SUPREME COURT OF NOVA SCOTIA
Citation: *McDonald v Hue*, 2024 NSSC 24

Date: 20240122
Docket: 499829
Registry: Halifax

Between:

Michael William McDonald and Diann Elizabeth McDonald

Plaintiff

v.

Scott D. Hue

Defendant

Judge:	The Honourable Justice Darlene A. Jamieson
Final Written Submissions:	October 30, 2023, November 17, 2023 and November 30, 2023
Counsel:	Robert Pineo, for the Plaintiffs (Grace MacCormick, Solicitor of Record for the Plaintiffs) Shelley Wood, for the Defendant

By the Court:

Introduction

[1] On August 17, 2020, the Applicants, Michael William McDonald and Diann Elizabeth MacDonald ("the McDonalds"), filed a Notice of Application in Court seeking among other things, a permanent injunction enjoining the Respondent, Mr. Scott Hue ("Mr. Hue") from trespassing upon and encroaching upon the lands of the Applicants and an order to remove all structures, chattels, materials or other encroachments on the lands of the Applicants. Mr. Hue filed a Notice of Contest on October 30, 2020. In the Notice of Contest Mr. Hue takes the position that his predecessors in title and his occupants' use of the deeded easement is in line with the uses provided for in the grant of right-of-way. He also advances several alternative arguments including that he benefits from an equitable prescriptive easement to park vehicles on the land.

[2] On December 10, 2021, Mr. Hue filed a Notice of Objection to Admissibility which raised a number of objections in relation to the contents of the affidavits of Mr. McDonald, Ms. McDonald and Ms. Diane Hilchie. The motion concerning the Notice of Objection to Admissibility proceeded in writing. The application in court is scheduled to be heard over four days beginning February 5, 2024.

[3] In short, this litigation centres around the proper use of a right-of-way. The right-of-way was granted in March 1991. The McDonalds are the grantors and Robert J. McDonald, the grantee. Mr. Robert McDonald is the predecessor in title to Mr. Hue. Mr. Hue also relies on a prior (1961) agreement between predecessors in title.

[4] The following is my decision in relation to Mr. Hue's Notice of Objection to Admissibility.

Objections to the Affidavit Evidence of Mr. McDonald sworn on March 31, 2021 and on June 30, 2021

[5] The motion seeks to strike certain paragraphs, or parts thereof, from the two affidavits filed by Mr. McDonald. Mr. Hue seeks to strike the evidence on several basis, including that the evidence:

(a) is inadmissible hearsay;
(b) is irrelevant;

(c) contains opinion;
(d) is a legal submission or legal argument;
(e) is speculation; and/or,
speaks for someone other than himself.

Objections to the Affidavit Evidence of Ms. Hilchie sworn on June 30, 2021

[6] The motion seeks to strike certain paragraphs, or parts thereof, from the affidavit filed by Ms. Hilchie on several basis, including that the evidence:

(a) is attempting to speak for others beyond her personal knowledge, and/or contains opinion and speculation.

Objection to the Affidavit Evidence of Ms. McDonald sworn on March 31, 2021

[7] Mr. Hue submits that this affidavit contains inadmissible oath helping and should be struck in its entirety.

Parties' Positions

Mr. Hue

[8] Mr. Hue says there are instances in Mr. McDonald's affidavit where he attempts to offer statements or opinions that are not relevant to the issues in dispute. He further says that the affidavits are not confined to facts and contain a number of statements in the nature of narratives, submission or argument. He points to Mr. McDonald at times appearing to argue the merits of the application by arguing that certain affiants or individuals did not have a right to park in the right-of-way arguing what certain affiants were or were not personally aware of regarding the use of the right-of-way. Mr. Hue further says that in the McDonald reply affidavit there are numerous instances of opinion and speculation regarding what Mr. McDonald himself believes to be the proper use of the right-of-way, whether certain individuals were given permission to park in a certain location, or what he believes the applicant's rights are with respect to the right-of-way.

[9] In relation to hearsay, Mr. Hue says that while this is not the primary objection to the affidavits there are number of examples of inadmissible hearsay scattered throughout. He refers particularly to Mr. McDonald's statements concerning whether Ms. McDonald had conversations and with whom.

[10] In relation to the affidavit of Ms. McDonald, Mr. Hue submits that there is no purpose for this affidavit other than oath helping. He says that Ms. McDonald does

not offer any of her own opinion and therefore is simply attempting to bolster his credibility.

The McDonalds

[11] The McDonalds say that all of the relevance objections raised are better founded in other objections. They say the objections as to relevance appear to be included simply to provide additional attacks on the impugned paragraphs.

[12] With reference to the objections based on submission or argument, the McDonalds say a witness is permitted to describe an event that they experienced in their own words. The opposing party can cross-examine if they disagree with the description. The McDonalds say that various of the paragraphs simply provide rebuttal evidence to the affidavits filed on behalf of Mr. Hue.

[13] With respect to speculation and opinion, the McDonalds say that evidence is not speculative when it is within the direct knowledge of the witness. They say that Mr. McDonald is permitted to speak to things and experiences of which he has knowledge and if the opposing party objects to the truth of the statement it can be tested on cross-examination. The McDonalds further say that Mr. McDonald's observations, for example, that at first the tenants parked on Mr. Hue's property and not on the right-of-way, is not intended to be relied upon as evidence of the legal boundary between the properties. It is simply an observation as this case concerns the use of the right-of-way. They say many of the objectionable paragraphs are simply in response or rebuttal to assertions of Mr. Hue. They say that witnesses can speak to what they directly observe and their observations, for example, as to the adequacy of the parking at Mr. Hue's property after additions to the property is admissible lay opinion.

[14] In relation to hearsay, the McDonalds say that Mr. McDonald is not attempting to speak for anyone other than he and his wife who is the co-applicant. They say that Ms. McDonald states in her own affidavit that she agrees with Mr. McDonald's statements. They say both of them can be asked about veracity on cross-examination. In relation to other statements they say they are not offered for the truth of their contents but simply the fact that a telephone call was made and what Mr. McDonald took from it. In relation to statements attributed to Ms. McDonald by Mr. McDonald in his evidence, they say she has approved the contents of Mr. McDonald's affidavit and can be asked about these conversations on cross-examination, as she is one of the parties.

[15] In relation to Ms. McDonald's affidavit, the McDonalds' position is that it is not oath helping but simply states that her evidence is the same evidence as that presented by Mr. McDonald.

