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**Court of Appeal for Saskatchewan**  
**Docket: CACV4348**

**Citation: *Standing Buffalo Dakota First Nation v Maurice Law Barristers and Solicitors (Ron S. Maurice Professional Corporation)*, 2026 SKCA 11**

**Date: 2026-01-22**

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Between:

**Standing Buffalo Dakota First Nation**

*Appellant  
(Plaintiff)*

And

**Ron S. Maurice Professional Corporation  
operating as Maurice Law Barristers and Solicitors**

*Respondent  
(Defendant)*

And

**Pasqua First Nation, Piapot First Nation, Muscowpetung First Nation,  
George Gordon First Nation, Muskowekwan First Nation,  
Day Star First Nation, Kawacatoose First Nation,  
Little Black Bear First Nation, and Star Blanket First Nation**

*Respondents  
(Non-Parties)*

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Before: Schwann, Tholl and Kilback JJ.A.

Disposition: Application dismissed, appeal dismissed

Written reasons by: The Honourable Justice Jerome A. Tholl

In concurrence: The Honourable Justice Lian M. Schwann  
The Honourable Justice Keith D. Kilback

On appeal from: KBG-RG-02445-2022 (SKKB) and 2024 SKKB 44, Regina

Appeal heard: October 15, 2025

Counsel: Nathan Phillips, Mervin Phillips and Leane Phillips for the Appellant  
Corey Omer and Aliosha Hurry for Maurice Law Barristers and  
Solicitors  
Bill Henderson for Day Star First Nation, Muskowekwan First Nation  
and Pasqua First Nation  
Mark Ebert for Kawacatoose First Nation  
Michael Marschal for George Gordon First Nation, Muscowpetung First  
Nation and Piapot First Nation

**Tholl J.A.**

## **I. INTRODUCTION**

[1] In this judgment, the Court is called upon to weigh into the middle of an ongoing dispute between Standing Buffalo Dakota First Nation [SBDFN] and its former legal counsel, Ron S. Maurice Professional Corporation, operating as Maurice Law Barristers and Solicitors [Maurice Law]. SBDFN filed an originating application in the Court of King’s Bench on October 19, 2022, in which, as amended, it sought three distinct remedies as against Maurice Law. First, it contested the invoices Maurice Law had rendered for its legal work. Second, it sought to have a contingency agreement set aside. Third, it asked for the possession of files that Maurice Law had retained after the solicitor–client relationship was terminated.

[2] Within the lower-court proceedings, the parties brought several applications that were ultimately heard and determined by a Court of King’s Bench judge sitting in Chambers. Although many of the resulting orders are challenged on this appeal, the main issue concerns a claim of privilege over certain documents.

[3] When SBDFN terminated its services, Maurice Law had kept SBDFN’s physical files, pursuant to a solicitor’s lien. An order was made by a Court of King’s Bench judge requiring Maurice Law to transfer SBDFN’s files to it upon the deposit of a specific sum of money into court, subject to any claim of privilege that may be made by other First Nations in relation to those same files: *Standing Buffalo Dakota First Nation v Maurice Law Barristers and Solicitors (Ron S. Maurice Professional Corporation)*, 2023 SKKB 42, rev’d in part 2024 SKCA 14 [2023 *Fiat*] (but not on this point). Upon payment into court by SBDFN, Maurice Law released most of the files to SBDFN; there remained only 11 groups of documents over which other First Nations had asserted privilege.

[4] The 11 groups of documents not provided to SBDFN were filed with the Court of King’s Bench under seal [sealed documents]. This was all done in accordance with a procedure set out by the Chambers judge. SBDFN disputed the claim of privilege and sought an order requiring that the remaining documents be provided to SBDFN. The appeal at hand mainly addresses the Chambers judge’s upholding of privilege.

[5] The privilege claim was asserted by Pasqua First Nation, Piapot First Nation, George Gordon First Nation, Muskowekwan First Nation, Muscowpetung First Nation, and Day Star First Nation [privilege claimants], who were also clients of Maurice Law at the relevant time. However, SBDFN argued that it was entitled to the sealed documents because it had jointly retained Maurice Law, together with the privilege claimants and other First Nations, to advance a claim against the Government of Canada concerning the surrender, disposition, and management of the Last Mountain Lake Indian Reserve No. 80A [IR 80A Claim]. It says that the files and documents in question are held by Maurice Law pursuant to that joint retainer. As a result, SBDFN asserts that the associated files and documents jointly belong to SBDFN and the privilege claimants and, therefore, cannot be withheld from it based on a claim of privilege.

[6] In an oral decision rendered on September 18, 2023, reduced to written reasons on April 9, 2024, the Chambers judge denied SBDFN's preliminary application asking that he decline to preside over the pending applications: *Standing Buffalo First Nation v Maurice Law Barristers and Solicitors (Ron S. Maurice Professional Corporation)* (9 April 2024), Regina KBG-RG-02445-2022 (SKKB) [*Oral Decision*]. This objection had been made by SBDFN because the Chambers judge had been appointed as the case management judge. Arguments on the recusal application and the other applications had been heard together, with the Chambers judge reserving his decision.

[7] An extensive fiat was rendered by the Chambers judge on March 12, 2024: *Standing Buffalo First Nation v Maurice Law Barristers and Solicitors (Ron S. Maurice Professional Corporation)*, 2024 SKKB 44 [*Chambers Decision*]. A summary of the various applications, appearances, and issues is set out at paragraphs 6 to 33 of the *Chambers Decision* and need not be repeated at this point in my reasons. The relevant orders that resulted from those applications are set out below. Of main interest to this appeal, the Chambers judge determined that SBDFN was not a party to a joint retainer between the privilege claimants and Maurice Law regarding the IR 80A Claim. In arriving at this conclusion, the Chambers judge reviewed the sealed documents that had been provided to him, together with a 2020 memorandum of understanding [MOU] that named SBDFN, the privilege claimants, and three other First Nations (i.e., Kawacatoose First Nation, Little Black Bear First Nation, and Star Blanket First Nation) as parties to it. The Chambers judge also had regard to the other extensive evidence that had been filed.

[8] All parties agreed, however, that Star Blanket First Nation had not signed the MOU and was not part of a joint retainer. It was disputed whether Kawacatoose First Nation validly signed the MOU, but the Chambers judge determined that Kawacatoose First Nation had no interests at stake because, among other things, it had retained counsel other than Maurice Law a full two months before the date of the first document over which privilege was claimed. Little Black Bear First Nation did not assert any interest in this matter and was found by the Chambers judge to not be part of a joint retainer with the privilege claimants for the IR 80A Claim.

[9] With respect to the privilege claimants, SBDFN had submitted in the Court of King's Bench that the MOU must be interpreted as an agreement amongst all named First Nations to jointly retain Maurice Law. It argued this interpretation was supported by other evidence; and, as a result, any documents in the possession of Maurice Law were held for the common interest of the parties to the joint retainer and were not privileged as against SBDFN. The Chambers judge rejected that argument and found that the privilege claimants had met the burden required to establish privilege to the exclusion of SBDFN. Key to this determination was his finding that SBDFN had failed to prove that it was part of a joint retainer with the privilege claimants regarding the IR 80A Claim.

[10] The Chambers judge also decided numerous other issues and made several costs orders against SBDFN, most of which have been appealed by it.

[11] Although SBDFN's notice of appeal sets out numerous grounds of appeal, in my view, this appeal is resolved by answering the following questions:

- (a) Is leave required for SBDFN to bring this appeal?
- (b) If leave to appeal were required, should it be granted *nunc pro tunc*?
- (c) Should SBDFN's fresh evidence application be granted?
- (d) Did the Chambers judge err in finding that the privilege claimants had established their right to assert privilege as against SBDFN over the sealed documents?

[12] As I will discuss, leave was required for SBDFN to bring its appeal, with one possible exception. In the result, I would grant leave for it to appeal only some of the orders made by the Chambers judge. In connection with the orders for which I would grant leave, for the reasons that follow, the fresh evidence application and the appeal should be dismissed.

## II. ANALYSIS

### A. Leave to appeal is required

[13] Maurice Law submits that the *Chambers Decision* was interlocutory in its entirety and that, because leave to appeal was neither sought nor granted, SBDFN's appeal must be dismissed. Pasqua First Nation, Muskowekwan First Nation, and Day Star First Nation join in this submission. The other respondents take no position on this issue.

[14] SBDFN argues that the *Chambers Decision* permanently prevents it from receiving the documents in question and is, therefore, a final disposition of that aspect of the relief that it had sought under the originating application. It does not concede that any of the orders under appeal are interlocutory. In the alternative, if leave is required, SBDFN asks that it be granted *nunc pro tunc*.

#### 1. The law on leave to appeal

[15] The right to appeal in this matter is governed by the following provisions of *The Court of Appeal Act, 2000*, c C-42.1:

##### **Right of appeal**

7(2) Subject to subsection (3) and section 8, an appeal lies to the court from a decision:

(a) of the Court of King's Bench or a judge of that court ... .

...

##### **Interlocutory appeals**

8(1) ... no appeal lies to the court from an interlocutory decision of the Court of King's Bench unless leave to appeal is granted by a judge or the court.

