CACV4563

IN THE COURT OF APPEAL FOR SASKATCHEWAN

ON APPEAL FROM THE COURT OF KING'S BENCH
JUDICIAL CENTRE OF SASKATOON
QBG-SA-00766-2022

BETWEEN:

CAITLIN ERICKSON, JENNIFER SOUCY (BEAUDRY) and STEFANIE HUTCHINSON

APPELLANTS
(PLAINTIFFS)

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, DEIDRE BENNEWEIS, DARCY SCHUSTER, RANDY DONAUER, JOHN THURINGER, MILE TWO CHURCH INC., THE GOVERNMENT OF SASKATCHEWAN, JOHN DOES and JANE DOES

RESPONDENTS
(DEFENDANTS)

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

FACTUM
ON BEHALF OF THE APPELLANTS, CAITLIN ERICKSON, JENNIFER SOUCY (BEAUDRY) and STEFANIE HUTCHINSON

Scharfstein LLP
Barristers & Solicitors
200 Princeton Tower
123 - 2nd Avenue South
Saskatoon, SK S7K 7E6

Lawyers in Charge of File:
Grant J. Scharfstein, K.C. / Samuel W. Edmondson
Solicitors for the Appellants
Our Reference: 21,835.1

TABLE OF CONTENTS

AF 1

I. INTRODUCTION

1. This appeal has important implications not only for the parties, but for the legal community and the administration of justice as a whole. The questions at the heart of this appeal are:

   a. Did and should the immediate disclosure rule for settlement agreements apply in Saskatchewan?
   b. If it applies, what should the scope of the rule be in Saskatchewan?
   c. How are remedies for abuse of process dealt with in Saskatchewan?

2. In this appeal, this Honourable Court can decide whether the law in this province supports a nuanced and balanced approach to the above questions, or a rigid approach.

3. The Appellants submit that if this Honourable Court finds that the immediate disclosure rule should apply in Saskatchewan, a refined analysis ought to be employed which can be adapted to the circumstances of a given case to more fully achieve the ends of justice.

4. The Appellants further submit that the law in this province does, and should, support a nuanced approach to remedies for abuse of process.

5. This appeal concerns an application made by the Defendants, led by Mile Two Church Inc. ("**Mile Two**"), alleging that the Plaintiffs committed an abuse of process in failing to immediately disclose settlement agreements entered into with three of the Defendants.

6. In her decision dated June 3, 2025, the Chambers judge ruled that the Plaintiffs had committed an abuse of process and that the only remedy available was the stay of the proceedings (the "**Chambers Decision**").[1] The Chambers judge relied heavily on non-binding jurisprudence from Ontario, British Columbia, and Alberta to reach her

[1] *Erickson v Mile Two Church Inc.*, 2025 SKKB 71 [Chambers Decision].

conclusions, while ignoring binding jurisprudence from the Supreme Court of Canada ("**SCC**") and the Court of Appeal for Saskatchewan.

7. The Plaintiffs appeal the Chambers Decision to this Honourable Court. The Chambers Decision discloses numerous legal errors, including the Chambers judge's failure to apply the proper legal framework for abuse of process and the failure to apply the mandated legal test for deciding a remedy.

8. The Chambers Decision raises legal and policy issues that merit determination by this Court. The Plaintiffs have been deprived of justice in circumstances where such treatment is entirely unwarranted and unsupported by existing Saskatchewan law. The Chambers Decision blindly and broadly prioritizes the disclosure of settlement agreements to the detriment of all else. Other legitimate interests such as settlement privilege, encouraging settlement, facilitating a just resolution of disputes, and determination of actions on their merits have been completely ignored. This is a decision that puts into question the fairness of the legal system.

9. In finding an abuse of process and staying the Plaintiffs' action, the Chambers judge committed legal errors, errors in principle, and granted a remedy that is clearly wrong, inequitable, and unjust. This Honourable Court has the opportunity to rectify the injustice imposed by the Chambers judge. Such intervention is necessary to clarify this province's reasonable and equitable stance in this area of the law.

II. JURISDICTION AND STANDARD OF REVIEW

10. This Court derives its jurisdiction to hear this appeal from s. 7(2) and s. 10 of *The Court of Appeal Act, 2000,* SS 2000, c C-42.1.

11. Regarding the standard of appeal in abuse of process cases, the SCC stated very recently in *Saskatchewan (Environment) v Metis Nation – Saskatchewan,* 2025 SCC 4, 500 DLR (4th) 279 [*Sask Environment*]:

AF 3

> [31] Whether there is an abuse of process is a question of law (*Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, [2022] 2 S.C.R. 220, at para. 30). Thus, the applicable standard of review is correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8).
>
> [32] That said, I would add the following for clarity. Where an abuse of process has been established, a subsequent question arises: What remedy is to be granted? That decision is discretionary (see *King's Bench Rules*, r. 7-9(1)(a)). Being a discretionary decision, it is "generally entitled to deference" and "may only be interfered with if there is a legal error (considered to be an error in principle), a palpable and overriding factual error (viewed as a material misapprehension of the evidence) or a failure to exercise discretion judicially (which includes acting arbitrarily or being 'so clearly wrong as to amount to an injustice').

12. As such, the finding of an abuse of process is an error of law subject to review on the correctness standard. The *remedy* for an abuse of process, on the other hand, is a discretionary decision. This Court must intervene if there is a material error, an error in principle, a failure to act judicially, or if the decision was so plainly wrong as to amount to an injustice.[2]

13. Further, one basis for appellate intervention in a discretionary decision is where the judge has failed to correctly identify the legal criteria governing the exercise of their discretion or has misapplied those criteria. These are errors of law.[3]

14. The decision under appeal in this case was rendered by the Chambers judge solely on affidavit evidence. This Court has clarified that the standard of review for findings of fact determined solely on affidavit evidence is palpable and overriding error.[4]

15. Questions of mixed fact and law are also subject to a standard of review of palpable and overriding error.[5] A palpable and overriding error is defined as being those findings which are unreasonable or unsupported by the evidence.[6]

---

[2] *Sask Environment* at para 32.
[3] *Herold v Wassermann*, 2022 SKCA 103 at para 24, 473 DLR (4th) 281 [*Wassermann*].
[4] *Yorkton (City) v Mi-Sask Industries Ltd.*, 2021 SKCA 43 at para 25, [2021] 6 WWR 18.
[5] *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 [*Housen*].
[6] *H L v Canada (Attorney General)*, 2005 SCC 25 at paras 55-56, [2005] 1 SCR 401. at paras 55-56.

16. Where an erroneous finding of fact is traced to an error in the characterization of the legal standard, less deference is afforded, and the standard of review falls more in line with the correctness standard of review.[7]

III. SUMMARY OF FACTS

(a) The Parties & Procedural History

17. This action was commenced by the Plaintiffs pursuant to *The Class Actions Act*, SS 2001, c C-12.01 (the "**Act**"). The operative pleading in this action is the Second Amended Statement of Claim, dated June 29, 2023 (the "**Claim**") [AB1].

18. The Claim alleges systemic, persistent, and egregious abuse of students and minor attendants of Legacy Christian Academy and Mile Two by the Defendants. The Claim initially named 22 individual defendants plus John Does and Jane Does.

19. The use of the term "**Defendants**" herein shall refer to the Defendants currently named in the style of cause in this action.

20. The representative plaintiffs in this proposed class action are Caitlin Erickson, Jennifer Soucy (Beaudry), and Stefanie Hutchinson (collectively, the "**Plaintiffs**").

21. Bardai J. (as he then was), was the original judge designated to consider certification. On May 15, 2024, following Justice Bardai's appointment to the Court of Appeal for Saskatchewan, Justice Wempe was designated as the certification judge.

22. On September 15, 2023, Justice Bardai ruled that none of the defendants in this action were required to file defences until a reasonable time after the certification application is heard.[8]

---

[7] *Housen*, *supra* note 5 at para 33.
[8] *Erickson v Johnson*, 2023 SKKB 191 [*Erickson*].

AF 5

23. Most Defendants have brought various requests for particulars and applications demanding further and better particulars. Those applications have yet to be heard.

24. On March 20, 2025, the Plaintiffs in this action served and filed their application for certification with supporting materials.

(b) The Production Application and the Stay Application

25. The Plaintiffs entered into Settlement Agreements with three of the defendants (the "**Settling Defendants**"), as follows:

a) The Settlement Agreement with Stephanie Case (dated Nov. 1, 2023);

b) The Settlement Agreement with Tracey Johnson (Feb. 20, 2024); and

c) The Settlement Agreement with Fran Thevenot (Feb. 24, 2024). [9]

(Collectively, the "**Settlement Agreements**")

26. None of the Settlement Agreements required payment from the Settling Defendants to the Plaintiffs. Following the execution of the Settlement Agreements, the action was discontinued against each of the Settling Defendants.

