KING'S BENCH FOR SASKATCHEWAN

Citation: **2025 SKKB 71**

Date: **2025 06 03**
Docket: QBG-SA-00766-2022
Judicial Centre: Saskatoon

BETWEEN:

CAITLIN ERICKSON, JENNIFER SOUCY (BEAUDRY), and STEFANIE HUTCHINSON

Plaintiffs (Respondents)

- and -

MILE TWO CHURCH INC.

Defendant (Applicant)

- and -

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, DARCY SCHUSTER, RANDY DONAUER, JOHN THURINGER, THE GOVERNMENT OF SASKATCHEWAN, JOHN DOES and JANE DOES

Defendants

Counsel:

Samuel W. Edmondson and Michael R. Scharfstein	for the plaintiffs / respondents
Amanda M. Quayle, K.C., and Mackinley M. Sim	for the defendant (applicant), Mile Two Church Inc.,
Scott R. Spencer	for the defendant, Aaron Benneweis
James S. Ehmann, K.C.	for the defendant, John Thuringer
Todd G. Parlee	for the defendant, Darcy Schuster
Adam R. Touet, K.C.	for the defendant, Randy Donauer
Justin T. Stevenson	for the defendant, The Government of Saskatchewan

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JUDGMENT
June 3, 2025

WEMPE J.

Introduction

[1] The defendants in this matter have brought applications for a stay of the action as an abuse of process. At the hearing, counsel for Mile Two Church Inc. [Mile Two] had instructions from counsel for the other defendants and the self-represented defendants to adopt as their own the arguments advanced by Mile Two and the Government of Saskatchewan. The defendants argue the failure to immediately disclose and produce information regarding three settlement agreements among some of the parties to the action changes the adversarial landscape of the litigation causing an abuse of process which can only be remedied by a stay of proceedings.

[2] For the reasons that follow, I have held the immediate disclosure rule relating to settlement agreements must apply in Saskatchewan. I find the plaintiffs in this matter failed to immediately disclose settlement agreements they reached with three named defendants. I also find the settlement agreements changed the adversarial landscape of the litigation by causing the settling defendants to switch sides. Finally, the only available remedy for an abuse of process in the circumstances is a stay of the action.

Factual Background

[3] This action was commenced by statement of claim issued August 8, 2022, naming 22 individual defendants, excluding John Does and Jane Does. The statement of claim was amended on December 12, 2022, and again on June 29, 2023. The second amended statement of claim dated June 29, 2023, is the operative pleading in the action.

[4] The statement of claim alleges systemic abuse of students and minor attendants of Legacy Christian Academy and Mile Two by the defendants.

[5] By way of fiat dated September 15, 2023, Bardai J. (as he then was), the original certification judge, relieved the defendants from serving and filing a

defence until a reasonable time after certification is heard. (*Erickson v Johnson*, 2023 SKKB 191.

[6] Almost all the defendants also brought, either individually or jointly, applications for further and better particulars. Although there was some disagreement initially regarding sequencing of the applications for particulars with the abuse of process application, all parties eventually agreed the abuse of process application would be heard first.

[7] The evidence before the Court on the abuse of process application includes the affidavit of Bryan Reynolds sworn November 1, 2024 [Reynolds affidavit], filed in support of Mile Two and the other defendants' application. The plaintiffs rely on the affidavit of Caitlin Erickson, affirmed October 3,2024 [Erickson affidavit], and the affidavit of Mark Drapak, sworn January 21, 2025 [Drapak affidavit].

[8] The plaintiffs have entered into settlement agreements with Stephanie Case (dated November 1, 2023), Fran Thevenot (dated February 24, 2024), and Tracey Johnson (dated February 20, 2024). Discontinuances of claim have been filed against the following defendants: Stephanie Case (November 6, 2023), Fran Thevenot (February 5, 2024), Tracy Johnson (February 21, 2024), Anne MacMillan (April 25, 2024), Catherine Randall (April 26, 2024), Deirdre Benneweis (April 26, 2024), and Simbo Olubobokun (April 29, 2024).

[9] By letter dated March 7, 2024, Mile Two's counsel wrote to plaintiffs' counsel requesting copies of all discontinuances, communications or other documents relating to the arrangements on which the discontinuances were provided.

