Leading by Example: The Jurisprudence of Chief Justice Richard J. Chartier

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ABSTRACT

In this article, lawyers for the Manitoba Court of Appeal analyze the jurisprudence of Chief Justice Richard J. Chartier, who served as the Chief Justice of Manitoba from 2013 until 2022. The article highlights his most prominent decisions and provides a jurimetric analysis of his appellate judgments. It also outlines his important contributions to the law regarding appellate standards of review, to the administration of the Court and to the broader Canadian judicial community through his work with the Canadian Judicial Council.

Keywords: Chief Justice Chartier, Manitoba Court of Appeal, standards of review

INTRODUCTION

Chief Justice Richard J. Chartier served as the Chief Justice of Manitoba from 2013 until 2022. In this article, after providing some brief biographical background, we endeavour to highlight his most prominent decisions, also providing a jurimetric analysis of his appellate judgments. In particular, we note his important contributions to the evolution of the law regarding appellate standards of review. In this article, we wish to highlight not only the significant jurisprudential content

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of Chief Justice Chartier's decisions, but also how he led by example in issuing brief decisions promptly.

I. BACKGROUND

Richard J. Chartier is a proud Franco-Manitoban who was born in Saint-Boniface. He received his Bachelor of Arts from l'Université de Saint Boniface in 1979 and his Bachelor of Laws from the Université de Moncton in 1982.[2] He was called to the Manitoba Bar in 1983. He was a partner in the Winnipeg law firm of Aikins, MacAulay & Thorvaldson, where his practice was focused on corporate-commercial law.[3] In 1993, he was appointed to the Provincial Court of Manitoba. In 1998, he reviewed Manitoba's French language services. His report *Above All, Common Sense* was tabled in the legislative assembly and has since been fully implemented.[4] In 2005, he was a member of a team that received the Gold Medal for Innovative Management from the Canadian Institute of Public Administrators for the "Domestic Violence Front-End Project". In 2006, that project was recognized in New York with the United Nations Public Service Award. In that same year, he was appointed to the Manitoba Court of Appeal.[5] In March 2013, he was appointed Chief Justice of Manitoba, the first Chief Justice of Manitoba appointed directly to the Court of Appeal from the Provincial Court.[6]

While this article focuses on Chief Justice Chartier's contributions as a jurist, he will perhaps be best remembered as an excellent administrator. Chief Justice Chartier oversaw many innovations during his time with the Court of Appeal. He initiated annual reporting requirements,[7] which

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2 Chief Justice Chartier credits the Hon. Michel Bastarache as the reason that he went to law school, after their paths crossed in the late 1970s, when he was President of the Federation of Young French Canadians (Fédération des jeunes canadiens-français) and Prof. Bastarache was teaching at the Université de Moncton. Up until that point, Chief Justice Chartier had planned to study medicine.

3 "Interview with The Chief Justice of Manitoba" (2013) 37:1 Man LJ 43 at 53.

4 https://www.gov.mb.ca/fls-slf/report/index.html.

5 https://www.manitobacourts.mb.ca/site/assets/files/1032/bio_chartier.pdf.

6 Chief Justice Prendergast had experience as a County Court judge before ultimately being appointed the Chief Justice of Manitoba: http://www.mhs.mb.ca/docs/people/manitobajudges.shtml.

7 Manitoba Court of Appeal, "Media Notice" (16 November 2021), online: https://www.manitobacourts.mb.ca/site/assets/files/2015/mbca_press_relase_for_ar

required the Court of Appeal to prepare reports about the operation, functioning and administration of the Court each year.[8] He initiated discussions regarding criminal procedure improvements, and was commended by the Canadian Judicial Council for encouraging debate on the subject of eliminating preliminary inquiries.[9] He hosted the Supreme Court of Canada in Winnipeg in 2019; the first time that Court sat outside of Ottawa.[10] He also led the Manitoba Court of Appeal through the COVID-19 pandemic, quickly pivoting to remote hearings and pioneering the introduction of new technologies into the courtroom, bringing in many pragmatic rule changes and practice directions. He also issued a practice directive to better ensure that both forms of address and pronouns align with a person's gender identity.[11]

Chief Justice Chartier was an active member of the Canadian Judicial Council ("CJC"). He chaired public inquiry committees reviewing the conduct of judges in Quebec and Ontario.12 From 2018 to 2020, he was the National Chair of the Judicial Education Committee of the CJC. He was also a member of the Board of Governors of the National Judicial Institute and a member of the Executive Committee of the CJC. He helped revise the Ethical Principles for Judges and served on the CJC's Advisory Committee on Judicial Ethics.[13]

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8 https://www.manitobacourts.mb.ca/court-of-appeal/about-the-court-of-appeal/annual-report/. *The Courts Modernization Act (Various Acts Amended)*, SM 2019, c 16, s. 5. The Provincial Court of Manitoba has been subject to an annual reporting requirement since 2003: *The Provincial Court Act*, CCSM c C275, s. 11.2(1).

