to describe a change in the direction that the train is moving.

[83] As I will discuss, I agree with CPR that, in the circumstances of this case, its standard of care pursuant to the *CROR* was informed by Rule 103(a), which only required CPR to ensure that a crew member was providing protection on the lead car, being in a position to warn persons about to cross or in the process of crossing the track. The Train was not "reversing", as that term is understood under Rule 103.1(a), at the time of the Collision. CPR was therefore not required to provide manual protection.

i. Train movement

[84] Turning to an analysis of the *CROR* and its application to the facts of this case, the Chambers judge found that, as a standard of care, the *CROR* required CPR, when the Train was progressing toward and crossing through the intersection, to ensure that a person was on the lead car with a warning device or was on the ground providing manual protection. He further found that Mr. Olson was on the lead car with a warning device until seconds before the Collision but that no CPR employee was providing manual protection by standing on the ground in a position to warn Mr. Henderson.

[85] As I said, CPR argues that it met the standard of care by acting in accordance with the *CROR*. In my view, the determination of the standard of care required from CPR is informed by the *CROR* but is not exclusively defined by it because the requirements of the *CROR* are not necessarily "coextensive" with the requirements of the common law standard of care. The Supreme Court examined this issue as follows in *Ryan v Victoria (City)*, [1999] 1 SCR 201 [*Ryan*]:

> [29] Legislative standards are relevant to the common law standard of care, but the two are not necessarily coextensive. The fact that a statute prescribes or prohibits certain activities may constitute evidence of reasonable conduct in a given situation, but it does not extinguish the underlying obligation of reasonableness. … Statutory standards can, however, be highly relevant to the assessment of reasonable conduct in a particular case, and in fact may render reasonable an act or omission which would otherwise appear to be negligent. This allows courts to consider the legislative framework in which people and companies must operate, while at the same time recognizing that one cannot avoid the underlying obligation of reasonable care simply by discharging statutory duties.
>
> …
>
> [40] Where a statute authorizes certain activities and strictly defines the manner of performance and the precautions to be taken, it is more likely to be found that compliance with the statute constitutes reasonable care and that no additional measures are required. By contrast, where a statute is general or permits discretion as to the manner of performance, or where unusual circumstances exist which are not clearly within the scope of the statute, mere compliance is unlikely to exhaust the standard of care. This approach strikes an appropriate balance among several important policies, including deference to legislative determinations on matters of railway safety, security for railways which comply with prescribed standards, and protection for those who may be injured as a result of unreasonable choices made by railways in the exercise of official authority.

[86] In considering the standard of care required by the *CROR*, I have relied on the version of the *CROR* that was supplementally provided to the Chambers judge by counsel on January 6, 2023, which the parties agreed was the relevant version informing CPR's standard of care. As noted, the rules salient to the parties' arguments concerning CPR's standard of care are Rules 103 and 103.1. These fall within the span of Rules 62 through 116, under the heading "Operation of Movements".

[87] In addition to those quoted above, the following rules from the *CROR* are also relevant:

> **103. Public Crossing at Grade**
>
> …
>
> (g) When providing manual protection of a crossing, a crew member or other qualified employee must be on the ground ahead of the movement, in a position to stop vehicular and pedestrian traffic before entering the crossing. A hand signal by day and a light or a lighted fusee by night will be used to give a signal to stop vehicular and pedestrian traffic over such crossing. The movement must not enter the crossing until a signal to enter the crossing has been received from the employee providing the manual protection. When the crossing is known to be clear of traffic, and will remain clear until occupied, manual protection need not be provided.
>
> **103.1 Public Crossing at Grade with Warning Devices**
>
> …
>
> (b) Unless otherwise directed by special instructions, a main track movement over a public crossing at grade, equipped with automatic warning devices, which;
>
> (i) has stopped or is switching, on the main track in the vicinity of the crossing; or
>
> (ii) is entering the main track in the vicinity of the crossing; or

> (iii) has been authorized to pass a block or interlocking signal indicating Stop which is located within 300 feet of the crossing; must not exceed 10 MPH from a distance of 300 feet from the crossing until the crossing is fully occupied by the movement. In addition, unless manually protected, the crossing must not be occupied until the warning devices are known to have been operating for at least 20 seconds.
>
> Applicable to item (iii): At all other crossings within the block, movements must not exceed 15 MPH entering the crossing unless the warning devices are known to have been operating for at least 20 seconds prior to occupancy.
>
> (c) Unless otherwise directed by special instructions, a movement on non-main track over a public crossing at grade, equipped with automatic warning devices, must not exceed 10 miles per hour from a distance of 300 feet until the crossing is fully occupied.
>
> (d) At a public crossing at grade where special instructions require that warning devices be operated by pushbutton, or other appliances, or that movements stop at stop signs, movements affected must not occupy the crossing until the warning devices have been operating for at least 20 seconds. Pushbutton boxes must be closed and locked when not in use.

[88] As will become clear in the discussion below, it is material whether the track on which the Collision occurred is a "main track" as defined in the *CROR*. "Main track" means a "track of a subdivision extending through and between stations governed by one or more methods of control upon which movements, track units and track work must be authorized", and a "method of control" is "[r]ules and/or special instructions governing the use of a track(s)" (at 9). From the record, it can be inferred that the portion of track involved in the Collision at issue is a "main track".

[89] That inference made, it is not contentious that the lead car of the Train involved in the Collision formed part of a "movement" within the meaning of the *CROR*. I acknowledge, however, that the Chambers judge pointed out a potential ambiguity in the definition of "movement(s)" provided for in the *CROR*, which definition includes "trains, transfers or engines in yard service". For him, the ambiguity arose from whether this definition refers to "trains" generally or is limited to "trains in yard service" (*Decision* at para 90).

[90] Nevertheless, in the context of the entire *CROR*, the term "movement(s)" is not ambiguous in this way. Nowhere do the rules mention a "train in yard service" or a "transfer in yard service". By contrast, the phrase, "engine in yard service", is expressly defined and is used throughout the *CROR*. Considering the *CROR* in its entirety, the terms "train", "transfer", and "engine in yard service" together capture the circumstances in which an engine and any accompanying cars might operate on main tracks. The three terms capture these circumstances exhaustively:

(a) a “train” is generally defined as an “engine with or without cars intended to operate on the main track at speeds in excess of 15 MPH” (at 13);

(b) a “transfer” is defined as an “engine with or without cars operating on [a] main track at speeds not exceeding 15 MPH” (at 13); and

(c) an “engine in yard service” is defined as an “engine with or without cars utilized exclusively in switching, marshalling, humping, trimming and industrial switching” (at 8).

Rule 65 contemplates that an “engine in yard service” may be “required to enter [a] main track” in specified circumstances and will nonetheless generally “not be considered a train or transfer”.