[16] Arising out of these provisions, a determination of whether leave to appeal is required in any particular matter turns on whether the challenged decision is final or interlocutory. The resolution of that question is often far less straightforward than its simple formulation would suggest, although the classification is not as difficult as it was in the not-too-distant past: see *Lombard v Ron S. Maurice Professional Corporation (Maurice Law Barristers & Solicitors)*, 2025 SKCA 35 at para 39 [*Lombard*]. In *Poffenroth Agri Ltd. v Brown*, 2020 SKCA 68, Kalmakoff J.A. describes the challenge and approach to be taken by an appellate court in determining whether a decision is interlocutory or final:

[15] At a very general level, an interlocutory decision is one made during the progress of an action or other proceeding that relates to some intermediate matter at issue in the case, not to the ultimate matter in issue ...

...

[18] This does not mean that an order must bring the litigation to a conclusion in order to be final in nature; not all final orders do so. Nor does the fact that an order is a mere step in the litigation process, or leaves other issues outstanding for determination, necessarily classify it as interlocutory ([2018 SKCA 101] at paras 27–28). ... A particular order may be final if granted and interlocutory if refused and vice versa, depending on the nature of the order and its effect on the status of the litigation between the parties [reference omitted]. The determination of whether an order is final or interlocutory in nature turns on whether the order effectively disposes of the rights of the parties, in a final and binding way, with respect to a substantive issue. If it does, the order is a final order [references omitted].

[19] But how does one determine whether an order disposes of the rights of the parties, on a substantive issue, in a final and binding way? In *Van de Wiel v Blaikie*, 2005 NSCA 14, 230 NSR (2d) 186 [*Van de Wiel*], Cromwell J.A. (as he then was) had this to say:

[12] In general, an order is interlocutory which does not dispose of the rights of the parties in the litigation but relates to matters taken for the purpose of advancing the matter towards resolution or for the purpose of enabling the conclusion of the proceedings to be enforced: [reference omitted].

[13] In *Irving Oil Ltd. v. Sydney Engineering Inc.* (1996), 150 N.S.R. (2d) 29 (C.A. Chambers), Bateman, J.A. considered the distinction between interlocutory and final orders. Although finding it unnecessary to conclusively determine the nature of the order in the case before her, she cited with approval the first edition of *The Conduct of an Appeal* by Sopinka and Gelowitz (1993) at p. 15 which described the distinction as follows:

Where such orders have a terminating effect on an issue or on the exposure of a party, they plainly “dispose of the rights of the parties” and are appropriately treated as final. Where such orders set the stage for determination on the merits, they do not “dispose of the rights of the parties” and are appropriately treated as interlocutory.

[20] The approach set out in *Van de Wiel* is, in my view, consistent with the line of analysis that runs through this Court’s decisions ... . That is to say, an order need not bring the entire dispute between the parties to an end to constitute a final order; an order can be final if it finally determines the particular proceeding before the court, notwithstanding that there may be some other issues left to be determined in some other proceeding or by some other process.

[21] However, one must be careful not to expand this proposition beyond its limits as, in one sense, any decision could be seen as constituting a final decision, in that it finally resolves the particular application that was made in the broader proceedings. The determination as to whether an order is final or interlocutory must take into account the context of the action as a whole. It is not the loss of every potential “right” that gives rise to a final decision. ...

[22] Without putting too fine a point on things, an order that does not finally resolve the action may constitute a final decision when it impacts on the substantive merits of a cause of action or a substantive defence . . . . An order is interlocutory where it constitutes merely a step in the action that does not bring the matter to an end.

(Emphasis omitted)

## 2. The decisions sought to be appealed

[17] In deciding whether leave is required, it is important to clarify exactly what aspects of the *Oral Decision* and the *Chambers Decision* are being challenged, given that the Chambers judge decided many issues and because it is not unusual for a fiat that determines multiple requests for relief to contain some orders that are interlocutory and some that are final. For example, a single decision resolving an application by a plaintiff in the Court of King's Bench might contain two orders: one that grants permission for the plaintiff to amend their statement of claim and one that removes the defendant's counsel as a result of a conflict of interest. The order granting an amendment of the pleadings would be interlocutory (see *Kidd v Flad*, 2007 SKCA 130), whereas an order removing counsel of record would be final in nature: see *Mitchell v Mitchell*, 1996 CanLII 4996, 144 Sask R 223 (SKCA). The former order would require leave to appeal but the latter one would not, despite the orders arising from a single application and being contained in the same decision and formal order. A recent example of such a situation is found in *Lombard*: also see *Kashuba v Wilton (Rural Municipality)*, 2022 SKCA 37.

[18] Here, based on its notice of appeal, SBDFN seeks to challenge the Chambers judge's jurisdiction to hear the applications, as set out in the *Oral Decision*, as well as portions of the March 12, 2024, formal order that issued as a result of the *Chambers Decision*, which read as follows (at p 2-6):

### **PCFN Privilege Application**

1. The PCFN [privilege claimants] have met their burden in establishing privilege, proprietary or otherwise, in the vetted portions of the documents tendered to the Court as against SBDFN. No joint retainer has been established between Maurice Law, SBDFN, and any other First Nation;
2. Maurice Law shall not disclose to SBDFN any document over which privilege is asserted that relates to the involvement or potential involvement with Maurice Law of the PCFN, Kawacatoose First Nation, Star Blanket First Nation, or Little Black Bear First Nation;
3. SBDFN shall be entitled only to the unredacted documents provided to the Court under seal pertaining solely to SBDFN and Maurice Law;

4. Within ten days of the entry of this Order, Mr. Henderson, on behalf of the PCFN, will deliver to the Court the unredacted documents referred to in Section 3 of this Order under seal for the Court's review, so that the Court can ensure that SBDFN receives only the appropriate unredacted documents in accordance with this Order;

### **SBDFN July 17, 2023 Application**

...

6. Other than with respect to the amendment ordered in Paragraph 5 of this Order, SBDFN's July 17, 2023 Application is denied in its entirety. Specifically, the Court denies SBDFN's requests for the following orders:

- a. An order requiring Maurice Law to produce to SBDFN all retainer agreements, invoices, and a list of time and disbursements not yet invoiced relating to work performed for other First Nations in relation to litigation, negotiation, or any other legal services concerning any of the allegations in Specific Claims Tribunal Proceeding SCT-5001-13, up to and including 2019 SCTC 3 (collectively, "Other FN IR80A Files");
- b. An order holding, pursuant to Rule 3-51 of *The King's Bench Rules*, that Subdivision 2, Division 2, Part 5 of the Rules applies to this litigation, and requiring Maurice Law to serve an affidavit of documents on SBDFN within 30 days, which affidavit shall also include the Other FN IR80A Files;
- c. An order permitting SBDFN to cross-examine Chief Matthew Peigan; and
- d. An order striking the affidavit of Anna Lomma sworn May 1, 2023 and the exhibit thereto, or, alternatively, permitting SBDFN to cross-examine Chief Clarence Bellegarde;

### **Maurice Law Application to Bifurcate**

7. Pursuant to Rule 7-1 of *The King's Bench Rules*, the issue of the taxation of invoices billed on a fee-for-service (i.e., hourly) basis, and not on a contingency basis, pursuant to Section 67 of *The Legal Professions Act, 1990* ("LPA"), including Invoice #7412, dated September 20, 2022 ("Invoice 7412"), issued by Maurice Law to SBDFN in relation to the General File (File 546.00), is bifurcated from the balance of the present proceedings. Accordingly:

- a. The taxation of the costs in Invoice 7412 is referred to a hearing before the Stage Two Judge in this matter, which hearing is to be set expeditiously following the appointment of the Stage Two Judge, so that the second step in the process outlined in *Weisbeck v Regina (City)*, 2018 SKQB 60, 18 CPC (8th) 376, may be completed before the said Judge who will decide whether any limitations or other terms will circumscribe the Local Registrar in its taxation of Invoice 7412; and
- b. Invoice 7412 will thereafter be referred by the Stage Two Judge to the Registrar for taxation pursuant to Section 67 LPA;

...

### **SBDFN Application to Strike**

9. The SBDFN Application to Strike the affidavit of Anna Lomma, sworn August 11, 2023, and the exhibits thereto, is denied;

**Maurice Law September 8, 2023 Application**

10. The Maurice Law September 8, 2023 Application for an order permitting Maurice Law to rely on evidence filed by SBDFN in another proceeding and for an abridgment of time for service of the Application is dismissed without prejudice to Maurice Law's ability to reapply for this relief should the conditions in the future require such an application, and with each party bearing its own costs;

**SBDFN December 22, 2023 Application**

11. The excerpts of the documents entitled (i) "Transcript of Cross-Examination on Affidavit of Ron Maurice by Mr. Morrison – Vol. 1, Held at Regina, Saskatchewan on November 25, 2022", filed in court file QBG-RG-00885-2020 between One Arrow First Nation and Maurice Law; (ii) "Transcript of Oral Questioning of Ron Maurice by Mr. Morrison – Vol. 1, Held at Regina, Saskatchewan on April 20 and 21, 2023", filed in court file QBG-RG00748-2021 between Beardy's and Okemasis Cree Nation and Ron S. Maurice and Maurice Law; and (iii) "Transcript of Cross-Examination on Affidavit of David Knoll by Mr. Henderson – Vol. 1, Held at Regina, Saskatchewan on November 24, 2022", filed in court file QBG-RG-00885-2020 (collectively, the "Transcripts"), sought to be filed by SBDFN in its December 22, 2023 Application constitute inadmissible similar fact evidence and may not be filed or utilized as evidence with respect to the determination of the September 18-19 Applications;

**Costs**

...