[10] Plaintiffs' counsel responded by providing copies of the discontinuances against Ms. Case, Ms. Thevenot and Ms. Johnson but refused to provide copies of communications or other documents relating to the discontinuances. Plaintiffs' counsel took the position that there was no requirement to provide any communications or other

documents.

[11] Mile Two's counsel wrote to plaintiffs' counsel again on March 11, 2024, providing judicial authority for the obligation on settling parties to immediately disclose all agreements relating to settlement. Mile Two again requested copies of all communications and other documents relating to the agreements on which the discontinuances were provided. There was no immediate response from the plaintiffs, so Mile Two's counsel sent another follow-up letter dated April 3, 2024.

[12] On April 8, 2024, plaintiffs' counsel provided copies of the settlement agreements entered into by the plaintiffs with Ms. Case, Ms. Thevenot and Ms. Johnson. After receiving the settlement agreements, Mile Two's counsel wrote to plaintiffs' counsel on April 10, 2024, seeking all communications or other documents relating to the settlement agreements, including specific documents referred to in the settlement agreements. Plaintiffs' counsel responded by way of a letter dated April 15, 2024, refusing to disclose and produce the records requested by Mile Two.

[13] The settlement agreements are attached to the Reynolds affidavit as Exhibits "G" (Case settlement agreement), "H" (Thevenot settlement agreement) and "I" (Johnson settlement agreement). The three settlement agreements were provided on April 8, 2024. The Case settlement agreement was provided five months after it was signed, and the Thevenot and Johnson settlement agreements were provided almost two months after they were signed.

[14] Because the defendants argue the settlement agreements have changed the litigation landscape, it is necessary to outline some of the salient details of the agreements themselves. Notably the Case agreement contains the following relevant provisions:

> 1. 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 fees.
>
> 2. The Settling Defendant will not take any adversarial position against the Plaintiffs in the Action.
>
> 3. ... The Settling Defendant shall disclose and produce all relevant documents within 90 days of the date of this Agreement.
>
> ...
>
> 7. It is understood by the parties hereto that no Court approval of this Agreement is necessary as no Statements of Defence have been filed in the Action.
>
> ...
>
> 9. It is the intent of the parties that the Settling Defendant shall not be liable to make any payment or payments whatsoever to the Plaintiffs which in any way might relate to the matters with are the subject of the Action.
>
> ...
>
> 14. The terms of the settlement and this Agreement are intended to be confidential and, unless otherwise agreed to in writing and subject always to the direction or order of the Court otherwise, shall be kept confidential from any intentional disclosure, ...

[15] The Erikson affidavit, filed on behalf of the plaintiffs, confirms that Ms. Case has provided an affidavit answering written questions, which was obtained solely for the purpose of this litigation.

[16] The Thevenot and Johnson agreements are similar, but with a few notable differences. The Thevenot settlement agreement contains the following provisions:

1. The Settling Defendant will reasonably cooperate and make herself available to the Plaintiffs' counsel, in the investigation and prosecution of the matters which are 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, 2013 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 does 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.

2. 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 the Plaintiff or ember of any certified class action.

3. The Settling Defendant has no relevant documents in her possession, custody, or control. In the event that the Settling Defendant discovers or comes to possess or control any relevant documents the Settling Defendant shall promptly disclose such documents to the Plaintiffs.

[17] The Johnson settlement agreement contains terms materially similar to the terms of the Case agreement with the exception of paragraph 2 which is identical to paragraph 2 of the Thevenot agreement reproduced above.

[18] The Erickson affidavit states that neither Ms. Thevenot nor Ms. Johnson have provided any further documentation.

Issues

[19] The issues for this Court to determine are:

1. Should the immediate disclosure rule for settlement agreements apply in Saskatchewan?

2. Application of the immediate disclosure rule:

    a. Did the plaintiffs fail to immediately disclose the settlement agreements?

    b. Did the settlement agreements alter the litigation landscape?