[91] As all three terms are encompassed in the term “movement(s)”, that defined term fulfills the purpose of specifying that certain rules apply generally to engines and accompanying cars operating on main tracks, in addition to activities on other tracks by an engine in yard service. This concords with the unusual phrasing of the definition of movement: “The term used in these rules to indicate that the rule is applicable to trains, transfers or engines in yard service”. Moreover, this is supported by the definition of “engine”, when it is noted that the expressions “train”, “transfer” and “engine in yard service” all describe an “engine” operating in distinct specified circumstances. “Engine” is defined as a “locomotive(s) operated from a single control or a cab control car, used in train, transfer or yard service” (emphasis added).

ii. Train not reversing

[92] In considering whether Rule 103.1(a) informs CPR’s standard of care, it is critical to determine whether the Train was “reversing”. I have concluded that the movement of the Train in this case does not constitute “reversing” in the manner contemplated by Rule 103.1(a). This conclusion is based on a reading of the entire text of Rule 103.1(a) and considering the scheme of the rules surrounding it, as well as the object of these rules: i.e., *reverse* in the *CROR* indicates the changing of a direction after having previously moved in a different direction. For clarity, I do not arrive at this conclusion based on a narrowly fixed interpretation of the word “reverse”.

[93] The term "reverse" is not defined in the *CROR*, and it is not used in the *Railway Safety Act*. Accordingly, I look to the ordinary meaning of the word and to a possible technical meaning in the domain of rail operations: "When a word or expression has both an ordinary non-technical meaning and a technical one, the ordinary non-technical meaning is presumed" (*The Construction of Statutes* at § 4.02 [1]).

[94] Beginning with ordinary meaning, multiple definitions appear for the verb "reverse" in the *Oxford English Dictionary Online* (Oxford University Press, December 2024) sub verbo "reverse"). The definitions most pertinent to the instant case relate directly to vehicular travel. These support the broad interpretation that "reverse" does not require that the ground covered in the reverse direction be already covered in the forward direction:

(a) "9.b. *transitive*. To cause (an engine) to work or revolve in the contrary direction"; and

(b) "9.c. *transitive*. To drive (a motor vehicle) so as to travel backwards; to put (a motor vehicle) into reverse gear".

[95] Insofar as "reverse" may be a technical term in rail operations, it is helpful to next consider the way the term is used by specialized Canadian arbitrators and tribunals. I have identified several uses in reported decisions of administrative bodies in which "reverse" refers to movement that does not require the train retrace its exact previous path – only that it changes direction. In these cases, the rail cars have come from one track and reversed into another track – for instance, to set off cars onto that second track and leave them behind: see, for example, *Canadian National Railway Company v Canada (Minister of Transport)*, 2022 TATCE 3; *Canadian National and Canadian Auto Workers, Rail Division & Brotherhood of Locomotive Engineers, Local 100*, [2005] CLCAOD No 43 (QL) (Canada Occupational Health and Safety Tribunal); *Canadian National Railway Company v Canada (Minister of Transport)*, 2017 TATCE 9; and *Canadian National Railway Company v Teamsters Canada Rail Conference*, 2016 OHSTC 20.

[96] From the ordinary and technical use of the word "reverse", it is my view that the word refers to movement backwards over track that either has or has not already been covered in the forward direction. A review of the *CROR* in its entirety supports the same conclusion. Let me explain.

[97] For instance, Rule 115 relates to shoving equipment. This rule is concerned with rail equipment travelling along the track such that its leading car is not one in which a crew member would ordinarily be stationed and able to properly give signals and instructions. It contemplates the following:

(a) Rules 115(a) and (c) – "equipment is shoved by an engine", meaning the engine is pushing the equipment from behind rather than pulling it;

(b) Rules 115(a) and (c) – equipment is "headed by an unmanned remotely controlled engine"; or

(c) Rule 115(d) – "when reversing with a locomotive consist", a "locomotive consist" refers to the specific grouping of locomotives that are operated together as a single unit to pull a train.

[98] Notably, there is no text in Rule 115 indicating that a locomotive consist is only "reversing" when it is traversing ground which it previously covered in the forward direction nor can I see how that would be implied based on the object of the rule. In line with the set of administrative decisions discussed above, the meaning of "reverse" in Rule 115 must apply to set off and switching operations in which a locomotive consist would travel backwards onto a track not previously traversed in the forward direction. To say otherwise would arbitrarily defeat the object of the rule in certain situations.

[99] For its part, Rule 308.1 provides that a train or transfer "authorized to proceed by clearance … must move only in the specified direction" but, subject to certain conditions, "may reverse a distance of 300 feet or less". Rule 308.1 in its entirety states as follows:

> **308.1 Changing Direction – Proceed Clearance**
>
> Unless otherwise provided by rules or special instructions, when authorized to proceed by clearance, a train or transfer must move only in the specified direction.
>
> Provided the track to be operated over has not been released or a block in ABS [automatic block signal system] is not re-entered, a train or transfer authorized by clearance to proceed may reverse a distance of 300 feet or less. In ABS a crew member must be in position to see the section of track to be used is clear and will remain clear of equipment or a track unit.

[100] Rule 308.1 applies only when a train or transfer is moving pursuant to an authorization "by clearance" to "proceed". By contrast, if the train or transfer was authorized "by clearance" to "work", then Rule 308, rather than 308.1, governs, and the train or transfer may "move in either direction within the limits named in the clearance" (Rule 308). The purpose of this distinction between Rule 308 and Rule 308.1 is illuminated by Rule 303(a): "A combination of trains or transfers to a limit of two may each be authorized to proceed in the same direction, within the same limits, provided that each is instructed on its clearance to protect against the other."

[101] Thus, because of its context, I find that Rule 308.1 contemplates that a train or transfer would only be "reversing" over ground already covered in the opposite direction. For the purposes of Rule 308.1, however, I do not consider that narrow interpretation to coincide with the object of the rule, which is to avoid collisions between trains proceeding over track for which a clearance is required. I would expect that no gap is intended to arise in the scope of Rule 308.1 by reason that a movement reverses onto a different track than the one it had initially proceeded on.

[102] The meaning is slightly different for Rule 103.1(a), which is at issue in this case. Like Rule 308.1, its textual context suggests that "reversing" would only occur after the train has travelled in one direction, stopped, and then travelled back over track already traversed.

[103] Beginning with the entire text of Rule 103.1(a), I emphasize that among the preconditions for it to be engaged is the following: "When a movement passes over" a public crossing and "before reversing over the crossing". The word "before" indicates a sequence of events. First, the movement "passes over" the public crossing and then it "revers[es]" over that crossing.

[104] Further, the French version of Rule 103.1(a) supports the proposition that "reverse" means to change directions and cross back over a place that has already been crossed:

> **103.1 Passages à niveau munis de dispositifs de signalisation**
>
> (a) Lorsqu'un mouvement, après avoir franchi un passage à niveau public équipé de dispositifs de signalisation automatiques, doit y repasser en sens inverse, le passage à niveau doit être protégé manuellement par un membre de l'équipe.

The French word "après" has the same significance as the word "before" in the English version. Moreover, the French version uses the words "y repasser en sens inverse" in place of the English "reversing over the crossing". Particularly owing to the definition of the verb "repasser", that expression translates more closely to, in English, "go back over [the crossing] in reverse" (translation mine).