13. The PCFN shall:

- a. Have their costs relating to the PCFN Privilege Application taxed in column 3 and payable forthwith, as against SBDFN;
- b. Have their costs relating to the SBDFN December 22, 2023 Application taxed in column 3 and payable forthwith, as against SBDFN;

14. The PCFN are awarded enhanced costs totaling \$5,500, comprised of awards of enhanced costs of (i) \$3,500 and (ii) \$2,000, payable forthwith by SBDFN;

15. Kawacatoose First Nation shall:

- a. Have its costs relating to the PCFN Privilege Application taxed in column 3 and payable forthwith, as against SBDFN;
- b. Have its costs relating to each of the four applications forming part of the July 17, 2023 Application set out in Paragraph 6 above, taxed in column 2 and payable forthwith, as against SBDFN;

16. Kawacatoose First Nation is awarded enhanced costs of \$2,000, payable forthwith by SBDFN;

17. Maurice Law shall:

- a. Have its costs relating to the PCFN Privilege Application payable in the cause;
- b. Have its costs relating to each of the four applications forming part of the July 17, 2023 Application set out in Paragraph 6 above, taxed in column 2 and payable in any event of the cause, as against SBDFN;

- c. Have its costs relating to the Maurice Law Application to Bifurcate taxed in column 3 and payable in any event of the cause, as against SBDFN;
  - d. Have its costs relating to the SBDFN Application to Strike taxed in column 2 and payable in any event of the cause, as against SBDFN;
  - e. Have its costs relating to the SBDFN December 22, 2023 Application taxed in column 3 and payable forthwith, as against SBDFN;
18. Maurice Law is awarded enhanced costs of \$2,000, payable forthwith by SBDFN; and
19. SBDFN shall have its costs relating to its application to amend forming part of the July 17, 2023 Application taxed in column 1 and payable in any event of the cause, as against Maurice Law.

(All emphasis omitted)

### **3. Arguments on appeal**

[19] In their notice of appeal, SBDFN advances the following grounds of appeal:

4. The appeal is taken on the grounds that the Case Management Judge erred by:
- 1) Denying the Appellant access to its IR80A claim file with Maurice PC [Maurice Law] on any basis, including but not limited to privilege asserted by anyone else;
  - 2) Finding that the Interested First Nations and the Appellant did not enter into a joint retainer of Maurice PC, or alternatively a cost sharing arrangement with similar effect regarding the Appellant's entitlement;
  - 3) Finding that no further disclosure or production by Maurice PC to the Appellant was appropriate, including but not limited to the IR80A claim file;
  - 4) Denying the Appellant procedural fairness, and without limiting same:
    - a) finding that the Case Management Judge should hear the applications notwithstanding Rule 4-9, his appointment as Case Management Judge, the absence of subsequent consent, dissimilarity of issues and parties, etc;
    - b) deciding issues on the basis of submissions not raised by the parties;
    - c) finding that the claims of privilege had been properly made;
    - d) finding the affidavit of Anna Lomma sworn May 1, 2023, admissible;
    - e) refusing to grant cross-examination of Chief Matthew T. Peigan or Chief Clarence Bellegarde, and without limiting same finding that there was no material conflict in the evidence, and no sincere need for clarification;
    - f) failing to identify evidence determined inadmissible, and the reasons for same;
    - g) refusing to consider admissible evidence, including but not limited to the Ron S. Maurice cross-examination transcripts contained in Tabs A and B to the December 22, 2023, application of the Appellant;

h) finding Exhibit 1 to the affidavit of Anna Lomma sworn August 11, 2023, admissible, and without limiting same finding that its purpose did not include an attempt to effect compromise/settlement;

5) Awarding costs, or enhanced costs, against the Appellant, and without limiting same:

a) awarding 4 sets of Tariff Column 2 costs to each of Kawacatoose First Nation and Maurice PC regarding paragraphs 2, 3, 4 and 5 of the July 17, 2023, application of the Appellant notwithstanding:

i. only a single application had been brought, the result of which was mixed;

ii. the substantive submissions of Kawacatoose First Nation were confined to paragraph 1, which was decided in favour of the Appellant;

iii. Kawacatoose First Nation did not make substantive submissions in relation to paragraphs 2, 3, 4 and 5;

b) awarding costs to Kawacatoose First Nation in relation to the PCFN application regarding a claim of privilege over the 11 classes of documents in the April 18, 2023, affidavit of documents of Chief Matthew T. Peigan, when Kawacatoose First Nation made no assertion of privilege over any of those documents and did not support or oppose any of those claims of privilege;

c) disregarding or failing to consider that:

i. costs of the applications and Originating Application are more appropriately determined by the Trial Judge;

ii. Kawacatoose First Nation and PCFN made inappropriate allegations, including but not limited to misstating the evidence, submissions absent evidence, and allegations against counsel for the Appellant;

d) finding that the Appellant had:

i. ignored or not complied with the deadline for responding to the PCFN application, or that same was serious or caused prejudice;

ii. made an inappropriate submission regarding Maurice PC;

iii. made an inappropriate submission regarding Mr. Henderson;

iv. inappropriately served/involved Kawacatoose First Nation.

[20] Despite the broad wording of its notice of appeal, nothing in SBDFN's factum or oral submissions takes issue directly or by implication with the following orders:

(a) the bifurcation order (item 7, above quoted, in the formal order);

- (b) the order dismissing Maurice Law's September 8, 2023, application for an order permitting it to rely on evidence that had been filed by SBDFN in another proceeding and for an abridgment of time for service of the application (item 10 in the formal order); or
- (c) the order for the payment of costs in favour of SBDFN (item 19 in the formal order).

[21] Further, in the relief section of its factum, SBDFN did not ask for any of those three items of the formal order to be set aside. In reply at the hearing of this matter, SBDFN confirmed that it was not seeking to overturn the bifurcation order. As such, I understand SBDFN is not challenging these three aspects of the *Chambers Decision* in its proposed appeal. If I am incorrect in this observation, I would note that SBDFN has provided no submissions that would persuade me to grant leave to appeal *nunc pro tunc* from these interlocutory orders.

[22] In addition to pinpointing what orders SBDFN seeks to appeal, it is important to examine the nature of the applications that were the subject of the *Chambers Decision*. The *Chambers Decision* arose as a result of a series of applications made by the parties within the proceedings that were commenced by the originating application. None of those applications sought a final decision on any aspect of the originating application itself, except arguably the privilege issue, and the Chambers judge did not treat any of the applications he addressed as seeking such a remedy. This matter has not yet reached stage 2. This leaves me to determine whether any of the orders granted were, nonetheless, final orders.

[23] Setting aside for the time being the orders directly involving the disputed documents (items 1 to 4 of the formal order) and costs (items 13 to 18), I am satisfied that the remainder of the orders, including the Chambers judge's determination that he had jurisdiction to hear the applications as the appointed case management judge and would not decline to do so under Rule 4-9 of *The King's Bench Rules*, are interlocutory to the proceedings. They involve disclosure from a party to the litigation, procedural rulings, applications to strike certain evidence, and applications to admit certain evidence. These types of orders are each preliminary to the determination of the substance of the issues the judge was called upon to decide. They are prototypically interlocutory and require leave to appeal: see, for example, *Saskatchewan Trust Company v Coopers & Lybrand Inc.*, 2003 SKCA 75; *Mann Motor Products Ltd. v Hlewka*, 2004 SKCA 163; *Rask v Hus*, 2006 SKCA 29;

*Dutchak v Dutchak*, 2009 SKCA 89; *Rekken Estate v Health Region No. 1*, 2012 SKCA 86; *Preece v Clements*, 2014 SKCA 63; *O.M.S. v E.J.S.*, 2023 SKCA 9; and *Balders Estate v Nova Scotia (Registrar of Probate)*, 1999 NSCA 119. This does not mean that these types of orders cannot be appealed or form grounds of appeal when an appellant ultimately appeals a final judgment, but the orders themselves are interlocutory and subject to a leave requirement.

[24] The orders finding the existence of privilege in the disputed documents (items 1 to 4 of the formal order) bear more extensive comment. SBDFN takes the position that the Chambers judge’s ruling on the privilege issue was final in nature. It relies on *CPC Networks Corp. v McDougall Gauley LLP*, 2021 SKCA 127 at paras 27-31 [*CPC Networks*], for the proposition that a finding of whether a prior solicitor must deliver its file to its former client is a final order. But in the circumstances of *CPC Networks*, the impugned order arose out of an application seeking to exercise an independent right. More specifically, the application there sought delivery of documents from a former solicitor in the context of one application for use in two other actions. This led to a final order regarding the delivery of the solicitor’s files. In *CPC Networks*, that was the end of that issue with no ability for the requestors of the files to obtain them at a later point in the same action. It appears that specific litigation also ended, despite the documents being relevant to other ongoing and related actions. That is an order with an entirely different character than the situation here. In the matter at hand, the delivery of the files is one of the final forms of relief sought by SBDFN in its originating application.