3. What is the appropriate remedy?

4. Costs.

Analysis

1. Should the immediate disclosure rule for settlement agreements apply in Saskatchewan?

[20] Although there are no Saskatchewan cases which have considered this issue, there is no reason why the immediate disclosure rule should not apply in Saskatchewan. There is a significant body of case law based on sound principles from Ontario, British Columbia and Alberta. The rationale underlying the rule is based on fairness, preserving the integrity of the court process and preventing abuse of the court process, all of which are important and necessary in Saskatchewan.

[21] The Ontario Court of Appeal has developed significant case law on the immediate disclosure rule, holding repeatedly that settlement agreements reached between some parties, but not others, must immediately be disclosed to non-settling parties if they entirely change the litigation landscape. This litigation obligation has

been outlined and refined through the decisions of:

- *Skymark Finance Corporation v Ontario*, 2023 ONCA 234 at para 46, 166 OR (3d) 131 [*Skymark Finance*];
- *CHU de Québec-Université Laval v Tree of Knowledge International Corp.*, 2022 ONCA 467, 162 OR (3d) 514 [*Tree of Knowledge*];
- *Poirier v Logan*, 2022 ONCA 350 at para 47 [*Poirier*], leave to appeal to SCC refused, 2022 CanLII 115635;
- *Waxman Estate v Waxman*, 2022 ONCA 311 at para 24, 471 DLR (4th) 52 [*Waxman*], leave to appeal to SCC refused, 2022 CanLII 96459;
- *Tallman Truck Centre Limited v K.S.P. Holdings Inc.*, 2022 ONCA 66 at para 23, 466 DLR (4th) 324 [*Tallman*], leave to appeal to SCC refused, 2022 CanLII 96460;
- *Handley Estate v DTE Industries Limited*, 2018 ONCA 324, 421 DLR (4th) 636 [*Handley Estate*];
- *Aecon Buildings v Stephenson Engineering Limited*, 2010 ONCA 898, 328 DLR (4th) 488 [*Aecon*], leave to appeal to SCC refused, 2011 CanLII 38818; and
- *Laudon v Roberts*, 2009 ONCA 383, 308 DLR (4th) 422, leave to appeal to SCC refused, 2009 CanLII 61390.

[22] The immediate disclosure rule has also been applied in Alberta in *Ball v 1979927 Alberta Ltd.*, 2024 ABKB 229 [*Ball*], and in British Columbia in *Bilfinger Berger (Canada) Inc. v Greater Vancouver Water District*, 2014 BCSC 1560 [*Bilfinger*], and *Kim v 1048656 B.C. Ltd.*, 2023 BCSC 192 [*Kim*]. It is also noteworthy that the Supreme Court, when given an opportunity to weigh in on the rule, has

dismissed all leave applications: see *Aecon*, *Tallman*, *Waxman*, and *Poirier*.

[23] The principles of the rule were aptly summarized by the Ontario Court of Appeal in the *Tree of Knowledge* case as follows:

> [55] The following principles can be drawn from this court's decisions on the abuse of process that arises from a failure to immediately disclose an agreement which changes the litigation landscape:
>
> a) There is a "clear and unequivocal" obligation of immediate disclosure of agreements that "change entirely the landscape of the litigation". They must be produced immediately upon their completion: *Handley Estate*, at para. 45, citing *Aecon Buildings v. Stephenson Engineering Limited*, 2010 ONCA 898, 328 D.L.R. (4th) 488 ("*Aecon Judgment*"), at paras. 13 and 16, leave to appeal refused, [2011] S.C.C.A. No. 84; see also *Waxman*, at para. 24;
>
> b) The disclosure obligation is not limited to pure *Mary Carter* [*Booth v Mary Carter Paint Co.* (202 So. 2d 8 (Fla. 2d DCA 1967)] or *Pierringer* [*Pierringer v Hoger*, 124 NW (2d) 106 (Wis SC 1963)] agreements. The obligation extends to any agreement between or amongst the parties "that has the effect of changing the adversarial position of the parties into a co-operative one" and thus changes the litigation landscape: *Handley Estate*, at paras. 39, 41; see also *Tallman*, at para. 23; *Waxman*, at paras. 24, 37; *Poirier*, at para. 47;
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> c) The obligation is to immediately disclose information about the agreement, not simply to provide notice of the agreement, or "functional disclosure": *Tallman*, at paras. 18-20; *Waxman*, at para. 39;
>
> d) Both the existence of the settlement and the terms of the settlement that change the adversarial orientation of the proceeding must be disclosed: *Poirier*, at paras. 26, 28, 73;
>
> e) Confidentiality clauses in the agreements in no way derogate from the requirement of immediate disclosure: *Waxman*, at para. 35;

