COURT FILE NUMBER	QBG-SA-00766-2022

COURT OF KING'S BENCH FOR SASKATCHEWAN

JUDICIAL CENTRE	SASKATOON
PLAINTIFFS	CAITLIN ERICKSON, JENNIFER SOUCY (BEAUDRY) and STEFANIE HUTCHINSON
DEFENDANTS	KEITH JOHNSON, JOHN OLUBOBOKUN, KEN SCHULTZ, NATHAN RYSAVY, DUFF FRIESEN, LYNETTE WEILER, JOEL HALL, LOU BRUNELLE, JAMES RANDALL, KEVIN MACMILLAN, DAWN BEAUDRY, NATHAN SCHULTZ, AARON BENNEWEIS, DEIDRE BENNEWEIS, DARCY SCHUSTER, RANDY DONAUER, JOHN THURINGER, MILE TWO CHURCH INC., THE GOVERNMENT OF SASKATCHEWAN, JOHN DOES and JANE DOES

Brought under *The Class Actions Act*, SS 2001 c C-12.01

BRIEF OF LAW

ON BEHALF OF THE PLAINTIFFS

Applications to Stay the Action

Hearing scheduled on: Tuesday, March 25, 2025

Lawyers in Charge of File: Grant J. Scharfstein, K.C. / Samuel W. Edmondson
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I. INTRODUCTION AND BACKGROUND

1. Three applications have been brought by Defendants in the action, seeking an Order staying the action as an abuse of process. These applications are:

    a. Notice of Application, dated November 1, 2024, by Mile Two Church Inc.;

    b. Notice of Application, dated November 29, 2024, by John Olubobokun, Ken Schultz, Nathan Rysavy, Duff Friesen, Joel Hall, Lou Brunelle, James Randall, Kevin MacMillan, Dawn Beaudry, Nathan Schultz, Aaron Benneweis, Randy Donauer and John Thuringer; and

    c. Notice of Application, dated December 16, 2024, by Government of Saskatchewan.

    (together the "**Applications**" by the "**Applicants**")

2. The Applications are based on what the Applicants claim is a failure on the part of the Plaintiffs to immediately disclose and produce information about an agreement amongst the parties to an action that has the effect of changing the adversarial landscape of the litigation.

3. The Plaintiffs entered into settlement agreements with individuals formerly named as Defendants in the action:

    a. Stephanie Case, by agreement dated November 1, 2023;

    b. Fran Thevenot, by agreement dated February 24, 2024; and

    c. Tracey Johnson, by agreement dated February 20, 2024.

    (the "**Settlement Agreements**" with the "**Settling Defendants**")

4. None of the Settlement Agreements requires payment by the Settling Defendant to the Plaintiffs.

5. Following execution of the Settlement Agreements, the claim was discontinued against each of Stephanie Case, Fran Thevenot and Tracey Johnson. The claim was

also discontinued against former Defendants Anne MacMillan, Catherine Randall, Deidre Benneweis and Simbo Olubobokun.[1]

6. The Applications were brought while numerous other applications were extant:

   a. Applications for further and better particulars, brought by the Defendants John Thuringer, Catherine Randall, Duff Friesen, James Randall, Ken Schultz, Mile Two Church Inc., Aaron Benneweis, Anne MacMillan, Deidre Benneweis, Government of Saskatchewan, Joel Hall, John Olubobokun, Kevin MacMillan, Lou Brunelle, Nathan Rysavy, Randy Donauer, and Simbo Olubobokun (the "**Particulars Applications**"). By Order of the Court, these applications had been set to be determined during the week of January 6, 2025.

   b. Application by Mile Two Church Inc., dated June 18, 2024, to compel production of records by the Plaintiffs in relation to settlement discussions between the Plaintiffs and former Defendants Stephanie Case, Fran Thevenot, and Tracey Johnson (the "**Production Application**"). By Order of the Court, the Production Application had been set to be determined during the week of January 6, 2025.

7. This Brief of Law addresses why the Applications should be dismissed, with costs payable to the Plaintiffs forthwith and in any event of the cause.

II. FACTS

8. The Plaintiffs filed their Statement of Claim in this matter on August 8, 2022. The Statement of Claim was amended on December 12, 2022, and again on June 29, 2023. The Second Amended Statement of Claim is the operative pleading in the action.

9. The Statement of Claim, as amended, alleges in detail the systematic, persistent, and egregious abuse of students and minor attendants of Legacy Christian Academy (the "**School**") and Mile Two Church (the "**Church**") by the Defendants.

[1] The claim against Elaine Shultz had previously been abandoned following her demise.

10. The Defendants in the action, excluding Lynette Wieler and Keith Johnson, sought an order deferring their obligation to file defences in the action. By fiat of the then certification judge, Justice Bardai (as he then was), the Defendants were relieved from serving and filing a defence until "a reasonable time after certification is heard".[2]

11. Almost all of the Defendants served their own, individually or jointly with one or more other Defendants, Request for Particulars on the Plaintiffs, with Replies to the said Requests for Particulars served by the Plaintiff on December 28, 2023. By the end of February of 2024, the Particulars Applications were brought.

12. The Plaintiffs entered into settlement agreements:

    a. with Stephanie Case on November 1, 2023;[3]

    b. with Fran Thevenot on February 24, 2024;[4] and

    c. with Tracey Johnson on February 20, 2024.[5]

13. Mile Two Church Inc. demanded copies of the Settlement Agreements, settlement discussions and any records disclosed between the Plaintiffs and the Settling Defendants, which demands were refused by the Plaintiffs. The Settlement Agreements were disclosed to Mile Two Church Inc. on or about April 8, 2024.[6]

14. Mile Two Church Inc. made further demands for additional records from the Plaintiffs. The Plaintiffs responded to the demands by confirming that records would be disclosed in accordance with *The King's Bench Rules*.[7]

15. A conference call was held before Justice Wempe on June 3, 2024, following the prior case management judge, Justice Bardai, being elevated to a Justice of the Saskatchewan Court of Appeal. The conference call related to coordinating and

[2] Fiat of Bardai, J, dated September 15, 2023.
[3] Affidavit of Bryan Reynolds, sworn November 1, 2024, Exhibit "G".
[4] Affidavit of Bryan Reynolds, sworn November 1, 2024, Exhibit "H".
[5] Affidavit of Bryan Reynolds, sworn November 1, 2024, Exhibit "I".
[6] Affidavit of Bryan Reynolds, sworn November 1, 2024, at para 7.
[7] A ffidavit of Bryan Reynolds, sworn November 1, 2024, Exhibit "K".

scheduling a hearing of the Particulars Application. In the conference call Mile Two Church Inc. advised that it would be bringing another application that same week.

16. Notwithstanding that Mile Two Church Inc. had represented to the Court that it would be bringing another application that week, it did not do so until June 18, 2024. That application was the Production Application.

17. The Production Application brought by Mile Two Church Inc., was to compel the Plaintiffs to "disclose and produce all documents connected to the arrangements that led to the settlement and discontinuances of the claim against the following defendants."[8]

18. Mile Two Church Inc. grounded the Production Application substantially on the following propositions:

   a. The Settlement Agreements must be immediately disclosed to the non-settling Defendants, and approved by the Court.[9]

   b. That "[f]ailure to immediately disclose and produce information about an agreement amongst parties to an action that has the effect of changing the adversarial landscape of the litigation is an abuse of process requiring a stay of proceedings."[10]

19. The Production Application was grounded by Mile Two Church Inc. in precisely the same acts or omissions as this Application.

20. Following the service and filing of the Production Application, the Plaintiffs served and filed the Affidavit of Caitlin Erickson, affirmed October 3, 2024.

21. The <u>only</u> change in circumstances between June 18, 2024 when Mile Two Church Inc. brought the Production application and this Application are the averments in the Affidavit of Caitlin Erickson, namely the explicit assertion of settlement privilege and litigation privilege over documentation arising in relation to discontinuance of the

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[8] Notice of Application, dated June 18, 2024, at para 1.a.
[9] Notice of Application, dated June 18, 2024, at para 2.
[10] Notice of Application, dated June 18, 2024, at para 7.

action against the former Defendants,[11] and that Stephanie Case had provided an affidavit answering written questions for which litigation privilege is asserted.

22. Notwithstanding that the Production Application was extant, Mile Two Church Inc. and the other Defendants now apply for different relief based on the same basis that the Plaintiffs had been obligated to promptly disclose the existence and content of the Settlement Agreements.

23. None of the Defendants, or former Defendants, had or has served or filed a Statement of Defence in the action.

24. None of the Defendants, or former Defendants, has filed <u>any</u> evidence as to the relationship between them in the litigation, or in what way the litigation landscape has changed.

25. None of the Defendants, or former Defendants, has filed <u>any</u> evidence that they, or their litigation strategy, has changed <u>at all</u> as a result of the Settlement Agreements.

26. In short, the Applications are grounded solely on the face of the Settlement Agreements.

27. As a result of the Applications, the adjudication of the Particulars Applications has been delayed by Mile Two Church Inc.

28. The Plaintiffs submit that the Applications are part of a pattern on the part of the Defendants to delay the proceedings and increase the time and cost to the Plaintiffs' moving the action to a certification hearing.

III. ISSUES

29. The Plaintiffs submit that the issues to be determined by this Honourable Court are as follows:

a. Were the Plaintiffs entitled to discontinue the action against the Settling Defendants?

[11] Affidavit of Caitlin Erickson, affirmed October 3, 2024 at para 20.

b. In what circumstances is a partial settlement required to be disclosed to non-settling Defendants and/or the Court?

c. If disclosure of the Settlement Agreements was required, is the obligation to disclose to the non-settling Defendants and/or the Court immediately?

d. If the Plaintiffs breached an obligation to disclose the Settlement Agreements, what is the appropriate remedy?

IV. ANALYSIS

30. At this stage, the action is not a class action within the meaning of *The Class Actions Act*, SS 2001 c C-12.01 as it has not been certified pursuant to the said *Act*.[12]

31. As an ordinary action in the Court of King's Bench, the disclosure obligation of the Plaintiffs arises pursuant to Part 5 of *The King's Bench Rules*.

32. Prior to the filing of defences, and certification of the action as a class action, Part 5 of *The King's Bench Rules* does not compel production of documents outside of specific processes such as a Request for Particulars or a Notice to Produce Documents. No such process has been employed in relation to the Settlement Agreements or any related correspondence or records.

a) The Plaintiffs were entitled to discontinue the action against the Settling Defendants

33. Discontinuance of an action is prescribed by Rule 4-49 of *The King's Bench Rules*. Rule 4-49(1) clearly and unambiguously allows a Plaintiff to discontinue a claim in whole, or in part, prior to defences being filed. Rule 4-49(4) expressly allows for discontinuance of an action against any number of defendants.[13]

34. None of the Defendants in this action have served or filed a Statement of Defence.

35. None of the Defendants have asserted a Cross-claim or Counterclaim against the Settling Defendants, or any of them.

36. Pursuant to Rules 4-49(1) and 4-49(4) the Plaintiffs have the right to discontinue the claim against any defendant at such time as they see fit, before receipt of a Statement of Defence from any defendant.

