Citation: R v DMS, 2025 MBCA 16
Date: 20250212
Docket: AR23-30-09911

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Janice L. leMaistre
Madam Justice Karen I. Simonsen
Madam Justice Anne M. E. Turner

B E T W E E N:

	)	***A. Y. Kotler***
HIS MAJESTY THE KING	)	*for the Appellant*
	)	
Appellant	)	***K. L. Jones***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard:*
D. M. S.	)	***September 25, 2024***
	)	
(Accused) Respondent	)	*Judgment delivered:*
	)	***February 12, 2025***

NOTICE OF RESTRICTION ON PUBLICATION: An order has been made in accordance with section 486.5(1) of the *Criminal Code*, RSC 1985, c C-46, directing that any information that could identify a victim or witness in this proceeding shall not be published, broadcast or transmitted in any way.

On appeal from: *R v DS* (10 January 2023), Winnipeg CR 21-01-38829 (MBKB) [*oral reasons*];
R v DS (29 June 2023), Winnipeg CR 21-01-38829 (MBKB) [*written reasons*]

SIMONSEN JA

[1] The Crown appeals the accused's acquittals on charges of robbery and choke to overcome resistance arising from an alleged robbery of a female sex trade worker (the complainant). The Crown alleges that the trial judge erred by summarily dismissing its application, under section 714.1 of the

Criminal Code, RSC 1985, c C-46 [the *Code*], for an order permitting the complainant to testify remotely by videoconference.

[2] This appeal provides an opportunity for this Court to consider (1) the test to be applied on a motion for summary dismissal of an application in a criminal proceeding, and (2) the test to be applied on an application under section 714.1, which allows for witnesses to provide their testimony remotely. The Crown alleges that the trial judge erred in law by applying the wrong test on both issues.

[3] Given the dismissal of the Crown's application under section 714.1, as well as the trial judge's dismissal of the Crown's alternate application to admit into evidence the complainant's video-recorded police statement (the statement) pursuant to the principled exception to the hearsay rule, it followed that acquittals were entered on the two charges.

[4] For the reasons set out below, I conclude that the trial judge made both errors of law alleged by the Crown, at least one of which had a material bearing on the acquittals. I would, therefore, allow the appeal, set aside the acquittals and order a new trial on the charges of robbery and choke to overcome resistance arising from the alleged robbery of the complainant.

The Trial

[5] The accused was charged with attacking eight sex trade workers (the complainants) between December 2020 and January 2021. He was arrested in January 2021 and, approximately ten months later, a direct indictment was preferred. The trial was set to commence on January 9, 2023. The complainant was one of the sex trade workers who was to testify at the trial.

[6] The only anticipated issue at trial was identification, that is, the identity of the attacker of the complainants. It was expected that the complainant would describe the crimes against her and provide evidence regarding identification of her attacker. She did not purport to identify the accused—rather, the relevance of her evidence to identification lay in the similarity of her experience to that of the other complainants. The Crown intended to make a similar fact application to use her evidence in proving the identity of the accused in relation to the other counts in the indictment.

[7] At a pre-trial conference on January 20, 2022, the Crown advised that several of the complainants resided outside Manitoba and that it would pursue an application under section 714.1 for remote testimony, should it be necessary. At a further pre-trial conference on October 21, 2022, the Crown advised that it might also file an application for an order allowing five police officers to testify via videoconference. On October 24, 2022, counsel for the accused (trial counsel) (different than counsel on appeal) responded that they were opposed to any such application.

[8] The complainant was served with a subpoena on October 4, 2022 and again on January 5, 2023. During this timeframe, the Crown made unsuccessful attempts to reach her to schedule a meeting.

[9] On December 23, 2022, the Crown filed its trial readiness report, indicating that it was ready to proceed with the trial.

[10] Then, on December 29, 2022, less than two weeks prior to the trial, the complainant, who was residing in Ontario, contacted Victim Services to advise that she was prepared to testify at the trial, but that she could not fly as she lacked the required identification.

[11] The next day, prosecutors spoke with her and she provided further details, advising that her home had been broken into and that her purse, which contained her passport, had been stolen. She had no other identification suitable for flying. In fact, she had no other identification at all, except an invalid driver's license.

[12] The Crown looked into means of transportation other than by airplane. The complainant did not own a car. Even if she did, transport by car would have required several days. Travel by commercial bus would also have taken many hours, including dozens of stops and several transfers. The complainant indicated to prosecutors that she was prepared to testify at the trial via video link if permitted, but that she was not prepared to travel to Winnipeg by motor vehicle.

[13] On December 30, 2022, the Crown applied, under section 714.1, to have the five police officers testify remotely via videoconference. All of the officers were located in Ontario.

[14] Then, on January 5, 2023, as a result of its communications with the complainant, the Crown also applied, under section 714.1, to have her testify remotely via videoconference using Microsoft Teams from her home or local police station. The Crown's two section 714.1 applications are, together, hereinafter referred to as "the section 714.1 applications". Due to an oversight, the notice of application in relation to the complainant was not served on trial counsel until January 9, 2023, although they had received the Crown's brief on January 6, 2023.

[15] In support of each of the section 714.1 applications, the Crown filed affidavits of Heather Holt (Ms. Holt), a case management paralegal employed

by the Prosecutions Service of the Manitoba Department of Justice. Ms. Holt explained the background of the Crown's contact with the complainant. She also indicated that a private and secure room was available at the local police station. Ms. Holt further explained that there would be sufficient internet capabilities for the complainant to testify remotely and that there would be screens present during the trial to allow the Court, all counsel and the accused to view her video testimony.

[16] On the first day of the trial, the accused moved to have the section 714.1 applications summarily dismissed, essentially due to late notice. The Crown observed that the fact it had been unable to confirm many of the complainants' willingness to testify and ability to travel is often the reality with transient and vulnerable victims. Because the Crown stayed some charges, it also advised that it no longer required the remote testimony of two of the five police officers. The trial judge raised whether the Crown had presented an adequate evidentiary foundation for a section 714.1 order, and whether it would present further evidence. There was also discussion about the Crown calling Ms. Holt for cross-examination the following day and the section 714.1 applications being addressed further at that time. The trial judge adjourned the hearing to the next day to allow the Crown to file a third affidavit of Ms. Holt and trial counsel to submit a more comprehensive brief, which they did.

[17] At the outset of the second day of the trial, without receiving further evidence and briefly hearing from counsel on the issue of timing, the trial judge dismissed the section 714.1 applications, giving *oral reasons* for doing so and indicating that "further fulsome reasons" would be provided later. Subsequently, on June 29, 2023, he issued *written reasons*, which provided

more complete reasons for his decision on the section 714.1 applications, as well as his reasons for dismissing the Crown's application to have the statement admitted into evidence. It is only his decision regarding the section 714.1 application in relation to the complainant that is the subject of this appeal.

[18] As a consequence of the trial judge dismissing the Crown's applications, there was no evidence from the complainant and, therefore, acquittals were entered on the charges that related to her.

[19] At the trial, three other complainants testified. The accused was found guilty of the robberies and related offences allegedly committed against them.

