*R v Zoe*, 2020 NWTSC 51 S-1-CR-2020-000071

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

BOBBY ZOE

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Transcript of the Decision of The Honourable Justice

S.H. Smallwood, sitting in Yellowknife, in the Northwest Territories, on the 19th day of November, 2020.

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APPEARANCES:

B. MacPherson (by telephone): Counsel for the Crown

J. Cunningham (by video): Counsel for the Applicant

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I N D E X

PAGE

REASONS FOR DECISION 2

# REASONS FOR DECISION

1. THE COURT: All right. So I will be
2. giving a decision today.
3. The applicant, Bobby Zoe, was designated a
4. dangerous offender and sentenced to an
5. indeterminate sentence. He successfully appealed
6. his sentence, and the matter was remitted back to
7. the Territorial Court for a new sentencing
8. hearing.
9. Mr. Zoe now brings an application for
10. prohibition to prevent the sentencing judge from
11. rehearing the Crown's application to have Mr. Zoe
12. declared a dangerous offender.
13. On February 23, 2016, Mr. Zoe was convicted
14. after trial in the Territorial Court of three
15. offences: breaking and entering into a dwelling
16. house and committing sexual assault, breaking and
17. entering into a dwelling house and committing
18. theft, and breach of probation for failing to
19. keep the peace and be of good behaviour.
20. Following Mr. Zoe's convictions, the Crown
21. sought to have Mr. Zoe designated as a dangerous
22. offender. The sentencing judge presided over a
23. dangerous offender hearing, which was held from

25 July 10 to 12, 2017. The matter was then

1. adjourned to December 7, 2017, for counsel to
2. make written submissions. Following brief oral
3. submissions, the matter was adjourned to the
4. following day for decision.
5. On December 8, 2017, the sentencing judge
6. found that Mr. Zoe was a dangerous offender
7. pursuant to section 753(1)(b) of the *Criminal*
8. *Code*. The sentencing judge then went on to
9. sentence Mr. Zoe to an indeterminate period of
10. detention.
11. Mr. Zoe appealed his convictions and his
12. designation as dangerous offender and the
13. indeterminate sentence to the Court of Appeal.
14. Court of Appeal decision was released on January
15. 31, 2020. The Court of Appeal dismissed
16. Mr. Zoe's conviction appeal but allowed the
17. sentence appeal. The sentencing was remitted
18. back to the Territorial Court for a new
19. sentencing hearing.
20. In allowing the sentence appeal, the Court
21. of Appeal concluded that the sentencing judge had
22. committed two errors of law: failing to consider
23. Mr. Zoe's treatment prospects before designating
24. him a dangerous offender and applying a
25. presumption of an indeterminate sentence.
26. In the Territorial Court, the same judge who
27. presided over the trial and sentencing was
28. assigned to hear the new sentencing hearing.
29. Mr. Zoe brought an application to have the
30. sentencing judge recuse himself on the basis that
31. there was a reasonable apprehension of bias
32. because the sentencing judge had heard the first
33. dangerous offender application and made a number
34. of findings that bore directly on issues to be
35. determined at the rehearing.
36. On June 30, 2020, the sentencing judge
37. dismissed the recusal application.
38. Mr. Zoe now applies to prohibit the
39. sentencing judge from rehearing the dangerous
40. offender application on the basis that there
41. would be a reasonable apprehension of bias if he
42. were to do so.

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1. Position of the Parties
2. The applicant claims that allowing the
3. sentencing judge to rehear the dangerous offender
4. application would give rise to a reasonable
5. apprehension of bias and that in coming to the
6. decision not to recuse himself, the sentencing
7. judge applied the wrong test.
8. The Crown argues that the sentencing judge
9. applied the correct legal test and that there is
10. no reasonable apprehension of bias. The Crown
11. argues that the sentencing judge was correct not
12. to recuse himself and invites the court to
13. dismiss the application.