9 https://cjc-ccm.ca/en/news/canadian-judicial-council-dismisses-complaint-about-participation-chief-justices-finding.

10 https://www.scc-csc.ca/court-cour/events-evenements/winnipeg/index-eng.aspx.

11 May 27, 2021.

12 In the matter concerning the Honourable Michel Girouard, Chief Justice Chartier dissented on a particular procedural point (https://cjc-ccm.ca/sites/default/files/documents/2019/2015-11-18%20Report%20of%20the%20Inquiry%20Committee%20to%20the%20Canadian%20Judicial%20Council.pdf). His concerns were echoed by CJC in their Report to the Minister of Justice (https://cjc-ccm.ca/sites/default/files/documents/2019/2016-04-20%20Report%20of%20the%20Canadian%20Judicial%20Council%20to%20the%20Minister%20of%20Justice.pdf).

13 https://cjc-ccm.ca/en/resources-center/publications/ethical-principles-judges-2021.

II. A JURIMETRIC ANALYSIS OF CHIEF JUSTICE CHARTIER'S MANITOBA COURT OF APPEAL JUDGMENTS

The mission statement of the Manitoba Court of Appeal, which was developed during Chief Justice Chartier's tenure, is simple: delivering quality decisions in a timely manner. Chief Justice Chartier was also firmly of the view that you can't manage what you don't measure.[14] Under his leadership, the Court measured its inventory of cases in progress and did its utmost to respect the CJC's six-month decision-writing guideline.[15] There was also a noticeable shift during Chief Justice Chartier's time with the Court towards a larger percentage of decisions being issued from the bench, rather than being reserved.[16]

In this article, we wish to highlight not only the important jurisprudential content of Chief Justice Chartier's decisions, but also how he led by example in issuing brief decisions promptly.[17] From his appointment to the Court of Appeal in 2006 until his retirement in 2022, he authored 242 reported decisions.[18] Of these, 51 were issued in

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14 He has long been a strong believer in the Deming philosophy of continuous quality improvement: "Interview with The Chief Justice of Manitoba" (2013) 37:1 Man LJ 43 at 50.

15 *Ethical Principles for Judges*, §3.B.2 (https://cjc-ccm.ca/sites/default/files/documents/2021/CJC_20-301_Ethical-Principles_Bilingual_Final.pdf).

16 Similar to the Ontario Court of Appeal's "Appeal Book Endorsement" (*e.g.*, *2748355 Canada Inc. v Aviva Insurance Company of Canada*, 2022 ONCA 667) and the Alberta Court of Appeal's "Memorandum of Judgment Delivered from the Bench" (*e.g.*, *R v Moocheweines*, 2022 ABCA 344). For statistics regarding the ratio between bench decisions and reserved decisions from 2015-2020, see the *Manitoba Court of Appeal's Annual Report for 2019-2020* (https://www.manitobacourts.mb.ca/site/assets/files/2015/court_of_appeal_ann_report_eng_2019-20-nov.pdf) at 9.

17 Doubtlessly inspired by his days as a Provincial Court Judge. Westlaw contains 29 Provincial Court judgments penned by Chief Justice Chartier during his tenure with that Court, the longest of which is 59 paragraphs (*R v CH*, 1994 CarswellMan 605 & *R v NE*, 1994 CarswellMan 606, virtually identical *Charter* challenges to *The Liquor Control Act*, RSM 1988, c L160), not including those where exchanges with counsel are included in the judgment (such as *R v MacSteeofain*, 1997 CarswellMan 682 and *R v JM*, 2001 CarswellMan 656).

18 According to searches performed in Westlaw.

Chambers,[19] while the rest involved a panel of judges. On average, he would release a decision approximately 40 days after the case was heard.[20] In fact, he pronounced a decision on the day of the appeal hearing in over 100 cases. Taking his Chambers and panel decisions together, the average length of a decision written by Chief Justice Chartier was just over 19 paragraphs.[21] Indeed, in his 16 years at the Court of Appeal, he only wrote five decisions longer than 100 paragraphs.[22] Of his 242 decisions, over 100 were less than 10 paragraphs in length. It is fitting that the first judgment he rendered as Chief Justice of Manitoba was a Chambers decision pronounced on the day the matter was heard.[23]

Even prior to the COVID-19 pandemic, there was a movement towards written joint submissions in criminal sentencing matters without the need for an oral hearing.[24] In the early days of the pandemic, the *Court of Appeal Rules* were amended to expressly permit the disposition of appeals without an oral hearing.[25] In addition to consent sentencing appeals, this new rule has been utilized in a criminal matter involving a joint request for an acquittal.[26] During the pandemic, Chief Justice Chartier wrote decisions in six cases heard by videoconference.[27]

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19 Procedural matters heard by a single judge of the Court of Appeal.

