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Faculty Editor
Saskatchewan Law Review
College of Law
University of Saskatchewan
15 Campus Drive
Saskatoon, Saskatchewan S7N 5A6

Phone: (306) 966-5909
Email: sask.lawreview@usask.ca
Website: sasklawreview.ca

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The Judgments for the Court of Appeal for Saskatchewan, 2023

Michelle Biddulph* & William Lane**

* B.A. (Saskatchewan); J.D. (Saskatchewan); Law Clerk, Court of Appeal for Saskatchewan, 2014-15; Law Clerk, Supreme Court of Canada, 2015-16; Associate Lawyer, Greenspan Humphrey Makepeace LLP (Toronto).

** B.A. (Saskatchewan); J.D. (Saskatchewan); LL.M. (Chicago); Law Clerk, Court of Appeal for Saskatchewan, 2014-15; Partner, McDougall Gauley LLP (Regina).

I. Introduction

This is the fourth installment in our annual review of the decisions of the Court of Appeal for Saskatchewan. The Court's output in 2023 was again extensive, with 136 total decisions published. In order to keep this article within a manageable length, we have again chosen to highlight one or two decisions released by the Court in 2023 in each of the main categories of cases—for example, sentencing, criminal evidence, substantive civil law, civil procedure, and other categories. We have, however, maintained a comprehensive catalogue of decisions released on particular issues, as indicated in the footnotes throughout this article.

The only major change to the Court's composition in 2023 was the retirement of Chief Justice Richards, effective August 31, 2023.[1] Justice Leurer (as he then was) was elevated to the position of Chief Justice in October of 2023. However, his seat on the bench was not filled until the appointment of Justice Bardai in April of 2024.[2] There were, therefore, no additions to the Court of Appeal in 2023.

1 Courts of Saskatchewan, "Chief Justice to Step Down" (17 March 2023), online: <sasklawcourts.ca/chief_justice_to_step_down> [perma.cc/KU3H-ZUEQ].

2 Department of Justice Canada, News Release, "Minister of Justice and Attorney General of Canada Announces Judicial Appointments in the Province of Saskatchewan", Department of Justice (22 April 2024), online: <www.canada.ca/en/department-justice/news/2024/04/minister-of-justice-and-attorney-general-of-canada-announces-judicial-appointments-in-the-province-of-saskatchewan.html> .

II. Criminal Law

A. Substantive Criminal Law

The Court's decisions on matters of substantive criminal law in 2023 dealt with a number of common issues, such as the reasonableness of a verdict;[3] misapprehensions of evidence;[4] assessments of witness credibility;[5] sufficiency of reasons;[6] and statutory interpretation.[7] The Court also considered several less common issues,[8] such as the use of the trial management power in controlling re-examination of a witness;[9] the question of whether a trial judge's interference in the conduct of a trial renders the trial unfair;[10] and the adequacy of jury instructions on the issue of constructive first degree murder.[11]

The decision in *R v Ratt*[12] raised an interesting question of statutory interpretation in the context of the offence of intentional discharge of a firearm. The accused in that case was inside of a one-story house and fired a shotgun into the ceiling.[13] He was charged with an offence under s. 244.2(1)(a) of the *Criminal Code*, which requires the Crown to prove that he intentionally discharged a firearm "into or at a place, knowing that or being reckless as to whether another person is present in that

3 *R v Singharath*, 2023 SKCA 6 (defence appeal of the reasonableness of the verdict on second degree murder dismissed); *R v Taylor*, 2023 SKCA 49 (defence appeal of the reasonableness of the verdict on several possession offences dismissed; also raised an issue of potential inconsistent verdicts which was dismissed); *R v Charles*, 2023 SKCA 118 (defence appeal on the assessment of circumstantial evidence on the issue of identity dismissed); *R v JG*, 2023 SKCA 92 (defence appeal allowed based on trial judge's failure to assess the impact of evidence of an eyewitness that directly contradicted the evidence of the complainant in a sexual assault case).

4 *R v Dorie*, 2023 SKCA 7 (new trial ordered after the trial judge misapprehended evidence in a sexual assault case).

5 *R v Merasty*, 2023 SKCA 32 (defence appeal relating to assessments of credibility in a sexual assault case dismissed); *R v Purcell*, 2023 SKCA 56 (defence appeal relating to assessments of credibility in a sexual assault case dismissed); *R v Thompson*, 2023 SKCA 66 (defence appeal allowed where the trial judge used the accused's interest in avoiding conviction as a basis to discount his credibility); *R v Cook*, 2023 SKCA 117 (defence appeal relating to credibility and reliability of Crown witnesses, and errors in drawing inferences about the cause of death in a first degree murder trial dismissed).

6 *R v RP*, 2023 SKCA 65 (allegation of insufficient reasons in a defence appeal against conviction for sexual offences against children; appeal dismissed).

7 *R v Androsoff*, 2023 SKCA 42 [*Androsoff*] (Crown appeal allowed on the issue of whether assault causing bodily harm is an included offence to aggravated assault); *R v Envirogun Ltd*, 2023 SKCA 51 [*Envirogun*] (statutory interpretation issue as to whether a regulatory provision created a strict liability or full *mens rea* offence).

8 See e.g. *R v Patron*, 2023 SKCA 34 (dealing with assorted issues relating to jurisdiction in a trial for wilful promotion of hatred, such as whether the death of the Queen caused a loss of jurisdiction; appeal dismissed).

9 *R v JA*, 2023 SKCA 119 at paras 24–31 (holding that the trial judge's refusal to permit the Crown to re-examine a witness on a particular point is an exercise of the trial management power that is entitled to deference).

10 *R v John*, 2023 SKCA 116 at para 4 (allowing a defence appeal based on the trial judge's interference in the conduct of the trial which undermined defence strategy and rendered the trial unfair).

11 *R v Barre*, 2023 SKCA 129 (defence appeal allowed based on inadequate instruction on the element of forcible confinement in a charge of constructive first degree murder under s. 231(5)(e) of the *Criminal Code* (RSC 1985, c C-46 [*Criminal Code*]). The case also includes an interesting discussion at paras 55–58 as to the circumstances in which a trial judge is required to modify model jury instructions in order to respond to the live issues in a case).

12 2023 SKCA 2 [*Ratt*].

13 *Ibid* at paras 4–5.

place."[14] The accused was acquitted at trial and the Crown appealed against his acquittal.[15] The issue turned on whether the *actus reus* of the offence under s. 244.2(1)(a) required proof that the firearm was discharged from one physical place into or at another physical place, or whether discharge of a firearm *within* a single physical place was sufficient.[16] As there was little jurisprudence on the issue, Leurer J.A. (as he then was) conducted a statutory interpretation analysis of the provision. He began with a plain wording interpretation[17] and then considered the purpose of the provision in light of its broader statutory context.[18] He rejected the Crown's interpretation on the basis that it would capture benign conduct that Parliament did not intend to criminalize, such as the firing of a gun at a shooting range.[19] Finally, he turned to the parliamentary record to confirm that his interpretation aligned with Parliament's intent in enacting the provision.[20] Having concluded that it did, he held that s. 244.2(1)(a) requires the Crown to prove that a firearm was discharged from one physical place into or at another.[21]

We have chosen to highlight the decision in *Ratt* not because there is anything particularly important about the *actus reus* of the offence under s. 244.2(1)(a) of the *Criminal Code*, but rather, because it is an excellent illustration of the proper approach to statutory interpretation in the context of an offence-creating provision. In a tight forty paragraphs, Leurer J.A. ably demonstrated how the modern approach to statutory interpretation[22] is reconciled with the traditional approach to strict construction of penal statutes.[23] His reasoning should be a model for any court tasked with conducting a *de novo* interpretation of an offence-creating provision.

R v Legresley,[24] *R v Murillo*,[25] *R v Owston*,[26] and *R v Demong*[27] all raised issues relating to the *mens rea* of sexual assault and the thorny question of consent. *Legresley* was a Crown appeal dealing specifically with the *mens rea* of the offence, while *Murillo*, *Owston*, and *Demong* were all defence appeals that together establish a very interesting approach to the assessment of circumstantial evidence on the issues of consent and capacity in sexual assault cases.

14 *Criminal Code*, *supra* note 11, s 244.2(1)(a).

15 *Ratt*, *supra* note 12 at para 7.

16 *Ibid* at para 13.

17 *Ibid* at paras 20–29.

18 *Ibid* at paras 30–35.

19 *Ibid* at paras 32–35.

20 *Ibid* at paras 36–38.

21 *Ibid* at para 41.

22 *Rizzo & Rizzo Shoes Ltd (Re)*, 1998 CanLII 837 at para 21 (SCC) [*Rizzo*].

23 See *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 28.

24 2023 SKCA 71 [*Legresley*].

25 2023 SKCA 78 [*Murillo*].

26 2023 SKCA 101 [*Owston*].

27 2023 SKCA 109 [*Demong*].

In *Legresley*, the trial judge found that the complainant did not consent to the sexual contact at issue. Instead, the accused had an honest but mistaken belief in consent.[28] The trial judge found the complainant subjectively did not consent, but that her reactions to the accused's sexual advances were "permissive" insofar as she cooperated in the removal of her clothing and seemed to be a willing participant.[29] Richards C.J.S., writing for the Court, allowed the Crown's appeal on the basis that the trial judge erred by failing to consider the issue of recklessness.[30] On the accused's own evidence, the complainant had said no to a particular sexual act, and the accused moved on to another sexual act without clarifying with the complainant that she was consenting to the second sexual act.[31] He held that such conduct amounts to recklessness as to the question of consent, which is sufficient to satisfy the *mens rea* of the offence.[32] However, instead of convicting the accused, a new trial was ordered, as the trial judge had not made findings to reconcile the differing versions of events given by the complainant and accused.[33]

A difficult and unsettled issue in the context of sexual assault relates to the *mens rea* of the offence and the overlap between recklessness as an element of the offence and statutory limits on the defence of honest but mistaken belief in consent. This issue arises out of the Supreme Court of Canada's decision in *R v Morrison*,[34] where the Court held that disproval of the defence of honest but mistaken belief is not enough to ground a conviction; the Crown must still prove the substantive *mens rea* of the offence.[35] Appellate courts have split as to whether this proposition extends to other sexual offences, or whether it is confined to the peculiar context of the offence of child luring (which was at issue in *Morrison*).[36] To understand this confusion, one must understand how the defence of honest but mistaken belief in consent operates: the accused bears the onus of establishing an air of reality to the defence; then the onus shifts to the Crown to disprove the defence beyond a reasonable doubt.[37]

If the Crown successfully disproves the defence beyond a reasonable doubt (for example, by proving that the accused took most, but not all, reasonable steps to obtain consent), has the Crown thereby proven that the accused was reckless as to the element of consent? While one might think the answer to this question is obviously yes, it is not so simple: the "all reasonable steps" inquiry is measured on a partly objective standard,[38] while recklessness is measured on a subjective standard.[39] In other

28 *Legresley*, *supra* note 24 at paras 20–21.

29 *Ibid* at para 21.

30 *Ibid* at paras 30–32.

31 *Ibid* at para 32.

32 *Ibid* at para 35.

33 *Ibid* at paras 41–42.

34 2019 SCC 15 [*Morrison*].

35 *Ibid* at para 90.

36 See e.g. *R v Carbone*, 2020 ONCA 394 (applying *Morrison* to all sexual offences); *R v Angel*, 2019 BCCA 449 (confining *Morrison* to the offence of child luring).

37 *R v Barton*, 2019 SCC 33 at paras 121–23.

38 *Ibid* at para 104. The partly objective standard is sometimes described as subjective-objective because it requires an objective assessment of reasonableness based on things subjectively known to the accused at the time (See *Morrison*, *supra* note 34 at para 105).

39 *Sansregret v The Queen*, 1985 CanLII 79 at para 16 (SCC).

words, a person may *subjectively* believe they took all steps to obtain consent, yet measured on an objective standard, their efforts failed. This does not necessarily mean that the person was reckless as to the absence of consent, as recklessness implies a subjective awareness of risk and a decision to proceed in the face of that risk.[40] If a person truly subjectively believed they had taken steps to obtain the consent of a sexual partner and did obtain that consent, how can that person necessarily be found to be reckless because they did not take all objectively reasonable steps?

This is the issue that appellate courts are struggling with, and it is, unfortunately, an issue to which *Legresley* only contributes confusion. This confusion arises out of Richards C.J.S.'s failure to reconcile the trial judge's findings on the defence of honest but mistaken belief in consent with recklessness, as it is not clear whether he was holding that the trial judge erred in finding that the accused took all reasonable steps to ascertain consent and was thereby reckless, or whether he held that the accused's recklessness can arise *regardless* of an honest but mistaken belief in consent. While one would assume that his holding was the former, unfortunately *Legresley* does little to clarify this unsettled area of the law.

Murillo, *Owston*, and *Demong* collectively address the question of whether the *R v Villaroman*[41] approach to the assessment of circumstantial evidence applies to the issue of consent in a sexual assault case. In *Villaroman*, the Supreme Court of Canada directed that in cases where proof of one or more essential elements of the offence "depends exclusively or largely on circumstantial evidence,"[42] the trier of fact should be instructed to convict the accused only if an inference of guilt is the only reasonable inference arising from the evidence as a whole.

Each of these three cases dealt with a different aspect of consent in sexual assault cases: *Murillo* dealt with the question of how evidence ought to be assessed as a whole where the complainant provides direct evidence as to their non-consent;[43] *Owston* dealt with the question of how capacity to consent ought to be assessed where the complainant has no memory of the sexual activity;[44] and *Demong* dealt with the question of how actual consent ought to be assessed where a complainant, while having capacity, is unable to remember the sexual activity due to intoxication.[45]

In each of these three cases, the Court of Appeal held that a trial judge must consider all reasonable inferences inconsistent with guilt before entering a conviction for sexual assault. In *Murillo*, Justice Barrington-Foote held that even though *Villaroman* does not necessarily apply where there is direct evidence of non-consent from the complainant, "the trier of fact must *consider* other plausible theories [inconsistent with guilt], whether they arise from the evidence of the accused or otherwise."[46] This reasoning, while seemingly trite in the context of circumstantial evidence, is novel in the context of a credibility case. Typically, in a case turning on credibility, there is direct evidence of most elements

40 *Ibid*.

41 2016 SCC 33 [*Villaroman*].

42 *Ibid* at para 30.

43 *Murillo*, *supra* note 25 at paras 7–16.

44 *Owston*, *supra* note 26 at paras 15–23.

45 *Demong*, *supra* note 27 at para 2.

46 *Murillo*, *supra* note 25 at para 26 [emphasis in original].

of the offence; the question is whether that direct evidence ought to be believed. Because credibility cases are often non-circumstantial evidence cases, the *Villaroman* approach has rarely been applied to them. However, the fact that this is a somewhat novel approach is not necessarily a bad thing. While it remains to be seen whether lower courts will pick up on this aspect of *Murillo*, Barrington-Foote J.A.'s approach to how inferences inconsistent with guilt must be assessed on the evidence as a whole in a credibility case has the potential to significantly clarify and even revolutionize the third stage of the *R v W(D)*[47] analysis; something which has confounded juries and attracted judicial criticism for decades.[48]

If the reliance on *Villaroman* in *Murillo* was arguably *obiter dicta*, it took center stage in the decisions in *Owston* and *Demong*. In *Owston*, the complainant testified that she had no memory of the sexual activity due to her intoxication, but that there was "no scenario" in which she would have had sex with the accused or anyone else without a condom.[49] On the question of capacity, the Court held that the trial judge was required to consider all reasonable possibilities inconsistent with guilt before concluding the only reasonable inference that can be drawn from the evidence as a whole is that the complainant lacked the capacity to consent.[50]

Similarly, in *Demong*, the complainant had no memory of having sex with the accused other than a brief fragmented flash, but testified that she would not have consented to having sex with the accused because he was pursuing a sexual relationship with her mother.[51] However, there was no issue as to lack of capacity.[52] The Court allowed the appeal from conviction, holding that the trial judge failed to assess all inferences inconsistent with guilt on the evidence as a whole. The complainant's evidence that she would not have consented to sex with the accused had to be assessed in light of the evidence of her intoxication and the drug's impact on her decision-making, judgment, and ability to assess risk.[53] As there was no evidence of what had occurred during the period when the complainant had no memory, there was a possibility that she did consent and a possibility that she did not consent; both possibilities had to be considered and assessed logically in light of the evidence as a whole.[54] Because the trial judge did not do so, and instead dismissed the possibility of consent as "speculative," the Court of Appeal allowed the appeal and ordered a new trial.[55]

47 1991 CanLII 93 (SCC).

48 See e.g. *R v Ryon*, 2019 ABCA 36 at paras 35–54.

49 *Owston*, *supra* note 26 at paras 41–43.

50 *Ibid* at para 51.

51 *Demong*, *supra* note 27 at para 13.

52 *Ibid* at para 3.

53 *Ibid* at paras 21–24.

54 *Ibid* at paras 27–28.

55 *Ibid* at para 26.

B. Criminal Procedure

The Court's jurisprudence on matters of criminal procedure in 2023 included various decisions on leave to appeal against summary conviction decisions;[56] extensions of time to file a notice of appeal;[57] applications to appoint defence counsel;[58] allegations of ineffective assistance of counsel;[59] and miscellaneous other procedural matters.[60]

The decision in *R v Yates*[61] raised an interesting and important issue regarding the circumstances in which it is permissible for a court to disqualify an accused's counsel of choice prior to trial where the accused repudiates a plea agreement. Shortly before a preliminary hearing on a charge of second degree murder was set to begin, counsel for the Crown and defence announced the preliminary hearing could be vacated because the parties had reached a resolution.[62] Both accused indicated they would plead guilty to the lesser offence of manslaughter, and sentencing would proceed by way of joint submission.[63] An information was laid charging both of the accused with manslaughter, and both were arraigned and entered guilty pleas. The Crown then withdrew the information that charged both accused with second degree murder.[64] The matter was adjourned for several days to allow for the preparation of an agreed statement of facts and other miscellaneous material.[65] At the next appearance, counsel for Mr. Yates, indicated that the defendant was resiling from the joint submission, but that he was not applying to expunge his guilty plea to the charge of manslaughter.[66] The matter was adjourned for submissions on whether counsel could ethically continue to act for Mr. Yates.[67] The Provincial Court of Saskatchewan suggested that counsel had acted unethically and queried whether the Court should, of its own motion, direct that counsel be discharged.[68] Further submissions were held, and ultimately the Court directed counsel to withdraw and for Mr. Yates to retain a new lawyer from a firm that

56 *R v Zheleznikov*, 2023 SKCA 15, (leave to appeal refused); *R v Dela Cruz*, 2023 SKCA 36, (leave to appeal refused); *R v Stonechild*, 2023 SKCA 130, (leave to appeal refused).

57 *R v Sweet*, 2023 SKCA 50.

58 *R v RD*, 2023 SKCA 111 (granting an order appointing counsel for the appellant).

59 *R v Brick*, 2023 SKCA 107 (defence appeal allowed based on ineffective assistance of counsel arising out of a failure to advise the accused on s. 34 of the *Criminal Code* and the availability of self defence).

60 *Envirogun*, *supra* note 7 (miscellaneous procedural issues arising out of the Court's order dismissing the substantive appeal); *R v Ali*, 2023 SKCA 46 (decision setting aside a release order pending trial on a first degree murder charge).

61 2023 SKCA 47 [*Yates*].

62 *Ibid* at para 2.

63 *Ibid*.

64 *Ibid* at para 7.

65 *Ibid* at paras 8–9.

66 *Ibid* at para 10.

67 *Ibid* at paras 11–13.

68 *Ibid* at para 13.

is independent from his former counsel.[69] The appeal centered on two questions: (1) whether the Court of Appeal had jurisdiction to hear the appeal from the decision to discharge counsel; and (2) whether the Provincial Court had erred in ordering that counsel be discharged.[70]

On the jurisdictional point, Justice Schwann, writing for the Court, held that the rule prohibiting interlocutory appeals in criminal matters applies to decisions to remove counsel, such that the proper time to appeal such rulings is after the trial has concluded.[71] There was, therefore, no issue with the accused's decision to raise this issue on a conviction appeal rather than on an application for *certiorari* prior to the commencement of trial.[72]

On the substantive point, Schwann J.A. emphasized the fundamental importance of the right to counsel of choice, and that it is not a right that can be interfered with lightly.[73] She held that the fundamental error committed by the trial judge was to assume that it was defence counsel who chose to resile from the joint submission, rather than recognizing that she was giving effect to her client's instructions to resile from that joint submission.[74] Schwann J.A. held that it is an error to view repudiation of a plea agreement as a breach of an undertaking by counsel, as this would be inconsistent with the permissible repudiation of plea agreements by Crown counsel as well as with counsel's professional obligations to their clients, who cannot be forced to accept plea agreements.[75] Further, Schwann J.A. held that counsel is not always required to withdraw for ethical reasons if a client repudiates a plea agreement, but noted that there may be difficulties with continued representation of the accused at trial depending on the admissions made by the client to counsel relating to the essential elements of the offence.[76] Here, these difficulties did not necessarily arise given that the plea was only tendered (but not accepted) before the issues arose.[77]

Having found an error in the decision to discharge the accused's counsel of choice, Schwann J.A. gave careful consideration to the issue of remedy. She held that while the accused was not required to demonstrate that he was actually prejudiced by the decision to remove his counsel of choice, the question of whether a new trial ought to be ordered turned on "whether there has been damage caused to the perception of trial fairness."[78] Schwann J.A. found no such perception on the facts of the case, as the denial of counsel of choice occurred two years before trial and the accused was ultimately convicted of manslaughter after trial.[79] She further held that even though the decision to remove

69 *Ibid* at para 16.

70 *Ibid* at para 30.

71 *Ibid* at para 45.

72 *Ibid* at para 51.

73 *Ibid* at paras 52–59.

74 *Ibid* at paras 64–66.

75 *Ibid* at paras 78–79. See also *R v Nixon*, 2011 SCC 34 at paras 44–49.

76 *Yates*, *supra* note 61 at paras 82–87.

77 *Ibid* at paras 98–109.

78 *Ibid* at para 140.

79 *Ibid*.

counsel was an error of law, the curative proviso applied given the unique circumstances of the case.[80] Finally, she held that the erroneous removal of counsel of choice did not give rise to a miscarriage of justice given that the accused had no complaints about how his new counsel represented him at trial.[81]

C. *Charter of Rights And Freedoms*

The Court's decisions under the *Charter of Rights and Freedoms*[82] involved factual appeals on matters of pre-trial delay;[83] the right to counsel;[84] grounds to make a breath demand;[85] racial profiling;[86] and s. 24(1) costs awards.[87]

Three of the Court's *Charter* decisions in 2023 were appealed to the Supreme Court of Canada, either as of right or with leave. First, *R v Sabiston*[88] was a split decision arising out of a search incident to an unlawful arrest. The accused was known to police in Regina as a gang member. Officers spotted him walking down an alley and noticed that he was shirtless but wearing a bulletproof vest that was similar to those worn by Regina police officers. He was arrested for possession of stolen property (being the bulletproof vest) and was searched incident to arrest.[89] A knife was found in his pocket, and he was re-arrested for carrying a concealed weapon. The accused then told the officer that he had a firearm in his backpack, and he was arrested a third time.[90] There were no reports that any bulletproof vests had been stolen from any police officer in Regina, and no evidence that the one worn by the accused was not legally obtained.[91] The trial judge found that the police had grounds to detain the accused but not to arrest him, and ultimately admitted the evidence under s. 24(2).[92]

Justice Drennan, writing for the majority, held that the trial judge erred in finding that the officers had grounds to detain the accused, given that the officers had leapt from their knowledge of the accused's gang affiliation to the conclusion that he was in possession of stolen property without considering

80 *Ibid* at para 146.

81 *Ibid* at paras 151–52. The conviction appeal was dismissed after concluding that the trial judge made no error in his application of s. 21(2) of the *Criminal Code* (*ibid* at para 168).

82 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

83 *R v Gardener*, 2023 SKCA 12 (stay of proceedings set aside based on misapprehension of factual record in a s. 11(b) *Charter* appeal).

84 *R v CL*, 2023 SKCA 58 (defence appeal allowed on a factual question of breach of the informational duty under s. 10(b)).

85 *R v Macfie*, 2023 SKCA 39 (Crown appeal allowed on factual question of whether officer had objectively reasonable grounds to make a breath demand).

86 *R v Ali*, 2023 SKCA 127 [*Ali*] (split but very fact-specific decision on whether police actions in effecting a traffic stop were motivated by racial profiling).

87 *R v Kamara*, 2023 SKCA 112 (Crown appeal of costs award under s. 24(1) allowed; costs set aside).

88 2023 SKCA 105 [*Sabiston*].

89 *Ibid* at paras 74–75 (per Justice Tholl in dissent, but with his recitation of the facts adopted by the majority (*ibid* at para 8).

90 *Ibid* at para 80.

91 *Ibid* at para 81.

92 *Ibid* at para 88.

the possibility that the vest was obtained legally.[93] She held that the trial judge erred in considering the inevitable discoverability of the firearm in the accused's backpack in the s. 24(2) analysis, given that the police did not have a reasonable suspicion that could justify an investigative detention or search incident to that detention.[94] She noted that while firearms offences are undoubtedly serious, "a firearm has no presumptively unique or transcendent status in the s. 24(2) analysis."[95] In her view, it was important that factors such as gang affiliation or the nature of the neighbourhood in which the accused was found, "do not operate in a stereotypical or discriminatory fashion"[96] that can displace the need for an individualized assessment of the totality of the circumstances. She allowed the appeal, excluded the evidence, and entered an acquittal.[97]

Justice Tholl disagreed. He saw no factual or legal errors in the trial judge's s. 24(2) analysis, accepting that even though police did not actually conduct a safety search pursuant to a lawful investigative detention, they had the grounds to do so.[98] He further held that the discoverability of the firearm attenuated the impact of the breach on the *Charter*-protected interests of the accused at the second stage of the analysis, since the firearm would have been discovered if police had proceeded to investigatively detain rather than arrest the accused.[99] He therefore would have dismissed the appeal.[100]

The Crown appealed as of right to the Supreme Court of Canada.[101] In brief oral reasons, a majority of the Court allowed the appeal for the reasons of Tholl J.A.[102] Justice Moreau dissented, as she was in substantial agreement with the majority of the Court of Appeal. She noted that given the lack of any clear nexus between the accused and the crime of possession of stolen property, there was no reasonable suspicion, and the majority of the Court of Appeal did not err in excluding the firearm.[103]

The decision in *R v Wilson*[104] raised an interesting issue regarding whether police are empowered to arrest an individual for an offence for which they cannot be charged. The appeal centered on s. 4.1(2) of the *Controlled Drugs and Substances Act*,[105] which states that an individual cannot be charged or convicted of an offence of simple possession if the evidence in support of that offence was obtained or discovered as a result of that person seeking emergency medical or law enforcement assistance for themselves or another person. The accused was part of a group who were using illicit substances.

93 *Ibid* at paras 38–40.

94 *Ibid* at para 47.

95 *Ibid* at para 63.

96 *Ibid* at para 65.

97 *Ibid* at paras 67–70.

98 *Ibid* at paras 110–12.

99 *Ibid* at paras 119–20.

100 *Ibid* at para 122.

101 The Crown's application for leave to appeal on the question of substantive *Charter* breaches was dismissed, meaning that the Supreme Court appeal dealt only with the s. 24(2) question. See Docket: *His Majesty the King v. Stuart Michael George Sabiston*, 40937 (SCC), online: <scc-csc.ca/cases-dossiers> [perma.cc/2AMH-B6ZH].

102 *R v Sabiston*, 2024 SCC 33.

103 *Ibid*.

104 2023 SKCA 106 [*Wilson*].

105 SC 1996, c 19, s 4.1(2) [*CDSA*].

A member of the group overdosed, and another member of the group called 911. The accused remained at the scene and when the police and paramedics arrived, an officer observed a bag which appeared to contain crystal meth near the side of the group's truck and detected an odour of marijuana from the truck.[106] The three individuals remaining at the scene, as well as the individual who had been revived from her overdose by paramedics, were all arrested for possession of a controlled substance.[107] The officers searched the truck incident to arrest, discovering various handguns, ammunition, scales, baggies, and other indicia of drug trafficking.[108] Mr. Wilson was ultimately charged with a number of firearms and other offences, though not with any offence relating to drug possession.[109]

The appeal turned on whether the initial arrest for drug possession was lawful, as it was this arrest which authorized the search of the vehicle and led to the ultimate discovery of the firearms and other evidence.[110] Leurer J.A. (as he then was), writing for the Court, held that even though s. 4.1(2) of the *CDSA* does not negate the criminal nature of drug possession, the fact that an individual cannot be charged with or prosecuted for that act where the conditions of s. 4.1(2) are met, means that police are not entitled to arrest an individual for that act. He noted that the only purpose of the first arrest was to charge Mr. Wilson with drug possession; an action prohibited by s. 4.1(2) of the *CDSA*.[111] He therefore found a breach of ss. 8 and 9 of the *Charter*.

With respect to the s. 24(2) *Charter* issue, Leurer J.A. held that the purpose of s. 4.1(2) of the *CDSA* is to "remove a barrier to medical help being given to a person experiencing an overdose," [112] and that the officers' actions in this case undermined that purpose. While it was not clear whether the arresting officers were even aware of s. 4.1(2), Leurer J.A. held that the state misconduct was "moderately serious."[113] He held that the impact of the breaches on the accused's *Charter*-protected interests was moderately intrusive, as it could not be concluded that the evidence would have been discovered without the *Charter* breaches.[114] Given the nature of the evidence discovered and the seriousness of the charges, Leurer J.A. held that society's interest in the adjudication of the case on its merits weighed heavily in favour of the admission of the evidence.[115] However, he held that the evidence must be excluded primarily because admitting it would undermine Parliament's objective in enacting s. 4.1(2).[116] He noted that the individual who overdosed was alive only because her companion called 911; something that may not necessarily happen in the future if individuals understand that evidence

106 *Wilson*, *supra* note 104 at paras 5–6.
107 *Ibid* at paras 6–10.
108 *Ibid* at para 11.
109 *Ibid* at para 13.
110 *Ibid* at para 45.
111 *Ibid* at paras 51–56.
112 *Ibid* at para 86.
113 *Ibid* at para 88.
114 *Ibid* at paras 91–93.
115 *Ibid* at paras 96–98.
116 *Ibid* at para 105.

found in violation of their immunity from arrest for simple possession will nevertheless be used against them.[117] Given the statutory purpose in enacting s. 4.1(2) and the serious risk to human life if the evidence is admitted, the Court held that the balance weighed in favour of excluding the evidence.[118]

The Crown has been granted leave to appeal to the Supreme Court of Canada, with a hearing scheduled for early 2025.[119] While it is, of course, for the Supreme Court to determine whether an individual may be arrested for an offence for which they cannot be charged or prosecuted, there is much to be commended in Leurer J.A.'s logic. Permitting police to arrest an individual who is immune from prosecution only to exercise search powers for the purpose of discovering evidence that can be used for an offence to which such immunity does not apply is an end-run around the protective purpose of s. 4.1(2) of the *CDSA*. It would authorize police to utilize the power of search incident to arrest for purposes not authorized by that common law search power since the scope of the search necessarily cannot be constrained by the reason for the arrest. The police cannot search for evidence in support of a charge of drug possession because such a charge cannot be laid; they must, therefore, necessarily be searching for evidence in support of some other hypothetical offence which they have no reasonable grounds to believe has been committed. This interpretation, if condoned, would constitute a vast expansion of police search powers, undermining Parliament's purpose in encouraging drug users to seek medical attention for overdoses. There is, therefore, much wisdom in Leurer J.A.'s approach.

The final *Charter* case from the 2023 term that found its way to the Supreme Court's docket is *R v Singer*,[120] a case dealing with the implied license to enter private property in order to investigate an impaired driving offence. Police in that case were investigating a tip of a potential impaired driver. Approximately one hour after commencing the investigation, they located a truck matching the description in the driveway of a private residence.[121] They knew the driveway was private property but approached the vehicle in order to investigate the complaint. An individual was found lying down in the driver's seat, asleep, and with a strong odour of alcohol.[122] They woke the individual, obtained a roadside breath sample and, after it registered a fail, arrested the accused for impaired driving and made a breath demand. He ultimately declined to provide a breath sample at the police detachment and was charged with refusal.[123] The accused was convicted.

The Court of Appeal allowed the appeal, holding that the police did not have an implied license to enter the accused's private property for the purpose of conducting a criminal investigation.[124] The fact that the accused was in his vehicle in the driveway rather than in the residence was irrelevant, as the implied license to knock does not permit the police to enter private property for the purpose

117 *Ibid* at paras 106–08.

118 *Ibid* at para 109.

119 See Docket: *His Majesty the King v. Paul Eric Wilson*, 40990 (SCC), online: <https://scc-csc.ca/cases-dossiers> [perma.cc/ZR9F-V8MV].

120 2023 SKCA 123.

121 *Ibid* at para 6.

122 *Ibid* at paras 6–7.

123 *Ibid* at paras 8–9.

124 *Ibid* at para 64.

of gathering evidence against the occupant.[125] While s. 8 of the *Charter* would not be triggered by the police merely walking up the driveway, it was the knocking on the car window and opening of the car door for the purpose of conducting a criminal investigation that intruded on the accused's reasonable expectation of privacy and thereby constituted a search.[126] The Court held that the evidence of the accused's refusal ought to be excluded under s. 24(2) of the *Charter* as the state misconduct was serious given the absence of any reasonable and probable grounds to believe that a crime had been committed,[127] and the seriousness of the impact on the accused's privacy interests.[128] The balance therefore tipped in favour of exclusion of the evidence.[129]

D. Evidence

The Court released only a few decisions on criminal evidence issues in 2023, including the necessity[130] and reliability[131] criteria for the admissibility of hearsay evidence. In *R v Schreiner*,[132] the Court addressed an interesting issue regarding the circumstances in which a trial judge can rely on statements made to a medical team under a court-ordered psychiatric assessment as inculpatory evidence where the defence of not criminally responsible on account of mental disorder ("NCRMD") is raised but not established.[133] The accused in that case was charged with second degree murder in relation to the death of his wife. He was subject to a court-ordered psychiatric assessment in order to assess his fitness to stand trial.[134] In the course of that assessment, he made various statements to the psychiatric assessment team that established a motive to kill his wife.[135] While the accused raised the defence of NCRMD at trial, the trial judge found that the Crown had disproved the defence beyond a reasonable doubt.[136]

The Court addressed a number of issues on appeal relating to the trial judge's reasons for judgment and procedures at trial.[137] However, the most legally interesting portion of Justice Caldwell's decision relates to the admissibility and use of statements made by an accused person as part of a court-ordered psychiatric assessment.[138] Caldwell J.A. held that the statements were protected statements

125 *Ibid*.

126 *Ibid* at para 67.

127 *Ibid* at paras 85–86.

128 *Ibid* at paras 91–92.

129 *Ibid* at para 98.

130 *R v Lachance*, 2023 SKCA 48.

131 *Androsoff*, *supra* note 7 (also addressing substantive questions relating to included offences).

132 2023 SKCA 121 [*Schreiner*].

133 *Ibid* at paras 2–5.

134 *Ibid* at paras 8–9.

135 Namely his belief that his wife was going to claim he was a pedophile in order to get sole custody of their children (*ibid* at para 9).

136 *Ibid* at paras 16–18.

137 *Ibid* at paras 22–69.