37. The Court reserves the right to prevent an abuse of Court process, and in doing so, may set aside a discontinuance of an action.[14]

38. None of the Defendants have objected to discontinuance against the Settling Defendants, or applied to set aside the discontinuances.

39. Nor have any of the Defendants contended that fair adjudication of the action requires records or information from the Settling Defendants which would require them to be parties to the action.

40. None of the Defendants led evidence or any submission whatsoever as to any basis for liability on the part of the Settling Defendants by way of Cross-claim, Counterclaim, contribution or indemnity, much less that such Cross-claim, Counterclaim or claim for contribution or indemnity is impaired by discontinuance against the Settling Defendants.

41. In any event, and distinguishing from some or all of the Saskatchewan cases, the claim against the Defendants includes claims for which contribution and indemnity is not available. Contribution and indemnity from other defendants is not available for the tort of conspiracy. The same is generally true of other intentional torts.

42. Accordingly, there is no basis for the Court to determine that discontinuance of the claim as against the Settling Defendants, or any other party, has deprived the Court from fairly and appropriately adjudicating the action.

43. In short, there is no basis to conclude that the discontinuance of the action against the Settling Defendants amounts to an abuse of process. The Plaintiffs have acted entirely, and properly, as allowed by *The King's Bench Rules.*

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[12] *The Class Actions Act*, SS 2001 c C-12.01 ss 2, Part II; *Alves v Mytravel Canada Holidays Inc.*, 2009 SKQB 517 at para 27.
[13] *The King's Bench Rules*, Rule 4-49(1), (4).
[14] *Poffenroth Agri Ltd. v Brown*, 2020 SKQB 31 at para 22, aff'd 2020 SKCA 121.

b) Disclosure of partial settlement agreements where payment is made by a settling defendant, and where the litigation has progressed beyond pleadings

44. As set out above, disclosure of records between the parties is governed by Part 5 of *The King's Bench Rules*. Disclosure obligations arise:

    a. Following the close of pleadings (Rule 5-5(2));

    b. On receipt of a Notice to Produce Documents (Rule 5-11(3)); and

    c. On an Order of the Court (Rules 5-14. 5-15, and the inherent jurisdiction of the Court).

45. The action is nowhere near the stage where disclosure of records between the parties is compelled by *The King's Bench Rules*. This flows entirely from the Defendants' insistence against serving defences in the action, and the sequence of interlocutory applications brought by them to be determined before a certification hearing.

46. Parenthetically, that leave of the Court is not required for the Plaintiffs to discontinue as against the Settling Defendants also flows entirely from the Defendants' insistence against serving defences in the action.

47. The cases cited by the Applicants as to what partial settlement agreements must be disclosed to non-settling defendants, and when, are largely extra-provincial, are not binding on this Honourable Court, and do not state or reflect the law in the Province of Saskatchewan.

48. Resort to extra-provincial jurisprudence is of limited assistance, particularly where the remedy sought is the extreme remedy of depriving the Plaintiffs of the adjudication of the subject matter of the claim.

49. Where there is not settled, or even contested, law in a Province it is neither plain and obvious, nor the clearest of cases, that the law is in effect and binding on the parties, much less whether the law applies in the particular circumstances of a given case, or that it can possibly be an abuse of process worthy of the most extreme remedy of denying the Plaintiffs of fair adjudication of the action.

50. As set out below, it is not plain and obvious that the Plaintiffs were obligated to disclose the Settlement Agreements to the non-settling Defendants, or the Court. Reported Saskatchewan jurisprudence addresses only an obligation to disclose *Mary Carter* and *Pierringer* partial settlement agreements, and in one instance a stand-still agreement.

51. Further, reported Saskatchewan jurisprudence has not addressed disclosure of partial settlement agreements between a plaintiff and some, but not all, defendants prior to defences being served.

52. This might reasonably be expected given that, as set out herein, *The King's Bench Rules* expressly allow a plaintiff to discontinue their action against some, but not all, defendants prior to defences being filed.

53. Nor do reported Saskatchewan cases address disclosure of such partial settlement agreements in instances where no payment or proportionate payment is made, or to be made, by the settling defendants.

54. Again, this might reasonably be expected given that where no payment is made there is no risk whatsoever of double recovery by a plaintiff.

55. *Mary Carter* agreements are partial settlement agreements in which the settling defendant remains a party in the action, with their liability capped to a fixed or proportional sum. The Settlement Agreements are clearly not *Mary Carter* agreements.

56. *Pierringer* agreements, or proportionate share settlement agreements,[15] are partial settlement agreements between the plaintiff(s) and one or more, but not all, of the defendants in an action.[16] An integral component of such agreements is that the settling defendant is obligated to make payment of a fixed or proportional sum to the plaintiff(s).[17]

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[15] See, for example: *Marble (Litigation Guardian of) v Saskatchewan*, 2003 SKQB 282 at para 71.
[16] See, for example: *Marble (Litigation Guardian of) v Saskatchewan*, 2003 SKQB 282 at para 71.
[17] *Rosetown (Town) v Bridge Road Construction Ltd.*, 2020 SKQB 3 at para 10.

57. In this regard the Settlement Agreements are not *Mary Carter* or *Pierringer* agreements, and the jurisprudence surrounding *Mary Carter* and *Pierringer* agreements is, at best, ofmarginal assistance to the Court.

58. In any event, the Settlement Agreements have been disclosed to the Applicants, and disclosure occurred before the Production Application or the Applications. Any assertion by the Applicants that their approach to the action, litigation strategy, or relationship between the Defendants, or any of them, has been affected is wholly unsupported by the evidence.

59. It goes without saying that reported Saskatchewan cases do not go further, to compel production of settlement discussion or other documents leading to or otherwise related to the settlements, as Mile Two Church Inc. had requested in the Production Application, and which they refer to nebulously in their Notice of Application and Brief of Law.[18]

60. Rather, Saskatchewan jurisprudence, and decisions of the Supreme Court of Canada binding upon the Courts of Saskatchewan, have dealt with disclosure of partial settlement agreements where actions have proceeded beyond the close of pleadings, and in which there was or would be payment from the settling defendants to the plaintiff(s).

61. In *Newell v McIvor* (1998) 164 Sask R, 258, 1998 CanLII 13755 (SK KB) [“***Newell***”], Justice Laing considered an application to compel disclosure to one defendant of an agreement between the plaintiff and the other defendant. Justice Laing held:

> **The issue of whether a settlement agreement must be disclosed only arises when after the partial settlement (in the normal course) the contracting parties remain parties to the action, the nature of which has been defined by the pleadings filed.** The pleadings define who is opposed in interest, not only for the purpose of disclosure and discovery, but also determine the order of proceeding at trial, determining who may call evidence on what issues, and who may cross-examine, and in what order. Our

[18] Notice of Application, dated November 1, 2024, para 3 “disclose and produce information about an agreement amongst the parties …”; Brief of Law of the Applicant (Defendant) Mile Two Church Inc. dated February 14, 2025 at para 26

> litigation process is an adversarial one in which only the parties adverse in interest on an issue may lead evidence and cross-examine on that issue. In trial, admissions made by or extracted from a party adverse in interest usually carry more weight with the trier of fact than does evidence emanating from a party's own witnesses. In other words, the pleadings, by defining who is adverse in interest on any one issue, also indirectly impact on credibility findings that may be made at the end of the trial.[19]
>
> (Emphasis added)

62. Not only had the settling defendant filed a defence in *Newell*, but after the settlement the settling defendant sought to file an amended statement of defence. The amended statement of defence asserted facts which were demonstrably untrue in the face of the settlement agreement. Justice Laing found the amended statement of defence to be misleading to the other defendants and the Court, and an abuse of process.[20] The decision of Justice Laing cannot be considered without this context.

63. Further, it is plain from the reasons in *Newell* that the disclosure obligation arises only where the settling defendant remains a party to the action.

64. The rationale of Justice Laing was relied on in *Aviaco International Leasing Inc. v Boeing Canada Inc.* (2000), 9 BLR (3d) 99, 2000 CanLII 22777 (ON SC) ["***Aviaco***"], in which the Court said:

> 23 I believe the approach taken by Laing J. in the *Newell* case gets closer to defining the crux of what should determine whether such agreements must be disclosed and produced. I would put the issue as follows: Do the terms of the agreement alter the apparent relationships between any parties to the litigation that would otherwise be assumed from the pleadings or expected in the conduct of the litigation? **The reason why "Mary Carter" agreements have to be produced is because such agreements fundamentally alter what otherwise would be the expected relationship between two parties to the litigation—normally the plaintiff and one of the defendants. It changes that relationship from an adversarial one to a co-operative one and it is consequently important that both the court and the other parties know of that change. Otherwise the court and the other parties might be misled.** If, however, as is the case here, the agreement entered into between co-defendants is simply directed at sharing information and otherwise concentrating on the defence of the plaintiffs' claim, which all defendants would plainly have an interest in achieving and which the court would expect the defendants to pursue, then I see no reason to override the common interest privilege that would otherwise apply to it. I note in this regard that counsel remain under their professional responsibility, referred to in commentary 4 to rule 10 of

[19] *Newell v McIvor* (1998), 164 Sask R 258, 1998 CanLII 13755 at p 8 (cited to CanLII).

> the Rules of Professional Conduct, not to mislead the court as to the position of their clients in the adversarial process. If there was any aspect of such an agreement that could lead at any point to a misleading of the court and other parties, the counsel whose clients were parties to the agreement would then be under an absolute obligation to immediately disclose the agreement.[21]
>
> (Emphasis added)

65. In the context of the decision, and the reliance on *Newell*, it is readily apparent that the Court in *Aviaco* is referring to instances in which the settling defendant remains a party to the action.

66. In this regard *Aviaco* is also of no assistance to the case at hand.

67. In *Bioriginal Food & Science Corp v Saskcopack Inc*, 2012 SKQB 469 ["***Bioriginal***"] there were Counterclaims advanced against parties other than the plaintiff. Plainly defences had been filed, and the action proceeded. The settlement agreement in question was described as a "Proportionate Share Settlement Agreement".

68. Similarly, in *Rosetown (Town) v Bridge Road Construction Ltd.*, 2020 SKQB 3 ["***Rosetown***"] it is evident that pleadings have closed, in that the application sought an order implmenting a *Pierringer* agreement, which relief required leave of the Court.[22] Further, as stated by Justice Hildebrandt, "[t]he process, insofar as Bridge Road is concerned, is not at the infant stage. Bridge Road and the Town were well on the road to arbitration."

69. Were the pleadings not closed, leave of the Court would not have been required to amend the Statement of Claim. The settlement agreement in question was described as Bridge Road capping their exposure, and in the application the non-settling defendants did not object to keeping the settlement amount confidential.[23]

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[20] *Newell v McIvor* (1998), 164 Sask R 258, 1998 CanLII 13755 at p 8 (cited to CanLII).
[21] *Aviaco International Leasing Inc. v Boeing Canada Inc.* (2000), 9 BLR (3d) 99, 2000 CanLII 22777 at para 23 (ON SC).
[22] *Rosetown (Town) v Bridge Road Construction Ltd.*, 2020 SKQB 3 at para 1.
[23] *Rosetown (Town) v Bridge Road Construction Ltd.*, 2020 SKQB 3 at para 2.