27. By letter dated March 7, 2024, Mile Two's counsel requested from the Plaintiffs copies of all discontinuances, communications, or other documents relating to the arrangements on which the discontinuances were provided.[10]

28. Plaintiffs' counsel responded by providing copies of the discontinuances against the Settling Defendants 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]

---

[9] The Settlement Agreements are attached to the Affidavit of Bryan Reynolds, sworn November 1, 2024 ["Reynolds Affidavit"], at Exhibits "G" [AB242], "H" [AB247] and "I" [AB252].
[10] Reynolds Affidavit at para 3 [AB210].
[11] Reynolds Affidavit at para 4 [AB210].

29. Mile Two's counsel wrote to Plaintiffs' counsel on March 11, 2024, again requesting copies of all communications and other documents relating to the agreements.[12] There was no immediate response from the Plaintiffs, so Mile Two's counsel followed up on April 3, 2024.[13]

30. The Settlement Agreements were disclosed to Mile Two by the Plaintiffs on or about April 8, 2024.[14]

31. Mile Two made further demands for additional records from the Plaintiffs.[15] The Plaintiffs responded to the demands by confirming that records would be disclosed in accordance with *The King's Bench Rules*.[16]

32. On June 18, 2024, Mile Two applied for an order compelling the Plaintiffs to disclose and produce all documents connected to the arrangements that led to the settlement and discontinuances of the claim against the Settling Defendants (the "**Production Application**").

33. The Plaintiffs replied to the Production Application with the Affidavit of Caitlin Erickson, sworn October 3, 2024 (the "**Erickson Affidavit**"). Erickson asserts settlement privilege and litigation privilege over documentation arising in relation to discontinuances of the action against the Settling Defendants.[17]

34. On November 1, 2024, Mile Two applied for a stay of this action based on the failure of the Plaintiffs to immediately disclose and produce information about the Settlement Agreements [AB74]. On November 29, 2024, most, but not all, of the other Defendants followed suit by filing a joint application seeking the same relief [AB80, AB86] (collectively, the "**Stay Application**").

---

[12] Reynolds Affidavit at para 5 [AB211].
[13] Reynolds Affidavit at para 6 [AB211].
[14] Reynolds Affidavit at para 7 [AB211].
[15] Reynolds Affidavit at paras 12-13 [AB212].
[16] Reynolds Affidavit at para 14 [AB212].
[17] Erickson Affidavit at para 20 [AB205].

AF 7

35. The named Defendants who did not participate in the Stay Application are:

a) Keith Johnson;
b) Lynette Wheeler; and
c) Darcy Schuster.

36. Mile Two's evidence supporting the Stay Application is by way of the Reynolds Affidavit [AB209], which sets out the timeline of requests made to the Plaintiffs for information and facts surrounding the receipt of the Settlement Agreements. The other Defendants filed short affidavits from various individuals that all speak to the timing of the receipt from the Plaintiffs of the discontinuances and Settlement Agreements.[18]

37. None of the Defendants or Settling Defendants has filed any evidence describing the relationships between them in the litigation or describing any changes to the litigation landscape.

38. None of the Defendants or Settling Defendants has filed any evidence describing how their litigation strategy has changed as a result of the Settlement Agreements.

39. One of the Settling Defendants, Stephanie Case, has provided the Plaintiffs with an affidavit answering written questions, which has not been disclosed due to litigation privilege and settlement privilege.[19]

40. Mark Drapak, a member of the class in the within proposed class action, has sworn an affidavit stating that if this action is stayed, he intends to bring a new proposed class action lawsuit in substantially the same form as the current action.[20]

41. On June 3, 2025, the Chambers judge released the Chambers Decision staying the Plaintiffs' action as an abuse of process for failing to immediately disclose the Settlement Agreements to the Defendants [AB100].

---

[18] AB283, AB286, AB288, AB292, AB302, AB316, AB318, AB320, AB323, AB325, AB327, AB329, AB331.
[19] Erickson Affidavit at para 21(a) [AB205].
[20] Affidavit of Mark Drapak, sworn January 21, 2025 [AB347].

AF 8

42. On July 9, 2025, the Chambers judge released her decision determining costs of the action [AB121] (the "**Costs Decision**").

IV. POINTS IN ISSUE

43. The Plaintiffs submit the key issues to be determined on this appeal are:

A. Did the Chambers judge err in finding that the Plaintiffs committed an abuse of process?

i. Did the Chambers Judge err in determining that the immediate disclosure rule for settlement agreements, as developed in Ontario, applied in Saskatchewan?

ii. Did the Chambers judge err in determining that the settlement agreements "changed entirely the litigation landscape"?

iii. Did the Chambers judge err in determining that the legal test for abuse of process could be met without a finding of harm or prejudice to the integrity of the judicial system and/or the parties?

B. Did the Chambers judge err in determining that the settlement agreements entirely changed the litigation landscape in an absence of evidence to support this finding?

C. Did the Chambers judge err in determining that a stay of the proceedings was the only available remedy?

D. Did the Chambers judge err in determining that the action could be stayed for an abuse of process in the absence of prejudice?

E. Did the Chambers judge improperly fetter her discretion and err in determining that she was required to follow extra-provincial jurisprudence?

AF 9

V. ARGUMENT

ISSUE A: The Chambers judge erred in finding that the Plaintiffs committed an abuse of process.

44. The Plaintiffs submit that the decision of the Chambers judge discloses a fundamental misunderstanding of and departure from the underlying principles of the abuse of process doctrine. This failure to properly set the legal groundwork was an error of law that rippled through the decision, resulting in drastic consequences for the parties.

45. A return to basic principles is essential in determining the outcome of this appeal. Though this case deals ultimately with a narrow subset of the abuse of process doctrine (i.e. the failure to immediately disclose a partial settlement agreement), the basic legal framework remains the same.

46. The SCC has commented frequently and recently on the flexible nature of the abuse of process doctrine and the underlying purpose. The flexibility of the doctrine is crucial to ensure the doctrine has the intended effect. In each case, the judge must consider whether the judicial system has been misused in a way that would bring the administration of justice into disrepute.

47. These principles were summarized very recently by the SCC in *Sask Environment*, as follows:

> [33] The doctrine of abuse of process is concerned with the administration of justice and fairness (*Behn*, at para. 41). The doctrine engages the inherent power of the court to prevent misuse of its proceedings in a way that would be manifestly unfair to a party or would in some way bring the administration of justice into disrepute (*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 37; *Behn*, at para. 39; *Abrametz*, at para. 33).
>
> [34] In *Abrametz*, this Court reiterated that abuse of process is a broad concept that applies in various contexts (para. 34, citing *Toronto (City)*, at para. 36, and *Behn*, at para. 39). The Court noted that the doctrine of abuse of process is "characterized by its flexibility. It is not encumbered by specific requirements, unlike the concepts of *res judicata* and issue estoppel" (para. 35, citing *Behn*, at para. 40, and *Toronto (City)*, at paras. 37-38).

AF 10

48. The SCC has emphasized that the doctrine of abuse of process is characterized by its flexibility, and that the underlying principles are *fairness* and *the administration of justice*.

49. While the Chambers judge had the discretion to adapt the abuse of process doctrine to suit the circumstance, she did not have the ability to abandon its essence. The rigid application of extra-provincial case law by the Chambers judge, without a genuine analysis of *fairness* and *the administration of justice* was an error of law that amounted to an injustice to the Plaintiffs.

(i) The Chambers judge erred in determining that the immediate disclosure rule for settlement agreements applied in Saskatchewan.

50. At the outset of the analysis in the Chambers Decision, the Chambers judge says: "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."[21] In other words, we are treading into an area of new law for Saskatchewan.

51. The Chambers judge goes on to state that the law from Ontario, British Columbia, and Alberta should apply in Saskatchewan because the rule from those cases is based on fairness, preserving the integrity of the court process, and preventing abuse of the court process.[22] Unfortunately, the Chambers judge does not go on to explain how any of these objectives are actually being achieved by applying the rigid rule from Ontario in this case or cases like this one, nor how the rule fits into the legal fabric of Saskatchewan.

52. Similarly, in the Costs Decision, at para 8 [AB124], the Chambers judge acknowledges that, "… the application for a stay considered a novel legal issue in Saskatchewan."