[25] At the hearing of this appeal, Maurice Law, Pasqua First Nation, Muskowekwan First Nation, and Day Star First Nation submitted that the finding of privilege was *not* a final order and that a different determination might yet be made when the matter is ultimately adjudicated. None of the other respondents took a position on the issue.

[26] As a starting point on the nature of the decision regarding privilege, I note that in the 2023 *Fiat*, the Chambers judge explicitly referred to the two-part process under General Application Practice Directive #9, “Scheduling of Summary Judgment, Set Aside and Judicial Review Applications” (GA-PD #9) (SKKB) [Practice Directive #9], and wrote as follows about the adjudication of the privilege issue in that context (2023 *Fiat*):

[40] Despite the breadth of the affidavit evidence and legal argument that has preceded this decision, it is important to note that this matter is winding its way through the first stage in a two-stage process pursuant to Practice Directive #9. ...

...

[93] As I have struck paragraph 1, I do not need to determine whether a final order pursuant to Rules 7-2 and 7-5 need be made with respect to that paragraph. However, both parties have indicated they want a determination with respect to paragraphs 2, 3 and 4 of the originating application. Therefore, after reviewing the affidavit evidence and paragraphs 2, 3 and 4 on the basis outlined in *Michel v Saskatchewan*, 2021 SKCA 126, I find that I am able to make a fair and just determination on the merits in relation to those matters with respect to almost all of the matters *other than the privilege claim* associated with the IR 80A file.

(Emphasis added)

[27] Later in the 2023 *Fiat*, the Chambers judge referenced the method that had been used to assess privilege in *Beardy's & Okemasis Cree Nation v Maurice Law Barristers and Solicitors (Ron S. Maurice Professional Corporation)* (30 June 2022), Regina QBG-RG-00748-2021 (SKQB), and used that framework to set out the procedure he would employ to evaluate whether privilege would be asserted or waived: see paragraphs 150 to 154 of the 2023 *Fiat*. That procedure was apparently followed, but there was no clear indication that the Chambers judge determined that he would be deciding the privilege issue in a final manner. In a later fiat, the Chambers judge continued to refer to the two-stage process under Practice Directive #9: "I am the stage one judge pursuant to Practice Directive #9, so it is my duty to shepherd this matter towards the full adjudication process that will occur during the stage two process" (*Standing Buffalo Dakota First Nation v Maurice Law Barristers and Solicitors (Ron S. Maurice Professional Corporation)* (3 May 2023), Regina KBG-RG-02445-2022 at para 2 (SKKB)).

[28] I do not see any place in the fiats and the parties have not referred me to any ruling where the Chambers judge explicitly stated that he had reached the point where he could make a final determination of the privilege claim. A full reading of the *Chambers Decision* reveals some indication by the Chambers judge to the contrary. This is best illustrated in the following paragraphs:

[124] In my [2023 *Fiat*], I dealt with the factual and legal circumstances of the privilege issue in paras. 24, 25, 26, 33, 34, and 150–154. However, the circumstances involving the parties' entry into the MOU must now be examined in greater depth by analyzing in detail the specific wording used and the agreements, if any, between the parties. Further, I am making this determination regarding the existence of the MOU only to determine whether the asserted claim of privilege by the PCFN exists. A court may come to a different conclusion at the stage two hearing of this matter should it receive further and more detailed evidence.

...

[159] While SBDFN is identified in these [band council resolutions] as a joint claimant, there is no documentary evidence filed that they ever signed a [band council resolution] establishing this type of relationship with Maurice [Law]. I find that, presently, there is insufficient evidence establishing SBDFN as part of the above joint retainer agreement with Maurice and the other noted First Nations. How can a document entered into and signed by others establish the legal rights of an unsigned party?

...

[382] Unfortunately, the resolution of this multitude of proceedings has not brought the proceedings to a point where, pursuant to Practice Directive #9, a stage two judge can be appointed. Once such a judge is appointed, the hearing with respect to the general invoices should be able to be set rather quickly. In any event, it is hoped that neither Kawacatoose First Nation nor the PCFN will need to be dragged back into these proceedings in any fashion so that the focus will be the determination of the reasonableness of Maurice's invoices to SBDFN. From my review, it is now time for the parties to set deadlines for the filing of affidavit material for the eventual hearing(s) and the receipt of briefs.

[29] As mentioned, the Chambers judge did not make any explicit comments in the *Chambers Decision* that would lead me to conclude that he had construed any of the applications in front of him as permitting him to determine the privilege issue in a final manner. Conversely, none of the parties filed an application in the Court of King's Bench seeking to have the privilege issue determined on an interim basis, so it is unclear how he could embark on an exercise that resulted in an interim order.

[30] There are numerous factors pointing in both directions regarding whether the privilege issue was intended to be decided in a final manner or revisited at a later stage of the proceedings. Given this ambiguity, I would not want to foreclose the possibility that the Chambers judge was deciding that issue on either basis unless it is absolutely necessary for the purposes of this appeal. If it was an interim order, the privilege issue remains outstanding in the litigation initiated by SBDFN's originating application, and SBDFN might yet obtain the sealed documents that were not provided to it. In that case, the impugned portions of the order would be interlocutory. However, if items 1 to 4 of the formal order were intended to be a final determination of the issue, leave to appeal would not be required because SBDFN's rights would have been disposed of in a final and binding way with respect to a central or substantive issue.

[31] Absent a definitive ruling by the Chambers judge on the categorization of the order, combined with the ambiguity in the decision itself, the best solution for appeal purposes is to decline to categorize items 1 to 4 of the formal order as being either final or interlocutory.

Regardless, as discussed in the next section, I would grant leave to appeal *nunc pro tunc* on the privilege issue. If the question of access to the sealed documents arises further in the court below, the Chambers judge or the stage 2 judge can address it.

[32] Lastly, costs orders raise an interesting issue regarding the necessity of leave. If only a costs order is being appealed, s. 6-14(b) of *The King's Bench Act*, SS 2023, c 28, requires that leave of the judge who made the order be obtained. That is not the case here. In the matter at hand, the costs orders arise in conjunction with a series of orders.

[33] There will be no ability for the Chambers judge or the judge who ultimately determines the issues at stage 2 to revisit the costs awards made in the *Chambers Decision: Greengen Holdings Ltd. v British Columbia (Ministry of Forests, Lands and Natural Resource Operations)*, 2024 BCSC 18 at paras 7-11, rev'd 2025 BCCA 115 (but not on the issue of costs), leave to appeal to SCC pending, docket 41848). In that respect, for appeal purposes, the costs orders seem final.

[34] Although the costs orders dispose of SBDFN's rights in a *final and binding way*, they do not dispose of any of SBDFN's rights with respect to a *central or substantive issue*. As a result, I find that the costs orders are interlocutory and require leave. This is congruent with the underlying purposes of the leave requirement – the screening of proposed appeals for the purpose of avoiding needless expense and delay: *Miller v Miller Estate*, 2024 SKCA 70 at para 17 [*Miller*]. I would further note that such orders remain subject to being appealed, in the same manner as all incidental decisions arising out of a Chambers application, after a final judgment is rendered: s. 9(5) of *The Court of Appeal Act, 2000*, Rule 12(2) of *The Court of Appeal Rules*, and *Bank of Montreal v Kergen*, 1988 CanLII 5269 at para 4, 70 Sask R 166 (SKCA).

[35] In my view, for purposes of this appeal, all the orders made in the *Chambers Decision* were interlocutory in nature or, in the case of items 1 to 4 of the formal order, potentially interlocutory. As such, leave to appeal was required. Given that leave has not yet been obtained, I must turn to an examination of whether leave to appeal should be granted *nunc pro tunc*.

## **B. Partial leave to appeal should be granted *nunc pro tunc***

[36] SBDFN submits that, if leave to appeal is required, it should be granted *nunc pro tunc* on all grounds of appeal. Maurice Law, Pasqua First Nation, Muskowekwan First Nation, and Day Star First Nation oppose leave being granted *nunc pro tunc*. The remaining respondents take no position on this issue.

[37] This Court may grant leave to appeal *nunc pro tunc* in appropriate circumstances, but it is an extraordinary power that must be exercised sparingly so as not to defeat the purposes of the requirement to obtain leave: *Lombard* at paras 55-58, *Miller* at paras 17-18, and *Xiao-Phillips v Thomson*, 2024 SKCA 67 at paras 33-34. It is incumbent on counsel to carefully scrutinize any order or judgment that their client wishes to appeal and to be proactive in seeking leave within the time period provided by s. 9(3) of *The Court of Appeal Act, 2000*, or other applicable legislation. Further, in my view, failing to apply for leave to appeal and then seeking it *nunc pro tunc* at the hearing of the appeal exposes that party to a costs award, regardless of the outcome of the *nunc pro tunc* leave application or the appeal.