70. Likewise, *Pchelnyk et al v Carson et al*, 2017 SKQB 181 [“***Pchelnyk***”] the Court observed that “pleadings have closed and disclosure is complete as is questioning.”[24] The settlement agreement at issue was described as a “Proportionate Share Settlement Agreement”.[25]

71. In addition, in *Underhill v Central Aircraft Maintenance Ltd.*, 2017 SKQB 102 [“***Underhill***”] it is unclear where the action stood. Of note, however, the action was commenced in 2011 and the application for approval of the *Pierringer* agreement decided April 10, 2017.[26] For an action other than a class action not to be defended for 6 years appears implausible. The settlement agreement in question was placed in a sealed envelope in the Court file “including the settlement amount and allocation of that amount between the plaintiff”.[27]

72. Of note, the decisions in Saskatchewan relate to agreements in the nature of *Mary Carter* and *Pierringer* agreements, both of which include as essential elements a payment, or proportional share payment, from the Settling Defendant to the Plaintiff. The instant case involves <u>no payment from the Settling Defendants to the Plaintiff</u>. This further distinguishes the circumstances before the Court from the reported decisions relating to disclosure of partial settlement agreements to the other parties.

73. Common to <u>all</u> of the Saskatchewan jurisprudence in the area is that the partial settlement agreements were reached in circumstances where leave of the Court, or consent of the non-settling defendants, was required for the plaintiff to amend their claim.

74. In the ordinary course, it is the filing of a defence which crystalizes the cooperative and adversarial relationships between parties. To that point there are no facts or issues in dispute. To hold otherwise is baldly speculative, and offensive to the repute of the administration of justice.

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[24] *Pchelnyk et al v Carson et al*, 2017 SKQB 181 at para 24.
[25] *Pchelnyk et al v Carson et al*, 2017 SKQB 181 at para 2.
[26] *Underhill v Central Aircraft Maintenance Ltd.*, 2017 SKQB 102.
[27] *Underhill v Central Aircraft Maintenance Ltd.*, 2017 SKQB 102 at para 14.

75. Given that Rule 4-49 of *The King's Bench Rules* expressly allows a plaintiff to discontinue all or part of a claim prior to any defences being served, it is not surprising that the issue of approval of settlement agreements prior to defences being filed has not been addressed in any reported decisions in Saskatchewan.

76. In any event, decisions of this Honourable Court and the Saskatchewan Court Appeal which discuss disclosure or approval of partial settlement agreements have had no indication or explanation of a requirement for immediacy of disclosure, except for an *obiter* comment of Justice Smith in *Bioriginal*. For reasons which follow, those *obiter* comments are grounded in a mistaken understanding of the decision in *Aecon Buildings v Stephenson Engineering Ltd.*, 2011 SCC 33 ["***Aecon SCC***"].

77. Justice Smith had relied, in *obiter*, on the proposition from *Aecon Buildings v Stephenson Engineering Ltd.*, 2010 ONCA 898 ["***Aecon ONCA***"], that partial settlement agreements must be disclosed immediately, had been affirmed by the Supreme Court of Canada in *Aecon SCC*. Justice Smith provides no analysis whatsoever of the supposed immediate disclosure obligation beyond his reliance on *Aecon ONCA* and its supposed affirmation in *Aecon SCC*.

78. In fact, the Supreme Court of Canada did not affirm or deny the decision of the Ontario Court of Appeal in *Aecon SCC*. Rather, the Supreme Court of Canada faced an application to produce fresh evidence in Aecon's application for leave to appeal *Aecon ONCA*, to include 11 publications in the application for leave to appeal. The application was dismissed.[28]

79. Further, as noted in *Aecon ONCA* and *Aecon SCC*, the settlement agreement in question was a *Mary Carter* agreement in which the settling defendant remained a party to the action – engaging significant concern as to the true adversarial or cooperative relationship between the plaintiff(s) and settling defendant(s).

80. In addition, *Aecon SCC* plainly, and at times explicitly, identifies the publications' referring to the rule in Ontario that partial settlements are to be disclosed immediately.

[28] *Aecon Buildings v Stephenson Engineering Ltd.*, 2011 SCC 33 at para 10.

81. The application for leave to appeal *Aecon ONCA* to the Supreme Court of Canada was dismissed, without reasons, on June 30, 2011, in *Aecon Buildings v Stephenson Engineering Ltd.*, 2011 CanLII 38818 (SCC).

82. It is unknown what had been referred to, or considered by, Justice Smith in *Bioriginal*, however it is plain and obvious that his reliance on *Aecon SCC* is a misstatement of the law. Further, the reasons of Justice Smith do not demonstrate other binding, or persuasive, authority, nor is there other reasoning from which the conclusion that disclosure is required or that such disclosure must be immediate. *Bioriginal* is entirely unpersuasive for the proposition that immediate disclosure of the Settlement Agreements was required, as the Applicants contend.

83. To the extent that the immediacy of disclosure referenced in *Bioriginal* has been relied on in subsequent decisions of the Court of King's Bench in Saskatchewan, it does not appear that there has been <u>any</u> consideration of the *reasoning* in *Bioriginal*, or that the comments were made in *obiter*. In this regard their reliance on the conclusion that disclosure is required is unpersuasive.

84. To the extent that *Bioriginal* has been relied on by other Courts outside of Saskatchewan, it has not been for the proposition that partial settlements must be disclosed. Rather, where other Courts have cited *Bioriginal* it has been for the proposition that "imperfect information is virtually always the case in settlement negotiations. There are always knowns and known unknowns and inevitably unknowns that are not known."[29] This proposition has been cited as a reason <u>not to disclose settlement amounts</u> in partial settlement agreements.[30]

85. There is no legislation, regulation, rule or common law in the Province of Saskatchewan compelling a plaintiff to "immediately" disclose a partial settlement agreement to the non-settling defendants.

[29] *Bioriginal Food & Science Corp v Sascopack Inc*, 2012 SKQB 469 at para 33.
[30] *Bioriginal Food & Science Corp v Sascopack Inc*, 2012 SKQB 469 at para 35; *Sable Offshore Energy Corp v Ameron International Corp.*, 2013 SCC 37 at paras 29, 30; *Brown v Cape Breton (Rural Municipality)*, 2011 NSCA 32 at para 67.

86. Since *Bioriginal*, Saskatchewan Courts have addressed applications for approval of *Pierringer* type partial settlement agreements, in the context of actions with closed pleadings. As set out herein, no decisions of Saskatchewan Courts have been reported respecting *Pierringer* type partial settlement agreements where no defences have been filed and the plaintiff(s) are free to avail themselves of the ability to discontinue an action against some or all defendants without Court approval pursuant to Rule 4-49.

87. The concern of double recovery evident throughout the jurisprudence, as referenced in *Bioriginal* and in *Pchelnyk*, is not engaged in this instance. The Settlement Agreements provide for no payment by the Settling Defendants.

88. Further, in this instance the Settling Agreements compel the Settling Defendants to provide records and information which will assist the Court in the fair adjudication of the dispute.

89. Given that no payment is made, or to be made, as between the Settling Defendants and the Plaintiff, and that the Plaintiffs were entitled pursuant to Rule 4-49 to discontinue the claim without leave of the Court, there is and was no obligation, in Saskatchewan, to disclose the Settlement Agreements to the non-settling Defendants or seek approval of the Court.

90. The understanding between the Plaintiffs and the Settling Defendants that disclosure and approval were not, and are not, required is encapsulated in the Settlement Agreements.[31]

91. Further, any concern that the Court would not have necessary information to adjudicate the action, because the Settling Defendants are not parties, is fully addressed by the Settlement Agreement requiring the Settling Defendants to provide an Affidavit of Documents, as would be required by Part 5 of *The King's Bench Rules*, to submit to written questions and/or questioning as if they were a party. Records disclosed to the Plaintiffs would be subject to their own obligations for disclosure pursuant to Part 5 of *The King's Bench Rules*. Further, none of the

Settlement Agreements preclude the Settling Defendants from providing records, information or evidence to the non-settling Defendants.

92. As the Plaintiffs were entitled to discontinue the claim against the Settling Defendants, the disclosure obligations of the Settling Defendants enhance, rather than impair, the evidence which is or would be available to the parties and the Court in the adjudication of the action.

93. In other words, the nature of the Settlement Agreements are not capable of the type of mischief contemplated in *Bioriginal*.

94. The Settlement Agreements were reached before any defence was filed. Concerns with double recovery by the Plaintiffs, or absence of information required for fair adjudication of the action, are not raised by the terms of the Settlement Agreements. Saskatchewan law did not, and does not, require disclosure of the Settlement Agreements or approval of the Court.

95. In the event that this Honourable Court determines that disclosure to non-settling defendants of a partial settlement agreement, which is neither a *Pierringer* nor *Mary Carter* agreement, and which is entered into before any defences are filed, this would be a <u>new</u> development in the law in this Province. Axiomatically, in the event that disclosure of such agreements must be made to non-settling defendants immediately, that too would be a <u>new</u> development in the law in this Province. This will be further examined below in submissions as to remedy.

i. Inapplicability of extra-provincial jurisprudence on the obligation to disclose partial settlement agreements

96. As set out herein, Saskatchewan jurisprudence requiring disclosure of a partial settlement agreement between a plaintiff and some, but not all, defendants, prescribes no clear rule. It is evident that *Mary Carter* agreements and *Pierringer* agreements

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[31] Affidavit of Bryan Reynolds, sworn November 1, 2024, Exhibit "G" at para 7; Affidavit of Bryan Reynolds, sworn November 1, 2024, Exhibit "H" at para 7; Affidavit of Bryan Reynolds, sworn November 1, 2024, Exhibit "I" at para 7.

must be disclosed. The Settlement Agreements in the within case are neither a *Mary Carter* nor a *Pierringer* agreement.

