CaseMail

The Law Society of Saskatchewan Library's online newsletter highlighting recent case digests from all levels of Saskatchewan Court. Published on the 1st and 15th of every month.

Volume 27, No. 15 **August 1, 2025**

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***R v Olynik*, 2025 SKCA 51**

Tholl Kalmakoff Drennan, 2025-05-21 (CA25051)

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The appellant was sentenced to a global term of imprisonment of six years and nine months after being found guilty of six offences after Provincial Court trial. The offences included intentionally discharging a firearm while being reckless as to the life or safety of another person (s. 244.2(1)(b)), breaking and entering a dwelling house and committing an indictable offence therein (s. 348(1)(b)), in addition to possessing a firearm while prohibited and failing to stop for police. Based on circumstantial evidence, the trial judge concluded that the appellant and an accomplice attacked the two occupants of the basement suite of a home. One of the attackers hit an occupant of the suite in the face with a crowbar causing significant lacerations. One of the

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attackers shot the other occupant during the break and enter and fired twice. The occupant of the main floor suite testified that saw two people in the backyard running at the door and trying to force it open, and that he saw one of them fire a gun through the window. He watched the intruders leave the yard and saw a sedan with LED taillights emerge from the alley and drive away. He kept the car in sight and made observations in real time to a 911 operator. Officers spotted a car matching the description of the vehicle. The appellant was driving and engaged police in a low-speed pursuit that ended in Warman. Police arrested the appellant and noticed that he had a fresh cut on the top of his head. Inside the car, police found a yellow crowbar, a yellow-handled hammer and bolt cutters. Police recovered a .22 calibre magazine and a black handled hammer in the snow. Back at the house, police found faint blood droplets in the snow. The door had pry marks and yellow paint left on it, and two .22 calibre shell casings were found at the scene. Police observed footprints in the snow at the scene that matched the shoes worn by the appellant and accomplice. The appellant appealed against his convictions, arguing that the trial judge erred by finding that the evidence proved beyond a reasonable doubt that he was one of the attackers. He also argued that he did not receive competent assistance from his counsel at trial. The Crown appealed the sentence, arguing that the overall sentence was demonstrably unfit. The Court of Appeal (court) determined the following issues: 1) whether the trial judge erred in concluding that the Crown had proven that the appellant was one of the intruders at the house; 2) whether the trial judge erred in finding the appellant guilty of an offence under s. 348(1)(b) of the *Criminal Code*; 3) whether the appellant received ineffective assistance from trial counsel, resulting in a miscarriage of justice; and 4) the Crown sentence appeal.

HELD: The court dismissed the conviction appeal. The court granted leave to the Crown's sentence appeal but dismissed it. 1) The trial judge did not err in his assessment of the evidence; his conclusion was reasonably supported by the evidence. His reasons demonstrated that he fully understood the alternative inferences put forward by the appellant but rejected each of them because they defied common sense, or were neither reasonable nor plausible in the circumstances. The court stated that when the Crown's case depends wholly or substantially on circumstantial evidence, the criminal standard of proof requires that the trier of fact be satisfied beyond a reasonable doubt that the accused's guilt is the only reasonable inference to be drawn from the evidence as a whole. The court noted that deference is owed to a trial judge's conclusion that there are no reasonable alternative inferences other than guilt. There is no *Villaroman* error where a trial judge rejects an alternative theory inconsistent with guilt on the basis that they find it to be unreasonable when measured against the evidence/lack of evidence, human experience, and common sense. 2) The court set out the wording of s. 348(1)(b) and noted that it had two elements that must be proven before an accused can be found guilty: (i) breaking and entering a place; and (ii) committing an indictable offence therein. The offence is not complete until the accused commits a distinct indictable offence in the place