[38] The first step in considering whether to grant leave *nunc pro tunc* consists of determining whether the standard leave criteria are met: *Miller* at para 18. The test for the granting of leave is described by Kalmakoff J.A. in *Michel v Saskatchewan*, 2023 SKCA 97:

[19] Where leave to appeal is required, the determination as to whether it should be granted is guided by two key considerations: merit and importance. An applicant for leave to appeal bears the onus of establishing that the prospective appeal is “of *sufficient merit* to warrant the attention of the Court of Appeal” and “of *sufficient importance* to the proceedings before the court, or to the field of practice or the state of the law, or to the administration of justice generally, to warrant determination by the Court of Appeal” (*Rothmans, Benson & Hedges Inc. v Saskatchewan*, 2002 SKCA 119 at para 6, 227 Sask R 121, emphasis in original [*Rothmans*]).

[20] The merit criterion does not set a high bar for a prospective appellant to clear. At this stage of the analysis, an appellate Chambers judge is not required to decide whether the proposed appeal will succeed, but rather to consider whether the proposed appeal is *prima facie* frivolous or vexatious or *prima facie* destined to fail, bearing in mind the standard of review that would apply were leave to be granted and the appeal to proceed [references omitted]. Under the merit branch of the test, a judge should also consider whether the appeal would unduly delay the proceedings or add unduly or disproportionately to their cost [reference omitted].

[21] The second branch of the test – assessing the importance of the proposed appeal – requires consideration of whether the issues raised by the proposed appeal are of sufficient importance to the proceedings before the court, the field of practice or the state of the law, or the administration of justice generally to warrant determination by the Court of Appeal. This branch of the *Rothmans* test asks questions such as:

- does the decision bear heavily and potentially prejudicially upon the course or outcome of the particular proceedings?
- does it raise a new or controversial or unusual issue of practice?
- does it raise a new or uncertain or unsettled point of law?
- does it transcend the particular in its implications?

[22] In the end, the authority to grant leave is discretionary and calls for an appellate Chambers judge to decide whether they are sufficiently concerned about the correctness of a decision to warrant its exercise [reference omitted]. Such concerns, however, must amount to something of substance. Judges of this Court have repeatedly endorsed the position that the party applying for leave to appeal must demonstrate that both the merit and importance considerations weigh decisively in favour of leave being granted [references omitted]. Even where a proposed appeal appears to have merit, leave may be properly denied if the application fails under the importance branch [references omitted].

Additionally, any other relevant considerations, such as delay and expense, may also be taken in account: *Miller* at para 23.

### **1. First group of orders**

[39] I would first consider the group of orders that fall into the category of document production respecting work performed for other First Nations, procedural rulings, applications to strike certain evidence, and applications to admit certain evidence. These are found in paragraphs 6(a) to 6(d), 9, and 11 of the formal order resulting from the *Chambers Decision* and include the jurisdictional objection addressed in the *Oral Decision*. SBDFN's representations on these issues were sparse and not well-developed. Considering that the Chambers judge was also the case management judge, and that he had retained jurisdiction on some of the matters prior to his appointment as such, the grounds of appeal on this group of orders are not strong: *Jastek Master Builder 2004 Inc. v Holmes*, 2021 SKCA 57 at para 44, and the 2023 *Fiat* at para 177. This weighs against leave being granted, even though the low bar for merit has been crossed – that is, the appeals from these orders are not *prima facie* frivolous or vexatious or destined to fail.

[40] Combining the weakness of the grounds of appeal with an examination of the importance factor, leads me to conclude that leave should not be granted. The issues do not bear heavily and potentially prejudicially on the outcome of this matter, particularly when the principle of

proportionality is added to the mix. As to general importance, the jurisprudence regarding all these issues is well settled. SBDFN has not pointed to any new or controversial or unusual issues of practice or a new or uncertain or unsettled point of law. Nor do the grounds of appeal related to these orders transcend the particular in their implications. In summary, I am not convinced that any of the arguments made in relation to these orders justifies the exercise of the Court's extraordinary power to grant leave *nunc pro tunc*. I would deny leave to appeal from this group of orders.

## **2. Second group of orders**

[41] Turning next to the file and privilege orders – items 1 to 4 of the formal order – I would grant leave to appeal these four orders, if necessary, for the reasons noted above. Although I ultimately determine that the appeal of these orders should be dismissed, the grounds of appeal related to them would have satisfied the merit and importance criteria had a leave application been brought earlier. The core issue raised was extensively briefed and argued in this Court and forms the main point in contention. No further delay or expense will be occasioned to the parties by granting leave *nunc pro tunc* to appeal these orders. The jurisprudence will be enhanced, though perhaps marginally, by a further examination of this issue. I would grant leave to appeal items 1 to 4 of the formal order.

## **3. Third group of orders**

[42] Lastly, regarding the costs orders – items 13 to 18 of the formal order – I would not grant leave to appeal these orders. Even if I accept that the low bar on merit has been crossed, this portion of the proposed appeal fails to satisfy the importance test. It is difficult to see how a costs order of the nature in dispute here could bear heavily and potentially prejudicially upon the course or outcome of these proceedings.

[43] Again, there is nothing controversial or unusual or an uncertain or unsettled point of law at stake. This portion of the proposed appeal does not transcend the particular in their implications. I see no reason why the Court would exercise its extraordinary power to grant leave *nunc pro tunc* in relation to the costs orders.

### C. The fresh evidence application should be dismissed

[44] SBDFN filed an application, pursuant to Rule 59 of *The Court of Appeal Rules*, to adduce fresh evidence on the appeal. The proposed evidence consists of an affidavit sworn on September 30, 2025, by Diane Phillips, a legal assistant for SBDFN's counsel. Exhibited to the affidavit are several emails, a printout from the efilings portal of the Specific Claims Tribunal of Canada for docket SCT-5001-13, and a proposed supplemental appeal book that contains 357 pages of documents for a total of 373 additional pages. The 357 pages consist of a letter from Corey Omer (counsel who is also involved in the IR 80A Claim), five affidavits with exhibits, and formal responses: all of which were filed with the Specific Claims Tribunal of Canada for docket SCT-5001-13 by Pasqua First Nation, Muskowekwan First Nation, and Day Star First Nation. At the hearing of this appeal, SBDFN submitted that the one-page letter from Mr. Omer could be removed from its fresh evidence application but should still be considered by the Court.

[45] Maurice Law, Pasqua First Nation, Muskowekwan First Nation, and Day Star First Nation oppose the introduction of the fresh evidence. The remaining respondents take no position on this issue.

[46] In response to the application, Maurice Law filed the affidavit of Nicole Fedak, a legal assistant for one of Maurice Law's counsel. Exhibited to her affidavit is an email thread between Mr. Omer and SBDFN's counsel from October 1, 2025, to October 9, 2025, and an affidavit sworn on December 19, 2022, by Chief Rodger Redman of SBDFN, which was filed in a case in the Federal Court of Appeal. Maurice Law has not filed its own fresh evidence application and only seeks to have this affidavit admitted if SBDFN's application for fresh evidence is granted.

[47] The test for the admission of fresh evidence is found in *R v Palmer*, 1979 CanLII 8, [1980] 1 SCR 759 (SCC), as further discussed in *Barendregt v Grebliunas*, 2022 SCC 22 (at para 29):

- (i) the evidence could not, by the exercise of due diligence, have been obtained for the [lower-court hearing] ... ;
- (ii) the evidence is relevant in that it bears upon a decisive or potentially decisive issue;
- (iii) the evidence is credible in the sense that it is reasonably capable of belief; and
- (iv) the evidence is such that, if believed, it could have affected the result [of the lower-court decision].

[48] I have examined the fresh evidence application in relation to whether to grant leave to appeal as well as in relation to the portion of the appeal on which I have granted leave. It is my view that the fresh evidence should not be admitted in either respect.

[49] Before applying the *Palmer* criteria, it is helpful to understand the rationale SBDFN proffered for the admission of the proposed fresh evidence. First, it submitted that the fresh evidence demonstrates that Pasqua First Nation, Muskowekwan First Nation, and Day Star First Nation took a different position on the joint retainer and privilege issue in front of the Specific Claims Tribunal than they did in front of the Chambers judge and are now taking in this Court. It argues this is an abuse of process and contends that the *Palmer* criteria do not apply when abuse of process is alleged. SBDFN further asserts that the proposed fresh evidence is relevant to the question of whether there was a joint retainer and whether the privilege claimants are entitled to withhold documents from SBDFN on the basis of privilege.

[50] SBDFN also argues that the fresh evidence is relevant to the question of whether it has received its complete file from Maurice Law. This last issue is irrelevant to this appeal because it is only the sealed documents over which privilege was found that are the subject matter of this appeal. If SBDFN believes that *other* documents are missing, it can pursue that issue in the first instance, not on this appeal. To the extent that SBDFN sought to widen the issues or supplement its submissions on the appeal in its brief of law on the fresh evidence application, without reference to how the fresh evidence justifies those additional submissions, those arguments must be disregarded.

[51] In support of its position, SBDFN points to a series of paragraphs in the affidavits of Matthew Peigan (who is a former Chief of the Pasqua First Nation), Chief Lloyd Buffalo of the Day Star First Nation, Chief Fabian Ironeagle of the Pasqua First Nation, and Roberta Soo-Oyewaste (who is a former Chief of the SBDFN). Some portions of the formal response pleadings filed with the Specific Claims Tribunal are also referenced. In its submissions, SBDFN did not speak to the other material filed on the fresh evidence application.