97. The Ontario cases cited by the Applicants are primarily *Pierringer, Mary Carter* or standstill agreements, entered into after pleadings have crystalized positions of the some or all of the defendant parties, or where the agreement involves a defendant being required to commence or pursue a Cross-claim or Third Party Claim.

a. *Aecon ONCA* expressly references Third Party Claim and Fourth Party Claims. It is plain and obvious that defendant positions had crystalized in the pleadings.[32]

b. *Aviaco* expressly references affidavits of documents having been disclosed and productions being under way. It is plain and obvious that defendant positions had crystalized in the pleadings.[33]

c. *CHU de Québec-Université Laval v Tree of Knowledge International Corp.*, 2022 ONCA 467 expressly references the defendants having defended the claim, and Cross-claims having been filed.[34]

d. *Kingdom Construction Limited v Perma Pipe Inc.*, 2024 ONCA 593 ["***Kingdom CA***"] expressly references defences and Cross-claims having been asserted in the action.[35] A summary judgment application had been made in 2019 which was ultimately never heard. A partial settlement agreement was entered into on March 4, 2021. Further agreements were entered into, dated April 22, 2021. The settlement agreements were not disclosed to the other parties until September 22, 2021.[36] Of significant note, the Court did not stay the action.[37]

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[32] *Aecon Buildings v Stephenson Engineering Limited*, 2010 ONCA 898 at para 1.
[33] *Aviaco International Leasing Inc. v Boeing Canada Inc.* (2000), 9 BLR (3d) 99, 2000 CanLII 22777 at para 3 (CanLII) (ON SC)
[34] *CHU de Québec-Université Laval v Tree of Knowledge International Corp.*, 2022 ONCA467 at paras 10, 13.
[35] *Kingdom Construction Limited v Perma Pipe Inc.*, 2024 ONCA 593 at paras 12-16.
[36] *Kingdom Construction Limited v Perma Pipe Inc.*, 2024 ONCA 593 at paras 17-20, 22, 26.
[37] *Kingdom Construction Limited v Perma Pipe Inc.*, 2024 ONCA 593 at paras 32, 33, and 55.

e. *Poirer v Logan*, 2022 ONCA 350 expressly defences having been filed, as well as Cross-claims.[38] Further, there had been cooperation between the defendants in examinations on the Cross-claims "to avoid indirectly assisting Mr. Poirer in obtaining admissions that could assist in his action (the "stand still agreement")."[39]

   As an aside, one might ask whether the cooperation amongst defendants – whether or not Cross-claiming against each other – would also amount to an abuse of process. In instances of a Cross-claim, or apportionment of liability amongst defendants, or where the claim implies inherently adversarial positions among the defendants, must an agreement between defendants be disclosed to the other parties and the Court? If the Applicants' arguments are adopted, cooperation of any sort among defendants where there are Cross-claims, Counterclaims, or claims for apportionment of fault or liability, or where such positions are implied by the Statement of Claim, that agreement or cooperation must also be disclosed immediately to the other defendants and to the plaintiff in an action.

f. *Skymark Finance Corporation v Ontario*, 2023 ONCA 234 ["***Skymark***"] expressly references defences and Counterclaims having been filed.[40]

g. *Tallman Truck Centre Limited v K.S.P. Holdings Inc.*, 2022 ONCA 66 was an appeal from *Tallman Truck Centre Limited v K.S.P. Holdings Inc.*, 2021 ONSC 984. In the lower Court decision there is express reference to a defence having been filed by the settling defendant.[41]

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[38] *Poirer v Logan*, 2022 ONCA 350 at paras 8-9.
[39] *Poirer v Logan*, 2022 ONCA 350 at para 10.
[40] *Skymark Finance Corporation v Ontario*, 2023 ONCA 234 at paras 17-19.
[41] *Tallman Truck Centre Limited v K.S.P. Holdings Inc.*, 2021 ONSC 984 at para 13.

h. *Waxman v Waxman*, 2022 ONCA 311 expressly refers to defences having been filed, and discoveries of certain defendants undertaken and replies to undertakings given prior to the settlement agreement.[42]

98. *Handley Estate v DTE Industries Limited*, 2018 ONCA 324 ["***Handley CA***"] is a peculiar standout among the Ontario decisions cited by the Appellants. In that instance Aviva commenced a subrogated claim in the plaintiff's name. The defendant H&M had been dissolved before the claim was commenced, and had no assets. In 2011 H&M and Aviva entered into an agreement whereby H&M would defend the action, and advance a Third Party Claim, funded by Aviva.[43] Aviva and H&M did not disclose the 2011 agreement to the Court or to the other defendants. In March 2016 Aviva and H&M entered into a further agreement, in which H&M assigned its interest in the litigation to Aviva.[44] The fact of assignment of rights in the litigation was disclosed to the third parties 10 days following the 2016 agreement between Aviva and H&M.[45] The 2011 agreement was not disclosed until September 2016.[46]

99. The nature of the agreements in *Handley* are such that the other parties, and the Court, were misled <u>for years</u> as to the cooperative relationship between Aviva and H&M.

100. In the Court below,[47] the Court refers to the defendants DTE Industries Limited being insolvent and not defending.[48] The decisions also refer to H&M having not defended when the settlement agreement with Aviva was entered into in 2011.[49]

101. No mention is made in the *Handley* decisions as to whether the other defendants, Geo. Williamson Fuels Ltd. and Ultramar Ltd., had defended the action or asserted Cross-claims or Counterclaims between themselves by the time the settlement agreement between Aviva and H&M had been reached in 2011.

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[42] *Waxman v Waxman*, 2022 ONCA 311 at para 12.
[43] *Handley Estate v DTE Industries Limited*, 2018 ONCA 324 at paras
[44] *Handley Estate v DTE Industries Limited*, 2018 ONCA 324 at para 2.
[45] *Handley v DTE Industries Limited*., 2017 ONSC 4349 at para 18.
[46] *Handley v DTE Industries Limited*., 2017 ONSC 4349 at para 24.
[47] *Handley v DTE Industries Limited*., 2017 ONSC 4349.
[48] *Handley v DTE Industries Limited*., 2017 ONSC 4349 at para 8.
[49] *Handley v DTE Industries Limited*., 2017 ONSC 4349 at para 6.

102. The agreement in 2011 is expressly referenced as having been entered into as the expiry of the limitation period for a claim of contribution or indemnity approached.[50]

103. In any event, it is obvious that the effect of the 2011 and 2016 agreements between Aviva and H&M necessarily mislead the Court as to the cooperative relationship between them, as plaintiff and defendant, and the corresponding relationships with the other parties to the litigation.

104. One extra-provincial case purports to impose an obligation to disclose a partial settlement agreement where there is no defence served. That case is *Ball v 1979927 Alberta Ltd.*, 2024 ABKB 229. As with this action, this is a pre-certification class action in which defences and claims for contribution had not been filed.[51] That case relies entirely on the Ontario jurisprudence, based solely on the decision in *Skymark* holding "… the focus is on the Minutes of Settlement, not what transpired afterwards".[52]

105. The Court in *Ball* "acknowledged these arguments", namely that no defences or indemnity claims had been filed and there was no prejudice to the non-settling defendants.[53] What the Court neglects, <u>entirely</u>, is that the plaintiffs were fully entitled to amend their pleadings as they saw fit – including withdrawal of any claim against some or all defendant. The complete and total failure on the part of that Court to rationalize its decision, within the context of the rights of the plaintiff under the rules and jurisprudence of the Alberta Court of King's Bench, renders its conclusion unreliable and unpersuasive.

106. Throughout the extra-provincial decisions cited by the Applicants a common thread emerges – disclosure is required <u>where the settlement agreement "changes entirely the landscape of the litigation</u>."[54]

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[50] *Handley v DTE Industries Limited*., 2017 ONSC 4349 at para 8; *Handley Estate v DTE Industries Limited*, 2018 ONCA 324 at para 11.
[51] *Ball v 1979927 Alberta Ltd.*, 2024 ABKB 229 at paras 1, 77, 80.
[52] *Ball v 1979927 Alberta Ltd.*, 2024 ABKB 229 at para 77.
[53] *Ball v 1979927 Alberta Ltd.*, 2024 ABKB 229 at para 77.
[54] See, for example: *Aecon Buildings v Stephenson Construction Ltd.*, 2010 ONCA 898 at para 13; *CHU de Quebec-Universite v Tree of Knowledge International Corp.*, 2022 ONCA 467 at para 55 a).

107. What constitutes "changes entirely the landscape of the litigation" has also been characterized as "significantly alters the relationship among the parties to the litigation" and "changing entirely the landscape of the litigation in a way that significantly alters the dynamics of the litigation" (emphasis added).[55]

108. The most recent pronouncement on this issue of the Ontario Court of Appeal referred to by the Applicants is *Kingdom CA*[56]. The Court states:

> [1] Settling parties must immediately disclose a partial settlement – a settlement between a plaintiff and some, but not all, defendants – **if the settlement changes entirely the landscape of the litigation in a way that significantly alters the dynamics of the litigation**. The failure to do so is an abuse of process, the remedy for which is a stay of the action against the non-settling defendants: *Aecon Buildings v. Stephenson Engineering Limited*, 2010 ONCA 898, 328 D.L.R. (4th) 488, at paras. 13, 15-16; *Skymark Finance Corporation v. Ontario*, 2023 ONCA 234, 166 O.R. (3d) 131, at paras. 46-47, 53.
>
> [46] **A settlement will entirely change the landscape of the litigation when it involves a party switching sides from its pleaded position**, changing the adversarial position of parties set out in pleadings into a cooperative one: *Tallman Truck Centre Limited v. KSP Holdings Ltd.*, 2021 ONSC 984, 60 C.P.C. (8th) 258, at para. 46, aff'd 2022 ONCA 66; *Handley Estate*, at paras. 39-41.
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> (Emphasis added)

109. The Ontario Court of Appeal has succinctly stated when a settlement agreement must be disclosed - when a party switches sides from its own pleaded position.

110. Applying the most recent statement of the law applied in Ontario, have the Plaintiffs "switched sides from [their] pleaded position, changing the adversarial position of the parties set out in pleadings into a cooperative one"? The Plaintiffs submit that they have not.

111. The Settling Defendants have plainly not "switched sides" from their pleaded position. The Settling Defendants have not filed **any** pleadings setting out any "pleaded position".

[55] *Skymark Finance Corporation v Ontario*, 2023 ONCA 234 at paras 52-53.
[56] *Kingdom Construction Limited v Perma Pipe Inc.*, 2024 ONCA 593.

112. Nor have the non-settling Defendants "switched sides" from their pleaded position as against either the Plaintiffs or the Settling Defendants. The non-settling Defendants have not filed **any** pleadings.

113. Even the foregoing application of *Kingdom CA* is not dispositive. *Kingdom CA* provides further basis undermining the Applicants' submissions.

114. In the Court below, in *Kingdom Construction Limited v Perma Pipe*, 2023 ONSC 4776, the Court declined to order a stay of the action. The Court determined that the partial settlement agreements were not required to be disclosed as there had been insufficient change in the litigation dynamics to engage the obligation to disclose.

> [44]… the legal positions of the non-settling defendants were unaffected by the settlement between Kingdom, Catlin, York and Dunham. As noted previously, none of the non-settling defendants advanced a claim that they were additional insureds under the Catlin policy. However, it would be open to them to seek leave to amend their pleadings to make that allegation. […] The settlement took nothing away from the non-settling defendants' ability to claim that they were insureds under the policy.
>
> [45] Moreover, the settlement took nothing away from the non-settling defendants' denials of liability in negligence in their respective pleadings. The nature of the claims against them as asserted in Kingdom's Statement of Claim, and the documents and evidence to be led to advance those claims were unaltered by the settlement. Although the terms of the settlement require Kingdom to make all relevant documents and its officers, directors, and staff available to assist Catlin in prosecuting the claim against the non-settling defendants, that same evidence would have been marshalled against the non-settling defendants had the settlement not occurred.[57]

115. In *Kingdom CA* the Ontario Court of Appeal upheld this rationale, finding no error by the motions judge.

116. As set out herein, the Settlement Agreements do not compel the Settling Defendants to take any position adversarial to the non-settling Defendants. In fact, the Settling Defendants are excused from the action altogether, subject to an obligation that they provide information and documents that they would have had to provide had they remained as Defendants in the action.

[57] *Kingdom Construction Ltd. v Perma Pipe*, 2023 ONSC 4776 at paras 44-46.