[16] Attached to this decision as Appendix "A" is a chart setting out, in an abbreviated format, Mr. Hue's objections and the McDonalds' responses.

The Law

[17] *Civil Procedure Rule* 39 addresses the contents of affidavits. It states:

> **39.01 Scope of Rule 39**
>
> A party may make and use an affidavit, and a judge may strike an affidavit, in accordance with this Rule.
>
> **39.02 Affidavit is to provide evidence**
>
> (1) A party may only file an affidavit that contains evidence admissible under the rules of evidence, these Rules, or legislation.
>
> (2) An affidavit that includes hearsay permitted under these Rules, a rule of evidence, or legislation must identify the source of the information and swear to, or affirm, the witness' belief in the truth of the information.
>
> . . .
>
> **39.04 Striking part or all of affidavit**
>
> (1) A judge may strike an affidavit containing information that is not admissible evidence, or evidence that is not appropriate to the affidavit.
>
> (2) A judge must strike a part of an affidavit containing either of the following:
>
> > (a) information that is not admissible, such as an irrelevant statement or a submission or plea;
> >
> > (b) information that may be admissible but for which the grounds of admission have not been provided in the affidavit, such as hearsay admissible on a motion but not supported by evidence of the source and belief in the truth of the information.
>
> (3) If the parts of the affidavit to be struck cannot readily be separated from the rest, or if striking the parts leaves the rest difficult to understand, the judge may strike the whole affidavit.
>
> (4) A judge who orders that the whole of an affidavit be struck may direct the prothonotary to remove the affidavit from the court file and maintain it, for the record, in a sealed envelope kept separate from the file.
>
> (5) A judge who strikes parts, or the whole, of an affidavit must consider ordering the party who filed the affidavit to indemnify another party for the expense of the motion to strike and any adjournment caused by it.

[18] Rule 5.20 of the *Civil Procedure Rules* provides as follows:

> **Rules of evidence on an application**
>
> 5.20 The rules of evidence, including the rules about hearsay, apply on the hearing of an application and to affidavits filed for the hearing except a judge may, in an *ex parte* application, accept hearsay presented by affidavit prepared in accordance with Rule 39 - Affidavit.

[19] *Waverley (Village Commissioners) v. Nova Scotia (Minister of Municipal Affairs)*, 1993 NSSC 71, remains the leading authority on proper affidavit evidence. It has been applied consistently by this court in motions to strike portions of affidavits and has been affirmed by our Court of Appeal. Justice Davison set out various principles regarding affidavit evidence at pp. 11-12:

> It would [be] helpful to segregate principles which are apparent from consideration of the foregoing authorities and I would enumerate these principles as follows:
>
> 1. Affidavits should be confined to facts. There is no place in affidavits for speculation or inadmissible material. An affidavit should not take on the flavour of a plea or a summation.
>
> 2. The facts should be, for the most part, based on the personal knowledge of the affiant with the exception being an affidavit used in an application. Affidavits should stipulate at the outset that the affiant has personal knowledge of the matters deposed to except where stated to be based on information and belief.
>
> 3. Affidavits used in applications may refer to facts based on information and belief but the source of the information should be referred to in the affidavit. It is insufficient to say simply that "I am advised."
>
> 4. The information as to the source must be sufficient to permit the court to conclude that the information comes from a sound source and preferably the original source.
>
> 5. The affidavit must state that the affiant believes the information received from the source.

[20] As an aside, I agree with the comments of Justice Keith in *Colbourne Chrysler Dodge Ram Limited v. MacDonald*, 2023 NSSC 309, that receipt of an affidavit from an opposing party is not an invitation to identify microscopically every potential evidentiary issue regardless of significance:

> 4 The Jacobs Affidavit and Gillis Affidavit clearly contain inadmissible evidence. However, the Defendants' response was also problematic. Receiving an affidavit from an opposing party is neither an open-ended invitation to identify every possible evidentiary issue regardless of significance; nor is it a call to arms, requiring an instinctive attack on every aspect of the opposing party's affidavits. Litigants must maintain perspective and bring a reasonable degree

> of judgment to bear, having regard to the promise in Civil Procedure Rule 1.01 for "the just, speedy and inexpensive determination of every proceeding."

[21] I would add that just as Justice Davidson in *Waverley, supra* warned that great care should be exercised in drafting affidavits, so too must counsel carefully exercise their judgment on behalf of their clients, when objecting to the admissibility of affidavit evidence. A failure to take care in either circumstance could result in a cost award and, depending on the circumstances, potentially a significant cost award.

[22] In my decision in *Thornridge Holdings Limited v. Ryan*, 2023 NSSC 11, at paragraphs 19 through 35, I set out the law in relation to many of the admissibility issues raised in this preliminary motion including relevance, hearsay, submissions or legal argument, and speculation. I reiterate my prior comments below.

Relevance

[23] Before evidence can be said to be relevant, it must be probative of a fact in issue. The Supreme Court of Canada in *R. v. White*, 2011 SCC 13, said the following regarding relevance:

> [36] ...In order for evidence to satisfy the standard of relevance, it must have "some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than that proposition would be in the absence of that evidence". …

[24] In addition, in *R. v. Arp* [1998], 3 S.C.R. 339, the court indicated that:

> [38] ... To be logically relevant, an item of evidence does not have to firmly establish, on any standard, the truth or falsity of a fact in issue. The evidence must simply tend to "increase or diminish the probability of the existence of a fact in issue". ...

[25] David Paciocco, Palma Paciocco, and Lee Stuesser in *The Law of Evidence*, Eighth Edition (Toronto: Irwin Law Inc., 2020), discuss the concept of "materiality" at pp. 33-34:

> Regardless of the kind of proceeding, courts or tribunals resolving issues of fact are being asked to settle particular controversies. They are not interested in information about matters other than those that need to be settled. Evidence that is not directed at a matter in issue is inadmissible because it is "immaterial". By contrast, "evidence is material if it is directed at a matter in issue in the case."