20 Nearly all cases argued in the Manitoba Court of Appeal are heard in a single day. Most matters are set down for a half-day hearing, although full day hearings may be necessary for more complex matters. The longest Manitoba Court of Appeal hearing in recent memory is the eight-day hearing in *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2010 MBCA 71.

21 On average, decisions issued from the Bench by Chief Justice Chartier were just over eight paragraphs long; his average Chambers decision was just over 10 paragraphs in length.

22 *R v Gowenlock*, 2019 MBCA 5 (107 paragraphs); *Manitoba Metis Federation Inc v Brian Pallister*, 2021 MBCA 47 (110 paragraphs); *R v Grant*, 2009 MBCA 9 (126 paragraphs); *R v Henderson*, 2012 MBCA 93 (142 paragraphs); and *Manitoba Federation of Labour v The Government of Manitoba*, 2021 MBCA 85 (158 paragraphs).

23 *Dhillon v Leiman*, 2013 MBCA 24. See also *R v Ara*, 2013 MBCA 25 and *R v Kovnats*, 2013 MBCA 26.

24 *R v DAJH*, 2018 MBCA 77; *R v Candy*, 2018 MBCA 112; *R v Safaye*, 2018 MBCA 121; *R v Houle*, 2019 MBCA 20.

25 *Court of Appeal Rules, amendment*, MR 32/2020, s. 2. For examples of appeals heard pursuant to Rule 37.3, see *R v Richards*, 2020 MBCA 120; *R v CP*, 2021 MBCA 9; *R v Ostamas*, 2022 MBCA 68.

26 *R v Roulette*, 2021 MBCA 95 (aggravated assault).

27 *R v Bonni*, 2020 MBCA 64; *R v Amyotte*, 2020 MBCA 116; *R v Simon*, 2020 MBCA

Chief Justice Chartier's decisions have been cited with approval by all appellate courts across Canada.[28] According to Westlaw, his most frequently-cited decision is *R v Farrah*, with 173 citing references.[29] *R v Grant* has also been cited over 125 times.[30] According to Westlaw, counsel sought leave to appeal Chief Justice Chartier's decisions to the Supreme Court of Canada on 22 occasions.[31] Leave to appeal was denied every time.[32]

Chief Justice Chartier only wrote 10 decisions that took longer than the recommended six months to prepare.[33] Two of them involved

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117; *Manitoba Metis Federation Inc v Brian Pallister*, 2021 MBCA 47; *Manitoba Federation of Labour v The Government of Manitoba*, 2021 MBCA 85; *R v Siwicki*, 2022 MBCA 53.

28 According to Westlaw, three of his decisions have each been cited by 11 Canadian jurisdictions: *R v Ruizfuentes*, 2010 MBCA 90; *R v Arbuthnot*, 2009 MBCA 106; and *R v Kociuk*, 2011 MBCA 85. His decisions have been cited by the Supreme Court of Canada on a number of occasions (*e.g.*, *R v Noble*, 2010 MBCA 60; *R v Scott*, 2013 MBCA 7; *R v Banayos and Banayos*, 2018 MBCA 86) and even by courts outside Canada (such as *Lukács v United Airlines Inc.*, 2009 MBCA 111, cited in New Zealand).

29 2011 MBCA 49. As of October 31, 2022. According to CanLII, paragraph 7 (which sets out the standard of appellate review for alleged *Charter* breaches) has been cited 64 times.

30 2009 MBCA 9. According to CanLII, paragraph 108 (which confirms a sentencing range of 8-12 years for high-end drug traffickers) has been cited 12 times.

31 In addition, leave to appeal from his Chambers decision in *Winnipeg (City) Assessor v 346 Portage Ave. Inc.*, 2011 MBCA 110 was denied by a panel of the Court (2011 MBCA 110).

32 There were also two appeals as of right (*Criminal Code*, RSC 1985, c C-46, s. 691): *R v Kociuk*, 2011 MBCA 85, aff'd 2012 SCC 15 & *R v Koczab*, 2013 MBCA 43, rev'd 2014 SCC 9

33 *R v Dickson*, 2013 MBCA 58; *R v Koczab*, 2013 MBCA 43; *R v Henderson*, 2012 MBCA 93; *R v RGB*, 2012 MBCA 5; *R v Scott*, 2013 MBCA 7; *Benson v Workers Comp.*, 2008 MBCA 32; *R v Nodrick*, 2012 MBCA 61; *R v WJC*, 2008 MBCA 11; *R v Grant*, 2009 MBCA 9; *R v Kociuk*, 2011 MBCA 85.

dissents,[34] one was jointly written with another judge,[35] and one involved a complex appeal heard over two days.[36]

In terms of the types of decisions rendered by Chief Justice Chartier, about half of his decisions related to criminal law matters, including young offenders. He wrote over 90 judgments regarding civil litigation and administrative law, and 14 family law matters. He issued two decisions related to child protection.