[105] I turn next to the scheme of the rules surrounding Rule 103.1(a), and for that, it is helpful to identify the object of that scheme. Based on how they are headed, only two rules in the Operation of Movements section of the *CROR* relate to "public crossings", such as the Crossing at issue, and these are Rules 103 and 103.1: public crossing is not defined in the *CROR*. Together, Rules 103 and 103.1 are intended to address the danger of collisions between members of the public and rail cars moving near or across a public roadway. In particular, these two rules require additional precautions from railways whenever rail cars are near or crossing a public roadway while they are not headed by an engine in the usual fashion. This danger has long existed, as exemplified by the 1903 Ontario Court of Appeal case, *Moyer v Grand Trunk Railway*, 1903 Carswell 54 (WL) (Ont CA), where a collision occurred with a train that was "in the unusual position of backing up, with the tender instead of the engine in front" (at para 1).

[106] On my reading, Rules 103 and 103.1 set out a scheme composed of a general rule, an exception to that general rule, and then exceptions to that exception. This relates to crossings, not to sharing a roadbed, which engages a different rule.

[107] Setting aside the possibility of a "special instruction", the preconditions for the general rule concerning crossings are the following:

(a) rail cars are "moving over a public crossing at grade"; and

(b) those cars are "not headed by an engine … or other equipment equipped with a whistle and headlight" (Rule 103(b)).

If these preconditions are met, the general rule requires that "a crew member must provide manual protection of the crossing until the crossing is fully occupied" (Rule 103(b)).

[108] An exception to that general rule applies if "the crossing is equipped with automatic warning devices and a crew member is on the leading car to warn persons standing on, or crossing, or about to cross the track" (Rule 103(b)).

[109] That exception cannot be relied upon, however, in several specified circumstances (Rule 103(b) and Rule 103.1). On my reading, these are circumstances in which warning devices might not operate in the usual manner to provide sufficient warning on their own. These circumstances include the following:

(a) the movement "has stopped or is switching" on "the main track in the vicinity of the crossing" (Rule 103.1(b)(i));

(b) the movement "is entering the main track in the vicinity of the crossing" (Rule 103.1(b)(ii));

(c) the movement is passing "a block or interlocking signal indicating Stop which is located within 300 feet of the crossing" (Rule 103.1(b)(iii)); and

(d) where "warning devices" require operation "by pushbutton, or other appliances" (Rule 103.1(d)).

[110] In every one of those circumstances, Rule 103.1 requires either manual protection of the crossing or that the warning devices be known to have been operating for at least 20 seconds prior to the movement occupying the crossing.

[111] Rule 103.1(a) is concerned with a movement passing over a public crossing and the automatic warning devices then ceasing their operation while or just before the movement reverses back into that crossing. This interpretation is concordant with the difference between Rule 103.1(a) and all the other rules, listed above, which make unavailable the warning device exception to the general rule requiring manual protection at public crossings. Those rules all contemplate that manual protection is not required if the warning devices have been operating for at least 20 seconds. Rule 103.1(a) includes no such consideration. Instead, the concern targeted by Rule 103.1(a) is not whether the warning device "has been operating"; it is that the warning device will cease operating while or just before a train car enters the crossing.

[112] The interpretation just above also avoids an arbitrary, perhaps even absurd, result. If the interpretation were rejected, then Rule 103.1(a) would be engaged whenever a movement proceeds in the reverse direction over a public crossing, whether or not it has just passed over it in the forward direction. If that were so, then if an engine was facing forward, moving in that direction, and shoving other cars in front of it into a public crossing at grade, and if the crossing was equipped with an automatic warning device, then the crew would not be required to provide manual protection. Yet, if the engine was facing the opposite way but moving in the same direction, which is to say towards the crossing, and all other aspects of the scenario remained the same, then the

crew would be required to provide manual protection. It is absurd that all would depend on the orientation of the engine, which could be dozens of car-lengths from the crossing. A more reasonable interpretation is that the rules focus on the conditions of the crossing itself and of the lead car entering that crossing.

[113] For clarity, although for the reasons given above I agree with CPR that it was not required to provide manual protection by having an employee on the ground, I do not agree with its specific contention, as articulated in its factum, that "[i]f a train with rail cars not headed by an engine, snow plow or other equipment is necessarily 'reversing' within the meaning of section 103.1(a), then there is no circumstance in which the exception to the manual protection requirement in section 103(b) would *ever* apply" (emphasis in original). As I have just discussed, an engine facing and moving forward would not be "reversing" even if it is pushing cars in front of it, but in such a case, that engine and the cars in front would form a movement "not headed by an engine, snow plow or other equipment equipped with a whistle and headlight"; yet, where there are automatic warning devices, that movement could benefit from the exception provided for in Rule 103(b) without the applicability of that exception being defeated by Rule 103.1(a).

iii. Rule 103(a) inapplicable: Tracks not parallel to roadbed

[114] As the Chambers judge observed, the *CROR* does not provide a definition for "roadbed", a term used in Rule 103(a): see paragraph 93 of the *Decision*. Despite this, from my reading of the text of Rule 103(a), and in light of its context, I am of the view that Rule 103(a) does not apply to this case.

[115] The *Oxford English Dictionary Online* defines "roadbed" as "the substructure on which a road, esp. a railroad, rests" (sub verbo "roadbed"). Unlike Rules 103(b) and 103.1(a) discussed above, Rule 103(a) makes no reference to a "crossing" as a noun. On my reading, despite its placement within Rule 103, which is headed, "public crossings at grade", Rule 103(a) does not contemplate a railway track crossing with a public road as in the case at hand.

[116] Instead, Rule 103(a) is limited to circumstances in which a railway track and a public road run approximately parallel to each other but do not cross each other. If it were otherwise, the reference in Rule 103(a) to a "fence or other barrier" between the railway track and public road would make little sense. Rather, crossings between a railway track and a public road are

exhaustively governed by the remaining provisions in Rules 103 and 103.1, as detailed above. In the same vein, Rule 103(a) is the only rule which considers the circumstance of a track and road running side by side, where indeed there might be a risk of collision between "moving rail cars" and "persons" who, given they are not separated from the track by a fence or barrier, might be "standing on" or be "crossing" (used here as a verb, not a noun) or "about to cross" the track.

iv. Rule 103(b): Effect of the Warning Devices

[117] In my view, Rule 103(b) applies to the facts of the instant case and, therefore, informs CPR's standard of care. As discussed above, Rule 103(b) sets out both the general rule for manual protection at crossings and the exception to that rule where the crossing is equipped with automatic warning signals.