[26] They also explain the relationship between materiality and relevance at pp. 35-36:

> The concept of materiality describes the relationship between evidence and the matters in issue; logical "relevance" is about the relationship between evidence and the fact it is offered to prove. There is no legal test for identifying relevant evidence. Relevance is a matter of logic, based on inferences drawn from everyday experience and common sense. If it is not clear what a party is seeking to prove, they should be called upon to explain their theory of relevance. Then logic and human experience should be applied to judge whether the evidence supports the inference that the party seeks to have drawn. To continue with the robbery example, evidence that the alleged robber had downloaded a map of the area where a bank that was robbed was located would be relevant in linking the accused to the robbery. Evidence that the accused had downloaded movies about bank robbers would not be relevant because it is not specific enough to support a logical inference that the accused is the robber.

[27] The evidence must have some tendency to advance a material inquiry. It is a modest standard and evidence will be received if it meets the standard unless its probative value is outweighed by the prejudice it may cause if admitted. In this case, the issue on the Application in Court is whether the court should grant the relief sought by the McDonalds. As such, affidavits filed in support of each party's position must be relevant to the claims advanced.

[28] When assessing relevance, I must keep in mind the main issues for determination at the hearing on the merits. They are whether Mr. Hue's use of the Right-of-Way is consistent with the uses provided for in the Grant of Right-of-Way and whether Mr. Hue has expanded the scope of the easement through "natural evolution" or whether the Hue property benefits from a prescriptive easement. The McDonalds also claim Mr. Hue is overburdening the right-of-way. There are various associated issues raised by the parties in their briefs but these are the main issues based on the pleadings.

[29] With regard to interpretation of the wording of the grant of right-of-way, I refer to my comments in *Freeman v. Ponhook Lodge*, 2023 NSSC 255 at paragraphs 124 to 130 and expressly the following:

> 125. Express grants contained in a deed are subject to the principles of contractual interpretation outlined by the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53 (*Duncanson v. Webster*, 2015 NSCA 29; *Purdy v. Bishop*, 2017 NSCA 84; *Penney v. Langille*, 2018 NSCA 43; and *Muir v. Day*, 2023 NSCA 21). In *Sattva*, the court noted that the overriding concern in contractual interpretation is to determine the objective intent of the parties and the scope of their understanding. The court emphasized that consideration of the surrounding circumstances is essential to the search for intent:

> [47] Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, per LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, per Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning …
>
> [48] The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300, at para. 15, per Hamilton J.A.; see also Hall, at p. 22; and McCamus, at pp. 749-50). As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.):
>
> > The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]
>
> [Emphasis added]

126. The Supreme Court of Canada confirmed in *Corner Brook (City) v. Bailey*, 2021 SCC 29, that *Sattva* "explicitly directs decision-makers to consider the meaning of the words in the surrounding circumstances when interpreting any contract" (para. 28). In *The Law of Contracts*, 8th ed. (Toronto: Thomson Reuters, 2022), at ¶334, S.M. Waddams notes that this approach "elevates the 'factual matrix' to a central place in contractual interpretation."

127. While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words chosen by the parties. There are also limits to the evidence that can be properly considered under the rubric of "surrounding circumstances." The Supreme Court of Canada explained in *Sattva*:

> [57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are

> relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. BC Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62 (B.C. C.A.)).
>
> [58] The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.
>
> [Emphasis added]
>
> 128. As the surrounding circumstances consist only of objective evidence of the background facts known to both parties at the time of the deed's execution, evidence of the parties' subjective wishes, motives or intent is inadmissible (*Knock v. Fouillard*, 2007 NSCA 27, at para. 27).

[30] The requirements for a prescriptive easement necessarily mean the court will examine the evidence presented in relation to the historical use made of the property over the period in question. I need not set out the law on prescriptive easements here but note the law is summarized in various cases including *Balser v Wiles*, 2013 NSSC 278; *Goulden v. Nova Scotia (Attorney General)*, 2013 NSSC 253; *Urban Farm Museum Society of Spryfield v Auby*, 2021 NSSC 136.

[31] I note the above to provide context for my determinations regarding the objections to admissibility based on relevance. The evidence submitted must be relevant to the claims advanced.

[32] As *The Law of Evidence*, *supra* notes, it is inevitable that when narrating a story, witnesses will include minutiae that do not meet the tests of relevance and materiality. While I have allowed some evidence as narrative, I am satisfied that I can instruct myself on the proper and improper use of such narrative evidence.

Hearsay

[33] In *King v. Gary Shaw Alter Ego Trust*, 2020 NSSC 288**,** which involved a motion to strike portions of an affidavit, Justice Norton said the following regarding hearsay evidence:

[12] Hearsay is one of the most common objections made to the introduction of evidence. It has been defined by the Supreme Court of Canada as follows:

> Written or oral statements, or communicative conduct mad [*sic*] by persons otherwise than in testimony at the proceeding in which it is offered, are inadmissible, if such statements or conduct are tendered as proof of their truth or as proof of assertions implicit therein. [*R. v. Bradshaw*, 2017 SCC 35, at para. 1 and 20]

[13] *Sopinka* says:

> The usual hearsay circumstance covered by the rule is where the witness testifies as to what someone else, who is not before the court, said. However, the modern interpretation of hearsay also encompasses prior out-of-court statements made by the very witness who is testifying in court when such earlier statements of the witness are tendered to prove the truth of their contents. [*Supra*, at p. 249]

[14] The defining features of the rule are that the purpose of adducing the evidence is to prove the truth of its contents and the absence of the contemporaneous opportunity to cross-examine the declarant. It is the inability to test the reliability of the evidence by cross-examination of the declarant that makes the admission of such evidence unfair and inadmissible. The rule recognizes the difficulty of the trier of fact assessing the probative value, if any, to be given to a statement made by a person who has not been seen or heard and who has not been subject to cross-examination. [*R. v. Khelawon*, [2006] 2 S.C.R. 787]

[34] Justice LeBlanc in *Canadian National Railway Company v. Halifax (Regional Municipality)*, 2012 NSSC 300, said the following in relation to assessing hearsay objections:

> [6] The "essential defining features" of hearsay are ... "(1) the fact that the statement is adduced to prove the truth of its contents and (2) the absence of a contemporaneous opportunity to cross-examine the declarant." (*Khelawon* at para. 35) It must be emphasized that it is "only when the evidence is tendered to prove the truth of its contents that the need to test its reliability arises." (*Khelawon* at para. 36) Further, Charron J. said for the court in *Khelawon*, (paras. 37-38) that while an out-of-court statement by a witness who testifies will be hearsay if adduced for the truth of its contents:
>
> > When the witness repeats or adopts an earlier out-of-court statement, in court, under oath or solemn affirmation, of course no hearsay issue arises. The statement itself is not evidence, the testimony is the evidence and it can be tested in the usual way by observing the witness and subjecting him or her to cross-examination. The hearsay issue does arise, however, when the witness does not repeat or adopt the information contained in the out-of-court statement and the statement itself is tendered for the truth of its contents. ...
>
> [7] Charron, J. went on to discuss the challenges of recognizing hearsay, at paras. 56-58:
>
> > The first matter to determine before embarking on a hearsay admissibility inquiry, of course, is whether the proposed evidence is hearsay. This may seem to be a rather

> obvious matter, but it is an important first step. Misguided objections to the admissibility of an out-of-court statement based on a misunderstanding of what constitutes hearsay are not uncommon. As discussed earlier, not all out-of-court statements will constitute hearsay. Recall the defining features of hearsay. An out-of-court statement will be hearsay when: (1) it is adduced to prove the truth of its contents and (2) there is no opportunity for a contemporaneous cross-examination of the declarant.
>
> Putting one's mind to the defining features of hearsay at the outset serves to better focus the admissibility inquiry. As we have seen, the first identifying feature of hearsay calls for an inquiry into the purpose for which it is adduced. Only when the evidence is being tendered for its truth will it constitute hearsay. The fact that the out-of-court statement is adduced for its *truth* should be considered in the context of the issues in the case so that the court may better assess the potential impact of introducing the evidence in its hearsay form.

[8] Second, by putting one's mind, at the outset, to the second defining feature of hearsay — the absence of an opportunity for contemporaneous cross-examination of the declarant, the admissibility inquiry is immediately focussed on the dangers of admitting hearsay evidence. Iacobucci, J. in *R. v. Starr*, [2000] 2 S.C.R. 144 identified the inability to test the evidence as the "central concern" underlying the hearsay rule. Lamer, C.J. in *U. (F.J.)* expressed the same view but put it more directly by stating: "Hearsay is inadmissible as evidence because its reliability cannot be tested" (para. 22).

[35] The Nova Scotia Court of Appeal in *McKinnon Estate v. Cadegan*, 2021 NSCA 79, discussed the governing framework for hearsay:

> [33] The development of the principled approach did not displace the traditional categories for hearsay exceptions. In fact, when evidence falls within an established common law exception, it will only be excluded in rare cases. The Supreme Court explained this in *Khelawon*:
>
> > 42 It has long been recognized that a rigid application of the exclusionary rule would result in the unwarranted loss of much valuable evidence. The hearsay statement, because of the way in which it came about, may be inherently reliable, or there may be sufficient means of testing it despite its hearsay form. Hence, a number of common law exceptions were gradually created. A rigid application of these exceptions, in turn, proved problematic leading to the needless exclusion of evidence in some cases, or its unwarranted admission in others. Wigmore urged greater flexibility in the application of the rule based on the two guiding principles that underlie the traditional common law exceptions: necessity and reliability (*Wigmore on Evidence* (2nd ed. 1923), vol. III, _ 1420, at p. 153). This Court first accepted this approach in *Khan* and later recognized its primacy in *Starr*. The governing framework, based on *Starr*, was recently summarized in *R. v. Mapara*, [2005] 1 S.C.R. 358, 2005 SCC 23, at para. 15:

(a) Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place.

(b) A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance.

(c) In "rare cases", evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.

(d) If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a *voir dire*.

[36] When an out-of-court statement is offered simply as proof that the statement was made, it is not considered to be hearsay. Such evidence is admissible as long as it has some probative value. In this circumstance, the person indicating that the statement was made is available for cross-examination. The question is one of relevancy. Does the statement have a purpose aside from the truth of its contents? If yes, it may be admissible for that limited purpose. The trier of fact must be cautious concerning the limited relevancy of the statement – its relevance lies in the fact that it was made, not in the fact that its contents are true.

[37] The law with respect to documentary hearsay was set out by Justice Rosinski in *Gibson v. Party Unknown*, 2014 NSSC 220, at para. 25:

> 25 I recognize that under the rules of evidence, hearsay may also come from documentation. Such documentation may be admissible as an exception to the hearsay rule, if it meets the test for the *Ares v. Venner*, [1970] S.C.R. 608, criteria (the common law exception) or under s. 23 of the *Evidence Act* RSNS 1989 c. 154, records made in the usual and ordinary course of business; or if it can be characterized as "necessary" and "reliable: -- *R. v. Khelawon* [2006] 2 SCR 787; and its probative value significantly outweighs its prejudicial effect on the fair trial process.

Submissions

[38] As stated by the Court of Appeal in *Canadian National Railway v. Teamsters Canada Rail Conference*, 2017 NSSC 10, “Submissions do not constitute evidence” (para 49). In *Canadian Imperial Bank of Commerce v. CNH Capital Ltd*., 2013 NSCA 35, the Court of Appeal commented on the prohibition against statements in the nature of a plea or submission:

> [81] *First:* CNH Capital Canada says that the statements are a "submission" or "plea" which must be excluded under *Civil Procedure Rule* 39.04(2):

> 39.04 (2) A judge must strike a part of an affidavit containing either of the following:
>
> > (a) information that is not admissible, such as an irrelevant statement or a submission or plea;
>
> CNH Capital Canada submits that Rule 39.04(2) codifies Justice Davison's statement in *Waverley (Village) v. Nova Scotia (Acting Minister of Municipal Affairs)* (1993), 123 N.S.R. (2d) 46 (N.S. S.C.):
>
> > [20] It would be helpful to segregate principles which are apparent from consideration of the foregoing authorities and I would enumerate these principles as follows:
> >
> > 1. Affidavits should be confined to facts. There is no place in affidavits for speculation or inadmissible material. An affidavit should not take on the flavour of a plea a summation.
>
> [82] I agree with Justice Davison's statement from *Waverley*. But I disagree that the challenged statements in the affidavits of Messrs. Bayne and Tucci are a "submission" or "plea". <u>What is objectionable under Rule 39.04(2)(a) is a conclusory statement that embodies or assumes a point of law. Whether, how, and the degree to which Ford Credit's identity was important to the Bank are questions of fact, as I have explained earlier (para 63).</u>
>
> [Emphasis added]

[39] It is important to note that a witness can describe an event they have experienced. In addition, as noted in *Armoyan v. Armoyan*, 2013 NSCA 99, solely because a word has a potential legal meaning or use does not automatically mean that an affiant who uses the word does so for a legal purpose (paras. 146 – 147).