f) The standard is "immediate", not "eventually" or "when it is convenient": *Tallman*, at para. 26;

g) The absence of prejudice does not excuse a breach of the obligation of immediate disclosure: *Handley Estate*, at para. 45; *Waxman*, at para. 24; and

h) Any failure to comply with the obligation of immediate disclosure amounts to an abuse of process and must result in serious consequences: *Handley Estate*, at para. 45; *Waxman*, at para. 24; Poirier, at para. 38. The only remedy to redress the abuse of process is to stay the claim brought by the defaulting, non-disclosing party. This remedy is necessary to ensure the court is able to enforce and control its own processes and ensure justice is done between the parties: *Handley Estate*, at para. 45; *Tallman*, at para. 28; *Waxman*, at paras. 24, 45-47; *Poirier*, at paras. 38-42.

[24] In their brief, the plaintiffs distinguish the above cases on the basis that they primarily involved *Pierringer* (*Pierringer v Hoger*, 124 NW (2d) 106 (Wis SC 1963)), *Mary Carter* (*Booth v Mary Carter Paint Co.* (202 So. 2d 8 (Fla. 2d DCA 1967)) or standstill agreements, were entered into after pleadings had crystalized the positions of some or all of the defendants, or the agreement involved a defendant being required to commence or pursue a crossclaim or third party claim.

[25] While I agree for the most part that many of the cases involved the above scenarios, I am of the view that the stage or type of litigation is not the determining factor; rather, it is whether the settlement agreement significantly alters the litigation landscape. The rationale underlying the rule is fairness and preserving the integrity of the court process. Where a settlement significantly alters the litigation landscape, fairness dictates that it must be disclosed to non-settling parties. The plaintiffs' arguments distinguishing this matter from the existing case law are more appropriately considered when analyzing whether the settlement agreements alter the litigation landscape to the extent necessary to engage the rule and on the issue of the appropriate remedy.

[26] The plaintiffs also argue that Saskatchewan differs from other jurisdictions which have endorsed the immediate disclosure rule. They assert there is no legislation, regulation, rule or common law in Saskatchewan compelling a plaintiff to immediately disclose a partial settlement agreement to non-settling defendants. They argue that Rule 4-49 of *The King's Bench Rules* provides them with the right to file a discontinuance anytime before the receipt of a statement of defence.

[27] The only Saskatchewan case remotely on point is *Bioriginal Food & Science Corp. v Sascopack Inc.*, 2012 SKQB 469, 410 Sask R 158 [*Bioriginal*]. In *Bioriginal*, Smith J. held that a *Pierringer* agreement be disclosed to non-settling defendants (without the particulars of the actual consideration paid) after the plaintiff and settling defendant applied for court approval of the agreement at issue. He noted that the agreement substantially changed the litigation landscape and the relationship between the defendants. He also noted it seemed well settled that there was an obligation on the settling parties for immediate disclosure of at least the existence of such an agreement to the Court and to other parties in the litigation. Although some of the basic principles of *Bioriginal* are applicable, there was no allegation of an abuse of process nor an application for a stay.

[28] While I agree this case is the first opportunity for a Saskatchewan court to consider the immediate disclosure rule in an application for a stay for abuse of process, I disagree with the plaintiffs' reliance on Rule 4-49 as authority for not disclosing the settlement agreements. Rule 4-49 only relates to the timing for filing a discontinuance or withdrawal of claim. It has nothing to do with disclosure of settlement agreements. The discontinuance is only the court form which discontinues the claim. It does not contain any information about the basis for the discontinuance, whether there is a settlement agreement or what the terms of the settlement might entail. The issue is the non-disclosure of the settlement agreements, not the discontinuances.