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that has been entered. The appellant argued that the trial judge was wrong to find that the "entering" and "committing an indictable offence therein" components could be fulfilled by a person who fired a gun through the window of a house while remaining physically outside the house. The court found that the trial judge erred in law by finding that the act of firing the gun through the window into the house constituted both the element of entering and the element of committing an indictable offence therein. However, the court added that the curative proviso could be applied to uphold the conviction. The trial judge found as a fact that the two attackers acted in concert for a common purpose: they both used instruments in attempting to gain access, one by battering the basement door, and the other by breaking a bedroom window and firing gunshots into the room. The trial judge also found that one victim suffered an injury from being struck with a blunt object, and the other was shot. The court concluded that there was no reasonable possibility the verdict under s. 348(1)(b) would have been different had the trial judge not made the reasoning error. The appellant also argued that there was an issue with the portion of the s. 348(1)(b) count that described the indictable offence he committed in the house as "discharge firearm". The court did not find the count to be either legally or factually deficient. The court added that there was no requirement that a count use any particular wording; just that the underlying transaction is identified in sufficient detail and that the accused knows which offence he may be convicted of. The court did state that it may be preferable for a count charging an offence under s. 348(1)(b) to identify the specifics of the indictable offence the person is alleged to have committed. In the circumstances of this case, the insertion of the words "discharge firearm" was factually sufficient to describe the indictable offence alleged to have been committed. Here, he was also facing two other counts alleging the discharge of a firearm, so the accused could not legitimately complain that the Crown had not identified with sufficient precision the conduct forming the indictable offence he was alleged to have committed in the dwelling house. Even if using only the words "discharge firearm" to describe the indictable offence rendered the count defective on its face, the court suggested that the appropriate time to object to the sufficiency of the count is prior to entering a plea under s. 601(1), so that the trial judge can consider whether to quash the count, amend it, or leave it as written. A count should only be quashed if it is so defective that it fails to give the accused notice of the offence, where a proposed amendment would not be supported by the evidence, or where an amendment would cause the accused irreparable prejudice. Otherwise, a defective count should be amended. Under s. 683(1)(g), an appellate court has the power to amend a defective count where it considers doing so to "be in the interests of justice" and the amendment does not mislead the accused person or prejudice them in their defence or their appeal. Here, the appellant raised no concern about the sufficiency of the count prior to plea or at trial, and the Crown proved all elements of an offence under s. 348(1)(b) beyond a reasonable doubt. However, even if the count were defective, it would be appropriate for the court to exercise its discretion under s. 683(1)(g) to amend the count and uphold the conviction. 3) The court rejected the appellant's argument that he did not receive effective assistance from his lawyer at trial. The DNA report did not change the overwhelming amount of evidence that tied the appellant to the crime scene. The appellant argued that his trial lawyer failed to competently engage with a report setting out the results of DNA analysis conducted on the blood droplets found in the snow outside the broken window of the house at the crime scene. When viewed in light of all the evidence led at the trial, the court saw no reasonable basis to conclude that the DNA report could be expected to have affected the result of the trial. There was no reasonable possibility that the accused was prejudiced by the alleged ineffectiveness of his trial counsel. The only thing the DNA report could establish was that the blood in the snow came from a male person who was not the appellant. Two other male persons at the scene had cuts because of the break and enter. 4) The court allowed the Crown's sentence appeal but dismissed it. The Crown argued that the trial judge made several errors in principle rendering the sentence demonstrably unfit, including errors in: A) identifying mitigating factors; B) the application of the parity principle; C) the application of the totality principle; and D) the demonstrable unfitness of the sentence. The court stated that an appellate court may only intervene to vary a sentence where the sentencing judge made an error in principle that had an impact on the sentence, or where the sentence was demonstrably unfit. Errors of law that may justify appellate intervention include errors of law, the failure to consider a relevant factor, or the erroneous consideration of aggravating or mitigating factors. A) The court did not agree that there was an error in identifying mitigating factors. The Crown argued there were no mitigating factors in this case. The judge found that the appellant's relative youth (31 at sentencing) and difficult personal circumstances, combined with supportive people in his life and employment prospects, were all relevant mitigating factors. The Crown argued that the accused's criminal record, behaviour in custody, and risk assessments in the PSR all contradicted a finding that there were prospects for rehabilitation. The Crown added that given the nature of the offences and the appellant's involvement, there should be no weight given to rehabilitation as a sentencing objective. The court stated that the trial judge's characterization of the appellant as being relatively young was a factual finding, entitled to deference in the absence of a palpable and overriding error. The court did not find that the trial judge placed undue emphasis on rehabilitation. There was ample evidence to support a conclusion that there was rehabilitative potential that was relevant to determining a fit sentence. The court noted that s. 718 requires sentencing judges to consider all sentencing objectives listed in every case – the sentencing objective of rehabilitation cannot be ignored even for the most heinous of crimes, because of the role it may ultimately play in the long-term protection of the public (*R v Bissonette*, 2022 SCC 23). Similarly, the court did not find error in the way the trial judge characterized or weighed factors relating to the difficult childhood circumstances of the appellant. The court noted that the presence of community support was not a truly mitigating circumstance, because it does not relate to the gravity of the offence or the degree of the offender's personal responsibility. However, the presence of community support is a personal circumstance of the offender that is properly considered in determining a fit sentence because it serves to inform the appropriate balance of sentencing objectives. The trial judge was entitled to find that the presence of community support was a positive factor. B) There was no error in the trial judge's

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application of the parity principle in setting the six-year concurrent sentences for discharging a firearm while being reckless as to the life or safety of other persons (s. 244.2(1)(b)) and the break and enter (s. 348(1)(b)). The Crown argued that the trial judge improperly applied the parity principle because the cases he referred to lacked the aggravating factor of the intentional discharge of a firearm during a violent home invasion. The court stressed that parity does not mean that similar offences committed by similar offenders will necessarily get identical sentences; the sentence must be individualized to the offender and the offence, within the purposes and principles set out in the *Code*. The parity principle requires a sentence fall within the acceptable range of sentences imposed for similar offences committed by similar offenders, and that differences in sentences can be rationally explained (*R v Klemenz,* 2015 SKCA 89). None of the cases relied upon by the parties matched up exactly with the appellant's case, but the trial judge was aware of those differences and took them into account. C) The court found that the trial judge correctly considered the principle of totality, because he concluded that the combined sentence would be unduly long or harsh absent a reduction. D) The court did not agree with the Crown's argument that the sentence was demonstrably unfit. A sentence is demonstrably unfit only if it constitutes an unreasonable departure from the principle of proportionality. Overall, the court did not find that the trial judge erred in principle in determining the appellant's sentence. Even though a lengthier sentence may have been possible, there was no basis for the court to conclude that the sentence imposed represented an unreasonable departure from the principle of proportionality.

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***R v Whitby*, 2025 SKCA 55**

Caldwell Tholl Drennan, 2025-06-03 (CA25055)

Appeal - Crown Appeal - Acquittal
Criminal Law - Murder - Second Degree - Appeal
Evidence - Opinion Evidence - Expert Witness

The Crown appealed the acquittal of the accused. The accused was charged with second degree murder in the death of her child. The child died in hospital with the cause of death determined to be blunt-force trauma to the head. The Crown's theory at trial was that the accused had caused the death. The Crown's case was based on circumstantial evidence and expert opinion evidence. The trial judge was left in a reasonable doubt by the statement of the accused and was not satisfied that the accused's guilt was the only reasonable inference to be drawn from the circumstantial evidence as a whole. The trial judge acquitted the accused of both second degree murder and manslaughter. The Crown argued that the trial judge erred in law when she limited the scope of opinion evidence from two of the Crown's expert physician witnesses. The trial judge excluded evidence of the physicians that was related

to the timing and cause of the child's death, because she found that they were not qualified to opine on those issues. The court determined whether the trial judge erred in excluding the evidence.
HELD: The Court of Appeal (court) dismissed the Crown's appeal. It was not an error in law for the trial judge to exclude opinion evidence. The court found no error with the trial judge's statement that opinion evidence is presumptively inadmissible. The court stressed that trial judges should carefully scrutinise whether such evidence should be admitted at the time it is proffered, and they "should not too easily admit it on the basis that evident frailties could go to weight rather than admissibility" (para 60). Opinion evidence that does not meet the threshold requirements of admissibility under *R v Mohan* should be excluded. The admissibility of expert opinion evidence is determined using the two-stage approach set out in *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23. The party wishing to tender expert opinion evidence in a trial must establish that it is relevant, necessary, not subject to an exclusionary rule, and that it is proffered by a qualified expert. The second stage involves determining whether the probative value of the evidence will outweigh its prejudicial effect. If the criteria in both stages are met, the expert opinion evidence may be admitted. The Crown failed to establish the qualifications of two of the physicians to provide expert evidence or to testify as to causation and the mechanism and timing of the deceased's injuries. The parts of their expert reports with opinions that the child's death was not an accident were struck. The Crown did not take issue in the appeal with the acquittal on the charge of second degree murder. The court stated that the trial judge closely followed the advice in *R v Abbey*, [1982] 2 SCR 24, which involves defining the range of expertise of the expert with as much precision as possible so that all parties are alerted to areas where the witness has not been qualified to give evidence, thus enabling the trial judge to rule with precision on what the expert can and cannot say. The trial judge found that the physician was not qualified to opine in areas which had been sought by the Crown, including: the causation, mechanism or timing of a brain injury; what caused the brain injury she observed; and whether the injuries were caused intentionally, unintentionally, deliberately, or accidentally.