1

* 1. Application of the Incorrect Legal Test
  2. In an application for recusal, there is a
  3. presumption of impartiality. Our judicial system
  4. is premised on the concept that the judges make
  5. decisions without bias or prejudice.
  6. The test to determine whether a judge has a
  7. reasonable apprehension of bias and should be
  8. disqualified was established in *Committee for*
  9. *Justice and Liberty v. National Energy Board*,
  10. [1978] 1 S.C.R. 369, as cited in *Wewaykum Indian*

12 *Band v. Canada*, [2003] 2 S.C.R. 259 at 289:

13 (as read)

14

1. ... the apprehension of bias must be
2. a reasonable one, held by a
3. reasonable and right-minded person,
4. applying themselves to the question
5. and obtaining thereon the required
6. information. In the words of the
7. Court of Appeal, that test is 'What
8. would an informed person, viewing
9. the matter realistically and
10. practically -- and having thought
11. the matter through -- conclude?
12. Would he think that it more likely
13. than not that [the decision-maker],
14. whether consciously or
15. unconsciously, would not decide
16. fairly?'

4

1. I summarized the law in the *R v. Shingatok*,
2. 2018 NWTSC 58 at paras. 15-16, with respect to
3. the reasonable person and the requirement for the
4. apprehension of bias: (as read)

9

1. The reasonable person is not very
2. sensitive or scrupulous and was
3. further described by Justice Cory in

13 *S.(R.D.)*, [1997] 3 S.C.R. 484 at p.

14 531, as requiring:

15

1. [T]he reasonable person
2. must be an informed
3. person, with knowledge of
4. all of the relevant
5. circumstances, including
6. the "traditions of
7. integrity and impartiality
8. that form a part of the
9. background and apprised
10. also of the fact that
11. impartiality is one of the
12. duties that judges swear to uphold."

1

* 1. The onus is on the person alleging
  2. bias, and the threshold for real or
  3. perceived bias is high. A real
  4. likelihood or probability of bias
  5. must be shown and mere suspicion is
  6. not enough. There is a presumption
  7. that judges will fulfil their oath
  8. of office, which requires a judge to
  9. render justice impartially. All
  10. judges owe a fundamental duty to the
  11. community to make impartial
  12. decisions and to appear impartial.

14 *S.(R.D.), supra* at p. 532-534.

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1. Mr. Zoe claims that the sentencing judge erred by
2. applying the incorrect test and focussing on
3. whether there were reviewable errors in his
4. original decision rather than considering whether
5. a reasonably informed person would view a judge
6. hearing a dangerous offender hearing for the
7. second time and being asked to make findings of
8. fact again as being impartial.
9. The Crown argues that there was no error
10. because the sentencing judge referred to the
11. correct legal test and then applied it.
12. In his decision, the sentencing judge
    1. referred to the errors found by Court of Appeal
    2. and viewed them as arising because of a new test
    3. set by the Supreme Court of Canada in *R v.*
    4. *Boutilier*, 2017 SCC 64, which was released two
    5. weeks after the sentencing decision in this case.
    6. Whether *Boutilier* established a new test or
    7. simply refined the previous test is a matter of
    8. debate and not relevant to this decision.
    9. In his reasons, the sentencing judge went on
    10. to state the correct legal test from the *National*
    11. *Energy Board* case. He then stated at p. 6-7 of
    12. his decision: (as read)

13

1. In this case, the reasonable person
2. would be aware that a judge is bound
3. by his oath; that a judge conducting
4. a hearing will listen to the
5. evidence, listen to counsel, listen
6. to their arguments; consider the
7. evidence and the arguments; apply
8. the law and render a decision; that
9. a judge is indifferent to the
10. outcome but must, to the best of his
11. ability, ensure justice is done;
12. that a judge is aware of and
13. respects the principle of *stare*
14. *decisis*; that a judge is aware that
15. superior courts have the authority
16. to overturn trial court decisions,
17. and a judge accepts and respects the
18. appellate decision; that superior
19. courts have the authority to direct
20. trial court judges on issues
21. relevant to the law and procedure;
22. and a judge will accept and respect
23. that authority and comply with those
24. directions.
25. I acknowledged that the Court
26. of Appeal was critical of the way in
27. which I considered and applied the
28. *Gladue* factors, but the Court did
29. not consider my error on this issue
30. as a reviewable error. I believe
31. the person referred to in the quote
32. taken from the *National Energy* case
33. would conclude that in the
34. circumstances of this case, I can
35. conduct the rehearing. The recusal
36. application is denied.