Speculation, Inference and Lay Opinion

[40] Cases are to be decided on facts, not guess-work. Speculation as to what the facts might be, what another person had in their mind, what could happen, etc., has little, if any, probative value. Justice Chipman in *Mi'kmaw Family and Children's Services v. Sipekne'katik,* 2022 NSSC 313 discussed the law in relation to the difference between speculation and an inference:

> [19] There is a difference between an inference, which is supported by objective facts, and speculation, which although it may be plausible, amounts to a mere guess. As noted by Justice Oland in *Kern v. Steele*, 2003 NSCA 147:
>
> > 98 Two of the leading cases on the difference between inference and speculation or conjecture are *Jones v. Great Western Railway Co.* (1930), 47 T.L.R. 39 (H.L.) and

> in *Caswell v. Powell Duffryn Associated Collieries, Limited*, [1940] A.C. 152. In the former, Lord Macmillan stated at p. 45:
>
> > The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof.
>
> In the latter, Lord Wright stated at p. 169-170:
>
> > Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.
>
> *Jones, supra* and *Caswell, supra* are often cited in the case law. See for example *R. v. German* (1979), 33 N.S.R. (2d) 565 (C.A.), *Parlee v. McFarlane* (1999), 210 N.B.R. (2d) 284 (C.A.) and *Lee v. Jacobson* (1994), 53 B.C.A.C. 75 (C.A.).

[41] As the Supreme Court of Canada said in *R. v. D(D)*, [2000] S.C.R. 275 at para 49 "A basic tenet of our law is that the usual witness may not give opinion evidence, but testify only to facts within his knowledge, observation and experience." However, witnesses can give estimates or approximations of distance, time, etc.

[42] The NSCA in *R. v. Kotio*, 2021 NSCA 76 provided an overview of the legal principles respecting factual and opinion evidence:

> 48 First, an overview of some legal principles respecting factual and opinion evidence is helpful:
>
> > 1. As a general rule, a witness may only testify to facts within their personal knowledge, observation or experience (see Sidney N. Lederman *et al*, Sopinka, *Lederman & Bryant on The Law of Evidence in Canada*, 5th ed. (Toronto: LexisNexis Canada Inc., 2018), at p. 815). However, lay opinion and expert opinion evidence are exceptions to this rule (see David M. Paciocco *et al*, *The Law of Evidence*, 8 th ed. (Toronto, Irwin Law, 2020) at p. 234).
> >
> > 2. Opinion refers to any inferences from observed facts. However, for characterization purposes, it is recognized that the distinction between opinion and facts is often difficult to draw (see Graat v. R., [1982] 2 S.C.R. 819 at p. 835).

> 3. A properly qualified expert may provide opinion evidence to assist the trier of fact where their technical expertise is required to assist in drawing inferences (see R. v. Abbey, [1982] 2 S.C.R. 24 at p. 42). It is also generally accepted that an expert may also offer lay opinion evidence in the course of their testimony: Paciocco *et al*, at p. 237.
>
> 4. Non-experts may give lay opinion evidence or draw inferences from facts where their evidence consists of a "compendious statement of facts that are too subtle and too complicated to be narrated separately and distinctly," so long as particular expertise or special qualifications are not required to draw the inference (*Graat* at p. 841). For example, also in *Graat*, the Supreme Court of Canada set this non-exhaustive list: the identification of handwriting, persons and things; apparent age; the bodily plight or condition of a person, including death and illness; the emotional state of a person — e.g. whether distressed, angry, aggressive, affectionate or depressed; the condition of things — e.g. worn, shabby, used or new; certain questions of value; and estimates of speed and distance (at p. 835).
>
> 5. It is important to recognize that when the evidence approaches the central issues a judge must decide, "one can still expect an insistence that the witnesses stick to the primary facts and refrain from giving their inferences. It is always a matter of degree. As the testimony shades towards a legal conclusion, resistance to admissibility develops" (see *Sopinka, Lederman & Bryant on The Law of Evidence* p. 820).
>
> [Emphasis added]

[43] I note that *The Law of Evidence*, *supra* summarizes the law governing lay opinion evidence at page 239 as:

> Lay witnesses may present their relevant observations in the form of opinions where
> - they are in a better position than the trier of fact to form the conclusion;
> - the conclusion is one that persons of ordinary experience are able to make;
> - the witness, although not expert, has the experiential capacity to make the conclusion; and
> - the opinions being expressed are merely a compendious mode of stating facts that are too subtle or complicated to be narrated as effectively without resort to conclusions.

[44] In short, as was said by the Supreme Court of Canada in *Graat, supra* the key is whether the lay witness was merely giving a compendious statement of facts that are too subtle and too complicated to be narrated separately and distinctly. Whether the evidence is ultimately accepted is another matter. The weight to be given to such evidence, if any, is entirely a matter for determination by the hearing judge. I have admitted some passages of lay opinion based on the concept of compendious statements of fact where the affiant had the experiential capacity to make the

conclusion. I am satisfied that I can properly instruct myself on the use of the admitted lay opinion evidence.

[45] I note that the McDonalds in their submission submit that on several occasions Mr. Hue in his affidavit offered lay opinion so, therefore, Mr. McDonald can also do so. The McDonalds have not filed a notice of objection regarding any of the affidavit evidence filed on behalf of Mr. Hue, so I fail to see the rationale of this position. Inadmissible evidence is not rendered less inadmissible simply because similar evidence is contained in an affidavit of an opposing party. The court will always, as gatekeeper, determine what, if any, weight the various evidence before the court is ultimately given.

Ms. McDonald's affidavit

[46] Mr. Hue argues the affidavit is simply oath helping. The McDonalds say "Ms. McDonald is not swearing only that "Mr. McDonald tells the truth" but that she agrees, in her own capacity, with the assertions made by Mr. McDonald in his affidavit." They say she is a co-resident of the property and has observed what Mr. McDonald has. They say that she is stating that her evidence is the same evidence as that presented by Mr. McDonald.