The Trial Judge's Reasons for Decision

[20] Taking the trial judge's reasons as a whole, both his *oral reasons* and his subsequent *written reasons*, it is not clear whether he summarily dismissed the section 714.1 applications or dismissed them on their merits. Either way, he gave essentially the same reasons for his decision. The following review of both sets of reasons supports this conclusion.

Oral Reasons

[21] Just before the trial judge delivered his *oral reasons*, trial counsel asked whether his decision would be "just on the summary dismissal application" or "a fulsome decision". The trial judge said that he was giving "a fulsome decision" and that he was "dismissing the [section 714.1] applications."

[22] In then proceeding to provide his *oral reasons*, the trial judge stated that his decision was based on the law and the evidentiary foundation put forward by the Crown, which he found to be "very weak, it is not fulsome, it does not help me in coming to a substantive decision, and I will explain that in fuller terms hopefully before the trial is over, but I do want to give you what I have got."

[23] He went on to outline the chronology of steps in the prosecution, cite the text of section 714.1, and conclude as follows:

> I am in the process of going through and analyzing all of the factors that I must consider. I give weight to certain factors and in this particular case more weight to certain factors than others. I have come to the conclusion, and in my mind, it is a very clear conclusion, that it is an inappropriate case in all the circumstances to allow the Crown's application therefore it is dismissed.
>
> As I say, I will provide further fulsome reasons for my decision hopefully later during the trial.

Written Reasons

[24] In the first paragraph of his *written reasons*, the trial judge stated that he had dismissed the section 714.1 applications during the trial, and that this decision provided his reasons for that ruling (see para 1).

[25] The trial judge then identified the wording of section 714.1 and cited the guiding principles on applications under that section as being set out in *R v SDL*, 2017 NSCA 58 [*SDL*].

[26] The trial judge clearly had difficulty with the late filing of the section 714.1 applications. He noted that the accused had been in custody for approximately two years awaiting his day in court, and commented that "[t]he

timing of these applications by the Crown cause[s] concern" (*written reasons* at para 30). He identified *R v Jordan*, 2016 SCC 27 [*Jordan*], where the Supreme Court of Canada addressed the issue of delay in criminal prosecutions. He stated that, based on *Jordan*, "[i]t is clear that the Crown, the defence and the courts have important roles to fulfill to ensure criminal matters proceed in a timely and fair fashion" (*written reasons* at para 28). The trial judge also stated that "[w]hen one party contests the application for remote video testimony, it is important that the applicant put their best foot forward in a timely manner to have the application determined in advance of the trial" (*ibid* at para 8).

[27] That being said, the trial judge accepted that the Crown first received word on December 29, 2022 that the complainant would testify but was unable to attend in person. He did not believe that "the Crown was laying in the weeds, waiting to spring this application on the defence, but rather the Crown simply 'dropped the ball'" (*ibid* at para 32). He stated that "[t]he lack of preparation by the Crown should never become an emergency for the accused. That is what happened in this matter" (*ibid* at para 33). He observed that "[t]he accused and his lawyers should have spent the last few days leading up to the trial discussing their final preparations. That opportunity was squandered as counsel scrambled to prepare for the unexpected applications" (*ibid*).

[28] At this point in his *written reasons*, the trial judge indicated that, at the outset of the trial, "[a]fter hearing the defence argument and reviewing their materials, [he] concluded there was no possibility for a successful application and *summarily dismissed* the [section 714.1] applications" (*ibid* at para 34) [emphasis added].

[29] The trial judge then said that he would explain "why the [section 714.1] application[s] fail on [their] merits" (*ibid* at para 35). With respect to the application in connection with the police officers, he concluded that there was no explanation for the delay and that the application "boil[ed] down to cost and convenience" (*ibid* at para 36). As for the application regarding the complainant, the trial judge indicated that "[t]he credibility and reliability of her evidence [on identification] is crucial. The defence ability to test her evidence and the court's ability to assess her evidence is also crucial" (*ibid* at para 41).

[30] In terms of the conduct of the Crown, the trial judge again expressed concern about delay. He was of the view that the Crown should have sought a further pre-trial conference when, on October 24, 2022, trial counsel advised that they were opposed to witnesses testifying remotely by videoconference. The parties then would have met with the pre-trial judge to discuss the matter and, failing agreement, filing timelines and hearing dates would have been set and a determination of the section 714.1 applications would have been made in advance of the trial (see *ibid* at para 49).

[31] Further, with respect to Crown conduct, the trial judge observed that "[t]here is no evidence that the Crown, victim services worker or Ms. Holt offered to assist [the complainant] in obtaining the required identification [for travel by airplane]" (*ibid* at para 39). Later, in the part of his reasons dealing with the Crown's application to admit the statement, he disagreed with the Crown's submission that it was inappropriate for members of the justice system to secure identification for witnesses; he stated that the Crown had not provided a policy to support its position and that, in any event, exceptions could be made for appropriate cases (see *ibid* at paras 69-70). The trial judge

also explained that he had suggested that the Crown consider the Court's assistance in procuring the attendance of the complainant but that the Crown was not inclined to seek a warrant because of concern about re-victimizing her.

[32] The trial judge further held that it was "problematic" (*ibid* at para 42) for the complainant to testify by video link from her home "as there is no control over the environment. There is no way to assure the witness is not accessing information for assistance while testifying" (*ibid*).

[33] The trial judge also determined that it was inappropriate for the complainant to testify from a police station. He found that "[t]estifying from the police detachment about the circumstances of the offence may have a direct or indirect, conscious or subconscious impact on the witness about the substance of her testimony" (*ibid* at para 44). He said that "[t]estifying from a police detachment may provide assurance to the witness that the police believe her evidence and reinforce to the witness, her evidence must be correct. The most difficult evidence to assess comes from an honest but mistaken witness" (*ibid*). The trial judge then stated that "[i]t should be an exceptional circumstance to have such a witness testify outside of the courtroom" (*ibid*).

[34] The trial judge added that having the complainant testify from a police detachment "is unacceptable as it diminishes judicial independence and the appearance of impartiality" (*ibid* at para 46). He observed that cities such as Toronto, Laval and Brampton, where the witnesses were located, all have courthouses. He concluded that "[t]o protect and promote judicial

independence and impartiality and the integrity of testimony, witnesses should testify from local courtrooms whenever possible" (*ibid* at para 50).

[35] In the end, the trial judge stated that he dismissed both of the section 714.1 applications.

Standard of Review

[36] Section 676(1)(a) of the *Code* limits the Crown's right to appeal an acquittal to questions of law alone. In addition to establishing that there was an error in law, when seeking a new trial on the appeal of an acquittal, the Crown must show that this error "might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal. The [Crown] is not required, however, to persuade us that the verdict would necessarily have been different" (*R v Graveline*, 2006 SCC 16 at para 14; see also *R v Williams*, 2023 MBCA 11 at para 32; *R v Cowan*, 2021 SCC 45 at para 86 [*Cowan*]).

[37] A decision to summarily dismiss an application is discretionary (see *R v Haevischer*, 2023 SCC 11 at para 61 [*Haevischer*]). So too is a decision as to whether to allow remote testimony (see *R v JLK*, 2023 BCCA 87 at para 56 [*JLK*]). Thus, both are subject to a deferential standard of review. As with any discretionary order, intervention will be appropriate only on the basis of an error in principle or palpable and overriding error (see *ibid* at para 31).