138 *Ibid* at paras 70–71.

for the purpose of s. 671.21(2) of the *Criminal Code*, which deems such statements to be inadmissible except for certain specified purposes, including for the defence of NCRMD.[139] In cases involving this defence, protected statements are admissible for the purpose of determining whether the accused was suffering from automatism or a mental disorder so as to be exempt from criminal responsibility.[140] Another exception is testimonial inconsistency, where the accused's testimony at trial is inconsistent in a material way with a protected statement previously made by the accused.[141]

Caldwell J.A. held that the accused's consent to undergo a court-ordered psychiatric assessment did not, on its own, amount to consent to the admissibility and use of protected statements at trial.[142] However, he held that because the accused had adduced many of the statements himself during his testimony and challenged the credibility of one of the psychiatrists, the accused had waived the protections of s. 672.21 with respect to those statements.[143] He held that the trial judge therefore did not err in using the protected statements for the truth of their contents for the purpose of establishing the *mens rea* of the offence of second degree murder.[144]

The issue confronted by the Court in *Schreiner* is of enormous importance to accused persons raising the defence of NCRMD. Section 672.21(3) is quite limited in the permissible use of protected statements and does not contemplate the admissibility of a protected statement for the truth of its contents on the substantive elements of the offence charged. Instead, s. 672.21(3)(e) only deems a protected statement to be admissible for the truth of its contents for the purpose of "determining whether the accused was, at the time of the commission of an alleged offence, suffering from automatism or a mental disorder so as to be exempt from criminal responsibility."[145] A plain language reading of this provision would imply that once the court determines that the accused is *not* exempt from criminal responsibility, any permissible use of the protected statements under this subparagraph is exhausted.

The issue therefore must turn on the meaning of "consent" for the purpose of s. 672.21(2), as a protected statement is generally inadmissible except with the consent of the accused. Caldwell J.A.'s reasons imply that consent can be inferred from the accused's tactical choices at trial; however, when examined critically, this conclusion is troubling. It is troubling because the accused will generally be adducing protected statements at trial for the sole purpose of advancing an NCRMD defence—as occurred in this very case.[146] Trials in which the NCRMD defence is raised are not bifurcated; the parties will lead their entire respective cases and the trier of fact will then determine, based on the evidence led at trial, whether the defence has been made out.[147] This process is necessary to follow

139 *Ibid* at paras 73–77.

140 *Ibid* at para 77.

141 *Ibid*.

142 *Ibid* at para 84.

143 *Ibid* at paras 85–86.

144 *Ibid* at paras 86–90.

145 *Criminal Code*, *supra* note 11, s 672.21(3)(e).

146 See the trial judge's reasons (*R v Schreiner*, 2021 SKQB 175 at para 120).

147 For a sample overview of the procedure where NCRMD is raised by the defence in a murder trial see *R v David*, 2002 CanLII 45049 at paras 3–5, 40–56 (ONCA).

because the defence of NCRMD only negates the *mens rea* of the offence; the trier of fact must be satisfied beyond a reasonable doubt that the accused committed the *actus reus* of the offence before it can consider the defence. This necessarily requires the Crown to lead its entire case and for the defence to respond.

The problem with Caldwell J.A.'s reasoning is that inferring consent to the admissibility of protected statements on the substantive elements of the offence from the mere adducing or reliance on them at trial places the accused in an untenable position. An accused seeking to raise the NCRMD defence will, generally, have made numerous statements to a psychiatrist about their mental state at the time of the incident; those statements are what the psychiatrist is using to determine whether they were suffering from automatism or a disease of the mind at the time of the incident. The implication of Caldwell J.A.'s reasoning is that an accused person raising an NCRMD defence must refrain from making any reference to the content of any protected statements when advancing the defence because such reference can be deemed as a tactical choice to waive the protections of s. 672.21 and the statements will be used as inculpatory evidence against the accused if the NCRMD defence fails. Such a broad interpretation of "consent" in s. 672.21 seems to render the protections of that provision almost entirely illusory, at least in circumstances where the accused testifies at trial.

E. Extradition

The Court heard only one extradition case in 2023, dealing with the Minister of Justice's (the "Minister") obligation to consider whether prosecution in the requesting state would be an abuse of process. In *Clarke v Canada (Attorney General)*,[148] the accused had been interviewed by police in the early 1980s in relation to claims of sexual abuse that allegedly occurred in the 1970s. The accused admitted to some of the sexual acts, but police declined to pursue charges based on the dated nature of the complaints.[149] In 2012, an inquiry into sexual abuse in institutions in Northern Ireland was commenced, with a report released in 2017. The accused was interviewed by the BBC following publication of the report, where he admitted to indecently assaulting teenage boys in his care in the 1970s.[150] In June of 2019, police decided to prosecute the accused for these alleged acts and sought his extradition from Canada.[151] The accused consented to committal, but submitted to the Minister that any surrender would be unduly oppressive or unjust because the prosecution in the U.K. was an abuse of process.[152] The Minister rejected these submissions and ordered the accused's surrender.[153]

Leurer J.A. (as he then was), writing for the Court, dismissed the application for judicial review. He held that the Minister correctly concluded that issue estoppel did not apply to the decision from

148 2023 SKCA 84 [*Clarke*].

149 *Ibid* at paras 8–12.

150 *Ibid* at para 13.

151 *Ibid* at para 15.

152 *Ibid* at paras 16–23.

153 *Ibid* at paras 24–25.

the 1980s not to prosecute the accused, as issue estoppel only applies to judicial determinations.[154] He further rejected the submission that the change in prosecutorial intention, whether alone or in combination with the delay in the initiation of charges, amounted to an abuse of process that would result in surrender being unduly oppressive or unjust.[155] While much of his analysis is framed as a response to the applicant's submissions in this respect, several aspects of Leurer J.A.'s legal reasoning on this point merit further attention. His reasons distinguish between abuse of process and a claim under s. 7 of the *Charter*, implying that an abuse of process is somehow different from a breach of s. 7.[156] This choice of framing is odd as Leurer J.A. relied on various s. 7 decisions in defining the content of abuse of process,[157] yet considered the applicant's s. 7 argument in a manner distinct from the abuse of process claim.

Leurer J.A.'s reasoning on the manner in which *Charter* arguments are considered under s. 44(1)(a) of the *Extradition Act*[158] seems to conflict with the Supreme Court's decision in *Canada (Justice) v Fischbacher*.[159] In *Fischbacher*, the Court held that *Charter* claims are relevant to the Minister's obligation to refuse surrender under s. 44(1)(a), as any surrender that is contrary to the principles of fundamental justice will also necessarily be unjust or oppressive within the meaning of that provision.[160] Yet, Leurer J.A. held in *Clarke* that the applicant had not made a distinguishable *Charter* argument *because* the applicant's submissions were focused on the alleged abuse of process, and that this somehow meant that no plausible *Charter* argument had been advanced outside of the applicant's submissions under s. 44(1)(a) of the *Extradition Act*.[161] However, this seems to miss the point: abuse of process is a limitation of the applicant's liberty and security of the person in a manner that is inconsistent with the principles of fundamental justice; and surrendering an individual in circumstances that are contrary to the principles of fundamental justice is necessarily unjust or oppressive for the purpose of s. 44(1)(a).[162] Leurer J.A.'s reasons seem to confuse the interaction between the *Charter* and the Minister's obligation to refuse surrender. This is likely a product of the manner in which he chose to structure his reasons (a virtual line-by-line refutation of the arguments made by the applicant in his factum instead of the sort of holistic legal analysis typically seen in appellate decisions) rather than any intent to depart from established Supreme Court jurisprudence, but it does raise the possibility for confusion in future extradition jurisprudence in Saskatchewan.

154 *Ibid* at paras 33–35.

155 *Ibid* at paras 56–78.

156 *Ibid* at paras 79–83.

157 *Ibid* at paras 57, 76.

158 SC 1999, c 18.

159 2009 SCC 46 [*Fischbacher*].

160 *Ibid* at para 39.

161 *Clarke*, *supra* note 148 at para 82.

162 *Fischbacher*, *supra* note 159 at para 39.

F. Sentencing

The Court heard relatively few sentencing appeals in 2023. These appeals dealt with many common issues, such as the question of future risk in dangerous offender proceedings;[163] the obligation to consider *Gladue* factors;[164] the weight to be given to aggravating and mitigating factors;[165] and issues relating to jurisdiction to reduce the length of a long-term supervision order.[166]

In *R v Jimmy*,[167] the Court split over whether a Crown sentence appeal alleging various errors in principle ought to be allowed. Justice Kalmakoff, writing for himself and Tholl J.A., held that the trial judge erred in assuming that the penitentiary was an inappropriate place for a relatively young offender convicted of aggravated assault.[168] He further held that the sentencing judge had erred in applying the "step principle," which requires incremental increases in sentences where an offender is "sentenced on subsequent occasions for offences of similar severity."[169] Kalmakoff J.A. held that the step principle (sometimes called the "jump principle") does not apply where the subsequent offence is more serious than the previous offences, as was the case here.[170] Kalmakoff J.A. held that the sentencing judge also erred in observing that *Gladue* principles rendered a penitentiary sentence inappropriate, as the sentencing judge did not explain how those principles led him to that conclusion.[171] This led Kalmakoff J.A. to conclude that the sentencing judge erred by treating *Gladue* principles as an "automatic sentencing discount"[172] for Indigenous offenders. The sentence for the offence of aggravated assault was increased from two years less a day to three years imprisonment.[173]

Justice Jackson dissented. She emphasized the need for appellate deference, especially where the trial judge heard the witnesses testify at trial and had a far better understanding of the context of the offences than the majority of the Court of Appeal.[174] She also noted that the impact of the Crown's submissions and, as a result, the majority's decision, would be to suggest that the principles

163 *R v Napope*, 2023 SKCA 1 (allowing Crown appeal of a dangerous offender sentence based on the standard of control of future risk; indeterminate sentence imposed); *R v Bird*, 2023 SKCA 40 (Crown appeal dealing with the extent to which the assessment of future risk in dangerous offender proceedings must be based on past conduct; appeal dismissed).

164 *R v Burnouf*, 2023 SKCA 21 (failure to consider *Gladue* factors in sentencing for breach of a long-term supervision order).

165 *R v Mosquito*, 2023 SKCA 29 (Crown sentence appeal based on weight given to aggravating and mitigating factors dismissed); *R v Merasty*, 2023 SKCA 33 (Crown sentence appeal allowed based on error in assessing mitigating factors and failure to give primary effect to denunciation and deterrence); *R v Tinker*, 2023 SKCA 54 (Crown sentence appeal dismissed based on the application of various sentencing principles).

166 *R v Parfitt*, 2023 SKCA 125 (holding that the Court does not have the authority to reduce the length of a long-term supervision order as compensation for an unfit custodial sentence that has already been served).

167 2023 SKCA 28 [*Jimmy*].

168 *Ibid* at paras 15–17.

169 *Ibid* at para 18.

170 *Ibid* at para 19.

171 *Ibid* at para 30.

172 *Ibid*.

173 *Ibid* at para 64.

174 *Ibid* at paras 75–78.

of denunciation and deterrence can only be served by penitentiary time.[175] Jackson J.A. held that denunciation and deterrence can be served by a period of custody combined with a probation order, as probation implies that the individual will be under state supervision with their liberty restricted for the entirety of the probation order.[176] To increase the sentence to one of penitentiary time would remove the ability to impose a probation order, undermining the "restorative importance" of probation in this case.[177]

While *Jimmy* seems, on its face, to be a simple disagreement over whether a particular sentence was fit for a particular offender, a deeper reading indicates a philosophical disagreement over the punitive effect of probation and whether a probation order can adequately serve the sentencing objectives of denunciation and deterrence. As Parliament continues to direct that denunciation and deterrence are primary sentencing objectives for a wide swath of offences,[178] any meaningfully restorative sentencing options are correspondingly reduced. Probation orders bridge the gap between punishment and rehabilitation. If probation orders can serve the sentencing objectives of denunciation and deterrence, they offer significant flexibility for sentencing judges in crafting fit sentences that serve all applicable sentencing objectives. If, however, probation orders are purely rehabilitative in nature, then the increasing prioritization of denunciation and deterrence as primary sentencing objectives will correspondingly reduce the number of cases in which a probation order can be appropriate. This philosophical enquiry into the punitive nature of probation orders in light of the sentencing objectives of denunciation and deterrence deserves further examination.

R v Lonechild[179] confronted the interrelationship between the risk of recidivism and a finding of intractable criminal behaviour in the dangerous offender analysis. The Crown argued on appeal that once a sentencing judge finds that an offender has committed a serious personal injury offence that is a part of a pattern of behaviour (as required by s. 753(1) of the *Criminal Code*) and that the offender poses a high likelihood of recidivism, the sentencing judge is obligated to declare that individual to be a dangerous offender.[180] In other words, the Crown took the position that it was not separately required to prove that the individual's pattern of behaviour was intractable before the individual could be designated as a dangerous offender.[181] Jackson J.A., writing for the Court, rejected this proposition. She held that a finding of a high likelihood of recidivism is not incompatible with a finding that the offender's behaviour is not intractable, as inherent in the definition of intractability is a conclusion that the offender is unable to surmount their pattern of criminal behaviour.[182] A sentencing

175 *Ibid* at para 90.

176 *Ibid* at paras 91–93.

177 *Ibid* at para 90.

178 See e.g. *Criminal Code*, *supra* note 11, ss 718.01–718.04, in addition to jurisprudential prioritization of denunciation and deterrence for many other criminal offences. See e.g. *R v Kaviok*, 2024 NUCA 13 at paras 31–40 where the Court held that a conditional sentence for a youth offender was not appropriate because it failed to give priority to denunciation and deterrence. See also *R v Friesen*, 2020 SCC 9 at paras 101–05 [*Friesen*].

179 2023 SKCA 75 [*Lonechild*].

180 *Ibid* at para 72.

181 *Ibid*.

182 *Ibid* at paras 82–84.

judge is therefore obligated to find both that the offender presents a high likelihood of recidivism *and* that the offender's criminal behaviour is intractable before the offender can be designated as a dangerous offender.[183]

Jackson J.A. also addressed the question of whether a sentencing judge can consider evidence of the manageability of the accused's risk at the designation stage, or whether such evidence is only relevant at the penalty stage of the analysis.[184] She endorsed the reasoning of the Court of Appeal for British Columbia in *R v TLP*[185] on this point, holding that if a court has found an offender's criminal behaviour to be intractable, it would be an error of law to consider whether the offender's risk could be managed in the community at the designation stage.[186] However, evidence of manageability is still of limited relevance at the designation stage, as it can inform whether the offender's criminal behaviour is truly intractable.[187] The Crown's appeal against the refusal to designate the offender as a dangerous offender was dismissed.

The final sentencing decision of note in 2023 is the split decision in *R v LA*[188] in relation to sentencing an offender for sexual offences against children. The case dealt with two important issues: (1) how a sentencing judge ought to treat pleas for leniency in a victim impact statement; and (2) whether sentencing an individual based on increases to the maximum sentence subsequent to the commission of the offence infringes s. 11(i) of the *Charter*.[189] On the first point, while two of the victims (the appellant's daughters) had provided victim impact statements to the Crown, the sentencing judge refused to read them into the record, make them exhibits, or permit the victims to speak.[190] The appellant filed affidavits from these victims as fresh evidence on appeal, where both victims indicated that they would have said positive things about their father if they were permitted to speak at the sentencing hearing and that they did not wish for their father to go to jail.[191] Jackson J.A., writing for the majority, held that the participatory right granted by s. 14 of the *Canadian Victims Bill of Rights*[192] is exercised in the sentencing process codified by s. 722 of the *Criminal Code*.[193] Section 722 does not permit a victim to influence the length of sentence by expressing views on whether the offender should be punished leniently or harshly.[194]

183 *Ibid* at para 96.

184 *Ibid* at paras 100–06.

185 2021 BCCA 36.

186 *Lonechild*, *supra* note 179 at para 106.

187 *Ibid* at paras 113–18.

188 2023 SKCA 136 [*LA*].

189 *Ibid* at paras 3–4. A number of other factual issues were raised regarding the applicable principles of sentencing and the length of the s. 161 order (*ibid* at paras 121–92).

190 *Ibid* at paras 42–46.

191 *Ibid* at paras 49–50.

192 SC 2015, c 13 s 2.

193 *LA*, *supra* note 188 at paras 63–64.

194 *Ibid* at para 69.

Jackson J.A. held that given the Supreme Court's decision in *Friesen* and Parliament's decision to prioritize denunciation and deterrence for sexual offences against children, a sentencing judge cannot give effect to any request from a child victim or that child's parents for a reduction of sentence on the basis that they suffered no significant harm from the offender's criminal acts.[195] She interpreted *Friesen* as creating a mandatory and irrebuttable presumption that a parent who has sexually abused their child has caused significant harm.[196] Jackson J.A. concluded that statements from victims of sexual abuse "who are still resident in the family home with the offender and who now call for leniency, should be approached with extreme caution, if accepted at all."[197] She therefore held that the sentencing judge did not err by refusing to hear from the child victims.

On the second point, the appellant argued that the increase in sentence length for sexual offences against children that was mandated by the Supreme Court in *Friesen* rested on the 2015 increase in the maximum punishment for these offences.[198] Since the offences in this case were committed in 2004, the appellant argued that he ought to have been sentenced based on the ranges that existed in 2004.[199] Jackson J.A. held that while the trial judge did err in utilizing the wrong maximum sentence and assuming a mandatory minimum sentence applied, this legal error did not impact the sentence that was ultimately imposed, as the trial judge had appropriately crafted the sentence based on *Friesen*'s understanding of the harms caused to children by sexual abuse.[200]

Drennan J.A. dissented on both of these points. However, it is her position on the victim impact statement issue that is of the most interest.[201] While she agreed that the *Canadian Victims Bill of Rights* does not create participatory rights for victims outside of those granted by s. 722 of the *Criminal Code*, she held that the trial judge still erred by failing to inquire as to whether any victim input was received from either of the two daughters.[202] She further commented that it is not for Crown counsel to determine which victims are allowed to provide impact statements, as it is the sentencing judge alone that is the gatekeeper of the sentencing process.[203] While Drennan J.A. agreed that victim impact statements should contain no recommendations as to the severity or leniency of the sentence, she held that the impact statements at issue in this case did not just contain submissions on leniency; instead, they detailed the nature of the harm that both victims suffered. She held that the sentencing judge ought to have considered them and, as is normal in cases of inappropriate material in a victim impact statement, simply disregarded the aspects of the statement that were not permissible.[204]

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195 *Ibid* at para 78.

196 *Ibid* at paras 78–81.

197 *Ibid* at para 90.

198 *Ibid* at paras 96–100.

199 *Ibid* at para 102.

200 *Ibid* at paras 104–06, 111–14.

201 Drennan J.A. took a fact-based approach to the question of the post-*Friesen* sentencing range (see *LA*, *supra* note 188 at paras 230–34), and held that the sentencing judge erred in principle in determining that the appellant should be subject to a s. 161 order for life (*ibid* at paras 246–52).

202 *Ibid* at paras 204–08.

203 *Ibid* at para 209.

204 *Ibid* at para 214.

The disagreement between the majority and minority in *LA* in relation to the victim impact statement issue raises important questions about the autonomy of young victims of sexual offences in the sentencing process. For the majority, any claim by a young victim to have suffered no or minimal harm must be ignored because the Supreme Court has proclaimed that all child victims of sexual abuse necessarily suffer significant harm as a result of that abuse.[205] For the dissenting justice, child victims ought to have the right to describe lesser harm that they suffered and to have those sentiments considered by the sentencing judge. There is much wisdom to be commended in the dissenting justice's approach. While *Friesen* creates a presumption that child victims of sexual offences suffer significant harm, victims are not a singular monolith. Some may be more resilient than others. Some may have processed the trauma by the time of sentencing and are in a position to move on with their lives; others may suffer lifelong consequences. To disregard a victim's self-assessment of the harm they suffered from sexual abuse on the basis that it does not conform with what the Supreme Court has decreed they necessarily suffered seems to deny victims the individuality and autonomy that underpin the concept of victim participation in the sentencing process. A sentencing judge is, of course, not required to give significant weight to victim descriptions of minimal harm, but to disregard those descriptions entirely seems wrong. This is, of course, not to say that *Friesen* becomes irrelevant or that the sentence should necessarily be reduced in the rare case where a victim describes having suffered little harm; the descriptions of harm in *Friesen* are still relevant to the principle of general deterrence, which looms large in sentencing for sexual offences against children. The point, however, is that Drennan J.A.'s approach to victim impact statements seems to be more in line with Parliament's intent in granting victims participatory rights in the sentencing process.

205 See the text accompanying notes 202–04.

III. Civil Law

The Court issued forty-five civil law decisions in 2023. In addition to the areas of law addressed below, the Court's civil law decisions addressed the proper interpretation of court orders;[206] the pleading requirements for the tort of defamation;[207] writs of possession;[208] breach of contract;[209] class actions;[210] the duty of fairness owed to parties in a proceeding;[211] striking claims for want of prosecution;[212] striking pleadings;[213] security for costs;[214] a client's right to the contents of their lawyer's file;[215] receiverships;[216] disclosure and production;[217] and judicial sales and foreclosures.[218]

A. Limitation Periods[219]

In *MFI Ag Services Ltd v Kramer Ltd*,[220] the Court considered the interaction of the two-year limitation period in *The Limitations Act*[221] and a secured creditor's right to seize farm equipment under *The Saskatchewan Farm Security Act*.[222] Beginning in 2016, the farmer rented several pieces of farming equipment from the secured creditor. The farmer ceased making payments on the equipment in 2017 but retained (and used) the equipment for each of the 2018 through 2021 farming seasons.[223] When the secured creditor finally took steps to seize the equipment in 2022, the farmer asserted that the creditor's action was barred by the limitation period.[224] Writing for the Court, Kalmakoff J.A. dismissed the farmer's argument. Most significantly, Kalmakoff J.A. held that the *Limitations Act* does not apply to proceedings under the *SFSA*. This flows from s. 3(1) of the *Limitations Act*, which restricts that statute's application to "claims pursued in court proceedings," which are either

206 *Hertz v Kille*, 2023 SKCA 3; *Greenwood v Greenwood*, 2023 SKCA 87 [*Greenwood*].

207 *Wilson v Saskatchewan Water Security Agency*, 2023 SKCA 16.

208 *6517633 Canada Ltd v Gibson Creek Farms Ltd*, 2023 SKCA 19, leave to appeal to SCC refused, 2024 CanLII 528.

209 *Englot v Ritchie Bros Auctioneers (Canada) Ltd*, 2023 SKCA 27.

210 *MacInnis v Bayer*, 2023 SKCA 37; *Abbott Laboratories, Ltd v Spicer*, 2023 SKCA 55; *Larocque v Yahoo! Inc*, 2023 SKCA 62; *Larocque v Yahoo! Inc*, 2023 SKCA 63; *Hoedel v WestJet Airlines Ltd*, 2023 SKCA 135.

211 *Windels v Reddekopp*, 2023 SKCA 38 [*Windels*].

212 *Arkell v Komodowski*, 2023 SKCA 79.

213 *Smith v Toronto-Dominion Bank*, 2023 SKCA 81; *Nexus Holdings Inc v City of Saskatoon*, 2023 SKCA 126.

214 *CPC Networks Corp v Miller*, 2023 SKCA 89.

215 *CPC Networks Corp v McDougall Gauley LLP*, 2023 SKCA 90.

216 *Eye Hill (Rural Municipality) v Saskatchewan (Energy and Resources)*, 2023 SKCA 120.

217 *Bell v Insulation Applicators Ltd*, 2023 SKCA 128.

218 *Mann v Farm Credit Canada*, 2023 SKCA 132.

219 See also *Fibabanka AŞ v Arslan*, 2023 SKCA 13; *Zhang v Wehner*, 2023 SKCA 22.

220 2023 SKCA 10 [*MFI 1*].

221 SS 2004, c L-16.1 [*Limitations Act*].

222 SS 1988-89, c S-17.1 [*SFSA*].

223 *MFI 1*, *supra* note 220 at paras 5–13.

224 *Ibid* at paras 13–14.

actions "commenced by statement of claim" or proceedings "commenced by originating notice and are not proceedings in the nature of an application."[225] Under the *SFSA*, a secured creditor does "not commence a proceeding at all. It simply serve[s] the notice required by s. 48 of the *SFSA*. The service of this notice does not necessarily lead to court proceedings."[226] Kalmakoff J.A. also noted that in *MFI 1*, *the farmer* commenced the action against the secured creditor by exercising the right under s. 50 of the *SFSA* to demand a hearing by the Court, in response to the secured creditor's *SFSA* notice.[227] Consequently, the secured creditor simply had not commenced a "claim pursued in court proceedings"[228] necessary to engage the *Limitations Act*.

The same farmer raised another limitations defence in *MFI Ag Services Ltd v Farm Credit Canada*.[229] In that case, the farmer obtained loans from Farm Credit Canada, which were secured by mortgages against farmland.[230] When the farmer defaulted, the lender took steps to collect the debt. Those steps included serving notices of intention to commence an action on those mortgages under s. 12(1) of the *SFSA*.[231] Section 22(1) of the *SFSA* suspends the limitation period upon service of s. 12(1) notices. By operation of s. 12(16) of the *SFSA*, the s. 12(1) notices also expire after three years.[232] In *MFI 2*, the lender had, after three years, not yet obtained an order under s. 11 of the *SFSA* allowing it to enforce its mortgages when its notices expired, and the farmer again defaulted on the loans.[233] The lender again took enforcement steps. The farmer argued that, because the lender had failed to obtain a s. 11 order within the three-year period, s. 22(1) of the *SFSA* never took effect to suspend the limitation period.[234] Unsuccessful at the Court below, the farmer appealed. Writing for the Court, Tholl J.A. dismissed the farmer's appeal. Interpreting the *SFSA* and *Limitations Act* in accordance with the well-established approach set out in *Rizzo*,[235] the Court held that the suspension of the limitation period takes effect on service of the notice of intention, and does not require the lender to obtain a s. 11 order within the three years in which the notice takes effect. To hold otherwise would "have several unsalutary effects and frustrate the overall purpose of the *SFSA*," including incentivizing lenders to commence actions to enforce their mortgages and seize farmland rather than allow defaulting farmers a grace period to rehabilitate their finances.[236]

225 *Limitations Act*, *supra* note 221, s 3(1).

226 *MFI 1*, *supra* note 220 at para 34.

227 *Ibid* at para 35.

228 *Limitations Act*, *supra* note 221, s 3(1).

229 2023 SKCA 30 [*MFI 2*].

230 *Ibid* at para 1.

231 *Ibid*.

232 *Ibid*; See *SFSA*, *supra* note 222, ss 12(1), 12(16), 22(1).

233 *MFA 2*, *supra* note 229 at para 2.

234 *Ibid*.

235 *Rizzo*, *supra* note 22; *MFI 2*, *supra* note 229 at paras 26–33, 62–63.

236 *MFI 2*, *supra* note 229 at para 62.

B. Recordings of Court Proceedings

In *Phillips v Vo*,[237] the Court took the unusual opportunity to interpret Rule 9-34 of *The King's Bench Rules*,[238] which governs access to audio and video recordings of proceedings at the Court of King's Bench for Saskatchewan.[239] In *Vo*, the appellant law firm had unsuccessfully applied for an audio recording of a fee assessment hearing. It sought the recording for the purpose of defending itself from proceedings brought against it by the Law Society of Saskatchewan for professional misconduct.[240] Richards C.J.S. allowed the appeal. First, he noted that Rule 9-34 prohibits anyone from accessing recordings of Chambers applications, pre-trial conferences, and case management conferences.[241] All other recordings are accessible "in accordance with two protocols."[242] First, a lawyer of record may request the Local Registrar provide a recording, provided the lawyer undertakes "that they will use the recording only for proper purposes in connection with the performance of their duties as counsel."[243] Second, any person other than a lawyer of record may apply to the Court itself for access to a recording.[244] The person seeking the recording must "specify the purpose for which a copy of the recording is sought, the manner in which they intend to use the copy of the recording, and how long they need the copy of the recording."[245] Interpreting the Rule, Richards C.J.S. held that the Court's assessment of an application for a recording is limited to those three factors: purpose, use, and length of time for which the recording is needed.[246] Any other considerations exceed the scope of the Court's

237 2023 SKCA 20 [*Vo*].

238 Saskatchewan, *The King's Bench Rules* [*Rules*].

239 Rule 9-34 states:

(1) In this rule, 'recording of a proceeding' means an audio or video recording of a proceeding made by or on behalf of the Court, but does not include a recording made of a chamber application, a pre-trial conference or a case management conference.

(2) Court recordings of chamber applications, pre-trial conferences and case management conferences do not form part of the Court record, and no access to these recordings shall be granted by the Court to any party, lawyer of record, member of the media, or member of the public.

(3) Subject to subsection (4) and to any enactment, rule or order restricting access to a proceeding, no person shall obtain or make a copy of a recording of a proceeding except by order of the Court.

(4) The local registrar may provide a copy of the recording of a proceeding to a lawyer of record who files a request with the Court in Form 9-34A.

(5) Any person, other than a lawyer of record, seeking a copy of the recording of a proceeding must file an application with the Court in Form 9-34B.

(6) On receipt of an application pursuant to subrule (5), the Court may do any of the following:

(a) require that notice of the application be given to the other parties to the proceeding or to other interested persons;

(b) set the matter down for a hearing;

(c) grant the application, on any terms and conditions that the Court may direct;

(d) dismiss the application.

(7) An order granting a request for a copy of the recording of a proceeding shall be in Form 9-34C, with any additional terms and conditions that the Court may direct.

240 *Vo*, *supra* note 237 at para 2.

241 *Ibid* at para 19.

242 *Ibid* at para 20.

243 *Ibid* at para 21.

244 *Ibid* at para 22.

245 *Ibid*.

246 *Ibid* at para 26.

jurisdiction.[247] Richards C.J.S. also noted (in a *dictum*) that the open court principle may further force the Court's hand to grant any future Rule 9-34 applications.[248] In practical terms, the open court principle means (in this context) that "if engaged with respect to the exercise of discretionary authority under Rule 9-34(5), the open court principle would require a judge faced with an application for a copy of a recording to order that the copy be provided unless doing so would pose a serious risk to an important public interest and so forth, as per *Sherman Estate*."[249]

C. Estate Litigation[250]

In *Klaptchuk v Johnson*,[251] the Court had occasion to consider the doctrine of *devastavit*. Summarizing the doctrine, Barrington-Foote J.A. wrote that an executor or administrator may commit *devastavit* when they, either willfully or recklessly, "[waste] the estate's assets by mismanaging, misapplying, squandering or neglecting them, contrary to the duty imposed on them as a personal representative of the estate."[252] The doctrine of *devastavit* (a species of waste) does not apply where the executor or administrator acted honestly, and exercised reasonable skill and prudence.[253] In addition to the common law limitation on *devastavit*, Saskatchewan has enacted legislation that allows a court to relieve an executor or administrator of liability, where they acted honestly and reasonably and it would be fair to do so.[254] Allowing the estate administrator's appeal, Barrington-Foote J.A., writing for the Court, held that the Court below erred in summarily allowing the claim against the executrix, without considering the full suite of defences to *devastavit* that were available to her.[255]

D. Participant Expert Witnesses

The Court grappled with the procedural and substantive rules that govern participant expert witnesses in *Wynward Insurance Group v Smith Building and Development Ltd*.[256] Participant expert witnesses are witnesses who have expertise in a relevant subject *and* participated in the underlying events giving rise to the litigation. Their contemporaneously formed opinions are admissible because, in essence, those opinions are intractably linked with their fact evidence resulting from their participation in

247 *Ibid* at para 28.

248 *Ibid* at para 31.

249 *Ibid*, citing *Sherman Estate v Donovan*, 2021 SCC 25 at para 38.

250 See also *Bell v Bell Estate*, 2023 SKCA 53; *Witzaney v Fisher*, 2023 SKCA 77.

251 2023 SKCA 25 [*Johnson*].

252 *Ibid* at para 52.

253 *Ibid* at para 53.

254 *Ibid* at para 54, citing *The Trustee Act, 2009*, SS 2009, c T-23.01, s 45.

255 *Johnson*, *supra* note 251 at paras 60–62.

256 2023 SKCA 57 [*Wynward*].

the underlying events at issue.[257] Since the participant expert's opinion evidence is fundamentally intertwined with their fact evidence, a party tendering a participant expert witness is excepted from the ordinary requirement to give notice of expert opinion under Rule 5-40.[258]

Where, however, the ostensible participant expert's opinion "goes beyond an opinion formed as part of the ordinary exercise of a person's skill, knowledge, training and experience, *while observing or participating in such events*,"[259] then, Schwann J.A. concluded, that opinion strays beyond the procedural exception recognized in *Racette*.[260] That may occur where, for instance, a participant expert's testimony is "in generalities" rather than limited by their participation in and observation of the subject-matter of the litigation.[261] Where an erstwhile participant expert's evidence might exceed the scope of the *Racette* exception, the party tendering the participant expert is likely better served by tendering a notice of expertise in compliance with Rule 5-40, and then qualifying the expert in the usual manner.[262]

E. Corporate Law[263]

The Court considered a contentious shareholder dispute in *Stromberg v Olafson*.[264] The majority opinion, authored by Barrington-Foote J.A. (Richards C.J.S. concurring, Jackson J.A. dissenting) resulted in at least four important clarifications of the procedure governing oppression actions. First, the Court confirmed that although an oppression action may, under *The Business Corporations Act*, be commenced by "application"[265] (which must be an Originating Application), that commencement vehicle is not mandatory and it is equally appropriate to use a Statement of Claim to commence the action.[266] Second, where a complainant raises allegations of *new instances* of oppression after commencing the action, the complainant must either amend their initial pleadings to incorporate the new instances of oppression as they arise, or raise them in an entirely new action. It is not appropriate for a complainant to use Notices of Application (i.e. non-commencement documents) to allege new instances of oppression and seek substantive relief without first amending their pleadings.[267] If the complainant does not amend their pleadings in relation to those new instances of oppression, then

257 *Ibid* at paras 25, 48–49. See also *Saskatchewan v Racette*, 2020 SKCA 2 [*Racette*], leave to appeal to SCC refused, 2020 CanLII 32301.

258 *Racette*, *supra* note 257 at para 61; *Rules*, *supra* note 238.

259 *Wynward*, *supra* note 256 at para 28 [emphasis in original].

260 *Ibid*.

261 *Ibid* at para 31.

262 *Ibid* at paras 59–62.

263 See also *Windels*, *supra* note 211; *Mann v Mann*, 2023 SKCA 100; *Mann v Mann*, 2023 SKCA 104.

264 2023 SKCA 67 [*Stromberg*].

265 *The Business Corporations Act*, RSS 1978, c B-10, s 234 [*Repealed SBCA*]. The *Repealed SBCA* was substantially repealed and replaced by the *Business Corporations Act, 2021*, SS 2021, c 6 [*SBCA*]. The new *SBCA* likewise permits a complainant to commence an oppression action by application (*ibid* s 184).

266 *Stromberg*, *supra* note 264 at paras 26–30.