[47] The affidavit of Ms. McDonald simply states "I have reviewed Michael McDonald's affidavit and agree with its contents." Interestingly prior to this paragraph the affidavit contains the usual introductory paragraphs:

> I have personal knowledge of the evidence sworn to <u>in this affidavit</u> except where otherwise stated to be based on information and belief.
>
> I state, <u>in this affidavit, the source of any information</u> that is not based on my own personal knowledge, and I state my belief of the source.
>
> [Emphasis added]

[48] Clearly Ms. McDonald has not provided any evidence in her affidavit. Mr. McDonald in his affidavit speaks of various subjects including the history of ownership of the Hue property and of the McDonalds' property; his family's history with the property including back to the 1950s; the background to the grant of a right-of-way in 1991 concerning his uncle's property; use of the property historically; use of the property after Mr. Hue took title etc. A witness' evidence is to be confined exclusively to facts within his or her own knowledge. Ms. McDonald does not give any evidence of what is within her knowledge. I have no information as to whether

Ms. McDonald has personal knowledge of the facts set out in Mr. MacDonald's affidavit, nor do I know if she personally observed or had any of the same experiences relayed in the evidence. In short, Ms. McDonald's affidavit provides no assistance whatsoever to the court. An affidavit must record facts to which the witness directly testifies. Ms. McDonald has made no attempt to give her own account of the evidence but merely attempts to adopt another person's account of the evidence.

[49] In addition, Ms. McDonald by simply agreeing with Mr. McDonald's evidence attempts to relay to the court, the evidence of what another person has said, which is hearsay (see for example paragraphs 23, 42, 46, etc. of Mr. McDonald's affidavit).

[50] In short, Ms. McDonald's affidavit does not indicate which evidence (which paragraphs) within Mr. McDonald's affidavit are based on her own personal knowledge, what is based on information and belief etc. The affidavit does not assist the court because I cannot determine what is or is not reliable based on Ms. McDonald simply saying she agrees with the contents of Mr. McDonald's affidavit. The affidavit does not comply with our *Civil Procedure Rules* and must be struck.

[51] In certain circumstances, where witnesses have provided their own account of the evidence in an affidavit and where, for example, certain evidence is not controversial, I see no difficulty with a witness referring to and adopting as their own evidence certain passages of another individual's affidavit by specifically referencing the paragraphs, stating they have personal knowledge of the facts contained in those paragraphs etc. However, that is not the situation here.

[52] It is with the above various legal principles in mind that I made my findings regarding the admissibility objections of Mr. Hue. It is important to note that there are two stages in which evidence is evaluated. We are at the initial stage, being the admissibility stage, where evidence is evaluated for its compliance with the rules of admissibility. Even when evidence passes the threshold of admissibility, that is not the end of the exercise. At the hearing on the merits, the trier of fact makes the ultimate decision in the case by weighing the evidence and applying its finding to the relevant rules of substantive law. The standards to be met before evidence is ruled admissible should not be confused with the ultimate standard of proof before facts are found in the ultimate case. Evidence that is admitted is sometimes given little or no weight at the merits hearing or trial. The strength of the evidence and the ultimate use to which it is put is a question of fact, not to be resolved at this initial admissibility stage. In this written motion, I am dealing solely with the first stage --

the admissibility of certain evidence contained in the affidavits of Mr. McDonald, Ms. McDonald and Ms. Hilchie filed on the Application in Court.

[53] As to the merits of the admissibility objections raised by Mr. Hue, in the attached Appendix "A", I have reviewed each of the statements objected to and have made rulings on each as to admissibility.

Conclusion

[54] In summary, I find that the written motion to strike portions of the affidavits filed on behalf of the McDonalds is allowed in part. Appendix "A" to this decision contains a chart setting out Mr. Hue's objections, the McDonalds' submissions on the various objections, and my ruling on each of the objections.

[55] I ask that counsel for Mr. Hue prepare the Order which shall include a direction that counsel for the McDonalds prepare a copy of the affidavits with the various passages I have ordered struck, either removed or struck-through. Any revised affidavits are to be filed with the court by January 29, 2024.

[56] Mr. Hue is entitled to costs. Costs will be dealt with after the hearing on the merits.

Jamieson, J.

APPENDIX "A"

1. AFFIDAVIT OF MICHAEL MCDONALD, SWORN ON MARCH 31, 2021			
Paragraph	**Grounds of Objection**	**Response of the McDonalds**	**Ruling**
27 - "No permission was ever given to the tenants to park vehicles, extra vehicles, trailers or other items on Pheasant Lane."	This paragraph contains speculation and the affiant purports to speak for other individuals by making the blanket statement "No permission was ever given."	Paragraph is the culmination of several paragraphs relaying history of usage of the right of way. Mr. McDonald has knowledge about his family's use and treatment of the property.	Admissible Speaking of his own personal knowledge and understanding.
35 - "At first, the tenants were respectful of the property boundaries and parked all vehicles within the limits of Mr. Hue's Property."	This paragraph contains opinion regarding Mr. McDonald's characterization of actions and his opinion on the property boundary.	This is Mr. McDonald's own observation of the tenants' use of the property.	Admissible Speaks to Mr. McDonald's knowledge and understanding of the property boundaries and historical use.
39 - "<u>This was further exacerbated by</u> the addition of the stone patio and stairs and an increase in the number of cars Mr. Hue allowed his	This paragraph contains opinion, argument and speculation. Whether something was	Mr. McDonald is describing his experience and belief the renovations made the situation worse.	Admissible lay opinion

tenants to park on the right of way."	"exacerbated" is not a fact but an inference that should be made by a trier of fact.		
40 - "Any encroachment onto our property by way of parking, fixtures, or chattels did not start until 2016."	This paragraph contains legal argument on one of the ultimate issues to determined, and inadmissible opinion.	This is Mr. McDonald's observation. The witness is not using word encroachment for legal purpose.	Admissible – describing the date the issues arose. The word "encroachment" is not being used for a legal purpose/ relaying own understanding.
47 - "Michael Kennedy then sent a formal letter to Mr. Hue and the owner of Lot 3, John Crosby, advising that their tenants are not permitted to park in the right of way or place garbage containers on the Right of Way."	This paragraph contains inadmissible hearsay.	This is a fact within Mr. McDonald's knowledge. Mr. McDonald is available for cross examination.	Struck -Hearsay and no exhibit attached
48 - "We have never acquiesced. "	The affiant is attempting to speak for others in this paragraph.	Mr. McDonald is referring to himself & Ms.	Admissible Can speak for himself but change "we" to "I".[1]

[1] Mr. McDonald has, on several occasions, described conversations using "we". I have assumed this refers to he and Ms. McDonald and have noted the evidence is admissible with a change from "we" to "I". For example, paragraphs 48 and 8(g).