[118] In this case, it was common ground that the public crossing at issue was equipped with Warning Devices and that its red lights were flashing at the time of the Collision. CPR's uncontested evidence was that the warning lights were flashing continuously for at least 20 seconds prior to the Collision and that Mr. Olson was in the lead car until just before the Collision. Accordingly, the exception to the requirement for manual protection in Rule 103(b) is clearly engaged: "Manual protection of the crossing is not required provided the crossing is equipped with automatic warning devices and a crew member is on the leading car". In short, Rule 103(b) did not require CPR to provide manual protection on the ground.

c. Conclusion on standard of care informed by *CROR*

[119] It follows that the standard of care required of CPR can be assessed by interpreting the *CROR* in conjunction with an assessment of the overall evidence to determine the reasonableness of CPR's actions at common law. The Chambers judge erred by not undertaking that analysis.

[120] In the result, it is Rule 103(b) that informs the required standard of care in the circumstances of this case. This means that as the Train moved towards and across the Crossing, CPR was required to station a crew member to provide protection on the leading car or on the ground, and that person had to be in a position to warn persons (including persons in vehicles) standing on, or crossing, or about to cross the railway track. As the Train was not "reversing" (rather, the engine was pushing), manual protection was not required pursuant to Rule 103.1(a).

3. The Ramcharan Affidavit

a. The Chambers judge erred by not ruling on its admissibility

[121] CPR says that the Chambers judge erred when he declined to determine the admissibility of the Ramcharan Affidavit, which was tendered by the Cartage Parties in response to CPR's evidence of its alleged damages and the quantum of those damages.

[122] The Chambers judge gave the following reasons for declining to determine the admissibility of the Ramcharan Affidavit (*Decision*):

> [54] CPR has asked that Mr. Ramcharan's affidavit be struck because it offers opinion evidence from a witness who is not an expert. I have declined to adjudicate damages given the conflicting and incomplete nature of the evidence. Because Mr. Ramcharan's affidavit primarily addresses damages, I will not rule on the admissibility of his affidavit. That matter will be left to the court that may be asked to quantify damages based on the evidence that the defendants might bring forward at trial.

[123] Once again, the Chambers judge's decision that he would not decide the admissibility of the Ramcharan Affidavit was discretionary and is reviewable on the deferential standard set out in *Kot*. However, as I will discuss, it is my respectful view that the Chambers judge erred in law when he did not determine the admissibility of the Ramcharan Affidavit. This is because he could not properly conclude whether there were triable issues respecting damages without first determining whether the affidavit would be admitted into evidence.

[124] The Chambers judge correctly recognized the genuine issue requirement: "Determining whether a genuine issue requires a trial necessitates understanding the entirety of the sometimes voluminous and detailed evidence … . The court can often only determine whether a genuine issue requires a trial after gaining complete familiarity and understanding of the evidence and the argument" (*Decision* at para 15). This is consistent with this Court's reasoning in *McCorriston v Hunter*, 2019 SKCA 106, 33 RFL (8th) 310 [*McCorriston*]. Justice Leurer (as he then was) determined that, in assessing a summary judgment application, a judge must analyze the evidence and issues, consider their interrelation, and determine what facts can be established on the presented evidence. He expressed the principle as follows:

> [44] The assessment of whether summary judgment is appropriate as a process and whether there is a genuine issue requiring trial must generally be answered at the same time, because in most cases they are two sides of the same coin. Summary judgment can be granted if "there is no genuine issue requiring trial with respect to a claim or defence" (Rule 7-5(1)(a)). In connection with this, the existence of a "genuine issue" is seldom in dispute.

> Instead, in most cases, the issue at large when a motion for summary judgment is presented is whether the resolution of that issue requires a trial in order to sort out the facts. *To assess if a trial is required, a Chambers judge must get into the detail of how the issue and evidence interrelate, and then decide if the evidence allows the issue to be fairly resolved. This follows from the idea that no genuine issue requiring a trial exists if facts can be found, law applied, and a fair and just determination on the merits achieved*. In the course of undertaking this process, the judge has discretion whether, if necessary, to use the so-called "new powers" set out in Rule 7-5(2) (i.e., to weigh evidence, evaluate credibility, and draw reasonable inferences) in order to sort out the facts. However, the fundamental question does not change – the question remains whether a trial is required to reach a fair and just determination of the issue. These points were said, perhaps more succinctly, in *Blue Hill Excavating Inc. v Canadian Western Bank Leasing Inc*., 2019 SKCA 22, [2019] 4 WWR 393, with reference to paragraph 49 of *Hryniak*:
>
> > [41] This test presupposes that when summary judgment is granted the court has reached a fair and just determination; the point simply being that the summary judgment process is appropriate in any particular case because it is possible for the court to reach a fair and just determination of the issue(s) before it. Therefore, when summary judgment is granted, the issues of process and merits are inextricably intertwined.
> >
> > (Underline emphasis in original, italic emphasis added)

[125] In short, the approach to summary judgment dictated by this Court necessitates an analysis of all the evidence presented by the parties to determine what facts can be found or to determine whether the evidence is too controverted to find a fact or facts.

[126] In the instant case, the Cartage Parties tendered the Ramcharan Affidavit in response to CPR's evidence respecting its alleged loss. The Ramcharan Affidavit was the primary source of evidence the Cartage Parties tendered to oppose CPR's assessment of damages. CPR objected to the admissibility of the Ramcharan Affidavit on the basis that it primarily contained opinion evidence and that Mr. Ramcharan, a claims adjuster with a speciality in railway insurance claims, was not qualified as an expert witness to proffer his opinion on the issues that he did.

[127] With respect, the difficulty with the Chambers judge's approach, here, was that he declined to adjudicate damages because of what he found to be the "conflicting and incomplete nature of the evidence" (*Decision* at para 54). But, had the Ramcharan Affidavit been found to be inadmissible, then the apparent conflict in the evidence respecting damages would have been resolved. As such, the Chambers judge *had to determine* the admissibility of that evidence in order to decide, on the whole of the admissible evidence, whether there actually was a conflict in the evidence (and, as I will discuss below, whether the evidence could be said to be incomplete). In other words, he was not in a position to conclude that the evidence respecting damages was so

conflicting or incomplete as to preclude summary judgment without first ruling on the admissibility of the only affidavit material filed by the Cartage Parties relating to damages. Thus, his failure to make a ruling on the admissibility of the Ramcharan Affidavit was an error.

b. The Ramcharan Affidavit is inadmissible

[128] As I discuss in more detail below, I have determined that it is in the interests of justice for this Court to deal with all the issues raised on this appeal, rather than remit the matter to the Court of King's Bench and put the parties and the administration of justice to the expense of further litigation. It follows that I must rule on the admissibility of the Ramcharan Affidavit.

[129] I find that the Ramcharan Affidavit is not admissible because it largely contains opinion evidence and conjecture. The affidavit does not comply with Rule 5-37 (duty of an expert witness) and Rule 5-39 (service of expert report) of the *Rules* governing the use of expert affidavits. More critically, the opinions expressed in the Ramcharan Affidavit do not satisfy the test for the admissibility of expert opinion evidence.