[29] As stated earlier, I am of the view that in Saskatchewan, as in Ontario,

Alberta and British Columbia, settlement agreements reached between some parties, but not others, must immediately be disclosed to non-settling parties if they entirely change the litigation landscape. The immediate disclosure rule is necessary to ensure fairness and the integrity of the court process.

2. Application of the immediate disclosure rule

a. Did the plaintiffs fail to immediately disclose the settlement agreements?

[30] The three settlement agreements were provided to the defendants on April 8, 2024 – over five months after the Case agreement was entered into and nearly two months after the Thevenot and Johnson agreements were entered into. It is also noteworthy that the settlement agreements were only disclosed after Mile Two independently learned of the discontinuances and made repeated requests for information from the plaintiffs.

[31] The defendants in this matter argue this Court can infer the plaintiffs never intended to advise the non-settling defendants or the Court that the agreements had been reached because it was only through the probing of Mile Two's counsel that the agreements were eventually disclosed. While I agree the agreements were only disclosed after a number of requests from plaintiffs' counsel, I do not agree that leads to the inevitable conclusion there was an intention by the plaintiffs to keep the agreements secret. It could just as easily have been an oversight by plaintiffs' counsel or a decision based on the lack of case law in Saskatchewan. In any event, I do not have evidence before me to further explain the delay in disclosing the agreements.

[32] In *Tallman*, the Court noted that the standard for disclosure is "immediate", "not eventually or when it is convenient" (para. 26). In *Aecon*, the Court stated, "other parties to the litigation are not required to make inquiries to seek out such agreements. The obligation is on the parties who enter such agreements to immediately disclose the fact." (para. 15).

[33] The obligation was on the plaintiffs to immediately disclose the three settlement agreements. Five months and two months is not immediate disclosure. I find that the Case, Thevenot and Johnson settlement agreements were not immediately disclosed.

b. Did the settlement agreements alter the litigation landscape

[34] The more difficult question in this matter is whether the settlement agreements altered the litigation landscape.

[35] In *Handley Estate*, the disclosure obligation was described as extending to any agreement which had the effect of changing the adversarial position of the parties set out in their pleadings into a cooperative one (para. 39). Similarly, in *Waxman*, the Court noted the key question for the Court is whether the agreement at the time it was entered into changed the adversarial position of the parties to one of cooperation (para. 37). In *Skymark Finance*, the court provided guidance on what type of change in the litigation landscape would engage the rule:

> [51] What does the expression, "to change the entirety of the litigation landscape", mean? That is an often recurring issue in this line of cases. As the cases cited above demonstrate, the determination is fact-specific, based on the configuration of the litigation and the various claims among the parties. On appeal, a motion judge's finding with respect to the change to the litigation landscape is a question of mixed fact and law and, barring an extricable error of law, is entitled to deference on appeal: *Waxman*, at para. 27; *Performance Analytics v. McNeely*, 2022 ONCA 731, at para. 3.
>
> [52] This concept – a change to the entire litigation landscape – has been explained in similar, yet not identical ways in this court's cases. In *Laudon*, at para. 39, MacFarland J.A. described such an agreement as one that "significantly alters the relationship among the parties to the litigation." In *Aecon Buildings*, at para. 13, she referred to agreements that "change entirely the landscape of the litigation", restated by Brown J.A. in *Handley Estate*, at para. 37.

> [53] More recently, in *Crestwood Preparatory College Inc v. Smith*, 2022 ONCA 743, at para. 57, Feldman J.A. referred to agreements that have "the effect of changing entirely the landscape of the litigation in a way that significantly alters the dynamics of the litigation" (emphasis added). I would adopt this more specific language.

[36] More recently, in *Kingdom Construction Limited v Perma Pipe Inc.*, 2024 ONCA 593, 500 DLR (4th) 79 [*Kingdom Construction*], the Court observed:

> [46] A settlement agreement will entirely change the landscape of the litigation when it involves a party switching sides from its pleaded position, changing the adversarial position of the parties set out in the pleadings into a cooperative one [citations omitted].

[37] Coincidentally, *Kingdom Construction* is the only case which held that the settlement did not change the litigation landscape. The Court held that the settlement agreement in *Kingdom Construction* did not provide for any cooperation and did not involve any switching of sides on any issue of concern. Accordingly, the Court found the immediate disclosure rule was not engaged.