53. The Chambers judge goes on to say in the Costs Decision:

---

[21] Chambers Decision, *supra* note 1 at para 20 [AB106].
[22] *Ibid*.

> [13] … this is not a matter where the plaintiffs' conduct can be characterized as "entirely unfounded or highly objectionable". Although I held that the immediate disclosure rule applied in Saskatchewan and the plaintiffs' failure to immediately disclose settlement agreements was an abuse of process, the law in Saskatchewan was not clear prior to this case…[23]

54. The Chambers judge concedes, both in the Chambers Decision and in the Costs Decision, that this is a novel legal issue in Saskatchewan. Yet the Chambers judge treats the Plaintiffs like they ought to have been bound by this law retroactively and must suffer the severest of possible consequences. This is an injustice to the Plaintiffs.

55. The immediate disclosure rule did not apply in Saskatchewan at the time the Chambers Decision was made. Whether it *should* apply, and in what form, are different questions, which will be discussed in detail below

56. The Chambers judge was entitled to adopt Ontario law and apply it in Saskatchewan going forward, had she done it in a principled way, and in a way that does not conflict with existing Saskatchewan law. The Chambers judge was not entitled to hold that the law applied previously when it quite obviously, and by her own admission, did not. This was an error of law.

(ii) The Chambers judge erred in determining that the settlement agreements "changed entirely the litigation landscape."

57. The rule emerging from Ontario states that only settlement agreements that change *entirely* the litigation landscape need to be disclosed. This standard requires more than a minor change, or even a moderate change. The legal test as set out by the Ontario Court of Appeal in *Skymark Finance Corporation v Ontario*, 2023 ONCA 234, 166 OR (3d) 131 [*Skymark*] and preceding cases contemplates an *entire* change of the litigation landscape. This is a high standard which was obviously not designed to apply to all partial settlement agreements and all litigation circumstances.

---

[23] AB124.

AF 12

58. The Chambers judge cites, at para 35 of the Chambers Decision [AB112], an excerpt from the Ontario Court of Appeal in *Skymark*, explaining the standard as follows:

> [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 Corp. v. McNeely*, [2022] O.J. No. 4727, 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] O.J. No. 4759, 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.

59. Thus, the current rule in Ontario is that parties to litigation must immediately disclose agreements that have the effect of changing *entirely* the landscape of the litigation *in a way that significantly alters the dynamics of the litigation*. This specific language was carefully chosen.

60. At para 36 of the Chambers Decision [AB113], the Chambers judge cites *Kingdom Construction Limited v Perma Pipe Inc.*, 2024 ONCA 593, 500 DLR (4th) 79 [*Kingdom Construction*], for the proposition that "a settlement agreement will entirely change the litigation landscape where it involves a party switching sides from its pleaded position, changing the adversarial position of the parties as set out in the pleadings into a cooperative one."[24]

[24] *Kingdom Construction Limited v Perma Pipe Inc.*, 2024 ONCA 593 at para 46, 500 DLR (4th) 79.

AF 13

61. Note the recent reference by the Ontario Court of Appeal to a party's "pleaded position." Pleaded positions act as a baseline for determining the litigation landscape.

62. According to paras 25 and 45 of the Chambers Decision [AB109, AB116], the Chambers judge was of the view that the immediate disclosure rule was engaged in this case because the Settlement Agreements had the effect of "significantly altering the litigation landscape." This is an overly simplified, and materially inaccurate, version of the legal test.

63. The whole point is that there needs to be room in this legal test for a fact-specific analysis. Unfortunately, some judges applying this line of jurisprudence have been tending toward interpreting the rule narrowly, resulting in no real distinctions being made in practice between types of settlement agreements or litigation landscapes.

64. For example, the court in the Alberta case of *Ball v 1979927 Alberta Ltd.*, 2024 ABKB 229 [*Ball*], applied the jurisprudence out of Ontario strictly, calling it a "bright line" test.[25] The implication by the Alberta court is that the rule is designed to leave no room for variability. This is perplexing given that, as explained above, the rule was intentionally designed to require a contextual and fact-specific analysis. The court in *Ball* went on to say that the failure to immediately disclose settlements that "drastically alter" the litigation landscape is an abuse of process. That is not a precise or accurate description of the legal test developed in Ontario.

65. The Chambers judge in the present case made the same error of implementing the law out of Ontario as a "bright line" rule. The legal test has been painted with too rigid a brush, and the required subtlety of the analysis has been painted over entirely.

66. Further and in any event, the present case is distinguishable from *Ball* because *Ball* dealt with a Pierringer agreement, where payment from the settling defendants to the plaintiffs was a term of the agreement, where court approval of the agreement was

[25] *Ball v 1979927 Alberta Ltd.*, 2024 ABKB 229 at paras 64, 66 [*Ball*].

required, and where the relationship between the parties was unique because the settling defendants were former directors of the company in which the plaintiffs were all former shareholders. For reasons that will be further explained below, terms such as these make a significant difference in the analysis of whether agreements need to be immediately disclosed.

67. In blinding following cases out of Ontario, Alberta, and British Columbia, the Chambers judge failed to correctly identify and give adequate consideration, or consideration at all, to the legal criteria governing the exercise of her discretion, thereby committing errors of law.

68. The following are relevant factors which, when taken together, establish that the litigation landscape was <u>not</u> changed entirely, if at all, by the Settlement Agreements in a way that significantly altered the dynamics of the litigation:

1. The stage of the litigation;
2. The class action nature of the litigation;
3. The absence of any statements of defence from any defendants;
4. The nature and terms of the Settlement Agreements;
5. The nature of the allegations advanced in the Claim;
6. The unknown relationships between the parties and unknown changes to those relationships.

69. The Chambers judge states at para 25 of the Chambers Decision [AB109], with reference to the Plaintiffs' argument that other cases in this area can be distinguished from the present case because of the type of agreement and the stage of the litigation:

> [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…

70. The Chambers judge shows in these reasons that she fails to grasp the contextual analysis required by the Ontario jurisprudence. While the stage of litigation and type of

litigation may not be determining factors when taken in isolation, they are certainly factors that must be considered in an analysis of the litigation landscape.

71. Most of the extra-provincial jurisprudence referred to in the Chambers Decision consisted of cases where pleadings, including statements of defence, had crystallized the legal positions of the defendants. The wording throughout the cases, including the most recent Ontario Court of Appeal authority, speaks to the "pleaded positions" of the parties, and "changing the adversarial position of the parties as set out in the pleadings into a cooperative one" [emphasis added].[26]

72. The Chambers judge rejected the Plaintiffs' argument regarding the importance of pleaded positions as follows:

> [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.[27]

73. Again, while the lack of defences may not have been determinative alone, it was certainly a central factor to be considered given that pleadings are the foundational documents setting the stage for the litigation. The litigation landscape is informed by the pleadings in all cases. To neglect this factor in an assessment of the litigation landscape was an error that goes to the heart of the legal question.

74. The pleadings, including defences, disclose the adversarial relationships between the parties. In this case, we can expect that some of the defendants will be adverse in interest to each other based on the allegations made in the Claim. Statements of defence, when filed, will crystallize these positions. For example, it is common for an employer to cross claim against a co-defendant employee, stating that any alleged wrongdoing by

---

[26] *Kingdom Construction*, *supra* note 26 at para 36.
[27] AB114.

the employee was outside the scope of the employee's authority. Conversely, it is common for employees to deny liability by alleging they were simply following orders.[28]

75. Further, the nature of the Settlement Agreements was of key importance to this analysis. Whether they are called Pierringer agreements, Mary Carter agreements, standstill agreements, etc., is not what matters. What matters is that certain agreements will tend to change the adversarial landscape of the litigation, while others will not, depending on the terms of the particular agreement.

76. One term that must be considered in this analysis is whether payment is required by the settling defendants. This is important because payment by one or more defendants may affect the settlement position and/or negotiation strategy of other defendants, depending on the allegations made in the claim.

77. The Law Society of Saskatchewan's *Code of Professional Conduct* [*Code*] includes commentary addressing this narrow issue. Rule 5.1-2 commentary states:

> [1] In civil proceedings, a lawyer has a duty not to mislead the tribunal about the position of the client in the adversarial process. Thus, a lawyer representing a party to litigation who has made or is party to an agreement made before or during the trial by which a plaintiff is guaranteed recovery by one or more parties, notwithstanding the judgment of the court, should immediately reveal the existence and particulars of the agreement to the court and to all parties to the proceedings.

78. Thus, the *Code* contemplates disclosure of the existence and particulars of an agreement only where the plaintiff is guaranteed recovery by one or more parties. If this obligation was intended to be of wider application, the rule would so state.