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***Cosgrove v Saskatchewan Government Insurance*, 2025 SKCA 56**

Tholl McCreary Drennan, 2025-06-04 (CA25056)

Automobile Accident Insurance Act - Appeal
Motor Vehicle Accident - Common Law Presumption Against Suicide
Statutes - Interpretation - *Automobile Accident Insurance Act*, Section 107(1)

The appellant's husband died when he drove his personal truck at a high rate of speed into the back of his heavy-duty work truck parked on a residential street. SGI initially approved death benefits payable to the appellant's spouse and her children under Division 5, Part VIII of *The Automobile Accident Insurance Act* (AAIA). However, once SGI determined that the deceased's death was a suicide, no further benefits were paid, pursuant to s. 107(1) of the AAIA. That section states that no benefits are payable to an insured when his or her death occurs because of suicide with a motor vehicle. There was a high level of alcohol in the deceased's system, and he had experienced longstanding mental health issues. Immediately preceding the crash, he sent text messages to his girlfriend, former wife, and children to say goodbye. The appellant first appealed to the Automobile Injury Appeal Commission

(commission). The commission decided on balance that the collision was intentional, and upheld SGI's decision to terminate the appellant's family benefits. The appellant appealed to the Court of Appeal with leave under s. 194(1) of the AAIA, which provided a right of appeal from the commission on a question of law only. The appellant argued that the commission erred in law by failing to apply the common law presumption against suicide, which required SGI to prove on balance that the victim died by suicide. SGI agreed that it was an error for the commission to discount the presumption against suicide, but that it did not matter in the end – SGI accepted that it had the persuasive burden to prove that the victim had died by suicide on a balance of probabilities. The court determined whether the commission erred by: 1) failing to apply the common law presumption against suicide; 2) misapplying the onus of proof and the burden of proof; 3) improperly taking judicial notice of certain facts; and 4) failing to draw an adverse inference against SGI.

HELD: The Court of Appeal (court) dismissed the appeal. There was no error in the commission's finding that SGI had met the persuasive burden and concluded that the victim had died by suicide. The court had jurisdiction to hear an appeal from the commission on a question of law only, given s. 194(1) of the AAIA. 1) The commission erred when it concluded that the common law presumption against suicide no longer applied in insurance litigation. The court stated that the presumption against suicide is still good law; it places the onus on the party alleging suicide to prove suicide on a balance of probabilities. However, the commission's legal error did not matter, because SGI conceded at the commission hearing that it bore the onus of proof on a balance of probabilities. When insurance benefits are denied due to suicide exclusions, a rebuttable presumption against suicide operates against the insurer and burdens them with proving that the deceased died by suicide on a balance of probabilities. To rebut the presumption, the adjudicator must be satisfied that on the whole of the evidence it is more probable than not that the death was a suicide. Where the evidence equally supports either conclusion, the presumption against suicide has not been rebutted and the trier of fact must conclude that the death was not by suicide. The presumption against suicide does not require that suicide be proved at a higher standard than on a balance of probabilities. The court reiterated the Supreme Court of Canada's unequivocal direction in *F.H. v McDougall*, 2008 SCC 53 that there is only one civil standard of proof at common law: proof on a balance of probabilities. The presumption against suicide places the persuasive burden of proof on the party alleging suicide. Historically, where the cause of death was uncertain in insurance cases, it was presumed that the death was accidental unless the party asserting suicide could prove it. The court reviewed the jurisprudence to note that the presumption against suicide has been a longstanding presumption in insurance law. 2) The court found that the commission correctly applied the onus and burden of proof. The appellant argued that she presented two plausible theories supporting her position that the death was an accident (that he was severely intoxicated and that his "goodbye" messages were consistent with his manipulative behaviour). The commission found that the inferences to be drawn from the evidence were not equally consistent with the deceased's death being accidental. The commission found that the inferences led to the conclusion that it was more likely than not that the deceased died by suicide. SGI did not have to disprove all other plausible explanations. The court found that the commission's findings of fact were supported by the evidence and its inferences were not irrational. The court noted that findings of fact can give rise to a question of law when there was no evidence before a tribunal that could be capable of supporting the tribunal's finding. Here, the court did not find that the commission's error in rejecting the presumption against suicide caused it to misapprehend the evidence, or to make a factual decision based on no evidence, irrelevant evidence, or an irrational inference because it correctly applied the persuasive burden. The commission correctly stated that it had to consider the evidence as a whole to determine whether the deceased intended his own death. There was no error of law. 3) The court found that any error in taking judicial notice of social views respecting suicide and policy reasons that might support discarding the presumption against suicide were of no consequence. The court repeated that the commission's error respecting the presumption against suicide was of no legal consequence because SGI agreed that it bore the onus of proof on a balance of probabilities, and that the commission applied the correct persuasive burden to the evidence. 4) The commission did not err in law by not drawing an adverse inference. The court noted that the "adverse inference rule" is a discretionary evidentiary rule. A court is not required as a matter of law to draw an adverse inference where a party fails to call a witness.

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***Holowachuk v Saskatchewan Workers' Compensation Board*, 2025 SKCA 58**

Tholl Kalmakoff McCreary, 2025-06-12 (CA25058)

Civil Procedure - Frivolous and Vexatious Proceedings
Limitations of Actions - Statement of Claim - Statute-barred

The appellant appealed a King's Bench Chambers decision to strike her claim against the Saskatchewan Workers' Compensation Board (WCB). The chambers judge concluded that the claim was frivolous because it was plain and obvious that it was statute-barred.
HELD: The Court of Appeal (court) dismissed the appeal. There was no basis to interfere in the chambers judge's decision to strike the claim. The evidence before the chambers judge clearly established that the appellant was aware of everything that was necessary to have discovered her claim. The court stated that where it is plain and obvious or beyond a reasonable doubt that an action could not succeed because a statutory limitation period expired before the claim was commenced, it could properly be struck as frivolous.