[38] At its core, this appeal is about the trial judge's alleged failure to interpret and apply the correct legal tests for (1) summary dismissal of an application, and (2) an order under section 714.1 of the *Code*. These issues raise questions of law reviewable on a standard of correctness (see *Cowan* at

para 48; *R v Araujo*, 2000 SCC 65 at para 18). Because the legal test for granting an order under section 714.1 turns on the interpretation of that section, the issue is one of statutory interpretation, which also raises a question of law that is reviewed for correctness (see *R v Stonefish*, 2012 MBCA 116 at para 29).

Analysis and Decision

Issue No. 1: Did the Trial Judge Err in Principle by Applying the Wrong Test for Summary Dismissal of an Application?

[39] As I mentioned, it is not clear whether the trial judge summarily dismissed the section 714.1 applications or dismissed them on their merits. For the following analysis, I will assume that he summarily dismissed them. A motion for summary dismissal was before him and, at one point in his *written reasons*, he said that he had summarily dismissed the section 714.1 applications.

The Applicable Principles—*Haevischer*

[40] In the recent decision of the Supreme Court in *Haevischer*, Martin J, writing for the Court, revisited and narrowed the circumstances in which a court may summarily dismiss an application in a criminal proceeding. This decision was released after the trial judge delivered his *oral reasons* but before he issued his *written reasons*.

[41] Summary dismissal powers in the criminal context aim to promote trial efficiency while ensuring trial fairness. In the normal course of a criminal trial, a two-part framework applies when one party files an application and the

opposing party counters with a motion for summary dismissal (see *Haevischer* at para 100). First, a judge should address the summary dismissal motion. If that motion is refused, the judge must then decide the application on its merits.

[42] For the first question—the summary dismissal motion—Martin J, in *Haevischer*, rejected the test of "no reasonable prospect of success" (at paras 75-77; see also *R v England*, 2024 ONCA 360 at para 67). Instead, she held that judges must ask "whether, taking the facts and inferences alleged to be true, the party seeking summary dismissal has demonstrated that the underlying application is *manifestly frivolous*" (*Haevischer* at para 101) [emphasis added].

[43] A motion for summary dismissal is "intended to be summary" (*ibid* at para 60). As its name suggests, it should be "preliminary, brief, and more in the nature of an overview than a deep dive" (*ibid*). Justice Martin defined the "frivolous" part of the test as weeding out applications that will necessarily fail; this is "a very low bar" (*ibid* at para 67). She defined "manifestly" as obvious, evident, unmistakable or openly (*ibid* at para 69). Justice Martin stated that the "fundamental flaws ought to be manifest. If the error is not apparent on the face of the record, the application should proceed" (*ibid* at para 88). As Martin J observed, under the manifestly frivolous standard, most applications will end up being decided on their merits (see *ibid* at para 3).

[44] Justice Martin outlined these circumstances where an application will be manifestly frivolous (see *ibid* at paras 85-87):

- there is a fundamental flaw in the application's legal pathway and the remedy requested cannot be reached; for example, there

is a jurisdictional issue, or the application puts forward a legal argument that was already rejected, or the application depends on legal propositions that are clearly at odds with settled and unchallenged law;

- the remedy sought could never issue on the facts of the particular application; or

- key portions of the application may be missing; for example, the application may fail to set out a conclusion that is necessary to satisfy the relevant legal test.

[45] Based on the definition of manifestly frivolous in *Haevischer*, I am of the view that a judge's consideration of Crown delay goes beyond a determination of whether a section 714.1 application brought by the Crown is manifestly frivolous.

[46] On a motion for summary dismissal, it is not sufficient for the moving party to simply advance conclusory statements that the underlying application will not result in the remedy. According to Martin J, "that line of argument inappropriately focuses on the final merits of the underlying application and not on whether it is manifestly frivolous" (*ibid* at para 95). Justice Martin was clear that a judge hearing a motion for summary dismissal should not consider the merits of the underlying application.

[47] The record on a summary dismissal motion should normally be minimal because extensive evidence would work to defeat the purpose of the motion. A judge may decide such a motion based on oral submissions of counsel or may conclude that more is required (see *ibid* at paras 93, 98). The

greater the record, the greater the risk that the summary dismissal hearing will inadvertently lead the judge to decide the merits of the underlying application (see *ibid* at para 98).

Haevischer and Provincial Criminal Rules

[48] The Crown submits that the manifestly frivolous standard set out in *Haevischer* does not replace legislated or judicial summary dismissal thresholds nor the application of local court rules, practices, directives and procedures. I agree.

[49] With respect to legislated or judicial summary dismissal thresholds, Martin J, in *Haevischer* at para 80, was clear:

> The "manifestly frivolous" standard is intended to be a clear standard to be applied to summary dismissal motions brought in the criminal law context that are *not otherwise subject to a legislated or judicial threshold.* It does not, for example, have an impact on applications brought under *Criminal Code* provisions such as s. 685(1) applications concerning frivolous appeals or s. 679 applications for bail pending an appeal (including *Oland*). Nor does this standard eclipse the bodies of law that have developed around particular types of applications, such as *Garofoli* and *Pires* applications to challenge the lawfulness of a search warrant.
>
> [emphasis added]

Also, see e.g., the post-*Haevischer* decision in *United States of America v Cuppen*, 2023 BCSC 2361.

[50] With respect to the principle that local court rules, practices, directives and procedures must be followed notwithstanding the *Haevischer* framework, Martin J stated (*ibid* at para 94):

> As a preliminary matter, the party filing the underlying application must ensure that their application complies with the local court rules and applicable practices, directives and procedures. Some jurisdictions have developed particular rules and approaches to control which applications should be heard in a *voir dire*. Ontario incorporated the power to summarily dismiss an application into its rules of criminal procedure (see *Glegg*, at para. 34; *Criminal Proceedings Rules for the Superior Court of Justice (Ontario)*, SI/2012-7, r. 34.02).

[51] As Martin J observed, some jurisdictions have incorporated the power to summarily dismiss an application into their local criminal rules, such as *Criminal Proceedings Rules for the Superior Court of Justice (Ontario)*, SI/2012-7, r 34.02 [the repealed *ONSC Criminal Rules*], as repealed by *Criminal Proceedings Rules for the Superior Court of Justice (Ontario)*, online: <ontariocourts.ca/scj/practice/rules-forms/>, s 1.02 [the current *ONSC Criminal Rules*]. Rule 34.02 provides judges with the authority to summarily dismiss any pre-trial or other application that has no reasonable prospect of success and permits a preliminary assessment of the merits (in contrast to *Haevischer*). There is no comparable provision to r 34.02 of the repealed or the current *ONSC Criminal Rules* in *Criminal Proceedings Rules of the Manitoba Court of Queen's Bench*, SI/2016-34 [*MBKB Criminal Rules*].

[52] However, the Crown also raises r 34.03 of the current *ONSC Criminal Rules*, which it says gives a trial judge the authority to summarily dismiss an application in circumstances where it is not compliant with the court rules—and that there is a comparable rule in the *MBKB Criminal Rules*.