[52] Turning first to the due diligence prong of the inquiry, it is beyond doubt that the affidavits or formal responses themselves were not available for the Court of King's Bench hearing. They are new evidence in that regard. However, the due diligence test involves examining whether the

evidence was available at the time of the hearing, not whether it has been reduced to a new form or presented in a new document. The portions of the affidavits and the formal responses highlighted by SBDFN refer to information *shared* with SBDFN prior to the proceedings in the Court of King's Bench. The main thrust of SBDFN's arguments regarding privilege is that the information in question was freely shared with it; and, as such, nothing was confidential from it as one of the First Nations who had jointly retained Maurice Law. A key observation about this point is that SBDFN would have known what information had been provided to it during that period of time. This is the essence of sharing. Even though its Chief has changed, many SBDFN councillors from that time remain on the Band Council and the First Nation itself has existed continuously over the relevant period. SBDFN is a sophisticated entity, represented by counsel, and could have put that same information in one of its affidavits filed in the Court of King's Bench, had it wanted to do so. As this information was within its control to a large degree, I conclude SBDFN did not take all reasonable steps to adduce this evidence in the court below.

[53] I further note that, as part of SBDFN's fresh evidence application, prompted by what it says are akin to revelations in the Specific Claims Tribunal material, SBDFN did not file an affidavit in this Court from anyone in authority with SBDFN setting out what information had been shared with it or what information was unknown to it at the time of the hearing in the Court of King's Bench that it claims is now revealed in the Specific Claims Tribunal material. There is no evidence demonstrating the steps that SBDFN took to search its own records or the memories of its councillors or employees regarding its own knowledge of such matters. Simply put, SBDFN has not established that it exercised the required due diligence.

[54] Regarding credibility, SBDFN submits that the fresh evidence is *credible only for the purpose of this proceeding*. It places this qualification on its position because it intends to challenge the evidence at the Specific Claims Tribunal by cross-examining the affiants and filing its own evidence in rebuttal. No information was provided regarding which aspects of the evidence are not accepted or what would be sought to be contradicted in those proceedings. Instead, this Court is presented with a partial tribunal record that appears to be yet in flux. It is unusual, to say the least, to propose that a court should accept fresh evidence that the proffering party does not consider to be credible. However, no one disputes that affidavits have been submitted to the Specific Claims Tribunal or that some information was shared with SBDFN.

[55] Moving on to a combined analysis of the two remaining parts of the *Palmer* test, it is worth noting at this point of my analysis that all that remains at stake in this appeal is whether the Chambers judge erred in determining that the sealed documents, over which privilege is claimed, were privileged and that SBDFN was not one of the privilege holders. This turns on whether SBDFN established that it was a member of the joint-retaining First Nations, not simply whether some confidential information had been shared. SBDFN contends that the opposite position regarding the joint retainer is being taken by Pasqua First Nation, Muskowekwan First Nation, and Day Star First Nation in a different forum. It posits that the admission made in the Specific Claims Tribunal materials that confidential information was shared establishes that there was a joint retainer and that joint retainer included SBDFN.

[56] This is too long a bow to draw in the matter at hand based on the evidence provided here. The sharing of some confidential information in one proceeding does not necessarily mean that the parties jointly retained counsel in another proceeding or that the parties have waived solicitor–client privilege in its entirety: while not completely on point, see *Archibald v Archibald*, 2018 SKCA 86 at para 41 [*Archibald*]. Nowhere in the proposed fresh evidence do the privilege claimants take the position that there was a joint retainer which included SBDFN or that the sealed documents are not subject to solicitor–client privilege. An abuse of process is not established. In summary, nothing in the proposed evidence bears upon a decisive or potentially decisive issue or could have affected the result in the *Chambers Decision*.

[57] For the reasons given, the fresh evidence application should be dismissed.

[58] I turn now to costs of the application. Regarding entitlement to costs, the principle that costs should follow the success of an application is appropriate here. Looking at the quantum of the costs, the volume of proposed fresh evidence is a factor. SBDFN submitted that it put the entirety of the affidavits and briefs in its fresh evidence application so that there was no issue of cherry-picking. However, the tendering of this vast amount of material was unnecessary and required the respondents to review a large volume of documentary evidence, which has ultimately been rejected for consideration in this appeal. For these reasons, I would award costs on the fresh evidence application from SBDFN to Maurice Law, fixed in the amount of \$2,500, payable forthwith. Likewise, I would award one set of costs to Pasqua First Nation, Muskowekwan First Nation, and Day Star First Nation, collectively, fixed in the amount of \$2,000, payable by SBDFN forthwith.

[59] None of the other respondents took positions, made submissions, or filed material on the fresh evidence application, so no costs on the application should be awarded regarding any other respondents.

#### **D. The Chambers judge did not err regarding privilege**

[60] As noted, the central issue on appeal is whether the Chambers judge erred in finding that SBDFN was not entitled to the sealed documents because of the existence of solicitor–client privilege. This question turns on whether the Chambers judge erred in determining that SBDFN had failed to establish that it was part of the group of First Nations who jointly retained Maurice Law on the IR 80A Claim.

##### **1. Position of the parties on privilege**

[61] Maurice Law takes no position on this issue, other than to submit that SBDFN is “weaponizing these issues to expand the scope of this taxation well past its breaking point, in the hopes of gaining access to the files of other First Nations and to work product for which it has not paid and for which it has no apparent intention of paying”. Pasqua First Nation, Muskowekwan First Nation, and Day Star First Nation echo this concern.

[62] George Gordon First Nation, Muscowpetung First Nation, and Piapot First Nation are represented by different counsel on this appeal than they were in the Court of King’s Bench. They take no position as to whether SBDFN was a party to a joint-retainer agreement on the IR 80A Claim with the other privilege claimants. They, as three of the joint holders of the solicitor–client privilege in the disputed documents, no longer object to them being released to SBDFN “on the basis of common-interest privilege”, provided that SBDFN “undertakes to not disclose the documents to Canada or file the documents with the Court, unless such documents are filed under seal and a Court order sealing the documents from public review is obtained”. In the course of its submissions, SBDFN did not offer such an undertaking nor state that it would be content with a result to that effect. These three First Nations take no position in relation to the remaining issues on appeal, do not ask for costs of the appeal, and request that no order for costs be made against them.

[63] Kawacatoose First Nation argues forcefully that it was not part of a joint retainer with Maurice Law respecting the IR 80A Claim and contends that the Chambers judge did not err in reaching that conclusion. It takes no position regarding whether SBDFN was part of such a joint retainer. In my view, the bottom-line to this position is that Kawacatoose First Nation is not asserting that it has solicitor–client privilege in the disputed documents so it has no interest at stake in this aspect of the appeal.

[64] Pasqua First Nation, Muskowekwan First Nation, and Day Star First Nation continue to assert privilege in the disputed documents and submit that no error was made by the Chambers judge. They argue that the standard of review for this finding is palpable and overriding error, an error which SBDFN has not established. They further submit that privilege cannot be waived by the other three privilege claimants, even to the limited extent proposed, without the consent of all the privilege claimants.

## 2. Analysis of SBDFN’s assertions of error

[65] Despite SBDFN’s repeated attempts to have this Court construe the privilege claimants’ submissions as having admitted that privilege cannot be asserted against it for the disputed documents, there were no such concessions by the privilege claimants.

[66] It is instructive to briefly examine the legal principles associated with solicitor–client privilege and describe the nature of a joint retainer. Privilege arises as a result of “confidential communications between the client and [their] solicitor” (*Blank v Canada (Minister of Justice)*, 2006 SCC 39 at para 28, quoting R.J. Sharpe, “Claiming Privilege in the Discovery Process” in *Special Lectures of the Law Society of Upper Canada* (Law Society of Upper Canada, 1984) at p 163). Solicitor–client privilege is “fundamental to the proper functioning of our legal system and a cornerstone of access to justice” in the Canadian legal system (*Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53 at para 34). The assurance of confidentiality inherent in the relationship must be “as close to absolute as possible” (*R v McClure*, 2001 SCC 14 at para 35).

[67] A solicitor–client relationship can involve a single party and a lawyer or it might involve multiple parties who have retained the same counsel or law firm, as the case may be, on the same matter. In the latter case, a joint retainer arises. It stands to reason that clients who are party to a

joint retainer must have common interests because a lawyer is prohibited from acting for parties on a matter in which the clients' interests conflict: rule 3.4-5(c) of the Law Society of Saskatchewan's *Code of Professional Conduct*, 2012. In a joint retainer, there is no confidentiality as between all the jointly retaining clients and their counsel, but privilege may be asserted as against the rest of the world: *CPC Networks* at para 59 and *R v Dunbar*, 1982 CanLII 3324 at para 56, 138 DLR (3d) 221 (ONCA). When clients consent to a joint retainer, they implicitly authorize the sharing of confidential information among the parties to that joint retainer. All of this is viewed from the clients' perspective, to whom the privilege belongs.

[68] A joint retainer may arise as a result of a written or an oral contract or can be inferred from the conduct of the parties: *Archibald* at paras 28 and 39 and *Texas Industries Ltd. v Siewert*, 1996 CanLII 19949 at para 18, 194 AR 303 (ABQB), *aff'd* 1998 ABCA 367.