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***R v A.W.*, 2025 SKCA 59**

Tholl McCreary Kilback, 2025-06-13 (CA25059)

Constitutional Law - *Charter of Rights*, Section 14 - Right to an Interpreter - Inadequate Interpretation
Criminal Law - Appeal - Appeal from Conviction
Criminal Law - Sentencing - Mitigating Factors - Parity Principle - Totality Principle

The trial judge convicted the appellant of each of the nine counts on the indictment, finding the appellant guilty of offences including sexual assault with a weapon, sexual assault, assault, uttering threats, and unlawful confinement, committed against his wife and step-daughter. The appellant's first language was Tigrinya. Interpreters were used for all court proceedings and for some of the appellant's phone calls and meetings with counsel. The appellant argued that he received ineffective assistance of counsel, and that the interpretation services at his trial were inadequate. He appealed against his convictions and sentence. The trial judge found both victims to be vulnerable persons for many reasons, concluding that the gravity of the offences was very high, and that the appellant's moral culpability was also very high. The trial judge sentenced the appellant to a 15-year global sentence. On the conviction appeal, the court determined: 1) whether the fresh evidence application should be granted; 2) whether there was a miscarriage of justice as a result of ineffective assistance of counsel; and 3) whether there was a miscarriage of justice as a result of inadequate interpretation. On the sentence appeal, the court determined: 4) whether the trial judge erred by failing to take the appellant's personal circumstances into account; and 5) whether there was error regarding totality or parity that affected the sentence, and whether the sentence was demonstrably unfit.

HELD: The Court of Appeal (court) dismissed both the conviction and sentence appeals. 1) The court found no merit to the appellant's argument of ineffective assistance of counsel. The fresh evidence could not have affected the result and was not admitted. The appellant sought to admit his own affidavit on the issue of ineffective assistance of counsel, and on his assertions regarding the quality of interpretation during the proceedings. The court noted that there is a slightly different *Palmer* test for issues related to ineffective assistance of counsel: the due diligence criterion is not required (see: *R v Palmer*, [1980] 1 SCR 759). The court noted that the purpose of the inquiry into an allegation of ineffective assistance of counsel is to determine whether a miscarriage of justice occurred, not to grade counsel's performance. To be successful in proving a miscarriage of justice, the appellant had to establish that counsel's performance fell outside the acceptable professional range and that the incompetence caused a miscarriage of justice. The court found that the appellant was fully informed in making his choice to elect a judge-alone trial. Here, the appellant did not remember important details of a meeting with trial counsel, whereas trial counsel had unshaken testimony about what occurred, as well as contemporaneous notes. Similarly, the appellant failed to establish that he was advised by trial counsel to lie on the witness stand. The court noted that the appellant was not convicted because of lack of preparation or a lack of defence witnesses; rather, he was convicted because the trial judge found that his testimony was not credible and the testimony of the Crown's witnesses was. 3) The appellant did not demonstrate that the interpretation fell below the required standard under the *Charter*. The court referred to s 14 of the *Charter*, which provides the right to the assistance of an interpreter. The appellant argued that the interpretation during the trial was deficient to the point that a new trial was required. The overarching principle of s. 14 is to ensure trial fairness. Where any deficiencies in interpretation are not clear from a review of the transcript, the onus is on the appellant to prove three elements on a balance of probabilities: i) that the accused was actually in need of interpreter assistance; ii) that there had been a departure from the basic, constitutionally guaranteed standard of interpretation; and iii) that the alleged lapse in interpretation occurred in the course of the proceedings themselves when a vital interest of the accused was involved, not in matters extrinsic or collateral to the advancement of the case. While perfection is not demanded, the standard for adequate interpretation is high. The trial judge knew the level of competence required for an interpreter and asked the interpreter numerous questions about his qualifications. The trial judge provided detailed instructions to the interpreter regarding the process and instructed him not to clean up the wording and not to summarize, but to become the speaker's voice. The trial judge asked the parties if they had any concerns about the interpreter's competence, and they responded that they had none. The same interpreter was used throughout. The appellant did not file evidence to demonstrate that any part of the interpretation was incorrect. The court noted that the interpreter's frequent requests for clarification or repetition demonstrated his attentiveness and diligence. A second translator was provided for confidential discussions between the appellant and trial counsel, and he sat at counsel's table. The court noted that this second translator could also have assisted in pointing out inaccuracies, but he did not raise any issues with trial counsel about the accuracy of the interpretation. Based on the transcript, the court accepted the appellant's submission that it was more probable than not that the interpretation was not perfect but repeated that the constitutional standard for interpretation did not require perfection. 4) The court could only interfere with a sentence if an error in principle had an impact on sentence, or if the sentence was demonstrably unfit. The appellant argued that the trial judge erred by failing to take his personal circumstances into account to reduce his moral culpability. The court did not agree – the trial judge discussed the appellant's personal circumstances at length but concluded that in the circumstances of these offences and this offender, none of his personal background reduced his moral culpability. The trial judge determined that even taking his personal circumstances into account, his moral culpability remained very high. There was no error in the trial judge's reasoning. 5) There was no error in principle related to parity or totality. The court found that the global sentence of 15 years was proportionate to the gravity of the offences and the appellant's high level of moral culpability. The court highlighted the significance of the Supreme Court of Canada's (SCC) direction in *R v Friesen*, 2020 SCC 9, on sentences involving the sexual abuse of children. While the SCC did not establish a sentencing range, the message in *Friesen* was that mid-single digit penitentiary terms for sexual offences against children are normal and that upper-single digit and double-digit penitentiary terms should be neither unusual nor reserved for rare or exceptional circumstances. The court found that the sentence imposed for the sexual assault with a weapon on the appellant's stepdaughter did not depart in an unacceptable manner from the sentences imposed in other cases of sexual abuse.