[53] Rule 34.03 of the current *ONSC Criminal Rules* states:

Dismissal for Non-Compliance with Rules

34.03 Where an applicant has failed to comply with the rules governing an application, the application shall not be heard unless the presiding judge grants leave, after taking into account all the circumstances of the case, including but not limited to:

(a) the nature of the applicant's non-compliance with these rules;

(**b**) the apparent merits of the application as reflected in any materials filed and any submissions made in the proceeding;

(**c**) the right of the applicant to raise issues, including issues relating to the admissibility of evidence and to have those issues determined on their merits;

(**d**) the right of other parties to have a reasonable opportunity to respond to any issues raised by an applicant;

(**e**) the need for an expeditious determination of pre-trial applications and the orderly conduct of trial proceedings;

Rejet pour cause d'inobservation des règles

34.03 Si le requérant ne se conforme pas aux règles qui régissent la demande, celle-ci ne peut être entendue à moins que le juge qui préside ne l'autorise, en tenant compte de toutes les circonstances de la cause, y compris sans s'y restreindre :

a) la nature du manquement aux règles;

b) le bien-fondé apparent de la demande tel que l'attestent les documents déposés et les observations formulées au cours de l'instance;

c) le droit du requérant de soulever des questions, notamment des questions relatives à l'admissibilité des éléments de preuve, et de voir ces questions réglées d'après leur bien-fondé;

d) le droit des autres parties d'avoir une occasion raisonnable de répondre à toute question soulevée par le requérant;

e) la nécessité de rendre une décision dans les plus brefs délais sur les demandes présentées avant le procès et d'assurer le déroulement ordonné de l'instance;

(**f**) the history of the pre-trial applications and the proceedings;	**f)** l'historique des demandes présentées avant le procès et de l'instance;
(**g**) any notice given to other parties about the issues raised in the pre-trial applications;	**g)** tout avis donné à chacune des autres parties en rapport avec les questions soulevées dans les demandes présentées avant le procès;
(**h**) any prejudice to any other party in the proceeding;	**h)** tout préjudice causé à une autre partie à l'instance;
(**i**) the nature of the issues raised and the extent of their impact on the course of the trial or other proceeding;	**i)** la nature des questions soulevées et la portée de leur impact sur le cours du procès ou d'une autre instance;
(**j**) any explanation advanced for failure to comply with these rules; and,	**j)** toute explication avancée quant au défaut de se conformer aux présentes règles;
(**k**) any other factors the judge considers relevant.	**k)** tout autre facteur que le juge considère pertinent.

[54] In *R v Kazman*, 2020 ONCA 22 [*Kazman*], Doherty JA, writing for the Court, recognized that r 34.03 of the repealed *ONSC Criminal Rules* gives trial judges the authority to summarily dismiss an application for non-compliance. While Doherty JA was considering the previous version of r 34.03, in my view, the language of r 34.03 did not change substantially in the current *ONSC Criminal Rules* so as to impact Doherty JA's reasoning (Appendix A to these reasons compares rr 34.02 and 34.03 of the repealed *ONSC Criminal Rules* and the current *ONSC Criminal Rules* to demonstrate

that, while the language changed slightly in the new rules, the effect of these rules remains the same).

[55] The provision in the *MBKB Criminal Rules* that is comparable to r 34.03 in the current *ONSC Criminal Rules*, is r 2.02, which reads:

Dismissal of motion or application **2.02** If an applicant has failed to comply with the rules respecting the filing of a document in support of a motion or application, the motion or application must not be heard unless the presiding judge grants leave, after taking into account all the circumstances of the case, including	**Rejet d'une requête ou d'une demande** **2.02** Si un requérant omet d'observer les présentes règles qui régissent le dépôt d'un document au soutien d'une requête ou d'une demande, celle-ci ne peut être entendue à moins que le juge qui préside l'instance ne l'autorise après avoir tenu compte de toutes les circonstances de la cause, notamment :
(**a**) the nature of the applicant's non-compliance with these rules;	**a**) la nature de l'inobservation de ces règles;
(**b**) any explanation advanced for failing to comply with these rules;	**b**) toute explication donnée quant à l'inobservation de ces règles;
(**c**) the apparent merits of the motion or application as reflected in any materials filed and any submissions made in the proceeding;	**c**) le bien-fondé apparent de la requête ou de la demande, attesté par les documents déposés et les observations formulées au cours de l'instance;
(**d**) any notice given to the other parties about the issues raised in the motion or application and the right of those parties to have a reasonable opportunity to	**d**) tout avis donné aux autres parties en rapport avec les questions soulevées dans la requête ou la demande et le droit de ces parties d'avoir une occasion raisonnable de

respond to the issues raised by the applicant; and	répondre aux questions soulevées par le requérant;
(**e**) the history of the proceedings and the need for an expeditious determination of pre-trial motions and applications and the orderly conduct of trial proceedings.	**e**) l'historique de l'instance et la nécessité de rendre une décision expéditive sur les requêtes et demandes présentées avant le procès et d'assurer le déroulement ordonné du procès.

[56] Given the similarity between r 34.03 of the current *ONSC Criminal Rules* and r 2.02 of the *MBKB Criminal Rules*, Doherty JA's reasoning in *Kazman* to classify r 34.03 as a summary dismissal power is directly applicable to an understanding of r 2.02 in Manitoba.

[57] Rule 34.03 of the current *ONSC Criminal Rules* and r 2.02 of the *MBKB Criminal Rules* serve as a form of summary dismissal in specific circumstances with legislated thresholds enumerated in each of the rules. This means that, pursuant to Martin J's comments in *Haevischer*, the manifestly frivolous threshold does not apply to the application of r 2.02 of the *MBKB Criminal Rules* (see *Haevischer* at para 80).

[58] Notwithstanding this, the manifestly frivolous framework does apply in Manitoba to any motions for summary dismissal that are not based on non-compliance with the rules or subject to other judicial and legislative thresholds.

Application to the Present Appeal

[59] In addressing the section 714.1 applications, the issue of the late filing of the section 714.1 applications was at the forefront for both trial

counsel and the trial judge. Although the trial judge stated that issues of timing related to the section 714.1 applications should have been addressed at a further pre-trial conference, no specific reference was made to r 14.02 of the *MBKB Criminal Rules* (annexed at Appendix B to these reasons). Rule 14.02 provides that, if a motion is identified at a pre-trial or case management conference, the judge must set time limits for filing and serving materials—and, if not identified, the party making the motion is to schedule another pre-trial or case management conference to have such time limits and hearing dates set.

[60] Because the Crown did not seek a further pre-trial conference to set dates for the section 714.1 applications, it suggests (and the accused does not dispute) that the appropriate way for this matter to have been dealt with was by way of an application under r 2.02 of the *MBKB Criminal Rules*. An application brought under r 2.02 would, under subsection (c), involve, as one of many factors, a consideration of the merits of the underlying application.