23

1. The focus of the applicant in submissions at
2. the recusal application was not just on the
3. errors made by the sentencing judge at the
4. initial dangerous offender hearing but on the
5. evidence and determinations that would need to be
6. made by the sentencing judge at a rehearing.
7. Counsel for the applicant stated in submissions:
8. (as read)

5

1. Our position is that any judge who
2. made the findings and determinations
3. that were made in this case would
4. appear to an informed person to have
5. a predisposition towards a
6. particular result. And that is very
7. understandable since the dangerous
8. offender hearing encompasses
9. wide-ranging evidence about an
10. offender's background, criminal
11. history, correctional history,
12. assessments of risk, intractability,
13. treatability, and all the
14. possibilities of lesser measures
15. that could protect the public.
16. Especially when a decision is
17. made to order someone to be
18. incarcerated indeterminately, the
19. informed person would think that the
20. original judge would have
21. strongly-held views and findings
22. lingering from this challenging role

1 that was affected first time around.

2

1. In the sentencing judge's recusal decision, he
2. focused on the appeal and the impact of the Court
3. of Appeal's decision regarding his errors on the
4. reasonable person and did not address issues
5. raised by the applicant in submissions.
6. While the sentencing judge articulated the
7. correct legal test and adequately described the
8. reasonable person and the information regarding
9. the appeal process the reasonable person would
10. have knowledge of, his focus was on the
11. reviewable legal errors that might have been made
12. in his original decision and how those would be
13. viewed by the reasonable person.
14. In the original dangerous offender hearing,
15. Mr. Zoe conceded that he should be found a
16. dangerous offender but argued that an
17. indeterminate sentence should not be imposed.
18. Counsel for Mr. Zoe sought a penitentiary
19. sentence of eight years to be followed by a
20. long-term supervision order for ten years.
21. In deciding to impose an indeterminate
22. sentence on Mr. Zoe, the sentencing judge made
23. findings including that Mr. Zoe refused to accept
24. responsibility for most of his convictions, that
25. Mr. Zoe was an untreated sexual offender who was
26. unwilling or unable to accept treatment, and that
27. there was nothing in Mr. Zoe's background that
28. would lower his moral blameworthiness for the
29. predicate offence.
30. The sentencing judge failed to consider
31. whether the evidence adduced at the dangerous
32. offender hearing and his past findings regarding
33. Mr. Zoe, Mr. Zoe's background, and Mr. Zoe's
34. level of risk, intractability, or treatability
35. would cause a reasonable person to conclude there
36. was a reasonable apprehension of bias.
37. These are relevant concerns given the nature
38. of a dangerous offender hearing and the
39. significance of a dangerous offender designation
40. and an indeterminate sentence on an offender.
41. In the circumstances, I conclude that the
42. sentencing judge, erred in his application of the
43. test by failing to consider these factors in his
44. analysis.

20

1. Reasonable Apprehension of Bias
2. Turning now to whether there is a reasonable
3. apprehension of bias and whether the sentencing
4. judge should be prohibited from rehearing the
5. Crown's application to have Mr. Zoe designated a
6. dangerous offender.
7. The first issue I want to address is the
   1. jurisprudence on this issue: When the Court of
   2. Appeal allowed Mr. Zoe's appeal, they stated:
   3. (as read)

4

1. The decision below is quashed and
2. sentencing is remitted to the
3. Territorial Court for a new
4. sentencing hearing,

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1. The Court of Appeal did not remit the matter
2. back to the sentencing judge and did not
3. specifically address whether the matter should be
4. heard by the original sentencing judge or by
5. another judge.
6. The issue of whether the original sentencing
7. judge should hear the matter arose in case
8. management in the Territorial Court. Counsel for
9. Mr. Zoe was opposed to the original sentencing
10. judge hearing the matter. Counsel wrote to the
11. Court of Appeal seeking clarification and
12. requesting to have the formal order indicate
13. whether the matter was remitted to the original
14. trial judge or before a different judge. The
15. Court of Appeal issued an order which restated
16. the language from the Court of Appeal decision
17. but provided no further clarification.
18. Counsel made submissions at the recusal
    1. application and before me regarding the
    2. jurisprudence in this area when appeals are
    3. allowed and new dangerous offender hearings are
    4. ordered.
    5. The Court of Appeal chose not to direct that
    6. the matter be heard by a particular judge,
    7. whether it was the sentencing judge or another
    8. judge, although it was open for the Court of
    9. Appeal to do so, pursuant to s.759(3)(a)(ii) of
    10. the *Criminal Code*.
    11. While the decision in most cases that were
    12. presented to me has been that a new judge should
    13. be assigned to the rehearing, I do not think that
    14. this should be considered a standard practice nor
    15. should it automatically occur. There is no rule
    16. or presumption that a judge should recuse himself
    17. from a second dangerous offender hearing. If an
    18. offender is concerned about the same judge
    19. presiding over a rehearing, it is open to the
    20. offender to do as Mr. Zoe has done and bring an
    21. application for recusal on the basis of a
    22. reasonable apprehension of bias. A determination
    23. will have to be made on the basis of the specific
    24. facts and circumstance of each case.
    25. I referred earlier to the test: whether
    26. there was a reasonable apprehension of bias,
    27. whether a reasonable, informed person could
19. conclude that it is more likely than not that the
20. sentencing judge, whether consciously or
21. unconsciously, would not decide fairly.
22. The test has been stated in the *R v. Kelly,*
23. 2004 BSC 1063 at para. 31, in relation to
24. rehearing a dangerous offender application as:
25. (as read)