[38] The recent case of *Thrive Capital Management Ltd. v Noble 1324 Queen Inc.*, 2024 ONSC 5297, citing *Crestwood Preparatory College Inc. v. Smith*, 2022 ONCA 743, 164 OR (3d) 291 [*Crestwood*], found the litigation landscape had changed because under the terms of an agreement, the settling defendant was agreeing to do more than what would have been required in the normal course of litigation:

> [55] When all of these terms of the Bowen Agreement are considered, I find that the Bowen Agreement did have the effect of changing the adversarial position between the plaintiffs and Bowen to a co-operative arrangement (even though Bowen remains a defendant in the action on paper). It altered the apparent relationships or expected conduct of the litigation between the plaintiffs and Bowen from what would otherwise be assumed from the allegations in the statement of claim. The agreement thus changed the litigation landscape and altered the

> dynamics of the litigation.
>
> [56] The conduct required of Bowen under the terms of the Bowen Agreement would not be expected by the non-settling Developer Defendants in the normal course of the litigation. Bowen was agreeing to do more than what would have been required of him as a defendant in the normal course of the litigation. see *Crestwood Preparatory College Inc. v. Smith*, 2022 ONCA 743, 164 O.R. (3d) 291, at para. 54.

[39] The British Columbia cases of *Kim* and *Bilfinger* looked at the issue from the Court's perspective, holding that the Court also must never be misled about the position of a party in the adversarial process, therefore any agreement which affects the party's position in a way that is different than that revealed by the pleadings must be disclosed immediately.

[40] The plaintiffs argue that the settling defendants have not switched sides from their pleaded position because they have not yet filed any pleading setting out their position. This argument rings hollow. Although the defendants have not filed defences, from the statement of claim one would expect the settling defendants to be adverse in interest to the plaintiffs based on the allegations of vicarious liability "for the wrongdoing of employees, agents, and representatives including the Individually Named Defendants and Unidentified Parties" and conspiracy.

[41] The adversity of the settling defendants is also evidenced in the history of the proceedings. The settling defendants participated and joined in on Mile Two's application to defer the filing of defences until after certification was determined. The plaintiffs were opposed to this application making them adverse in interest. Two of the settling defendants, Ms. Thevenot and Ms. Johnson, also delivered requests for particulars concerning the claim.

[42] The argument that a party is not adverse in interest if a defence has not yet been filed was also rejected in a number of recent cases: *Peninsula Employment*

Services Ltd. v Castillo, 2025 ONSC 1121 [*Castillo*]; *Crestwood*; and the *Ball* case out of Alberta. In *Crestwood*, the defendants had not yet taken positions against one another in the litigation. The Court cited *Handley Estate* as authority for the proposition that the test refers to a change in the apparent relationships between parties that would otherwise be assumed from the pleadings or expected in the conduct of the litigation. The Court reasoned therefore that the analysis of the relationship among the parties was not limited to what was disclosed in the pleadings. The Court also cited *Poirier*, which held that pleadings were not an essential element of the disclosure test and not a condition precedent to determining that the obligation to disclose had arisen. The Court concluded the principle applied where pleadings were not complete and stated:

> [48] To hold otherwise could defeat the intent of the disclosure obligation which is to ensure that when parties take steps in the litigation, and when the court makes rulings, the parties and the court are not being actively misled as to the consequences of those steps or rulings. If they are, the process becomes "a sham and amounts to a failure of justice": *Aecon*, at para. 16.

[43] More recently in *Castillo* the Court followed *Crestwood* emphasizing that the same considerations apply at the pre-statement of defence stage as well as after.

> [13] Accordingly, a settlement under which the three settling Defendants are obliged to assist the Plaintiff against Castillo represents a significant shift in the posture of the action. "[P]rocedural fairness requires immediate disclosure, among other things because the settlement agreement may have an impact on the strategy to be pursued by non-settling defendants, who need to be able to properly assess the steps being taken by the settling parties… These considerations apply at the pre-statement of defence stage as well as after" [emphasis added]: *Ibid.*, at para. 81, citing *Handley*, at para. 38.