[69] Turning back to the matter at hand, it is my view that the Chambers judge fully understood the nature of joint retainers and the related privilege issues. He canvassed these topics extensively in paragraphs 123 to 161 of the *Chambers Decision*. While item 1 of the formal order and paragraph 162 of the *Chambers Decision* refer to "privilege, proprietary or otherwise", an overall reading of the *Chambers Decision* makes it apparent that the decision here was based on solicitor–client privilege and, in particular, turned on whether SBDFN was included in the joint retainer.

[70] SBDFN advances eight arguments they say demonstrate error on the part of the Chambers judge. I will deal with each of its submissions in turn.

[71] The first point asserted by SBDFN is that the Chambers judge erred by shifting the onus to SBDFN to establish the absence of privilege, when the privilege claimants bore the burden of establishing privilege. I agree that a party who asserts solicitor–client privilege has the onus of demonstrating that such a privilege exists: *Boldt v Saskatchewan Telecommunications*, 2025 SKCA 54 at para 22, and *Hamalainen v Sippola*, 1991 CanLII 440, [1992] 2 WWR 132 at para 21 (WL) (BCCA). However, the existence of solicitor–client privilege was not in contention before the Chambers judge. SBDFN did not argue that solicitor–client privilege does not exist in the documents over which privilege is asserted by the privilege claimants. Nowhere in its submissions does SBDFN say that there is no solicitor–client privilege. To the contrary, its submissions must be characterized as an assertion that the documents are subject to solicitor–client privilege but,

because it was a party to the joint retainer with the privilege claimants, privilege cannot be asserted as against it. Rather, the question before the Chambers judge, as it is on this appeal, was whether SBDFN is one of the privilege holders. This is a significantly different issue than a more common situation where privilege is asserted as against a third party and the question is whether the privilege exists. Thus, the outcome here turns on a determination of whether SBDFN had jointly retained Maurice Law with the privilege claimants.

[72] Further, there was no onus on the privilege claimants to rebut SBDFN's assertion that it had jointly retained Maurice Law. The privilege claimants had established solicitor–client privilege in the disputed documents. SBDFN claimed that it was also a concurrent privilege holder by virtue of a joint retainer. The existence of this joint retainer was an assertion of fact by SBDFN. It had the onus of establishing that fact: *Archibald* at para 37. The privilege claimants did not have the onus to disprove that fact. There is no merit in this argument.

[73] In its second argument, SBDFN submits that the Chambers judge erred by determining the joint retainer and privilege issue on a theory that was not raised by any of the parties or non-parties at the hearing. It argues that none of the participants had submitted that the privilege claimants' Band Council resolutions [BCRs] created a joint retainer with Maurice Law or that a joint retainer commenced with the passing of their respective BCRs to the exclusion of SBDFN. There is no particular part of the *Chambers Decision* that SBDFN points to as demonstrating this assertion. I note that the BCRs were discussed in the *Chambers Decision* at paragraphs 134 to 137 and 157 to 159. The Chambers judge also touched on BCRs at paragraphs 165 to 179, but because those are only alternate findings, I need not address these latter references. Instead, I understand SBDFN to be taking issue with the following conclusion:

[159] While SBDFN is identified in these BCRs as a joint claimant, there is no documentary evidence filed that they ever signed a BCR establishing this type of relationship with Maurice [Law]. I find that, presently, there is insufficient evidence establishing SBDFN as part of the above joint retainer agreement with Maurice [Law] and the other noted First Nations. How can a document entered into and signed by others establish the legal rights of an unsigned party?

[74] I see no error in the Chambers judge's treatment of the BCRs. There was evidence before him that the privilege claimants had each passed BCRs retaining Maurice Law for the IR 80A Claim, but there was no *corresponding* BCR from SBDFN in the evidence. The Chambers judge

explicitly relied on the 2020 MOU and the BCRs as evidence establishing that the privilege claimants were collectively part of a joint retainer: see paragraph 157 of the *Chambers Decision*. The Chambers judge was entitled to put the absence of a similar BCR by SBDFN into the mix in determining that SBDFN had not established that it was included in that joint retainer. This was not a new theory. It was an appropriate consideration and involved the weighing of the evidence in the context of the participants' opposing theories regarding the joint retainer. The Chambers judge did not err in considering and weighing all the evidence the parties had placed before him and in using the presence and absence of BCRs as a reason for reaching his overall conclusion.

[75] In its third argument, SBDFN contends that the Chambers judge erred by failing to find that a joint retainer can be created by an oral or a written contract or be inferred from the conduct of the parties. In its factum, SBDFN dedicated one paragraph to this submission; and, other than referring to this principle being set out in paragraph 28 of *Archibald* and in paragraph 59 of *CPC Networks*, it did not explain where this error was to be found in the *Chambers Decision* or how it was established. In oral submissions, SBDFN expanded on its arguments on this issue somewhat. It asserted that the Chambers judge required there to be a legally binding contract before a joint retainer could be found. SBDFN relied on the following paragraphs from the *Chambers Decision* in support of this argument (some repetition for reference):

[159] While SBDFN is identified in these BCRs as a joint claimant, there is no documentary evidence filed that they ever signed a BCR establishing this type of relationship with Maurice [Law]. I find that, presently, there is insufficient evidence establishing SBDFN as part of the above joint retainer agreement with Maurice [Law] and the other noted First Nations. How can a document entered into and signed by others establish the legal rights of an unsigned party?

...

[198] While Chief Peigan further deposed in para. 10 of that same affidavit that "I have been advised by Ron S. Maurice of Maurice Law and do verily believe that file materials have in fact been produced or commissioned for the benefit of the eight Accepted Beneficiaries for the purposes of these settlement negotiations with Canada", this second-hand information is not relevant for consideration whether a joint contract exists between Maurice [Law], SBDFN and other First Nations. As noted previously, the determination of *consensus ad idem* requires objective written evidence and not the opinion of a party as deposed in an affidavit. Chief Peigan's affidavit is also open to the interpretation that Maurice [Law] may have separate retainer arrangements with the parties in the lawsuit.

[76] I do not agree that the Chambers judge erred in the way asserted by SBDFN. The Chambers judge found the MOU and the BCRs to be highly relevant evidence, but he also examined the other evidence and did not state that there needed to be a formal contract or documents evidencing such an agreement. The documentary evidence was important in the Chambers judge's analysis of the joint retainer issue, but this does not mean that the Chambers judge held that a written or oral contract was required in order for SBDFN to establish that a joint retainer existed. While SBDFN is correct in its submissions that a solicitor–client relationship can arise in the absence of a formal written retainer, the question here was whether a joint retainer could be inferred from the evidence. It was clear that there was no written retainer agreement and no evidence establishing an oral contract to that effect, so the Chambers judge examined the evidence to see if he could infer that a joint retainer existed. The documents assisted in making that determination but at no point did the Chambers judge express the view that a formal contract was required for SBDFN to be successful on that issue. To the contrary, he stated the following:

[123] In determining this matter, I must first scrutinize whether the Memorandum of Understanding [MOU] involving various First Nations, including SBDFN, that I will reproduce below, constituted a joint retainer involving SBDFN or *whether there exists some other evidence that would, in concert with the MOU or independently establish a joint retainer* between Maurice [Law], SBDFN and some First Nations.

(Emphasis added)

[77] SBDFN argues vigorously that an expectation of confidentiality existed as between Maurice Law, the privilege claimants, *and* SBDFN. The corollary to this argument is that, because confidentiality to the exclusion of all others is a critical underlying tenet of solicitor–client privilege, the privilege claimants cannot assert privilege against SBDFN. However, the Chambers judge found that there was a joint retainer that did not include SBDFN. As such, this means that he found a solicitor–client relationship existed between Maurice Law and the privilege claimants that, as one of its fundamental characteristics, excluded all others (including SBDFN). Although there was some evidence that the privilege claimants had shared some information with SBDFN concerning the IR 80A Claim, that alone did not destroy the existence of the solicitor–client relationship.

[78] An inquiry into whether a joint retainer exists is a highly fact-sensitive and context-dependant analysis: see, for example, *Capital Sports Management Inc. v Trinity Development Group Inc.*, 2022 ONSC 2657 at paras 33-37, rev'd 2022 ONSC 6128 (but not on the context-

dependant aspect). The conclusions reached by the Chambers judge regarding the entities that were included in the joint retainer were findings of fact. SBDFN has not established a palpable and overriding error in those determinations.

[79] Fourth, SBDFN submits that the Chambers judge failed to identify which evidence was admissible and which evidence was inadmissible for purposes of its application. It contends that *Wongstedt v Wongstedt*, 2017 SKCA 100 at para 39 [*Wongstedt*], requires a Chambers judge to make such determinations. SBDFN points to the following excerpt from the *Chambers Decision* as indicative of this alleged error:

[196] While Chief Peigan asserts in his affidavit of November 16, 2022, at para. 10 that “In connection with the settlement negotiations with Canada, the eight Accepted Beneficiaries retained Maurice Law to act as negotiator and legal counsel furthering the collective interests of the Accepted Beneficiaries who have a joint and undivided interest in IR 80A”, I noted at para. 25 of my [2023 *Fiat*] that this was opinion evidence and presumptively inadmissible, and, at the bequest of SBDFN, I only considered this statement as part of the narrative for explanations of other portions of Chief Peigan’s affidavit.