117. As it pertains to "cooperation" between the Plaintiffs and the Settling Defendants, the Settlement Agreements require that the Settling Defendant

- "will reasonably cooperate and make herself available to the Plaintiffs, their experts or consultants, and their counsel, in the investigation and prosecution of the matters which are subject of the Action against the Other Defendants, including, without limiting the generality of the foregoing, providing sworn responses to written interrogatories and/or attending for Questioning as contemplated by *The Queen's Bench Rules*, and, if required, swearing an affidavit or affidavits and attending as a witness at trial, on service of a subpoena and appropriate witness fee."[58] (Settlement Agreement between the Plaintiffs and Stephanie Case)

- "will reasonably cooperate and make herself available to the Plaintiffs' counsel, in the investigation and prosecution of the matters which are the subject of the Action against the Other Defendants. This reasonable cooperation shall include, without limiting the generality of the foregoing: providing responses to the twenty-two (22) Written Questions provided to the Settling Defendant on or about September 19, 2023 within a without prejudice document, which shall be protected by litigation privilege; providing responses to further reasonable written questions that may be submitted to the Settling Defendant at a later date on the same basis noted above; and attending as a witness at trial, on service of a subpoena and appropriate witness fees. The Settling Defendant agrees that any testimony to be provided at trial will not vary in any unreasonable way from the written responses provided pursuant to this Settlement Agreement. However, the parties agree that it is not possible to anticipate all questions which may be asked of the Settling Defendant, and nothing shall prevent the Settling Defendant from providing full, honest and complete answers to questions that she may be asked in Court proceedings."[59] (Settlement Agreement between the Plaintiffs and Fran Thevenot)

- "will reasonably cooperate and make herself available to the Plaintiffs, their experts or consultants, and their counsel, in the investigation and prosecution of the matters which are subject of the Action against the Other Defendants, including, without limiting the generality of the foregoing, providing sworn responses to written interrogatories and/or attending for Questioning as contemplated by *The King's Bench Rules*, and, if required, swearing an affidavit or affidavits and attending as a witness at trial, on service of a subpoena and appropriate witness fee."[60] (Settlement Agreement between the Plaintiffs and Tracey Johnson)

118. The cooperation required of the Settling Defendants is merely to provide evidence which would have been required had they remained a Defendant in the action. The duty and obligation of the Settling Defendant in providing such evidence is, as with

[58] Affidavit of Bryan Reynolds, sworn June 18, 2024, Exhibit "I" at para 1.
[59] Affidavit of Bryan Reynolds, sworn June 18, 2024, Exhibit "H" at para 1.
[60] Affidavit of Bryan Reynolds, sworn June 18, 2024, Exhibit "I" at para 1.

any evidence tendered to the Court, required to be truthful on penalty of perjury. In other words, the cooperative effort is no more than to provide records and information that would be required of the Settling Defendants if they continued as Defendants.

119. Part 5 of *The King's Bench Rules* requires a party to serve an Affidavit of Documents, to submit to Questioning by opposing parties, and to provide responses to written interrogatories of opposing parties. Part 5 of *The King's Bench Rules* also imposes disclosure obligations on the Plaintiffs. Records obtained from the Settling Defendants are fully disclosable, and producible, pursuant to *The King's Bench Rules*, subject to lawful exemptions. The Plaintiffs are, therefore, required to disclose in Schedule 1 or Schedule 2 of their Affidavit of Documents, when the time comes, all records received pursuant to the Settlement Agreements.

120. In other words, the action can continue in the ordinary course as would an action in which a plaintiff had settled with some, but not all, wrongdoers before issuing their claim.

121. The "cooperation" compelled by the Settlement Agreements is to the benefit of the Plaintiffs, the non-settling Defendants, and the Court in the fair adjudication of the action.

122. The Settlement Agreements touch as well on what might be construed as the "adversarial" relationship between the Plaintiffs and the Settling Defendants:

- "The Settling Defendant will not take any adversarial position against the Plaintiffs in the Action."[61] (Settlement Agreement between the Plaintiffs and Stephanie Case)

- "The Settling Defendant will not take any formal adversarial position against the Plaintiffs in the Action. This is not to restrict the Settling Defendant from giving honest and forthright answers to questions asked of her under oath, even if such answers may be perceived as adverse to any individual, including any Plaintiff or member of any certified class action."[62] (Settlement Agreement between the Plaintiffs and Fran Thevenot)

- "The Settling Defendant will not take any formal adversarial position against the Plaintiffs in the Action. This is not to restrict the Settling Defendant from giving

[61] Affidavit of Bryan Reynolds, sworn June 18, 2024, Exhibit "H" at para 2.
[62] Affidavit of Bryan Reynolds, sworn June 18, 2024, Exhibit "H" at para 2.

> honest and forthright answers to questions asked of her under oath, even if such answers may be perceived as adverse to any individual, including any Plaintiff or member of any certified class action."[63] (Settlement Agreement between the Plaintiffs and Tracey Johnson)

123. These obligations extend to adversarial *positions* and not adversarial *evidence*. Nor do these obligations preclude the Settling Defendants from providing evidence or records to the non-settling Defendants, including the Applicants. Rather, the Settling Defendants would be precluded from bringing applications or opposing applications brought by the Plaintiffs in an action in which they are no longer parties.

124. Pursuant to the Settlement Agreements the Settling Defendants are not precluded from discussion of the subject matter of the claim with the non-settling Defendants, nor are the Settling Defendants precluded from providing records to the non-settling Defendants, nor are the Settling Defendants precluded from providing evidence to the non-Settling Defendants. In this regard any "cooperation" imposed by the Settlement Agreement has no effect whatsoever on disclosure of, or access to, information or records possessed by the Settling Defendants.

125. The Applicants gloss over the inherent adversarial relationship between the Defendants, and the assessment of whether that relationship has changed. It has not.

126. As an example, the Second Amended Statement of Claim pleads that the Individually Named Defendants are employees, agents or representatives of Mile Two Church Inc., and that Mile Two Church Inc. is vicariously liable for their acts or omissions.[64] Inherent in that pleading, in the absence of defences or evidence to the contrary, while the Individually Named Defendants and Mile Two Church Inc. may[65] be aligned in disputing whether acts or omissions took place, they are inherently adversarial as to whether Mile Two Church Inc. is vicariously liable for any acts or omissions that are proven. Similarly, as a joint and several judgment could be enforced jointly and severally against the Individually Named Defendants and Mile Two Church Inc., there is inherent adversity between the Individually Named Defendants to be

[63] Affidavit of Bryan Reynolds, sworn June 18, 2024, Exhibit "I" at para 2.
[64] Second Amended Statement of Claim at para 65.

indemnified by a vicariously liable Mile Two Church Inc. In this regard there is clearly not a cooperative relationship among the Individually Named Defendants and Mile Two Church Inc.

127. As a further example, the Second Amended Statement of Claim pleads conspiracy, by which the Defendants are jointly and severally liable. There is no contribution among intentional tortfeasors.

128. While each of the Defendants may join interest in avoiding a finding of liability, each of the Defendants have an inherent interest in liability being found against other Defendants to provide alternate sources of recovery in the event that the claim in conspiracy establishes liability of some or all of them. In this regard there is clearly not a cooperative relationship among the Defendants.

129. From all of the foregoing, aside from the *Ball* case out of Alberta, it is far from evident that a settlement agreement in the nature of the Settlement Agreements require disclosure prior to defences being filed, except in instances where the Court is plainly misled as to whether a plaintiff and settling defendant are aligned in interest.

130. In the instant case, the Settling Defendants are not aligned in interest with the Plaintiffs. As set out herein, the obligations of the Settling Defendants are substantially the same as if they remained Defendants in the action.

131. All of the foregoing demonstrates that the circumstances before the Court are readily distinguishable. This is so because:

   a. None of the Defendants has defended the action, made a Cross-claim or Counterclaim, or led any evidence whatsoever as to the relationship between them. The "adversarial" or "cooperative" relationship between the Defendants has not crystalized, and it is impossible for the Court to find that there has been a change in the cooperative or adversarial relationship having any impact whatsoever on the non-settling Defendants.

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[65] Any cooperative relationship or alignment of interests between the Defendants is a matter of fact which must be proved. It is not sufficient to ask the Court to speculate as to what position a party *might* take, or what interests a party *might* prioritize and act on.

b. The Settlement Agreements are fundamentally distinguishable in effect from the agreements for which Courts have found an obligation to disclose to other parties.

c. The Settlement Agreements are not such that the Settling Defendants remain defendants in the action, perpetrating a fiction as to their adversarial relationship with the Plaintiffs upon the non-settling Defendants and the Court.

132. Even if the rationale from the extra-provincial decisions applied to the instant case, disclosure of the Settlement Agreements would not be required:

a. There has been no "switching sides" from the pleaded position of the Plaintiffs against the Settling Defendants – the Settling Defendants have no pleaded position.

b. There has been no "switching sides" from the pleaded position of the Plaintiffs against the non-settling Defendants – the Plaintiffs' allegations against the non-settling Defendants remain, and the Defendants have no pleaded position.

c. There has been no "switching sides" from the pleaded position of the Settling Defendants against the non-settling Defendants – none has any pleaded position.

d. The Settlement Agreements do not obligate the Settling Defendants to take any position *vis a vis* the non-settling Defendants.

e. The Settlement Agreements *enhance* the information and records available to the parties, and to the Court, for the adjudication of the action when compared against the obligations had the Plaintiffs simply discontinued as against the Settling Defendants as they were entitled to do.

133. For this reason the cases and arguments of the Applicants do not support the Applicants' contention that the extra-provincial cases impose an obligation on the Plaintiffs in this action to have immediately disclosed the Settlement Agreements.

134. For all of the foregoing reasons, the Plaintiffs submit that disclosure of the Settlement Agreements was not, and is not, required. There has been no abuse of process by the Plaintiffs.

c) *There is no obligation that disclosure of the settlement agreements be immediate*

135. It goes without saying that if disclosure of the Settlement Agreements was not, and is not, required, that such disclosure need not be immediate.

136. While Saskatchewan jurisprudence has determined that a *Pierringer* agreement must be disclosed to the non-settling defendants and the Court,[66] no reported Saskatchewan case compels that disclosure be "immediate", excepting the decision of Justice Smith in *Bioriginal* which as discussed herein was decided in error, and was in any event *obiter*.

137. In *Underhill*, Justice Mills commends immediate disclosure of non-financial terms as preferable to an application to the Court to review the settlement agreement and come to a conclusion. Justice Mills also refers to disclosure of non-financial terms as "common practice".[67]

138. Simply put, there is no reported decision in Saskatchewan, or at the Supreme Court of Canada, which compels immediate disclosure of a partial settlement agreement to non-settling parties in an action. To impose that obligation in this instance is to create an obligation out of whole cloth, and punish the Plaintiffs for not being clairvoyant.

139. Extra-provincial decisions purport to require immediate disclosure. The rationale is not explained, beyond the pleadings misleading other parties and the Court.

140. The immediacy of disclosure, particularly with respect to *Mary Carter* agreements, in Ontario dates back to at least 1993.[68] In Ontario the jurisprudence has evolved to

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[66] See, for example: *obiter* comments of Justice Smith in *Bioriginal Foods & Science Corp v Sascopack*, 2012 SKQB 469 at para 20;
[67] *Underhill v Central Aircraft Maintenance Ltd.*, 2017 SKQB 102 at paras 11-12.
[68] *Handley Estate v DTE Industries Limited*, 2018 ONCA 324 at para 35, citing *Pettey v. Avis Car Inc.* (1993), 1993 CanLII 8669 (ON SC), 13 O.R. (3d) 725 (Gen. Div.).

encapsulate any agreement which changes entirely the landscape in a significant way from the pleaded positions of the parties.