79. In the present case, no payment was required or contemplated by the Settlement Agreements. The risk of double recovery of damages is not a concern.

80. The precise wording of a particular settlement agreement must be analyzed to determine whether the terms have the effect of changing the positions of the parties from

[28] See *Bazley v Curry*, [1999] 2 SCR 534, where the SCC set out the test for vicarious liability, and where the core dispute was whether there was liability on the part of the employer for acts of the employee.

adversarial to cooperative. The Chambers judge did turn her mind to this factor, though she erred in beginning with the assumption that the Settling Defendants were adverse in interest to the Plaintiffs and aligned in interest with the other Defendants in the first place.

81. The Settlement Agreements in the instant case require the Settling Defendants to cooperate with the Plaintiffs to a limited extent, but they do not require the Settling Defendants to take any position adversarial to the non-settling Defendants, nor do they prevent the Settling Defendants from cooperating with the non-settling Defendants.

82. Cooperation clauses, in and of themselves, by no means indicate that an agreement has reached the standard of changing entirely the litigation landscape. There is much more to the analysis than this.

83. For example, the case of *Caroti v Vuletic*, 2021 ONSC 2778 [*Caroti*] was one where the settlement agreement in question had "cooperation clauses." These clauses required the settling defendant to attend as a witness at trial if summoned, participate in witness preparation with plaintiffs' counsel, cooperate in discussions with plaintiffs' counsel in advance of discoveries, execute a will-say statement, swear and serve a supplementary affidavit of documents, and make efforts to have a file produced from a related legal action. Despite these requirements, the court held that the settlement agreement did not need to be immediately disclosed.

84. Justice Ricchetti reasoned in *Caroti* as follows:

> [54] Every settlement alters the litigation landscape to some extent. Some entirely, as in *Handley* and *Aecon*, where the real adversity amongst the litigants was hidden by the settlement agreement. On the other hand, a settlement, such as where a plaintiff simply agrees to discontinue against one defendant, alters the adversarial landscape but, because it does not entirely change the adversarial landscape [sic].
>
> [55] Even, in some circumstances where, pursuant to a settlement, a party agrees to cooperate with another litigant, does not necessarily amount to an "entire" change in the adversarial landscape [sic]. This was described by J. Perrell in *Poirier v. Logan*, 2021 ONSC 1633:

AF 18

> [57]... I also agree that it is only settlement agreements that fundamentally alter the relationship among the parties to the litigation such that there has been an entire change in the landscape of the litigation that must be immediately disclosed. Further, I agree that a settlement agreement by one litigant to co-operate with another litigant, be that other a friend or a foe, does not necessarily fundamentally alter the litigation landscape or the adversarial orientation of the litigation.
>
> [Emphasis in original]

85. This is well-reasoned and fitting in the circumstances of the present case. Justice Ricchetti went on to determine that each of the cooperation clauses in *Caroti* did not reach the threshold of altering entirely the litigation landscape. The terms had the effect of doing nothing more than permitting and committing the settling defendant to do what he was entitled and required to do anyway, and importantly, the agreement in no way prohibited the settling defendant from turning around and doing the same for the remaining defendants. Such is precisely the circumstance in the present case.

86. The Settlement Agreements have the effect of turning the Settling Defendants into witnesses instead of parties. Regardless of the existence of a settlement agreement, witnesses are required to participate if ordered to do so or summoned, and they are required to be truthful and cooperative. There is nothing requiring or entitling these parties to do anything more than a witness would do in the normal course. This has not changed the adversarial landscape, and it certainly has not changed it "entirely."

87. It is important to note that the Settling Defendants in this case have been removed from the action, subject to obligations to provide some of the information and documents they would have been required to provide had they remained in the action. Under the rules of court, they can be compelled to produce this information in any event, on the application of any party.

88. Additionally, the Chambers judge was required, in determining whether the litigation landscape had been entirely altered, to consider the class action nature of these proceedings. The objectives of class actions are unique, and the litigation landscape is

unique as a result. For example, a significant line of case law exists, unique to class actions, discussing practical and policy reasons why preliminary applications should not be brought prior to certification.[29] The focus at this stage of the proceedings should be on getting to certification to solidify the issues in the proceedings. Pre-certification, the litigation landscape has not been established.

89. The only factors the Chambers judge seems to have truly considered in her analysis of the litigation landscape were the four corners of the Settlement Agreements and the wrongly assumed relationships between the parties. However, as will be discussed in more detail below, there was no evidence led by the Defendants to indicate what those relationships were or how they were changed by the Settlement Agreements. Any attempt to define those relationships without evidence is speculation.

90. The culminative effect of all of the factors set out above is to illustrate that, in all of the circumstances of this particular case, the Settlement Agreements did not and could not "have the effect of changing entirely the landscape of the litigation in a way that significantly alters the dynamics of the litigation."

91. The Chambers Decision sets a dangerous, unsustainable and unjust precedent. The approach used by the Chambers judge allows little room for nuance or distinction in deciding cases in this area. Even if we accept, for the purposes of analysis, that the immediate disclosure rule from Ontario *should* apply in Saskatchewan, the Chambers judge nevertheless erred by failing to apply the appropriate standard as set out by the Ontario Court of Appeal.

92. The Chambers judge committed legal errors in failing to correctly identify the legal criteria which governed the exercise of her discretion and/or misapplying those criteria.

---

[29] For example, see *Piett v Global Learning Group Inc.*, 2018 SKQB 144 at paras 10-16, 28 CPC (8th) 417; *Knuth v Best Western International Inc.*, 2019 SKQB 216 at paras 12-22, 49 CPC (8th)100.

93. Further, insofar as the finding of an abuse of process in this case was an exercise of discretion, this is a case where the Chambers judge exercised discretion in such a way as to create an injustice. As such, this Court must intervene to rectify the error and do justice to the parties.

> *(iii) The Chambers judge erred in determining that the legal test for abuse of process could be met without a finding of harm or prejudice to the integrity of the judicial system and/or the parties.*

94. This ground of appeal deals not only with prejudice to the individual parties, but prejudice to the judicial system as a whole. As explained above, at the heart of the doctrine of abuse of process is the proper administration of justice and ensuring fairness.[30]

95. To reiterate the main point expounded by the SCC, the doctrine of abuse of process "…engages the inherent power of the court to prevent misuse of its proceedings in a way that would be manifestly unfair to a party or would in some way bring the administration of justice into disrepute" [emphasis added].[31]

96. Thus, there are two objectives to consider here: preventing manifest unfairness to a party and preventing harm to the administration of justice. The Plaintiffs submit that neither objective has been engaged in the present case, and therefore, the legal test for abuse of process cannot have been met.

97. With regard to the first objective, there was no manifest unfairness to the Defendants in having not received the Settlement Agreements "immediately." This ties into the question of whether the agreements entirely altered the litigation landscape, as described above. However, the issue runs deeper. At the most basic level, the Chambers judge failed to consider at all whether there was actual unfairness or actual prejudice to the Defendants. Instead, the Chambers judge stated that she need not consider prejudice,

---

[30] *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 at para 36, [2022] 2 SCR 220 [*Abrametz*].
[31] *Sask Environment*, *supra* note 2 at para 33.

citing *Handley Estate v DTE Industries Limited*, 2018 ONCA 324, 421 DLR (4th) 636 [*Handley Estate*] at para 45, for the proposition that a finding of prejudice is not required.

98. With respect, this is not the law in Saskatchewan, nor should it be. Neither the Saskatchewan Courts nor the SCC have stated that an abuse of process of this nature can be made out in the absence of prejudice. Rather, our Courts have consistently upheld SCC authority that there must be either manifest unfairness or harm to the administration of justice. While the Ontario Courts may choose to depart from SCC guidance and impose inflexible rules in this area of the law, Saskatchewan Courts need not follow.

99. When Justice Bardai decided the previous application in this matter regarding the deferral of defences, the Plaintiffs argued that the overwhelming approach out of Ontario, with other provinces following suit, was to require defences to be filed prior to certification. Justice Bardai considered the extra-provincial case law and the reasoning therein, acknowledged that courts in other jurisdictions are charting a different path, but ultimately decided that Saskatchewan's approach should be its own.[32] Clearly, Saskatchewan courts are not required to follow what is being done in other provinces.

100. Even if we do take the rule from *Handley Estate* and apply it stringently in Saskatchewan, as the Chambers judge has done, it is not the end of the analysis. If the underlying test for abuse of process is not met due to manifest unfairness to the parties, then it must be met because of harm to the administration of justice.