267 *Ibid* at paras 33–34.

the complainant must commence a wholly new action.[268] Third, and perhaps tritely, Barrington-Foote J.A. held that it is not appropriate for the Court to make final orders granting substantive relief, unless the Court is presented with either a Rule 7-2 (summary judgment) or Rule 7-1 (trial of a particular issue) application.[269] As a corollary, the Court lacks jurisdiction to use the "enhanced fact-finding powers" described in Rule 7-5 unless it is ruling on a summary judgment application and has determined it can make a fair and just determination on the merits through that process, such that there is no genuine issue requiring a trial.[270] Fourth, if an application is, in substance, an application for summary judgment, but was not expressly brought pursuant to Rule 7-2, the Court should assess whether summary judgment would be appropriate in the circumstances.[271] This fourth point, however, may have limited salience more generally, since none of the defendants objected to the form of the plaintiff's application for final relief.[272]

The majority opinion also clarified the proper analytical approach to oppression. Oppression cannot, Barrington-Foote J.A. concluded, be grounded on isolated instances of ostensibly unfair conduct. Since the action itself (and any remedy flowing therefrom) arises out of the parties' reasonable expectations, the court's assessment of what those expectations were, and their reasonableness, cannot be isolated from "the entire context" of the relationship between the parties.[273] Thus, practices that were reasonably expected at one time may change as the commercial context in which the company operates changes.[274] Similarly, business realities may make a long-established practice obsolete or impractical, such that abandoning it is the only reasonable course. Thus, even if a party's expectations may be static, their objective reasonableness is not so fixed. Where a complainant seeks a summary determination of an oppression action, then, the court must be confident it can make (and must then make) summary findings of all relevant context as well.[275] If the court cannot, then more substantive procedures (up to and including a trial) are necessary.

The Court considered the authority of corporate officers to carry out company business when its directors are deadlocked in *Mann v Mann*.[276] The corporate holding company had two directors (brothers, Jason and James Mann), who each owned 50 per cent of the issued voting shares.[277] Jason, as president of the holding company, signed several shareholder resolutions, ostensibly on behalf of the board.[278] James commenced an unsuccessful action to invalidate the resolutions for lacking the board's approval.[279] In dismissing James' appeal, the Court emphasized that the *Repealed SBCA*

268 *Ibid* at para 35.
269 *Ibid* at paras 69, 72.
270 *Ibid* at para 79.
271 *Ibid* at para 100.
272 *Ibid* at para 85.
273 *Ibid* at paras 126–28.
274 *Ibid* at para 129.
275 *Ibid* at para 136.
276 2023 SKCA 99 [*Mann*].
277 *Ibid* at para 2.
278 *Ibid* at para 4.
279 *Ibid*.

anticipates that officers will receive broad delegations of authority to "manage the business and affairs of the corporation."[280] Grants of power to corporate officers are to be construed in a way that allows the corporation to function in a commercially reasonable manner.[281] Where (as in *Mann*) the corporate bylaws grant officers broad powers, then the *absence* of specific approval from the board for a corporate officer to carry on normal course management activities is immaterial to the validity of that action.[282]

F. Witness Immunity

The plaintiff surgeon, Dr. Patel, in *Patel v McMurtry*[283] sued Dr. McMurtry, who had authored two expert reports regarding the plaintiff's surgical competence, and the agency through which the Saskatchewan Health Authority had retained Dr. McMurtry to be an expert witness in respect of Dr. Patel.[284] In related proceedings, the Saskatchewan Health Authority had relied on Dr. McMurtry's reports to suspend Dr. Patel's surgical privileges on an emergent basis.[285] Dr. Patel's suspension was then subject to administrative proceedings, in which Dr. McMurtry failed to be qualified as an expert witness.[286] Dr. Patel then claimed against Dr. McMurtry and the agency, claiming their conduct (and Dr. McMurtry's reports) constituted a bevy of different actionable legal wrongs, including negligence, negligent misrepresentations, defamation, and wrongful interference with economic relations.[287] The defendants successfully applied to strike the claim at the Court below on the basis of witness immunity.[288] Writing for the Court, Caldwell J.A. adopted the Nova Scotia Court of Appeal's summary of witness immunity in *Elliott v Insurance Crime Prevention Bureau*.[289] At its core:

> the immunity applies to words said or conduct performed *on a protected occasion*, the protected occasion being a judicial or a quasi-judicial proceeding, [and it is] critical to understand that it is not the nature of the conduct or the words which is the focus of the immunity, but the occasion on which the words are said or the conduct performed.[290]

280 *Ibid* at para 59; *Repealed SBCA*, *supra* note 265 s 116(a).

281 *Mann*, *supra* note 276 at para 66.

282 *Ibid* at paras 68–70.

283 2023 SKCA 74, leave to appeal to SCC Refused, 2024 CanLII 37802 [*Patel*].

284 *Ibid* at paras 1–6.

285 *Ibid* at para 8.

286 *Ibid* at para 15.

287 *Ibid* at paras 16–31.

288 *Ibid* at para 33.

289 2005 NSCA 115 [*Elliot*].

290 *Patel*, *supra* note 283 at para 36, citing *Elliot*, *supra* note 289 at para 144 [emphasis in original].

Thus, Dr. McMurtry's reports attracted the privilege insofar as they were made in the context of disciplinary proceedings against Dr. Patel, but did *not* necessarily attract privilege when they were created and used for the purpose of emergently suspending Dr. Patel's privileges when no judicial or quasi-judicial proceedings had been commenced and it was not clear an investigative process was ongoing.[291] Thus, although the Court left open that privilege *may* still attach to the reports in those circumstances, it was not plain and obvious that Dr. Patel's claim would fail.[292] Caldwell J.A. therefore allowed the appeal.

G. Insurance Law

In *Jantzen Estate v TD Life Insurance Company*,[293] the insured died of a cocaine overdose. His insurers declined to pay on two life insurance policies, which excluded coverage if death "result[ed]…, or happen[ed] while committing, a criminal offence."[294] The insurers relied on these exclusions, claiming that the insured was in possession of cocaine at the time of his death, which is a criminal offence. The insurers successfully applied for summary judgment, dismissing the estate's claim on the insurance policies.[295] Amongst other grounds of appeal, the estate argued the lower Court failed to properly consider the "Good Samaritan" provisions of *The Controlled Drug and Substances Act*.[296] At a summary level, those provisions exclude criminal liability for possession, where medical care is sought in respect of drug consumption, or a person remains on the scene to assist someone who has overdosed.[297] The estate argued that Mr. Jantzen could not have been convicted of a crime if he had been able to seek medical care prior to his death.[298] The Court rejected that argument, noting that the Good Samaritan provisions do not make criminal conduct (possession of controlled substances) lawful; they simply preclude conviction for it in certain circumstances.[299] Since possession of cocaine remains criminal irrespective of whether a person may be convicted for it, the exclusion clauses were unaffected by the Good Samaritan provisions.[300]

291 *Ibid* at para 52.

292 *Ibid* at paras 53–54.

293 2023 SKCA 76 [*Jantzen*].

294 *Ibid* at para 1.

295 *Ibid* at para 2.

296 *Ibid* at para 31; *CDSA*, *supra* note 105 ss 4.1(2)–(3).

297 *Jantzen*, *supra* note 293; *Good Samaritan Drug Overdose Act*, SC 2017, c 4.

298 *Jantzen*, *supra* note 293 at para 33.

299 *Ibid* at para 35.

300 *Ibid*.

H. Solicitor-Client Privilege

At issue in *Medynski v Rural Municipality of Prince Albert No 461*[301] was an alleged waiver of solicitor-client privilege. In seeking to advance a limitations defence, the defendant Rural Municipality disclosed and produced a document authored by a former official. That document quoted emails and referred to other correspondence that the official had exchanged with the Rural Municipality's external counsel.[302] The plaintiff sought production of those (and other) communications that the defendant Rural Municipality had with its external counsel on the basis that the Rural Municipality's partial disclosure and production had implicitly waived solicitor-client privilege.[303] Kalmakoff J.A. dismissed the plaintiff's arguments, and held that the Rural Municipality had not implicitly waived privilege over all of its communications with its counsel. To establish an implied waiver, Kalmakoff J.A. held that the party challenging privilege must establish:

> (a) the privilege holder has voluntarily disclosed that they sought or received legal advice; (b) the privilege-holder's seeking or receiving of legal advice is material to the claims or defences in the action, such that the legal advice is relevant; and (c) the privilege holder has attempted to rely on the legal advice in order to justify a particular course of action, such that it would be unfair for the holder of the privilege to retain the benefit of the privilege.[304]

The Court held that the plaintiff failed to establish the second and third elements of implied waiver.[305] The Court also held that waiver of *some* privileged communications does not automatically waive all privilege.[306] Where a partial waiver occurs, it is still incumbent on the party challenging privilege to establish that the partial waiver works an unfairness.[307]

I. Appeal Procedure[308]

On his final day as Chief Justice of Saskatchewan, Richards C.J.S., writing for a unanimous five-member panel, issued the Court's highly-anticipated decision in *Aecon Mining Construction Services, a division of Aecon Construction Group Inc v K+S Potash Canada GP*.[309] In *Aecon*, the Court revisited

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301 2023 SKCA 88.

302 *Ibid* at para 8.

303 *Ibid* at paras 17–18.

304 *Ibid* at para 29.

305 *Ibid* at paras 36–37.

306 *Ibid* at para 41.

307 *Ibid*.

308 See also *Banilevic v Cairney*, 2023 SKCA 31; *White City (Town) v Edenwold (Rural Municipality)*, 2023 SKCA 61; *Mann v Mann*, 2023 SKCA 73; *Evans v General Motors of Canada Company*, 2023 SKCA 86; *Patel v Saskatchewan Health Authority*, 2023 SKCA 93; *Michel v Saskatchewan*, 2023 SKCA 97.

309 2023 SKCA 102 [*Aecon*].

its 1993 decision in *Iron v Saskatchewan (Minister of Environment and Public Safety)*.[310] At issue in *Iron* was the proper procedure to follow when a party has sought leave to appeal (as though the order from the Court below were interlocutory), despite having a right of appeal because the order from the Court below is *de jure* final.[311] As the Court itself remarked in *Aecon* (and has expressed many times elsewhere), discerning between final and interlocutory orders is often much easier stated than done.[312]

In *Iron*, the prospective appellants simultaneously filed notices of appeal (as if they had a right of appeal) and applications for leave to appeal (as if they did not).[313] When their applications for leave to appeal were unsuccessful, they pursued their appeals in the normal course. The majority in *Iron* concluded that the appellants could not approbate and reprobate, such that they could not simultaneously seek leave to appeal and maintain they had a right of appeal.[314] In *Aecon*, Richards C.J.S. noted that *Iron* had been interpreted to mean that: (1) a party who seeks leave to appeal when none was required is taken to have made an irrevocable election to treat the underlying order as interlocutory;[315] (2) applications for leave have been dismissed, without prejudice to the applicant's right to file a subsequent notice of appeal;[316] (3) judges in chambers have declined to hear applications for leave when none was required;[317] and (4) the Court has granted leave to appeal *nunc pro tunc*, where leave was required but none was obtained.[318]

This state of affairs was unsatisfactory and put litigants in impossible tactical positions.[319] Richards C.J.S. therefore dispensed with *Iron* and adopted a two-stage approach. First, where there is established case law on whether an order is final or interlocutory, an appellant (or prospective appellant) must follow that case law.[320] Second, where there is "genuine uncertainty" as to whether an order is final or interlocutory, the appellant (or prospective appellant) has two options: (1) file a notice of appeal, or (2) seek leave to appeal.[321] If the appellant files a notice of appeal where it turned out leave was required, the respondent may apply to strike the notice or the Court may raise the issue on its own motion. If there was genuine uncertainty in the law, then it is appropriate for the appellant to proactively seek leave to appeal *nunc pro tunc*.[322] If a prospective appellant takes the second option and seeks leave to appeal, then the prospective appellant may make that application for leave "conditional on a finding that leave is required and include with the application an allied application asking the Chambers judge

310 1993 CanLII 6744 (SKCA) [*Iron*].

311 *Ibid* at para 2; There is a general right of appeal for (most) final orders: *The Court of Appeal Act*, *2000*, SS 2000, c C-42.1, s 7 [*CA Act*]. Section 8 of the *CA Act* stipulates that leave to appeal must be obtained to appeal an interlocutory order (*ibid*).

312 *Aecon*, *supra* note 309 at para 27.

313 *Iron*, *supra* note 310 at paras 8–9, 36.

314 *Ibid* at paras 18–20.

315 *Ibid* at para 31.

316 *Ibid* at para 32.

317 *Ibid*.

318 *Aecon*, *supra* note 309 at para 33.

319 *Ibid* at para 27.

320 *Ibid* at para 36.

321 *Ibid* at para 37.

322 *Ibid* at para 38.

to make a determination as to whether leave is necessary."[323] In doing so, Richards C.J.S. strongly suggests that the prospective appellant should be able to demonstrate its due diligence in researching whether the order was interlocutory or final, failing which the prospective appellant can expect to be sanctioned.[324] As part of that application, the prospective appellant should proactively seek an order extending the time to file a notice of appeal, in the event the Chambers judge determines leave was not required.[325] If the Chambers judge determines leave is not required, they will dismiss the application for lacking jurisdiction to grant leave and (if appropriate) order an extension of time for the appellant to file a notice of appeal.[326] Finally, if, and only if, the Court lacks statutory authority to extend the time to file a notice of appeal, a prospective appellant faced with "genuine uncertainty" as to whether they have a right of appeal may simultaneously file both a notice of appeal and an application for leave to appeal with an accompanying request for directions.[327]

Richards C.J.S.'s decision in *Aecon* is a triumph of practicality over the peculiar formalism that characterized the majority's holdings in *Iron*, and the inconsistent approaches and decisions that flowed from them. *Aecon* contains a clear, practical framework for litigants presented with challenging questions of appellate jurisdiction. It is, in short, a marked improvement over what preceded it.

In *Farms and Families of North America Inc (Farmers of North America) v AgraCity Crop & Nutrition Ltd*,[328] the Court had occasion to consider whether it had jurisdiction to hear an appeal from an *ex parte* order. In *FNA*, the respondents obtained an *ex parte* injunction against the appellants in the Court below.[329] Leurer J.A. (as he then was) held that in pursuing an appeal, the appellants had followed the wrong process. Where an *ex parte* order is obtained, the party against whom the order is made is entitled to apply to the Court that granted the *ex parte* order for an *inter partes* hearing.[330] That Court has the power to vary or set aside the *ex parte* order, where appropriate. For that reason, an appeal from an *ex parte* order will not be entertained,[331] and may even amount to an abuse of process.[332] Nonetheless, an appellate court *may* hear an appeal from an *ex parte* order in exceptional circumstances.[333] In declining to hear the appeal, Leurer J.A. did not opine on what might constitute "exceptional circumstances" that would justify an appellate court hearing a direct appeal from an *ex parte* order.

323 *Ibid* at para 39.
324 *Ibid*.
325 *Ibid*.
326 *Ibid*.
327 *Ibid*.
328 2023 SKCA 113 [*FNA*].
329 *Ibid* at paras 11, 13.
330 *Ibid* at para 27.
331 *Ibid* at para 28.
332 *Ibid* at para 29.
333 *Ibid* at para 35.

J. Summary Judgment[334]

Schwann J.A.'s unanimous decision in *Loraas v Loraas Disposal North Ltd*[335] will have significant practical ramifications on the conduct of summary judgment applications. Most importantly, the Court held that an application for summary judgment does not displace a party's right to discovery under Part 5 of the *King's Bench Rules* of Saskatchewan.[336] Thus, if one party applies for summary judgment under Part 7, any other party (and perhaps even the party seeking summary judgment) may simultaneously press onwards with discovery processes, including questioning under oath, provided for in Part 5 of the *Rules*. As Schwann J.A. wrote:

> Part 5 and Part 7 operate independently from each other, and there is nothing in [the Rules] stipulating that, once a summary judgment application is filed, the process and procedures for discovery, including questioning, are displaced, suspended or deferred to allow for the Part 7 summary judgment adjudication process to run its course.[337]

Instead, a party who has applied for summary judgment may seek an order deferring any further discovery steps. In deciding whether to exercise its discretion to grant such an order, the Court should be guided by "'due consideration to the purposes of the summary judgment provisions, and keeping in mind the need for proportionality, the need to facilitate the resolution of the issues, and the need to discourage conduct that unnecessarily or improperly delays proceedings or unnecessarily increases their cost.'"[338]

334 See also *Koh v Atrium Mortgage Corporation*, 2023 SKCA 45; *AC Forestry Ltd v Big River First Nation*, 2023 SKCA 96; *Harpold v Saskatchewan (Corrections and Policing)*, 2023 SKCA 98.

335 2023 SKCA 131 [*Loraas*].

336 *Rules*, *supra* note 238.

337 *Loraas*, *supra* note 335 at para 63.

338 *Ibid* at para 77.

IV. Administrative Law

The Court heard eighteen administrative law appeals in 2023. This included its usual bevy of municipal property tax assessment appeals;[339] judicial reviews and appeals of labour and employment standards awards;[340] and appeals under *The Automobile Accident Insurance Act*.[341] It also considered the availability of damages for alleged breaches of procedural fairness;[342] an appeal from a penalty imposed by the Law Society of Saskatchewan against a member;[343] and whether a member of the Labour Relations Board had a reasonable apprehension of bias.[344] Most notable were decisions on the duty of procedural fairness owed by a regulatory body to a complainant, and a regulatory body's jurisdiction to regulate its members' off-duty conduct.

A. Procedural Fairness Owed to Complainants

In *Toutsaint v Investigation Committee of The Saskatchewan Registered Nurses' Association*,[345] the Court considered the extent of a professional regulatory body's duty of procedural fairness owed to a complainant. Writing for himself and Leurer J.A. (as he then was), Tholl J.A. held that in the circumstances, Mr. Toutsaint had a legitimate expectation that the subject of his complaint will respond to the complaint, and that:

> the investigation committee would take his complaint seriously, consider the issues that it raised, and investigate it in accordance with the legislation and in the context of the circumstances. However, Mr. Toutsaint was not a party to the proceedings and could not reasonably have expected to receive the same procedural protections afforded to a member of a self-regulated profession. The evidence does not support any other specific expectations.[346]

339 *Brandt Properties Ltd v Sherwood (Rural Municipality)*, 2023 SKCA 4; *Brandt Properties Ltd v Sherwood (Rural Municipality)*, 2023 SKCA 5; *SBLP Town N Country Mall Inc v Moose Jaw (City)*, 2023 SKCA 94; *Consumers Co-operative Refineries Limited v Regina (City)*, 2023 SKCA 133; *855 Park Street Properties GP Ltd v Regina (City)*, 2023 SKCA 134.

340 *P&H Milling Group a Division of Parrish & Heimbecker, Limited Saskatoon v United Food and Commercial Workers Local 1400*, 2023 SKCA 14; *Unifor Locals 1-S & 2-S v Saskatchewan Telecommunications*, 2023 SKCA 68; *Andritz Hydro Canada Ltd v The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 179*, 2023 SKCA 69; *Saskatoon Co-operative Association Limited v United Food and Commercial Workers, Local 1400*, 2023 SKCA 72; *Lepage Contracting Ltd v McCutcheon*, 2023 SKCA 83; *United Food and Commercial Workers, Local 1400 v Saskatoon Co-operative Association Limited*, 2023 SKCA 122.

341 See e.g. *Zunti v Saskatchewan Government Insurance*, 2023 SKCA 82.

342 *Mandziak v Animal Protection Services of Saskatchewan*, 2023 SKCA 95.

343 *Abrametz v Law Society of Saskatchewan*, 2023 SKCA 114.

344 *International Brotherhood of Electrical Workers, Local 2038 v Stuart Olson Industrial Contractors Inc*, 2023 SKCA 115.

345 2023 SKCA 11 [*Toutsaint*], leave to appeal to SCC refused, 40652 (7 September 2023).

346 *Toutsaint*, *supra* note 345 at para 34.

In that respect, the duty of fairness owed to Mr. Toutsaint was "limited and falls 'at the low end of the spectrum.'"[347]

Jackson J.A. dissented. She emphasized that Mr. Toutsaint was both an inmate in a federal penitentiary and a patient of the subject nurse. Jackson J.A. held that "[i]t is axiomatic that prisoners cannot choose their medical caregivers or the timing of any intervention. Prisoners are vulnerable to a system that may choose to treat them or not or to interact with them with compassion or contempt, with little recourse in either instance."[348] Where prisoner-patients complain to their medical caregivers' regulatory body, a more robust duty of procedural fairness is therefore appropriately owed to such a complainant.[349]

B. Regulatory Discipline for Off-Duty Conduct

The Court considered the scope of a professional regulatory body's authority to discipline its members for off-duty conduct in *The College of Physicians and Surgeons of Saskatchewan v Leontowicz*.[350] In that case, the respondent physician had a sexual encounter with a woman who was not his patient.[351] The College of Physicians and Surgeons charged him with professional misconduct in relation to that sexual encounter. He was found guilty in the first instance, and his licence suspended indefinitely.[352] That decision was overturned on appeal in the Court below, which held his conduct did not amount to professional misconduct.[353]

Writing for the Court, Schwann J.A. commented on the necessary nexus between the off-duty conduct at issue and the profession itself. She held that a regulatory body can only determine whether that nexus exists through a "contextual analysis."[354] Relevant context will include "the nature of the profession; the relationship of the misconduct to the work of the profession or the personal characteristics considered necessary to practice the profession; and whether the person charged is identified or purported to act as a member of that profession."[355] Provided the regulatory body engages in that contextual analysis (without, for instance, considering extraneous factors), the regulatory body's conclusion on whether the off-duty conduct has a sufficient nexus with the profession, such that it should come within the regulator's purview, is entitled to deference.[356]

347 *Ibid* at para 38.
348 *Ibid* at para 62.
349 *Ibid* at para 104.
350 2023 SKCA 110.
351 *Ibid* at para 2.
352 *Ibid*.
353 *Ibid* at para 3.
354 *Ibid* at para 88.
355 *Ibid*.
356 *Ibid* at para 89.

V. Family Law

The Court released twenty-one family law decisions in 2023, dealing with the normal array of fact-based issues relating to division of property;[357] child and spousal support;[358] considerations in making custody and parenting orders;[359] and assorted procedural issues.[360]

In *OMS v EJS*,[361] the Court considered an appeal against a Chambers decision that required a child to be vaccinated against COVID-19, contrary to the wishes of both the child and her mother. The trial judge erred in taking judicial notice of the fact that COVID-19 vaccines are safe and effective for adults and children, as this was an issue on which expert evidence was required given the conflicting expert evidence adduced on this point before the Chambers judge.[362] However, this is not determinative, as a parent is not required to prove, nor is a court required to determine, whether a particular vaccine or drug is safe or effective. Rather, a court's determination is always focused on whether it is in the best interests of the child to be vaccinated, taking into account all of the relevant context.[363]

The Chambers judge erred in failing to account for the child's express wishes not to be vaccinated or the emotional or psychological impacts on the child if she were to be vaccinated against her wishes.[364] While the Chambers judge concluded that the child's physical health would not be compromised if she were to receive the vaccine, the Chambers judge erred in principle by failing to account for the impact on the child's mental health.[365]

In conducting the best interests of the child analysis afresh, the Court accepted that there would be significant benefits to the child in terms of her physical health and safety if she were to receive the COVID-19 vaccine.[366] However, against this had to be weighed the risk to the child's physical safety

357 *Bouvier v Bouvier*, 2023 SKCA 17 (addressing the applicability of issue estoppel in a property division claim); *Gaunce v Gaunce*, 2023 SKCA 18 (addressing both property division and retroactive child and family support); *Stewart v Stewart*, 2023 SKCA 59 (dealing with various factual issues in a property division appeal); *Leier v Leier*, 2023 SKCA 108 (factual issues in division of property).

358 *Ghremida v Elgahwas*, 2023 SKCA 23 (calculation of child support amounts); *Boutin v Boutin*, 2023 SKCA 41 (calculation of income for the purpose of child support); *Townsend v Townsend*, 2023 SKCA 91 (length of relationship as a material change in circumstance for the purpose of spousal support); *Kolodziejski v Maximiuk*, 2023 SKCA 103 (factual errors in the imputation of income).

359 *JB v JM*, 2023 SKCA 24 (affirming an interim parenting order); *Myrglod v Tarling*, 2023 SKCA 26 (allowing an appeal to vary a parenting order based on a material change in circumstances); *Giesbrecht v Stettner*, 2023 SKCA 52 (interpretation of a clause in a parenting order); *Wilk v Martin-Wilk*, 2023 SKCA 64 (appeal relating to factual issues in a parenting order and child/spousal support); *Jackson v Jackson*, 2023 SKCA 70 (dealing with both custody and support); *Pellegrini v Tkach*, 2023 SKCA 85 (custody and support appeal allowed); *EY v BA*, 2023 SKCA 124 (review of an interim parenting order).

360 *OMS v EJS*, 2023 SKCA 9 (relating to whether leave is required to appeal from an evidentiary fiat made in relation to an order under the *Divorce Act*, RSC 1985, c 3 (2nd Supp) [*Divorce Act*]; *JL v TT*, 2023 SKCA 43 (stay of a parenting order pending appeal); *Stewart v Stewart*, 2023 SKCA 44 (stay pending appeal dismissed).

361 2023 SKCA 8.

362 *Ibid* at paras 38–46.

363 *Ibid* at paras 48–49.

364 *Ibid* at paras 67–72.

365 *Ibid* at paras 73–74.

366 *Ibid* at para 81.

if she were to self-harm after receiving the vaccine; a risk that was reflected in the medical reports filed before the Chambers judge.[367] Further, the child's relationship with her father was fraught, and this relationship might be further undermined if she were forced to receive a vaccine at her father's behest.[368] The Court noted that a child's emotional and psychological well-being "is, in general, fostered by having a healthy, stable and continuous relationship with both parents,"[369] and damage to a relationship with a parent is harmful to a child's well-being.[370] If a court order would damage a child's tenuous relationship with a parent, this would present "a real risk of causing the very harm that orders made pursuant to the *Divorce Act* are meant to avoid."[371] Therefore, the Court held that, given the relevant considerations in this case, it was not in the child's best interest for the Court to order that she be vaccinated against her wishes.[372]

The decision in *Greenwood v Greenwood*[373] considered the principles applicable to the interpretation of a historical court order made in a family law proceeding. The deceased and his first wife were parties to a family law proceeding in 1981, where a court order was made vesting in the first wife, as tenant-in-common, a 47 per cent interest in the deceased's pension benefits.[374] The deceased remarried and elected to receive a joint and survivor pension, whereby the deceased would receive 55 per cent of his full entitlement as a pension, and the remainder would be paid to his second wife as the sole beneficiary of the survivor benefit in his pension.[375] In 1990, the matter came before the family law courts again, and the deceased sought clarification as to the percentage of the first wife's interest in his pension benefits.[376] A second order was issued fixing the first wife's entitlement to an amount equal to 25.56 per cent of the deceased's pension benefits received by him from his employer.[377] Following his death, the second wife began to receive the survivor benefits payable under the pension plan, and the first wife brought an application for an order requiring payment of a share of those survivor benefits under the 1981 family court order.[378] This application was dismissed, as the Chambers judge held that the 1990 order had varied the 1981 order. The second wife was only entitled to a percentage of pension benefits received by the deceased because neither order contemplated the inclusion of a future survivor benefit within the scope of the deceased's pension benefits.[379]

In allowing the appeal, Kalmakoff J.A. noted the interpretation of a court order is not governed by the intentions of the parties but, rather, is based on the language of the order, the context in which the

367 *Ibid* at para 86.
368 *Ibid* at para 91.
369 *Ibid* at para 92.
370 *Ibid* at para 93.
371 *Ibid*.
372 *Ibid* at paras 94–95.
373 *Greenwood*, *supra* note 206.
374 *Ibid* at para 3.
375 *Ibid* at paras 4, 14.
376 *Ibid* at para 15.
377 *Ibid*.
378 *Ibid* at para 17.
379 *Ibid* at para 20.

order was made, the reasons for the order, and the statutory framework underpinning that order.[380] He held that the 1981 order was drafted to follow a decision of the Supreme Court of British Columbia in *Rutherford v Rutherford*,[381] as there was significant confusion regarding the division of pension benefits at the time, given the relatively recent enactment of the *Matrimonial Property Act*.[382] By following *Rutherford,* the judge who issued the original order intended to divide the full value of the asset represented by the deceased's pension benefits, regardless of what the future value of that asset might be or the form those benefits might take.[383] The intention was not to divide the income stream that the deceased personally received during his lifetime, but instead, to divide the entire value of the asset created through the input of family property.[384] The 1990 order did not alter the substance of the 1981 order, as the intention was only to lessen the percentage of the deceased's pension benefits that were payable to the first wife (and not the nature of her interest in those benefits altogether).[385] The Court, therefore, held that the first wife was entitled to 25.56 per cent of the gross survivor benefits paid to the second wife as this formed part of the original division of family property.[386]

A final notable family law decision from 2023 is the decision of Tholl J.A. in *Friesen v Friesen*.[387] The issue in *Friesen* concerned, in part, the admissibility of social science evidence as fresh evidence on appeal regarding the impact of family violence on a child's well-being.[388] Tholl J.A. affirmed that while generally it is impermissible to introduce new evidence on appeal by simply including it in a book of authorities, judicial notice could be taken of various social and legislative facts contained in social science material that is appended to a book of authorities.[389] He ultimately took judicial notice of the fact that exposure to domestic abuse and family violence can have short-term and long-term negative effects on children, as well as the fact that most applications for relocation under the *Divorce Act* are made by women.[390]

With respect to s. 16(2) of the *Divorce Act*,[391] Tholl J.A. noted that consideration of a child's physical, emotional and psychological safety, security, and well-being requires consideration of the child's right to be raised in a healthy home environment, which is threatened by family violence.[392] This is reflected in recent amendments to the *Divorce Act* which require family violence to be taken into

380 *Ibid* at paras 26–28.

381 1979 CanLII 457 (BCSC) [*Rutherford*]; *Rutherford v Rutherford*, 1980 CanLII 653 (BCSC) [*Rutherford Addendum*].

382 *Greenwood*, *supra* note 206 at paras 35–43, citing *Rutherford*, *supra* note 381; *Rutherford Addendum*, *supra* note 381; SS 1979, c M-6.1.

383 *Greenwood*, *supra* note 206 at para 45.

384 *Ibid*.

385 *Ibid* at paras 52–54.

386 *Ibid* at para 55.

387 2023 SKCA 60 [*Friesen*].

388 *Ibid* at para 20.

389 *Ibid* at paras 31–39.

390 *Ibid* at paras 37–39.

391 *Divorce Act*, *supra* note 360, s 16(2).

392 *Friesen*, *supra* note 387 at para 74.

consideration as part of the overall assessment of the best interests of the child.[393] Here, the trial judge appropriately considered the family violence in the reasons for their decision. They were not required to exhaustively recite or analyse every single incident, as the acts of violence were not disputed by the parties.[394]

With respect to the question of relocation, a blended analysis should be preferred over a sequential analysis. In other words, assessing whether the child's best interests are better served by living primarily with one parent in one location versus the other parent in another location is preferred over assessing the best parenting arrangement and then determining whether permission should be granted for the move.[395] A blended analysis best accords with the *Divorce Act*'s child-centric focus, as it ensures that a trial judge considers all relevant factors as part of the overall assessment of the child's best interests.[396] If relocation is not in the child's best interests, then a judge may consider whether a conditional order should be granted, which means switching the residence of the child only once the relocating parent chooses to move.[397] Conditional orders should be permitted in order to encourage relocating parents (who are primarily women) to make relocation applications and obtain informed determinations as to whether their proposed relocations are in the child's best interest.[398]

393 *Ibid* at para 75.

394 *Ibid* at paras 79–80.

395 *Ibid* at para 86.

396 *Ibid* at paras 92–93.

397 *Ibid* at para 94.

398 *Ibid* at paras 96–97.

VI. Analysis

A. Reported Decisions

Table 1: Reported Decisions of the Court of Appeal, 2023[399]

Reported Decisions	136	
Criminal Law Decisions	51	(38%)
Civil Law Decisions	46	(34%)
Constitutional Law Decisions	0	(0%)
Family Law Decisions	21	(15%)
Administrative Law/Judicial Review Decisions	18	(13%)
Dissents	6	(4.4%)
Separate Concurring Judgments	1	(0.7%)
Successful Appeals/Chambers Applications[400]	64	(47%)

The Court reversed its trend of increased year-over-year output by releasing fewer decisions than in both 2022 and 2021. Only 136 decisions were released in 2023 compared to 150 and 171 in 2022 and 2021 respectively.[401] The percentage of successful appeals was the same in 2023 as the 47 percent seen in 2022.[402] There were six dissenting opinions issued in 2023 which represents a significant increase from 2022 which had two and 2021 which had only one dissenting opinion.[403] Jackson J.A. wrote half of the dissents in 2023[404] with Tholl J.A.,[405] Schwann J.A.,[406] and Drennan J.A.[407] issuing one each. Caldwell J.A. issued the Court's only separate concurring opinion in 2023.[408]

399 See "Court of Appeal for Saskatchewan – 2023" (last visited 31 July 2025), online: *CanLII* <canlii.org/sk/skca/nav/date/2023> [perma.cc/4WL7-ZM2D].

400 This figure includes appeals that were allowed in full or in part, successful cross-appeals, and successful Chambers application-based decisions.

401 Michelle Biddulph & William Lane, "The Judgments of the Court of Appeal for Saskatchewan, 2021 and 2022" (2023) 86:2 Sask L Rev 146 at 195.

402 *Ibid.*

403 *Ibid.*

404 *Toutsaint*, *supra* note 345; *Stromberg*, *supra* note 264; *Jimmy*, *supra* note 167.

405 *Sabiston*, *supra* note 88

406 *Ali*, *supra* note 86.

407 *LA*, *supra* note 188.

408 *Ali*, *supra* note 86.

Finally, the distribution of cases between different areas of law was relatively the same as in years past. The Court issued roughly two-thirds of its decisions in the areas of criminal and civil law with the remaining third split almost equally between administrative and family law matters. Unlike in 2022, the Court did not issue any constitutional law decision.[409]

409 Biddulph & Lane, *supra* note 401 at 195.

SASKATCHEWAN
LAW REVIEW

The Wisdom of Brian Dickson

The Honourable Justice Malcolm Rowe*

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* The Honourable Justice Malcolm Rowe was appointed to the Supreme Court of Canada in 2016. He had previously been appointed to the Newfoundland and Labrador Supreme Court in 1999 and to the Court of Appeal in 2001. The following is an edited version of a lecture delivered by Justice Rowe for the Saskatchewan Law Review Lecture on October 28, 2024 at the University of Saskatchewan College of Law.

I. Introduction

In their book, *Brian Dickson*: *A Judge's Journey*,[1] Justice Robert Sharpe and Kent Roach insightfully describe Chief Justice Dickson's life and his jurisprudence. The book opens as follows:

> Brian Dickson's judicial career spanned…twenty-seven years, from his appointment as a trial judge in Manitoba in 1963 to his retirement as chief justice of Canada in 1990. He spent seventeen years on the Supreme Court of Canada, six as the nation's chief justice, and retired as Canada's dominant judicial figure.[2]

What is remarkable is the enduring consequence of Dickson C.J.C.'s jurisprudence, thirty-four years after his retirement. His wisdom and conceptual clarity are key to this continued significance. His jurisprudence on the *Canadian Charter of Rights and Freedoms*[3] and on Aboriginal and treaty rights is ***foundational***. It remains important, both for direct reference (for example, the *Oakes* test) and by virtue of the conceptual frameworks that have been carried forward, often implicitly (for example, from *R v Sparrow*).[4]

I will discuss three foundational cases which Dickson C.J.C. wrote: *R v Big M Drug Mart Ltd.*[5] and the scope of *Charter* rights; *R v Oakes*[6] and the limitations of rights under s. 1; and *R v Sparrow* and the nature of Aboriginal rights (written with Justice La Forest). These cases continue to warrant close study.