[130] Rule 5-37 and Rule 5-39 govern the use of expert affidavits, including their application in summary judgment proceedings. These provisions state as follows:

> **Duty of expert witness**
>
> **5-37**(1) In giving an opinion to the Court, an expert appointed pursuant to this Division by one or more parties or by the Court has a duty to assist the Court and is not an advocate for any party.
>
> (2) The expert's duty to assist the Court requires the expert to provide evidence in relation to the proceeding as follows:
>
> (a) to provide opinion evidence that is objective and non-partisan;
>
> (b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and
>
> (c) to provide any additional assistance that the Court may reasonably require to determine a matter in issue.
>
> (3) If an expert is appointed pursuant to this Division by one or more parties or by the Court, the expert shall, in any report the expert prepares pursuant to this Division, certify that the expert:
>
> (a) is aware of the duty mentioned in subrules (1) and (2);
>
> (b) has made the report in conformity with that duty; and
>
> (c) will, if called on to give oral or written testimony, give that testimony in conformity with that duty.
>
> …

Service of expert report

5-39(1) An expert's report must:

(a) contain, at a minimum, the following information or any modification agreed on by the parties: (i) the expert's name, address and qualifications; (ii) the information and assumptions on which the expert's opinion is based; and (iii) a summary of the expert's opinion; and

(b) be served as required by rule 5-40.

(2) An expert's report must be accompanied by a statement of the party tendering the expert, or that party's lawyer, in Form 5-39 identifying the area of expertise in which the expert is tendered to offer an opinion.

[131] First, the Ramcharan Affidavit failed to meet the requirements of the *Rules* because, while it contained substantially opinion evidence, it did not constitute a valid expert report. The deponent did not acknowledge or certify that he was aware of and had complied with the obligations set out in Rule 5-37(1) and Rule 5-37(2) to refrain from being an advocate or that the exhibits attached to the affidavit were prepared in conformity with that duty. Failing to provide such acknowledgment and certification is not simply an issue of technical non-compliance or improper form. The purpose of the certification is to ensure that the expert is aware of their obligations. It is also to assure a court that it can rely on an expert's opinions because they have been prepared in conformity with the required duties.

[132] Further, the deficiency in the Ramcharan Affidavit could not be remedied by means of ex post facto attempts to supply the required certification because doing so would not provide assurance that the witness was aware of his duties as an expert at the time that his opinions were prepared. Proposed experts cannot "inoculate themselves from challenge merely by repeating the *White Burgess* phraseology like a mantra. They must *demonstrate* their understanding and *apply* it" (emphasis in original, *Canadian Broadcasting Corporation v Fertuck*, 2021 SKQB 218 at para 45).

[133] Second, even if the Ramcharan Affidavit was properly tendered as expert evidence pursuant to the *Rules*, it was not otherwise admissible as expert opinion evidence.

[134] The admission of expert opinion evidence is an exception to the general evidentiary rule barring opinion evidence. Expert evidence may be admitted where it is necessary to assist the decision maker with matters falling *outside* the experience and common knowledge of a judge or jury.

[135] In *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 SCR 182 [*White Burgess*], the Supreme Court clarified when expert opinion evidence should be admitted. That Court confirmed the two-stage admissibility analysis set out by the Ontario Court of Appeal in *R v Abbey*, 2009 ONCA 624, 246 CCC (3d) 301, leave to appeal to the SCC refused, [2010] 2 SCR v (note), which requires that, in the first stage, a threshold test of admissibility of the expert opinion be applied, and, in the second stage, the judge undertake a discretionary gatekeeping function.

[136] With respect to the first stage of the admissibility analysis, an expert opinion can only be admitted where it satisfies the four criteria set out in *R v Mohan*, [1994] 2 SCR 9 at 20:

> *(1) Expert Opinion Evidence*
> Admission of expert evidence depends on the …
>
> (a) relevance;
>
> (b) necessity in assisting the trier of fact;
>
> (c) the absence of any exclusionary rule;
>
> (d) a properly qualified expert.

See *White Burgess* at para 19.

[137] The proper qualification of an expert includes their area of specialization and their acknowledgment of the duties of impartiality, independence, and the absence of bias. An expert who does not meet their duties of independence and impartiality will be excluded at the first stage of the admissibility test. Impartiality and independence are preliminary questions of admissibility and are not simply a question of weight (although they are also considered at the second stage of the analysis): see *White Burgess* at paras 46 and 54.

[138] In the second stage of the analysis for admissibility, a judge must undertake a gatekeeping function of balancing the potential benefits of admitting the evidence against the risks and dangers in doing so. While the factors of relevance, necessity, reliability and absence of biases are used in the first stage of admissibility, they continue to play a role in the second stage of the inquiry to assist the judge with their gatekeeping task. Thus, these factors are first used to assess threshold admissibility and then, at the second stage, are used in a nuanced weighing of the competing risks and benefits. As the Supreme Court in *White Burgess* stated, “At the end of the day, the judge must be satisfied that the potential helpfulness of the evidence is not outweighed by the risk of the dangers materializing that are associated with expert evidence” (at para 54).

[139] Expert evidence that starts to usurp the adjudicative function of a court should be "subjected to special scrutiny", and "the closer the evidence approaches an opinion on an ultimate issue, the stricter the application of this principle" (*Mohan* at 25 and *R v J.-L.J.*, 2000 SCC 51 at para 37, [2000] 2 SCR 600).

[140] Applying these principles to this case, the Ramcharan Affidavit frequently strays into expressing an opinion on questions requiring judicial determination. In various paragraphs of the affidavit, the affiant purported to weigh the evidence and to make findings of fact and law. While the stated purpose of the Ramcharan Affidavit was to review the quantum of damages claimed by CPR, the opinions expressed contain a significant amount of conjecture respecting what occurred. Much of the affidavit contradicts the evidence filed by CPR, but it does not provide the methodology used by the affiant to arrive at the contradictions. In short, the Ramcharan Affidavit fails to provide inferences of a scientific or technical nature supported by a well-defined methodology and evidence.

[141] In addition, in portions of the Ramcharan Affidavit and exhibited reports, the affiant opined on matters of law. For example, he interpreted the *CROR* to recommend arguments reducing the liability of the Cartage Parties. Clearly, this type of opinion evidence is not admissible, and even if it were, this affiant was not qualified to give such opinion: *Casbohm v Winacott Spring Western Star Trucks*, 2019 SKQB 44 at para 112, [2019] 9 WWR 714, aff'd 2021 SKCA 21, leave to appeal to SCC refused, 2021 CanLII 66409.

[142] Finally, the Ramcharan Affidavit was not accompanied by a statement "identifying the area of expertise in which the expert is tendered to offer an opinion", as required by Rule 5-39(2). As observed in *Seaboard Specialty Grains and Foods (PS International Canada Corp.) v Palimar Farms Inc.*, 2016 SKQB 232, aff'd 2017 SKCA 78, Rule 5-39(2) is "more than a mere technicality that can be waived for the sake of expediency" (at para 37). This is because a judge's gatekeeper function requires that the scope of expertise within which a witness will be permitted to give opinion evidence be carefully identified and delineated (*Seaboard* at para 36, citing *Vigoren v Nystuen*, 2006 SKCA 47 at para 67, 266 DLR (4th) 634, leave to appeal to the SCC refused, 2006 CanLII 39441). In the present case, the area of expertise in which the affiant purported to provide opinion evidence was unclear. Additionally, while the curriculum vitae attached to the Ramcharan Affidavit suggests that the affiant might be qualified to provide an expert opinion in the area of insurance, the issues upon which he opined did not fall entirely within that area of expertise.