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1. ... whether a reasonably and fully
2. informed person would perceive a
3. real likelihood that the evidence
4. heard and findings made at the
5. earlier hearing would unconsciously
6. affect the decision made at the
7. subsequent hearing in spite of the
8. conscientious effort of the judge to
9. guard against that.

18

1. The applicant's arguments on this issue are
2. similar to those made before the sentencing judge
3. at the recusal application. They reflect
4. concerns about the same judge hearing evidence
5. regarding Mr. Zoe and his background and having
6. to make findings about Mr. Zoe's level of risk,
7. intractability, and treatability, and whether the
8. previous findings made by the same sentencing
9. judge would cause a reasonable person to conclude
10. that there was a reasonable apprehension of bias.
11. This case is not like in *R v. Johnson*, 2003
12. BCSC 1839, where the rehearing was going to be
13. focused on an issue that had not been considered
14. at the first hearing. In that case, the
15. sentencing judge declined to recuse himself on
16. the basis that he had made no findings of
17. credibility and the hearing was to consider new
18. evidence and would consider the long-term
19. offender provisions which had not previously been
20. considered.
21. In this case, while there may not be
22. findings of credibility to be made, I understand
23. that the hearing will require the sentencing
24. judge to make many of the same findings of fact
25. and conclusions as were required at the original
26. hearing including addressing some issues that may
27. not have been considered at the previous hearing.
28. In finding Mr. Zoe a dangerous offender and
29. deciding to impose a indeterminate sentence on
30. him, the sentencing judge necessarily had to make
31. findings about Mr. Zoe that were negative. As
32. the Supreme Court of Canada stated in *R v.*
33. *Boutilier*, 2017 SCC 64 at para. 3, the dangerous
34. offender provisions of the *Criminal Code*:
35. (as read)

27

* 1. ... authorize the most extreme and
  2. clearest form of preventative
  3. sentence that can be imposed on an
  4. offender, indeterminate detention,
  5. in order to protect the public from
  6. a small group of persistent
  7. criminals with a propensity for
  8. committing violent crimes against
  9. the person.

10

1. In this case, the sentencing judge made a
2. number of findings regarding Mr. Zoe. Among the
3. conclusions made by the sentencing judge are as
4. follows: (as read)

15

1. Even the mere possibility of
2. eventual control of the defendant's
3. criminal behaviour in this case
4. assumes that the defendant will
5. cooperate in treatment. This is
6. highly unlikely considering his
7. attitude to date. He has been
8. diagnosed as an untreated sexual
9. offender.

25

26 And later: (as read)

27

1. The defendant refuses to accept
2. responsibility for most if not all
3. of his convictions including the
4. matters before the Court ... I
5. appreciate the expert evidence that
6. denial with respect to sexual
7. assault convictions does not
8. interfere with treatment. But that
9. presumes, or at least assumes, the
10. offender can and will accept
11. treatment. Expert opinion suggests
12. that the defendant has trouble
13. accepting treatment in group
14. therapy. He has been accommodated
15. with one-to-one treatment. However,
16. he has not either understood his
17. obligations or he has refused to
18. accept his obligations to
19. participate.