III. Chief Justice Chartier's Key Decisions

Chief Justice Chartier authored many notable decisions during his tenure as both a trial and appellate judge. At the appellate level, one important decision is *R v Gowenlock*.[37] In that case of first impression, the Court addressed whether the rule-making power found in ss. 482(1) and or 482.1 of the *Criminal Code* authorized a court to make rules that would allow a judge of that court to award costs personally against counsel.[38]

Factually, the origins of the order at issue were straightforward. A defence lawyer missed a date to bring a motion as earlier agreed to in a pre-trial conference. His explanation, at a subsequent conference, was that he had inadvertently put the dates in his Google calendar instead of his Outlook calendar, and that it had never happened before. On his own motion, and without giving the lawyer the option to adduce evidence or consult counsel, the judge proceeded to award costs personally against the lawyer in the amount of $1000. The lawyer appealed.

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34 *R v Kociuk*, 2011 MBCA 85, aff'd 2012 SCC 15; *R v Koczab*, 2013 MBCA 43, rev'd 2014 SCC 9. Of his 191 panel decisions, only seven included dissenting judgments (*R v Vandenbosch*, 2007 MBCA 113; *Neusitzer v GFK Capital Base Corp.*, 2007 MBCA 128; *R v Kociuk*, 2011 MBCA 85; *R v PK*, 2012 MBCA 69; *R v Koczab*, 2013 MBCA 43; *Tymkin v Ewatski*, 2014 MBCA 43; *Lake Louise Limited Partnership v Canad Corp. of Manitoba Ltd.*, 2014 MBCA 61). On four occasions, he wrote jointly with another judge (*R v RGB*, 2012 MBCA 5; *R v JAH*, 2016 MBCA 58; *R v Frost*, 2017 MBCA 43; and *R v BS*, 2017 MBCA 102). The only time Chief Justice Chartier dissented was regarding the sentence appeal in *R v Vandenbosch*, *supra*.

35 *R v RGB*, 2012 MBCA 5.

36 *R v Henderson*, 2012 MBCA 93, leave to appeal denied, 2013 CanLII 18843 (SCC). The decision was 142 paragraphs long.

37 2019 MBCA 5.

38 The applicable rule is r. 2.03 of the *Criminal Proceedings Rules of the Manitoba Court of King's Bench*, SI/2016-34.

In affirming that a personal costs order could be made pursuant to the applicable rule, Chief Justice Chartier reviewed the critical question of whether costs-awarding rules were substantive or procedural. To that end he considered their "central point, essence or focus" as well as a Queen's Bench Practice direction that focused on delay and the principles enunciated in *R v Jordan*.[39] With that background, he concluded that the purpose of costs-awarding rules related to compliance and helped to change the culture of complacency that had long plagued the criminal justice system. Simply, an award of costs against counsel provides a court with the necessary procedural tools to regulate counsel to comply with court-ordered guidelines (the "machinery"), and best ensures that it can try an accused within a reasonable time (the "product").[40]

Finally, Chief Justice Chartier indicated that the discretion to make such an award, as an extraordinary remedy, must be exercised with restraint. In adopting the standard articulated in the *Charter*-infringement decision in *Ontario v 974649 Ontario Inc.*, the impugned conduct must be "a marked and unacceptable departure from the reasonable standards expected" of counsel.[41]

Another noteworthy decision, and one which demonstrates Chief Justice Chartier's considerable attention to historical background, is *R v Siwicki*.[42] Briefly, the appellant was facing offences relating to driving while impaired. She was prepared to plead guilty to the charge and asked the judge to change the venue of sentencing from the originating court (in the jurisdiction where the offences occurred) to another court (the receiving court), which was only a five-minute drive away. Crown counsel consented to the request.

The judge refused the request and referred counsel to a recent practice directive that addressed transferring matters between Manitoba judicial court centres.[43] As there were no apparent extenuating circumstances, and none were offered by counsel, the request was denied.

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39 2016 SCC 27.

40 At para. 49.

41 2001 SCC 81.

42 2022 MBCA 53.