[143] For all these reasons, the multiple deficiencies in the Ramcharan Affidavit render it inadmissible.

4. Damages could be summarily determined

a. The Cartage Parties could obtain evidence

[144] Before I turn to a consideration of whether the evidence respecting damages required a trial, I will address the Cartage Parties' argument that they were improperly prevented by CPR from gathering evidence that would assist them in disproving CPR's claim for damages, specifically the quantum of CPR's alleged damages. In written submission, they argue the following:

> 52. It is important to remember that the Ramcharan affidavit was filed with no response from the railway to a letter sent on April 28, 2021, which contained questions that Mr. Ramcharan needed answered before a proper assessment of damages could be done. The letter was sent at the request of the railway (see paragraph 13 and Exhibit "F" to the Ramcharan affidavit). Rather than respond, the railway chose to ignore the letter and proceed with its application for summary judgment, thereby making it very difficult for the Respondents to fully advance the failure to mitigate defence.

[145] This contention is without merit. I see no basis for the conclusion that the Cartage Parties were truly prejudiced by CPR not responding to their request for further information. Following their April 28, 2021 request to CPR for further information, they cross-examined CPR's affiants on all the affidavits filed. If there was further information that they were unable to obtain through cross-examination, they could have applied to the court to compel that information, even after a summary judgment application was set down to proceed: see, for example, *Loraas v Loraas Disposal North Ltd.*, 2023 SKCA 131 at paras 87–88. As Justice Schwann noted in *Loraas*, "a court retains the discretion to engage in procedures related to document production and questioning in the face of a pending summary judgment hearing" (at para 88). If the Cartage Parties believed they required further information to present their case, they were obliged to take steps to compel it or suffer the consequences.

b. No conflicting evidence requiring a trial

i. Issues of liability

[146] The Chambers judge determined that the issue of damages must proceed to trial because the evidence was too conflicting and was incomplete. He stated as follows (*Decision*):

> [95] The evidence respecting CPR's allegation of damages is too conflicting to be summarily determined. Evidence is vague and conflicting respecting adjustment for depreciation or betterment when some of the new equipment was an upgrade from the original equipment. The additional expense incurred to install a temporary bungalow apparently required additional power to the original locations. I agree with the defendants that to explore the issue of damages, questioning may be required.

[147] CPR says that the Chambers judge erred in coming to this determination without considering the body of the evidence on damages and the shifting burden of proof in a summary judgment proceeding. I agree that the Chambers judge erred in this way.

[148] CPR contends that its evidence met the burden on a summary judgment applicant to show there was no triable issue with respect to damages, and, as noted in CPR's factum, the Cartage Parties "did not lead any direct evidence, other than speculative hypotheses or vague references to what may be adduced in the future" (at para 119). Consequently, it says that the Chambers judge should have applied the best foot forward principle, which amounts to an assumption "that both parties had given the Court the evidence that they had at their disposal" (at para 148). It submits that the Chambers judge, therefore, should have expected no better evidence could be led at trial. In short, CPR says there was "no material conflict of fact or credibility" that would necessitate a trial, particularly if the Ramcharan Affidavit was found to be inadmissible (at para 149).

[149] For their part, the Cartage Parties respond that the evidentiary record was "inconclusive" and insufficient to allow for summary judgment as it did not provide "certainty" with respect to the damages claimed by CPR, nor did it illustrate whether betterment should be accounted for in any award of damages, or whether CPR had mitigated its damages.

[150] In my view, because the Ramcharan Affidavit should have been held inadmissible, as a matter of law it could not properly be the basis on which the Chambers judge considered the evidence going to damages to be "conflicting": see paragraph 95 of the *Decision* (quoted above). Further, by accepting the Cartage Parties' submission that the evidence was incomplete because further questioning might be required, the Chambers judge ran afoul of the "best foot forward" principle.

[151] It is well-established that a respondent to a summary judgment application "cannot respond to the application by saying that the case to be made, either in the pursuit of a claim or defence, will be made in the fullness of time at trial" (*Deren v SaskPower and Saskatchewan Watershed*

Authority, 2015 SKQB 366 at para 122, aff'd 2017 SKCA 104 [*Deren*]). Relatedly, in the summary judgment application process, "the court will assume that the record contains all the evidence the parties would present if there was a trial" (*Peter Ballantyne Cree Nation v Canada (Attorney General)*, 2016 SKCA 124 at para 30, [2017 1 WWR 685 [*Ballantyne*]).

[152] This should not be taken to suggest that the evidence in a summary judgment application must be presented in the same way it would be presented at a full trial. As the Supreme Court observed in *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 [*Hryniak*], for example, a party in a summary judgment application would be expected to produce "a 'will say' statement or other description of the proposed evidence" instead of the oral testimony that would come out at trial (at para 64). However, in this respect, form must not be confused with substance: "The issue is not whether the summary judgment process is as thorough or the evidence is as complete as at trial. It is whether the judge is confident he or she can find the facts and apply the relevant legal principles so as to fairly resolve the dispute" (*Tchozewski v Lamontagne*, 2014 SKQB 71 at para 31(3), [2014] 7 WWR 397 [*Tchozewski*], citing *Hryniak* at paras 50 and 57).

[153] To tie these propositions together, the following discussion in *Caplan v Atas*, 2021 ONSC 670, 71 CCLT (4th) 36, is helpful. There, motions for summary judgment had been made in several actions being case managed together. Justice Corbett observed the following:

> [108] Two points … bear emphasis for these motions for summary judgment. First, the parties must put their "best foot forward" on these motions. They must adduce evidence and may not rest on the allegations set out in their pleadings. The plaintiffs have adduced a voluminous record to support their motion. Atas [the defendant] has adduced no evidence in her defence of these motions. This does not mean the plaintiffs should win the motion, solely because of Atas' failure to place any evidence before the court. It is still for the plaintiffs to prove on a balance of probabilities that there are no issues for trial.
>
> [109] Second, a point seldom discussed in the vast jurisprudence respecting summary judgment, the court is entitled to presume [the parties] have placed before it "*in some form*" all of the evidence that will be available for trial. The court does not presume that the evidence on the motion is the "best evidence" or in the form of the evidence that would be tendered at a trial. Quite the contrary, hearsay evidence may be tendered in affidavits on information and belief on a motion for summary judgment, evidence that would not generally be admissible in this form at a trial unless a successful *Khan* application was brought. *R v Khan*, [1990] 2 SCR 531.
>
> (Emphasis in original)

[154] In the instant case, the only evidence the Cartage Parties filed respecting CPR's damages was the inadmissible Ramcharan Affidavit. The pertinent question, then, is whether the absence of admissible evidence from the Cartage Parties can be considered "conflicting evidence" or "incomplete evidence", which would therefore require the parties in this case to proceed to trial on the damages issue.