141. The same is not the case in Saskatchewan, where there is no clear obligation of disclosure, much less that such disclosure be immediate.

142. Where disclosure is actually required, to avoid other parties and the Court being misled in a material way as to the adversarial nature of the parties' pleaded positions, there is some sense to disclosure in a manner which avoids the risk of the other parties, or the Court, relying on the materially misleading fact. Such reliance would be prejudicial to the parties, although in a manner which can be ameliorated by costs, and to the administration of justice, which is more challenging to remedy.

143. The Plaintiffs submit that a more nuanced approach than "immediate" is required in order to be consistent with the requirements of abuse of process.

144. As set out in *Toronto (City) v C.U.P.E., Local 79*, 2003 SCC 63:

> 35 Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (*R. v. Power*, 1994 CanLII 126 (SCC), [1994] 1 S.C.R. 601, at p. 616), and as "oppressive treatment" (*R. v. Conway*, 1989 CanLII 66 (SCC), [1989] 1 S.C.R. 1659, at p. 1667). McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, 1990 CanLII 27 (SCC), [1990] 3 S.C.R. 979, at p. 1007:
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> > . . . abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.[69]

145. In each instance, an analysis may be undertaken to determine at what point not disclosing a partial settlement agreement to non-settling defendants, is:

a. Unfair to the point that it is contrary to the interest of justice; or

b. Oppressive treatment.

146. It is trite law that the objective of this Honourable Court is to fairly and efficiently adjudicate disputes. This is articulated in the Foundational Rules in Part 1 of *The King's Bench Rules*. The objective serves the interest of justice.

147. The interest of justice are also served by the preservation of settlement privilege.[70] As set out in *Sable Offshore Energy Inc. v Ameron International Corp.*, 2013 SCC 37 ["***Sable Offshore***"], with respect to exceptions to settlement privilege:

> [19] There are, inevitably, exceptions to the privilege. To come within those exceptions, a defendant must show that, on balance, "a competing public interest outweighs the public interest in encouraging settlement" (*Dos Santos Estate v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4, 207 B.C.A.C. 54, at para. 20). These countervailing interests have been found to include allegations of misrepresentation, fraud or undue influence (*Unilever plc v. Procter & Gamble Co.*, [2001] 1 All E.R. 783 (C.A. Civ. Div.), *Underwood v. Cox* (1912), 1912 CanLII 582 (ON SCDC), 26 O.L.R. 303 (Div. Ct.)), and preventing a plaintiff from being overcompensated (*Dos Santos*). [71]

148. In an instance where the pleading of a party amounts to fraud on the Court, by maintaining or filing a pleading, the core of which – the existence of a *lis* between the plaintiff and a settling defendant who remained a party to the action – is a fraud. This was the case in *Newell* and in *Handey CA*, where the pleadings fundamentally amounted to a claim or defence being a fiction. These were an abuse of process, and one among the clearest of cases.

149. In an instance like *Newell* and *Handey CA*, the partial settlement agreement must be immediately disclosed in order to avoid blatant misrepresentation of the core of the pleading to the Court and the other parties. Maintaining a cause of action which has been wholly settled between the plaintiff and settling defendant cannot <u>ever</u> serve the interest of justice. A non-settling defendant will have little difficulty in establishing "a competing public interest" which "outweighs the public interest in encouraging settlement" in those circumstances.

150. The Plaintiffs submit that there is a critical question, when it comes to the timing of disclosure of a partial settlement agreement to a non-settling defendant: Has the non-

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[69] *Toronto (City) v C.U.P.E., Local 79*, 2003 SCC 63 at para 35.
[70] See, for example: *Sable Offshore Energy Inc. v Ameron International Corp.*, 2013 SCC 37 at paras 12, 19.
[71] *Sable Offshore Energy Inc. v Ameron International Corp.*, 2013 SCC 37 at para 19.

settling defendant been prejudiced in their conduct of the litigation which it would not have been had the partial settlement agreement been disclosed?

151. For a *Mary Carter* type agreement, where the settling defendant remains a party in the action, the Plaintiffs acknowledge that immediate disclosure is appropriate. Fundamentally an agreement where the settling defendant remains a party in the action presents risk similar to that in *Newell* and *Handey CA*.

152. In *Pierringer* type agreements, or partial settlement agreements in the nature of the Settlement Agreements, it is less clear when the interests of justice require disclosure.

153. In any event, prior to defences being pled by a defendant, where the plaintiff is entitled to discontinue an action against a defendant without leave of the Court, there is no immediacy whatsoever in disclosing a settling agreement. The non-settling defendant can be made whole for any expense incurred between the settlement agreement and disclosure of the settlement agreement.

154. Prompt disclosure should, however, be required upon the occurrence of any of the following events:

a. A pleading being filed which asserts a Cross-claim, Counterclaim, or apportionment of fault or liability against the settling defendant.

b. An application being brought seeking adjudication of any dispute which is resolved by the terms of the partial settlement agreement.

155. Failing to promptly disclose the partial settlement agreement in these circumstances risks the Court being misled in a material way, which is contrary to the fair and efficient adjudication of the real issues between the parties, and the interest of justice. A failure to disclose salient terms of a partial settlement agreement once these steps are taken risks bringing the administration of justice into disrepute.

156. Part 11 of *The King's Bench Rules*, and the common law surrounding costs – and particularly solicitor-client costs – are risks faced by a plaintiff who does not disclose a partial settlement agreement before a non-settling defendant, or other party, takes

steps which would not have been taken had the partial settlement agreement been disclosed. A non-settling defendant can, through costs, be made whole.

157. In the instant case there is no evidence whatsoever of <u>any</u> step taken by the Applicants, or any of them, which would not have occurred if the Settlement Agreements had been disclosed. In fact, even these Applications were not brought until <u>after</u> the Settlement Agreements had been disclosed.

158. Nor have the Applicants established that there is <u>any</u> interest at play which outweighs the public interest in encouraging settlement.

159. The Plaintiffs' proposal serves to accomplish the fair and efficient administration of the dispute, while preserving settlement privilege. This is an appropriate balancing of the public interest that outweighs the public interest in encouraging settlement - as *Sable Offshore* requires.

160. The Plaintiffs make no submission as to the timing of disclosure in instances where defences, Cross-claims, Counterclaims, or other proceedings have been taken to crystalize the pleaded positions of the non-settling defendants. That is not the case before the Court, and the Plaintiffs have not considered the myriad circumstances which would bear on proposing an applicable test.

d) No remedy is necessary respecting the purported abuse of process in the circumstances

161. The relief sought by the Applicants for a permanent stay of the action is an extreme remedy, which would effectively deprive the Plaintiffs from adjudication of their action.

162. In *Abrametz v Law Society of Saskatchewan*, 2022 SCC 29, writing for an 8-1 majority, Justice Rowe addressed the significance of a stay of proceedings:

> [83] A stay of proceedings is the ultimate remedy for abuse of process. It is "ultimate" because it is "final"; the process will be permanently stayed: *Regan*, at para. 53. In disciplinary matters, that means that charges will not be dealt with, any complaint will go unheard and the public will not be protected. Given these consequences, a stay should

> be granted only in the "clearest of cases", when the abuse falls at the high end of the spectrum of seriousness: *Blencoe*, at para. 120, citing *Power*, at p. 616.[72]

163. In other contexts, prejudice is a necessary condition to a finding of abuse of process. See, for example: delay in prosecution of a human right complaint,[73] delay in prosecution of an administrative prosecution,[74] or a stay of proceedings for contravention of fundamental notions of justice.[75]

164. The remedy of a stay of proceedings for abuse of process is addressed by the Supreme Court of Canada in *R v Babos*, 2014 SCC 16:

> [30] A stay of proceedings is the most drastic remedy a criminal court can order (*R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 53). It permanently halts the prosecution of an accused. In doing so, the truth-seeking function of the trial is frustrated and the public is deprived of the opportunity to see justice done on the merits. In many cases, alleged victims of crime are deprived of their day in court. [76]

165. The Supreme Court of Canada went on to describe when a stay may be appropriate:

> [31] Nonetheless, this Court has recognized that there are **rare occasions —the "clearest of cases"** — when a stay of proceedings for an abuse of process will be warranted (*R. v. O'Connor*, 1995 CanLII 51 (SCC), [1995] 4 S.C.R. 411, at para. 68). These cases generally fall into two categories: (1) where state conduct compromises the fairness of an accused's trial (the "main" category); and (2) where state conduct creates no threat to trial fairness but risks undermining the integrity of the judicial process (the "residual" category) (*O'Connor*, at para. 73). The impugned conduct in this case does not implicate the main category. Rather, it falls squarely within the latter category.
>
> [32] The test used to determine whether a stay of proceedings is warranted is the same for both categories and consists of three requirements:
>
> (1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" (*Regan*, at para. 54);

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[72] *Abrametz v Law Society of Saskatchewan*, 2022 SCC 29 at para 83.
[73] *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 101, holding "In the administrative law context, there must be proof of significant prejudice which results from an unacceptable delay."
[74] *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 at para 67, holding "[72] The test for whether delay amounts to an abuse of process has three steps. First, the delay must be inordinate. This is determined on an assessment of the context overall. Second, the delay must have caused significant prejudice. When these two requirements are met, the court or tribunal is to conduct a final assessment as to whether abuse of process is established. This will be so when the delay is manifestly unfair to the party to the proceedings or in some other way brings the administration of justice into disrepute: *Behn*, at paras. 40-41."
[75] *R v Babos*, 2014 SCC 16 at para 32.
[76] *R v Babos*, 2014 SCC 16 at paras 30.

> (2) There must be no alternative remedy capable of redressing the prejudice; and
>
> (3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" (*ibid.*, at para. 57).
>
> [33] The test is the same for both categories because concerns regarding trial fairness and the integrity of the justice system are often linked and regularly arise in the same case. Having one test for both categories creates a coherent framework that avoids "schizophrenia" in the law (*O'Connor*, at para. 71). But while the framework is the same for both categories, the test may — and often will — play out differently depending on whether the "main" or "residual" category is invoked. [77]
>
> (Emphasis added)

166. In these cases, the Supreme Court of Canada has been clear that prejudice is an essential element of abuse of process in those contexts.