101. However, the Chambers judge did not consider actual harm to the administration of justice either. Any potential consideration of prejudice to the Defendants or harm to the administration of justice which could be read into the Chambers Decision was abstract theory and speculation given the wording of the Settlement Agreements.

102. The immediacy requirement of the legal test, as developed in Ontario and adopted by the Chambers judge, indicates that it is the *delay* in disclosing a settlement agreement

[32] *Erickson*, *supra* note 8.

that produces the harm this rule is designed to prevent. It is not the settlement agreement itself that is an abuse of process, but the fact it was not disclosed *immediately*. It follows that there must be some level of prejudice or harm in the *delay* for this rule to have application. In the present case, no such harm exists, nor was such harm alleged by the Defendants.

103. It defies reason for an immediate disclosure rule to apply in situations where the harm it was designed to prevent does not exist. To hold otherwise results in punishing a party for harm that never occurred (i.e. failing to immediately disclose something that does not need to be immediately disclosed). Any Ontario case law advocating for this approach has, with respect, lost the point of the rule.

104. It was an error of law, given SCC authority in this area, for the Chambers judge to find that an abuse of process could be made out without evidentiary findings to satisfy the essential elements of manifest unfairness or harm to the justice system. This legal error, which pervades the decision, is reviewable on the standard of correctness.

105. Further and in the alternative, the Chambers judge made this error in mixed fact and law for failing to properly consider, or to consider at all, whether the requisite elements of prejudice and/or harm were made out in this case. This error was palpable and overriding, warranting and necessitating the intervention of this Court.

ISSUE B: The Chambers judge erred in determining that the settlement agreements entirely changed the litigation landscape in an absence of evidence to support this finding.

106. The question of whether the litigation landscape has been changed entirely in a way that significantly alters the dynamics of the litigation is a contextual analysis that must be grounded in admissible evidence from which the judge can reasonably draw conclusions. The onus to establish an alleged “entire change” to the litigation landscape is on the Defendants.

107. However, the Chambers judge's analysis in this area was based on completely speculative ideas about the relationships between the parties and any potential changes to those relationships, instead of on actual evidence. There was no evidence led by the Defendants to establish that the parties had been aligned in interest or had become adverse in interest. There was no evidence led to indicate that litigation strategies were forced to change after the Settling Defendants were released. There was no evidence led that any defendant had ever developed a litigation strategy.

108. The landscape of the litigation, both before and after the Settlement Agreements were entered into, is unknown. This is due to both the lack of evidence led by the Defendants in the context of the Stay Application, but also the lack of pleading by any of the Defendants.

109. In the *Ball* case out of Alberta, which was a case where defences had not yet been filed, the evidentiary foundation for the judge's decision was an affidavit sworn by one of the defendants which set out, among other things, the relationships between the parties. The plaintiffs in that case filed no affidavits in response and therefore the evidence was uncontroverted. This clearly distinguishes *Ball* from the present case.

110. In the present case, the evidence led by the Defendants dealt largely with the timing of the receipt of discontinuances and correspondence from the Plaintiffs regarding production of the Settlement Agreements. Most of the affidavit evidence relied on by the Defendants is merely a recital of this same information by different individuals.

111. The Chambers judge reasoned at para 45 [AB116] that, "the statement of claim, the history of the action and the assumed relationship or expectations of the litigation" all indicate that the Plaintiffs and the Settling Defendants were adverse in interest prior to the agreements. With respect, it is impossible for the judge to make those stretching inferences without an evidentiary basis to ground them. The Chambers judge had only the wording of the Statement of Claim and the wording of the Settlement Agreements on their face to guide her analysis. The rest was guesswork.

112. An inference cannot be drawn based on the Statement of Claim alone that the Plaintiffs and Settling Defendants were adverse in interest or that the Defendants and Settling Defendants were all cooperative with each other. The Statement of Claim sets out only the Plaintiffs' position. The Defendants' positions remain unknown. Moreover, the nature of some of the causes of action pled would actually tend to attract the more logical inference that certain Defendants were adverse in interest to each other – a fact entirely disregarded by the Chambers judge.

113. When the Claim is read in its entirety, it is clear there were significant adversarial relationships between defendants already in play prior to the Settlement Agreements being entered into. For example, vicarious liability is alleged in the Claim. As discussed above, the reasonable inference is that employer and employees are adverse in interest.

114. It is entirely possible that some or all of the Defendants will concede some or all of the allegations made in the Claim. We have to assume the Defendants will be truthful in the process. In fact, the requirement to engage truthfully in the process is all that is required of the Settling Defendants in the Settlement Agreements, and it was already required of them independent of the Settlement Agreements.

115. A reasonable inference that the Defendants were cooperative with each other cannot be drawn from the history of the litigation either. The Chambers judge appears to have based this inference on the court record, which shows that the Settling Defendants participated in Mile Two's application to defer the filing of defences, and that two of the Settling Defendants also delivered requests for further particulars of the Claim. First of all, no evidence was led about litigation strategy on past applications, nor was evidence led as to litigation strategy going forward.

116. Second, the procedural applications that have been made so far in this litigation have nothing to do with the actual substance of the underlying Claim or the nature of the allegations made therein. It is flawed logic to say that the Settling Defendants must have

been aligned with the other Defendants because they also wanted to defer their defences and also requested further particulars of the Claim.

117. Most of the Defendants have separate counsel, indicating they have clearly contemplated that their interests and strategies in dealing with this Claim are or may be divergent from the other Defendants.

118. It was an error for the Chambers judge to start with the presumption that the Settling Defendants were in a cooperative relationship with the other Defendants. No evidence was led to establish this relationship. It is more logical to assume the opposite.

119. It was an error for the Chambers judge to start with the presumption that the Settling Defendants were adverse in interest to the Plaintiffs when no defences had been filed to set out the legal position of any defendant. As explained above, it is very likely that Mile Two will deny they are vicariously liable for the actions of the individually named defendants.

120. It is entirely possible that the Settling Defendants intend to file defences stating that everything alleged in the Statement of Claim is true to the best of their knowledge. It is also possible, and quite likely in ordinary litigation dynamics, that some of the Defendants will point fingers at other Defendants. It is likely that, had pleadings been completed, there would be crossclaims and counterclaims between Defendants.

121. It is unfounded for the Chambers judge to assume that the Defendants were all on the same side when, in reality, co-defendants are more likely to be at odds with one another in litigation.

122. The bottom line is that this is all pure speculation in the absence of evidence. The Chambers judge erred in principle, which amounts to an error in law, by failing to ground her findings of fact on an evidentiary basis that would allow her to reasonably make the inferences she did. This Court’s intervention is justified and needed.

123. In the alternative, this was a serious misapprehension of the evidence that justifies intervention by this Court.

ISSUE C: The Chambers judge erred in determining that a stay of the proceedings was the only available remedy.

124. As discussed above, the doctrine of abuse of process is intended to be flexible to fit all of the circumstances of a particular case. It logically follows that the remedy must be flexible as well. This has been well settled by the SCC.

125. In *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29, [2022] 2 SCR 220 [*Abrametz*] at para 74, the SCC reiterated that, "Courts and tribunals must be mindful as to appropriate remedies in the various contexts in which abuse of process can occur." When choosing a remedy for an abuse of process, the SCC, and Saskatchewan Courts following SCC guidance, have used a "spectrum" approach.

126. As summarized by the SCC in *Abrametz*:

> [76] As noted, the doctrine of abuse of process is broad; it can usefully be appreciated on a spectrum: see, in criminal matters, *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 107. Various remedies are available, up to and including a permanent stay of proceedings. However, when this high threshold is not met, when there is inordinate delay and resulting prejudice, but it is "not significant enough that proceeding in its wake would, in and of itself, shock the community's sense of fairness and decency" (*Regan*, at para. 107), then other remedies are available.

127. *Abrametz* was a case about abuse of process due to delay in administrative law. However, the general principles laid out by the SCC in that case and preceding cases have broad application.

128. At para 52 of the Chambers Decision [AB118], the Chambers judge dismisses the Plaintiffs' argument that she should consider abuse of process principles as set out in other areas of the law, such as criminal and administrative proceedings. This is a mistake. The grounding legal principles of the abuse of process doctrine as set out in *Toronto*

(City) v CUPE, Local 79, 2003 SCC 63, [2003] 3 SCR 77 [*CUPE 79*] have been relied upon in subsequent SCC decisions in multiple areas of law.[33]

129. As stated by the SCC in *CUPE 79*:

> [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. …

130. Clearly, the basic principles of the abuse of process doctrine were intended by the SCC to apply in criminal, administrative, and civil cases alike. The foundational SCC cases have been widely relied on by Saskatchewan Courts in all of these contexts, including civil proceedings.[34]

131. The Chambers judge also states at para 52 of the Chambers Decision [AB118]: "While I can see the appeal of a more nuanced approach which could balance some of the competing interests rather than an automatic rule, this is not how the law presently operates." This is a contradiction of the Chambers judge's earlier acknowledgment that this is new law in Saskatchewan. This may be how the law presently operates in Ontario, but it is certainly not how the law presently operates in Saskatchewan. Nor should it be.