[155] A distinction must be maintained between *incomplete* evidence and *conflicting* evidence. Where an incompleteness of evidence results from the failure by a party to marshal evidence in relation to a material issue, this provides no basis upon which an application judge may conclude that a trial is the better procedure to resolve that issue. A circumstance of that nature corresponds to the failure of that party to put its best foot forward, even if that party suggests that the evidence would be more complete at trial. In practical terms, in the summary judgment determination process, that party would be found not to have met its burden to show there is or is not a genuine issue requiring a trial, which depends on whether the application judge is or is not "able to reach a fair and just determination on the merits based on the affidavit and other evidence" (*Tchozewski* at para 31(2), referencing *Hryniak* at para 49).

[156] Some authority might, as with part of the reasoning of the *Decision*, be read as considering incomplete evidence to have the same effect as conflicting evidence – see, for example, *Regional Tire Distributors (Saskatchewan) Inc. v Quality Tire Service Ltd.*, 2019 SKQB 8, in which the court concluded, "I am left with incomplete and conflicting evidence" (at para 29). While an irresolvable conflict in the evidence is a proper reason to decline to issue a summary judgment, the principles set out by this Court in *Ballantyne* instruct that simply finding one or more of the parties will be better prepared for trial than they are at the hearing of the summary judgment application is not, itself, a valid reason to direct a matter to trial.

[157] It is true that incomplete evidence in a summary judgment application may result in a decision to proceed to trial. This is only so, however, where it is the applicant that adduces incomplete evidence and therefore fails to meet its burden to prove there is no genuine issue requiring a trial. That must not be conflated with a conclusion that a "conflict in the evidence" demonstrates there is a genuine issue requiring a trial, because such a conclusion can only result after the applicant and respondent have each adduced evidence and met their respective burdens, as follows:

(a) the applicant, through its evidence, has proven that there is no genuine issue requiring a trial; and then

(b) the respondent, through its own evidence, has disproved this by demonstrating a conflict in the evidence exists that does necessitate a trial.

[158] The above propositions are equally true where a party puts forward evidence in relation to an issue, but that evidence is ruled inadmissible. As mentioned, the application judge "will assume that the record contains all the evidence the parties would present if there was a trial" (*Ballantyne* at para 30). Consequently, if in relation to a particular issue a party adduces only inadmissible evidence in the summary judgment application, it is assumed that party will at trial similarly have no admissible evidence in relation to that issue. This also accords with the proposition that the respondent cannot overcome a lack of admissible evidence in the application with reference to "the case to be made … in the fullness of time at trial" (*Deren* at para 122).

[159] Accordingly, if CPR met its initial evidentiary burden in relation to damages, which, as I will discuss below – it did – then the Cartage Parties relied, at their peril, on nothing more going to damages than the opinion evidence contained in the inadmissible Ramcharan Affidavit. Questions, argument or conjecture raised by the Cartage Parties respecting the evidence led by CPR cannot constitute conflicting evidence or give rise to the conclusion that the evidence is incomplete and that therefore a trial is required.

ii. Issues of damages

[160] The Cartage Parties advanced the following defences in relation to damages in their statement of defence:

> 10. In further response to paragraph 17 of the Statement of Claim, the defendants deny that the plaintiff suffered loss or damage as alleged, and put the plaintiff to the strict proof thereof. The defendants state that the plaintiff has exaggerated the nature and extent of any loss or damage allegedly sustained, including the replacement of both signal bungalows at the Crossing, later consolidated into one larger signal bungalow when relocated approximately 50 meters south of the Crossing.
>
> 11. In further response to paragraph 17 of the Statement of Claim, if the plaintiff suffered loss or damage as alleged, which is not admitted but expressly denied, then the defendants state that the plaintiff has failed or refused to take any reasonable steps to mitigate the loss or damage it may have sustained.

[161] However, they did not formally amend their pleadings to specifically plead the defence of betterment or to provide particulars concerning the way in which CPR allegedly "exaggerated the nature or extent of any loss or damage". Rather, the Cartage Parties' positions on these issues developed as affidavits and other documents were exchanged leading up to the summary judgment hearing.

[162] Because the Ramcharan Affidavit was inadmissible and there was no other evidence from the Cartage Parties respecting damages (supporting a pleaded defence) or evidence of the *existence* of such evidence, the Chambers judge was obliged to proceed on the evidence available, which was the evidence from CPR. That evidence detailed what property of CPR was damaged in the Collision and also particularized the costs of repairing that damage, thereby establishing a *prima facie* case of damages. Thus, pursuant to the "best foot forward" principle, the Chambers judge erred when he failed to recognize that the evidence filed by CPR was the complete and comprehensive evidence that would be available at trial.

D. This Court will resolve the remaining issues

1. Rationale for appellate determination

[163] As I stated earlier, I am of the view that it is in the interests of justice for this Court to resolve all the issues raised on this appeal, rather than remitting the matter to the Court of King's Bench and putting the parties and the administration of justice to the expense of further litigation.

[164] While appellate courts do not routinely exercise fact-finding powers, choosing to do so can promote finality and efficiency "if, in light of the nature of the factual issues, and the state of the trial record, the appellate court can confidently make the necessary factual findings without working any unfairness to either party" (*Pucci v The Wawanesa Mutual Insurance Company*, 2020 ONCA 265 at para 62, 2 CCLI (6th) 165).

[165] Given the robust record here and the evidentiary issues that I have adjudicated, this Court is able to make the determinations required to resolve this dispute. As I have said, once determinations respecting the admissibility of evidence are made, the evidence is predominantly documentary, and the issues to be decided are limited to drawing inferences from the evidence. In these circumstances, this Court may make whatever findings are necessary in the interests of

justice and finality: see *Cook v Joyce*, 2017 ONCA 49 at para 80. This approach is consistent with the Supreme Court's direction in *Hyrniak*, as it ensures a "proportionate, more expeditious and less expensive means to achieve a just result" (*2651171 Ontario Inc. v Brey*, 2022 ONCA 148 at para 23, 468 DLR (4th) 545).

2. CPR not contributorily negligent

[166] By interpreting the *CROR* and considering the facts found by the Chambers judge, I am able to conclude that CPR was not contributorily negligent in respect of the Collision because its conduct did not fall below the standard of care informed by the *CROR* nor was there any other evidence to suggest that CPR's actions were unreasonable or inconsistent (or both) with the safe and careful operation of the Train.

[167] As the Chambers judge noted, when considering whether CPR was contributorily negligent, "duty of care, standard of care, breach, proof of loss and causation must be determined" (*Decision* at para 86). CPR's duty to care for motorists was conceded, and the standard of care evolved to be the dominant issue.