		McDonald co-applicant.	

2. AFFIDAVIT OF DIANN MCDONALD, SWORN ON MARCH 31, 2021			
Paragraph	**Grounds of Objection**	**Response of the McDonalds**	**Ruling**
4 - "I have reviewed Michael McDonald's Affidavit and agree with its contents."	This paragraph is "oath-helping." It is adduced solely for the purpose of proving that the evidence of Michael McDonald is truthful. It is therefore inadmissible.	She is not swearing only that Mr. McDonald tells the truth but that she agrees in her own capacity the with the assertions in his affidavit.	Struck in its entirety

3. REPLY AFFIDAVIT OF MICHAEL MCDONALD, SWORN ON JUNE 30, 2021			
Paragraph	**Grounds of Objection**	**Response of the McDonalds**	**Ruling**
5(a) - "This put his property frontage on Rocky Lake Drive, therefore he could have had driveway access from Rocky Lake Drive which there is room for. Permission to access his property over our land is a	This paragraph contains speculation, opinion, argument, and irrelevant material.	This paragraph responds to Mr. Hue's assertion that the only access to his property is via the right of way	Struck -- From the words "therefore, he could have had driveway …" to the end of this paragraph. Argument and opinion.

privilege which he is misusing."			
5(c) - "At Paragraph 19, Mr. Hue repeats his statement that the Right of Way is the only access to and from his property and adds that there is no direct access to his property from Rocky Lake Road. Building his own driveway off Rocky Lake Drive would provide him with the direct access to his property from Rocky Lake Drive and would eliminate the need for the Right of Way"	This paragraph is irrelevant, contains speculation, and opinion.	This is a response to an assertion of Mr. Hue. The response is an inference drawn from objective facts.	Struck – The sentence beginning with "Building his own driveway" is struck. (Argument) Remainder (exhibit) admissible (It is unsafe at this stage to declare irrelevant).
5(g) - "Exhibit "B" of this reply Affidavit shows there is not enough room to park three cars side by side as stated in Paragraph 28 of Mr. Hue's Affidavit. The renovations he references include	This paragraph contains argument and opinion.	This is a response to paragraph 28 of Mr. Hue's affidavit. If Mr. Hue is permitted to opine as to the number of cars so is Mr. McDonald. Both are lay opinion.	Admissible lay opinion

an extension to the house, a stone patio and walkways, this created less space for parking, not more."			
5(h) - "At Paragraph 29 of Mr. Hue's Affidavit, he provides Exhibit "9" — photographs taken on November 4, 2019 and September 19, 2019 of his truck parked in a parking spot that he refers to as a "typical parking spot for 36 Pheasant Lane". Exhibit 9 shows Mr. Hue's truck parked on the Right of Way, not a parking spot as he states, and he did not have permission to park there which is clearly outlined in the letter provided to him from our lawyer, Michael Kennedy, dated October 24, 2019."	This paragraph contains argument and opinion.	Mr. McDonald is offering rebuttal evidence to illustrate truck is parked on right of way not on Mr. Hue's property.	First portion admissible – speaks to his understanding. Strike portion of sentence stating: "which is clearly outlined in the letter provided to him from our lawyer Michael Kennedy, dated Oct 24, 2019". (argument and hearsay) No exhibit.

5(i) – "At Paragraph 30, Exhibit 10, Mr. Hue provides photographs taken on September 21, 2019 of the vehicles parked in the "typical parking spots for vehicles parked at 38 and 42 Pheasant Lane". This exhibit shows Mr. Hue's tenants parking on the Right of Way. Mr. Hue and the tenants had full knowledge that parking on the Right of Way was not permitted.	This paragraph contains argument, opinion, and speculation.	Paragraph provides rebuttal evidence as to the parking situation in that photos illustrate tenants are parking on right of way. It is reasonable to assume tenants with whom he spoke multiple times understood what he was saying.	Admissible – reply to Mr. Hue's affidavit/ is speaking to his understanding of the right-of-way and that he provided the information relayed to Mr. Hue and the tenants. [2]
5(j) - '"At paragraph 31, Mr. Hue states that the photograph provided in Exhibit 11 taken on November 9, 2019 is a "typical parking spot for vehicles parked at 42 and 44 Pheasant Lane".	This paragraph contains argument, opinion, and speculation.	This paragraph is offered as rebuttal to Respondent's assertion that his photograph represents a "typical" parking situation.	Strike – Inadmissible hearsay and argument -Speaks to a discussion between Mr. Hue & his tenant. Strike only the portion of the sentence beginning "who was aware that she should …"and to the end of that sentence.

[2] While the wording in Mr. McDonald's reply affidavit should have been more carefully considered, there are certain paragraphs where I have assumed they were intended to indicate that Mr. McDonald himself provided the referenced notice to the tenants (for example paragraphs 5(i) and 6(b)). I make this assumption because the reply affidavit is in response to the affidavits filed on behalf of Mr. Hue, which speak to such notice being given by Mr. McDonald (i.e. para. 70).

Exhibit 11 shows a red car and red SUV parked on the Right of Way. The red car is a visitor of the tenant and the owner of the red SUV is a tenant who was aware that she should be parked on the other side of the compost bins as directed from her landlord but has chosen not to follow the property boundaries. Attached hereto as Exhibit 'C" are photographs taken by me on June 28 and 29, 2021 showing the proper parking of the tenants at 42 & 44 Pheasant Lane."			Remainder is evidence within the knowledge of the affiant.
5(k) - "At Paragraph 32, Exhibit 12, Mr. Hue provides a series of photographs taken between September 19, 2019 and November 8, 2019, photographs	This paragraph contains argument and opinion.	Provides comment on photographs provided by Mr. Hue. Mr. Hue says this is a typical scenario since 1976, whereas Mr. McDonald says the parking is without permission.	Admissible Mr. McDonald can indicate that he did not give permission to these vehicles to park where the photos show them to be. Mr. Hue describing the area as