20

1. The sentencing judge ultimately concluded
2. that Mr. Zoe was "an untreated sexual offender
3. who has been unwilling or unable to accept
4. treatment."
5. In coming to these conclusions, the
6. sentencing judge has made findings of fact and
7. expressed a clear opinion regarding Mr. Zoe's
8. treatment history and prospects. It is difficult
9. to conceive how a reasonable informed person
10. could come to the conclusion that when presented
11. with the same or very similar evidence that the
12. sentencing judge, whether consciously or
13. unconsciously, would not be predisposed to coming
14. to the same conclusions. Having made negative
15. conclusions about Mr. Zoe, his background, and
16. his prospects for treatment, the concern is that
17. the sentencing judge, despite a conscientious
18. effort, might not be open to a different
19. conclusion.
20. Another issue raised at the recusal
21. application was the sentencing judge's approach
22. to the *Gladue* factors. Section 718.2(e) of the
23. *Criminal Code* requires judges to pay attention to
24. the circumstances of Aboriginal offenders when
25. sentencing them. They are also applicable in
26. dangerous-offender and long-term-offender
27. proceedings.
28. The Supreme Court of Canada in the cases of
29. *Gladue* and *Ipeelee* required sentencing judges to
30. consider the unique systemic or background
31. factors which may have played a part in bringing
32. the particular Aboriginal offender before the
33. Court and the types of sentencing procedures and
34. sanctions which might be appropriate in the
35. circumstances for the offender because of his
36. Aboriginal background.
37. As part of this process, judges are required
38. to take judicial notice of the broad systemic and
39. background factors affecting Aboriginal people.
40. This includes taking judicial notice of things
41. like the history of colonialism, displacement,
42. and residential schools, among other things.
43. Mr. Zoe is an Aboriginal offender, and at
44. the sentencing hearing, a presentence report was
45. prepared. The presentence report detailed
46. Mr. Zoe's background and referred to issues, like
47. his issues with substance abuse, his criminal
48. history, and issues in various treatment
49. programs.
50. In submissions, both counsel urged the
51. sentencing judge to consider the unique systemic
52. and background factors that might have played a
53. part in bringing Mr. Zoe before the Courts and
54. the types of sentencing procedures and sanctions
55. which may be appropriate in the circumstances for
56. Mr. Zoe because of his Aboriginal heritage or
57. connection.
58. In his decision, the sentencing judge
59. reviewed some aspects of Mr. Zoe's background in
60. his decision before concluding: (as read)

27

* 1. I cannot see anything in the
  2. defendant's background that should
  3. lower his blameworthiness with
  4. respect to the predicate offence.

5

1. This conclusion overlooked evidence in the
2. presentence report which should have been
3. considered in a fulsome analysis of the *Gladue*
4. factors. The sentencing judge's decision made no
5. reference to taking judicial notice of unique
6. systemic and background factors which might have
7. affected Mr. Zoe.
8. While the Court of Appeal did not find that
9. the sentencing judge erred in his consideration
10. of the *Gladue* factors, it did state at *R v. Zoe,*
11. 2020 NWTCA 1 at para. 54: (as read)

17

1. Even based on the evidence in the
2. presentence report, this was an
3. impoverished approach to
4. understanding and applying *Gladue*
5. factors.

23

1. The Court of Appeal considered the potential
2. applicability of the *Gladue* factors in a
3. dangerous offender hearing in its decision,
4. stating at paras 57-8: (as read)

1

* 1. We note that in some cases *Gladue*
  2. factors may have a limited role in a
  3. dangerous-offender situation where
  4. protection of the public is a
  5. primary factor: *R v Bonnetrouge*,
  6. 2017 NWTCA 1 at para 22.
  7. Significant *Gladue* factors may not
  8. be enough on their own to avoid a
  9. dangerous offender designation or
  10. sentence.
  11. However, *Gladue* factors may be
  12. more relevant to determining whether
  13. culturally sensitive programming
  14. might enhance the offender's
  15. prospects of rehabilitation and
  16. treatability: *R v. Moise*, 2015 SKCA
  17. 39 at para 24; *Bonnetrouge* at para
  18. 23. This is especially relevant to
  19. this case. There is some evidence
  20. that Mr. Zoe has been meeting with a
  21. traditional counsellor for a certain
  22. time period, and this has been
  23. positive.