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***R v Herman*, [2025 SKCA 67]**

Schwann McCreary Kilback, 2025-06-25 (CA25067)

Criminal Law - Appeal - Conviction - Attempted Murder
Criminal Law - Appeal - Sentence - Attempted Murder
Criminal Law - Evidence - Credibility

The appellant was convicted of attempted murder following a shooting during a social gathering in the basement of a house in Saskatoon and was sentenced to 13 years of imprisonment. The appellant appealed both his conviction and his sentence.
HELD: The appeal was dismissed. (1) The verdict was not unreasonable or unsupported by the evidence. On hearing of an appeal against a conviction, the court may allow the appeal if it is of the opinion that: (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence; (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law; or (iii) on any ground there was a miscarriage of justice. In this case, there was uncontroverted evidence from one of the witnesses that supported an inference that the appellant was the shooter. While the witness' testimony concerning her identification of the appellant as the shooter was not direct evidence, it was a reasonable inference that was open to the jury. The absence of physical evidence supporting the witness' testimony did not render the verdict unreasonable. In addition, the trial judge had also ruled against the admissibility of the third-party suspect evidence relied upon by the appellant. (2) There was no error of law. There was nothing in the record to support the allegation of prosecutorial misconduct. The police were operating

pursuant to a search warrant when they entered the premises where the appellant was located. There was also a clear basis for the appellant's arrest and there was no evidence adduced at trial or on appeal to substantiate the appellant's allegations of mistreatment in the custodial facility. (3) There was no miscarriage of justice. For an appellant to succeed on an appeal based on an allegation of the ineffective assistance of trial counsel, two things must be established: (a) that their trial lawyer performed incompetently; and that the incompetence caused a miscarriage of justice. In this case, there was nothing capable of supporting the allegation that the appellant's counsel was incompetent. The trial counsel was thorough, tactical, and ethical in his efforts to attack the witness' credibility and defend his client. (4) There was no error in the appellant's sentencing. In this case, the trial judge gave effect to the appellant's *Gladue* factors. He commented on the over-representation of Indigenous peoples in prisons and the need for judges to consider the unique, systemic, and background factors that played a part in bringing the accused before the court. He stressed that the sentence imposed on the appellant must take those factors and his specific circumstances into account and that judges must look to principles of restorative justice to determine if there are sanctions other than incarceration that would meet the purpose and principles of sentencing. (5) The appellant's sentence was not demonstrably unfit. The trial judge appropriately focused on the fundamental principle of proportionality as the foundation for a fit and fair sentence. While the 13-year sentence imposed on the appellant was unquestionably significant, it did not deviate from the sentencing range for attempted murder and was responsive to the gravity of the offence and the appellant's degree of culpability. Moreover, considering the nature of the offence, the numerous aggravating factors, and the sentencing decisions reviewed in the parity analysis, it could not be said that the sentence was demonstrably unfit.

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***Regina Police Service v Wowk*, 2025 SKKB 64**

Norbeck, 2025-05-16 (KB25059)

Criminal Procedure - Appeal - Standard of Review
Criminal Procedure - Application for Continued Detention of Seized Property

The appellant appealed the oral decision of a Justice of the Peace on an application for the continued detention of property seized by the appellant. The appellant had been investigating the offences of obtaining material benefit from sexual services and money laundering, and numerous items had been seized from the residence of the respondent. The appellant's application for an order for continued detention of the items seized was dismissed by a Justice of the Peace.
HELD: The appeal was allowed. The Justice of the Peace erred in requiring the appellant to satisfy that the seized items were required for an investigation for the duration requested. In an application for continued detention of items, the Honourable Justice of the Peace needed to be satisfied that the seized items were reasonably required for an investigation or proceeding and that it was in the interests of justice to order their ongoing detention. In this case, the appellant was not required to provide evidence of future steps or specific timelines for the investigation. In determining that the appellant needed to satisfy that the things seized were reasonably required for an investigation and that they were required for the duration requested, the Justice of the Peace relied on an incorrect test.

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***Kuemper v Peet*, 2025 SKKB 65**

Robertson, 2025-05-21 (KB25061)

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Practice - Application for Summary Judgment - Disposition Without Trial
Practice - Application to Strike - Frivolous and Vexatious/Abuse of Process

Multiple applications were brought before the court to dismiss actions that the plaintiff had commenced in response to domestic violence charges that had been brought against him. He alleged negligence, malicious prosecution, and various *Charter* breaches. The plaintiff sued the complainant and a number of government and police employees and bodies. The plaintiff had no prior criminal record and alleged, among other things, that there was a conspiracy to lay unsupported charges. Three of the individual parties, including the plaintiff, were self-represented and the court addressed its obligations and those of the self-represented parties in this context. Several defendants sought summary judgment on the basis that no genuine issue requiring a trial had been raised. Other applications were brought to strike out or amend portions of the pleadings.
HELD: The court confirmed that judges and court officials can provide legal information to help a self-represented litigant navigate the court system, but they must not provide legal advice or advocacy. On the other hand, self-represented persons are entitled to represent themselves at court but are still obliged to familiarize themselves with legal practices and procedures, prepare their own case and follow the standard rules and practices in presenting or defending a claim. A trial judge cannot provide legal advice to a self-represented litigant, become an advocate for them, guide the presentation of their case, bend the rules of evidence, or decline to apply the substantive law to compensate for their lack of legal knowledge. When reviewing pleadings drafted by a layperson, the court may grant some latitude beyond that normally applied in a striking application. The plaintiff must state in summary form the material facts on which they rely, but not the evidence supporting same. A justiciable claim must be evident against each defendant. Summary judgment may be granted to strike an entire claim that has no reasonable chance of success even if the plaintiff were to succeed in proving everything they allege. In an application for summary judgment, the court must first consider whether the issues can be decided without a trial and whether the materials filed are sufficient to reach a just decision. The court addressed the various duties of participants in the criminal justice system, as well as the immunities that apply at law, as these were the legal issues which were raised by the pleadings. The application under *The Saskatchewan Interpersonal Violence Disclosure Protocol (Clare's Law) Act* was also considered in the context of those immunities, as one of the plaintiff's objections was police disclosure that had been made pursuant to that legislation. Regarding the relief sought by each applicant, the court held as follows. The statements of claim brought by the plaintiff did not clearly identify causes of action. The court considered whether those causes of action were made out if properly pled, and concluded: (1) a claim for defamation was not made out on the undisputed facts; (2) the tort of harassment is not recognized in Saskatchewan; (3) there was no basis in law to hold the Calgary Police Service liable for incorrect contents of a CPIC record; (4) there was no basis in the circumstances to support a claim of negligent investigation against the RCMP, including