[61] Therefore, the trial judge erred in principle by failing to consider the request for summary dismissal through the lens of r 2.02. Instead, he considered it as a motion for summary dismissal not governed by judicial or legislated thresholds, including court rules; in such circumstances, the test prescribed by *Haevischer* applies. However, in summarily dismissing the section 714.1 applications, the trial judge did not apply the manifestly frivolous test set out in *Haevischer*. Instead, he relied heavily on Crown delay and conflated the reasons for summary dismissal with a consideration of the section 714.1 applications on their merits.

[62] The accused says that these errors, if made, did not have a material impact on the outcome because, had the trial judge considered the matter under r 2.02, he would have addressed the merits of the section 714.1 applications and reached the same conclusion. However, the Crown suggests that the trial judge may well have reached a different conclusion under r 2.02 because, in that scenario, he likely would have had an evidentiary hearing and heard full argument on the merits on the second day of the trial before making his decision.

[63] All of this being said, even if the trial judge, without so stating, could be considered to have, in effect, assessed the merits of the section 714.1 applications in the context of r 2.02, he made a material error in principle in doing so. As I will explain later in these reasons, he erred by applying the wrong test under section 714.1.

A Judge's Case Management Powers

[64] Although of minimal impact on the outcome of this appeal given the trial judge's decision to hear the summary dismissal motion and decide it on the issue of delay and the merits of the section 714.1 applications, I will nonetheless canvass what Martin J said in *Haevischer* about the wide scope and importance of a judge's case management powers (see also the post-*Haevischer* decisions of *R v Blanchard*, 2024 ABCA 130 at para 99; *R v Neudorf*, 2023 ABCA 318 at para 8, which continue to recognize the importance of these powers).

[65] In *Haevischer*, Martin J explained that judges can decide whether to entertain a summary dismissal motion at all and, if it proceeds, how that motion should be heard. In some circumstances, a judge may decide that a

summary dismissal hearing is not an effective use of court time and may create delay (see *ibid* at para 104). For example, this would arise when a summary dismissal hearing would take just as much time as a *voir dire* for the underlying application. In such circumstances, a judge should consider "whether fairness, efficiency and respect for the administration of justice more strongly support using the [summary dismissal hearing] time to deal with the merits of the underlying application" (*ibid*).

[66] Furthermore, pursuant to their case management powers, judges can direct how motions or a *voir dire* will be heard, direct the order that evidence is called, restrict cross-examination when necessary, place reasonable limits on oral submissions, direct written submissions or defer rulings (see *ibid* at para 102, citing *R v Samaniego*, 2022 SCC 9 at para 22; *R v Felderhof*, 2003 CanLII 37346 at para 57 (ONCA)).

[67] A judge's power to summarily dismiss is ongoing. A judge retains the ability to summarily dismiss an application during the *voir dire* if it becomes apparent that the application is manifestly frivolous (see *Haevischer* at para 89).

[68] In the context of the present appeal, *Haevischer* confirms that, pursuant to the trial judge's case management powers, he could have decided to summarily dismiss the section 714.1 applications under r 2.02 of the *MBKB Criminal Rules* on the basis of non-compliance with r 14.02, even though r 2.02 was not raised by the parties. This would have more accurately aligned with the approach he wanted to take—that is, to address the issue of delay as well as the merits of the section 714.1 applications.

Issue No. 2: Did the Trial Judge Err in Principle by Applying the Wrong Test Under Section 714.1?

[69] In addressing the merits of the section 714.1 applications, the trial judge determined the applicable test under that section. Again, the question is whether he erred in principle in doing so.

Interpretation of Section 714.1 and the Applicable Principles

[70] The starting presumption is that all court participants should personally appear in a proceeding except as otherwise permitted by the *Code* (see s 715.21). Section 714.1 creates an exception to this starting presumption by permitting remote testimony by way of videoconferencing or audioconferencing.

[71] Section 714.1 was amended in 2019 (see *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, SC 2019, c 25, s 290 [*2019 amendment*]). The *2019 amendment* slightly changed the test to be applied and added more factors for a court to consider in its analysis.

[72] Prior to the *2019 amendment*, section 714.1 read:

Video links, etc. — witness in Canada **714.1** A court may order that a witness in Canada give evidence by means of technology that permits the witness to testify elsewhere in Canada in the virtual presence of the parties and the court, if the court is of the opinion that	**Témoin au Canada** **714.1** Le tribunal peut, s'il l'estime indiqué dans les circonstances — compte tenu du lieu où se trouve le témoin, de sa situation personnelle, des coûts que sa présence impliquerait et de la nature de sa déposition — ordonner au témoin qui se trouve au

it would be appropriate in all the circumstances, including

(a) the location and personal circumstances of the witness;

(b) the costs that would be incurred if the witness had to be physically present; and

(c) the nature of the witness' anticipated evidence.

Canada de déposer au moyen d'un instrument qui retransmet sur le vif, ailleurs au Canada, au juge et aux parties, son image et sa voix et qui permet de l'interroger.

[73] Currently, section 714.1 reads:

Audioconference and videoconference — witness in Canada

714.1 A court may order that a witness in Canada give evidence by audioconference or videoconference, *if the court is of the opinion that it would be appropriate having regard to all the circumstances, including*

(a) the location and personal circumstances of the witness;

(b) the costs that would be incurred if the witness were to appear in person;

(c) the nature of the witness' anticipated evidence;

Audioconférence et vidéoconférence : témoin au Canada

714.1 Le tribunal peut ordonner au témoin qui se trouve au Canada de déposer par audioconférence *ou par vidéoconférence s'il l'estime indiqué, eu égard aux circonstances, notamment* :

a) le lieu où se trouve le témoin et sa situation personnelle;

b) les coûts que sa déposition en personne impliquerait;

c) la nature de sa déposition;

(d) the suitability of the location from where the witness will give evidence;	**d)** le caractère approprié du lieu à partir duquel il fera sa déposition;
(e) the accused's right to a fair and public hearing;	**e)** le droit de l'accusé à un procès public et équitable;
(f) the nature and seriousness of the offence; and	**f)** la nature et la gravité de l'infraction;
(g) any potential prejudice to the parties caused by the fact that the witness would not be seen by them, if the court were to order the evidence to be given by audioconference.	**g)** le risque d'effet préjudiciable à une partie en raison de l'impossibilité de voir le témoin, si le tribunal ordonnait la déposition par audioconférence.

[emphasis added]

[74] I also note that, in 2019, section 715.22 was added to the *Code*. It states:

Provisions providing for audioconference or videoconference **715.22** The purpose of the provisions of this Act that allow a person to appear at, participate in or preside at a proceeding by audioconference or videoconference, in accordance with the rules of court, is to serve the proper administration of justice, including by ensuring fair and efficient proceedings and enhancing access to justice.	**Dispositions prévoyant l'audioconférence ou la vidéoconférence** **715.22** L'objet des dispositions de la présente loi permettant de comparaître ou de participer à une procédure, ou de la présider, par audioconférence ou par vidéoconférence, conformément aux règles de cour, est de servir la bonne administration de la justice, notamment en assurant la tenue d'audiences équitables et efficaces ainsi qu'en améliorant l'accès à la justice.

[75] Section 714.1 has not been the subject of much appellate discussion save for in two divergent cases—the Nova Scotia Court of Appeal's approach in *SDL* and the British Columbia Court of Appeal's approach in *JLK*.