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1 Robert J Sharpe & Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2003).

2 *Ibid* at 3.

3 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

4 [1990] 1 SCR 1075, 1990 CanLII 104 (SCC) [*Sparrow* cited to SCR].

5 1985 CanLII 69 (SCC) [*Big M*].

6 1986 CanLII 46 (SCC) [*Oakes*].

II. The Scope of *Charter* Rights: *R v Big M Drug Mart Ltd*

A. Context

Big M Drug Mart ("Big M") was charged with operating on Sunday, contrary to the *Lord's Day Act*.[7] Big M challenged the constitutionality of the *Lord's Day Act* on the basis that it violated freedom of religion.

Dickson C.J.C.[8] wrote that the purpose of freedom of religion is so "that every individual [is] free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own."[9] Applying this, the Supreme Court of Canada found that the *Lord's Day Act* violated s. 2(a) of the *Charter* as it compelled others to observe the Christian Sabbath.[10] The Court went on to decide that the violation could not be justified under s. 1, as the purpose of the *Lord's Day Act* was to compel religious observance.[11]

B. Significance

In *Big M*, Dickson C.J.C. explained that the *Charter*, being constitutional, is different in nature and status from the *Canadian Bill of Rights*,[12] which is simply a federal statute.[13] In light of this, the Court overturned one of its precedents, *Robertson and Rosetanni v The Queen,*[14] which had upheld the Sunday closing law under the *Canadian Bill of Rights*.[15]

Hunter et al v Southam Inc.[16] had established the broad contours of purposive interpretation; *Big M* built on this to set out the classic statement of the purposive approach to interpreting the *Charter*.[17]

The purpose of a *Charter* right is to be ascertained by "reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the

7 RSC 1970, c L-13.

8 At the time that *Big M* was decided, Justice Dickson had not yet become Chief Justice. However, for the purposes of consistency throughout this lecture, I refer to him as Chief Justice Dickson.

9 *Big M*, *supra* note 5 at para 123.

10 *Ibid* at para 136. Importantly, Dickson C.J.C. also clarified that either an unconstitutional purpose *or* an unconstitutional effect can invalidate legislation (*ibid* at para 80).

11 *Ibid* at para 141.

12 SC 1960, c 44.

13 *Big M*, *supra* note 5 at para 113. See also *Oakes*, *supra* note 6 at para 38.

14 1963 CanLII 17 (SCC).

15 *Big M, supra* note 5 at para 86. See also Peter W Hogg, "Interpreting the Charter of Rights: Generosity and Justification" (1990) 28:4 Osgoode Hall LJ 817 at 824.

16 1984 CanLII 33 (SCC).

17 Hogg, *supra* note 15 at 820.

historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*."[18] Let me list those four factors one by one:

i. "the character and larger objects of the *Charter*," that is, its nature as a constitutional instrument and its objective set out in s. 1 to maintain in Canada a "free and democratic society";

ii. "the language chosen to articulate the specific right or freedom," that is, the text;

iii. "the historical origins of the concepts enshrined," that is, how the *Charter* was conceived by those who adopted it, having regard to principles of freedom under law as embodied in the Westminster system of government and the common law, as well as principles in international instruments to which Canada was then a party or to which Canada had given its support (for example, the United Nations *Universal Declaration of Human Rights*[19]); and

iv. "where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*," for example, the "Fundamental Freedoms" under s. 2 are to be interpreted having regard to one another.

Note, the four factors relate to the situation at the adoption of the *Charter* in 1982. But, while the purposes of *Charter* rights are to be ascertained by reference to this, Dickson C.J.C.'s description is not "originalist," as how these purposes are to be given effect will develop over time in light of societal change. By this means, the "living tree" will flourish.

This was made clear in the passage that immediately followed, that the interpretation of a right should be "a generous rather than a legalistic one, aimed at fulfilling the ***purpose*** of the guarantee and securing for individuals the full benefit of the *Charter's* protection."[20] At the same time, it is important "not to overshoot the actual ***purpose*** of the right or freedom in question,"[21] but rather to remember that the *Charter* must be placed within its "proper linguistic, philosophic and historical contexts."[22] Let us look at each of these three.

Like the factors just referred to, all three contexts relate to the adoption of the *Charter*:

i. "linguistic," that is, the text;

ii. "philosophic," that is, the political and moral philosophy of liberal democratic society; and

iii. "historical," that is, the objects of constitutional protection as they were then understood.

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18 *Big M*, *supra* note 5 at para 117.

19 UNGA, 3rd Sess, UN Doc A/810 (1948) GA Res 217A (III).

20 *Big M*, *supra* note 5 at para 117 [emphasis added].

21 *Ibid* [emphasis added].

22 *Ibid.*

There is a clarity, coherence, and consonance to the *Big M* test for *Charter* interpretation. It sets out the interpretive framework that continues to govern.

As to freedom of religion, *Big M* held that this includes "both the absence of coercion and constraint, and the right to manifest beliefs and practices."[23] The *Charter* "safeguards religious minorities from the threat of 'the tyranny of the majority'"[24] such that "no one is to be forced to act in a way contrary to his beliefs or his conscience."[25]

As well, *Big M* was the first case to deal conceptually with the justification analysis under s. 1.[26] The first step was to determine "which government objectives are of sufficient importance to warrant overriding a constitutionally protected right or freedom."[27] Then, a court must decide "if the means chosen to achieve this interest are reasonable—a form of proportionality test."[28]

C. Enduring Legacy

1. Purposive Interpretation

The impact of *Big M* in shaping *Charter* jurisprudence cannot be overstated. A search on CanLII indicates that the Supreme Court has cited *Big M* in 186 cases. The purposive approach set out in *Big M* has structured the interpretation of *Charter* rights,[29] such as freedom of expression (*Irwin Toy Ltd. v Quebec (Attorney General)*),[30] mobility rights (*United States of America v Cotroni; United States of America v El Zeini*),[31] and s. 7 rights (*Re BC Motor Vehicle Act*).[32]

2. The Test for Section 1

Big M's articulation of the test for s. 1 laid out concepts that, one year later, were combined into the test set out in *Oakes*. I will discuss this further when I deal with that case.

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23 *Ibid* at para 95. See also The Honourable Justice Malcolm Rowe & Michael Collins, "Methodology and the Constitution" (2021) 42:1 Windsor Rev Legal Soc Issues 1 at 9.

24 *Big M*, *supra* note 5 at para 96.

25 *Ibid* at para 95. See also Rowe & Collins, *supra* note 23 at 9.

26 Andrew Lokan, "The Rise and Fall of Doctrine Under Section 1 of the *Charter*" (1992) 24:1 Ottawa L Rev 163 at 170.

27 *Big M*, *supra* note 5 at para 139.

28 *Ibid*.

29 Robert J Sharpe, "The Constitutional Legacy of Chief Justice Brian Dickson" (2000) 38:1 Osgoode Hall LJ 189 at 206. See also Colin Feasby, "The Evolving Approach to Charter Interpretation" (2022) 60:1 Alta L Rev 35 at 44.

30 1989 CanLII 87 (SCC).

31 1989 CanLII 106 (SCC).

32 1985 CanLII 81 (SCC).

3. Freedom of Religion

The methodology set out in *Big M* has guided the analysis in s. 2(a) cases. In *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*,[33] Chief Justice McLachlin and I wrote that while freedom of religion protects the right to believe and to manifest beliefs, it does not protect the objects of those beliefs; as the government action that was challenged did not compel anyone to act contrary to their beliefs, it did not infringe freedom of religion.[34]

III. The Limitation of *Charter* Rights: *R v Oakes*

A. Context

R v Oakes[35] decided that s. 8 of the *Narcotics Control Act*,[36] which set out a reverse onus for possession with intent to traffic, was unconstitutional. Under the impugned provision, the accused would have to prove that their possession was not for the purpose of trafficking. David Oakes, the accused, argued that the law violated the presumption of innocence in s. 11(d) and that the violation was not justified under s. 1. Dickson C.J.C. wrote that the law violated s. 11(d) of the *Charter*; he then considered s. 1.

Dickson C.J.C. found that s. 8 of the Act[37] satisfied the first step of the analysis, that is, that curbing drug trafficking by facilitating the conviction of those engaged in trafficking was a substantial and pressing objective.[38] But the provision did not meet the rational connection requirement. The presumption was held to be overinclusive and would lead to results that would defy rationality and fairness.[39] It was not a justifiable limit in a free and democratic society.

B. Significance

Oakes continues to set out the test for justifiable limitations on *Charter* rights.[40] Dickson C.J.C. identified the two functions of s. 1: first, it guarantees the rights and freedoms set out in the provisions

33 2017 SCC 54.

34 Rowe & Collins, *supra* note 23 at 9.

35 *Oakes*, *supra* note 6.

36 RSC 1970, c N-1, as repealed by *Controlled Drugs and Substances Act*, SC 1996, c 19.

37 *Ibid*.

38 *Oakes*, *supra* note 6 at para 73.

39 *Ibid* at para 78.

40 See Sujit Choudhry, "So What is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter*'s Section 1" (2006) 34 SCLR (2d) 501 at 503; Christopher M Dassios & Clifton P Prophet, "*Charter* Section 1: The Decline of Grand Unified Theory and the Trend Towards Deference in the Supreme Court of Canada" (1993) 15:3 Adv Q 289 at 290.

that follow. Second, it explicitly states its own justificatory criteria.[41] Dickson C.J.C. held that the onus rests on the party asserting a *Charter* violation to prove the violation; when that onus is met, the burden shifts to the government if it wishes to justify the infringement as a reasonable limit under s. 1. There is a "stringent standard of justification."[42] First, government must show its objective is pressing and substantial.[43] Then, government must show that the means used are demonstrably justified.[44] In doing so, a court weighs collective societal interests against the right of the claimant, or the competing rights of other individuals against the right of the claimant.[45] This is the proportionality test.

This test involves three components.[46] First, the measures must be rationally connected to the pressing and substantial objective (rational connection). Second, the means should impair the right as little as possible (minimal impairment). Third, there must be a proportionality between the deleterious effects of the measure that limits the right and the salutary effects of the objective—the more severe the deleterious effects, the more consequential the salutary effects must be.[47] Often, the decision turns on this final consideration, very much a policy-laden exercise.

C. Enduring Legacy

Oakes continues as the framework for s. 1 analysis,[48] with some further articulation. In *R v Edwards Books and Art Ltd.*,[49] Dickson C.J.C. wrote: "[I]t is not the role of this Court to devise legislation that is constitutionally valid, or to pass on the validity of schemes which are not directly before it, or to consider what legislation might be the most desirable."[50]

The three-step proportionality test in *Oakes* has informed adjudication in the United Kingdom, Israel, Hong Kong, Australia, and South Africa.[51]

41 *Oakes*, *supra* note 6 at para 63.

42 *Ibid* at para 65.

43 *Ibid* at para 69.

44 *Ibid* at para 70.

45 *Ibid* at para 71. See also Sharpe, *supra* note 29 at 206.

46 *Oakes*, *supra* note 6 at para 70.

47 *Ibid* at para 71.

48 Choudhry, *supra* note 40 at 505; Dassios & Prophet, *supra* note 40 at 302.

49 1986 CanLII 12 (SCC).

50 *Ibid* at para 150.

51 For a detailed accounting of foreign constitutional jurisprudence citing *Oakes*, see Choudhry, *supra* note 40 at 501–02.

IV. The Nature of Aboriginal Rights: *R v Sparrow*

A. Context

In 1985, Ronald Sparrow, a member of the Musqueam First Nation, went fishing in the Fraser River. He was charged under the *Fisheries Act*[52] for using a net longer than that prescribed in his fishing licence. At trial, he argued that the licence conditions were inconsistent with his rights protected by s. 35(1) of the *Constitution Act, 1982*.[53]

Dickson C.J.C. and La Forest J. described the rights protected under s. 35(1). The rights "recognized and affirmed" were those "in existence when the *Constitution Act, 1982* came into effect"; however, this should not "be read so as to incorporate the specific manner in which [the right] was regulated before 1982."[54] Thus, "[t]he nature of government regulations cannot be determinative of the content and scope of an existing aboriginal right."[55] Aboriginal rights being constitutionally protected, governments can infringe on them only in limited circumstances and they bear a high burden of justification for doing so.[56]

B. Significance

Sparrow was the first case to delineate the scope of Aboriginal rights. Section 35(1) was to be interpreted in a purposive, liberal, and generous way; this continues to structure the analysis.[57] As Robert Sharpe observes, Dickson C.J.C. and La Forest J. "opted for a flexible interpretation that would allow evolution over time and require justification of all limitations, whenever imposed."[58]

John Borrows argues that, in the framework for justifying an infringement of Aboriginal rights, the Supreme Court struck a compromise between two extremes: one that Aboriginal rights continue to exist in their original form, notwithstanding that they have been regulated, and two that most rights have been extinguished as a result of their regulation.[59]

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52 RSC 1970, c F-14, s 34.

53 s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

54 *Sparrow*, *supra* note 4 at 1091.

55 *Ibid* at 1101.

56 *Sparrow* also sets out a test to justify infringement. First, Indigenous claimants must show that legislation has the effect of interfering with an existing Aboriginal right (*ibid* at 1111). If a *prima facie* infringement is found, the burden then shifts to the government who can provide justification in a two-test analysis. First, the government must show a valid legislative objective and second, whether the measures are in keeping with the honour of the Crown (*ibid* at 1113–14).

57 *Ibid* at 1077, 1106, cited in *R v Desautel*, 2021 SCC 17 at para 21 [*Desautel*].

58 Sharpe, *supra* note 29 at 212. Similarly, Robert Hamilton and Joshua Nichols note that from one vantage point, *Sparrow* was a victory because it refused to adopt an approach whereby the rights protected by s. 35 would be limited to their regulated form in 1982. See Robert Hamilton & Joshua Nichols, "Reconciliation and the Straitjacket: A Comparative Analysis of the *Secession Reference* and *R v Sparrow*" (2021) 52:2 Ottawa L Rev 403 at 419.

59 John Borrows, "Uncertain Citizens: Aboriginal Peoples and the Supreme Court" (2001) 80 Can Bar Rev 15 at 28.

Dickson C.J.C. and La Forest J. wrote about the honour of the Crown and fiduciary duties, building on what Dickson C.J.C. wrote in *Guerin v The Queen*.[60] The Crown is to be held to a "high standard of honourable dealing"; this continues to structure s. 35(1) jurisprudence.[61]

Sparrow departed from earlier decisions, notably *St. Catharine's Milling and Lumber Co. v The Queen*[62] and *Calder v Attorney-General of British Columbia*,[63] regarding extinguishment of Aboriginal rights. Regulation is not the same as extinguishment. For the latter to have occurred, an intention to do so needed to be "clear and plain."[64]

C. Enduring Legacy

1. Scope of Aboriginal Rights

Sparrow did not set out a framework to determine the existence and content of an Aboriginal right. The framework was established in *R v Van der Peet*.[65] The test in *Van der Peet* built on the foundation set out by Dickson C.J.C. and La Forest J. when they stated in *Sparrow* that Musqueam fishing practices "ha[ve] always constituted an integral part of their distinctive culture."[66] As Chief Justice Lamer wrote in *Van der Peet*, Aboriginal rights protected by s. 35(1) are those "integral to the distinctive culture of the aboriginal group claiming the right."[67]

2. Infringement

In *Delgamuukw v British Columbia*,[68] the test for the infringement of rights set out in *Sparrow* was applied to infringement of Aboriginal title.[69]

60 1984 CanLII 25 (SCC).

61 Alain Lafontaine, "La coexistence de l'obligation de fiduciaire de la Couronne et du droit à l'autonomie gouvernementale des peuples autochtones" (1995) 36:3 C de D 669 at 707.

62 1887 CanLII 3 (SCC).

63 1970 CanLII 766 (BCCA).

64 *Sparrow*, *supra* note 4 at 1099.

65 1996 CanLII 216 (SCC) [*Van der Peet*].

66 *Sparrow*, *supra* note 4 at 1099.

67 *Van der Peet, supra* note 65 at para 46. See also John Borrows, "The Trickster: Integral to a Distinctive Culture" (1997) 8:2 Const Forum Const 27 at 29–30; Jeffery G Hewitt, "Reconsidering Reconciliation: The Long Game" (2014).

68 1997 CanLII 302 (SCC).

69 *Ibid* at para 165.

3. Ongoing Negotiations

Dickson C.J.C. and La Forest J. recognized that giving effect to Aboriginal rights is an ongoing process; they wrote that s. 35(1) "provides a solid constitutional base upon which subsequent negotiations can take place."[70]

4. Sovereignty

Dickson C.J.C. and La Forest J. stated that "there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown."[71] The Supreme Court situated Aboriginal and treaty rights, a type of sovereignty, within the overarching sovereignty of the Canadian state, a sovereignty within a sovereignty. In *Desautel* and in *Dickson v Vuntut Gwitchin First Nation*,[72] I describe Indigenous peoples as distinct political entities that, as of right, can and should operate according to their own laws, custom and practices.[73]

As a final point I would note that, after he retired, Dickson C.J.C. was involved in setting up the *Royal Commission on Aboriginal Peoples*.[74]

V. Closing

Brian Dickson was a person of good will and liberal sentiments. He was a jurist of insight and principle. He embodied fairness along with prudence. He sought to achieve social justice through moderation. His jurisprudence was grounded in the historical context of Canada. He was unfailingly respectful of our traditions and institutions.

Brian Dickson was a wise man. As lawyers, jurists, and citizens we continue to benefit from his wisdom through the foundational jurisprudence that he wrote regarding the *Charter* and regarding Aboriginal and treaty rights. Brian Dickson exemplified all that a good judge should be.

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70 *Sparrow*, *supra* note 4 at 1105.

71 *Ibid* at 1103.

72 2024 SCC 10.

73 *Ibid* at para 507; *Desautel*, *supra* note 57 at paras 19–34, 46.

74 Sharpe, *supra* note 29 at 212.

SASKATCHEWAN
LAW REVIEW

Will Challenges and the Disclosure of Third-Party Records: The Implications of *Stradeski v Kowalyshyn*, 2023 SKKB 177

James D. Steele*

* I wish to thank Justice Sean Sinclair and Lane Zabolotney for providing insightful comments on this article. Any views expressed here belong solely to the author, and any errors or omissions are solely the author's responsibility.

I. Introduction

The 2023 decision in *Stradeski v Kowalyshyn*[1] is of practical relevance to anyone challenging a will in Saskatchewan. The Court of King's Bench for Saskatchewan in *Stradeski* declares that a will challenger can never compel disclosure of relevant third-party documents until a disputed will has been set down for trial.[2] Once the will is set down for trial, a challenger can invoke documentary disclosure powers, but not before this point.

When a will is challenged in Saskatchewan, the challenger must overcome two stages.[3] Stage one is designed to weed out meritless challenges. At the first hearing, the challenger must establish a genuine issue to be tried and point to some evidence which, if accepted at trial, would tend to negative testamentary capacity or show coercion. If the challenger succeeds at stage one, the will is set down for a fulsome trial process, with more robust disclosure remedies.

For someone challenging a will, success is often impacted by the contents of the lawyer's file who took instructions from the testator,[4] or the medical records of the deceased.[5] These records often provide the most contemporaneous evidence of how the testator was functioning and what they expressed as their intention at the time of executing the will.

This article respectfully suggests that the bright-line approach taken in *Stradeski* will inevitably lead to unjust results in certain situations. *Stradeski* does not fully account for the benefits that result from keeping open the potential for challengers to obtain interim disclosure orders in appropriate situations. Rather, a preferable approach is the framework in the recent Court of King's Bench for Saskatchewan decision of *Nelson v Wagner*.[6] *Nelson* only pre-dates *Stradeski* by two years but was not mentioned or distinguished in *Stradeski*.

1 2023 SKKB 177 [*Stradeski*].

2 *Ibid* at paras 69–70.

3 See *McStay v Berta Estate*, 2021 SKCA 51 at para 22 [*McStay*], citing the foundational decision in *Dieno Estate v Dieno Estate*, 1996 CarswellSask 500 at paras 27–32, 1996 CanLII 6762 (SKKB) [*Dieno*], which is the oft-cited formulation of this two-stage process.

4 See Ian M Hull & Suzana Popovic-Montag, *Challenging the Validity of Wills*, 2nd ed (Toronto: Thomson Reuters, 2018) ("[t]he solicitor, who met with the client and prepared the will under scrutiny, will often be called as a witness in a will challenge and/or solicitor's negligence case. In such instance, he or she will have a critical role to play in the trial of a case and its potential outcome" at 268). There are many examples of the reliance that Saskatchewan courts place upon the evidence of the attending solicitor. See e.g. *Bachman v Scheidt Estate* (2016 SKCA 150), where the Court of Appeal for Saskatchewan held that "evidence of experienced solicitors was [often] noteworthy in the analysis of whether there was a genuine issue for trial on testamentary capacity" (*ibid* at para 20).

5 See e.g. Hull & Popovic-Montag, *supra* note 4 at 157. Hull & Popovic-Montag write the following: "The deceased's family physician will typically have an abundance of useful information with respect to the deceased's medical history…Medical evidence from the relevant time periods is perhaps the best type of evidence to support or refute testamentary capacity" (*ibid*).

6 2021 SKQB 113 [*Nelson*].

In *Nelson,* the Court ruled that interim disclosure orders are appropriate in certain situations, even if they are made before a stage one hearing has occurred.[7] *Nelson* said such orders are available if there is an allegation which could invalidate the will, and the evidence supporting such allegation is "credible."[8]

There are several benefits to the *Nelson* approach. First, interim disclosure of evidence can often narrow the issues in the later stage one application. This often results in better judicial decisions at the stage one hearing. A judge often relies on the testator's medical and legal records as crucial evidence to decide whether to order a trial.[9] Depriving a challenger of medical or legal evidence will sometimes prevent a challenger from obtaining evidence which *would* have raised a genuine issue had such evidence been placed before the court in stage one. Issues of disclosure are not theoretical. They are often the difference as to whether a will challenge fails or succeeds at stage one. If a will challenge is unsuccessful at stage one, that challenge is forever concluded.

Second, the primary concern raised by *Stradeski* is that interim disclosure will defeat the purpose of the two-stage process for determining will challenges.[10] However, interim disclosure need not increase the expense out of proportion to the benefits of such disclosure. If a challenger chooses to invest their own resources in obtaining an order for disclosure of additional records, that legwork is primarily borne by the challenger themselves. This reality will discipline most challengers to be selective of when they make disclosure demands.

If the challenger is later proven unsuccessful in the will challenge, they alone will typically bear their own legal fees. Numerous recent Saskatchewan decisions have ordered unsuccessful will challengers to either personally bear their own legal costs or to bear their own costs in addition to personally paying a separate measure of legal costs to the estate.[11] It is true that the estate will itself incur legal costs in reviewing the medical and legal records before the stage one hearing. However, if a will has been challenged, such an expense will often be incurred by the estate regardless. Competent estate

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7 *Ibid* at para 13.

8 *Ibid*. This article suggests that *Nelson's* framework for the release of third-party records applies not only to situations of alleged undue influence, but also to situations of alleged incapacity, or any other allegation that could invalidate a will. In other words, while *Nelson* involved facts that happened to involve alleged undue influence, there was no suggestion in *Nelson* that the Court was restricting its framework only to situations of undue influence. Rather, *Nelson* was based largely on practical policy grounds, which revolved around the benefits of permitting both litigants and judges to review pre-stage 1 disclosure in appropriate situations. These policy grounds apply with equal force to situations involving any ground which may invalidate a will. For example, in situations of alleged incapacity, disclosure of third-party records will also "assist counsel on whether the matter can be resolved and if not to identify the precise issues [that] are in play. It can assist me as the case management judge in deciding whether or not to order trial... If all parties have this information early on in the process it may result in settlement. If not, it will surely serve the purposes of having the claim justly resolved in a timely and the most cost effective manner" (*ibid* at para 14).

9 *Ibid* at para 14.

10 *Stradeski*, *supra* note 1 at para 57, citing *Seepa v Seepa*, 2017 ONSC 5368 at para 35 [*Seepa*].

11 See e.g. *Karpinski v Lozinski*, 2017 SKQB 278 at para 52; *Kyrylchuk v Cox*, 2017 SKQB 353 at para 97; *Richardson v Hooker*, 2018 SKQB 201 at para 45; *Fraser v Mountstephen*, 2021 SKQB 192 at para 60. For broader Canadian caselaw, see *Sweetnam v Lesage* (2016 ONSC 5110), which held the following: "Under the modern principles relating to estate litigation, the historical practice of ordering an estate to bear costs of all parties has been replaced by the ordinary costs principle that the loser pays" (*ibid* at para 22). See also Hull & Popovic-Montag, (*supra* note 4), where the authors write that "cost awards in estate litigation matters are no longer guided by the simple 'estate pays' scenario that once was" (*ibid* at 229).

litigation counsel who are responding to a will challenge will always obtain and review the medical and legal file before the stage one hearing as such evidence may be vital in helping their client respond to a given allegation. This internal review is undertaken regardless of whether the challenger has formally requested disclosure.

For all of these reasons, this article suggests that Saskatchewan law should preserve the basic ability to seek an order for interim disclosure before stage one. The potential existence of such orders will keep executors conscientious about responding carefully to legitimate requests for pre-stage one disclosure and ensure that in appropriate situations, a court may order such disclosure.

II. Background to a Will Challenge

Before proceeding further, it helps to place in context *why* the medical or legal files are so important in a stage one hearing. To do that, we must understand the two-stage process involved in proving a will in solemn form.

The phrase proof in "solemn form" refers to the process of formally challenging a will. For context, most wills in Saskatchewan are not contested. Rather, most wills receive probate after being proven simply in "common form," whereby the court will grant letters probate to the executors upon confirming that a given will complies with the requisite formalities and upon reviewing proof of the testator's execution of the document.

For a limited number of wills, however, there may be an interested party who believes they have evidence of potential incapacity or coercion. If they hold such concerns, and they are prepared to incur the legal fees of challenging a will, they may ask for the will to be proven in solemn form.

If a will is challenged, the law mandates that a challenger must overcome a two-stage process before any will is found to be invalid:[12]

1. **Stage 1:** The challenger must first bring a chambers application to allow a judge to determine whether the challenger has raised sufficient evidence to raise a genuine issue in relation to the will's validity. In other words, stage one is a process designed to eliminate weak will challenges or mere fishing expeditions simply launched by unhappy beneficiaries who lack actual evidence.[13] If the challenger fails at stage one, the challenge is over, and the will can be probated.

12 This two-stage process was set out by the Court of Queen's Bench for Saskatchewan (as it then was) in *Dieno*, *supra* note 3 at para 27.

13 The Court noted that "unless the applicant challenger is required to meet some evidentiary threshold, proof in solemn form would have to be granted on request. The undesirable result would be needless expense and litigation. In small estates, the costs could conceivably deplete the estate" (see *ibid* at para 30).

2. **Stage 2:** If the challenger wins at stage one, a judge will order a trial. A full trial process is required, which will typically afford a challenger the normal rights involved in questioning, disclosure, pre-trial conference, and trial. This trial process will often take years, putting each side to tens of thousands of dollars in legal fees.

Thus, unlike a claimant in other civil litigation in Saskatchewan, a will challenger has no immediate inherent right to invoke the fact-finding tools of the *King's Bench Rules* of Saskatchewan.[14] There is no Rule which expressly specifies that a will challenger is entitled to question a witness under oath or compel the other side to produce its affidavit of documents, before the stage one hearing occurs. Rather, it is typically only when a court has already proceeded beyond the stage one hearing and ruled that a will should undergo a trial process, that the challenger *then* becomes entitled to automatically invoke the discovery powers offered by Part 5 of the Rules.[15]

This reality is in contrast to most other civil claimants in a normal civil lawsuit. The Rules state that when any civil claimant files a statement of claim, no matter if the merits of their claim are strong or weak, they are entitled to the fact-finding tools provided by Part 5 of the Rules, including disclosure and questioning.[16] In contrast, in a will challenge, a challenger must start their will challenge, and potentially argue it at the stage one hearing, without any immediate right to see the most vital evidence, which is generally in the medical or solicitor records. It is only once the challenger gets over stage one and a trial is ordered that the challenger then has the right to compel disclosure of relevant documents that are in the possession of third parties. Of course, stage two may never exist for some challengers, who may lose at stage one. The policy rationale behind the two-stage process is to reduce expenses and ensure not every will is subject to the full expense of a trial process, unless the "challenge to the will's validity meets legal muster."[17]

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14 Saskatchewan, *The King's Bench Rules* [Rules].

15 There are a variety of sources that suggest will challengers can only invoke their automatic discovery rights under Part 5 of the Rules, once they have overcome stage one. See e.g. *Grams v Babiarz* (2015 SKQB 374) where the Court ordered that the will be proven in solemn form, and said "[t]he proceeding to determine these issues shall be conducted subject to the rules governing the conduct of civil actions" (*ibid* at para 112). See also *Wilson v Staples* (2018 SKQB 245) (overturned on other grounds) where the Court ordered that the will was to be set for trial. The Court specifically directed: "*The Queen's Bench Rules* shall apply to this action with respect to, *inter alia*, document disclosure and production and questioning" (*ibid* at para 94). See also *Green v Oliver (Executor of the Estate of Margaret Rosebud Oliver)* (2020 SKQB 211) where the Court ordered that the will be set down for a trial, and that in the future trial process "full disclosure of all relevant documentation is to be undertaken by all parties" (*ibid* at para 85); see also *Deneve v Kadachuk Estate*, 2007 SKCA 145 at para 39. The foregoing comments by Saskatchewan courts would be redundant if a will challenger *already* had the inherent right, from the moment they first brought a will challenge, to insist on document disclosure before stage one. Rather, these comments indicate that it is only when a will challenge has been set down for a trial that the challenger can formally invoke their discovery rights under Part 5 of the Rules. This point was made clear by *Stradeski* (*supra* note 1) when the Court said that "'the full panoply of fact-finding tools' follows, but does not precede, an initial finding of suspicious circumstances" (*ibid* at para 58).

16 See the mandatory wording set out in Rule 5-5 (Rules, *supra* note 14), which states that every party "shall" serve an affidavit of documents on the other parties, within certain timelines. Rule 5-6 says that the affidavit of documents "must" include all documents relevant to any matter in issue in the action. Rule 5-12 sets out penalties for parties who default in their duties of document production. Rule 5-15 provides that a party may even ask the court to order that a third party produce documents which are relevant and are ones that the third party might be required to produce at trial. Thus, merely by commencing a proceeding, a plaintiff becomes vested with the right to force other parties to produce documents. From a practical view, those rights are extremely valuable. They give plaintiffs the ability to obtain helpful documents which may support their claim, *before* the plaintiff is asked to actually prove the merits of their case before a court.

17 *Stradeski*, *supra* note 1 at para 49.

III. The Context of Disclosure of Records

For a challenger to rely on a testator's medical or legal file in court, the challenger must obtain and review such evidence. The dilemma is that the challenger does not typically have any access to such evidence. Such records are privileged and confidential. They are typically held in the third-party offices of medical or legal professionals.

The executor of the estate is the person who has the right to access to these records. In law, the executor steps into the legal shoes of the deceased. This means that anything which the deceased could have done in their lifetime can now be done in law by the executor. Or, at the very least, if the executor simply endorses a consent order (along with the challenger), any records created by, or for the benefit of the deceased, would typically be readily released by a third-party. In other words, if the executor cooperates with a disclosure request, third-party records are readily releasable before the stage one hearing.

The executor is typically opposed to any will challenge, as they will be defending the validity of the will. However, it was traditionally common for a challenger to reach an agreement with the executor, wherein the executor would voluntarily consent to the disclosure of the medical and legal files before the stage one hearing was held.[18]

This was often done on the basis that all sides realized that there was a real risk that a court may well order such disclosure before the stage one hearing took place. It was also done on the basis that many executors realized that they would appear more forthcoming in the eyes of a court, if they disclosed such relevant evidence before the stage one hearing. It also permitted the executor to better argue (at the stage one hearing) that a trial was not required, as the most crucial evidence had already been fully disclosed, and a trial process would not uncover any new material documents.

18 There is some direct and indirect evidence for just how common these voluntary disclosure agreements have been prior to *Stradeski* (*supra* note 1). In *Stradeski*, the Court of King's Bench for Saskatchewan referenced an argument made by counsel for Ms. Stradeski, where said counsel (who had very extensive experience with will challenges) argued that "early disclosure of medical records in such matters is *commonplace in practice*, sensible and cost-effective" (*ibid* at para 3 [emphasis added]). This author can attest from personal experience with will challenges that it has indeed been common in Saskatchewan for both sides to voluntarily agree on the disclosure of medical records before the stage one hearing. In many previous Saskatchewan decisions, the issue of disclosure of documents before stage one was not often the subject of explicit judicial comment. This was because the disclosure of medical or legal records often proceeded by the out-of-court agreement of the two opposing counsel, and thus did not require express judicial direction. That said, one may refer to those decisions in which both parties, and the chambers judge, were provided with the medical or legal records of the deceased before stage one. See e.g. *Fisher Estate v Witzany* (2022 SKQB 103), where the Court observed in passing that "[t]he medical records have been provided" (*ibid* at para 16) and elsewhere referred to the extensive notes voluntarily provided by the attending solicitor (*ibid* at para 34). See also *Bell v Bell* (2022 SKQB 198), where the attending solicitor voluntarily filed his "file records" on the Court file, meaning that his evidence was therefore disclosed by consent of the executors (*ibid* at para 27), and *McStay* (*supra* note 3), where it appeared that the medical and legal records had been voluntarily disclosed by the executors, before the stage one hearing (*ibid* at paras 29–33).

IV. *Stradeski v Kowalyshyn*

A. Factual Background in *Stradeski*

With the above procedural context in mind, we now turn to the specific facts which underlay the decision in *Stradeski*:

1. Jerry Wionzek ("the Deceased" or "Mr. Wionzek") was a lifelong bachelor, who died on November 8, 2019, at the age of sixty-three;[19]
2. Mr. Wionzek left a will dated November 7, 2019 ("Will"), which had been signed the day before he died;[20]
3. This Will was challenged by his sibling, Ms. Stradeski. Ms. Stradeski was adopted by Mr. Wionzek's parents, Louis Wionzek and Mary Wionzek, when she was three months old;[21]
4. Mr. Wionzek never had any children and appeared to live an impoverished lifestyle;[22]
5. Mr. Wionzek was diagnosed with cancer in the summer of 2019. He entered the hospital in October of 2019. On November 6, 2019, two days before he died of cancer, the Deceased signed documents to transfer his farmland into the names of his neighbours, Nick and Debbie Kowalyshyn. Nick and Debbie gave no consideration to Mr. Wionzek for this transfer and treated it as a gift. Debbie prepared the transfer authorisation, which was witnessed by Frank Oystryk, a partner at Active Accounting Ltd. in Canora;[23]
6. On November 7, 2019, one day before he died of cancer, Mr. Wionzek signed the Will in which Nick and Debbie were named as executors and beneficiaries;[24]
7. Ms. Stradeski commenced an action in July of 2020, seeking an order setting aside the transfer of the farmland and requiring the Kowalyshyns to prove the Will in solemn form;[25]
8. As noted above, one who challenges a will in Saskatchewan must overcome two different stages.[26] At stage one, which is a chambers hearing, the issue is not whether the challenger has proved their case. Rather, it is whether they have raised a genuine issue which, *if* accepted at trial, could invalidate the will. Stage two involves a full trial process, accompanied by the normal rules of disclosure, sworn questioning, and so forth;

19 *Stradeski*, *supra* note 1 at para 5.
20 *Ibid* at paras 5, 10.
21 *Ibid* at para 5.
22 *Ibid* at para 6.
23 *Ibid* at paras 8–9.
24 *Ibid* at para 10.
25 *Ibid* at paras 1–2.
26 See Part II, *above*.