[44] The *Ball* case out of Alberta was similar to this case in that it involved a pre-certification class action where defences and claims for contribution had not yet been filed. The Court applied the Ontario case law and similarly rejected the plaintiffs'

arguments that no defences or indemnity claims had been filed and there was no prejudice to the non-settling defendants.

[45] Applying the case law, I find that the three settlement agreements in this case did have the effect of significantly altering the litigation landscape. It is clear from the pleadings that Ms. Case, Ms. Thevenot and Ms. Johnson were all named defendants in the class action with allegations made against them by the plaintiffs. The settlement agreements had the effect of them switching sides and cooperating with the plaintiffs. The statement of claim, the history of the action and the assumed relationship or expectations of the litigation all indicate the plaintiffs and the settling defendants were adverse in interest prior to the agreements.

[46] The terms of the agreements specifically provided that the settling defendants would cooperate, make themselves available to the plaintiffs and their experts, provide affidavits and sworn responses to written interrogators, attend questioning, disclosure and production of documents, attend as a witness at trial and provide testimony which does not vary from their written responses, and not take any formal adversarial position against the plaintiffs. The terms of the settlement agreements make it clear that the settling parties have switched sides and must cooperate with the plaintiffs.

3. What is the appropriate remedy?

[47] The case law is clear that the only appropriate remedy for failing to immediately disclose settlement agreements which alter the litigation landscape is to stay the action as an abuse of process. In *Tree of Knowledge*, citing *Handley Estate*, *Waxman*, *Poirier*, and *Tallman*, at para. 55(h) the Court noted that any failure to comply with the obligation of immediate disclosure amounts to an abuse of process and must result in serious consequences. The only remedy to redress the abuse of process is to stay the claim brought by the defaulting, non-disclosing party. This remedy is necessary

to ensure the court is able to enforce and control its own processes and ensure justice is done between the parties.

[48] In *Poirier*, the Court explained why a stay is the only appropriate remedy,

> [41] It follows that the usual principles that apply in granting a stay, an otherwise discretionary remedy that is to be used only in the clearest of cases, do not apply. Essentially, any breach of the obligation to disclose falls among the clearest of cases that require a stay. There is a one-part test, not a two-part test. Put simply, if it is found that immediate disclosure of a settlement was required but not made, it follows automatically that an abuse of process has occurred and that the action must be stayed.

[49] In *Tallman*, the plaintiff argued that the failure to disclose did not warrant a stay of proceedings because there was no bad faith, the period of non-disclosure was a short duration (only three weeks), and the non-settling defendants suffered no prejudice. The court rejected this argument at paragraphs 27 and 28:

> [27] Lastly, Tallman submits that, to the extent that this case crossed the line in the *Handley*, it did not warrant a stay of proceedings. He relies on the fact that the missteps of Tallman's counsel were not taken in bad faith, the delay was comparatively brief, and K.S.P. suffered no prejudice as a result of what happened.
>
> [28] This argument was firmly rejected in *Aecon*, in which MacFarland J.A. held, at para. 16: "Any failure of compliance amounts to an abuse of process and must result in consequences of the most serious nature for the defaulting party." Reinforcing this principle, in *Handley*, Brown J.A. confirmed that, "[t]he only remedy to redress the wrong of the abuse of process is to stay the claim asserted by the defaulting, non-disclosing party": at para. 45. This remedy is designed to achieve justice between the parties. But it does more than that – it also enables the court to enforce and control its own process by deterring future breaches of this well-established rule.

[50] The plaintiffs argue that there has been no prejudice to Mile Two or the other defendants by the failure to disclose the settlement agreements. However, the

cases in this regard are clear – no actual prejudice is required for the immediate disclosure rule to be triggered: see *Aecon* at para 16; *Tree of Knowledge* at para 55(g); *Tallman* at paras 27-28; *Waxman* at para 24; *Ball* at para 77; and *Kim* at para 82.