because several of the claims made were barred by s. 25 of the *Criminal Code*; (5) malicious prosecution was similarly not supported by the facts pled, and that claim was struck; (6) no factual foundation was pled for a number of the claims of *Charter* violations so those were struck; (7) a number of pleadings were struck based on abuse of process regarding two individual defendants and the Calgary Police Service; (8) a number of claims were struck under Rule 7-2 summary judgment based on the balance of uncontradicted evidence before the court; (9) the Attorney General of Canada, apart from not being properly named as a party, was not engaged in the behaviours alleged and therefore the plaintiff could not found an action against it; (10) although a duty of care was owed by RCMP officers to a suspect, the court was fully satisfied on the evidence that the officers fully met their standard of care, particularly in light of *The Interpersonal Violence Disclosure Protocol (Clare's Law) Act*; (11) the claim of malfeasance in public office regarding the police officer defendants was struck as no deliberate unlawful conduct was alleged; (12) the plaintiff's application for production of documents was dismissed because it did not comply with the rules of court and would delay the hearing of the other applications if permitted; (13) instead of authorizing an amendment curing the misnaming of the Calgary Police Service, the claim against it was struck for disclosing no reasonable cause of action; (14) the court commented and ruled on materials that were filed late in explicit contravention of the previous chambers judge's order; and (15) costs were awarded to the defendants in view of their success, in amounts specified by the court.

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***Nakihimba v Zawryucka*, [2025 SKKB 66]**

Robertson, 2025-05-21 (KB25062)

Civil Procedure - Pleadings - Application to Strike Statement of Claim
Civil Procedure - Pleadings - Application to Strike Statement of Defence
Employment Law - Just Cause
Employment Law - Wrongful Dismissal
Practice - Application to Strike - Frivolous and Vexatious/Abuse of Process

Striking applications were brought by both the plaintiff and defendants in this action. Affidavits were filed by both parties in support of their applications. The plaintiff had been a short-term employee at a food plant but failed to report to work following the Christmas holiday period between December 24, 2022, and January 2, 2023. The plaintiff did not contact the employer until January 16, almost two weeks after his scheduled return shift, by which time he had been terminated. He made a complaint to the Human Rights Commission regarding the dismissal, and it was dismissed. He then brought a court application.
HELD: The plaintiff's application to strike paragraphs of the statement of defence was dismissed. The defendants' application to strike the statement of claim in its entirety was granted without leave to amend. While in practice, the courts afford some latitude to self-represented parties, they are required to familiarize themselves with and follow the rules and procedures of the court, including the rules governing pleadings. This basic requirement has been repeatedly stated by the court in decisions striking pleadings. See: *Ryan v KDGO Holdings Ltd.*, 2020 SKQB 170; *Yashcheshen v College of Physicians and Surgeons of Saskatchewan*, 2019 SKQB

43; and *A.L. v Saskatchewan*, 2008 SKQB 115. The Court of Appeal has directed that courts grant some allowance when assessing the adequacy of pleadings from a self-represented party. King's Bench Rules 3-9 and 13-8 were applied regarding the required contents of pleadings, and Rule 7-9 regarding the test for striking a pleading. The court also referred to Rule 13-30 regarding the appropriate contents of an affidavit, as there were issues with some of the evidence before the court. The court set out the type of evidence that can be considered on such an application, as well as the test for striking a pleading. (1) On a striking application, Rule 7-9(3) provides that no evidence is admissible on an application to strike for failing to disclose a cause of action: the court's review is restricted to the statement of claim. The court may, however, consider affidavit evidence on an application to strike relying upon the other grounds under Rule 7-9(2). (2) Regarding the plaintiff's application to strike certain sections of the defendant's affidavit, the court applied the rule that the fact that a party disagrees with a factual assertion in an affidavit is no reason to strike that paragraph. The parties may have different perceptions of what occurred. The court may later reconcile apparently divergent views or determine that an assertion is factual or false, but that is no reason to strike part of an affidavit. No paragraphs of affidavits were struck. (3) The pleadings are the foundational documents which frame the civil action and are then referred to throughout the action. Pleadings must be both complete and concise. The test is whether sufficient facts have been pled to establish the legal elements of the cause of action relied upon to support the claim. The purpose of pleadings is to inform, not to argue. The statement of claim should identify the parties, identify the causes of action and the material facts supporting each element of the causes of action pled. This information then allows the defendant(s) to respond with a statement of defence. The plaintiff's claim was that he should not have been terminated. Accepting the facts as pled, the amended statement of claim disclosed a reasonable claim of wrongful dismissal. (4) However, certain paragraphs were scandalous for making baseless claims of bad faith, and that the defendant D.Z. "lied or knowingly misled" and engaged in "egregious conduct, high-handed misconduct and oppression." Pleadings are not intended as a free forum for gratuitous insult and slander. The amended statement of claim was held to be frivolous in that it advanced claims that were groundless and could not succeed. It was held to be vexatious for advancing claims that are not known to law. The offending parts of the amended statement of claim were struck under this ground. (5) The court struck the statement of claim in its entirety on the basis that it sought to relitigate matters previously addressed by statutory tribunals. It was a collateral attack on those decisions and therefore an abuse of process. The legislature, having provided for resolution of certain disputes through tribunals, has removed the court's jurisdiction except through judicial review. The amended statement of claim therefore offended the rule against collateral attack. This amounted to an abuse of process. (6) The amended statement of claim sought to attach personal liability to D.Z. for an employment dispute. The corporate veil could not be lifted for this purpose. This would be a separate reason to dismiss the claim against D.Z. (7) The claim for $400,000 as punitive damages was simply absurd given that the plaintiff worked for a total of 19 hours at $16 an hour. (8) The amended statement of claim sought damages for a variety of losses supposedly resulting from loss of employment that were not compensable damages at law, as a "but for" test does not exist in employment law. The concepts of proof of damages, causation and remoteness of damages would apply to bar these claims. In conclusion, the court struck the amended statement of claim in its entirety as an abuse of process without leave to amend. (9) The court exercised its discretion in awarding costs to the defendant given that the plaintiff was unsuccessful in his application to strike parts of the affidavit and the defendants had complete success in dismissing the claim.