132. The SCC has held that a stay of proceedings is at the far end of the spectrum, to be used only in the most grievous cases. In *Abrametz*, the SCC emphasized this point:

> [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

---

[33] For example, general principles of the abuse of process doctrine as set out in *CUPE 79* have been cited subsequently by the SCC in *Behn v Moulton Contracting*, 2013 SCC 26, [2013] 2 SCR 227 (a civil case); *Abrametz* (an administrative law case); *R v Sullivan*, 2022 SCC 19, [2022] 1 SCR 460 (a criminal law case); *Sask Environment* (a civil case); etc.

[34] For example, see Bear v Merck Frosst Canada & Co., 2011 SKCA 152 at paras 36-36, 345 DLR (4th) 152; *Onion Lake Cree Nation v Stick*, 2018 SKCA 20 at paras 52-53, [2018] 5 WWR 111.

> 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.

133. Three crucial points emerge from SCC jurisprudence:

1) There is a spectrum of remedies available in abuse of process cases;

2) The Court is tasked with choosing the remedy that best fits the circumstances of the case; and

3) A stay of proceedings is the ultimate remedy to be granted only in the clearest of cases, when the abuse falls at the high end of the spectrum of seriousness.

134. The Chambers judge made a legal error when she failed to follow, or even consider, established SCC authority. Instead, the Chambers judge opted to implement a rigid rule from non-binding Ontario jurisprudence which pre-determines the remedy.

135. This Court has endorsed a nuanced approach to remedies for abuse of process. In *Onion Lake Cree Nation v Stick*, 2018 SKCA 20, [2018] 5 WWR 111 [*Onion Lake*], in the context of an abuse of process case, this Court stated:

> [47] The court's power to grant a stay of proceedings is discretionary. As stated in s. 37 of *The Queen's Bench Act, 1998*, such stays may be granted if the judge considers it "appropriate" in the circumstances. Section 37 provides no guidance as to how judges should exercise their discretion, but jurisprudence from both this Court and the Court of Queen's Bench provides assistance.
>
> [48] In *Leier v Shumiatcher* (1962), 39 WWR 446 (Sask CA) [*Leier*], Davies J. (*ad hoc*), writing for this Court stated:
>
> > [2] Considerable argument was addressed to the court as to the circumstances under which a discretion to stay proceedings may be exercised, and the extent and limitation thereof. There is the principle, sanctioned by high and respected authority, that the discretion should be exercised only under extraordinary circumstances: *Rowe v. Brandon Packers Ltd.* (1961) 35 WWR 625, 35 CR 410 (Man. C.A.), and the cases therein considered. **I am, however, respectfully of the opinion that the right to exercise a discretion should not be curtailed by any inflexible rule of law, but should be guided in each instance by the merits of the matter under review.** I am convinced that a judge, whose duty it is to exercise the discretion, has not only an inherent right to do so, but where the attainment of justice demands, an obligation and an unfettered right to do so, subject to any limitations imposed by statute or the rules of court: *Re Trade Union Act;*

> *Re Blackwoods Beverages Ltd. and Dairy Employees, Truck Drivers and Warehousemen, Local No. 834* (No. 1) (1956) 18 WWR 481, at 486. **The exercise of the discretion must not, of course, be capricious or arbitrary, but must have as its foundation admissible evidence of record from which the judge may reasonably draw conclusions.** Where a discretion has been exercised without evidence, or (what is tantamount to it) evidence from which no reasonable conclusion should be drawn, the discretion has been based on a wrong principle of law and cannot stand: *Boychuk v. Korzenowski*, [1924] 2 WWR 750 (Sask. C.A.). ...

…

> [49] It is clear the discretion to grant a stay of proceedings is not governed by rigid principles or criteria. Instead it is to be guided by the particular circumstances of each case. Its exercise must not be arbitrary or capricious but rather based on admissible evidence. There can be no exhaustive list of factors a judge should consider when determining whether to grant a stay of proceedings as the relevant factors will, of necessity, be determined by the context in which the request for a stay arises. Finally, judges should bear in mind when exercising their discretion that the ultimate effect of the stay will always be either to forestall or postpone access to the courts and, thus, justice.
>
> [emphasis in original]

136. These principles were also cited in *Herold v Wassermann*, 2022 SKCA 103, 473 DLR (4th) 281 [*Wassermann*] where this 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. …
>
> [63] In other words, when confronted with a request for a stay of proceedings, the court should assess what other tools exist for managing the interests at stake in the application. Brought into the circumstances of this case, this means that the court should assess whether some procedural mechanism - other than a stay - might eliminate or sufficiently ameliorate the deleterious effects of the existence of parallel actions such that the reasons for the stay no longer justify its grant.
>
> [emphasis added]

137. At para 54 of the Chambers Decision [AB119], the Chambers judge dismissed the Plaintiffs' reliance on *Wassermann* to support a nuanced approach because the *Wassermann* case did not involve an abuse of process. However, the Chambers judge

failed to recognize that *Onion Lake* was in fact a case involving abuse of process, and *Onion Lake* was a case *Wassermann* had relied on for the principles cited therein.

138. The Chambers judge was required, based on binding jurisprudence from the SCC and this Court, to take a nuanced approach to remedies, balancing all the interests in play in this particular case. The Chambers judge failed to undertake this fundamental analysis.

139. The Chambers judge states at para 52 of her decision [AB118] that in determining the remedy she need not look to considerations such as:

> … "only the clearest of cases", whether there was bad faith, 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. …

140. With respect, these are *exactly* the types of factors it was incumbent on the Chambers judge to consider when crafting the appropriate remedy. The Chambers judge was mistaken in her belief that the abuse of process doctrine as it applies in this particular case does not have overlap with, and involve the same underlying principles as, abuse of process in other areas of the law. She was mistaken in determining that she did not need to engage in a balancing exercise to determine the appropriate remedy.

141. The irony is that, when it came to the Costs Decision, the Chambers judge did turn her mind to fairness and weighed relevant factors. The Chambers judge analyzed the following factors, *inter alia*, in her determination of the appropriate costs award:

> [10] I am also of the view that aspects of this matter had significant importance for the law in Saskatchewan. The stay application was the first case in the province to consider the immediate disclosure rule and apply it in the class action context. This has important implications for all class actions going forward. This matter also involved serious allegations of sexual, physical and psychological abuse by school and church officials where there has been significant media attention.
> …
> [12] Class actions can serve as an access to justice avenue for plaintiffs who may not have the wherewithal to bring individual actions on their own. This matter involved serious allegations and was dismissed without an adjudication on its merits. It is therefore my view that the factors of access to justice and reasonableness should be weighed in determining an appropriate costs amount.

> [13] … this is not a matter where the plaintiffs' conduct can be characterized as "entirely unfounded or highly objectionable". Although I held that the immediate disclosure rule applied in Saskatchewan and the plaintiffs' failure to immediately disclose settlement agreements was an abuse of process, the law in Saskatchewan was not clear prior to this case…[35]

142. Clearly, factors such as access to justice, the unique nature of class proceedings, and the nature of the claims brought in this action are central factors that all weigh toward the conclusion that a stay is unjust in the circumstances. The Chambers judge recognized these factors in the Costs Decision and recognized that this is novel law in Saskatchewan. In the Chambers Decision, the Chambers judge got stuck in applying the law so rigidly that she neglected to consider what was fair and reasonable in the circumstances.

143. It is manifestly unfair to the Plaintiffs to order a stay of the proceedings when there was no prior legislation, regulation, rule, or common law jurisprudence in Saskatchewan compelling the Plaintiffs to immediately disclose the Settlement Agreements. Despite the absence of prior Saskatchewan law, the Plaintiffs are being retroactively punished and denied justice.

144. The Plaintiffs cannot be expected to know of and follow every law from every jurisdiction, nor can they be expected to follow future laws which have yet to be adopted in Saskatchewan. Such an idea is absurd. If the law is going to be changed, so be it, but the Plaintiffs cannot and should not be penalized for this change. The Saskatchewan Court of Appeal has affirmed this view before.