[168] To find contributory negligence, there must be a causal connection between a party's impugned conduct and the injury sustained. The following was noted by Carolyn Sappindeen and Prue Vines (eds), *Flemming's The Law of Torts*, 10th ed (Sydney: Tomson Reuters Australia, 2011):

> [12.150] A negligent failure on the part of the plaintiff to look out for his or her own safety will not prejudice him or her unless it is causally relevant to his or her injury. For example, although a plaintiff who drives without his vehicle's tail lights illuminated does not take reasonable care of himself, if he is involved in a head-on collision, his negligence will not count against him since it was not causally related to the accident. The plaintiff's carelessness must increase the risk that damage would be sustained in accordance with general causal phenomena.

[169] As I have indicated above, Rule 103(b) of the *CROR* creates an exception to the manual protection requirement at a public crossing at grade for cars not headed by an engine with a whistle and headlight, if the crossing is protected by automatic warning devices, the warning devices have been on for a minimum of 20 seconds, and a crew member is on the leading car of the train. In this case, it was common ground that this was a public crossing at grade, the Train's cars were not headed by an engine, red lights were flashing, and the Crossing was protected by Warning Devices.

The Chambers judge also found that Mr. Olson was on the lead car of the Train and shining a flashlight at the cab of the Truck as it approached the Crossing. These facts were sufficient to demonstrate that CPR complied with its obligations pursuant to the *CROR*, since manual protection was not required.

[170] Further, no other evidence suggests that any actions taken by CPR leading up to the Collision were otherwise unreasonable and, therefore, negligent: see *Ryan* at para 29.

[171] For example, there was no evidence that the Collision would have been avoided if Mr. Olson or another CPR crew member had been on the ground with a lighted fusee to signal to stop vehicular traffic over the Crossing. Notably, the Chambers judge found that Mr. Olson was shining his light at Mr. Henderson's truck cab, while standing on the lead car of the Train, and that Mr. Henderson still failed to see the light. Further, the Chambers judge found that Mr. Henderson's "vision was obscured by the flashing lights and that he did not see the railcar until it was on the track" (*Decision* at para 68). Given Mr. Henderson's impaired vision from, and failure to yield to, the lights signaling him to stop, there was no evidence to support any contention that he would have seen other warnings issued by CPR.

[172] Further, on cross-examination, Mr. Henderson was unable to confirm or deny that Mr. Olson was on the lead car of the Train or if Mr. Olson was waiving his flashlight at him. He simply did not know. He conceded that if Mr. Olson was waving his flashlight, it would have occurred behind the flashing lights at the Crossing, which he admitted had been obscuring his vision. In addition, with the Warning Devices activated and flashing red, there were no circumstances that would suggest to CPR's crew that an accident was imminent or that the driver of the Truck would not exercise reasonable care for his own protection and the protection of others. Mr. Henderson admitted that, while he was familiar with the Crossing, he did not see the Train until he was on the track when it was too late for him to take any effective steps to avoid the Collision. He also admitted that he proceeded into the Crossing while his vision was compromised.

[173] Thus, on a balance of probabilities, the evidence supports that Mr. Henderson's negligence was the sole cause of the Collision and disposes of any contention that CPR was contributorily negligent.

3. Damages

[174] The Chambers judge found that the Cartage Parties were liable to CPR in negligence. I have found that CPR was not contributorily negligent. Further, I have determined that there was no admissible evidence that conflicted with the evidence tendered by CPR respecting the damages it suffered and that the evidentiary record was not incomplete. It follows that CPR's entitlement for damages can be summarily decided. The question becomes if a trial is required to quantify this entitlement.

[175] The Cartage Parties informally advanced the defence of betterment in response to CPR's claim for damages. However, given that the Ramcharan Affidavit is inadmissible, there is no other evidence to suggest that betterment is an issue: only CPR's evidence is at play. The governing principle in the assessment of damages for loss of CPR's property is *restitutio in integrum*: i.e., that the plaintiff should be put in the same position, so far as money can, that it would have been in had the tort not occurred. Where real property is destroyed by a defendant's negligence, the measure of damages can either be the diminution in value of the property or the replacement cost. While there are a number of factors that courts consider in determining which measure of damages is appropriate, the most important one in awarding replacement cost is whether the plaintiff has established a need for the same property.

[176] In this case, the Rosin Affidavit provides specific information to demonstrate that CPR had a need for the damaged property it replaced after the Collision and that the costs it incurred to do so were reasonable. For example, that affidavit provided the following evidence:

(a) The permanent bungalow was in service by November 2018, not 2019 (see paragraph 4), thereby refuting the suggestion that there was double billing in 2019.

(b) CPR only invoiced for the cost of the permanent bungalow and inside material, not the cost of the temporary bungalow and inside material, thereby refuting the allegation that the Cartage Parties were charged for the cost of two separate bungalows.

(c) During the winter months, the only way that CPR could operate the Crossing was to have the Warning Devices run off a generator. These costs were only incurred until May 14, 2018. After that, the temporary bungalow ran on a new power service installed by SaskPower. During cross-examination, Mr. Rosin reaffirmed that the new power service that was installed for the temporary bungalow also served the permanent bungalow. This averted the need for cabling across roadways or tracks.

(d) Since the original Signal Cases were part of an existing crossing on the day on which the *Grade Crossings Regulations*, SOR/2014-275 [*Regulations*], came into force, they were exempt from current sightline clearance requirements under the *Regulations* in relation to visual obstructions. However, when the original Signal Cases were destroyed by the Collision, CPR was no longer exempt from these requirements and had to account for any permanent visual obstructions created by the new bungalow installation.

(e) To address the visual obstructions created by the new bungalow installation, CPR's options were to either install crossing gates to mitigate the reduced sightline visibility (sightline requirements do not apply to a grade crossing with a warning system with a gate) or to install the permanent bungalow in a less obstructive location. CPR chose the latter as the most cost-effective option.

[177] Considering all the admissible evidence respecting CPR's loss and the damages it suffered, it is my view that CPR has demonstrated that it had a justifiable need to restore the Crossing for its railway operations and that it was required to do so expeditiously. The admissible evidence demonstrates that the costs incurred by CPR to replace the Warning Devices and the Signal Cases were required to place CPR, so far as reasonably possible, in the position that it would have been in had the Cartage Parties' negligence not occurred. There is no other evidence to suggest that these costs were unreasonable.

[178] It follows that judgment must be granted to CPR in the amount it claims, being $645,149.25, plus prejudgment and post-judgment interest in accordance with the provisions of *The Pre-judgment Interest Act*, SS 1984-85-86, c P-22.2.

V. CONCLUSION

[179] In conclusion, I would allow CPR's cross-appeal and grant judgment to CPR.

[180] While the Cartage Parties successfully argued that their counterclaim should have been allowed as an amendment to the pleadings filed outside the limitation period, because CPR was not contributorily negligent, that issue is rendered moot. As a result, I would dismiss the Cartage Parties' appeal and order that CPR be entitled to costs in the court below on Column III and also to the costs of its cross-appeal in the usual manner. I would make no order of costs in relation to the Cartage Parties' appeal.

"McCreary J.A."
McCreary J.A.

I concur.

"Kalmakoff J.A."
Kalmakoff J.A.

I concur.

"Drennan J.A."
Drennan J.A.