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***Maurice Law Barristers & Solicitors v Sweetgrass First Nation*, 2025 SKKB 67**

Gerecke, 2025-05-26 (KB25063)

Aboriginal Law - Negotiated Settlement - Trust Direction

The applicant was the solicitor for the respondent in its efforts to negotiate a settlement of the respondent's Treaty 6 benefits claim against Canada. The parties entered into retainer agreements, with the respondent obtaining financing to be able to pursue the claim. The retainer agreements included an irrevocable direction executed by the respondents that the applicants intended to ensure that settlement funds were promptly paid to the financing party and to the applicant for its fees. Canada provided the respondent with a settlement offer, and several months later the respondent terminated all retainers with the applicant. Canada and the respondent entered into a settlement. The applicant then attempted to ensure that funds were paid in accordance with the irrevocable direction, but Canada had already triggered payment to a different trust. Shortly after, the respondent filed an originating application to assess the applicant's legal fees. The application here was filed in response to the originating application. Here, the applicants wanted the court to order immediate payment to it of nearly $5.5 million in fees. The court noted the applicant initially agreed to be paid over four years in installments. The direction to trustee contained no acceleration provision on default. The respondent opposed the application, arguing that its originating application to assess fees must take priority.
HELD: The court dismissed the application. The court found that the assessment of fees took priority. The applicant failed to satisfy the tests for specific performance. The applicant argued for an interlocutory injunction in the alternative, which was also rejected by the court. The court referred to *Phillips Legal Professional Corporation v Vo*, 2017 SKCA 58, for the conclusion that the respondent's application for assessment must take priority. The court noted that the applicant could have delivered the direction to Canada and the direction to Trustee to the other trust but chose not to. The applicant's main issue was that none of the settlement funds were ever paid into the settlement trust, with the court therefore finding that that neither of the directions created a property or trust interest in the settlement funds. The court also noted that the respondent consented to the court's order to pay the claimed funds into court.

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***Henrie v H.S.*, 2025 SKKB 74**

Bergbusch, 2025-06-09 (KB25067)

Family Law - Person Having Sufficient Interest

The petitioner applied for an order under *The Children's Law Act, 2020* designating her as a person having a sufficient interest in two children, along with an order granting her sole decision-making responsibility and primary parenting of the children with supervised parenting time for the children's parents. The petitioner was not related to the children, and both parents opposed the application. The parents had paid the petitioner for childcare services for approximately four years. The parents were separated, but

shared parenting time. According to the father, the petitioner began making decisions about the children without his permission and refused to let the father take the children out of the petitioner's home. The petitioner refused to return the children to the care of the mother, who contacted police to have the children returned to her care. The petitioner sought to cast doubt on the parenting of the respondents. The respondent father argued that he did not agree to give the petitioner any parental or guardianship rights for the children when he hired her to provide childcare services. The court determined whether the nature of the petitioner's relationship to the children warranted the order designating her as a person having sufficient interest, and if so, which parenting order was in the best interests of the children.
HELD: The applicant should not be designated as a person having a sufficient interest in the children, so it was inappropriate to make any parenting order related to the children. Even if the applicant were a person having a sufficient interest, the court would not have granted the parenting order because it was not in the best interests of the children. The court noted that there is a two-stage analysis when a party who is not the parent of a child applies for a parenting order: (i) the court must consider whether the person is a person having a sufficient interest in the child; and (ii) if the first threshold is met, the court must then consider what parenting order is in the best interests of the child. The court found that the petitioner did have significant involvement in the children's lives, because the father needed extensive babysitting assistance from the petitioner so he could work. The court concluded that the petitioner was a well-intentioned but misguided caregiver and should not be recognized as a person having a sufficient interest in the children. The court noted that the petitioner brought multiple duplicative without notice applications and JCC requests, which considerably lengthened proceedings. The court fixed costs at $2,000.

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***Graham Design Builders LP v Mod-Panel Manufacturing Ltd.*, [2025 SKKB 87]**

Megaw, 2025-06-23 (KB25078)

Civil Procedure - Frivolous and Vexatious Proceedings
Civil Procedure - Pleadings - Adding Parties
Statutes - Interpretation - *Limitations Act*

The plaintiffs sought to amend their statement of claim to add new party plaintiffs and assert a claim for recovery of economic loss. The amended defendants also sought an order striking the statement of claim as well as the cross claim brought against them on the basis that they were statute-barred. Three individual defendants, Mule-Hide Products Co. Inc. (Mule-Hide), Premium Spray Products Canada GP Inc. (Premium), and 101172087 Saskatchewan Ltd. (1011 Sask) also applied to have the claims and cross-claims advanced against them struck on the basis that they were frivolous, vexatious, an abuse of the court's process, or disclosed no reasonable cause of action.
HELD: The plaintiffs' application to amend the statement of claim to add new plaintiffs was allowed but the plaintiff's application to amend the claim to plead "dangerous defects" was dismissed. The application to dismiss the statement of claim as statute-barred was dismissed. However, the claims brought against Premium, 1011 Sask and Mule-Hide were struck out. (1) The plaintiffs were