43 See Manitoba, Provincial Court, "Practice Directive: Re: Transferring Matters between Judicial Court Centres" (25 July 2019), online (pdf): Manitoba Courts <www.manitobacourts.mb.ca/site/assets/files/1175/notice_-_transferring_matters_between_judicial_court_centres_-_e.pdf> (date accessed 13

The critical question before Chief Justice Chartier was whether a court maintains oversight over such requests and the parties submitted that the answer to the question turned on the correct interpretation of s. 479 of the *Criminal* Code.[44]

In the result, Chief Justice Chartier found that s. 479 no longer had application in Manitoba as Provincial Court judges, for several decades, now had province-wide territorial jurisdiction. In the course of making that finding he reviewed the different concepts of jurisdiction, including "jurisdiction over the offence" (which includes the concept of territorial

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May 2022)) (the directive). The directive read, in part:

Re: Transferring Matters between Judicial Court Centres

There is a general presumption, based on principles of access to justice, matters will be heard in the community in which the incident is alleged to have occurred. It is in the public interest to have matters heard in the community or the closest judicial centre so that members of the affected community can participate fully in the proceedings and see that justice is done.

There may be extenuating circumstances where the above principles should not apply. If that is the case and counsel are seeking to have any matter heard in a judicial centre other than the judicial centre closest to where the incident is alleged to have occurred, counsel shall bring an application before the presiding judge, in the originating judicial centre in which the incident is alleged to have occurred, requesting the matter be transferred to another judicial court centre.

This protocol applies to all jurisdictions and all matters and is effective immediately.

[44] The section reads:

Offence outstanding in same province

479 Where an accused is charged with an offence that is alleged to have been committed in the province in which he is, he may, if the offence is not an offence mentioned in section 469 and

in the case of proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government, the Attorney General of Canada consents, or

in any other case, the Attorney General of the province where the offence is alleged to have been committed consents,

appear before a court or judge that would have had jurisdiction to try that offence if it had been committed in the place where the accused is, and where the accused consents to plead guilty and pleads guilty to that offence, the court or judge shall determine the accused to be guilty of the offence and impose the punishment warranted by law, but where the accused does not consent to plead guilty and does not plead guilty, the accused shall, if the accused was in custody prior to appearance, be returned to custody and shall be dealt with according to law [emphasis added].

jurisdiction), "jurisdiction over the person" and, finally, the wider concept of jurisdiction in the sense of a court's authority to make certain decisions.[45]

With respect to the wider concept of jurisdiction, he noted that it was grounded in the principle of judicial independence and, specifically, its "administrative independence" component. In Chief Justice Chartier's view, the decision as to where the sentencing should be heard simply cannot rest with the parties as courts are the given the authority and responsibility under the Constitution, and legislative provisions, to exercise their judicial functions and control their process. This is how he put it:[46]

> I adopt the application judge's reasoning that the decision to transfer a matter from one judicial court centre to another is an administrative one — requiring judicial oversight to ensure the proper administration of justice and to facilitate access to justice. Such decisions relate to a court's authority 'over the administrative decisions that bear directly and immediately on the exercise of the judicial function' (*Valente* at para 52; see also *PEI Judges Remuneration* at para 117). However, I will go further. In my view, these judicial court centres were established by the province for administrative purposes, not for territorial jurisdiction purposes.

Based on the above considerations, as well as the strong presumption that a matter ought to be tried where the offence was committed, he held that the application judge properly exercised his discretion in dismissing the change of venue application.

Finally, we note the decision in *R c Rémillard*, which was written in French.[47] As Chief Justice Chartier explained in para. 2, "[a]t issue in this appeal is the nature and scope of the principle of linguistic equality in respect of the delivery of services by the City of Winnipeg (the City) in the designated bilingual area of Riel." He upheld the language rights of the residents of Riel and emphasized the importance of the City's language obligations.

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45 See paras. 28-31. In respect to jurisdiction over the person, Chief Justice Chartier references s. 470 of the *Criminal Code* which, in his view, relaxed the common law rule that an accused can only be tried in the locality where the offence was committed.

46 At para. 51.

47 2009 MBCA 112. However, this was not the first Manitoba Court of Appeal decision written in French. Chief Justice Monnin issued several bilingual judgments (*e.g.*, *R v Sabourin* (1984), 29 Man R (2d) 101; *Asselin v Laliberte* (1989), 57 Man R (2d) 237; *Asselin v Laliberté* (1989), 62 Man R (2d) 241). His sons Michel and Marc both wrote French-language decisions, as well (*e.g.*, *Chartier c Manitoba (Évaluateur municipal de la Province)* (2000), 145 Man R (2d) 166 and *Camara c Ndiaye*, 2012 MBCA 11).

Of course, in this brief article we cannot adequately address all of Chief Justice Chartier's significant decisions.[48]

IV. Chief Justice Chartier's Contribution to the Law Regarding Standards of Review

In October 2006, just prior to Chief Justice Chartier's appointment to the Court of Appeal, the Manitoba *Court of Appeal Rules* were amended to require parties to include the applicable standard of review in their facta.[49] The timing of this amendment was prescient. Upon his elevation to the Court of Appeal, Chief Justice Chartier embraced the burgeoning trend in appellate jurisprudence to increasingly emphasize the applicable standard of review. Indeed, he pioneered the adoption of an electronic bench book cataloguing the Court's decisions regarding standards of review.