167. In *Onion Lake Cree Nation v Stick*, 2018 SKCA 20, the Saskatchewan Court of Appeal addressed what is required to prove an abuse of process:

> [52] The doctrine of abuse of process is also a flexible one. There is no set test or rules for determining what amounts to an abuse of process. Rather, the doctrine engages a court's inherent power to prevent the misuse of its judicial proceedings. As Arbour J. stated in *Toronto (City) v CUPE, Local 79*, 2003 SCC 63, [2003] 3 SCR 77, the doctrine of abuse of process focusses on the integrity of the adjudicative process:
>
>> [43] … In all of its applications, the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of courts. Whether it serves to disentitle the Crown from proceeding because of undue delays … or whether it prevents a civil party from using the courts for an improper purpose … the focus is less on the interest of parties and more on the integrity of judicial decision making as a branch of the administration of justice. …
>
> See also *Insurance Company of the State of Pennsylvania v Cameco Corporation*, 2010 SKCA 95 at paras 47–51, [2010] 10 WWR 385.
>
> [53] In *Behn v Moulton Contracting Ltd.*, 2013 SCC 26, [2013] 2 SCR 227, LeBel J., writing for the Court, described the doctrine in these terms:
>
>> [39] In *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, Arbour J. wrote for the majority of this Court that the doctrine of abuse of process has its roots in a judge's inherent and residual discretion to prevent

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[77] *R v Babos*, 2014 SCC 16 at paras 31-33.

abuse of the court's process: para. 35; see also P. M. Perell, "A Survey of Abuse of Process", in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation 2007* (2007), 243. Abuse of process was described in *R. v. Power*, 1994 CanLII 126 (SCC), [1994] 1 S.C.R. 601, at p. 616, as the bringing of proceedings that are "unfair to the point that they are contrary to the interest of justice", and in *R. v. Conway*, 1989 CanLII 66 (SCC), [1989] 1 S.C.R. 1659, at p. 1667, as "oppressive treatment." **In addition to proceedings that are oppressive or vexatious and that violate the principles of justice, McLachlin J. (as she then was) said in her dissent in *R. v. Scott*,** 1990 CanLII 27 (SCC), **[1990] 3 S.C.R. 979, at p. 1007, that the doctrine of abuse of process evokes the "public interest in a fair and just trial process and the proper administration of justice".** Arbour J. observed in *C.U.P.E.* that the doctrine is not limited to criminal law, but applies in a variety of legal contexts: para. 36.

[40] **The doctrine of abuse of process is characterized by its flexibility.** Unlike the concepts of *res judicata* and issue estoppel, abuse of process is unencumbered by specific requirements. In *Canam Enterprises Inc. v. Coles* (2000), 2000 CanLII 8514 (ON CA), 51 O.R. (3d) 481 (C.A.), Goudge J.A., who was dissenting, but whose reasons this Court subsequently approved (2002 SCC 63, [2002] 3 S.C.R. 307), stated at paras. 55-56 that **the doctrine of abuse of process**

> **engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute.** It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 [(C.A.)], at p. 358 ….
>
> One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. See *Solomon v. Smith*, *supra*. It is on that basis that Nordheimer J. found that this third party claim ought to be terminated as an abuse of process.
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> (Underline emphasis in original, bold emphasis added)

See also, the decision of this Court in *Bear v Merck Frosst Canada & Co.*, 2011 SKCA 152 at paras 36–38, 345 DLR (4th) 152.[78]

(Emphasis in original)

168. What is evident from *Onion Lake* is that it is necessary for the Court, when asked to find an abuse of process, to engage in an analysis of whether it is "manifestly unfair

[78] *Onion Lake Cree Nation v Stick*, 2018 SKCA 20 at paras 52, 53.

to a party to the litigation before it, or would in some other way bring the administration of justice into disrepute."

169. As set out herein, the circumstances before the Court do not create manifest unfairness to any of the parties before the Court. Nor is the administration of justice brought into disrepute by the Plaintiffs being permitted to have their claim adjudicated on the merits. It would, however, bring the administration of justice into disrepute if the Plaintiffs are prevented from having their claim adjudicated on the merits.

170. Even if the Court is satisfied that a failure to disclose the Settlement Agreements to the non-settling Defendants resulted in manifest unfairness to the non-settling Defendants, or brings the administration of justice into disrepute, a stay is not an appropriate remedy.

171. While the extra-provincial cases commend a stay, consideration of a stay on decisions binding in this Province do not.

172. In the civil context, the Saskatchewan Court of Appeal in *Herald v Wasserman*, 2022 SKCA 103 ["***Wasserman***"] described the test for a stay of an action:

> [47] As explained in *Metropolitan Stores*, a "stay of proceedings and an interlocutory injunction are remedies of the same nature". Justice Beetz went on to immediately state that, in "the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of an interlocutory stay the principles which they follow with respect to interlocutory injunctions" (at 127). This was reiterated in *RJR-MacDonald Inc. v Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 SCR 311 at 334 [*RJR-MacDonald*], in which Sopinka and Cory JJ., speaking for the Court, explained the basic three-part test that generally applies when a court is called to consider whether to grant a stay or an interlocutory injunction:
>
>> *Metropolitan Stores* adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on

> the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.
>
> f the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.
>
> g a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.
>
> I will call this three-part test the *RJR-MacDonald* framework. In this province, the leading authority explaining it is *Mosaic*.
>
> [48] Inherent in both the second and third parts of the *RJR-MacDonald* framework is that the applicant seeking a stay or interlocutory injunction will suffer prejudice if it is not granted. In this regard, the second part of the framework establishes the threshold as being "irreparable harm". The third part invites the court to weigh this harm against that which the respondent will suffer if the stay or injunction is granted or not.[79]

173. Consistent with Supreme Court of Canada jurisprudence in other areas, prejudice is a necessary condition for a stay of proceedings to be granted.

174. The Applicants have led no evidence whatsoever that they will suffer "irreparable harm", or prejudice, in the circumstances. Nor could they – the Settlement Agreements were disclosed to them (whether or not they were required to be) before any further step was taken in the action.

175. Even had the Applicants led evidence of irreparable harm, or prejudice, their submissions fail to address the impact on the Plaintiffs, and members of the classes encompassed by the proposed classes.

176. The Saskatchewan Court of Appeal added further consideration, in the context of an application to stay class action proceedings such as this action. In *Wasserman*, the Court stressed the importance of considering the impact on the plaintiffs in a class action.

177. At paragraphs 50-51 the Saskatchewan Court of Appeal found error on the part of the Chambers Judge in failing to consider the impact on the class plaintiffs in each of the

[79] *Herald v Wasserman*, 2022 SKCA 103 at paras 47, 48.

two class actions should a stay be granted, or not granted.[80] In doing so the Court held:

> [53] The failure of the Chambers judge to specifically identify the injustice or prejudice that the Brons Plaintiffs would suffer if a stay of the Herold Action was not granted means that he also failed to ask if there are other ways, short of an order staying the Herold Action, that would protect against that risk.[81]

178. The Saskatchewan Court of Appeal went on to hold that in an application for a stay of class proceedings, the Court must consider the objectives of class proceedings[82] – described in *Western Canadian Shopping Centres v Dutton*, 2001 SCC 46 as:

    a. Judicial economy, avoiding unnecessary duplication in fact-finding and legal analysis;

    b. Dividing litigation costs over a large number of plaintiffs; and

    c. Permitting claims to proceed to ensure that wrongdoers, and potential wrongdoers, do not ignore their obligations to the public, where individual claims may be cost-prohibitive for harmed plaintiffs.[83]

179. In the circumstances of this case, a stay of proceedings denies the Plaintiffs, and could deny members of the proposed classes, adjudication of their claim. That is among the most extreme remedies, and one which is wholly inappropriate in the absence of any prejudice to the Applicants.

180. In any event, the evidence before the Court is that another member of the proposed class stands ready to commence a new claim in the event that this claim is stayed.[84] In light of the compulsory consideration of the objectives of class proceedings, and impact on the parties, a stay of this action would incur cost to the members of the proposed classes and delay in the action proceeding to certification. A stay therefore only serves to frustrate the fair and efficient adjudication of the subject matter of the action.

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[80] *Herald v Wasserman*, 2022 SKCA 103 at paras 51, 52.
[81] *Herold v Wasserman*, 2022 SKCA 103 at paras 50-53.
[82] *Herald v Wasserman*, 2022 SCKA 103 at para 61.

181. The Saskatchewan Court of Appeal went on, in *Wasserman*, to make abundantly clear that the Court must consider lesser remedies which could balance the competing interests of the applicant(s) and respondent(s). The Court stated:

> [62] I would add one final point before turning to the question of whether a temporary stay should be imposed in this case. It is this: when considering a request for a stay, the court should assess whether and how a different order, short of the denial of outright access to the courts, will affect the balancing of the competing interests of the applicant and respondent. This idea is consistent with the principle that a stay or injunction should be granted only if necessary to protect the applicant's interests and then should only be as broad as required to do so. See, for example only: *NunatuKavut Community Council Inc. v Nalcor Energy*, 2014 NLCA 46 at paras 71 and 95, 358 Nfld & PEIR 123; *Cambie Surgeries Corp. v British Columbia (Medical Services Commission)*, 2010 BCCA 396 at para 39, 323 DLR (4th) 680; *St. Lewis v Rancourt*, 2015 ONCA 513 at para 16, 337 OAC 15; and *Labourers' International Union of North America, Local 183 v Castellano*, 2020 ONCA 71 at paras 18 and 26, 444 DLR (4th) 183.[85]

182. Within this context, as set out herein the law in the Province of Saskatchewan does not clearly or unambiguously compel the disclosure of partial settlement agreements of the nature of the Settlement Agreements to the non-settling defendants. It is certainly far from clear that in Saskatchewan such disclosure must be immediate.

183. As was the case in *International Capital Corporation v Robinson Twigg & Ketilson*, 2010 SKCA 48 ["***ICC***"], [86] the Plaintiffs have conducted themselves within the law as it existed in the Province of Saskatchewan. To the extent that the law may change, it would do injustice to, and prejudice, the Plaintiffs, and potentially the members of the proposed classes, if that change in the law in Saskatchewan were applied retrospectively.

184. In *ICC* the Saskatchewan Court of Appeal held that the plaintiffs had conducted themselves according to the law as articulated in *Carey v Twohig*, 1973 CanLII 898, 38 DLR (3d) 718. The law in Saskatchewan, under *Carey*, was that to dismiss an action for want of prosecution an assessment of whether there would be "serious prejudice" if the action proceeded to trial was a necessary condition to dismissing the claim. The Court of Appeal determined that the law must change – where there is

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[83] *Western Canadian Shopping Centres v Dutton*, 2001 SCC 46 at paras 27-29.
[84] Affidavit of Mark Drapak, sworn January 21, 2025 at para 3.
[85] *Herald v Wasserman*, 2022 SKCA 103 at para 61.

inordinate and inexcusable delay, the Court should move directly to examining whether it is in the interest of justice for the action to proceed to trial notwithstanding the delay, with prejudice considered in that context rather than as a discrete question.[87]

185. Although the Court of Appeal had articulated new law in dismissing an application for want of prosecution, the risk of unfairness in applying that new law to the parties was enough for the Court of Appeal to allow the plaintiffs to continue their action.[88]

186. The Defendants submit that the approach commended by the Applicants amounts to a change to the law in the Province of Saskatchewan. As such, as was the case in *ICC*, it would be manifestly unfair, and impugn the administration of justice, for the Court to blindly apply the most extreme remedy available, and deny the Plaintiffs the fair adjudication of the action.

187. This leaves a question of what remedy is appropriate in the circumstances, if the Court is satisfied that the failure to immediately disclose the Settlement Agreements amounts to an abuse of process. As the Settlement Agreements have been disclosed and no prejudice whatsoever has been established, no remedy is required or appropriate.