25

1. This issue was raised by counsel for Mr. Zoe in
2. the recusal application. Counsel argued that
3. *Gladue* was going to be a significant factor in a
4. second dangerous offender hearing and that
5. applying *Gladue* in a robust manner was going to
6. be required. Counsel expressed the concern that
7. the judge might approach sentencing a second time
8. with preconceived ideas about these issues based
9. upon on the first hearing.
10. In his recusal decision, the sentencing
11. judge disposed of this concern stating:

|  |  |  |
| --- | --- | --- |
| 10 | (as | read) |
| 11 |  |  |
| 12 |  | I concede, as stated by the Court of |
| 13 |  | Appeal... that mine was an |
| 14 |  | impoverished approach to |
| 15 |  | understanding and applying *Gladue* |
| 16 |  | factors. My reasons do establish |

1. that there were *Gladue* factors, and
2. they were considered.

19

1. The sentencing judge later noted that this
2. was not considered a reviewable error by the
3. Court of Appeal.
4. The sentencing judge's decision does not
5. specifically address whether a reasonable
6. informed person would perceive a real likelihood
7. that the evidence heard and findings made at the
8. earlier hearing with respect to the *Gladue*
9. factors would affect the decision made at the
10. subsequent hearing particularly considering the
11. role that *Gladue* factors may play in the
12. analysis. The sentencing judge's approach to
13. *Gladue* in his original sentencing decision, his
14. response to concerns raised by counsel at the
15. recusal application and to the Court of Appeal's
16. comments regarding *Gladue* raise concerns about
17. his consideration of *Gladue* factors at a second
18. dangerous offender hearing.
19. This concern adds to my conclusion that a
20. reasonable informed person would conclude that
21. that when presented with the same or very similar
22. evidence that the sentencing judge, whether
23. consciously or unconsciously, would be
24. predisposed to coming to the same conclusions,
25. including in his consideration of the *Gladue*
26. factors.
27. For these reasons, I conclude that the
28. sentencing judge erred in his consideration of
29. the applicable legal test. I also conclude that
30. a reasonable fully informed person viewing this
31. matter realistically and practically would
32. conclude that there is a real possibility of bias
33. if the same sentencing judge were to preside over
34. the second dangerous offender hearing,
35. notwithstanding that there may be no suggestion
36. of actual bias.
37. Therefore, there will be an order
38. prohibiting the Deputy Judge J.R. McIntosh from
39. presiding over Mr. Zoe's dangerous offender
40. hearing.

# (PROCEEDINGS CONCLUDED)

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# 1 CERTIFICATE OF TRANSCRIPT

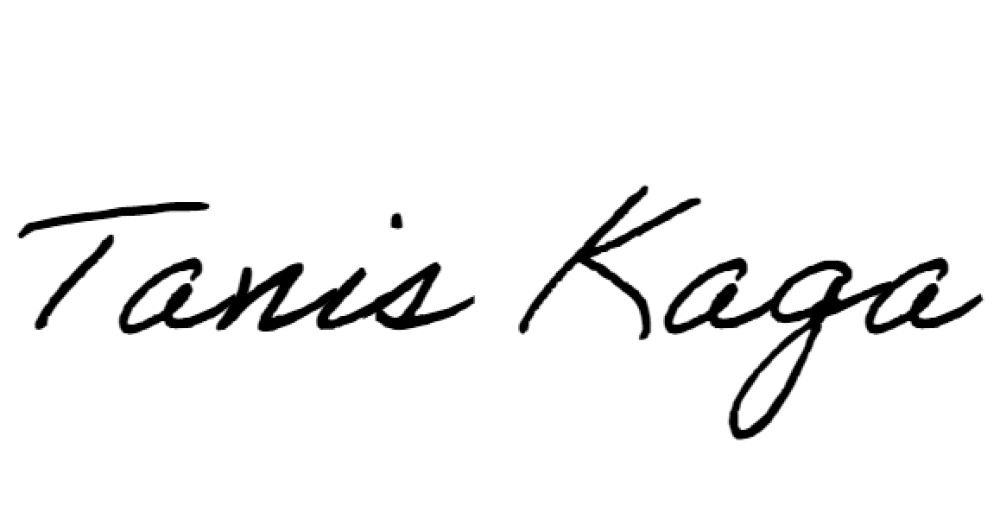
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1. I, the undersigned, hereby certify that the
2. foregoing pages are a complete and accurate
3. transcript of the proceedings taken down by me in
4. shorthand and transcribed from my shorthand notes
5. to the best of my skill and ability. Judicial
6. amendments have been applied to this transcript.

9

1. Dated at the City of Calgary, Province of
2. Alberta, this 10th day of December 2020.

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1. Tanis Kaga, CSR(A)
2. Official Court Reporter

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