During his time with the Court, Chief Justice Chartier wrote about standards of review in many contexts – from administrative[50] and civil matters[51] to criminal[52] and family law cases.[53] In his view, standards of

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48 See, as just recent two examples, *Manitoba Metis Federation Inc v Brian Pallister*, 2021 MBCA 47 (honour of the Crown), leave to appeal denied, 2022 CanLII 14382 (SCC) and *Manitoba Federation of Labour v The Government of Manitoba*, 2021 MBCA 85 (statutory wage freezes), leave to appeal denied, 2022 CanLII 98950 (SCC).

49 *Court of Appeal Rules, amendment*, MR 177/2006, s. 7.

50 See, for example: *Kisil Hotel Ltd. v Winnipeg (City) Assessor*, 2007 MBCA 114; *Law Society of Manitoba v Pollock*, 2008 MBCA 61; *Gardentree Village Inc. v Winnipeg (City)*, 2009 MBCA 79; *Harder v Manitoba Public Insurance Corp.*, 2012 MBCA 101; *The Armstrong's Point Association Inc. v The City of Winnipeg*, 2013 MBCA 110; *Kuny v College of Registered Nurses of Manitoba*, 2018 MBCA 21.

51 See, for example, *Neusitzer v GFK Capital Base Corp.*, 2007 MBCA 128; *Ecclesiastical Insurance Office plc v Michaud*, 2008 MBCA 129; *Chrysler Canada Inc. v Eastwood Chrysler Dodge Ltd.*, 2010 MBCA 75; *Barnett v Ewatski*, 2012 MBCA 113; *Lake Louise Limited Partnership v Canad Corp. of Manitoba Ltd.*, 2014 MBCA 61; *Manitoba Federation of Labour v The Government of Manitoba*, 2021 MBCA 85; *Vale Canada Limited v Urbanmine Inc*, 2022 MBCA 18.

52 See, for example, *R v DJM*, 2007 MBCA 98; *R v Ladouceur and Traverse*, 2008 MBCA 110; *R v Grant*, 2009 MBCA 9; *R v Ruizfuentes*, 2010 MBCA 90; *R v Farrah*, 2011 MBCA 49; *R v Henderson*, 2012 MBCA 93; *R v Scott*, 2013 MBCA 7; *R v Roussin*, 2014 MBCA 24; *R v Anderson*, 2015 MBCA 30; *R v Desjarlais*, 2016 MBCA 69; *R v Banayos and Banayos*, 2018 MBCA 86; *R v KNDW*, 2020 MBCA 52; *R v Flett*, 2021 MBCA 104; *R v Siwicki*, 2022 MBCA 53.

53 See, for example, *Boryskiewich v Stuart*, 2014 MBCA 77.

review were directly connected to the role and function of appellate courts. For instance, as he explained in para. 8 of *R v Van Wissen*: "One of an appellate court's roles is to correct error within standard of review constraints. It is not an opportunity to simply reargue all unfavorable decisions in first instance and hope for a different result."[54] As he described in para. 7 of *Zenyk Estate v Zenyk*, "[w]hen an appellate court is asked to review decisions of a judge, it faces a threshold question: By what standard should it conduct the review?"[55]

Of course, the framework for this "threshold question" in civil cases was set out by the Supreme Court in the seminal case of *Housen v Nikolaisen*.[56] As Chief Justice Chartier summarized in para. 7 of *Zenyk*, *supra*:

> The standard of review with respect to errors of law is correctness. For errors of mixed fact and law, or of fact alone, the standard is palpable and overriding error, unless an error of mixed fact and law involves an error relating to an extricable question of law, in which case the standard of correctness applies to that extricable legal question [citing *Housen, supra*]. Moreover, as we were recently reminded by Freedman J.A. in *Homestead Properties (Canada) Ltd. v. Sekhri et al.*, 2007 MBCA 61, 214 Man.R. (2d) 148, when the decision is discretionary in nature, we should not interfere with it (at para. 13) '.... [U]nless the judge has misdirected himself or if his decision is so clearly wrong as to amount to an injustice'[.]

Thus, he regularly applied the palpable and overriding error standard to factual findings.[57] But he acknowledged that interlocutory injunction decisions were discretionary and subject to a deferential standard of review,[58] just like cost awards.[59] On several occasions, he addressed the application of the standard of review analysis in the summary judgment context.[60] He confirmed the standard of review applicable to striking claims for disclosing no reasonable cause of action[61] and cases involving questions

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54 2016 MBCA 108.

55 2008 MBCA 109.

56 2002 SCC 33.

57 As in *Neusitzer v GFK Capital Base Corp.*, 2007 MBCA 128, para. 60.

58 *Insurance Council of Manitoba v Tomlinson*, 2007 MBCA 143, para. 20.