[80] It is important to recognize what *Wongstedt* determined about a Chambers judge’s obligations regarding the admissibility of affidavit evidence. There, a Chambers judge had not properly addressed two notices of objection to a party’s affidavits. In this regard, Caldwell J.A. contextualized the issue as follows:

[35] ... the Chambers judge had to determine whether the portions of Ms. Wongstedt’s affidavits impugned by Mr. Wongstedt’s notices of objection complied with *The Queen’s Bench Rules* and whether they ought to be struck. However, in addressing this issue, the Chambers judge simply wrote:

[5] Firstly, the court will deal with the two notices of objection. The court reviewed the portions which counsel for the petitioner requests be struck from the two affidavits of the respondent. The court accepts that some of the objections are appropriate in each affidavit. The court will ignore the portions which are in non-compliance with *The Queen’s Bench Rules*.

That is, he did not identify the portions of the affidavits that were not in compliance with *The Queen’s Bench Rules* or explain why that was so.

[81] Justice Caldwell determined that the judge’s response to the objection was not sufficient and discussed a Chambers judge’s obligation, in the face of a notice of objection to affidavit evidence, in the following terms:

[39] Regardless of how it is done, the parties, counsel and judges who hear subsequent applications ... must know what evidence was properly before the court or what evidence was struck from the record. Lastly, the practice of clearly identifying evidence that has been struck and briefly stating why it was struck provides an appellate court with the foundation for meaningful review of that decision, if it should be appealed.

[82] The problem with SBDFN's reliance on *Wongstedt* is that SBDFN does not assert that it had filed a notice of objection to affidavit evidence that the Chambers judge failed to address. Instead, in written argument, SBDFN goes much further and contends that "it is not clear what evidence was considered admissible and what evidence was not". It provided paragraph 196 of the *Chambers Decision* (quoted above at paragraph 79) as "one example among many", without identifying any other instances. To the extent that SBDFN submits the Chambers judge had to walk through every affidavit in the voluminous record before him and rule on what evidence was admissible and what evidence was not, this is incorrect.

[83] Absent a notice of objection, or an application for a ruling on admissibility, a Chambers judge does not have to sift through the affidavits and engage in an explicit categorization of the various averments as being admissible or inadmissible: see *Mosiuk v BASF Canada Inc.*, 2025 SKCA 90 at para 47. For the evidence whose admissibility was expressly challenged by SBDFN through a formal application – for example, the affidavits of Anna Lomma – the Chambers judge gave extensive reasons for not striking them: see paragraphs 237 to 245 and paragraphs 250 to 269 of the *Chambers Decision*.

[84] Regarding Chief Peigan's affidavit, the Chambers judge noted SBDFN's objection to parts of that affidavit and stated that he "will only refer to the portions I find relevant and admissible in relation to this hearing" (at para 141). He then referred to various aspects of it, which he inferentially accepted. The Chambers judge described the use to which Chief Peigan's evidence was put at paragraphs 130, 131, 142, 196, and 198 and further discussed it in the context of the request to cross-examine Chief Peigan at paragraphs 230 to 236 of the *Chambers Decision*.

[85] SBDFN has not pointed to anything else *in the record* where it had made additional oral objections to the admissibility of the evidence at the hearing in the Court of King's Bench. As was done here, it is good practice for a judge to explain why certain key evidence is accepted only for a limited purpose. No error is revealed in the Chambers judge's identification of admissible and inadmissible evidence.

[86] In its fifth argument, SBDFN says that the Chambers judge disregarded, misapprehended, or failed to consider admissible evidence. It simply submits that the “evidence in this regard is addressed at paras 17–53 [of SBDFN’s factum], which is incorporated herein”. Those paragraphs set out the facts, as SBDFN sees them, but its factum does not identify any particular evidence that the Chambers judge is said to have disregarded, misapprehended, or failed to consider. In oral submissions, SBDFN asserted that the Chambers judge ignored key evidence from Chief Peigan. However, as noted above, the Chambers judge did not ignore this evidence, he simply did not accept that it proved what SBDFN asserted that it did. There is no indication that the Chambers judge disregarded, misapprehended, or failed to consider admissible evidence in finding that SBDFN has failed to establish the existence of a joint retainer. SBDFN has not demonstrated that this error occurred.

[87] Sixth, SBDFN argues that the Chambers judge erred by failing to (a) consider the sworn testimony of Ronald Maurice, given when cross-examined in QBG-RG-00885-2020 and QBG-RG-00748-2021 (another matter), and (b) permit SBDFN to cross-examine Chief Peigan and Chief Bellegarde.

[88] As set out above, leave to appeal is denied from the orders dismissing these requests. Even if I considered this argument as part of a ground of appeal regarding the orders from which leave to appeal has been granted, there is no merit for the reasons expressed in *Ter Keurs Bros. Inc. v Last Mountain Valley (Rural Municipality)*, 2019 SKCA 10 at para 24. In its factum, SBDFN provided three sentences of submissions regarding this ground of appeal, none of which establish error.

[89] Seventh, at the hearing of the appeal, SBDFN argued that the Chambers judge failed to examine privilege on a document-by-document basis and, instead, made a broad, all-encompassing finding. It points to item 2 of the formal order as supporting this assertion. As a reminder, that item and the one preceding it are as follows:

1. The PCFN [privilege claimants] have met their burden in establishing privilege, proprietary or otherwise, in the vetted portions of the documents tendered to the Court as against SBDFN. No joint retainer has been established between Maurice Law, SBDFN, and any other First Nation;

2. Maurice Law shall not disclose to SBDFN any document over which privilege is asserted that relates to the involvement or potential involvement with Maurice Law of the PCFN, Kawacatoose First Nation, Star Blanket First Nation, or Little Black Bear First Nation ... .

[90] Reading item 2 in the context of item 1, it is obvious that the Chambers judge was referring to the disputed documents and not making an order at large regarding any other assertion of privilege that may be put forth at any time by any of the named First Nations. This argument has no merit.

[91] Lastly, SBDFN contends that several documents were withheld from it, despite no claim of privilege being advanced in relation to them. SBDFN did not further identify these documents in its arguments or explain their significance. It asserts that it was unable to make submissions regarding these documents and their evidentiary value on the privilege question, so this Court should receive those submissions now and decide the matter afresh. I decline to do so because SBDFN has not made a compelling argument for this Court to exercise its authority in this way.

### **3. Conclusion on joint retainer argument**

[92] Overall, the Chambers judge's determination that SBDFN had not established that it was part of the joint retainer was a finding of fact subject to review on the standard of palpable and overriding error: *Yorkton (City) v Mi-Sask Industries Ltd.*, 2021 SKCA 43 at para 25. Having failed to establish an error of law through its grounds of appeal or any palpable or overriding error in the findings of fact, SBDFN's appeal must be dismissed.

[93] As a final comment, I note that this appeal has not determined the issue of whether George Gordon First Nation, Muscowpetung First Nation, or Piapot First Nation can provide the disputed documents to SBDFN without the unanimous consent of the other privilege claimants. In this regard, see *Kelly v Kelly*, 2021 BCSC 983 at paras 47-60. That issue, and whether such relief could even be granted given the *Chambers Decision*, would first need to be determined in the Court of King's Bench.

## **III. COSTS IN THIS COURT**

[94] I would award costs on this appeal, inclusive of any costs for the application to obtain leave *nunc pro tunc*, from SBDFN to Maurice Law, fixed in the amount of \$8,500. This is in addition to the costs awarded for the fresh evidence application.

[95] Likewise, I would award one set of costs from SBDFN to Pasqua First Nation, Muskowekwan First Nation, and Day Star First Nation, collectively, fixed in the amount of \$8,500. Again, this is in addition to the costs awarded for the fresh evidence application.

[96] I would award Kawacatoose First Nation costs, fixed in the amount of \$4,000, payable by SBDFN.

[97] To avoid any doubt about this, these costs are payable forthwith.

[98] George Gordon First Nation, Muscowpetung First Nation, and Piapot First Nation do not ask for costs on the appeal. Conversely, Pasqua First Nation, Muskowekwan First Nation, and Day Star First Nation seek an order of costs in their favour against George Gordon First Nation, Muscowpetung First Nation, and Piapot First Nation arising out of the latter First Nations' purported request for a remedy permitting them to provide the disputed documents to SBDFN. In my view, this should not attract a costs order. There was no request for a remedy by the latter three First Nations; they merely described their position regarding the disputed documents. Accordingly, no costs are awarded for or against George Gordon First Nation, Muscowpetung First Nation, and Piapot First Nation.

#### IV. CONCLUSION

[99] Leave to appeal is granted *nunc pro tunc* on the issues described above.

[100] SBDFN's fresh evidence application and its appeal should be dismissed, with costs as set out above.

“Tholl J.A.”

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Tholl J.A.

I concur.

“Schwann J.A.”

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Schwann J.A.

I concur.

“Kilback J.A.”

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Kilback J.A.