entitled to amend their claim to include the additional named plaintiffs. The principles that apply to an application to strike a plaintiff's claim are the following: (i) The claim should be struck where, assuming the plaintiff proves everything alleged in the claim, there is no reasonable chance of success. (ii) The jurisdiction to strike a claim should only be exercised in plain and obvious cases where the matter is beyond doubt. (iii) The court may consider only the claim, particulars furnished pursuant to a demand and any document referred to in the claim upon which the plaintiff must rely to establish its case. (iv) The court can strike all, or a portion, of the claim. (v) The plaintiff must state sufficient facts to establish the requisite legal elements for a cause of action. To strike a claim or disallow a proposed amendment, it must be plain and obvious that the proposed claim is doomed to fail. In this case, the determination of the extent of the contractual claim regarding the transfer of loss would not be determined summarily but based on an appropriate interpretation of the contractual language in view of the particular factual relationship between the various parties to the litigation. This claim could not be determined summarily, and the court could not determine that it was so obviously unmeritorious or hopeless. (2) The plaintiffs' pleadings did not sufficiently advance a claim for pure economic loss. The ability to recover loss suffered due to shoddy goods requires the claimant to plead and ultimately establish a danger to people or property. In this case, while the pleadings alleged a danger, they did not allege an imminent risk or set forth material facts to support an allegation of a real and substantial danger. The proposed pleadings failed to include the necessary requirements to advance a claim for pure economic loss. (3) The claims advanced against Premium, Mule-Hide and 1101 Sask were an abuse of the court's process. A proceeding is considered an abuse of process if it is commenced or continued when no cause of action exists. In this case, the plaintiffs had taken no steps to complete any independent investigation into either the status of Premium, Mule Hide or 1101 Sask, nor into their involvement with this matter. There was nothing in any of the material to connect these defendants to the matters in issue. (4) The claims against the defendants were not statute-barred. Section 20 of *The Limitations Act* provides a substantive vehicle by which, notwithstanding the expiration of a limitation period, pleadings may be amended by adding parties or new proceedings. This may occur provided the pre-conditions set forth in the section are complied with: (i) the new claims or parties arise from the same transaction or occurrence, and (ii) there will be no actual prejudice to the parties. The court then has an unfettered discretion, exercised judicially, to determine whether to grant the application. In this case, the claims advanced against the amended defendants arose out of the same occurrence or transaction. There was also no actual prejudice against any of the amended defendants.

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***One Arrow First Nation v Maurice Law*, [2025 SKKB 88]**

Norbeck, 2025-06-24 (KB25079)

Civil Procedure - Solicitor-Client Costs
Contract Law - Retainer Agreements - Fair and Reasonable
Professions and Occupations - Barristers and Solicitors - Fees - Contingency Agreement

The applicants were both signatories to Treaty No. 6, in which the government of Canada made several promises to the signatory First Nations. The applicants engaged the respondent to assist them in claiming compensation from Canada related to certain promises broken and other wrongdoings. The respondent acted as legal counsel for Beardy's and Okemasis Cree Nation (the first applicant) between 2005 and January 2021. The retainer agreements between the respondent and first applicant involved an annuities claim and a flood and agricultural benefits claim (flood/ag retainer). One Arrow First Nation (the second applicant) retained the respondent in April 2012 to pursue compensation from the government of Canada for its unlawful acts concerning the 1885 Northwest Resistance. The respondent characterized the first written contingency fee agreement with the second applicant as the annuities and salaries retainer agreement, and the second as the western boundary retainer. Disputes arose in this case over the fairness and reasonableness of the retainer agreements between the parties, which included contingency fees, hourly rates and litigation financing agreements.

HELD: The court ordered that the second applicant pay to the respondent $25,000 plus interest of 1.5% monthly, compounded annually, from the date of the last invoice issued to the second applicant for services rendered on the salaries claim. The court also deemed the respondent entitled to payment of $65,000 plus interest from the second applicant, plus a 6% contingency fee, on the terms of the western boundary retainer. The respondent was ordered to reimburse the first applicant the sum of $826,797.84. The first applicant was also deemed entitled to enhanced costs in the sum of $100,000 payable by the respondents. The respondent was considered entitled to *quantum meruit* compensation for the salaries claim and the western boundary claim. (1) The annuities agreement with the first applicant was unreasonable. The determination of whether contingency agreements are fair and reasonable is a two-part analysis. The court must consider the circumstances in which the agreement was made and whether the client understood the nature and effect of the agreement, the rationale for the agreement, and what other fee arrangements may be available to them. The court must look at the whole of the circumstances and should not be too eager to find a contingency agreement unreasonable. In this case, there was no question that the respondent provided high-quality work on the first applicant's behalf. However, the respondent had erroneously concluded it had recovered all the costs and did not apportion the costs appropriately. Given the trust accounting mistakes requiring rectification, the work done, and the fees charged, the annuities retainer was unreasonable. (2) The flood/ag retainer for the first applicants was unfair and unreasonable. With the loan and insurance program, the respondent had zero risk of not being paid, and indeed, was paid along the way. Given those circumstances, it was unclear what the justification would be for a contingency fee arrangement. It was also unclear why the respondent determined that the first applicant was unable to pay to advance the flood claim and the ag benefit claim. (3) A *quantum meruit* assessment of legal fees owed to the respondent by the first applicant was appropriate. (4) The annuities retainer applying to the second applicant did not encompass the salaries claim. For the salaries claim to be included in the annuities retainer, the agreement would have had to state such clearly. In this case, the annuities retainer left open the potential that other claims might be included in the retainer, but no other specific claim was mentioned. No evidence was provided to suggest that there were additional documents, conversations, or considerations given to other claims that might be included in the annuities retainer. (5) A contingency fee was not payable by the second applicant to the respondent. The respondent's request for a contingency fee was illogical. It was also unclear on what basis the respondent sought the contingency fee. (6) The annuities retainer for the second applicant was fair and reasonable. The respondent had appropriately addressed the second applicant's concern and while the second applicant believed its compensation to the respondent in the annuities claim may have been overgenerous, the issues were satisfactorily resolved through negotiations with the respondent. (7) The western boundary retainer for the second applicant was fair and reasonable. While the timing was sub-optimal and may not have required a contingency fee arrangement, direct discussions about the western boundary retainer between the respondent and the second applicant occurred. Considering what the parties knew at the time the western boundary retainer was executed, the uncertainty of funding, and the fact that the second respondent had independent legal advice before signing, the western boundary retainer was fair and reasonable under the circumstances. (8) A *quantum meruit* assessment of the legal fees in respect of the annuities retainer for the second applicant was appropriate. (9) An award for solicitor-client costs was not appropriate. In awarding solicitor-client costs, the following principles apply: (a) they are awarded in rare and exceptional cases only; (b) they are awarded in cases where the conduct of the party against whom they are sought is described variously as scandalous, outrageous or reprehensible; (c) they are not generally awarded as a reaction to the conduct giving rise to the litigation, but are intended to censure behaviour related to the litigation alone; and (d) they may be awarded in exceptional cases to provide the other party complete indemnification for costs reasonably incurred. In this case, while the process was designed to be a summary procedure and it became quite complicated and drawn out, it did not rise to the level where an award of solicitor-client costs ought to be awarded.

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