9. Before the stage one hearing, and by notice of application, Ms. Stradeski sought several orders, including compelling the Saskatchewan Health Authority ("SHA") to disclose Mr. Wionzek's medical records, and compelling Nick and Debbie Kowalyshyn to disclose relevant documents in their possession to Ms. Stradeski;[27]

10. Ms. Stradeski argued that disclosure of Mr. Wionzek's medical records, now and not later, could help investigate any concerns that Ms. Stradeski held in relation to Mr. Wionzek's potential lack of capacity when he executed his Will. Ms. Stradeski also argued that early disclosure of medical records in such matters is commonplace in will challenges. Moreover, she argued that early disclosure was sensible and cost-effective in terms of narrowing the issues before stage one, and would perhaps help to resolve some matters before they needed to consume the full expense of a court hearing.[28]

B. Evidence Filed by Ms. Stradeski

Ms. Stradeski had obtained some direct evidence from various witnesses contemporaneous with the date of the Will.[29] This evidence suggested that Mr. Wionzek may have lost his mental capacity by the time he executed the Will.

In contrast, and as is typical in will challenges, the evidence filed by the defenders of the Will painted a very different picture. The evidence filed by the Kowalyshyns was compelling. It suggested that Mr. Wionzek was capable of understanding his property, and disposing of it, at the time he made the Will. Such evidence included affidavits from the Kowalyshyns, an attending physician, and Frank Oystryk (the man who drafted the Will for Mr. Wionzek).[30]

C. The Decision in *Stradeski*

The issue in *Stradeski* was whether Ms. Stradeski could compel production of relevant documents before a court had ordered that the Will be set down for trial.[31]

27 *Stradeski*, *supra* note 1 at para 2.

28 *Ibid* at para 3.

29 *Ibid* at paras 11–12.

30 *Ibid* at paras 23–26.

31 *Ibid* at para 4.

1. No Inherent Right to Compel Disclosure Before Stage Two

Stradeski declared that a challenger has no inherent right to compel disclosure before the stage one application is determined. As such, the Court of King's Bench for Saskatchewan found that neither the Kowalyshyns nor the SHA were compelled to produce Mr. Wionzek's medical records.[32]

The decision in *Stradeski* appeared to rely on the below grounds:

First, the Court observed that the issue of whether to order interim disclosure called for a balancing inquiry: "The answer calls for a balancing of two principles: the principle of full and open disclosure as a hallmark of civil litigation against the principle that estates should not be subject to challenges without the challenger raising an initial suspicion of invalidity."[33] The Court noted that the two-stage hearing is designed to avoid depleting an estate with a costly litigation before it is even determined if there is some potential merit to the challenge.[34]

Stradeski held that to complicate the stage one application with disclosure applications would risk frustrating the very purpose of the two-stage will challenge procedure. The Court referred to Justice Richards (as he then was) in *Ritchie v Royal Trust Corporation of Canada*,[35] in dissent:

> I agree with Justice Richards (as he then was) in *Ritchie* (in dissent) that the court should eschew overcomplicating the first stage application because it risks frustrating the purpose of the will challenge procedure. He wrote at paras. 42 and 43:
>
> > [42] …The first stage is concerned only with whether the circumstances warrant a trial. It does not involve determining if the applicant's case has been made out.
> >
> > [43] Unless that point is respected, it is very easy to slip into a situation where the benefit of a two-stage process is lost…In other words, the first stage inquiry will tend to assume a good deal of the cost and complexity of a trial unless it is clearly understood that it is concerned only with determining whether the applicant has demonstrated the need for a trial.[36]

32 *Ibid* at para 48.

33 *Ibid* at para 47.

34 *Ibid* at para 42, citing *Dieno*, *supra* note 3 at para 30.

35 2007 SKCA 64 [*Ritchie*].

36 *Stradeski*, *supra* note 1 at para 71, citing *Ritchie*, *supra* note 35 at paras 42–43.

Stradeski also cited a decision of the Ontario Court of Appeal in *Johnson v Johnson*.[37] In *Johnson* ONSC, the challenger had been removed from the latest version of the deceased's will.[38] The executor was able to offer evidence that the testator had intentionally removed the challenger as a beneficiary as a result of the challenger's improper management of the testator's affairs while acting as attorney for property.[39] The Ontario Superior Court of Justice in *Johnson* ONSC was not satisfied that the challenger had met the evidentiary threshold required to put that estate to the cost and delay of a will challenge.[40]

The Ontario Superior Court of Justice suggested that the tools of "document discovery" were only available to a challenger who had proven that they had met the "minimal evidentiary threshold":

> In *Seepa*, Myers J. zeroed in on the "minimal evidentiary threshold" requirement from *Neuberger*. At para. 35, Myers J. noted that, at this preliminary stage, the issue is not whether the applicant has proven his or her case but whether he or she ought to be given tools, such as documentary discovery, that are ordinarily available to a litigant before he or she is subjected to a requirement to put a best foot forward on the merits. At para. 38, Myers J. referred to the special responsibility the court owes to the testator who is not present to express their own wishes. At para. 39, he said that, in his view, the court ought to measure the evidence adduced by the applicant challenger against the evidence answered by the proponent of the will and assess what, if any, processes are required to resolve any conflicts that the court cannot fairly resolve on the record before it. At para. 40, Myers J. said it must be borne in mind that what is at issue is whether the court should exercise its discretion to require proof in solemn form, that the applicant will not likely be able to prove the case on the merits and that this is not summary judgment.[41]

The challenger appealed and argued that her will challenge should not have been dismissed without disclosure of the financial, medical, and legal documents that she had requested.[42] The Court of Appeal for Ontario in *Johnson* ONCA dismissed the appeal. It held that it was permissible to dismiss a will challenge even before such records had been produced:

> *We reject [the challenger's] submission that her application should not have been dismissed without production of the medical, financial, and legal documents that she had requested or the calling of further evidence from Mrs. Johnson's advisors. Her*

37 2022 ONCA 682 [*Johnson* ONCA], aff'g 2021 ONSC 6415 [*Johnson* ONSC].

38 *Johnson* ONSC, *supra* note 37 at paras 16–24.

39 *Ibid* at paras 16–17.

40 *Ibid* at paras 37–39.

41 *Ibid* at para 14, citing *Seepa*, *supra* note 10 at paras 35, 38–40.

42 *Johnson* ONCA, *supra* note 37 at para 5.

argument defeats the very practical purpose of the minimal evidentiary threshold prescribed by this court in Neuberger*, at para 88*: to avoid putting an estate to the needless expense and delay of a fishing expedition brought by "a disgruntled relative". It also undermines the policy concerns articulated in *Neuberger* that a claimant ought not be permitted to deplete an estate and delay its administration by seeking documentary discovery or other directions without meeting the minimal evidentiary threshold of "some evidence" that would call into question the validity of a will and that is not successfully answered by the responding party.

…

Myers J. went on, at para. 39, to offer guidance as to the sufficiency of the evidence that an applicant should put forward to meet the minimal evidentiary threshold. Drawing on the policy concerns and the culture change promulgated by the Supreme Court in *Hryniak v. Mauldin*, 2014 SCC 7, 366 D.L.R. (4th) 641, which apply to all civil cases, but are particularly important in estate cases that are at risk of depletion by needless and expensive litigation, he wrote:

> The scope of the court's discretion under Rule 75.06(3) helps to assess the sufficiency of an "answer" to the "minimal evidentiary threshold". … *In my view, the court ought to measure the evidence adduced by the applicant challenger against the evidence answered by the proponent of the will and assess what, if any, processes are required to resolve any conflicts that the court cannot fairly resolve on the record before it.* The court will be guided in making directions, as always, by the primary dictate to fashion a process that provides a fair and just resolution of the civil dispute. A fair and just resolution process is one that is developed to meet the goals of efficiency, affordability, and proportionality that underpin all civil cases as directed by the Supreme Court of Canada in *Hryniak*.

We agree with this approach. It also provides a complete answer to [the challenger's] argument that there is potential procedural unfairness in the Neuberger *approach because, as applied by the application judge, it favours an executor who has exclusive access to relevant information.* As the underlined portion of Myers J.'s reasons indicates, *the safeguard against the alleged risk of unfairness is the court's consideration of the evidence presented by the parties and the assessment of its sufficiency for the purpose of determining whether the dispute before the court can be fairly resolved on the basis of the existing record.*[43]

43 *Ibid* at paras 16, 18–19 [italics added; underlining in original], citing *Neuberger Estate v York*, 2016 ONCA 191 at para 88 [*Neuberger*] and *Seepa*, *supra* note 10 at para 39.

Stradeski said that a court should not conflate the two steps of the unique nature of solemn form proceedings. Solemn form does not allow a challenger to immediately gain the tools of document disclosure by simply commencing a proceeding. Rather, the challenger must first "prove" in stage one that their challenge is not a mere fishing expedition. *Stradeski* held the below:

> The courts have struck a balance between the interests of an unhappy disinherited person who wishes to explore the possibility of a trial to challenge the validity of a will and the interests of the executors and beneficiaries of an estate to conclude the administration and distribution of the estate. *That balance has been set by the two-step proceedings, which does not include ordered production of documents from a third party*.[44]

The Court of King's Bench for Saskatchewan also commented on the purpose of r. 5-15 of *The King's Bench Rules*.[45] Ms. Stradeski had applied for document disclosure under r. 5-15 which allows a court to order that a third-party release records. That provision expressly states that one of the conditions of ordering production of a third-party document is that they "might be required to produce it at trial."[46]

Crucial to the outcome in *Stradeski*, the Court held that implicit in this requirement is that the application for production (under r. 5-15) has been made when a trial is actually imminent. By contrast, *Stradeski* held that a trial is not imminent in a will challenge until the challenger has actually obtained an order for trial. As this was not the case in Ms. Stradeski's situation, the Court held that r. 5-15 was not appropriately invoked.[47]

As an aside, the decision in *Stradeski* did not necessarily mean that Ms. Stradeski would inevitably go on to lose the merits of the stage one hearing. The issue before the Court in *Stradeski* was solely on the narrow issue of interim disclosure. The Court was not yet making a final ruling on whether Ms. Stradeski had raised a genuine issue.[48]

2. The Practical Implications of *Stradeski*

Stradeski offers legal authority for executors to refuse any disclosure requests which are made before a trial has been ordered. If executors refuse the disclosure of medical or legal records, that will leave challengers to argue the stage one hearing armed with only the evidence that challengers can gather through their own initiative.

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44 *Stradeski*, *supra* note 1 at para 72 [emphasis added].

45 Rules, *supra* note 14, r 5-15.

46 *Ibid.* See also *Stradeski*, *supra* note 1 at para 70.

47 *Stradeski*, *supra* note 1 at para 70.

48 *Ibid* at para 46.

What will be the practical effect of *Stradeski*? This article suggests that some executors will nevertheless cooperate in some disclosure requests which are made before stage two. Some experienced counsel will advise executors that it is often to the tactical advantage of an executor to disclose medical or legal records, even if they are not strictly obligated to do so. First, such records are often quite helpful to the executor, as such records often show that capacity was indeed present. Once the challenger sees the records and realizes their case is doomed to fail, they will end their challenge accordingly.

Second, the optics of a stubborn refusal to disclose records has its own risks. Judges are human beings with common sense. If a beneficiary has already provided some independent evidence that a testator was failing mentally at the time they made a disputed will or was being pressured by someone at the time of the latest will, the judge will consider that evidence at the stage one hearing. The judge will then turn to the executor, who is defending the will, and ask: "Why have you so strongly opposed the release of the legal or medical records, which records may shed light on what this testator truly intended to do? What are you hiding?" In other words, a court would take such reality into account in deciding whether or not a trial process is appropriate before issuing Letters Probate.

However, *Stradeski* will undoubtedly have a noticeable impact in future. It is likely that in some situations, *Stradeski* will indeed prompt some executors to withhold evidence, where in the past, they might have been more resigned to cooperating with disclosure. Or, in other cases, executors may cherry-pick from among the medical or legal records and rely on only some records which are favourable to the defence of the will. Without the challenger being able to compel the entire disclosure, the challenger cannot as easily review such selective records in context.

Again, a challenger could protest such selective disclosure and argue that it raises sinister questions. Indeed, this argument was raised by Ms. Stradeski in response to the fact that the Kowalyshyns selectively filed *some* of the deceased's medical records, but did not disclose them all. As the Court summarized in relation to her submissions: "This selective disclosure, Ms. Stradeski states, creates unfairness and justifies full disclosure of Mr. Wionzek's medical records."[49] The Court went on to say that the future court which hears the stage one application "may see fit to consider the concerns Ms. Stradeski has raised in this application, that the Kowalyshyns, as proponents of the Will, have had the advantage of access to Mr. Wionzek's medical records and she has not."[50]

But as a practical matter, any challenger would still prefer a world in which they could obtain and review the entirety of the evidence and not simply be left to argue over inferences arising from partial disclosure. Thus, the practical reality is that *Stradeski* will make the role of a challenger more difficult than it was before.

49 *Ibid* at para 34.

50 *Ibid* at para 53.

V. The Conflict Between *Stradeski* and *Nelson*

This article suggests that the Court of Appeal for Saskatchewan must now examine *Stradeski* and provide clarity on whether or not a will challenger can ever compel disclosure before the stage one hearing. Simply put, two recent and conflicting Saskatchewan decisions now exist on this very topic.

For context, it is notable that in *Stradeski*, the Court said that "[c]ounsel has not provided a case specifically on point, that is whether a third-party can be compelled to produce documents prior to the court ordering a trial to prove a will in solemn form."[51] That said, the 2021 decision in *Nelson* provides authority which does speak to this issue. *Nelson* stands in conflict with *Stradeski* and bears discussion in this context.

Nelson was a 2021 decision of the Court of Queen's Bench for Saskatchewan (as it then was). There, the challengers had commenced a proceeding in which they alleged undue influence on the part of John James Nelson in respect of both a will and a transfer of land made by Hazel Nelson, the deceased.[52] The challengers sought the will file of the solicitor who had prepared the will.[53]

The challengers said it was appropriate for the Court to order disclosure now, prior to determining stage one of the will challenge.[54] The challengers said that the evidence in the solicitor's file could assist the Court in deciding whether it was appropriate to direct that the will be set for trial.[55] The solicitor argued that the Court should not disclose the records until the Court had heard the stage one application and determined if a trial should be ordered.[56]

The Court in *Nelson* agreed with the challengers and ordered the disclosure of the records immediately, even though the stage one hearing had not yet been determined.[57] The Court explicitly held that the disclosure of third-party records need not wait until a will had been set for trial.[58] The Court held that "to impose such a requirement is wrong in principle, would lead to significant inefficiencies and be contrary to the Foundational Rules of *The Queen's Bench Rules*."[59]

The Court in *Nelson* agreed that there was an initial threshold requirement that should be met before a court ordered production of a file that may be subject to solicitor-client privilege.[60] However, this threshold was not that a trial must first have been ordered in the stage one hearing. Rather, the

51 *Ibid* at para 67.

52 *Nelson*, *supra* note 6 at para 1.

53 *Ibid*.

54 *Ibid* at para 4.

55 *Ibid* at para 6.

56 *Ibid* at paras 5, 7.

57 *Ibid* at para 15.

58 *Ibid* at para 13.

59 *Ibid* at para 12.

60 *Ibid* at para 13.

threshold was simply that the allegations relating to the invalidity of the will must be "credible."[61] The Court in *Nelson* outlined the practical benefits that can result from early disclosure. Such records can provide assistance both to the parties in narrowing the issues and to the Court in determining whether to order a trial:

> The production, in advance of the decision whether or not to order trial of such an issue serves Foundational Rule 1-3(3)(a), which states:
>
> > (3) To achieve the purpose and intention of these rules, the parties shall, jointly and individually during an action:
> >
> > > (a) identify or make an application to identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense;
>
> Ordering production of Mr. Turner's file at this point may significantly assist counsel on whether the matter can be resolved and if not to identify the precise issues [that] are in play. It can assist me as the case management judge in deciding whether or not to order trial of the issue of undue influence. If all parties have this information early on in the process it may result in settlement. If not, it will surely serve the purposes of having the claim justly resolved in a timely and the most cost effective manner. It ensures that potentially significant evidence is available to the court when deciding whether there is a basis to order trial of the issue of undue influence. It applies the principled approach to determining whether to over-ride claims of solicitor-client privilege.[62]

It is true that the underlying application for solemn form in *Nelson* was commenced by originating application instead of a notice of application, as was used in *Stradeski*.[63] However, this procedural distinction does not appear to be relevant to the underlying rationale expressed in *Stradeski*, which said that "whether or not discovery of documents differs between an action and an application, my decision would not change."[64] The Court in *Stradeski* instead reached the more sweeping conclusion, being that a challenger has no inherent right to invoke disclosure from third parties until they obtain an order setting the will for trial.[65]

61 *Ibid*.

62 *Ibid* at paras 13–14.

63 *Ibid* at para 1; *Stradeski*, *supra* note 1 at para 2.

64 *Stradeski*, *supra* note 1 at para 62.

65 *Ibid* at para 70.

The rationales adopted by each decision are interesting when compared side by side. In *Stradeski*, the Court held that a challenger cannot compel disclosure before stage one is determined. This is because it would risk "overcomplicating the first stage application…[and] it risks frustrating the purpose of the will challenge procedure."[66]

In contrast, *Nelson* held that an order for disclosure before stage one can be appropriate. *Nelson* explicitly rejected any notion that the production of third-party records cannot be ordered until a trial has been ordered. We find the below in *Nelson:*

> *I do not disagree that there is an initial threshold requirement that should be met before a court orders production of a file that may be subject to solicitor-client privilege. However that threshold requirement is not that this court must first decide whether or not to direct a trial of the issue regarding undue influence.* The twostep process argued for does not require that I first direct a trial of the issue of undue influence. *So long as there are credible allegations of undue influence, as there are here, then in my opinion the appropriate threshold has been satisfied.* The production, in advance of the decision whether or not to order trial of such an issue serves Foundational Rule 1-3(3)(a).[67]

Nelson and *Stradeski* are both decisions issued by the same level of court, but reach inconsistent results on whether a challenger can ever compel disclosure prior to a will being set for trial. As such, only the Court of Appeal for Saskatchewan can now provide clarity to all courts in Saskatchewan to ensure future outcomes are decided in a consistent and predictable fashion.

VI. What is the Preferable Approach

This article contends that the framework outlined in *Nelson* is the preferable one. In the past, both the challenger and defender would often agree to the voluntary disclosure of solicitor and medical records.[68] This was regarded as a cost-effective means of narrowing the issues in dispute. This author can personally attest that many will challenges are abandoned (or settled for a nominal sum) once the challenger can review the medical and legal file, which may confirm capacity or intention.

Disclosure made in advance of the stage one hearing has a positive effect. Better decisions are typically the result of possessing more information instead of less information. The decisions which can be affected by pre-stage one disclosure include the below:

1. The decision of a challenger as to whether to abandon their challenge;

66 *Ibid* at para 71.

67 *Nelson*, *supra* note 6 at para 13 [emphasis added].

68 For further discussion on this issue, see *supra* note 18.

2. The decision of an executor as to whether to settle with a challenger, or, at minimum, which issues to concede and which to oppose; and

3. The decision of a court as to whether there is actually a genuine issue raised.

Nelson appropriately held that as long as a challenger has provided credible allegations relating to a ground that would invalidate a will, an individual judge should have the discretion to order pre-stage one disclosure.[69] Therefore, under *Nelson*, frivolous fishing expeditions would not result in an order compelling disclosure as a court would dismiss such applications. Moreover, such applications could be sanctioned by costs orders. The practical implication of the *Nelson* framework is to ensure that deserving challengers have the bare ability to ask a court to make disclosure before stage one is heard. The potential existence of such orders will keep executors conscientious about responding appropriately to legitimate requests for pre-stage one disclosure.

This article does wish to address the valid concerns expressed in *Stradeski* regarding the "mischief if challengers were permitted to obtain intrusive production before meeting any evidentiary threshold."[70] This concern has also been expressed by Ontario decisions, such as *Johnson* ONCA, mentioned above. In *Johnson* ONCA, the Court of Appeal for Ontario held that the cost and delay of documentary discovery should only be imposed on an estate if the challenger had first demonstrated that their challenge met the minimal evidentiary threshold:

> We reject [the challenger's] submission that her application should not have been dismissed without production of the medical, financial, and legal documents that she had requested or the calling of further evidence from Mrs. Johnson's advisors. Her argument defeats the very practical purpose of the minimal evidentiary threshold prescribed by this court in *Neuberger*, at para 88: to avoid putting an estate to the needless expense and delay of a fishing expedition brought by "a disgruntled relative". It also undermines the policy concerns articulated in *Neuberger* that a claimant ought not be permitted to deplete an estate and delay its administration by seeking documentary discovery or other directions without meeting the minimal evidentiary threshold of "some evidence" that would call into question the validity of a will and that is not successfully answered by the responding party. These concerns were also addressed by Myers J. in *Seepa* where he advocates "a culture shift" from the routine standard form orders for directions that "consign [the] parties to lengthy, intrusive, expensive documentary collection and investigation proceedings."[71]

69 *Nelson*, *supra* note 6 at para 13.

70 *Stradeski*, *supra* note 1 at para 57.

71 *Johnson* ONCA, *supra* note 37 at para 16, citing *Neuberger*, *supra* note 43 at para 88. See also *Seepa*, *supra* note 10 at paras 2–4.

However, this article suggests that when one examines the practical scenarios that unfold under the *Nelson* framework, they do not necessarily result in situations of inappropriate cost or delay.

This article offers the below observations, which stem from the author's involvement in numerous will challenges. First, if a challenger chooses to expend resources on obtaining third-party records, that additional cost is primarily borne by the challenger and not by the estate. The legal costs of the challengers will rarely be borne by the estate if the challenge is unsuccessful. Gone are the days in which everyone simply had their legal fees paid out of the estate, even if a challenger was proven unsuccessful. The Court of Appeal for Ontario has held as follows:

> *The modern approach* to awarding costs, at first instance, in estate litigation recognises the important role that courts play in ensuring that only valid wills executed by competent testators are propounded. It *also recognises the need to restrict unwarranted litigation and protect estates from being depleted by litigation. Gone are the days when the costs of all parties are so routinely ordered payable out of the estate that people perceive there is nothing to be lost in pursuing estate litigation.*[72]

As such, the extra work of reviewing the disclosure is a risk primarily borne by the challenger. Again, the challenger also faces the discipline of a future costs order if they bring a meritless application.

Second, while the estate will expend resources in carefully reviewing the medical and legal records, such resources will be expended by the estate regardless of whether or not such records are disclosed before stage one. If experienced counsel is advising an executor who is facing a will challenge, the executors will always begin by internally seeking out the medical and legal file, if such is relevant to the allegations at play. This internal review is done in any event, regardless of whether the challenger has yet even requested such documents to be disclosed.

Third, it is true that an estate could be forced to expend legal fees in opposing any court application brought solely to compel interim disclosure. However, there are a variety of factual realities to bear in mind:

1. If a challenger has shown credible grounds to justify disclosure of a medical or legal file, the estate can simply avoid such litigation costs relating to disclosure by *consenting* to the disclosure of the records. Again, from the author's own experience, and from many discussions with counsel who routinely litigate will challenges, such consensual disclosure has been the norm in the majority of will challenges brought before *Stradeski*;
2. Even if a challenger does happen to be fishing and has no real independent evidence of incapacity or coercion, many executors may still voluntarily disclose the medical and legal file. This is done on a tactical basis, to demonstrate to the challenger that they have no case

72 *McDougald Estate v Gooderham*, 2005 CanLII 21091 at para 85 (ONCA) [emphasis added].

and will lose in court. The challenger will often abandon its challenge out of a wish to avoid further legal fees. From a cost-benefit analysis, it is simply less expensive for an estate to disclose helpful medical or legal records to a challenger if such disclosure will immediately resolve the challenge. This disclosure in many situations will often remove the need to litigate purely on the issue of release of records; and

3. Even if an estate refuses to disclose records and a court application is necessitated purely on the issue of disclosure, these situations are comparatively rare. If a challenger is bringing a baseless challenge, it is unlikely the challenger will wish to expend the five figures in legal fees to bring a full court application (supported by affidavits and a brief of law) simply to seek interim disclosure. If the challenger does and is unsuccessful for failing to meet the threshold in *Nelson*, the estate can be awarded tariff costs payable by the challenger personally. Many will challenges involve estates worth well over a million dollars. Given this, the expenditure of legal fees on a disclosure application, which may involve highly relevant evidence of the testator's intentions and functioning, is not disproportionate to the stakes involved.

Finally, we turn to the concern that interim disclosure requests will simply impose needless delay. One can imagine a challenger who is delaying the determination of a will challenge by seeking endless disclosure requests before agreeing to fix a date for the hearing of the stage one application. That can be overcome by the executor carefully responding to any legitimate disclosure requests, based on the documents requested. Once the executor has responded to the appropriate requests, the executor can give notice that it will apply to lapse the caveat which the challenger has filed, unless the stage one date is set expeditiously. This will concentrate the mind of the challenger and force them to proceed with arguing the merits of the stage one application.

In other words, none of the potential outcomes which may ensue under *Nelson* are alarming enough to justify a blunt and total prohibition on interim disclosure orders. Rather, the more alarming scenarios flow from an unqualified ban on interim disclosure orders. Based on this author's experience, an all-inclusive ban introduces the risk that some meritorious challengers will be forced to fight the stage one hearing on a totally uneven evidentiary footing as compared to the executor.

If *Stradeski* prevails, it is inevitable that a future will challenge will be brought, and somewhere, tucked away in medical or legal files (beyond the reach of the challenger), will be relevant documents which can demonstrate a genuine issue of coercion or incapacity. If the *Stradeski* framework is adopted, such records could remain hidden simply because the executor knows that they face no requirement to ever disclose them before stage two. If so, and if the challenger loses on stage one due to an inability to utilize such records, such records will never see the light of day. In such situations, a will which may be invalid (when considered in light of all the evidence), will be probated as a result.

For all of these reasons, ensuring the availability of interim disclosure orders in *some* circumstances is not inconsistent with the two-stage gatekeeping process. Rather, such a framework would simply recognize that, in select situations, interim disclosure is necessary to ensure that credible challengers are permitted to put their best foot forward in the critical first stage. To enact a bright-line rule, in which disclosure orders are forever unavailable, will introduce consequences that are not intended.

VII. Conclusion

This article suggests that the Court of Appeal for Saskatchewan should clarify the law and uphold the framework in *Nelson*. Alternatively, the Court of King's Bench for Saskatchewan may wish to seriously consider creating a new rule in Division 4 of Part 16 of the Rules.[73] Such a rule could codify the framework set out in *Nelson* and outline a process by which a will challenger could ask a court to order the release of third-party records in appropriate situations. This codification would supersede *Stradeski* and provide certainty to both challengers and defenders of disputed wills.

73 Division 4 of Part 16 of the Rules (*supra* note 14) is the Division that relates to disputed estates.

Case Commentaries

Balancing Parliamentary Privilege and Constitutional Accountability in *Canada (Attorney General) v Power*

Alaa-Safia Bouzertit*

In *Canada (Attorney General) v Power*,[1] the Supreme Court of Canada examined whether the Crown can be held liable for damages under s. 24(1) of the *Canadian Charter of Rights and Freedoms*[2] for enacting legislation later declared unconstitutional. This decision considers the balance between respecting parliamentary privilege and accountability, showing that government actions infringing on *Charter* rights must still meet constitutional standards.

I. Background Information

In 2018, Joseph Power filed a legal challenge against the constitutionality of the "transitional provisions"[3] in the *Limiting Pardons for Serious Crimes Act*[4] and the *Safe Streets and Communities Act*.[5] These provisions barred him from obtaining a record suspension, even though the offences were committed before the provisions were enacted.[6] Mr. Power's case began with his 1996 convictions, where he served eight months in prison, after which he became a certified X-ray technician and worked as a medical radiation technologist in New Brunswick.[7] However, in 2011, his employer

* JD 2025 (Saskatchewan).

1 2024 SCC 26 [*Power*].

2 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

3 *Power*, *supra* note 1 at para 7.

4 SC 2010, c 5.

5 SC 2012, c 1.

6 *Power*, *supra* note 1 at para 11.

7 *Ibid* at para 9.

discovered his criminal record, which led to his suspension and subsequent difficulty finding work in his field.[8] In 2013, Mr. Power applied for a record suspension, but his application was denied due to the retroactive provisions, leaving him unable to continue in his profession.[9]

These provisions were later declared unconstitutional by courts for breaching ss. 11(h) and (i) of the *Charter*.[10] Canada argued, however, that it could not be held liable for damages under s. 24(1) for simply enacting such legislation, even while acknowledging the provisions' unconstitutionality.[11] Both the Court of Queen's Bench of New Brunswick and the Court of Appeal of New Brunswick found that the Crown was not entitled to absolute immunity, pushing Canada's appeal to the Supreme Court.[12]

II. Decision

The Supreme Court of Canada addressed whether "damages [can] ever be an appropriate and just remedy under s. 24(1) of the *Charter* for the enactment of legislation later declared unconstitutional?"[13] The Supreme Court upheld the lower courts' findings, and affirmed that the Crown has "no absolute immunity" in such cases.[14] The majority highlighted that the Crown may only be liable when the legislation "is clearly unconstitutional or was in bad faith or an abuse of power."[15] The appeal was dismissed with costs.[16]

III. Reasoning

The Supreme Court began by analysing constitutional provisions, particularly ss. 24(1) and 32(1) of the *Charter*, and s. 52(1) of the *Constitution Act, 1982*.[17] These provisions "entrench the court's role in holding the government to account for *Charter* violations."[18] Section 24(1), the Supreme Court noted, provides broad discretion for remedies and ensures that *Charter* rights "are only as meaningful

8 *Ibid* at para 10.

9 *Ibid* at para 11.

10 *Ibid* at para 12.

11 *Ibid* at para 13.

12 *Ibid* at paras 15–16.

13 *Ibid* at para 17.

14 *Ibid* at para 22.

15 *Ibid* at para 116.

16 *Ibid* at para 119.

17 Schedule B to the *Canada Act 1982* (UK), 1982, c 11; *Power*, *supra* note 1 at para 30.

18 *Power*, *supra* note 1 at para 30, citing Marilyn L Pilkington, "Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms" (1984) 62:4 Can Bar Rev 517 at 535, 552–67.

as the remedies provided for their breach."[19] Referencing *Doucet-Boudreau v Nova Scotia (Minister of Education)*,[20] the Supreme Court stated that s. 24 remedies "must remain flexible and responsive to the needs of a given case."[21]

In discussing damages as a s. 24(1) remedy, the Supreme Court referred to the four-step test from *Vancouver (City) v Ward*.[22] This test assesses whether a *Charter* right has been breached, whether damages will fulfill the goals of compensation, vindication, or deterrence, whether any countervailing factors defeat a damage award, and lastly, the quantum of damages.[23]

Building on this, the Court turned to *Mackin v New Brunswick (Minister of Finance); Rice v New Brunswick*[24] to address immunity. The Supreme Court agreed that *Mackin* had set a high threshold for damages in cases involving unconstitutional legislation.[25] While *Mackin* recognized a limited immunity for the mere enactment of unconstitutional laws,[26] it also recognized that such immunity could be overridden if the law was "'clearly wrong, in bad faith, or an abuse of power.'"[27] The Supreme Court rejected Canada's argument that *Mackin* should be overturned, finding no "compelling reason to overrule a precedent of this Court."[28]

The Supreme Court emphasized that limited immunity respects both parliamentary sovereignty and judicial accountability.[29] The Supreme Court explained that "parliamentary sovereignty is not undermined by the *Mackin* threshold,"[30] and that, while Parliament is subject to the constraints of the Constitution, it retains its power to legislate within those bounds.[31] The Supreme Court further emphasized that an absolute immunity "leaves little room for the principles that underpin legislative accountability,"[32] and risks undermining the integrity of *Charter* rights. Limited immunity, on the other hand, "ends at the point where it no longer strikes a justifiable constitutional balance."[33] When legislation is "clearly unconstitutional, in bad faith or in an abuse of power,"[34] shielding the government from liability can no longer be justified.[35]

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19 *Power*, *supra* note 1 at para 39.

20 2003 SCC 62 [*Doucet-Boudreau*].

21 *Power*, *supra* note 1 at para 40, citing *Doucet-Boudreau*, *supra* note 20 at para 59.

22 2010 SCC 27 [*Ward*].

23 *Power*, *supra* note 1 at para 42, citing *Ward*, *supra* note 22 at para 4.

24 2002 SCC 13 [*Mackin*].

25 *Power*, *supra* note 1 at para 23.

26 *Ibid* at para 65, citing *Mackin*, *supra* note 24 at para 79.

27 *Power*, *supra* note 1 at para 66, citing *Mackin*, *supra* note 24 at para 78.

28 *Power*, *supra* note 1 at para 77.

29 *Ibid* at paras 79–80.

30 *Ibid* at para 81.

31 *Ibid*.

32 *Ibid* at para 93.

33 *Ibid* at para 115.

34 *Ibid*.

35 *Ibid*.

IV. Conclusion

The Supreme Court of Canada's decision in *Canada (Attorney General) v Power*, highlights the essential role of the judiciary in maintaining constitutional balance. This decision sends a clear message that while legislative autonomy is respected, accountability is non-negotiable when laws infringe *Charter* rights.

The Fresh Start Principle v Penalties Imposed from Breaking the Law

Carla Fast*

Poonian v British Columbia (Securities Commission)[1] is a 2024 split decision from the Supreme Court of Canada focusing on debts that are not released by a discharge from bankruptcy. Justice Côté writes for the five to two majority and Justice Karakatsanis writes for the dissent.

I. Facts

The British Columbia Securities Commission (the "Commission") investigated Thalbinder Singh Poonian and Shailu Poonian for breaching the *Securities Act*[2] by manipulating the market, causing investors millions of dollars of losses.[3] The Poonians used pseudonyms and multiple accounts to artificially inflate the share price of a public company ("OSE") they had acquired a majority interest in.[4] With the help of a company, the Poonians and the company encouraged investors to purchase the overpriced shares.[5] As a result, the Commission imposed administrative penalties totalling $13.5 million for the Poonians and a disgorgement order representing amounts that they had obtained as a result of the manipulation.[6] This resulted in the Poonians owing over $19 million.[7] In April 2018, the Poonians elected to make a voluntary assignment in bankruptcy under the *Bankruptcy and Insolvency Act*.[8]

* JD 2025 (Saskatchewan).

1 2024 SCC 28 [*Poonian*].

2 *Securities Act*, RSBC 1996, c 418.

3 *Poonian*, *supra* note 1 at para 4.

4 *Ibid* at para 7.

5 *Ibid* at para 8.

6 *Ibid* at para 4.

7 *Ibid* at para 9.

8 *Ibid* at para 10; RSC 1985, c B-3 [*BIA*].