[51] The case law goes as far as to treat the rule as automatic – every breach of the immediate disclosure rule is an abuse of process for which the only appropriate remedy is a stay. The Ontario Court of Appeal confirmed this approach recently in *Rosemont Management Inc. v Cityzien Properties Limited*, 2025 ONCA 198:

> [17] The settlement disclosure rule is designed to give settling parties the strongest possible incentive to disclose settlements to other affected parties. That is why the extreme remedy of a stay of proceedings must be granted automatically whenever the rule is breached: see *Poirier v. Logan*, 2022 ONCA 350, at paras. 41-42, leave to appeal refused, [2022] S.C.C.A. No. 255; *Aecon Buildings v. Stephenson Engineering Limited*, 2010 ONCA 898, 328 D.L.R. (4th) 488, at para. 16, leave to appeal refused, [2011] S.C.C.A. No. 84.

[52] The plaintiffs argue that I should look to other areas of law involving abuse of process and stay applications to guide me adopting a more nuanced approach. They point to criminal law and administrative law where the legal test involves considerations such as: "only the clearest of cases", whether there was bad faith, the length of the delay, the public interest in matters proceeding, the interests of victims, whether there is an alternative remedy available, whether the administration of justice is brought into disrepute, whether trial fairness is impacted, whether there was prejudice, the objectives of class proceedings, access to justice, etc. While I can see the appeal of a more nuanced approach which could balance some of the competing interests rather than an automatic rule, that is not how the law presently operates.

[53] The plaintiffs also argue that I should consider cases which have held that a judge must consider the impact on the class plaintiffs in application for a stay. They cite *Herold v Wasserman*, 2022 SKCA 103 at para 61, 473 DLR (4th) 281

[*Wasserman*], as authority for the proposition that in an application for a stay of class proceedings, the Court must consider the objectives of class proceedings including access to justice, judicial economy and behaviour modification, and the rights of claimants to litigation autonomy. The Court in *Wasserman* also held that 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 (para. 62).

[54] The *Wasserman* case, however, was in an entirely different context than this case. In *Wasserman*, the Court of Appeal considered an appeal from an order staying an individual action until certification of a proposed class action was determined, where the individual plaintiffs would be class members if the action was certified. It was in that context that the Court noted competing interests must be considered when determining whether a stay is appropriate. Most importantly, the *Wasserman* case did not involve an abuse of process.

[55] I note that the alternative remedies suggested by the plaintiffs included a costs order, a temporary stay until the settlement agreements are approved, and striking or rectifying paragraphs of the settlement agreements. These are inadequate remedies, not proportionate to the prejudice caused, and not reflective of the current state of the law. The question is whether another remedy short of a stay could sufficiently address the abuse of process and restore fairness between the parties. In the circumstances, there is nothing short of a stay which could achieve this.

[56] The plaintiffs also argue that because there was no case law or other rule in Saskatchewan at the time making it clear the immediate disclosure rule applied in Saskatchewan, it would be unfair and an unjust to impose a stay in the circumstances.

[57] While I have some sympathy for this argument, I note that there is significant case law from three provinces dating back to 2009 which has clearly set out

the immediate disclosure rule in civil proceedings. Although the *Bioriginal* case did not consider an abuse of process, Smith J. did recognize it was well settled that there was an obligation on settling parties to disclose agreements to the Court and to other parties in the litigation. I also note that it took numerous requests by the defendants before the plaintiffs provided the settlement agreements. In the *Handley Estate* case, the Court directed that if a party is uncertain of their obligations, they can seek guidance from the Court:

> [47] Moreover, if a party to a litigation agreement is unclear whether the agreement has the effect of changing the adversarial position of the contracting parties, thereby attracting the mandatory disclosure obligation, it is always open to the party to move before the court for directions. In that way, the court can enforce and control its own process and ensure that justice is done between and among the parties.

[58] At its core the immediate disclosure rule and the associated remedy are about ensuring the integrity of the litigation process. By failing to immediately disclose the settlement agreements in this case, the plaintiffs have committed an abuse of the Court's process. In the circumstances, I must follow the caselaw and hold that the only appropriate remedy is a stay of the action.

4. Costs

[59] The defendant Mile Two is seeking costs of the application and the action. Conversely, the Government of Saskatchewan is not seeking costs. The defendant Mile Two shall make their costs submissions in writing within ten days. The plaintiffs shall have ten days after receipt of those submissions to make their own written submissions. There will be no right of reply.

J.
R.C. WEMPE