145. *In International Capital Corporation v Robinson Twigg & Ketilson*, 2010 SKCA 48, 319 DLR (4th) 155 [*ICC*], this Court determined that the law concerning dismissal for want of prosecution must change going forward. The Court found that the plaintiffs in that case had conducted themselves in accordance with the previously existing law as it had been traditionally understood. It would be unfair to apply the new law to the parties to their detriment. As such, the appeal in *ICC* was resolved based on the traditional

[35] AB124.

approach, and the plaintiffs were permitted to continue their action. However, the law was changed for future litigants.

146. Given this Court's decision in *ICC*, even if this Honourable Court determines that the immediate disclosure rule shall apply in Saskatchewan to the strictest degree, and even if it is found that the Settlement Agreements fall into the scope of the rule, the Plaintiffs must nevertheless be permitted to continue their action because they did not contravene any existing law. The Chambers judge did not address this argument at all.

147. It bears repeating here that the SCC has emphasized, time and again, that the doctrine of abuse of process is characterized by its flexibility and is not encumbered by specific requirements. In the same vein, a stay of proceedings is a remedy that is not to be constrained by rigid rules but must be guided in each instance by the merits of the matter under review.[36] The Chambers judge's use of an automatic rule to determine the remedy could not be more discordant with the doctrine and with the jurisprudence operating in this province.

148. In *Park Place Centre Ltd. v Manga Hotels (Dartmouth) Inc.*, 2022 NSSC 317, the Nova Scotia Supreme Court considered a defendant's application to stay the plaintiff's action because a settlement agreement with another defendant had not been disclosed "immediately." The applicant defendant argued that the immediate disclosure rule from Ontario should apply. Justice Chipman began by reviewing the seminal SCC cases on abuse of process, as well as jurisprudence from the Nova Scotia Court of Appeal which held that the remedy of a stay for an abuse of process is one which is to be used sparingly, and only in exceptional circumstances.

149. Justice Chipman wrote:

> [23] … I have reviewed all of the material with the integrity of the adjudicative process foremost in mind. While cognizant of the Ontario Court of Appeal cases outlining the clear principle that settlement agreements must be disclosed immediately in these kinds of cases, I am mindful of the direction from our Court of Appeal that the remedy of a

[36] *Wassermann*, *supra* note 3 at para 45.

> stay or dismissal for abuse of process should only be deployed in rare and exceptional cases.
>
> [24] Once Mr. MacKie and Park Place settled, their counsel should have forthwith provided the Minutes of Settlement and proposed consent dismissal Order to Manga's counsel. Instead, it took repeated requests by Manga's lawyer before the Minutes were provided about a week and a half later. This was not optimal and not in keeping with the immediate disclosure requirement emphasized by the Ontario Court of Appeal. Nevertheless, I must decline Manga's last minute request to grant a stay or dismissal for abuse of process. In this regard I do not regard this situation as one of the rare and exceptional cases where a stay must be granted because there has been conduct which has tainted the case to such a degree as to be manifestly unfair to Manga. Further, in all of the circumstances I cannot conclude that the failure to disclose the settlement immediately brings the administration of justice into disrepute by impairing the Court's adjudicative function and undermining public confidence in the legal process. Rather, I am of the view that fairness dictates that the evidence which has gone in must be considered and adjudicated on the merits. Accordingly, I dismiss Manga's abuse of process motion in its entirety.

150. Nova Scotia is evidently, like Saskatchewan, a province where Court of Appeal and SCC authority holds that the remedy of a stay of proceedings is only to be used in rare cases. In his reasons, Justice Chipman illustrates that he understands the underlying requirements for abuse of process (i.e. either manifest unfairness to a party or harm to the administration of justice). In coming to his conclusion that the action should not be stayed, Justice Chipman was concerned with the integrity of the justice system and with making the decision that fairness dictated in the circumstances. This is exactly the approach that was called for in the Chambers Decision, given both Saskatchewan's existing legal framework and the circumstances of the case.

151. Further, this Court made it clear in *Onion Lake* that admissible evidence is required as the foundation for the judge's discretion in choosing a remedy. The Court stated at para 48 of *Onion Lake*:

> … The exercise of the discretion must not, of course, be capricious or arbitrary, but must have as its foundation admissible evidence of record from which the judge may reasonably draw conclusions. Where a discretion has been exercised without evidence, or (what is tantamount to it) evidence from which no reasonable conclusion should be drawn, the discretion has been based on a wrong principle of law and cannot stand: *Boychuk v. Korzenowski*, [1924] 2 WWR 750 (Sask. C.A.). ...

152. As explained above, the Chambers judge erred in exercising her discretion in this way with no evidence before her on which she could reasonably draw her conclusions.

153. The Plaintiffs submit that the Chambers judge lost sight of the purpose and substance of the abuse of process doctrine and the mandated legal framework for remedies. The Chambers judge erred in failing to consider the spectrum of remedies, the balancing of interests, and factors such as: fairness, prejudice, encouraging settlement, public interest, whether the administration of justice is brought into disrepute, whether alternative remedies are available, etc. These are all relevant and necessary considerations that inform the remedy for abuse of process in all areas of law.

154. The Chambers judge jumped to the ultimate and final remedy of a stay without using the correct legal test. The failure of the Chambers judge to apply the appropriate legal framework was an extricable error of law reviewable on the standard of correctness.

155. Further, the exercise of the Chambers judge's discretion in granting a stay of proceedings, which has the effect of denying justice to the Plaintiffs, was a palpable and overriding error warranting this Court's intervention.

ISSUE D: The Chambers judge erred in determining that the action could be stayed for an abuse of process in the absence of prejudice.

156. The party seeking the stay has the onus of establishing the basis for it.[37] This Court in *Onion Lake* specifically stated that, in order to meet that onus, the party "must show prejudice should the proceedings be allowed to continue" [emphasis added]. [38]

157. In *Wassermann*, this Court commented in depth on the importance of considering what prejudice, if any, a party applying for a stay would suffer if that stay were not granted.[39] *Wassermann* was concerned with a temporary stay of the action pending

---

[37] *Onion Lake*, *supra* note 36 at para 50.
[38] *Ibid*.
[39] *Wassermann*, *supra* note 3 at paras 44-51.

certification of another class action. Our case deals with a permanent stay. Nevertheless, the Plaintiffs submit that the principles hold. If prejudice to the parties and a balance of interests must be considered in granting a temporary stay, it is obvious that such interests must be considered when granting a permanent stay, where the stakes are even higher.

158. Leurer, J.A. (as he then was), writing for this Court in *Wassermann*, determined that the lower court had erred in granting a stay without considering prejudice, or lack thereof, to the party seeking the stay. The Chambers judge in the present case made precisely this error.

159. The Chambers judge erred when she side-stepped the guidance as set out in *Wassermann* because it was not an abuse of process case. As stated by this Court in *Wassermann* at para 51:

> [51] I find it difficult to conceive of a situation where, in an assessment of the question as to whether a stay should be granted, one consideration would not be whether the interest or stake of the *applicant* justifies the grant of the stay. This is true even in cases where stays are requested because a proceeding is an abuse of process. As explained in *Canam Enterprises Inc. v Coles* (2000), 2000 CanLII 8514 (ON CA), 51 OR (3d) 481 (CA) at para 55, per Goudge J.A., dissenting (appeal to SCC granted, 2002 SCC 63, [2002] 3 SCR 307), 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" (emphasis added). This statement of law has been repeatedly endorsed by senior appellate courts. See, for example only, *Toronto (City) v C.U.P.E., Local 79*, 2003 SCC 63 at para 37, [2003] 3 SCR 77.
>
> [Emphasis added]

160. Leurer, J.A. specifically stated in *Wassermann* that these principles apply to abuse of process cases. There can be no doubt that, in the present case, prejudice was a relevant and crucial factor that the Chambers judge was required to consider.

161. This Court explained at length in *Wassermann* the framework from *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311 and its application to a request for a stay.[40] The Chambers judge was required to consider these principles and to the potential prejudice to the parties on both sides of the action that would arise if the

[40] *Wassermann* at paras 47-51,59-62.

stay were granted or not granted. In essence, this is a balancing exercise which considers all relevant factors to inform a reasonable and fair conclusion. This approach is harmonious with the SCC's guidance in *Abrametz* regarding the spectrum of remedies, but contrary to the approach from Ontario that was adopted by the Chambers judge.