II. History of the Case

A. Supreme Court Of British Columbia

The Commission applied to the Court for a declaration that the amounts owing under the penalties and disgorgement orders are not to be released by a discharge from bankruptcy by virtue of *BIA* ss. 178(1)(a) and (e).[9] The Judge found that both exceptions under ss. 178(1)(a) and (e) applied, and therefore, these debts were exempt from the discharge.[10]

B. Court of Appeal for British Columbia

The Court agreed that both the financial penalties and the disgorgement orders were exempt under *BIA* s. 178(1)(e), however, not under s. 178(1)(a).[11] The Court concluded that "s. 178(1)(e) is not restricted to cases in which the bankrupt made a fraudulent statement to the specific creditor relying on this provision."[12] As the Poonians obtained the funds by false pretences or fraudulent misrepresentation, s. 178(1)(e) applied and their appeal was dismissed.[13]

III. Issue

Whether the Commission's administrative penalties and the disgorgement order fit under one of the *BIA* s. 178(1) exceptions and survive a discharge from bankruptcy?[14]

IV. Supreme Court of Canada Decision

The seven justice majority starts by grounding their discussion with the overall principles of the bankruptcy scheme and courts' discretion in granting or refusing the discharge of a bankrupt. They then turned to reviewing the exceptions outlined in s. 178(1). Côté J. states that the debts specified within s. 178(1) are exceptions to the general rule that a bankrupt's debts are released by a discharge from bankruptcy,[15] noting that "[t]he exceptions in s. 178(1)(a) through (h) must be interpreted

9 *Poonian*, *supra* note 1 at para 5.

10 *Ibid* at para 11.

11 *Ibid* at para 15.

12 *Ibid* at para 19.

13 *Ibid*.

14 *Ibid* at para 3.

15 *Ibid* at para 25.

narrowly and applied only in clear cases."[16] The Court takes this approach in interpreting the exceptions as "the more claims that survive bankruptcy, the more difficult it becomes for a debtor to rehabilitate,"[17] which is one of the overarching principles of the *BIA*. Additionally, the majority states that if there is uncertainty as to whether the exceptions apply, then the uncertainty should benefit the bankrupt.[18] The Court notes that s. 178(1)(a) differs slightly between the English and French versions as the terms "in respect of an offence" are missing from the French version.[19] However, the majority interprets the specific wording of this provision, coming to the conclusion that neither the administrative penalties nor the disgorgement orders are covered under this exception since they were not "imposed by a court," as they were imposed by a regulatory agency (the Commission).[20] Côté J. confirms how a claimant can establish fraudulent misrepresentation or false pretences for s. 178(1)(e), and that there is no direct victim requirement needed.[21] As there was no direct link between the fraudulent conduct and the administrative penalties, they do not fall within the s. 178(1)(e) exception.[22] However, the disgorgement orders have a direct connection as they represent the amounts the Poonians obtained from their market manipulation, as such, they are within s. 178(1)(e) and survive the bankruptcy.[23] The dissent agrees with most of the majority's analysis, only disagreeing regarding s. 178(1)(e) stating that "both the disgorgement orders and the administrative penalties are monetary sanctions imposed because of, and thus resulting from, deceitful conduct that Parliament specifically sought to address" and should both be within this exception.[24]

V. Commentary

The Supreme Court conducted statutory interpretation to define the scope of *BIA* ss. 178(1)(a) and (e), keeping in mind the underlying principles of the Canadian bankruptcy scheme of providing the bankrupt with a fresh start by releasing them from their debts. The Court kept the definition of these exemptions fairly narrow as there should not be many exceptions that survive after a bankrupt has been discharged. This can provide insight into how the remainder of the exceptions in s. 178(1) would be interpreted by a court as this same reasoning would likely extend to the rest of the exceptions. There is balancing involved between ensuring that justice is upheld, specifically where a bankrupt has violated the law and benefitted from that violation, and providing the bankrupt with a clean slate after being discharged. This case helps to clarify where that balance lies.

16 *Ibid* at para 26.
17 *Ibid* at para 27.
18 *Ibid*.
19 *Ibid* at para 37.
20 *Ibid* at para 51.
21 *Ibid* at paras 67, 95.
22 *Ibid* at paras 103, 107.
23 *Ibid* at paras 112–14.
24 *Ibid* at para 141.

Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment): The Intersection between *Charter* Values and Administrative Law

Avery Gray*

I. Introduction

Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)[1] is a unanimous Supreme Court of Canada decision addressing the role of *Charter* values in administrative decision-making. The case involved the applications of several parents to the Minister of Education, Culture and Employment (the "Minister") to have their children educated in French, the minority language in the Northwest Territories. The parents did not qualify for minority language education rights under s. 23 of the *Charter,*[2] and instead applied under the Minister's Directive (the "Directive").[3] The Directive permits non-rights holders to seek admission to the French language education program under three streams: reacquisition, non-citizen Francophone, or new immigrant.[4] The Minister rejected all five applications, finding the parents ineligible under both s. 23 and the Directive.[5] The parents and the Commission scolaire francophone ("CSF") sought judicial review of the decisions, arguing that s. 23 should influence the Minister's discretionary power beyond the Directive.[6] The key issue before the Supreme Court was whether, and to what extent, s. 23 of the *Charter* should inform the Minister's decision-making process.[7]

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* JD Candidate 2026 (Saskatchewan).

1 2023 SCC 31 [*Commission scolaire francophone*].

2 *Canadian Charter of Rights and Freedoms*, s 23, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

3 *Commission scolaire francophone*, *supra* note 1 at para 6.

4 *Ibid* at para 17.

5 *Ibid* at para 6.

6 *Ibid* at para 7.

7 *Ibid* at para 58.

II. Procedural History

In two separate judicial review applications,[8] Justice Rouleau set aside the Minister's decisions,[9] finding that the Minister did not exercise her residual discretion to consider *Charter* values.[10] Rouleau J. emphasized that the Minister was required to balance government interests with the broader purpose of s. 23, including the impact of the decision on the development of the Francophone language and community.[11]

The Court of Appeal for the Northwest Territories overturned this decision.[12] The majority concluded that Rouleau J. erred by proceeding as though the parents' *Charter* rights were engaged.[13] Since the parents did not qualify under s. 23, the Government was not required to consider constitutional protections or values in exercising its discretion.[14]

The Supreme Court of Canada's decision authored by Justice Côté, allowed the appeal, holding that the Minister must consider s. 23 of the *Charter* when exercising residual discretion, even when the parents' *Charter* rights are not directly engaged.[15] The Supreme Court applied the *Doré* framework by first inquiring into whether the administrative decision engaged *Charter* rights or their underlying values.[16] The Supreme Court found the values central to s. 23—"preservation and development of minority language communities"—are directly linked to education in the minority language.[17] These values support s. 23's broader purpose: ensuring an equal partnership between Canada's two official languages in the context of education.[18] Given that admitting children into the French language program directly supports this purpose,[19] the Minister's discretion ought to have been guided by s. 23's values.[20]

The second step of the *Doré* framework required the Minister to conduct a proportionate balancing of government interests with *Charter* rights and their underlying values to "giv[e] effect, as fully as

8 *A.B., Commission scolaire francophone v Ministre de l'Éducation*, 2019 NWTSC 25; *Commission scolaire francophone v Minister of Education*, 2020 NWTSC 28.

9 *Commission scolaire francophone*, *supra* note 1 at paras 44, 49.

10 *Ibid* at paras 45, 48.

11 *Ibid*.

12 *Ibid* at para 54.

13 *Ibid* at para 52.

14 *Ibid*.

15 *Ibid* at para 8.

16 *Ibid* at para 64, citing *Doré v Barreau du Québec*, 2012 SCC 12 at para 4 [*Doré*]; *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at para 4 [*Loyola*]; *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 57 [*Trinity Western*].

17 *Commission scolaire francophone*, *supra* note 1 at para 80.

18 *Ibid* at para 4.

19 *Ibid.*

20 *Ibid* at para 97.

possible to the *Charter* protections at stake."[21] The Supreme Court reviewed the weight placed on each factor by the decision maker, concluding that the Minister overvalued budgetary considerations and the desire for consistency at the expense of constitutional values and the remedial nature of s. 23.[22]

III. Commentary

Commission scolaire francophone marks a significant development in the intersection of administrative law and constitutional principles. Building on *Doré*, the Supreme Court underscores that "*Charter* values are inseparable from *Charter* rights, which 'reflect' them"[23] and gives meaning to those rights. By applying this reasoning, the Supreme Court broadens the scope of constitutional protections, ensuring that *Charter* values guide administrative decisions even when an explicit constitutional right is not engaged. This approach strengthens the *Charter*'s influence in administrative law by fostering a broader understanding of constitutional rights and values.

However, the decision provides limited guidance on how administrative bodies should engage with *Charter* values when no constitutional right is infringed. While the Supreme Court adopts a contextual approach to determine the relevant values of s. 23,[24] it does not establish a concrete framework for determining how and when administrative bodies should consider *Charter* values in decision-making. This lack of clarity could pose challenges in future cases, particularly when more subjective constitutional values are implicated.[25]

Additionally, the Supreme Court maintains a distinction between *Charter* rights and *Charter* values, noting that *Charter* values inform the decision, but do not dictate a right to minority education.[26] This distinction could lead to confusion in cases where the boundaries between rights and values are unclear.

Ultimately, while *Commission scolaire francophone* strengthens the role of *Charter* values in administrative decision-making, the absence of clear guidance on engaging with these values when constitutional rights are not directly infringed may lead to inconsistent applications by administrative bodies and consequently, an increase in judicial review applications. This underscores the need for more clarity by the courts on the circumstances under which *Charter* values should be considered.

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21 *Ibid* at para 92, citing *Loyola*, *supra* note 16 at para 39.

22 *Commission scolaire francophone*, *supra* note 1 at paras 92–102.

23 *Ibid* at para 75, citing *Loyola*, *supra* note 16 at para 4.

24 *Commission scolaire francophone*, *supra* note 1 at para 85.

25 Interestingly, Justices Rowe and Côté authored a dissent in *Trinity Western* which warned that *Charter* values, such as equality, justice, and dignity are amorphous and undefined. They have become "rhetorical devices by which courts can give priority to particular moral judgments, under the guise of undefined 'values', over other values and over *Charter* rights themselves" (*supra*, note 16 at para 309).

26 *Commission scolaire francophone*, *supra* note 1 at para 77.

Eskasoni First Nation v Canada (Attorney General), 2024 FC 1856: Perpetuating *Van der Peet* despite UNDRIP and *R v Montour*

Benjamin Ironstand*

I. Introduction

Despite their inherent and eternal nature, Aboriginal rights in Canada have been at the mercy of Parliament and the courts since the inception of the country. While Aboriginal rights gained constitutional protection in Canada under s. 35, *Constitution Act, 1982*,[1] the scope and content of those rights was undefined. As such, it was left to the courts to define them on a case-by-case basis. Seminal decisions on the matter include *R v Sparrow*[2] which provided a precursor for the long-standing test for defining Aboriginal rights set out in *R v Van der Peet*.[3] The *Van der Peet* test, with minor variations and clarifications,[4] has ruled the day for defining Aboriginal rights for nearly thirty years. That is not to say, though, that it is not without its critics.

Significant criticisms of the *Van der Peet* test were set out in the recent Superior Court of Quebec decision *R c Montour*.[5] Some of the key criticisms of the *Van der Peet* test were identified in *Montour*.[6] In the *Montour* decision, Justice Sophie Bourque took a bold step and strayed from the *stare decisis* set in *Van der Peet* and defined a new test for defining Aboriginal rights.[7] This new test has been

* JD 2025 (Saskatchewan).

1 s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Constitution].

2 1990 CanLII 104 (SCC), [1990] SCR 1075.

3 1996 CanLII 216 (SCC) [*Van der Peet*].

4 See e.g. *Lax Kw'alaams Indian Band v Canada (Attorney General)*, 2011 SCC 56 at para 46 which sets out the *Van der Peet* test and cites jurisprudence which has modified, clarified, or affirmed each part of the test.

5 2023 QCCS 4154 [*Montour*].

6 *Ibid* at paras 1244–75.

7 *Ibid* at para 1297.

applauded by Indigenous groups[8] and addresses some of the criticisms of the old test.[9] *Eskasoni First Nation v Canada (Attorney General)*[10] was decided after *Montour* and even cited the case;[11] however, it made no mention of the departure from *stare decisis* and instead endorsed *Van der Peet*.

II. The *Eskasoni* Case

The *Eskasoni* decision was an application for judicial review of a decision which resulted in the adjustment of electoral boundaries in the province of Nova Scotia. The application was advanced by the Eskansoni First Nation and their Chief, Leroy Denny, who argued that the decision was procedurally unfair, unreasonable, a breach of the *Electoral Boundaries Readjustment Act*,[12] and a *Charter* breach.[13] Importantly, the applicants also asserted they were owed a duty to consult protected under s. 35 of the Constitution, which was breached, along with the *United Nations Declaration on the Rights of Indigenous Peoples*,[14] and the honour of the Crown.[15] The Federal Court's treatment of the last argument, specifically in relation to the asserted s. 35 right and the duty to consult are the subject of this commentary.[16]

The application was ultimately dismissed,[17] and the Court found that there was no duty to consult.[18] The duty to consult arises "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it."[19] It follows that an Aboriginal or treaty right must exist before the duty is triggered. In relation to the Applicant's framing of their argument that they were owed the duty to consult, it was noted they "did not clearly articulate a section 35 Aboriginal right that may have triggered a duty to consult, nor did they attempt to establish said section 35 Aboriginal right in accordance with [*Van der Peet*]."[20] The

8 Lara Koerner-Yeo & Brendan Schatti, "Update Part I: Attorney General of Quebec Appeals Trailblazing R v Montour and White Decision" (19 March 2024), online: <jfklaw.ca> [perma.cc/2W2B-YTMD]; Indian Time, "MCK Congratulates Derek White and Hunter Montour" (2 November 2023), online: <indiantime.net> [perma.cc/QX6G-N3D9].

9 For a description of the *Van der Peet* test and the new *Montour* test and some of its potential benefits, see Lara Koerner-Yeo, "Quebec Superior Court Relies on UNDRIP to Prescribe New Section 35(1) Test in R v White and Montour" (23 November 2023), online: <jfklaw.ca> [perma.cc/J42C-DSLT].

10 2024 FC 1856 [*Eskasoni*].

11 *Ibid* at para 74.

12 RSC 1985, c-E-3.

13 *Eskasoni*, *supra* note 10 at para 33.

14 *United Nations Declaration on the Rights of Indigenous Peoples*, UNGA, 61st Sess, UN Doc A/61/295 (2007) GA Res 61/295 [UNDRIP].

15 *Eskasoni*, *supra* note 10 at para 33.

16 These matters were addressed in paras 72–99 of *Eskasoni*.

17 *Eskasoni*, *supra* note 10 at para 6.

18 *Ibid* at para 99.

19 *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 35. This passage was quoted in *Eskasoni* (*supra* note 10 at para 93).

20 *Eskasoni*, *supra* note 10 at para 58. The Court also noted they did not clearly articulate a treaty right that would trigger the duty either (*ibid* at para 58).

Court still rightly addressed their argument to determine whether a specific, generic, or treaty right existed which would trigger the duty. Prior to engaging each of these topics, the Court set out the test for determining an Aboriginal right.

The Court first identified some critiques of the *Van der Peet* framework set out in *Montour*. Three of the critiques identified were: it creates a "frozen in time" approach to Aboriginal rights where they must have existed before April 1982; it is ill suited for commercial, economic, and self-government claims; and it was established prior to Canada's endorsement of UNDRIP and its implementation through the *United Nations Declaration on the Rights of Indigenous Peoples Act*.[21]

The Court went on to point out that "[i]n *Desautel*, the SCC had an opportunity to consider the impact of the UNDRIP in relation to the *Van der Peet* framework…[but instead] the Court endorsed the continued application of the *Van der Peet* framework."[22] Following this observation, Justice Blackhawk went on to state that "[t]he SCC did not comment on how, if at all, the UNDRIP may affect the future application of the *Van der Peet* framework. The *Desautel* decision predates the passage of the *UNDA*. That said, in my view, the *UNDA* does not in and of itself supplant section 35, nor the jurisprudence developed by the SCC."[23] This is a crushing blow to *Montour*.

III. Discussion

The weight of the Federal Court's endorsement of *Van der Peet* in spite of *Montour* is uncertain. On its face, it presumably undermines the new Aboriginal rights test set out in *Montour*, but there is room for counterarguments. First, the Federal Court did not explicitly mention the new test as set out in *Montour*. This could be taken two ways. On one hand it could be seen as an outright dismissal of *Montour*'s new test, as if it is not even worth mentioning. On the other hand, the lack of acknowledgment could leave room for its potential application. As mentioned earlier, the Applicants never articulated an argument establishing a specific Aboriginal right. With that, there was presumably no argument made that the *Montour* test is the test that should be applied, and no corresponding need to mention and specifically endorse or refute the test. Blackhawk J. only needed to go so far as to mention the existing Supreme Court of Canada jurisprudence on Aboriginal rights. However, it still seems that *Montour*'s departure was undercut since Blackhawk J. said that the "applicable legal framework for the determination of section 35 Aboriginal rights *continues* to be *Van der Peet*."[24]

It is noteworthy that Blackhawk J. only said "the *UNDA* does not in and of *itself* supplant section 35, nor the jurisprudence developed by the SCC."[25] In *Montour*, the Superior Court of Quebec used *both*

21 SC 2021, c 14 [*UNDA*]; *Eskasoni*, *supra* note 10 at para 74.

22 *Eskasoni*, *supra* note 10 at para 75.

23 *Ibid* at para 76.

24 *Ibid* at para 78 [emphasis added].

25 *Ibid* at para 76 [emphasis added].

UNDRIP and the *UNDA* as key arguments justifying a departure from *stare decisis*. It was reasoned their endorsement and implementation created a new legal issue and fundamentally changed the debate in relation to Aboriginal rights (the two requirements to change precedent) that justified a departure from the *Van der Peet* test.[26] Perhaps the limited wording of the Federal Court could leave room for the reasoning in *Montour*. Then again, it could also be said the *UNDA* innately includes UNDRIP and so Blackhawk J.'s dismissal of *UNDA*'s ability to justify a departure from *Van der Peet* also includes UNDRIP.

Montour has been appealed,[27] and there are indications that *Eskasoni* will also be appealed.[28] *Montour* has been appealed in its entirety, with specific reference to the departure from *stare decisis* among other reasons in the decision.[29] With this in mind, the Court of Appeal of Quebec will almost certainly address the updated Aboriginal rights test. *Eskasoni* on the other hand is less clear. It will be interesting to see whether the decision is actually appealed and if so on what grounds. Given that apparently no evidence was presented in relation to arguing a specific Aboriginal right, it is unlikely the matter will re-appear in the appeal in a meaningful way. If that is the case, the impact of its endorsement of the *Van der Peet* test may be limited.

In conclusion, the Federal Court's endorsement of *Van der Peet* in spite of *Montour* is disappointing for those who put hope in the new test. It could be argued that reconciliation is not best achieved through the courts; since a widely accepted role of the judiciary is primarily to resolve disputes through the interpretation and application of laws, reconciliation is not within its purview. However, the judiciary still undoubtedly has a role in creating laws and not just interpreting them, and *some* sorts of principles must guide the creation of laws, and if it not be reconciliation, then what? The alternative is maintaining the status quo. It remains to be seen what principles the appeal courts will apply.

26 *Montour*, *supra* note 5 at paras 1234, 1237.

27 Kate Gunn & Cody O'Neil, "Reframing Aboriginal Rights: R. C. Montour" (18 January 2024), online: <firstpeopleslaw.com> [perma.cc/PWU8-TGE6].

28 Ian Nathanson, "Eskasoni Chief Mulls Appeal of Cape Breton Federal Boundaries Judicial Review" (28 November 2024), online: <saltwire.com/atlantic-canada/news> [perma.cc/7NGR-LX86].

29 Koerner-Yeo & Schatti, *supra* note 8.

Shot Both Sides v Canada: Application of Limitation Periods to Treaty Claims

Ashley King*

I. Introduction

Shot Both Sides v Canada[1] is a 2024 unanimous decision of the Supreme Court of Canada written by Justice O'Bonsawin. This case involved a treaty breach claim by the Kainai, or the "Aakainawa, the Tribe of Many Leaders" ("Blood Tribe"), regarding the size of their reserve. The Blood Tribe was entitled to a reserve under Treaty No 7 (the "Treaty"),[2] with the size to be set in accordance with the prescribed formula.[3] After confirming the size of the reserve was not in accordance with the formula in 1971,[4] the Blood Tribe engaged in unsuccessful negotiations with the Minister of Indian Affairs and Northern Development from 1976 to 1978.[5] The Blood Tribe then commenced an action in the Federal Court of Canada in 1980, seeking monetary compensation and a declaration that Canada was in breach of the Treaty.[6] The Federal Court found that although the facts underlying the claim were discoverable around 1971, the applicable six-year limitation period set by Alberta's limitation statute did not begin to run until 1982 with the enactment of s. 35(1) of the *Constitution Act, 1982*,[7] meaning the claim brought in 1980 fell within the limitation period.[8] The Federal Court of Appeal reversed this decision, holding the claim was statute-barred by operation of the limitation period since, in the Court's view, a remedy for the breach of the Treaty was available prior to 1982.[9]

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* JD Candidate 2026 (Saskatchewan).

1 2024 SCC 12 [*Shot Both Sides*].

2 *Copy of Treaty and Supplementary Treaty No 7 between Her Majesty the Queen and the Blackfeet and Other Indian Tribes, at the Blackfoot Crossing of Bow River and Fort Macleod*, 4 December 1877, online: <rcaanc-cirnac.gc.ca> [perma.cc/87CT-TL3Y] [*Treaty No 7*].

3 *Shot Both Sides*, *supra* note 1 at paras 9–10.

4 *Ibid* at para 14.

5 *Ibid* at para 15.

6 *Ibid* at para 16.

7 Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

8 *Shot Both Sides*, *supra* note 1 at para 24.

9 *Ibid* at paras 25–28.

II. The Supreme Court of Canada Decision

The issue on appeal at the Supreme Court of Canada was determining whether the Blood Tribe's treaty claim was barred by the limitation period. In particular, the Court was tasked with clarifying whether a cause of action for breach of treaty rights was actionable in Canadian courts prior to the coming into force of s. 35(1) of the *Constitution Act, 1982*.[10] The Court affirmed that s. 35(1) does not create treaty rights nor a cause of action for their breach, but rather treaties are enforceable at common law from their date of execution.[11] Accordingly, the Blood Tribe's claim was actionable at the time of discovery (which was conceded to be 1971) and the claim brought in 1980 was barred by the limitation period.[12] The claim for consequential relief was thus statute-barred.

Despite finding the claim for consequential relief to be barred by the limitation period, the Court found declaratory relief was warranted in the circumstances. As the Court noted, "[a]lthough claims for personal relief or damages flowing from treaty breaches may be subject to limitations statutes, limitations legislation cannot bar courts from issuing declarations on the constitutionality of the Crown's conduct."[13] In the context of treaty rights, the Court was confident that declaratory relief is "a means by which a court can promote reconciliation."[14] The Court issued a bare declaration confirming: (1) the Blood Tribe's treaty right to a reserve size in accordance with the prescribed formula; (2) the current reserve is not in accordance with the prescribed formula; and (3) Canada dishonourably breached the treaty land entitlement provisions of the Treaty.[15]

III. Commentary

Shot Both Sides is important as it clarifies the impact, or lack thereof, of s. 35(1) of the *Constitution Act, 1982* on the enforceability of treaty rights. Particularly important in relation to treaty breach claims, this case affirms the ability of limitation periods to run prior to 1982. Indeed, based on the Supreme Court's judgment, the limitation period for a treaty breach could commence as early as the date of execution. As claimants cannot rely on 1982 as a benchmark for the commencement of the applicable limitation period, this clarification has the potential to bar more treaty breach claims arising out of historical breaches.

Additionally, *Shot Both Sides* is useful for clarifying the scope, availability, and reconciliatory power of declaratory relief in the context of treaty breach claims. Declarations provide legal clarity about the parties' relationship and rights, including a breach of a right, but do not provide any consequential or

10 *Ibid* at para 29.

11 *Ibid* at paras 32, 50.

12 *Ibid* at paras 58–59.

13 *Ibid* at para 63, citing *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at paras 135, 137, 139, 143.

14 *Shot Both Sides*, *supra* note 1 at para 70. See also *ibid* at paras 72–74.

15 *Ibid* at para 83.

coercive relief.[16] Despite its non-coercive nature, the Supreme Court was confident that declaratory relief can promote reconciliation by acknowledging the harms inflicted by the Crown in breaching a treaty and allowing the Indigenous party to engage in negotiations with the Crown in light of the declaration.[17] However, the Supreme Court also acknowledges the discretionary nature of declaratory relief, meaning this relief is not guaranteed in every case.[18] When a treaty breach claim has been barred by a limitation period and the court declines to issue a declaration, the aggrieved First Nation may walk away from expensive and lengthy litigation with no way to ensure the breach is redressed.

In addition to clarifying legal principles, this case acts as an example of the adverse implications of applying limitation periods to historic treaty breach claims. Given that reconciliation involves acknowledging the harms inflicted, acknowledging and making right the causes of harm, and making positive change,[19] allowing the Crown to avoid redressing a treaty breach by relying on a limitations argument does not appear consistent with the principles of reconciliation. Further, the discretionary and non-coercive nature of declaratory relief may result in inconsistent outcomes for Indigenous parties whose treaty rights were breached. Based on these implications, *Shot Both Sides* is useful for flagging a potential area for legislative reform to address these issues.

16 *Ibid* at paras 65–66.

17 *Ibid* at paras 63, 74, 82.

18 *Ibid* at para 67.

19 See Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: The Truth and Reconciliation Commission of Canada, 2015) at 6–7.

A Point of Clarity, Despite Further Uncertainty: *Qualex-Landmark Towers Inc v 12-10 Capital Corp* Restricts the Application of *Orphan Well Association v Grant Thornton Ltd*

George King*

I. Introduction

Through its 2019 decision in *Orphan Well Association v Grant Thornton Ltd*,[1] the Supreme Court of Canada altered lender priority under the bankruptcy regime in the *Bankruptcy and Insolvency Act*[2] by determining that statutory environmental obligations had priority over secured creditors. Since then, it has been unclear for many within the natural resources industry, and in particular lenders, how to manage financial risk due to the altered priority structure. Recently, the Court of Appeal of Alberta quashed an attempt to extend the principle under *Redwater* to the environmental obligations of private litigants outside of the *BIA* in *Qualex-Landmark Towers Inc v 12-10 Capital Corp.*[3] Despite continued uncertainty around the application of the reasoning expressed in *Redwater*, *Qualex* brings a welcome level of clarity to the boundaries of its extension.

II. Facts & Arguments

A. *Orphan Well Association v Grant Thornton Ltd*

The Orphan Well Association ("OWA") is an independent non-profit entity charged by the Alberta Energy Regulator (the "Regulator") with reclaiming "orphaned wells"—"oil and gas assets and their sites left behind in an improperly abandoned or unreclaimed state by defunct companies at the close

* JD 2025 (Saskatchewan).

1 2019 SCC 5 [*Redwater*].

2 RSC 1985, c B-3 [*BIA*].

3 2024 ABCA 115 [*Qualex* CA].

of their insolvency proceedings."[4] Redwater Energy Corporation ("Redwater") was an oil and gas company petitioned into receivership and eventually bankruptcy by its principal secured creditor. Grant Thornton Ltd. ("GTL") was appointed as both receiver and trustee in bankruptcy for the proceedings.[5] OWA advised GTL of Redwater's obligations regarding their orphaned assets and filed an application requesting that GTL fulfill the end-of-life obligations associated with Redwater's properties licensed under the Regulator.[6] GTL posited that it had no obligation to fulfill any regulatory requirements related to Redwater's orphaned assets and filed a cross-application seeking approval to sell Redwater's assets and transfer the licences thereof.[7]

In addressing the claims, the Supreme Court of Canada dealt with two issues: (1) whether s. 14.06(4) of the *BIA* enabled GTL to shield themselves from statutory environmental obligations via the doctrine of federal paramountcy, and (2) whether Redwater's end-of-life obligations relating to their orphaned assets were claims provable in bankruptcy.[8] Concerning the former, the Court found that s. 14.06(4) of the *BIA* is concerned with the personal liability of trustees, and therefore, it does not empower a trustee to abandon the environmental obligations of the estate it is administering.[9] Consequently, the doctrine of paramountcy is not invoked as there is no operational conflict between the Regulator's statutory powers and the *BIA*.[10] Regarding the latter, the Court utilized the three-part test set out in *Newfoundland and Labrador v AbitibiBowater Inc*,[11] to find that the regulatory requirements were not claims provable in bankruptcy under the *BIA*.[12] As a result, the decision in *Redwater* effectively made statutory environmental obligations not subject to the *BIA* priority scheme, therefore, giving the Regulator "super priority" over secured creditors in insolvency proceedings.

B. *Qualex-Landmark Towers Inc v 12-10 Capital Corp*

In *Qualex* CA, Qualex-Landmark Towers Inc. ("QLT") brought a civil action against 12-10 Capital Corp. ("Capital"), claiming liability for nuisance and negligence for damage to its property caused by the alleged migration of chemical contaminants from the land owned by Capital.[13] Leading up to the alleged contamination, Alberta Environment and Parks had been monitoring Capital's land and requested an environmental assessment.[14] Capital did not comply with the request and agreed to sell the land to a third-party. QLT registered a certificate of *lis pendens* to prevent the sale and filed an

4 *Redwater*, *supra* note 1 at para 3.
5 *Ibid* at paras 4, 46.
6 *Ibid* at paras 47, 52.
7 *Ibid* at paras 50, 52.
8 *Ibid* at paras 68–70.
9 *Ibid* at paras 110–14.
10 *Ibid* at para 108.
11 2012 SCC 67.
12 *Redwater*, *supra* note 1 at para 159.
13 *Qualex* CA, *supra* note 3 at para 2.
14 *Ibid* at para 3.

application for an attachment order claiming "super priority" to a portion of the sale proceeds for land remediation costs, arguing that Capital had become insolvent.[15] Initially, the Chambers judge granted QLT's request, reasoning that private litigants could be entitled to a "super priority" similar to that afforded to regulators under the *Redwater* decision.[16] Justice Nixon (as he then was) expanded this idea, holding that QLT, as a neighbouring landowner, could claim such a priority because environmental cleanup is a public duty which a neighbouring landowner, such as QLT, can enforce.[17] However, the Court of Appeal overturned this ruling. The Court of Appeal held that the principles established in *Redwater* did not apply outside of insolvency proceedings and that granting a private litigant such a priority over secured creditors lacked statutory authority.[18] The Court emphasized that *Redwater*'s "super priority" for environmental claims was specific to regulators acting under insolvency legislation, and private parties could not claim a similar right.[19] This decision reinforced the priority of secured creditors under existing law and clarified that private environmental claims do not override statutory creditor rights.

III. Analysis and Outcomes

While the decision in *Redwater* demonstrated a strong commitment to environmental protection, it also added a level of nuance for creditors evaluating their financial risk as the statutory priority structure under the *BIA* had been altered. *Qualex* KB represented a novel attempt to extend this principle outside of the federal insolvency regime. Although the Court of Appeal has quashed this attempt, it is worth noting that this decision only pertains to Alberta. As a result, given the confusion surrounding the boundaries of *Redwater*'s application,[20] there will likely be further attempts to extend its reasoning both within and beyond the *BIA*. Although *Qualex* CA gives much-needed clarity around the extension of *Redwater*, in provinces like Saskatchewan, where there is a push for expansion and investment in the natural resources sector,[21] how the *Redwater* decision is applied will be of particular interest to industry members as creditors seek to manage their financial risk in an uncertain lending environment.

15 *Ibid* at para 4.

16 *Qualex-Landmark Towers Inc v 12-10 Capital Corp*, 2023 ABKB 109 at para 100 [*Qualex* KB].

17 *Ibid* at paras 98–100.

18 *Qualex* CA, *supra* note 3 at para 24.

19 *Ibid*.

20 See e.g. *Qualex* KB, *supra* note 16 at para 85.

21 Ministry of Energy and Resources, News Release, "Increased Investments Strengthen Saskatchewan's Mining and Energy Sectors" (20 March 2024), online: <saskatchewan.ca> [perma.cc/RH7N-7NVL].

Evans v General Motors of Canada Company: Applying Pure Economic Loss to Automobile Manufacturers and Class Action Lawsuit

Ethan Lin*

I. Introduction

Evans v General Motors of Canada Company[1] is a 2024 decision by the Court of Appeal for Saskatchewan, written by Justice Schwann for a unanimous court. This case involved a plaintiff seeking certification to proceed with a class action lawsuit of a pure economic loss claim against General Motors of Canada Company and General Motors LLC (collectively, "General Motors"). The plaintiff sought to represent "all persons in Canada who had purchased or leased a 2011 or newer Chevrolet Cruze automobile manufactured by General Motors."[2] In their statement of claim, the plaintiff alleged that defects with the automobile's coolant system resulted in issues "such as overheating, warning lights remaining on and noxious and foul-smelling emissions entering the passenger compartment of the vehicle."[3] The plaintiff made no claims for damages arising from the defects except for the loss resulting from overpayment for defective vehicles and reduction in the value of their vehicles due to the defects.[4] The certification judge utilized the framework set out in s. 6(1) of *The Class Actions Act*[5] and concluded that the plaintiff had satisfied the requirements for certifying the claim as a class action.[6]

* JD Candidate 2026 (Saskatchewan).

1 2024 SKCA 87 [*Evans*].

2 *Ibid* at para 4.

3 *Ibid* at para 5.

4 *Ibid.*

5 SS 2001, c C-12.01, s 6(1) [*CAA*].

6 *Evans*, *supra* note 1 at paras 6–10.

II. The Decision

Of the four issues on appeal, Schwann J.A. devoted the majority of the judgment to addressing the first two issues. The first issue was whether the plaintiff's pleadings properly disclosed a cause of action in negligence, and the second issue was whether the plaintiff had established that a class action was the preferable procedure.[7] The Court answered both these questions in the negative and the *Certification Decision*[8] was reversed.

On the first issue, the plaintiff's claim was grounded in negligence, specifically, for pure economic loss. At the time the *Certification Decision* was made, *Winnipeg Condominium Corporation No 36 v Bird Construction Co*[9] was the leading case on pure economic loss, which stood for the proposition that "a plaintiff can claim in negligence against a manufacturer of defective building materials if the defective materials pose a 'real and substantial' danger."[10] However, *Winnipeg Condominium* did not address whether a plaintiff can make the same claim against the manufacturer of *non*-dangerous goods and the certification judge found it unnecessary to address this question.[11] Since the *Certification Decision*, the Supreme Court of Canada released its ruling on *1688782 Ontario Inc v Maple Leaf Foods Inc*.[12] Schwann J.A. provided a thorough review of *Maple Leaf* to conclude that the certification judge erred and the plaintiff did not sufficiently plead a cause of action in negligence.[13] In *Maple Leaf*, the Supreme Court declined to extend the scope of pure economic loss to non-dangerous defects because it would raise issues of conditions and warranties as to quality and fitness for purpose of the product, which should be addressed through the law of contract rather than tort.[14] Moreover, Schwann J.A. noted that liability under pure economic loss is limited to the cost of averting "*imminent risk* to person or property."[15] In summary, Schwann J.A. stated that a cause of action for pure economic loss is barred if it does not "plead the existence of an imminent risk of a real and substantial danger" and "the diminution of value of a vehicle resulting from an alleged defect is not recoverable in negligence."[16]

On the second issue, Schwann J.A. identified that the proper test for the preferability analysis under s. 6(1)(d) of the *CAA* was established by the Supreme Court of Canada in *Hollick v Toronto (City)*[17]and *AIC Limited v Fischer*.[18] The two-step analysis first requires the judge to ask "whether the class

7 *Ibid* at para 12.