[76] In 2017, prior to the *2019 amendment*, in *SDL*, the Nova Scotia Court of Appeal held that a strict test should apply, particularly where credibility of the proposed witness is at issue. Conversely, in *JLK*, the British Columbia Court of Appeal rejected that strict approach, opting for a discretion-based approach that focuses on consideration of all relevant circumstances. I will discuss each in turn.

[77] At issue in *SDL* was the trial judge's decision to allow the complainant and his mother to testify against the appellant via video link. The Court proposed eight guiding principles for Nova Scotian trial judges when considering section 714.1 applications. These principles are (*ibid* at para 32):

> 1. As long as it does not negatively impact trial fairness or the open courts principle, testimony by way of video link should be permitted. As the case law suggests, in appropriate circumstances, it can enhance access to justice.
>
> 2. That said, when credibility is an issue, the court should authorize testimony via 714.1 only in the face of exceptional circumstances that personally impact the proposed witness. Mere inconvenience should not suffice.
>
> 3. When the credibility of the complainant is at stake, the requisite exceptional circumstances described in #2 must be even more compelling.
>
> 4. The more significant or complex the proposed video link evidence, the more guarded the court should be.
>
> 5. When credibility will not be an issue, the test should be on a balance of convenience.

> 6. Barring unusual circumstances, there should be an evidentiary foundation supporting the request. This would typically be provided by affidavit. Should cross examination be required, that could be done by video link.
>
> 7. When authorized, the court should insist on advance testing and stringent quality control measures that should be monitored throughout the entire process. If unsatisfactory, the decision authorizing the video testimony should be revisited.
>
> 8. Finally, it is noteworthy that in the present matter, the judge authorized the witnesses to testify "in a courtroom ... or at the offices of Victims' Services ...". To preserve judicial independence and the appearance of impartiality, the video evidence, where feasible, should be taken from a local courtroom.

[78] In essence, the Nova Scotia Court of Appeal held that section 714.1 orders can be made when they would enhance access to justice; exceptional circumstances must exist where credibility is at issue and must be even more compelling when the credibility of a complainant is at issue.

[79] Although some trial decisions followed *SDL* (see *R v McKay*, 2023 ONSC 6849; *R v KS*, 2020 ONCJ 328), there is no appellate case law that adopts its approach. Further, as noted in *R v KZ*, 2021 ONCJ 321 [*KZ*], trial courts in Ontario generally declined to adopt *SDL*'s requirement of "exceptional and compelling circumstances" for a complainant to testify remotely (*KZ* at para 10, citing *R v McDougal*, [2021] OJ No 754 at para 3 (ONSC); *R v Metcalfe*, 2018 ONSC 4925 at para 12). Other trial decisions in which courts declined to adopt *SDL*'s requirement for exceptional circumstances where credibility is at issue are *R v SLC*, 2020 ABQB 515 at para 51 [*SLC*]; *R v Rutaihwa*, 2020 ONCJ 470 at paras 14-16.

[80] Then, in 2023, in *JLK*, the British Columbia Court of Appeal undertook a thorough review of the relevant case law on section 714.1 (see paras 32-48). The Court noted that, in *KZ*, the Ontario Court of Justice declined to follow the Nova Scotia Court of Appeal's guidance for several reasons (see *JLK* at para 38, citing *KZ* at para 11):

> - The *SDL* decision considered a prior version of s 714.1 that set out minimal criteria for the order.
>
> - In the subsequent amendments, Parliament expanded the relevant considerations but did not adopt a special, discrete test for witness credibility cases.
>
> - Criminal trial courts have decades of experience in assessing the credibility of complainants and other witnesses who testify by way of video technology. Courts have gained further experience during the COVID pandemic. No special test is required beyond the statutory criteria.
>
> - During the pandemic in a province where lockdown stay-at-home orders are in place and courtrooms have added restrictions for public health and safety, the use of videoconference technology can provide a better opportunity to assess credibility than in-person testimony.
>
> - Videoconference technology shows and records both the demeanour and the responses of a witness. When evaluating concerns about the ability to fully assess demeanor, it's important to remember the limited role demeanour plays in assessing witness credibility.
>
> - In my view, courts should decline to add a special, highly restrictive test that will often be applied in matters of alleged sexual assault such as *SDL* and this case, that would limit access to videoconference technology where an application otherwise meets the statutory criteria.

[81] The British Columbia Court of Appeal also expressly declined to adopt the restrictive principles set out in *SDL* for two of the reasons outlined in *KZ* (see *JLK* at para 51).

[82] First, the British Columbia Court of Appeal stated that, in *SDL*, the Nova Scotia Court of Appeal had considered an earlier version of section 714.1 (pre-*2019 amendment*) that included only three criteria to consider. The *2019 amendment* expanded the factors for consideration. The amendment did not include witness credibility as a relevant factor or require exceptional circumstances when credibility is in issue, nor did it carve out exceptions for particular types of cases.

[83] Second, videoconference technology has significantly developed since *SDL* was decided. Generally, videoconference technology now permits the parties in the courtroom, including the trier of fact and counsel, to see and hear the witness clearly such that the witness' testimony can be properly tested and assessed (see *JLK* at para 51, referring to *R v McLaughlin*, 2022 YKSC 17 at para 13; *R v Vann*, 2021 ONCJ 318 at para 22).

[84] In summary, the British Columbia Court of Appeal rejected the idea that "courts should layer additional factors on top of the existing statutory criteria to consider or develop a different and stricter test when there are issues of credibility, or in particular types of cases like alleged sexual assaults" (*JLK* at para 51). Instead, it relied on the statutory test in section 714.1 that requires a court to consider whether it is appropriate to order remote testimony by having regard to all the circumstances. The goal of section 714.1 is to balance the practical and logistical issues of testifying in court with any potential impact from remote testimony on the fairness of the trial and on an accused

person's ability to make full answer and defence (see *JLK* at para 50). An order is appropriate having regard to the circumstances when it strikes this balance. It is not necessary to have the best trial, but rather a fair trial.

[85] Many trial courts have opted to follow an approach similar to *JLK* instead of *SDL* (see *R v TJK*, 2024 ABCJ 89 at paras 33-34 [*TJK*]; *R v Bevan-John*, 2024 NSPC 25 at paras 44-45; *R v Kakakaway*, 2023 SKPC 56 at paras 12-13).

[86] On their face, the factors listed in section 714.1 assist a court in striking the appropriate balance. However, these factors are not exhaustive and should not be read as a complete code (see *JLK* at para 52). The phrase "having regard to all the circumstances" (the *Code*, s 714.1) means that a court can consider other factors as necessary to determine whether an order should be made.

[87] For example, courts have often considered the COVID-19 pandemic and its impact on a witness' ability to travel (see e.g. *JLK* at para 67; *R v Martell*, 2023 SKKB 31 at para 55; *R v Burns*, 2020 SKQB 228 at paras 11-12; *R v Milliken*, 2020 ONCJ 356 at para 70). Courts have also considered the possibility of delay in transmitting a witness' remote testimony as a relevant factor that may favour denying the application (see *R v Singh*, 2017 ONCJ 744; *R v Belem*, 2017 ONSC 2213).