59 *Barnett v Ewatski*, 2012 MBCA 113, para. 5.

60 See, *e.g.*, *Ecclesiastical Insurance Office plc v Michaud*, 2008 MBCA 129 and *Vale Canada Limited v Urbanmine Inc*, 2022 MBCA 18.

61 *Chrysler Canada Inc. v Eastwood Chrysler Dodge Ltd.*, 2010 MBCA 75, paras. 23-25.

of contractual interpretation.[62] He also addressed the complex issue of the standard of review applicable in cases involving the honour of the Crown.[63]

But perhaps Chief Justice Chartier's greatest contribution to the jurisprudence regarding standards of review was in the criminal law context. He was keenly aware of the interplay between common law standard of review jurisprudence and the language of the *Criminal Code*. In his numerous decisions in this area, he addressed the standard of review applicable to many aspects of criminal law, including: jurisdictional issues;[64] committals;[65] the "air of reality" test for potential defences;[66] hearsay evidence;[67] admitting videotaped statements;[68] circumstantial evidence;[69] recalling witnesses;[70] jury charges;[71] factual findings;[72] credibility findings;[73] inadequate reasons;[74] unreasonable verdicts;[75] statutory interpretation;[76] youth criminal justice matters;[77] detention issues;[78] dangerous offender designations;[79] Crown appeals;[80] and summary conviction appeals.[81]

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62 *Lake Louise Limited Partnership v Canad Corp. of Manitoba Ltd.*, 2014 MBCA 61.

63 *Manitoba Metis Federation Inc v Brian Pallister*, 2021 MBCA 47, para. 16.

64 *R v Siwicki*, 2022 MBCA 53.

65 *R v Eckstein*, 2012 MBCA 96; *R v Hyra*, 2013 MBCA 59.

66 *R v Mousseau*, 2007 MBCA 5, para. 11; *R v Côté*, 2008 MBCA 70.

67 *R v Woodard*, 2009 MBCA 42.

68 *R v Desjarlais*, 2016 MBCA 69.

69 *R v Banayos*, 2018 MBCA 86.

70 *R v Desjarlais*, 2016 MBCA 69.

71 *R v Grant*, 2009 MBCA 9; *R v Henderson*, 2012 MBCA 93; *R v Scott*, 2013 MBCA 7.

72 *R v Côté*, 2008 MBCA 70.

73 *R v McKay*, 2009 MBCA 53, para. 3; *R v WRB*, 2011 MBCA 17; *R v RGB*, 2012 MBCA 5; *R v Flett*, 2021 MBCA 104.

74 *R v Rocha*, 2009 MBCA 26; *R v Oddleifson*, 2010 MBCA 44.

75 *R v Oddleifson*, 2010 MBCA 44; *R v Kociuk*, 2011 MBCA 85, aff'd 2012 SCC 15; *R v Desjarlais*, 2016 MBCA 69.

76 *R v Rémillard*, 2009 MBCA 112; *R v Baron*, 2014 MBCA 43; *R v Siwicki*, 2022 MBCA 53.

77 *R v DJM*, 2007 MBCA 98; *R v AB*, 2012 MBCA 25; *R v Anderson*, 2015 MBCA 30.

78 *R v Vandenbosch*, 2007 MBCA 113.

79 *R v Atatise*, 2012 MBCA 117.

80 *R v Koczab*, 2013 MBCA 43.

81 *R v Alexson*, 2015 MBCA 5.

In a number of cases, he confirmed the deferential standard of review applicable in the sentencing context.[82] Regarding leave to appeal, he noted that "[w]hen assessing the merits of the appeal and its chance of success, the applicable standard of review must be taken into account. The more deferential the standard of review, the lesser the chances are for success."[83] Nevertheless, as he described in para. 11 of *R v Johnson*:

> However, this highly deferential standard of review does not mean that sentencing judges are completely shielded from review. In the same way that appellate courts do not have free rein to vary a sentence simply because they feel they should impose a different one, sentencing judges do not have free rein to impose a sentence without regard for the governing legal principles of sentencing. Where sentencing judges act outside the limits of their discretion, appellate courts have a duty to intervene and to vary the sentence as they think fit (see section 687 of the *Code*; and *R v Ipeelee*, 2012 SCC 13 at para 39). Finally, when appellate courts do intervene and vary a sentence, it does not mean that they start their analysis without any consideration for those findings or conclusions of the sentencing judge that are untainted by error.[84]

He also wrote several highly influential decisions regarding the standard of review analysis applicable to *Charter* matters. In *R v Grant*, a Hells Angel was convicted of a number of trafficking and extortion offences.[85] He appealed his conviction and sentence. Chief Justice Chartier noted (in para. 24) that "[t]he standard by which to review a *Charter* breach decision is not the same deferential standard used to conduct the review of a judge's discretionary power to grant a s. 24(1) *Charter* remedy." As he explained in para. 25:

> When examining a trial judge's decision on whether a *Charter* breach occurred, the appellate court will review that decision to ensure that the correct legal principles were stated and that there was no misdirection in their application. This is a question of law and the standard of review is correctness. The appellate court will then review the evidentiary foundation which forms the basis for the trial judge's decision to see whether there was an error. On this part of the review, the trial judge's decision is entitled to more deference and, except for palpable

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82 *R v Vandenbosch*, 2007 MBCA 113; *R v Ladouceur and Traverse*, 2008 MBCA 110; *R v Arbuthnot*, 2009 MBCA 106; *R v Ruizfuentes*, 2010 MBCA 90; *R v Foianesi*, 2011 MBCA 33; *R v Linklater*, 2015 MBCA 79; *R v KNDW*, 2020 MBCA 52; *R v Hall*, 2022 MBCA 59.

83 *R v Linklater*, 2015 MBCA 79, para. 4. See also *R v Catcheway*, 2017 MBCA 87, para. 2.

84 2020 MBCA 10.

85 2009 MBCA 9, leave to appeal denied, 2009 CanLII 30410 (SCC).

> and overriding error, it will not be disturbed. The appellate court will also examine the application of the legal principles to the facts of the case to see if the facts as found by the trial judge satisfy the correct legal test. This is a question of mixed fact and law and the standard of review is again palpable and overriding error, unless a question of law can be easily extricated from the mixed question of fact and law; then the standard of correctness would apply to that question of law.

With regard to the standard of review applicable to s. 24(1) remedial decisions, he confirmed (in para. 23) that it is deferential: "the Supreme Court of Canada held that this was an exercise of a discretionary power and that appellate intervention would only be justified if there is misdirection on the part of the trial judge or if the decision is so clearly wrong as to amount to an injustice." The decision also addressed the standard of review applicable to jury charges[86] and a sentencing judge's decision to order consecutive instead of concurrent sentences.[87]

Chief Justice Chartier's most-cited decision is *R v Farrah*, a case involving an armed robbery and the standard of review in *Charter* cases.[88] What is notable about his reasons is that they brought home to Manitoba counsel the important fact that there can be several components to the issue in a given case, each requiring a discrete standard of review:

> [7] By which standard is this court to review the issue of whether there is a *Charter* breach? There are several components to this question. They are as follows:
>
> a) When examining a judge's decision on whether a *Charter* breach occurred, the appellate court will review the decision to ensure that the correct legal principles were stated and that there was no misdirection in their application. This raises questions of law and the standard of review is correctness.
>
> b) The appellate court will then review the evidentiary foundation which forms the basis for the judge's decision to see whether there was an error. On this part of the review, the judge's decision is entitled to more deference and, absent palpable and overriding error, the facts as found by the judge should not be disturbed (see *Grant* at para. 129).
>
> c) The appellate court will also examine the application of the legal principles to the facts of the case to see if the facts, as found by the judge, satisfy the correct legal test. In the criminal law context, this is a question of law and the standard of review is correctness (see *R. v. Shepherd*, 2009 SCC 35 at para. 20, [2009] 2 S.C.R. 527).
>
> d) The decision on whether to exclude under s. 24(2) of the *Charter* is an admissibility of evidence issue which is a question of law. However,

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86 See para. 56.

87 See para. 94.

88 2011 MBCA 49.

> because this determination requires the judge to exercise some discretion, 'considerable deference' is owed to the judge's s. 24(2) assessment when the appropriate factors have been considered (see *Grant* at para. 86, and *R. v. Beaulieu*, 2010 SCC 7 at para. 5, [2010] 1 S.C.R. 248).

The case also addressed the deferential standard of review applicable to "[t]he judge's determination as to the amount of pre-sentence custody credit to be awarded under s. 719(3) of the *Criminal Code*."[89]

As a result of his frequent writings on this subject, Chief Justice Chartier was a sought-after speaker on the subject of standards of review and gave many presentations on the topic.[90]

V. CONCLUSION

Chief Justice Chartier made important contributions to Manitoba's jurisprudence, particularly on the subject of standards of review. Moreover, he instigated a change in judicial culture at the Manitoba Court of Appeal, reflected in the Court's new mission statement: delivering quality decisions in a timely manner. As explained above, he led by example in issuing brief decisions promptly. Nationally, he was an energetic member of the CJC and played an important role in judicial discipline, judicial ethics and judicial education.

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89 See para. 8.

90 See, *e.g.*, Richard J Chartier, "Standard of Review on Civil Appeals: Your Sword or Your Shield" (23 January 2015), Manitoba Bar Association Mid-Winter Conference and "Standards of Review on Criminal Appeals: Your Sword or Your Shield" (21 October 2015), Manitoba Crown/Defence Conference.