8 *Evans v General Motors of Canada Company*, 2019 SKQB 98 [*Certification Decision*].

9 1995 CanLII 146 (SCC) [*Winnipeg Condominium*].

10 *Evans*, *supra* note 1 at para 23 [emphasis in original], citing *Certification Decision*, *supra* note 8 at para 34. See generally *Winnipeg Condominium*, *supra* note 9.

11 *Evans*, *supra* note 1 at para 25, citing *Certification Decision*, *supra* note 8 at paras 35–37.

12 2020 SCC 35 [*Maple Leaf*].

13 *Evans*, *supra* note 1 at para 67.

14 *Maple Leaf*, *supra* note 12 at para 47.

15 *Evans*, *supra* note 1 at para 36 [emphasis in original].

16 *Ibid* at para 55.

17 2001 SCC 68 [*Hollick*].

18 2013 SCC 69 [*Fischer*].

proceeding is a fair, efficient and manageable method of advancing the claim," and then consider whether the advantages of a class action outweigh "all other 'reasonably available means of resolving the class members' claims.'"[19] Without legislative guidance, the analysis must be guided by the three goals of class proceedings: judicial economy, access to justice, and behaviour modification.[20] Turning to the facts found by the certification judge, Schwann J.A. found no basis "that the defects in the coolant system posed a real and substantial risk of physical injury or property damage due to stalling,"[21] that the risk was imminent, or that any class members had suffered compensable harm as a result of the defect.[22] Additionally, the plaintiff's claim that fumes resulting from the defect "'might be so overwhelming one day, that it affects [her] driving and causes an accident'" speaks only to the prospect of harm, which does not establish compensable harm or imminent risk of harm.[23] For a claim to be certified as a class action, the plaintiff must show that at least two class members suffered compensable harm and Schwann J.A. concluded that the plaintiff failed to do so.[24] Therefore, certification of this action would not further the goals of judicial economy or access to justice.[25]

III. Commentary

When discussing pure economic loss, it is important to recognize the distinction between tort law and contract law. The Court of Appeal provided insight into this distinction, as well as the purpose of tort law and what it seeks to compensate. The Court also used this decision as an opportunity to apply the framework in *Maple Leaf* to the context of a claim against automobile manufactures. Schwann J.A. clarified that pure economic loss is limited to claims against manufacturers of dangerous goods or defects rather than *non*-dangerous goods or defects because it would erode the distinction between tort law and contract law. Pure economic loss is sustained in tort through the idea that if tort law protects the "right to be free from injury to one's person or property"[26] then it should also compensate the plaintiff for the economic loss incurred to avert the danger to their person or property. Compensating the plaintiff for repairing a non-dangerous defect will improve the product's quality but not its safety. Accordingly, these are issues of conditions and warranties, which should be addressed through contract law rather than tort.[27]

19 *Evans*, *supra* note 1 at para 69, citing *Hollick*, *supra* note 17 at para 31 and *Fischer*, *supra* note 18 at para 48.

20 *Evans*, *supra* note 1 at para 70.

21 *Ibid* at para 81.

22 *Ibid* at para 89.

23 *Ibid*.

24 *Ibid* at paras 90, 93.

25 *Ibid* at para 93.

26 *Ibid* at para 34, citing *Maple Leaf*, *supra* note 12 at para 46.

27 *Evans*, *supra* note 1 at para 35, citing *Maple Leaf*, *supra* note 12 at para 47.

Lastly, Schwann J.A. clarified that a negligence claim requires proof of harm or the imminent risk of harm because "[t]here is no right to be free from the *prospect* of damage; there is only a right not to *suffer* damage that results from exposure to unreasonable risk."[28] Failing to do so is insufficient to ground a claim in negligence, and therefore, a class action claim grounded in negligence.

28 *Evans*, *supra* note 1 at para 85 [emphasis in original], citing *Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 at para 33.

Book Notes

Power Played: A Critical Criminology of Sport

Edited by Derek Silva and Liam Kennedy. Vancouver: UBC Press, 2022. 362 pp., $37.95 hc.

In *Power Played: A Critical Criminology of Sport*, Derek Silva and Liam Kennedy seek to develop a distinct critical criminology of sport, aiming to explore how sport and its culture contribute to power structures that reinforce inequality and oppression. A key objective of the book is to, in the words of the authors, "[demonstrate] how current developments in critical criminology can shed light on the various manifestations of crime and control within sporting cultures that both contribute to public understanding of criminal justice and reshape the justice system itself" (at 32). By using a critical criminology lens, they challenge traditional views of crime and harm, revealing how sports practices and discourses perpetuate social injustices. Comprised of 15 chapters, summarized below, the book calls for a broader exploration of how sport culture shapes perceptions of crime, justice, and social control.

The introduction to *Power Played* serves multiple purposes: it contextualizes sport and sports culture within the broader criminological landscape, introduces critical criminology while acknowledging scholars' hesitance to explore sport-related issues, advocates for the development of a critical criminology of sport, and outlines the book's goals and structure (at 9). The first part of the book, spanning three chapters, delves into the intersection of criminology and sport, pinpointing areas where critical criminology can be applied to explore these relationships (at 32).

In Chapter 1, Kevin Young argues for the importance of examining sports-related violence ("SRV") within criminology, challenging its historical treatment as peripheral to broader social violence (at 49). He discusses Michael Smith's typology of SRV (at 52–53) and explores how practices like hazing and playing through pain blur the lines between deviance and victimization (at 56). Young advocates for further research into the cultural and institutional factors driving sports violence (at 67).

Avi Brisman's Chapter 2 uses green cultural criminology to examine sports' environmental impact. Brisman critiques how, despite their cultural value, sports contribute to environmental harm, highlighting the ecological costs of large-scale events, horse racing, and golf (at 73–83). Brisman calls for a critical criminology approach to confront these issues.

Grace Gallacher's Chapter 3 challenges the belief that sports promote self-restraint and social order, instead arguing that sports often foster hyper-aggressive behaviors and reinforce capitalist exploitation (at 100, 113). Gallacher uses Norbert Elias' sociology to present sports as decivilizing agents, rather than forces for social good (at 33).

In Part 2, the focus shifts to critical criminological perspectives at the intersections of race, class, gender, sexuality, power, and inequality within sports (at 32–33). Dale Spencer, in Chapter 4, examines the belt-whipping ceremony in Brazilian Jiu Jitsu, arguing that such rituals should not be dismissed as inherently abusive but analyzed in context to understand their social and communal benefits (at 120, 132).

In Chapter 5, Stacy L. Lorenz and Braeden McKenzie explore racial dynamics in the National Hockey League ("NHL"), critiquing how the culture of hockey marginalizes Black players through subtle, systemic racism (at 141). Chapter 6, by Bridgette Desjardins, examines the exclusion of trans women from women's sports, framing the opposition as rooted in historical narratives that frame queer and trans individuals as criminal and deceitful (at 162–65).

Part 3 expands on the theme of violence, beginning with Matt Ventresca and Kathryn Henne's exploration of Chronic Traumatic Encephalopathy and its link to criminal behaviour in athletes, particularly in sports like American football and boxing (at 177). Further chapters continue this theme, addressing the sociolegal implications of head trauma, the role of injury in domestic violence, and the ethical dilemmas surrounding sport and the justice system.

Karen Corteen, in Chapter 9, critiques World Wrestling Entertainment's ("WWE") working conditions during the COVID-19 pandemic, arguing that they exemplify state-corporate crime through exploitation and lack of accountability (at 34). Chapter 10, by Victoria Silverwood, calls for systemic changes in hockey, focusing on how violence in the sport is commercialized and normalized at the structural level (at 34).

The book also critiques the Olympics, with Vida Bajc highlighting how surveillance measures undermine democratic values (at 262–63) and Jacqueline Kennelly critiquing the London 2012 Olympics for disproportionately affecting marginalized groups (at 291–92). Mark Norman, in Chapter 13, discusses sport's role within carceral systems, illustrating how it functions as both a tool of surveillance and a form of social control (at 313).

Finally, Rosie Meek's Chapter 14 examines the role of prison-based sports programs in the U.K., advocating for more emphasis on personal growth and well-being, rather than merely measuring recidivism (at 332–33). The book concludes with a look at the positive impact of rugby-based youth programs in England, with Crowther, Jump, and Smithson calling for a focus on equity, humanity, and social justice in sports interventions (at 346).

While many of the chapters in *Power Played* share overlapping themes, each offers its own distinct contribution to the field of critical criminology of sport. For instance, Chapters 5 and 6, while both addressing the marginalization of athletes from marginalized racial and gender groups, tackle different forms of discrimination in distinct sporting contexts. Lorenz and McKenzie's focus on the racial dynamics in the NHL (Chapter 5) highlights the subtleties of "colour-bland racism" in a predominantly white sport (at 141), while Desjardins' examination of transphobia in women's sports (Chapter 6) uncovers how exclusionary rhetoric is deeply embedded in historical notions of criminality and deceit. Similarly, the discussions in Chapters 9 and 10—focused on the exploitation of athletes within WWE and hockey—are united by their critique of the systemic nature of harm but offer unique perspectives

by addressing different sports and institutional structures. These chapters showcase the richness of the book, with each offering its own nuanced analysis while contributing to the broader conversation about how sport perpetuates social inequalities. This blend of shared concerns and individual insights makes *Power Played* a valuable resource for those exploring the intersection of criminology and sport.

Ultimately, *Power Played* presents a comprehensive exploration of the intersection of sport and criminology, urging readers to critically examine how sport perpetuates social inequalities, institutionalized violence, and harmful power dynamics. Through its diverse range of topics and empirical analyses, it calls for a paradigm shift in how we view crime, harm, and justice in the sporting world.

– Drake Bodie

Prison Born: Incarceration and Motherhood in the Colonial Shadow

By Robin F Hansen. Regina: University of Regina Press, 2024. 336 pp., $32.95 pb.

Robin Hansen's *Prison Born: Incarceration and Motherhood in the Colonial Shadow* is a critique of the Canadian legal system's treatment of pregnant incarcerated Indigenous women and their newborns, exposing systemic racism and colonial biases. Through Jacquie and her baby Yuri's story, Hansen exposes how routine separation at birth continues a cycle of discrimination, dehumanization, and neglect.

The Introduction frames the issue with Jacquie's story, showing how this practice "fails to consider the child's best interests," violates Canada's international obligations under the United Nations *Convention on the Rights of the Child*, and is "done disproportionately to Indigenous women and children" (at xv). She situates her argument in how such issues reflect deeper problems of colonial attitudes still alive in the Canadian legal system today (at xvi).

Part I opens with Chapter 1, where Hansen details how Jacquie's pregnancy was overlooked during sentencing, considered merely a "neutral factor" (at 5). After incarceration, Jacquie's untreated gestational diabetes and the stress of an unexpected motion hearing may have caused premature labour, a situation worsened by neglectful prison healthcare, requiring an emergency transfer to a hospital (at 7, 11–12). While Jacquie reunited with Yuri, Hansen estimates that at least forty-five newborns are unjustly separated from their incarcerated mothers in Canada each year (at 13). She argues that this stems from systemic prejudices about which women are seen as *worthy* of being mothers (at 13–14). Chapter 2 looks at the systemic practice of removing newborns, ignoring the lifelong and studied impacts of disrupting early bonding (at 20). Hansen notes that bonding "cannot be simply 'jump-started' later in the child's infancy" (at 21). In Saskatchewan, mothers are allowed five days with their newborns if a birth plan is approved prior to delivery, but after this, the newborn is placed in either foster care or sent to someone the mother identifies as suitable (at 22). Hansen

highlights that similar processes occur across Canada, where sentencing decisions and prison policies often violate children's rights to "fair process" (at 23). The lack of record keeping on these separations "underscores how devalued mothers and their newborns are in this situation" (at 32).

Hansen shifts to theory in Part II, using Chapter 3 to introduce "Niklas Luhmann's systems theory and Sherene Razack's concept of spatialized justice" (at 35). Systems theory explains how legal norms perpetuate themselves, while Razack's concept of spatialized justice looks at how colonial ideas influence law (at 35–37). Hansen argues that bias views of Indigenous peoples as "savage" or "dying" persist unconsciously, shaping harmful practices like automatic separation (at 49–50). Chapter 4 looks at how colonial ideologies continue to shape Canadian law, framing Indigenous peoples as "savage" or "dying" to justify systemic violence and dispossession (at 53–54). She traces this ideology to practices like residential schools and the Millennium Scoop, which continue in the form of child removals today (at 54). Breaking these "[c]hains of expectations," Hansen outlines, is essential for real change in the legal system (at 59). In Chapter 5, Hansen uses the Gerald Stanley trial as an example of how colonial narratives operate in the justice system (at 63). Stanley's defence invoked the "castle doctrine," casting him as a blameless landowner protecting his property from Colton Boushie, who was portrayed as a "savage" intruder (at 66). Analysing the trial transcript, Hansen shows how these biases were reinforced throughout the trial, which ultimately led to Stanley's acquittal (*ibid*).

In providing the theory, Hansen moves to Part III, beginning with Chapter 6, examining how colonial stereotypes of Indigenous mothers as "unfit," "savage," and "dying" justified child removals during the colonial period (at 83–84). These stereotypes provided justification for the removal of Indigenous children "who needed to be 'saved' and civilized" (at 88). Hansen highlights how these stereotypes continue today, where Indigenous mothers are "branded…as fully worthless" based on their identity or criminal record (*ibid*). Hansen critiques courts as sites of colonial power that contribute to the over-incarceration of Indigenous peoples in Chapter 7. Hansen outlines two colonial norms that are part of the court process: first, presenting the Indigenous defendant as a "savage" who requires containment through incarceration, and second, the denial of Canada's wrongdoing, which views the state as "perpetually innocent" (at 96). These colonial norms, she argues, result in harsher sentencing and increased surveillance of Indigenous peoples compared to non-Indigenous populations (at 96–97). In Chapter 8, Hansen looks at how prisons dehumanize incarcerated individuals, especially Indigenous women. She describes prisons as being a "wasteland" where "universal justice norms [are] suspended," allowing incarcerated individuals to be "locked away and forgotten…tantamount to trash" (at 133–34). Hansen outlines that with such colonial ideologies, "*[i]t is the baby that bears the burden of the decision*…dehumanized and dislocated from his or her family at a critical time in life" (at 143 [emphasis in original]).

In Part IV, Hansen begins in Chapter 9 discussing how androcentric norms play a role in shaping the legal system, which further reinforce the practice of automatic separation (at 148). These norms frame spaces such as courts and prisons as male-dominated spaces, marginalizing women and their specific needs (*ibid*). Pregnant incarcerated women are treated as though they conform to a male standard, resulting in the dehumanization of mothers and punitive treatment of their children (at 149). In Chapter 10, Hansen identifies three factors that prevent the legal system from changing: lack of

access to legal representation, lack of diversity among judges and lawmakers, and the inaccessibility of sentencing decisions (at 164). These factors shield the legal system from accountability and continue harmful practices like automatic separation (*ibid*).

Hansen turns to solutions in Part V, beginning in Chapter 10, with the shackling of pregnant women during labour (at 180). She outlines that shackling a woman in labour, who is "experiencing a state of exceptional pain and deep medical risk," is "profoundly inhumane and unconstitutional treatment by the state" (at 180, 183–84). In Chapter 12, Hansen critiques automatic separation as a breach of children's rights under the *Charter* and international law (at 195). She highlights how this practice ignores the physiological and psychological harm caused by severing early bonding, which can have lifelong consequences for the child (at 196). Hansen also distinguishes between process obligations and substance obligations, both of which demand recognition of the newborn's rights to health, family, and security (at 198–99).

In the Conclusion, Hansen calls automatic separation a clear violation of rights rooted in colonial and androcentric biases. She emphasizes that reconciliation requires valuing Indigenous parenting and holding the legal system accountable for the harms it has caused (at 213). Removing these biases would ensure fairness and dignity for mothers and their newborns, offering a path to a more just legal system (at 216–17). Overall, *Prison Born* offers a deeply moving and unflinching examination of the harms embedded in Canada's legal system. The book challenges its readers to confront uncomfortable truths while simultaneously offering hope for a future rooted in justice and equality.

– Alaa-Safia Bouzertit

Indigenous Legalities, Pipeline Viscosities

By Tyler McCreary. Edmonton: University of Alberta Press, 2024. 304 pp., $36.99 pb.

In *Indigenous Legalities, Pipeline Viscosities*, Tyler McCreary examines the relationship between Indigenous territorial claims to sovereignty and settler development in British Columbia. The book follows the history of the Wet'suwet'en Nation from pre-contact to their involvement in the battle against pipeline development in the Northern Gateway and Coastal GasLink projects. McCreary explains how the Wet'suwet'en Nation uses the colonial system to assert their claims to sovereignty over their traditional lands.

This book features three parts, with each part containing two chapters. These include: Part I, "The Historical Context of the Wet'suwet'en Encounter with Colonialism," Part II, "Pipeline Governance and the Arts of Reconciling Indigenous Peoples with Development," and Part III, "Indigenous Resurgence and Enduring Conflicts over Territorial Sovereignty."

First, Chapter 1 provides background into Wet'suwet'en-settler relations. This chapter outlines how the Wet'suwet'en Nation's geographic location placed them on the periphery of early Indigenous-settler interactions (at 5). It also dives into a discussion of some of the Wet'suwet'en Nation's pre-contact

societal structures (at 9–11), and how colonial actors disregarded these structures and other forms of Wet'suwet'en organization through the *Indian Act* (at 18). Finally, McCreary considers how the *Indian Act*, land development, and Canadian jurisprudence throughout the 1960s and 1970s prompted Indigenous mobilizations, challenging colonial power throughout British Columbia (at 43). Overall, Chapter 1 offers essential historical context, illustrating how the Wet'suwet'en resistance to pipeline projects is rooted in a long-standing struggle against colonial actors.

Next, Chapter 2 outlines the Wet'suwet'en and Gitxsan Nations' claims to ownership and jurisdiction over their traditional territories in *Delgamuukw v British Columbia* (1989 CanLII 2884 (BCSC); 1997 CanLII 302 (SCC) [*Delgamuukw*]) (at 45). The reader is guided through the procedural history of *Delgamuukw* to understand how the Wet'suwet'en and Gitxsan Hereditary Chiefs inserted their own forms of evidence and legal traditions into Canada's judicial system. For example, McCreary exposes the reader to Mary Johnson, Gitxsan Hereditary Chief Antgulilibix's use of oral evidence at the Supreme Court of British Columbia (at 54–55). The chapter concludes by highlighting the significance of the Supreme Court of Canada's judgment in *Delgamuukw* as they acknowledged the existence of Aboriginal title (at 74–75). This decision led to tripartite negotiations over land development, including pipeline development, on unceded lands in British Columbia.

Chapter 3 considers resource development in British Columbia following the Supreme Court of Canada's decision in *Delgamuukw*. Specifically, the chapter focuses on traditional land use and occupation studies, which are used by developers to integrate Indigenous knowledge into development projects. However, while these studies aim to recognize Indigenous territorial jurisdiction, in practice, they reveal tensions between developers and Nations when their interests' conflict. McCreary compares how the Wet'suwet'en and Skin Tyee Nations engaged with Enbridge, the leader of the Northern Gateway pipeline project, which proposed a pipeline crossing both Nations' traditional territories. The Skin Tyee Nation worked with Enbridge on traditional land use and occupation studies to modify the trajectory of construction and offset the most severe impacts of construction on their community (at 112). In contrast, the Wet'suwet'en Nation conducted its own traditional use and occupation studies around the proposed project. Then, it defended its interests by asserting jurisdiction over its traditional lands, challenging the development process, and ultimately blocking the pipeline (at 119, 127).

Next, Chapter 4 reviews Enbridge's use of Aboriginal Economic Benefit Packages ("AEBPs") to secure development and offer Indigenous groups economic security through industrial involvement (at 136, 146–47). AEBPs are commonly used to achieve partnerships between developers and Indigenous communities impacted by pipelines. Enbridge's packages focused on training, employment, subcontracting, equity investments, and community funding for impacted Nations (at 136). McCreary considers how these packages benefitted, yet further entrenched Indigenous groups into the Northern Gateway project. Ultimately, this chapter highlights how developers fail to recognize Indigenous Nations' inherent ability to refuse development on their territories by providing Nations with AEBPs to tie them to the project.

Chapter 5 continues to explore the relationship between the Wet'suwet'en Nation and Enbridge. This chapter explains how the Wet'suwet'en Nation rejected the AEBPs, then outlines how the 2012 Joint Review Panel ("JRP") for the Northern Gateway project attempted to override Indigenous

independence and sovereignty over development decisions on traditional lands. This attempt is demonstrated by the JRP's ignorance of the Wet'suwet'en's attempts to engage in Wet'suwet'en legal orders throughout the panel's hearing. For example, the JRP continually dismissed Wet'suwet'en legal orders as "cultural expressions" (at 180). This discussion of the JRP demonstrates a breakdown between Wet'suwet'en-Enbridge discussions of pipeline development and how the Wet'suwet'en Nation attempted to offset the authority of colonial actors to decide development on their traditional territory.

McCreary concludes with Chapter 6, a discussion of the Coastal Gaslink pipeline project, which, unlike the Northern Gateway project, advanced to construction. This project raised questions similar to those of the Northern Gateway project regarding who had the authority to determine the course of development (at 214). The Wet'suwet'en Nation also participated in mobilizations and blockades against the Coastal GasLink pipeline, resulting in various arrests throughout 2019 and 2020 (at 235). These arrests demonstrate how colonial actors continually assert their authority against Indigenous claims to sovereignty by suppressing Indigenous mobilizations (at 235). McCreary concludes with a discussion of how Indigenous mobilizations have continually stalled the Coastal GasLink project. He emphasizes that these development struggles demonstrate an entanglement of colonial power with Indigenous practices of self-determination and resistance (at 245).

In conclusion, *Indigenous Legalities, Pipeline Viscosities* explores the cycle between colonialism, dispossession, and Indigenous resistance to pipeline development in British Columbia. While McCreary focuses on the Wet'suwet'en resistance against the Northern Gateway project, this struggle highlights the complex relationships between settler development projects and Indigenous sovereignty generally.

This book is an insightful read for anyone interested in the intersection of land development and Indigenous Nations' struggles for sovereignty. It offers a timely exploration of recent events in British Columbia, making it an essential contribution to discussions around reconciliation. The book also provides a unique perspective on Wet'suwet'en history, Wet'suwet'en legal orders, and pipeline politics. Its in-depth exploration of these complex issues invites readers to engage with the realities of Indigenous governance and the ongoing challenges of land and resource development in British Columbia.

– Samantha Dorish

Our Crumbling Foundation: How We Solve Canada's Housing Crisis

By Gregor Craigie. Toronto: Random House Canada, 2024. 320 pp., $25.00 pb.

In *Our Crumbling Foundation: How We Solve Canada's Housing Crisis*, Gregor Craigie takes an unfiltered look at the devastating effects of Canada's housing crisis. Through personal interviews and powerful photographs, this book captures the widespread human consequences of Canada's rising market prices and the severe shortage of affordable homes. Canada is facing a significant housing

deficit; there is a projected need for an additional 3.5 million homes by 2030—beyond the 2.3 million new units already expected to be built by that time (at 2). Therefore, the message in this book could not be more urgent or relevant.

The impacts of this crisis are complemented by a well-researched scan of local and international responses to housing challenges. The book presents twenty individual case studies, documenting a compelling combination of the real-life repercussions of Canada's housing shortage with anecdotal evidence of how innovative housing strategies have transformed lives abroad. The inclusion of diverse perspectives and policy examples makes this study both relatable and inspiring, offering readers hope amid this crisis.

The chapters profiling Canadians' stories and personal struggles effectively demonstrate the need for action and mobilization in the face of the worsening housing crisis. For example, Chapter 19 tells the story of the Durlings, a family of five on the verge of homelessness (at 204–05). This family is on a two-year waitlist along with 6,000 other individuals in Nova Scotia attempting to move into affordable housing. In the meantime, the Durling family has opted to stay in a vacant RV in a campground as their temporary home (*ibid*). Chapter 11 tells the story of Diane Longpré, a single mother, whose rental applications have been rejected for having "too many kids" (at 120). As a result, Longpré, like many other women and gender diverse people, has resorted to returning to a previous romantic and sexual relationship in order to remain housed (at 123). Other illuminating struggles include renters living in woefully inadequate housing, rampant with mould, insects, and rodents, as they live in fear of ending up on the streets (at 59) and middle-income earners and essential workers unable to keep up with unattainable housing prices, resorting to hour-long commutes from outside city centers (at 142–44). Ultimately, these chapters demonstrate that housing is not just an economic or political issue but a human one, impacting health, dignity, and opportunity.

Our Crumbling Foundation acknowledges successful housing policies recently implemented across the country. Notable Canadian innovations include Indigenous-led projects such as the Squamish Nation's Sen'áḵw development in Vancouver, which aims to combine affordability and reconciliation by building 6,000 homes on returned land (at 227–29). Another example is the modular housing initiative in Toronto, which offers a quick and cost-effective solution to address homelessness (at 234). These measures highlight the potential for sustainable and community-driven strategies to resolve the housing crisis.

These impactful Canadian successes are balanced with policy critiques and failed opportunities for housing reform. The text critiques federal, provincial, and municipal governments for their lack of coordinated efforts to address the housing supply. It argues that governments are working at cross-purposes, or alternatively in a piece-meal fashion, which is effectively stalling progress on affordable housing (at 36–37). Similarly, Craigie assesses the Government of Canada's *National Housing Strategy*, introduced in 2017. While this ambitious plan sought to cut chronic homelessness by 50 per cent, remove 530,000 families from housing needs, and build 160,000 new homes, it is already far behind its original targets and has shown little progress on its promises (at 82).

Craigie's use of comprehensive international examples showcases a wide range of strategies used to address housing challenges, including rent control (at 72), relaxed zoning bylaws (at 25), and the use of infill development policies to encourage the creation of "cottage clusters"–tiny or modest groupings of small homes on a single lot (at 174–75). One of the most thought-provoking examples, discussed in Chapter 8, is Finland's national "Housing First" strategy (since adopted in Medicine Hat, Alberta (at 90)), which recognizes that stable housing is a prerequisite to addressing other challenges like addiction and mental health issues (at 87–88). Beyond the merit of improving the lives of many, this strategy has reduced Finland's homeless population from 20,000 in the mid-1980s to fewer than 4,000 in 2021 (at 90) and has saved the Finnish government approximately €15,000 annually per homeless person by reducing reliance on emergency services and homeless shelters (at 91). The book also contemplates municipal responses, such as those in Paris, France, where the city has committed to making 40 per cent of its housing stock affordable by 2035 and has imposed strict quotas and fines for non-compliant municipalities, reduced property taxes for social housing units, and encouraged reverting old factories and warehouses into affordable homes (at 48, 51). Overall, these chapters provide hope for a diverse range of private strategies and public-sector policies that could be implemented in Canada.

This approach is equally well-balanced, recognizing some drawbacks associated with certain housing investments, such as housing co-operatives, which are "non-profit companies that buy or build multi-home dwellings and rent them back to their members at an affordable rent" (at 65). While these co-operatives provide a sense of community and are effective models, particularly for small towns and rural settings (at 70), the book also recognizes their challenges, such as the high cost and availability of land in larger centers and the concern that an over-reliance on co-operatives, which are private entities, could undermine the development of truly affordable public housing (at 74).

Overall, this book provides an insightful compilation of thirty-seven potential measures that could be implemented throughout Canadian communities (at 237–43). While it raises pressing concerns and potential opportunities, it leaves the reader to infer which strategies would work best in Canada's unique context. Chapter 12, for instance, examines Singapore's compulsory savings program, which requires 20 per cent of wages to be set aside and used only for specific purchases. Of those specific purchases allowed, it is most common to use the program for purchasing a home (at 131). While a mandatory financial savings program may help ensure that people can eventually afford a down payment (at 137), this government-imposed strategy may prove politically unpopular in Canada. Similarly, Chapter 20 discusses the use of 3-D printed homes in Mexico (at 218–19), a tactic that may not be well-suited to withstand Canada's harsh winter climates. The book would benefit from further analysis on the feasibility of the proposed policy solutions and strategies in the Canadian context. After all, factors such as climate, regulations, and political and social differences make each country's housing market unique.

One of the limitations of this book is also a strength–as succinctly stated by Craigie, "there is no single measure that will fix this problem. Instead, most or even all of the solutions presented in this book will be needed" (at 4). There is no definitive or clear answer that will unilaterally solve Canada's

housing crisis. Instead, this book provides a roadmap to inform the reader of the gravity of this issue and serves as an invitation for a collective response from governments, private entities, and the public, to take accountability and begin to reconstruct Canada's crumbling housing foundation.

– Avery Gray

Traitor by Default: The Trials of Kanao Inouye, the Kamloops Kid

By Patrick Brode. Toronto: Dundurn Press, 2024. 182 pp., $26.99 pb.

Patrick Brode's *Traitor by Default* provides a compelling critique of post-WWII justice by analysing the life of Kanao Inouye, his time as a civil interpreter with the Japanese army and secret police during WWII, and his subsequent trials for war crimes and treason. Brode's book aims to do what he asserts the courts continually failed to do: get an objective picture of Inouye (at 146). By contrasting the complexities of Inouye's background to the depiction given in the trials, Brode nuancedly exposes injustices within post-war prosecutions, while acknowledging Inouye's culpability.

Chapters 1–4 of the book explain Inouye's life up to the trials flowing from his birth in Canada to Japanese parents and move to Japan, working with the Japanese army, the work with the Kempetai, or Japanese secret police, and, finally, his arrest for war crimes. Through these chapters, Brode intentionally leaves the reader conflicted by revealing Inouye's heinous acts, while also echoing to his hardships.

For example, Chapter 2 reveals that during WWII, Inouye took on a role as a civil interpreter for the Japanese government in the Japanese prisoner-of-war ("POW") camp Sham Shui Po in Hong Kong. Here, Canadian POWs gave him the nickname "Slap Happy Joe" for his proclivity for slapping Canadian POWs (at 22–24).

Brode duly notes and accepts that Inouye's acts were fueled by the racism he faced in Canada. Such racism was a common occurrence in early nineteenth century Canada against people of Asian descent. Brode utilises both a historical perspective of Canadian nativism and racism, and affidavits from POWs from Inouye's trial to show that a deep hatred for Canadians was behind these slaps (at 10–11, 23–24).

Throughout, Brode is careful to note that Inouye was never substantially linked to any killings or severe physical injuries (at 85, 150). He is also careful to point out that Inouye's conduct fit within Japanese punishment culture, which often used slapping and torture to create obedience (at 21, 73–75, 83). Both points show that Brode took care to present a fair and objective account of Inouye. Notably, these facts were largely ignored in Inouye's trial, forming just a few of the many injustices that Brode accounts for in the trials.

Through Chapters 5–12, Brode walks the reader through Inouye's arrest after the end of WWII, his charge for war crimes and treason, and the trials that would follow. Brode succinctly demonstrates the main errors within these trials from the defence, prosecution, and judiciary. Importantly, Brode does not suggest that Inouye is innocent, just less culpable than his convictions reflect (at 85).

For example, Chapters 10–12 focus on Inouye's final trial and subsequent appeal to the Supreme Court of Hong Kong, where he would be sentenced to death for committing high treason under *The Treason Act of 1351* (UK) (25 Edw III, c 2) (at 106). Here, Brode points out that Inouye, and his arguments, were continuously ignored and discredited, leaving Inouye to be convicted on a technicality for failing to file paperwork (a declaration of alienage) to renounce his British nationality (at 131, 135, 140). Brode also points out clear bias in Chief Justice Sir Henry Blackall's reasoning, showing that he was focused more on Inouye's conduct rather than on whether the conduct showed the prerequisite disloyalty required for a treason conviction (at 140).

Brode's detailed exposition in the early chapters pays off in subsequent chapters, making the errors and injustices within these trials feel and seem as bad as they truly were. In relation to the above example, Brode's exposition reveals that there is real merit to Inouye being *de facto* Japanese; therefore, his argument should have been considered. Had Brode simply begun the book with a brief explanation that Inouye had tortured Canadians, one would not have understood the complexities of Inouye's life. As a result, one likely would be willing to ignore, or even be amenable to, the injustices within the trial given Inouye's acts. Instead, one is left rightfully questioning Inouye's conviction and, more broadly, left with the notion that people deserve a full, fair, and unbiased trial no matter the situation of the court or the allegations against them. Therefore, while *Traitor by Default* is focused on a historic trial, its main themes and promotion of fairness and objectivity remain timeless.

However, the book has two main shortcomings. First, due to its short length, the book rushes through the many trials and complexities, leaving them underdeveloped. In Chapter 7, Brode reveals that it was atypical to sentence someone like Inouye to death for war crimes given he neither killed nor permanently harmed anyone physically. In support of this, he references cases with similar or worse facts where lesser punishments were delivered (at 85). Brode does not go into these cases deeply, leaving one wondering if there were any differentiating facts.

Second, one is left desiring some insight into how military trials have changed. An additional chapter that details the development of military courts post-Inouye's trial to today would allow readers to know whether improvements have been made. Do military courts still have a need to rush trials? If so, has policy been adopted to address issues of procedural and substantive fairness stemming from the need to rush? Have longstanding controversial precedents been overturned? These are some of the many questions one is left with after finishing the book, leaving some unsatisfaction.

Traitor by Default's key strength is its commitment to a fact-driven account guided by an analysis of primary sources. As Brode notes, various mainstream publications have made unsubstantiated claims about Inouye, leading to warped and distorted accounts of him with the effect of making his punishments seem just and fair (at 150–51). In contrast, *Traitor by Default* avoids speculation and gives Inouye the benefit of the doubt where there is not significant evidence to the contrary. The importance of Brode's restraint in simply stating everything we know about Inouye and that which we do not cannot be understated, as, without it, the book would have lost its power to expose the unjust trials.

Overall, *Traitor by Default* is a worthy read for anyone interested in a succinct critique of post-war justice. Moreover, it presents what is inherently a bizarre, captivating, and sadistic story in a manner that is as equally exciting to read as it is respectful to the source material and victims.

– Brad Heskin

Indigenous Peoples and the Future of Federalism

Edited by Amy Swiffen & Joshua Nichols. Toronto: University of Toronto Press, 2024. 320 pp., $36.95 pb.

Indigenous Peoples and the Future of Federalism is a collection of essays that explores different ways assertions of Indigenous sovereignty may manifest in the Canadian legal system. The book includes three parts. Part One, "Futures of Canadian Federalism," includes three essays which explore concepts such as the inherent sovereignty of Indigenous Nations and its independent existence outside of the Canadian Constitution; the need for a methodical and reflective process of relationship building between the Crown and Indigenous Nations; and the potential benefits of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNGA, 61st Sess, UN Doc A/RES/61/295 (2007), GA Res 61/295 [UNDRIP]) and how they might be fully realized. Part Two, "Decolonizing Constitutionalism," takes a step back and canvases the issue from a broader scale on an international level and considers different initiatives for self-determination and ways that UNDRIP may be engaged. Part Three, "Plurinational Federalism" includes three essays which consider how s. 25 of the *Canadian Charter of Rights and Freedoms* (Part I of the *Constitution Act,* 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11) might be utilized by Indigenous Nations in their efforts towards self-determination; different interpretive approaches used by the judiciary in interpreting Indigenous-state relations; and suggestions for how courts can give meaning to, and make room for Indigenous laws. Given the extensive content and analysis within the book, this book note highlights one chapter from each part.