provided under this Exhibit are of vehicles parked on the Right of Way without permission to do so."			the right of way is simply his narrative based on his understanding.
5(n) - "Mr. Hue does not own any side of the Right of Way. Mr. Hue has permission to enter and exit his property over ours as stated in the Easement Agreement which is attached hereto as Exhibit "D".	This paragraph contains argument and opinion.	Paragraph provides Mr. McDonald's recollection of the incident raised by Mr. Hue in his affidavit.	Admissible - His understanding of the Easement Agreement that is attached.
5(o) - "Mr. Hue's tenants have impeded our Right of Way on several occasions...."	This paragraph contains argument and opinion.	This paragraph relays Mr. McDonald's experience in response to statements made by Mr. Hue.	Admissible – speaks to his knowledge and understanding.
5(q) - "Tim Rand, the Contractor Mr. Hue's is referring to, contacted us to inform us that Mr. Hue was looking to work on our driveway. Mr. Rand would not proceed with a quote until we were made aware of this	The underlined portion of this paragraph contains inadmissible hearsay. The double underlined portion of this paragraph contains evidence purporting to speak for others beyond the affiant's personal knowledge.	Mr. McDonald is reporting on his experience of the conversation. It is not offered for truth of its contents.	Sentence beginning "Tim Rand the Contractor…" is admissible hearsay - Not offered for truth of its content. Additional sentence "Mr. Rand would not proceed…" is struck.

and had permission from us."			
5(s) - "… threatened us with involving the police, lawyers, and recovery of costs."	This paragraph contains scandalous material, argument, and opinion.	This is fair rebuttal evidence. The letter is attached as an exhibit. He is not using the word threat in a legal or criminal sense.	Struck – The sentence beginning with "The wording of Mr. Hue's letter …"Argument. Remainder admissible.
5(t) - "We fail to understand how we have used 'our land' incorrectly."	This paragraph is irrelevant and contains argument.	This paragraph is relevant and responds to allegations of misuse of the right of way / narrative content.	Struck - Sentences #2, 4 and 5 of Para 5(t) Argument / Remainder admissible
5(t) - "We are entitled to use this piece of our property in any fashion as we would like as long as access to their property is not impeded. Mr. Hue is misusing the Right of Way by impeding his own tenant's parking with the addition to his home and encroachments."	This paragraph contains argument and opinion.	This paragraph is relevant and responds to allegations of misuse of the right of way / narrative content.	Struck - Sentences #2, 4 and 5 of Para 5(t) Argument / Remainder admissible.
5(cc) - "Mr. Hue admitting that we spoke about the	This paragraph contains argument and opinion.	Concedes paragraph should be struck.	N/A

burning leaves on our property clearly shows that he has been spoke to before the August 2019 Notice about the issues pertaining to his personal use of the Right of Way.”			
6(b) - "The owner of the black Honda, Jeffery Parsons, was well aware of the boundaries."	This paragraph contains argument, speculation, and the affiant is attempting to speak for others.	Response to Mr. Long’s statements based on observation and experience.	Admissible – This is a reply affidavit to Mr. Hue’s affidavit. That affidavit refers to Mr. McDonald repeatedly speaking with tenants. Speaks to his understanding not what he was told.
6(c) - "...my wife did have conversations with Mr. Long's wife about planting flowers on the hill within the Right of Way. Mrs. Long was informed that this area was not on Mr. Hue's property and she was shown the property boundaries."	This paragraph contains inadmissible hearsay for which the affiant has no foundation or personal knowledge.	Approved by Ms. McDonald in her affidavit.	Struck -inadmissible hearsay (cannot speak to conversations his wife had with another person)
8(a) – “She was aware of the boundaries as on	This paragraph contains inadmissible hearsay,	Approved by Ms. McDonald in her affidavit.	Struck -inadmissible hearsay

multiple occasions she told my wife that she had informed the new tenants that they were not permitted to park beyond Mr. Crosby's boundaries."	speculation, and the affiant is attempting to speak for others.		(cannot speak to what his wife was told)
8(b) - "This tenant has always respected the property boundaries and parked as close to the home as possible."	This paragraph contains argument and opinion.	Asserts Mr. McDonald's belief as to the location of the boundary line.	Admissible Mr. McDonald's understanding.
8(g) - "We directly asked Ms. Parsons if she had any difficulty accessing her home during these evenings and she always stated she had no difficulty."	This paragraph contains inadmissible hearsay.	Applicants can testify to the fact they had this conversation.	Admissible Not hearsay as Ms. Parson's has sworn an affidavit / available for cross examination (Assumption "we" includes Mr. McDonald therefore "we" should be changed to "I".
8(h) – "Ms. Parsons' partner Garnet himself attended some of these once a month learning sessions."	This paragraph is irrelevant.	Responds to affidavits of Ms. Parson's and Mr. Hue. Demonstrates knowledge of events.	Struck - irrelevant

4. AFFIDAVIT OF DIANE HILCHIE SWORN JUNE 30, 2021			
Paragraph	**Grounds of Objection**	**Response of the McDonalds**	**Ruling**
6 - "There was an understanding amongst the residents at that time that the Right of Way over Pheasant Lane was for the purpose of entering and exiting your property. No one at that time had any issues with the purpose and use of the Right of Way."	The affiant is attempting to speak for others beyond her personal knowledge.	Ms. Hilchie directly observed the parking practices at her residence and her neighbour's residence. Her observations as to the adequacy of the parking is admissible lay opinion. The size and availability of parking between 1993 and today is something she can best assess. As former resident has direct knowledge of use of right of way. It is simply her understanding. Not offered for truth of contents.	Admissible Speaks to her understanding not what she was told.
7 - "When I owned our former property, each property located on Pheasant Lane had enough space for parking on their own property and	This paragraph contains opinion and speculation.	Ms. Hilchie directly observed the parking practices at her residence and her neighbour's. Her observations are admissible lay opinion.	Admissible lay opinion and speaks to her knowledge and understanding. Strike only the words "and there was no need for parking on the Right of Way."

there was no need for parking on the Right of Way."			
8 - “I have seen photographs taken by Michael McDonald that show the Property at present day which has changed a lot since 1993. These photographs show additions added to the property by the current owner, Mr. Scott Hues and from the photographs I can see that those additions created less space for parking then the original parking space I witnessed while a resident of Pheasant Lane. Attached hereto as Exhibit "A" are the photographs provided to me by Michael McDonald."	This paragraph contains opinion and speculation.	Ms. Hilchie directly observed the parking practices at her residence and her neighbour’s. Her observations are admissible lay opinion.	Admissible lay opinion