[88] In my view, Crown conduct can also be a relevant factor in assessing section 714.1 applications. However, Crown delay in filing an application will generally carry less weight than the statutory factors and is unlikely to be sufficient on its own to dismiss such an application (see e.g. *R v GP*, 2024 CanLII 344 (NLPC); *R v Kalejaiye*, 2020 ONCJ 422). The related concept of

the possibility of delay in the prosecution has also been considered a relevant factor (see e.g. *KZ*; *JLK*).

[89] *SDL* and *JLK* are also somewhat at odds with respect to the record required on a section 714.1 application. In *SDL*, the Court prescribed a stricter approach requiring formal evidence (i.e., affidavit and *viva voce* evidence). The Nova Scotia Court of Appeal stated, "[b]arring unusual circumstances, there should be an evidentiary foundation supporting the request. This would typically be provided by affidavit" (*ibid* at para 32).

[90] There is limited jurisprudence following *SDL* in this regard (see e.g. *R v Murrin*, 2021 CanLII 20363 (NLPC); *R v Kervian*, 2020 CanLII 16224 (NLPC); *R v Musseau #2*, 2019 CanLII 96480 (NLPC)), and most of the recent case law, with which I agree, permits a more flexible approach.

[91] The British Columbia Court of Appeal did so in *JLK*. It held that section 714.1 itself does not require any specific evidentiary foundation to support the application. Instead, according to the Court, many of the factors listed in section 714.1 will be readily apparent or disclosed by the pre-existing record. Further, submissions from counsel can provide the necessary basis to support a section 714.1 order (see *ibid* at para 64). However, it is open to a trial judge to require additional evidence in the form of affidavit or *viva voce* testimony if they are not satisfied on the basis of counsel submissions or the existing record (see *ibid* at para 58). There are numerous trial decisions that have applied similar evidentiary principles for section 714.1 applications (see e.g. *R v Walsh*, 2023 MBPC 2 at paras 10-16; *R v Navarro*, 2023 MBPC 56 at para 4; *SLC* at paras 17-19; *TJK* at para 13).

[92] Based on the foregoing analysis, I would adopt the approach outlined in *JLK*, and not the stricter approach prescribed by *SDL*, to section 714.1 applications.

Application to the Present Appeal

[93] Taking the trial judge's reasons as a whole, I conclude that he erred by applying the principles set out in *SDL*, rather than the test as articulated in *JLK*. In fairness to him, once again, *JLK* had not been released when he gave his decision and *oral reasons* but was issued by the time he rendered his *written reasons*.

[94] At the outset of the trial judge's *written reasons*, he clearly stated that the *SDL* principles were applicable to an application under section 714.1.

[95] This does not mean, however, that he erred in principle by relying on Crown conduct. As explained, Crown conduct can be part of a proper section 714.1 analysis. That being said, I am of the view that he likely attributed unreasonable weight to Crown delay in all of the circumstances—including the fact that the Crown first learned less than two weeks prior to the trial about the complainant's willingness to testify and her inability to attend the trial.

[96] As well, I have concerns about the trial judge's suggestion that the Crown should have assisted the complainant with obtaining identification. And, with respect to the Crown having declined the trial judge's offer to issue a warrant for the complainant, while historically that may have been the only tool available in these circumstances, times have changed and the *Code*

provides for other alternatives to facilitate the testimony of a witness and access to justice (such as remote testimony).

[97] In my view, the trial judge's reliance on *SDL* resulted in him erring in law by applying a higher standard to the application brought in relation to the complainant on the basis of the following three principles articulated in *SDL* at para 32:

> 2. When credibility is an issue, the court should authorize testimony via 714.1 only in the face of exceptional circumstances that personally impact the proposed witness. Mere inconvenience should not suffice.
>
> 3. When the credibility of the complainant is at stake, the requisite exceptional circumstances described in #2 must be even more compelling.
>
> . . .
>
> 8. To preserve judicial independence and the appearance of impartiality, the video evidence, where feasible, should be taken from a local courtroom.

[98] The trial judge relied on these first two principles when he stated:

- "The credibility and reliability of [the complainant's] evidence [on identification] is crucial. The defence ability to test her evidence and the court's ability to assess her evidence is also crucial" (*written reasons* at para 41).

- "The most difficult evidence to assess comes from an honest but mistaken witness" (*ibid* at para 44). The trial judge then stated that "[i]t should be an *exceptional circumstance* to have such a witness testify outside of the courtroom" (*ibid*) [emphasis added].

[99] While the fact that a witness' credibility is at issue should be considered as part of a holistic analysis under section 714.1, a judge should not consider criteria beyond the statutory criteria, to apply a stricter test when there are issues of credibility or where the witness is a complainant.

[100] I also observe that, even if *SDL* were applicable, the trial judge's concerns were about the complainant's reliability rather than her credibility, again making it inappropriate to rely on the *SDL* approach.

[101] Regarding the final principle from *SDL* relied upon by the trial judge—with respect to the location from which the complainant would testify—he stated that remote testimony should be from a courtroom "whenever possible" (*written reasons* at para 50), going even beyond "where feasible" as articulated in *SDL* (*SDL* at para 32). In my view, there is no presumption that remote testimony be taken from a courtroom, or that a police station is inappropriate. While a judge may conclude, on a sufficient evidentiary foundation, that testifying from a police station is unsuitable in a particular case, testifying from a police station may be appropriate even when testifying from a courtroom is possible or feasible.

[102] In any event, I expect that it was not likely or feasible that the complainant could have testified from her local courtroom in Brampton, Ontario. The Brampton courthouse has for years been notorious for backlogs, excessive caseloads and delays (see *R v A (C)*, 2024 ONSC 1603 at paras 71-79; *R v Vuong*, 2017 ONSC 3808 at para 18).

[103] Given all of the above, I am satisfied that, although the trial judge's error in applying the test outlined in *SDL* was not the sole basis for him dismissing the Crown's section 714.1 application in relation to the

complainant, it informed and impacted his analysis and decision. That decision resulted in the complainant's testimony not being before the Court. As such, the trial judge's error clearly had a material bearing on the acquittals.

Conclusion

[104] For the foregoing reasons, I would allow the appeal, set aside the acquittals and order a new trial on the charges of robbery and choke to overcome resistance in relation to the complainant.