The first chapter of the book is written by James (Sa'ke'j) Youngblood Henderson and is titled "Creating Inclusive Federalism." This chapter seeks "to make the foundational principles of treaty federalism… more visible, and to reveal how to reconcile and integrate these principles with the institutional and governmental future" (at 17). The chapter is framed on the reality that treaties form part of the basis of the Constitution of Canada, and, despite a lack of acknowledgment by the federal and provincial governments, those treaties were made based on a nation-to-nation relationship where Indigenous peoples held jurisdiction across the continent which could only be ceded or delegated through treaties. Youngblood Henderson advocates for an integration of treaty federalism with provincial federalism which balances shared rule and self rule not just between the provinces and the federal government, but also with the treaty Nations themselves. Citing numerous authorities and providing insightful analysis, Youngblood Henderson shows that the existing constitutional architecture required to realize this change exists, and that "what is required is a fresh examination of provincial federalism from the constitutionally required lens of the treaties, the honour of the Crown, reconciliation, and dialogical governance" (at 26). The chapter proceeds to list a number of structural and institutional changes

that could be implemented without requiring a constitutional amendment (at 27–31). This chapter is rightly placed at the beginning of the book as it skillfully articulates a number of foundational concepts referenced and engaged with throughout the book.

Part Two of the book, "Decolonizing Constitutionalism," includes three chapters, all of which include analysis of UNDRIP and different ways it may be used. Chapter 5 is an essay titled "A Theory of Decolonial Constitutionalism: Insights from Latin America" by Roger Merino. Merino engages concepts of constitutionalism from an Indigenous perspective with specific attention on how constitutionalism affects "the political economy and Indigenous political aspirations expressed in everyday social struggles" (at 118). The chapter provides a high-level overview of different approaches to Indigenous constitutionalism across the globe along with some of their shortcomings (at 123–25). The substantive portion of the essay provides an in-depth analysis of approaches to engaging constitutionalism that recognizes Indigenous self-determination in Latin America, namely multicultural constitutionalism in Peru and Colombia (at 125–28); and plurinational constitutionalism in Bolivia and Ecuador (at 128–32). The essay provides a theory for the decolonization of constitutionalism which involves the following: the recognition of Indigenous Nations into colonial constitutions, making them plurinational states; and concrete measures to "rebuild Indigenous territories and provide practical governance over them beyond the 'national interest'" (at 134). This chapter, along with the others in Part Two of the book, provides a thorough and insightful analysis of UNDRIP, its strengths, and potential uses. Importantly, the chapters in Part Two thoughtfully identify limitations and weaknesses of UNDRIP and provide cautions and suggested approaches to use it in order to realize increased Indigenous participation in their respective states.

Within Part Three of the book, "Plurinational of Federalism," sits Chapter 8, "Positivism and Pluralism: The Legal Imagination of Sovereignty in Indigenous-State Relations." This essay, written by Ryan Beaton engages the following question: "How should a Canadian court today approach and resolve disputes about the legal constitutional force attaching to promises made in historic agreements between Canada and Aboriginal peoples?" (at 204). In answering this, Beaton first examines differing interpretive approaches of the majority and the dissent in *Caron v Alberta* (2015 SCC 56 [*Caron*]), which turned on the interpretation of negotiations between Canada and the provisional government established by the Métis at Red River in 1870 (at 206). Noting overlap in the two approaches, Beaton points out the majority seemed to interpret the agreement in a way that aligned with modern conceptions of constitutional structure and parliamentary sovereignty, whereas the dissent placed more weight on the intent of the parties at the time and "interpreted relevant constitutional provisions instrumentally to fulfil the actual historic agreement" (at 207). The second part of the chapter reflects on these interpretive approaches from philosophical and legal-historical perspective and how they are engaged in jurisprudence. Particular attention is given to the reasoning employed by Chief Justice Marshall in the Marshall Trilogy when he confirmed the doctrine of discovery and assertions of British, and later, American sovereignty (at 218–35). Similarities between Chief Justice Marshall's reasoning and that of the Court in *Caron* are then analysed. The chapter concludes by suggesting the treatment of the Marshall Trilogy in Canadian law has been narrow and neglects some of the

creativity of Chief Justice Marshall himself in those decisions, which resonate more with a pluralist orientation similar to the dissent in *Caron*; Beaton suggests that it is these interpretive approaches that Canadian law could benefit from (at 237).

Indigenous Peoples and the Future of Federalism provides valuable perspectives and ideas on the assertion of Indigenous Nations' rights, expressions of self-determination, and participation within existing federal legal systems. The essays are either premised on or justify a legal landscape where Indigenous Nations are recognized as rights holders who are entitled to space within constitutional and federal orders. Some authors provide suggestions for modifying existing legal structures and institutions, and many provide critiques and cautions to existing or potential approaches. The book is highly relevant to those operating in the Canadian legal system and also includes international material that increases its relevance to other jurisdictions as well. *Indigenous Peoples and the Future of Federalism* is highly recommended for those interested in more substantive and meaningful participation of Indigenous Nations in existing federal systems, and an increased expression and acceptance of Indigenous legal orders. In addition to Indigenous law practitioners, the book is a recommended read for all judges and lawyers who would benefit from the perspectives and sound reasoning within.

– Benjamin Ironstand

Rights and the City: Problems, Progress, and Practice

Edited by Sandeep Agrawal. Alberta: University of Alberta Press, 2022. 272 pp., $34.99 pb.

Rights and the City, edited by Sandeep Agrawal, is an informative collection of essays exploring the tensions municipal governments face in combatting human rights issues. Drawing a distinction between rights *to* and *in* the city, the book applies philosophical and legal aspects of rights to answer one question: "*What is (and what ought to be) the role of municipal governments and planners in regulating, implementing, and advocating rights' claims?*" (at ix [emphasis in original]). Answers to this timely question emerge through the exploration of legal research, statutory and case law, and qualitative studies. Although each chapter focuses on different rights or themes, the chapters work together to develop a nuanced understanding of the interplay of rights at the municipal level.

Part I, "The Right to the City," introduces the theoretical concept of a right to the city, which envisions city inhabitants participating in urban politics in efforts to achieve greater access to city resources (at xiii). In Chapter 1, Alexandra Flynn uses Toronto as an example to identify the clash between Indigenous rights and the expansion of municipal power. As municipalities seek to expand their power through the courts, provincial legislation, and constitutional protection, Flynn contends this expansion must consider "constitutional and legal obligations to Indigenous Peoples and communities" (at 16), such as the duty to consult. The conceptualization of a right to the city, therefore, must be mindful and inclusive of the political autonomy of Indigenous peoples.

Chapter 2, by Jennifer Orange, explores how the concept of a right to the city can transform into a legal right through norm development. Orange sees this development happening through two interconnected methods: (1) national and international efforts to codify the norm into law, and (2) initiatives by cultural institutions, such as museums, to educate the public (at 29). These local and global efforts contribute to establishing the right to the city as a recognized norm, which could lead to its adoption as a human right.

Part II, "Rights in the City," offers a more tangible discussion on the implementation of human rights in cities. In Chapter 3, Sandeep Agrawal traces the development of federal and provincial rights legislation prior to the enactment of the *Canadian Charter of Rights and Freedoms* (Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]). Agrawal's findings highlight the historical absence or inadequacy of legislation in addressing pervasive discriminatory practices at the municipal level. Challenges to discriminatory bylaws that found a way to the courts were often resolved through federalism, not a human rights lens (at 61). Though acknowledging the legislative strides Canada has made in consolidating and protecting human rights, Agrawal also recognizes "there is still a long way to go" (at 71).

In Chapter 4, Sandeep Agrawal and Eran Kaplinsky explore how group and collective rights operate at a municipal level to affect urban issues such as limits on expression and religious practice. In constitutional challenges to municipal action, the courts generally uphold constitutionally afforded group and collective rights (at 98). The authors acknowledge that municipalities, especially in Quebec, struggle with balancing group and collective rights in the face of competing individual rights and collective interests (*ibid*).

Chapter 5, by Sandeep Agrawal, narrows in on whether municipal bylaws in Alberta are congruent with human rights legislation. Specifically, Agrawal identifies potential human rights issues emerging from municipal development plans and zoning bylaws across five cities and five rural municipalities in Alberta (at 109). Although the bylaws generally comply with rights legislation (at 125), the biggest area of potential concern was municipal restrictions on the provision of affordable and social housing (at 109). Additionally, Agrawal argues that amendments to federal legislation regarding drug use have impacted land use planning at the municipal level, particularly in the location of safe injection sites, methadone clinics, and cannabis dispensaries (at 121–23).

In Chapter 6, Renée Vaugeois describes the efforts of the John Humphrey Centre for Peace and Human Rights in transforming Edmonton, Alberta into a "human rights city" (at 134). Relying on the physical and relational dimensions of human rights, Vaugeois emphasizes that finding innovative ways to facilitate safe, inclusive spaces for community engagement is key to advancing human rights from a municipal standpoint (at 150–51). Furthermore, the author calls on municipalities to ensure remedy systems for violations of rights are available, accessible, affordable, and acceptable (at 151–52).

Part III, entitled "Other Rights in the City," delves into rights that are not afforded constitutional protection in Canada and freedoms that should be restricted. Michelle Oren and Rachelle Alterman dedicate Chapter 7 to exploring a constitutional right to housing in the international context. The authors present findings of their comparative textual analysis of the constitutions of 189 United

Nations ("UN") member states against the UN's seven criteria for adequate housing (at 169). Over half of the countries (including Canada) have not incorporated a constitutional right to housing (at 170). This chapter offers an insightful and comprehensive evaluation of the current global constitutional approach to a right to housing, identifying areas where nations can adopt or evolve this right.

Eran Kaplinsky, in Chapter 8, explores the important task municipalities and planning authorities face in balancing public interests and private property rights. Property rights are not afforded constitutional protection in Canada and instead fall under exclusive provincial jurisdiction (at 188). Municipalities are then delegated significant powers over land use by the provinces (*ibid*). The chapter focuses on the inconsistent awarding of compensation for three limitations of property rights by municipalities: expropriation, indirect affection, and restriction (at 201). Kaplinsky advocates for a more uniform and predictable approach to compensation that better aligns with public policy and the recognition of rights.

In Chapter 9, Ola Malik and Sasha Best close out the book by discussing restrictions on "othering" speech in public places. Drawing parallels to hate speech and defamation, Malik and Best contend that while othering speech may be a protected form of expression under s. 2(b) of the Canadian *Charter*, it is contrary to the principles and values underlying a free and democratic society and thus can, and should, be restricted by municipalities (at 210). The authors draw support from the captive-audience doctrine, which recognizes that freedom of expression should "balance between the person's freedom *of* speech and the unwilling listener's freedom *from* speech" (at 227 [emphasis in original]).

Rights and the City presents a rich discussion of the interconnected nature of city life and human rights. Though each chapter is a stand-alone contribution to the human rights law discussion, the book, as a collective, structures a broader conversation on the substantial role municipalities play in shaping, promoting, and infringing human rights. In identifying the varied recognition and protection of rights to and in the city, the book illustrates areas for reform and calls on municipal governments and residents to advocate for this change. Academics, policymakers, and city inhabitants can find invaluable inspiration and knowledge about human rights at the municipal level from this informative book.

– Ashley King

Unjust Transition: The Future for the Fossil Fuel Workers

Edited by Emily Eaton, Andrew Stevens & Sean Tucker. Halifax & Winnipeg: Fernwood Publishing, 2024. 224 pp., $29.00 pb.

Unjust Transition: The Future for Fossil Fuel Workers delves into the complex and fraught path towards a low-carbon economy, with a particular focus on the 2019–20 lockout of Unifor Local 594 workers (the "Union") at the Co-op Refinery Complex ("CRC") in Regina, Saskatchewan. Edited by Emily Eaton, Andrew Stevens, and Sean Tucker, this book brings together multiple contributors to highlight the difficulties posed on fossil fuel workers in the face of weakening labour protections and a transitioning

economy. The collection of essays serves as a vivid case study that underscores broader themes of justice, labour rights, and the inadequacies of current "just transition" policies that, from the authors' perspective, often prioritize profits over people.

The opening chapter situates the CRC lockout within a broader critique of corporate justifications for labour rollbacks under the guise of environmental responsibility. The authors argue that the CRC's emphasis on moving towards a "low-carbon economy" (at 2) was largely performative, masking underlying profit-driven motives to reduce labour costs (at 3–4, 7–8). The authors assert that, by framing their demands as necessary for a sustainable future, the CRC effectively co-opted the language of environmentalism to justify pension cuts and workforce restructuring (at 15–16). The chapter's conclusion sets the stage for the overall theme of the book: that a genuine "just transition" must center around worker protections and collective bargaining rights rather than using them as obstacles to profitability—a point, the authors argue, that is evident in the events surrounding the CRC lockout (at 16–17).

In Chapter 2, Kevin Skerrett examines the CRC's approach to pensions, focusing on the CRC's claim that defined-benefit pensions were financially unsustainable (at 30–31, 34). Skerrett counters this argument with industry data, showing that such pensions are feasible within the energy sector (at 26–27) and were targeted by the CRC primarily to cut costs (at 31, 34). Skerrett further situates the CRC's pension strategy within a larger pattern across the industry, where corporations have moved from defined-benefit to defined-contribution plans, which benefit employers more than employees (at 27–29). The chapter concludes by framing the importance of defined-benefit pension plans for worker protection in the wake of a looming global transition from a fossil fuel-based economy and the necessity of resisting "just transition" rhetoric to undermine workers' bargaining power (at 40–42).

Chapter 3 is unique in that it draws on interviews from Union members, who describe how the lockout created a long-term shift in labour relations between the Union and the CRC (at 62–66). In the interviews, workers share their feelings of betrayal and their sense that the CRC has departed from its "co-operative values" (at 62)—values, the authors argue, that could "advance a 'just transition' that balances community and economic interests" (at 66).

In Chapter 4, Charles Smith and Lisa Wanlin investigate how Saskatchewan's judicial system favoured the CRC through a series of pro-employer court injunctions that restricted Union picketing (at 68). The authors argue that these rulings demonstrate a systemic bias toward corporate interests within Canadian labour law (at 68–72), emphasizing how "the law reinforced and deepened an already imbalanced relationship between workers and employers" (at 83). Altogether, Smith and Wanlin suggest that these pro-employer rulings are emblematic of the power imbalance between the interests of workers and those of corporations (at 81–83).

In Chapter 5, Patricia Elliott traces the CRC's historical influence in Saskatchewan, arguing that the refinery's central economic role allowed it to exert disproportionate political and economic control (at 88–92). Elliott uses a journalistic tone to highlight the CRC's historical and current environmental problems (at 89–108), and demonstrates the personal health risks taken on by Union workers (at

110). Elliott argues that this corporate influence has caused all levels of government—municipal, provincial, and federal—to be "backed into a corner" when it comes to their ability to achieve equitable outcomes for the community as a whole (at 110).

Sean Tucker examines health and safety issues at the CRC in Chapter 6, emphasizing the heightened risks workers accept as an occupational hazard at the refinery (at 117–19). Tucker details specific cases in which the CRC neglected safety standards (at 119–22) and describes the CRC's treatment of safety issues as a "public relations exercise" (at 122). Tucker explains how "safety" became a narrative throughout the lockout (at 127–31) and how this rhetoric culminated in a large oil spill from the refinery into the city of Regina's sewer system (at 132–33). Tucker concludes by emphasizing that for a "just transition," we must advocate for worker health to stand alongside environmental goals and corporate profits (at 135).

In Chapter 7, Doug Nesbitt and Emily Leedham critique the media's portrayal of the lockout, arguing that mainstream journalism largely adopted the CRC's narrative and marginalized workers' perspectives (at 142–43). The authors analyse the historical consolidation of Canadian mainstream media (at 146–49), and discuss how traditional and alternative media outlets covered the dispute (at 150–57). The authors advocate for greater media literacy and diverse reporting, particularly on labour issues, to ensure the accurate representation of workers' voices and the combatting of misinformation (at 145, 160–61).

Emily Eaton's essay in Chapter 8 explores what a genuine "just transition" might entail for refinery workers, advocating for a worker and community-centred model (at 165–67). Eaton uses the lockout between the CRC and the Union as a case study and analyses how the CRC strategically adopted "green" language to justify austerity measures, including pension cuts and labour rollbacks (at 170–74). Eaton describes the CRC's actions as representative of "an *unjust* transition, whereby greenwashing and attempts to break the collective power of labour are part of the rhetoric of the 'net-zero' future" (at 175 [emphasis in original]). She concludes the chapter with suggestions for how Union workers—and fossil fuel workers as a whole—can be a part of the transition to a low-carbon economy (at 178–84).

The concluding chapter brings together the book's key themes, arguing for a "tripartite transition" (at 198) that engages workers, industry, and government (at 196–202). The editors suggest that the CRC lockout exemplifies the risks of an energy transition that neglects economic justice, underscoring the need for policies that support both environmental and social objectives concurrently (at 189–92). They call for structural reforms that provide workers a seat at the table when transition strategies are being developed, proposing that only by addressing labour rights can a truly equitable and sustainable transition be achieved (at 194–203).

Unjust Transition provides a comprehensive examination of the CRC lockout, using it as a lens to critique current transition models that the authors argue prioritize corporate profits over worker rights. Although the book often lacks balance, it makes a compelling case for a "just transition"

that includes labour protections, worker agency, and systemic reform to ensure equity for fossil fuel workers. As Canada and other nations move toward greener economies, *Unjust Transition* argues that only a holistic approach that includes the workers can achieve both social and environmental justice.

– George King

Canada's Surprising Constitution: Unexpected Interpretations of the Constitution Act, 1982

Edited by Howard Kislowicz, Kerri A Froc & Richard Moon. Vancouver: UBC Press, 2024. 334 pp., $115.00 hc.

The *Constitution Act, 1982* ("*Constitution*") has been part of the Canadian constitutional structure for over forty years and has been interpreted in many ways that would have been unexpected by its drafters (at 3). In this collection of essays, the authors identify four surprising ways in which the courts have engaged with the rights and guarantees enunciated by the *Constitution*. The authors attribute these surprises to "the openness of the *Charter*'s text, the courts' 'living tree' interpretive approach, and the flexibility inherent in the justification of rights infringements" (at 4–5). Whether we view these surprises as right or wrong, welcoming or worrisome, will depend on our idiosyncratic beliefs in politics, legal theory, morality, and such. Regardless of our views, this book is a crucial read for anyone interested in constitutional jurisprudence and legal history.

In Part 1, the authors discuss the first set of surprises pertaining to the many parts of the *Constitution* that remain underdeveloped. The authors analyse how the courts have engaged with the "Supremacy of God" clause in the preamble, and the provisions guaranteeing peaceful assembly, equality rights in s. 28, language rights, voting rights, and the notwithstanding clause. A common theme in this set of surprises is that the Supreme Court of Canada has yet to address certain foundational issues underlying these provisions. However, the editors recognise that this is not the fault of the Court. While the Supreme Court has control over its docket by granting applications for leave to appeal, certain issues are less likely to be litigated, and even when these issues are litigated, the Court has no control over how they are argued (at 5). Therefore, the reason why some of these provisions are underdeveloped is due to extraneous factors outside of the Court's control.

Part 2 explores the second set of surprises stemming from the unexpected interpretations of freedom of expression, religion, and the limitation clause. While s. 2(b) of the *Charter* guarantees freedom of expression, it also protects freedoms of "'thought, belief, [and] opinion,' as well as 'freedom of the press and other media of communication'" (at 169). However, Benjamin Oliphant identifies that the Supreme Court has rarely considered these freedoms, in part, due to the expansive scope they have given to freedom of expression (at 169–70). Likewise, Ashleigh Keall highlights the Court's unexpected use of freedom of religion to protect state interests in a way that Keall describes as "[taking] on the role of 'state-defender'" (at 193). Lastly, Richard Moon critiques the universal two-step approach that the Court has adopted for adjudicating *Charter* claims because it assumes that all the rights guaranteed

by the *Charter* protect an area of individual liberty from state interference (at 221). Moon makes the case that most *Charter* rights do not conform to this individual-liberty model and thus cannot be assessed by a generic limitation test such as the *Oakes* test.

Part 3 dives into the third set of surprises, described as disappointments, in how the courts have engaged with equality rights in s. 15, principles of fundamental justice, and recognition of Aboriginal rights. The first essay explores legal battles engaging with equality rights in s. 15. Despite the role women played in enacting ss. 15 and 28 of the *Charter*, and the litany of litigated cases since patriation, it took nearly four decades for the Supreme Court to uphold the first sexual discrimination against women claim in 2018 (at 8–9). Jennifer Koshan and Jonnette Watson Hamilton dive into the history of s. 15 claims between 1993 and 2002 to reveal concerning trends that leave the authors uncertain of the future of s. 15 claims as its objective of substantive equality continues to remain elusive. In the second essay, Martha Jackman examines the evolution of s. 7 jurisprudence "from its early surprising promise to its current wizened state" (at 261). One consideration made in this section is how the broad interpretation of the phrase "principles of fundamental justice," as initially promised by Justice Lamer in *Re BC Motor Vehicle Act* (1985 CanLII 81 (SCC)), has since been depleted. The narrowing of s. 7 can be observed in a recent case that concluded that denying life-saving health care to undocumented migrants was in accordance with the principles of fundamental justice (at 273). Jackman calls for the courts to adopt an expansive rights-affirming approach, particularly one that adheres to Lamer J.'s caution in *Re BC Motor Vehicle Act* against a narrow reading of s. 7, as the expansive approach is becoming increasingly imperative (at 277). In the last essay, Aimée Craft argues that the Supreme Court's narrow reading of s. 35 is often at odds with the purpose of the provision itself which, in turn, has allowed the government to appropriate Indigenous land and erode Indigenous languages, culture, and autonomous governance (at 288).

In Part 4, the authors highlight the fourth set of surprises, characterized as the unexpected interpretive expansion of *Charter* rights. This section explores the unexpected positive impact of s. 27 and its call on the courts to interpret *Charter* rights in light of Canada's commitment to multiculturalism, the inclusion of labour rights in freedom of association, and also the enduring approach to *Charter* interpretation. While s. 27 places a responsibility on the courts to interpret the *Charter* in light of Canada's commitment to multiculturalism, it does not guarantee any rights; however, Natasha Bakht argues that it has had a noticeable and positive impact on how courts have applied certain rights (at 9). Additionally, Bakht contemplates how s. 27 might be useful in challenging Quebec's Bill 21, which invokes s. 33 "to limit constitutional review of a law that has devastating consequences for religious minorities" (at 312). In the second essay, Fay Faraday examines the history of freedom of association guaranteed by s. 2(d). Faraday finds that after the Supreme Court's initial struggle to protect actions that are manifestations of association due to the Court's narrow interpretations, s. 2(d) is now being used to protect an array of labour rights (at 10). As a result, Canadian jurisprudence on labour rights is now in line with international law. In the book's concluding essay, Vanessa MacDonnell examines the purposive approach that was developed with the Supreme Court's first two *Charter* decisions: *Hunter et al v Southam Inc.* (1984 CanLII 33 (SCC)) and *R v Big M Drug Mart Ltd.* (1985 CanLII 69 (SCC)). In recent decisions, the Supreme Court has been more open to interpreting the *Charter* based on its text and history, an approach that MacDonnell cautions may risk ossifying the *Charter* (at 383).

To conclude, *Canada's Surprising Constitution* provides readers with excellent insight on how the interpretation of the *Constitution* has evolved throughout the years. Not only does it present the many ways that interpretations of the *Constitution* have resulted in positive outcomes, but it also highlights some key limitations that have arisen in jurisprudence involving narrow interpretation.

– Ethan Lin

Judging Sex Work: Bedford *and the Attenuation of Rights*

By Colton Fehr. Vancouver: UBC Press, 2024. 304 pp., $32.95 pb.

Colton Fehr's *Judging Sex Work:* Bedford *and the Attenuation of Rights* provides an in-depth analysis of the Supreme Court of Canada's decision in *Canada (Attorney General) v Bedford* (2013 SCC 72 [*Bedford*]). *Bedford* was a landmark case involving the constitutionality of sex work laws in which the Supreme Court ruled that various *Criminal Code* provisions were invalid under s. 7 of the *Charter*.

Fehr, an assistant professor at the University of Saskatchewan College of Law, provides a critical perspective on *Bedford*, arguing that the Supreme Court's decision did little to protect the safety interests of sex workers, jeopardized the ability of courts to decide rights cases implicating social science evidence coherently, rendered the most important rights provision under the *Charter* incomprehensible, and unduly widened the scope of judicial review while providing legislatures with an unprincipled legal means to sidestep judicial precedents (at 4).

Supported by interviews with Alan Young, the lead counsel for the applicants in *Bedford*, Fehr provides a thorough survey of the issues at play in the case and his perspective on the resultant consequences of the decision. Fehr's examination of *Bedford* ultimately asks the broader question: whether sex work should be rationally characterized as a criminal matter at all.

In Part 1 of *Judging Sex Work*, Fehr discusses the Supreme Court's past precedents upholding Canadian sex work laws. The sex work provisions struck down in *Bedford* were previously deemed constitutional by the Supreme Court, however Fehr and Young attribute the ability of the Court to readdress these provisions to two changes: "the availability of improved evidence of the dangers faced by sex workers and the evolution of section 7 of the Charter" (at 39–40). This section of *Judging Sex Work* provides a summary of the lead up to *Bedford*, describing the socio-economic issues faced by the litigants, the *Charter* issues at play, and the political motivations surrounding sex work regulation. This comprehensive discussion provides an interesting insight into the potential challenges in bringing a *Charter* challenge to the Supreme Court, making *Judging Sex Work* a valuable read for lawyers and law students looking to learn more about *Charter* litigation.

In Part 2 of *Judging Sex Work*, Fehr provides a critical analysis of the significant legal changes post-*Bedford* and argues that, contrary to its intent, the *Bedford* decision served to attenuate rights (at 7). Fehr discusses the Court's reconceptualized approach to s. 7, which he argues will allow legislatures to erode rights for political gain (at 113). He also highlights the Court's failure to develop law on

suspending declarations of invalidity, arguing that these will negatively impact future s. 7 claims (at 114). Fehr argues that these legal changes post-*Bedford* will have significant impact on future *Charter* litigation.

In response to the issues he identifies, Fehr rethinks the *Bedford* decision in Part 3 of *Judging Sex Work*. He outlines a choice-based argument for upholding the sex work laws, arguing that there is a distinction between "voluntary sex work" and "survival sex work" which should have altered the analysis in *Bedford* (at 140). "Survival sex workers," Fehr argues, should be able to access the defence of necessity (at 138); therefore, the harms that they face should not be considered in the constitutional analysis of sex work laws (at 142). However, Fehr argues that the choices made by "voluntary sex workers" are the primary cause of the harms they incur, and therefore causation between the law's effect and the harm suffered by the complainant should not have been found (at 146). As a result, Fehr finds that each *Criminal Code* provision, when applied solely to "voluntary sex workers," should have been upheld under s. 1 of the *Charter* (at 152, 155).

While this involuntariness approach is presented by Fehr, it would likely be extremely difficult, in reality, to determine which category individual sex workers fit into. Fehr acknowledges the criticisms of this approach, highlighting how some scholars have argued that "a binary between voluntary and involuntary sex work provides an impoverished understanding of the agency of those who engage in sex work" (at 142). However, he ultimately argues that any misunderstandings of whether a sex worker is working voluntarily or involuntarily would be better addressed at other stages of the criminal law process, such as sentencing (*ibid*).

Judging Sex Work then addresses the new sex work provisions that Parliament passed post-*Bedford*. These laws were controversial upon enactment, with some arguing that they essentially replicated the previous provisions, while others endorse them as a step towards ending the sex work trade (at 158). Fehr discusses each new provision in turn and concludes that each of these new laws should be found constitutional (at 166). Despite highlighting the substantial criticisms of these laws, Fehr argues that Parliament's choice to enact them should be shown deference by courts until more evidence on their efficacy is available (at 178–79). It is clear that Fehr is at an impasse: while he argues that the proper approach to constitutional analysis of the new sex work laws should result in these laws being upheld by the courts, he does see issues with the harms that these laws can cause to those who conduct sex work. Therefore, Fehr discusses the wider issue of whether sex work is the proper subject of criminal law at all (at 179). He argues that the best approach moving forward is for the Supreme Court to clarify what may be rationally criminalized by Parliament and considers whether sex work truly falls within this category (at 185).

Given the issues raised in his writing and the "ease with which commentators have criticized the *Bedford* case" (at 190–91), Fehr concludes *Judging Sex Work* by questioning how *Bedford* could possibly have been a unanimous decision (*ibid*). He believes that "it is unlikely that the individual justices were oblivious of all of these criticisms" and highlights what he believes to be an important factor in the lack of dissent in this decision: the leadership style of Chief Justice Beverley McLachlin (at 191). Fehr implies that McLachlin C.J.C.'s desire for consensus building affected the outcome of *Bedford* and resulted in the lack of dissent (at 193). However, there is no indication that McLachlin C.J.C.

"[deterred] dissent" (*ibid*), a move which surely would have resulted in a complaint by the other justices. Placed in the conclusion of *Judging Sex Work*, this discussion of McLachlin C.J.C.'s role appears to be an afterthought.

Overall, *Judging Sex Work* provides a thorough discussion of *Bedford* and presents readers with an interesting perspective on how s. 7 challenges occur in Canada. This book will be a valuable read for those who wish to understand the evolution of criminal-constitutional law in Canada and to learn more about the issues on the horizon of s. 7 jurisprudence.

– Kathleen Stoneham

The Common Law Jurisprudence of the Conflict of Laws

Edited by Sarah McKibben & Anthony Kennedy. Oxford: Bloomsbury Publishing, 2023. 260 pp., $122.85 hc.

The Common Law Jurisprudence of the Conflict of Laws is a collection of essays focused on leading common law cases in the realm of private international law. The cases discussed range from the eighteenth to the twenty-first century and span decisions from across the Commonwealth and beyond. Many bedrock concepts of conflicts are discussed, such as jurisdiction, choice of law, and recognition and enforcement of foreign judgments, among others. For Canadian readers familiar with private international law in our domestic context, this book offers an opportunity to trace the development of the fundamental values that are at play in conflicts cases, like "international comity, party autonomy, decisional uniformity, finality of outcome and, in certain cases, the protection of forum public policy and fundamental common law rights" (at v). The thoughtful commentary contained in this collection offers readers an opportunity to engage with the conceptual and comparative nature of private international law.

Given the breadth and scope of the essays contained in this collection, this book comment prioritizes a selection of them to illustrate the far-reaching contexts and principles that the study of private international law grapples with, and the type of redux each piece brings to familiar cases.

In Chapter 1, "*Brook v Brook*: Rethinking Marriage Choice of Law," Sarah McKibbin examines the evolution of the choice of law rules on marriage, and the influential role scholarship played in its development. In particular, she notes that until the latter half of the nineteenth century, the validity of a marriage with a foreign element was determined by the *lex loci celebrationis* (at 21)—that is, the law of the place of celebration. This approach was criticized by scholars of the day, who noted that "well-to-do British couples" began sojourning across Europe, flouting domestic laws by marrying abroad (*ibid*). Scholars began theorizing exceptions to the easily evadible *lex loci* rule. The House of Lords' decision in *Brook v Brook* ((1861) 9 HL Cas 193, 11 ER 703 [*Brook*]) is commonly viewed as a "'turning point'" (at 1) to this rule, as it is attributed with creating the choice of law rule which applied to the formal and essential validity of a marriage. And yet, this attribution is misplaced. As

McKibbin documents, this common view of *Brook* is a misreading of the decision, as the bifurcated rule said to have emerged was only the sole opinion of one of the Law Lords (at 15, 21). As often happens, this opinion was picked up by the English Court of Appeal, who applied the bifurcated rule in a subsequent case, thereby changing the trajectory of choice of law rules on marriage from then on (at 21). McKibbin covers exactly how this happens throughout her essay, and it certainly merits a read for both the fascinating lineage of *Brooks* and the legal issues that remain in the bifurcated rule to date.

Chapter 6, "Lucy's Argument: The *Spycatcher* Case in Australia," addresses issues relating to government authority and public policy at the state level, that is the "enforcement of governmental interests by foreign states beyond territory" (at v). In the Chapter, Reid Mortensen offers a closer view of the famous case involving the disgruntled MI5 agent, Peter Wright, and his attempts to publish his tell-all memoir—despite Margaret Thatcher's government trying to stop its publication in Australia (at 111). Mortensen describes this decision as being part of a broader trend within a wave of growing Australian nationalism (at 113–14). He then discusses how the private international law dimension slowly took shape and grew in importance as the case moved up the courts, specifically on the question of the enforcement of a foreign state's penal or public laws (at 123, 126). When the case finally made its way to the Australian High Court, the issue for them to resolve was one of private international law (at 130). Indeed, the penultimate result was a "jurisdictional bar on a foreign government enforcing its governmental interest in a civil court" (at 133). Throughout his discussion of *Spycatcher*, Mortensen naturally discusses the specific legal perspectives in the judgements, but he also humanizes the individuals doing the judging. That is, their role and influence within a growing Australian nationalism and in shaping Australia's relationship with its 'foreign' counterpart, the United Kingdom. In summary, this chapter is a discussion of *Spycatcher* with the legal nationalistic subtext made bare.

In Chapter 8, "*Tolofson v Jensen*: Reframing the Canadian Common Law Choice of Law Rule for Torts," Joost Blom demonstrates that "the impact of a common law decision can lie as much in the style of the reasoning as in the principles it articulates" (at 151). In analysing the reasoning contained in *Tolofson v Jensen* (1994 CanLII 44 (SCC), [1994] 3 SCR 1022 [*Tolofson*]), Blom focuses on three aspects: the "interplay between Canadian constitutional law, public international law, and private international law" (at 156), the "approach taken to non-Canadian authorities" (*ibid*), and finally the "evolution of the principles established by the case" (*ibid*). Of particular interest is the first aspect. Blom argues that underlying the rule relating to choice of law in torts was: 1) the "territoriality principle in exercising jurisdiction" and 2) the "inability of a province to legislate extra-territorially"—the former being drawn from doctrines in international law, and the latter from constitutional law (at 168). He criticizes this approach as effectively "pre-empt[ing] any future development of the law," as the judgment makes great efforts to dissuade courts from disturbing the *lex loci deliciti* rule (*ibid*). He compares the Canadian approach to that of Australia, which also provides no exceptions to the *lex loci deliciti* rule, but points out that Australia treats this rule as "a question of common law" unlike *Tolofson* which has coupled it with Canadian constitutional law (*ibid*).

Blom suggests that should the constitutional constraint be removed, courts could begin questioning whether "every substantive issue relating to a tort claim ought to be relegated, without exception,

to the *lex loci delicti*" (at 169). He points out that most choice of law arguments in road accidents concern no-fault compensation schemes, guest statutes, and limitation periods—issues that do not have as compelling a link with the place of tort (*ibid*). Blom closes his essay with recognition that the matter is unlikely to be addressed any time soon, given how few cases in private international law arrive before the Supreme Court of Canada, but remains optimistic that perhaps such a time is closer than we think.

The Common Law Jurisprudence of the Conflict of Laws is a mighty collection. The essays covered thus far touch upon but a few of the topics and principles discussed between the covers of this book. The book can be enjoyed by those with an understanding of the principles underlying this complex area of law, and academics looking to stay apprised of modern conflicts scholarship. Each author approaches their subject with rigour, insight, and fascination. And as the Chief Justice of the Supreme Court of New South Wales, Andrew Bell, noted in his foreword, the "authors are to be congratulated on the originality and thoroughness of their scholarship" (at viii).

– Samad Twemlow-Carter