188. The Defendants respectfully submit that no remedy is necessary in the circumstances – the Settlement Agreements have been disclosed to the Applicants. If a remedy is required, an appropriate remedy is, at most, a *temporary* stay until an application for approval of the Settlement Agreements is brought.

V. RELIEF REQUESTED

189. The Plaintiffs request that the Applications be dismissed, with costs payable forthwith and in any event of the cause.

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[86] *International Capital Corporation v Robinson Twigg & Ketilson*, 2010 SKCA 48 at paras 50-51.
[87] *International Capital Corporation v Robinson Twigg & Ketilson*, 2010 SKCA 48 at para 45.
[88] *International Capital Corporation v Robinson Twigg & Ketilson*, 2010 SKCA 48 at paras 50-51.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Saskatoon, Saskatchewan, this 7th day of March, 2025.

SCHARFSTEIN LLP

Per: ______________________________

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VI. AUTHORITIES

Authorities Available on www.canlii.org

As Per Rule 13-38.1, the authorities in this List of Authorities are available on www.canlii.org and are not enclosed except where otherwise noted.

The Summary statements of legal principles relied upon from each authority are not intended to be exhaustive, and should be read in context with the body text of this Brief of Law.

	Name	Pinpoints	Legal Principle
Case Law			
1	*Abrametz v Law Society of Saskatchewan*, 2022 SCC 29	Para 67, 72, 83	Prejudice is a necessary condition to a finding of abuse of process in the context of a delay in prosecution of a human rights complaint. This decision outlines the test for whether delay amounts to an abuse of process, which has three steps. Prejudice is a necessary condition for a stay of proceedings for abuse of process.
2	*Aecon Buildings v Stephenson Engineering Ltd.*, 2010 ONCA 898	Para 1, 13	This decision is distinguishable as the Court was concerned with a Mary Carter agreement in which the settling defendant remained a party to the action. The decision expressly references Third and Fourth Party Claims, and the defendant positions had crystalized in the pleadings. Disclosure is required where the settlement agreement changes entirely the landscape of the litigation.
3	*Aecon Buildings v Stephenson Engineering Ltd.*, 2011 SCC 33	Para 10	Identifying particulars of case which differ from the description of Smith, J in *Bioriginal*. The SCC was concerned with an application to produce fresh evidence in Aecon's application for leave to appeal

			Aecon ONCA, and the appeal was dismissed without affirming *Aecon ONCA*
4	*Alves v Mytravel Canada Holidays Inc.*, 2009 SKQB 517	Para 27	Class actions must be certified pursuant to Part II of *The Class Actions Act*.
5	*Aviaco International Leasing Inc. v Boeing Canada Inc.* (2000), 9 BLR (3d) 99, 2000 CanLII 22777 (ON SC)	Para 3, 23	"Mary Carter" agreements have to be produced because they fundamentally alter what otherwise would be the expected relationship between two parties to the litigation, as it changes the relationship from an adversarial one to a co-operative one. This case is distinguishable as affidavits of documents were disclosed, productions were underway, and defendant positions had crystalized.
6	*Ball v 1979927 Alberta Ltd.*, 2024 ABKB 229	Paras 1, 77, 80	Thesupposed obligation to disclose a partial settlement agreement where there is no defence served isan extra-provincial case that relied entirely on Ontario jurisprudence which is not applicable, binding, or persuasive.
7	*Bioriginal Food & Science Corp v Saskcopack Inc*, 2012 SKQB 469	Paras 1-5, 33, 35	The Court described the agreement as a "Proportionate Share Settlement Agreement". This decision is distinguishable as defences and Cross-claims had already been filed. Reliance and citation to *Bioriginal* is for the proposition that imperfect information is virtually always the case in settlement negotiations, and not for the proposition that immediate disclosure is required for partial settlement agreements. The *obiter dicta* respecting immediate disclosure is founded on mistaken statements of law.
8	*Blencoe v British Columbia (Human Rights*	Para 101	For abuse of process to be found in the administrative law context, there must be

	Commission), 2000 SCC 44		proof of significant prejudice which results from an unacceptable delay.
9	*Brown v Cape Breton (Rural Municipality)*, 2011 NSCA 32	Para 67	Privilege should extend to a concluded agreement. The argument that disclosure would facilitate settlement amongst the remaining parties ignores the fact that but for the privilege, the first settlement would often not occur.
10	*CHU de Québec-Université Laval v Tree of Knowledge International Corp.*, 2022 ONCA 467	Paras 10, 13	This case is distinguishable as defences and Cross-claims had been filed.
11	*Handley v DTE Industries Limited.*, 2017 ONSC 4349	Paras 6,8 18, 24	This case is distinguishable due to the fact that the nature of the agreements in question were such that the other parties and the Court were misled for years as to the cooperative relationship between the plaintiff and the settling defendant, and the corresponding relationship with the other parties to the litigation. The cooperative relationship extended to advancing positions for the benefit of the plaintiff.
12	*Handley Estate v DTE Industries Limited*, 2018 ONCA 324	Para 2, 11	This case is distinguishable due to the fact that the nature of the agreements in question were such that the other parties and the Court were misled for years as to the cooperative relationship between the plaintiff and the settling defendant, and the corresponding relationship with the other parties to the litigation.
13	*Herald v Wasserman*, 2022 SKCA 103	Para 47-48, 50-53, 61-62	This decision describes the test for the staying of an action in the civil context, which includes prejudice as a necessary condition. The Court also stresses the importance of considering the impact on the plaintiffs in a class action. In an application for a stay of class proceedings, the Court must consider the objectives of class proceedings, as

			described in *Western Canadian Shopping Centres v Dutton*, 2001 SCC 46 at paras 27-29. The Court must consider lesser remedies which could balance the competing interest of the applicant(s) and respondent(s).
14	*International Capital Corporation v Robinson Twigg & Ketilson*, 2010 SKCA 48	Paras 45, 50-51	The plaintiffs conducted themselves within the law as it existed (as articulated in *Carey v Twohig*, 1973 CanLII 898, 38 DLR (3d) 718)), and to the extent that the law may change, it would do injustice to, and prejudice, the plaintiffs if that change if the law were applied retrospectively.
15	*Kingdom Construction Limited v Perma Pipe*, 2023 ONSC 4776	Paras 44-46	The Court declined to order a stay of the action as the Court determined the partial settlement agreements were not required to be disclosed since there had been insufficient change in the litigation dynamics to engage the obligation to disclose, even under the applicable tests developed in Ontario.
16	*Kingdom Construction Limited v Perma Pipe Inc.*, 2024 ONCA 593	Paras 1, 12-16, 17-20, 22, 26, 32-33, 46, 55	Settling parties must immediately disclose a partial settlement if the settlement changes entirely the landscape of the litigation in a way that significantly alters the dynamics of the litigation. A settlement will entirely change the landscape of the litigation when it involved a party switching sides from its pleaded position. This case is distinguishable as defences and Cross-claims had been asserted in the action. Various agreements were entered into in March and April of 2021, and were not disclosed until September of 2021. The Court of Appeal affirmed the Ontario Superior Court decision not stay the action.

17	*Marble (Litigation Guardian of) v Saskatchewan*, 2003 SKQB 282	Para 71	Pierringer Agreements are characterized as proportionate share settlement agreements between the plaintiff(s) and one or more of the defendants in an action.
18	*Newell v McIvor* (1998) 164 Sask R, 258, 1998 CanLII 13755 (SK KB)	Para 18	The obligation to disclose a settlement agreement arises only where the settling defendant remains a party to the action.
19	*Onion Lake Cree Nation v Stick*, 2018 SKCA 20	Para 52-53	This decision makes it clear that when the Court is asked to find an abuse of process, the Court must engage in an analysis of whether it is "manifestly unfair to a party to the litigation before it, or would in some other way bring the administration of justice into disrepute"
20	*Pchelnyk et al v Carson et al*, 2017 SKQB 181	Paras 2, 24	This case is distinguishable as the pleadings were closed, and disclosure and questioning were completed.
21	*Poffenroth Agri Ltd. v Brown,* 2020 SKQB 31	Para 22	The Court has inherent jurisdiction to review and set aside the filing of a notice of discontinuance, even where the plaintiff was not required to obtain leave for such filing, if the discontinuance was filed for an ulterior and improper purpose.
22	*Poirer v Logan*, 2022 ONCA 350	Paras 8-10	This case is distinguishable as defences and Cross-claims had been filed, and there had been cooperation between the defendants in examinations on the Cross-claims.
23	*R v Babos*, 2014 SCC 16	Para 30-33	Prejudice is a necessary condition to a finding of abuse of process in the context a stay of proceedings for contravention of fundamental notions of justice. This decision outlines when a stay of proceedings may be appropriate. A stay of proceedings is the most drastic remedy a criminal court can order.

24	*Rosetown (Town) v Bridge Road Construction Ltd.*, 2020 SKQB 3	Paras 1-2, 10	A necessary element of a proportionate share settlement agreement is that the plaintiff receives a payment from the settling defendants in full satisfaction of the plaintiff's claim against them. This case is distinguishable as the pleadings were closed, and the relief sought (discontinuance) required leave of the Court.
25	*Sable Offshore Energy Corp v Ameron International Corp.*, 2013 SCC 37	Paras 12, 19, 29-30	This decision cites and relies on the *Bioriginal* decision for the proposition that imperfect knowledge is virtually always the case in settlement negotiations as there are always knowns and known unknowns, when considering whether to protect the settlement amount from disclosure. The interest of justice are served by preservation of settlement priveledge.
26	*Skymark Finance Corporation v Ontario*, 2023 ONCA 234	Para 17-19, 52-53	This case is distinguishable as defences and Counterclaims had been filed. Characterized "changes entirely the landscape of the litigation" as "changing entirely the landscape of the litigation in a way that significantly alters the dynamics of the litigation".
27	*Tallman Truck Centre Limited v K.S.P. Holdings Inc.*, 2022 ONCA 66	Para 13	The lower Court decision in this action makes it clear that defence had been filed by the settling defendant.
28	*Toronto (City) v C.U.P.E., Local 79*, 2003 SCC 63	Para 35	Judges have an inherent and residual discretion to prevent an abuse of the court's process.
29	*Underhill v Central Aircraft Maintenance Ltd.*, 2017 SKQB 102	Para 11-12, 14	The settlement agreement (Pierringer) in question was placed in a sealed envelope in the Court file, including the settlement amount and allocation of that amount between the Plaintiff.

30	*Waxman v Waxman*, 2022 ONCA 311	Para 12	This case is distinguishable as defences had been filed, and discoveries of certain defendants undertaken and replies to undertakings given prior to the settlement agreement in question.
Legislation			
1	*The Class Actions Act*, SS 2001 c C-12.01	s. 4(3)	The legislation requires statements of defence in class actions to be delivered within the timelines set out in the Rules.
Secondary sources			
1	*The King's Bench Rules*	Rule 4-49 Part 5 (Rule 5-5(2), 5-11(3), 5-14, 5-15)	Rule 4-49: Discontinuance or withdrawal of claim. Rule 5-5(2): Disclosure obligations arise following the close of pleadings Rule 5-11(3): Disclosure obligations arise on receipt of a Notice to Produce Documents Rule 5-14 and 5-15: Disclosure obligations arise on an order of the Court (the inherent jurisdiction of the Court)