Simonsen JA

I agree: leMaistre JA

I agree: Turner JA

APPENDIX A

Comparison of the *Criminal Proceedings Rules for the Superior Court of Justice (Ontario)*, SI/2012-7 [repealed *ONSC Criminal Rules*] to the *Criminal Proceedings Rules for the Superior Court of Justice (Ontario)*, online: <ontariocourts.ca/scj/practice/rules-forms/> [current *ONSC Criminal Rules*]:

Repealed *ONSC Criminal Rules*	Current *ONSC Criminal Rules*
English	
Preliminary Assessment of Application **34.02** The presiding judge may conduct a preliminary assessment of the merits of any pre-trial or other application on the basis of the materials filed, and, if satisfied that there is no reasonable prospect that the application could succeed, may dismiss the application without further hearing or inquiry.	**Preliminary Assessment of Application** **34.02** The presiding judge may conduct a preliminary assessment of the merits of any pre-trial or other application and may dismiss the application without further hearing or inquiry where the application is manifestly frivolous.
Dismissal for Non-Compliance with Rules **34.03** Where an applicant has failed to comply with the rules governing an application, the application shall not be heard unless the presiding judge grants leave, after taking into account all the circumstances of the case, including but not limited to:	**Dismissal for Non-Compliance with Rules** **34.03** Where an applicant has failed to comply with the rules governing an application, the application shall not be heard unless the presiding judge grants leave, after taking into account all the circumstances of the case, including but not limited to:
(a) the nature of the applicant's non-compliance with these rules;	**(a)** the nature of the applicant's non-compliance with these rules;
(b) the right of the applicant to raise issues, including issues relating to the admissibility of evidence and to have those issues determined on their merits;	**(b)** the apparent merits of the application as reflected in any materials filed and any submissions made in the proceeding;

(c) the right of other parties to have a reasonable opportunity to respond to any issues raised by an applicant;	**(c)** the right of the applicant to raise issues, including issues relating to the admissibility of evidence and to have those issues determined on their merits;
(d) the need for an expeditious determination of pre-trial applications and the orderly conduct of trial proceedings;	**(d)** the right of other parties to have a reasonable opportunity to respond to any issues raised by an applicant;
(e) the history of the pre-trial applications and the proceedings;	**(e)** the need for an expeditious determination of pre-trial applications and the orderly conduct of trial proceedings;
(f) any notice given to other parties about the issues raised in the pre-trial applications;	**(f)** the history of the pre-trial applications and the proceedings;
(g) the apparent merits of the application as reflected in any materials filed and any submissions made in the proceeding;	**(g)** any notice given to other parties about the issues raised in the pre-trial applications;
(h) any prejudice to any other party in the proceeding;	**(h)** any prejudice to any other party in the proceeding;
(i) the nature of the issues raised and the extent of their impact on the course of the trial or other proceeding;	**(i)** the nature of the issues raised and the extent of their impact on the course of the trial or other proceeding;
(j) any explanation advanced for failure to comply with these rules; and,	**(j)** any explanation advanced for failure to comply with these rules; and,
(k) any other factors the judge considers relevant to his or her determination.	**(k)** any other factors the judge considers relevant.

Français

Évaluation préliminaire **34.02** Le juge qui préside peut procéder à une évaluation préliminaire du bien-fondé de toute demande présentée avant le procès et de toute autre en se fondant sur les documents déposés, et, s'il est convaincu que la demande n'a aucune chance raisonnable d'aboutir, peut rejeter la demande sans tenir d'audience ou d'enquête.	**Évaluation préliminaire** **34.02** Le juge qui préside peut procéder à une évaluation préliminaire du bien-fondé de toute demande présentée avant le procès et de toute autre demande et peut rejeter la demande sans tenir d'audience ou d'enquête si elle est manifestement frivole.
Rejet pour cause d'inobservation des règles **34.03** Si le requérant ne se conforme pas aux règles qui régissent la demande, celle-ci ne peut être entendue à moins que le juge qui préside ne l'autorise, en tenant compte de toutes les circonstances de la cause, y compris sans s'y restreindre :	**Rejet pour cause d'inobservation des règles** **34.03** Si le requérant ne se conforme pas aux règles qui régissent la demande, celle-ci ne peut être entendue à moins que le juge qui préside ne l'autorise, en tenant compte de toutes les circonstances de la cause, y compris sans s'y restreindre :
a) la nature du manquement aux règles;	**a)** la nature du manquement aux règles;
b) le droit du requérant de soulever des questions, notamment des questions relatives à l'admissibilité des éléments de preuve, et de voir ces questions réglées d'après leur bien-fondé;	**b)** le bien-fondé apparent de la demande tel que l'attestent les documents déposés et les observations formulées au cours de l'instance;
c) le droit des autres parties d'avoir une occasion raisonnable de répondre sur toute question soulevée par le requérant;	**c)** le droit du requérant de soulever des questions, notamment des questions relatives à l'admissibilité des éléments de preuve, et de voir ces questions réglées d'après leur bien-fondé;
d) la nécessité de rendre une décision dans les plus brefs délais sur les demandes présentées avant le procès	**d)** le droit des autres parties d'avoir une occasion raisonnable de répondre à toute question soulevée par le requérant;

et d'assurer le déroulement ordonné de l'instance;	
e) l'historique des demandes présentées avant le procès et de l'instance;	**e)** la nécessité de rendre une décision dans les plus brefs délais sur les demandes présentées avant le procès et d'assurer le déroulement ordonné de l'instance;
f) tout avis donné à chacune des autres parties en rapport avec les questions soulevées dans les demandes présentées avant le procès;	**f)** l'historique des demandes présentées avant le procès et de l'instance;
g) le bien-fondé apparent de la demande tel que l'attestent les documents déposés et les observations formulées au cours de l'instance;	**g)** tout avis donné à chacune des autres parties en rapport avec les questions soulevées dans les demandes présentées avant le procès;
h) tout préjudice causé à une autre partie à l'instance;	**h)** tout préjudice causé à une autre partie à l'instance;
i) la nature des questions soulevées et la portée de leur impact sur le cours du procès ou d'une autre instance;	**i)** la nature des questions soulevées et la portée de leur impact sur le cours du procès ou d'une autre instance;
j) toute explication avancée quant au défaut de se conformer aux présentes règles;	**j)** toute explication avancée quant au défaut de se conformer aux présentes règles;
k) tout autre facteur que le juge considère pertinent à l'égard de sa décision.	**k)** tout autre facteur que le juge considère pertinent.

APPENDIX B

Criminal Proceedings Rules of the Manitoba Court of Queen's Bench, SI/2016-34, r 14.02:

Notice of motion
14.02(1) An application must be commenced by filing a notice of motion in Form 5 of the schedule.

Time limits set by judge
(2) If the issue that is the subject of the motion is identified at a pre-trial or case management conference, the pre-trial conference judge or the case management judge must set time limits for filing and serving the notice of motion and supporting materials.

Scheduling conference to set hearing dates
(3) If the issue that is the subject of the motion has not been identified at a pre-trial or case management conference, the party making the motion must schedule another pre-trial or case management conference to set hearing dates and time limits for filing materials.

Avis de requête
14.02(1) Toute demande est introduite par le dépôt d'un avis de requête rédigé selon la formule 5 figurant à l'annexe.

Délais fixés par le juge
(2) Lorsque la question faisant l'objet de la requête est définie lors d'une conférence préparatoire ou d'une conférence de gestion de l'instance, le juge qui a présidé la conférence préparatoire ou le juge responsable de la gestion de l'instance fixe les délais de dépôt et de signification de l'avis de requête et des documents à l'appui.

Fixation d'une conférence pour fixer une date d'audition
(3) Lorsque la question faisant l'objet de la requête n'a pas été définie lors d'une conférence préparatoire ou d'une conférence de gestion de l'instance, le requérant fixe une autre conférence préparatoire ou une autre conférence de gestion de l'instance afin de fixer une date d'audition et le délai pour le dépôt des documents à l'appui.