162. This Court in *Wassermann* also held, as quoted previously in this factum, that a judge faced with an application for a stay must consider whether there are alternative remedies available that would provide appropriate redress in the circumstances.[41]

163. The Chambers judge again sidestepped the Plaintiffs' arguments that other remedies ought to be considered by saying that the ruling in *Wassermann* does not apply. However, *Wassermann* was not decided in a vacuum. This ruling was based on legal principles derived from decades of jurisprudence dealing with stays of proceedings.

164. Further, in class proceedings specifically, a judge exercising the discretion to grant a stay must have regard to the principles underlying class proceedings: access to justice, judicial economy, and behaviour modification.[42] The Chambers judge gave absolutely no weight to any of these factors.

165. Evidence before the Court does establish that, if this action is stayed, another member of the proposed class intends to commence a new claim [AB37]. Therefore, imposing a stay can only serve to increase cost and delay to the class members, and frustrate the fair and efficient adjudication of the action. The Court is effectively asking the class to start over from the beginning and jump through all the same hoops. No legitimate purpose is served by this exercise, and it certainly does not benefit the Defendants or the justice system to have to start over again.

166. There is no prejudice to the Defendants in having received the Settlement Agreements four months later versus one minute after the Settlement Agreements were executed, as no meaningful steps were taken in the action in the intervening period. The

---

[41] *Ibid* at paras 62, 63.
[42] *Ibid* at para 50, 61.

Defendants have brought no evidence to demonstrate prejudice and have not argued there was prejudice, because there clearly was not. On the other hand, the prejudice to the Plaintiffs in not being able to proceed with their action is enormous. The Plaintiffs will be denied their right of access to the Court. This right is not to be lightly interfered with.

167. It is ironic that the Chambers judge would see fit to take such extreme steps to prevent an alleged abuse of process but then make a ruling which has the effect of creating manifest unfairness to the Plaintiffs. The administration of justice is no doubt brought into disrepute if the Plaintiffs are prevented from having their claim adjudicated on the merits in these circumstances.

168. When interpreted too broadly, this immediate disclosure rule creates a host of practical issues and policy concerns. For instance, were the Defendants required to immediately disclose to the Plaintiffs that they were planning to cooperate on preliminary applications? Are co-defendants in all actions who exchange information with each other to bolster defences required to immediately disclose that arrangement? Are parties required to disclose an agreement in principle that has not yet been executed?

169. On a policy level, how far does the requirement of "immediate" disclosure go, and what is the point of so rigid a rule? What harm are we seeking to address and is "immediate" disclosure actually required in all cases to prevent that harm? If so, what should "immediate" really mean?

170. Further, why is the focus only on the actions of plaintiffs? According to the rule out of Ontario and the Chambers Decision, the *only* remedy available for a failure to immediately disclose a settlement agreement is a stay of the action, which can only harm a plaintiff. This means that either the rule only applies to plaintiffs, which is patently inequitable, or there must be more remedies available. If more remedies are available, then the Chambers judge made a legal error when she stated that the only remedy available is a stay of proceedings.

171. The Plaintiffs submit that, as the Settlement Agreements were in fact disclosed to the Defendants before any further steps were taken by them in this action, there is no prejudice that needs to be remediated. There was no harm to the Defendants that warrants any further remedy.

172. Alternatively, if this Honourable Court accepts that there was some level of prejudice to the Defendants that needs to be ameliorated, there are other tools available outside of a stay of proceedings that are a better fit in the circumstances. It is excessive and bizarre to jump to the nuclear option when the interests at stake for the Plaintiffs and the proposed class members are so great.

173. If further remedy is required, such remedy needs to be proportionate and tailored to the supposed harm. Lesser and more suitable remedies are available in the circumstances, including: costs awards, further disclosure, requiring the Settlement Agreements to be approved by the Court, setting aside the Settlement Agreements, etc.

174. In sum, it was an error for the Chambers judge to fail to engage with the balance of competing interests and potential prejudices on both sides of the equation. It is submitted that the Court need not look further than the ruling in *Wassermann*, which is directly on point, to arrive at the same conclusion.

ISSUE E: The Chambers judge improperly fettered her discretion and erred in determining that she was required to follow extra-provincial jurisprudence.

175. This decision was a blind and blanket application of Ontario law by the Chambers judge, without due consideration of how that law fits into the picture in Saskatchewan.

176. At one point in the Chambers Decision, the Chambers judge goes so far as to state: "In the circumstances, I must follow the caselaw and hold that the only appropriate remedy is a stay of the action" [emphasis added].[43]

[43] Chambers Decision, *supra* note 1 at para 58 [AB120].

177. Of course, Ontario case law is not binding in Saskatchewan. That is not how *stare decisis* works. While the Chambers judge was entitled to find Ontario jurisprudence persuasive and have it inform her decision, she was not required to follow it. It was incumbent upon the Chambers judge, in choosing to adopt extra-provincial jurisprudence, to provide logical rationale for that adoption.

178. As explained above, binding case law from the SCC and from Saskatchewan courts was ignored by the Chambers judge in favour of adopting a strict approach. The Chambers judge improperly fettered her discretion by rigidly applying case law that she was not bound by, preventing any authentic exercise of discretion. The effect was a complete disregard for the circumstances of the case and their bearing on the outcome. This was an error in principle which cannot be allowed to stand.

179. Not only did the Chambers judge unduly restrict her own decision-making power by adhering strictly to extra-provincial law, she also set the tone for future cases in Saskatchewan. This decision represents a significant development in the law and such a development needs to be based on sound principles. If this decision is allowed to stand, it will make it extremely difficult for future parties to make the argument that, in the circumstances of their particular case, a settlement agreement need <u>not</u> be disclosed.

180. As explained above, the purpose of the abuse of process doctrine is undermined by this decision. The ability for this doctrine to accommodate nuance is a key underpinning. Not to mention that this rigid application of law closes the door to arguments based on settlement privilege and other legitimate interests of parties to litigation that also warrant protection.

181. When we take a step back and look at this from a practical perspective, it is perplexing that courts in Ontario, and other provinces now following suit, have placed such a heavy emphasis on the immediate disclosure rule in priority to all other interests that exist in litigation proceedings.

182. Following this decision, should it be permitted to stand, we can expect that out of an abundance of caution, all manner of agreements and arrangements will be immediately disclosed to avoid the wrath of the Court and the drastic consequences for breaching this rule. This overly broad law will have a chilling effect on settlement efforts.

183. Of course it is wrong to mislead the Court and other parties concerning settlement arrangements when those arrangements affect the fair administration of justice. But it is also wrong to require broad disclosure of settlement agreements in the absence of any harm to the other parties or the system.

184. A reasonable decision-maker has to be able to balance these countervailing interests and make a nuanced decision in light of all of the circumstances of the case. The Chambers Decision has set a restrictive precedent that will make a refined analysis in such cases nearly impossible going forward.

VI. RELIEF

185. For all of the above reasons, the Appellants ask this Court to intervene to rectify the errors committed by the Chambers judge and to clarify the law in this province.

186. Specifically, the Appellants ask this Court to:

(a) Overturn the Chambers Decision;

(b) Dismiss the application in the lower Court;

(c) Order costs of this Appeal and of the application in the lower Court in favour of the Appellants.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at Saskatoon, Saskatchewan, this 12 day of August, 2025.

SCHARFSTEIN LLP

Per: _____

Grant J. Scharfstein, K.C.
Solicitors for the Appellants

AF 41

This document is filed by:
Name of Firm: Scharfstein LLP
Name of lawyer in charge of file: Grant J. Scharfstein, K.C. / Samuel W. Edmondson
Address of Legal Firm: 200 Princeton Tower
123 – 2nd Avenue South
Saskatoon SK S7K 7E6
Telephone Number: (306) 653-2838
Fax Number: (306) 652-4747
Email address: gscharfstein@scharfsteinlaw.com
sedmondson@scharfsteinlaw.com
File number: 21,835.1

VII. AUTHORITIES

Caselaw

Ball v 1979927 Alberta Ltd., 2024 ABKB 229.

Bazley v Curry, [1999] 2 SCR 534.

Bear v Merck Frosst Canada & Co., 2011 SKCA 152, 345 DLR (4th) 152.

Behn v Moulton Contracting, 2013 SCC 26, [2013] 2 SCR 227.

Caroti v Vuletic, 2021 ONSC 2778.

Erickson v Johnson, 2023 SKKB 191.

Erickson v Mile Two Church Inc., 2025 SKKB 71.

Handley Estate v DTE Industries Limited, 2018 ONCA 324, 421 DLR (4th) 636.

Herold v Wassermann, 2022 SKCA 103, 473 DLR (4th) 281.

H L v Canada (Attorney General), 2005 SCC 25, [2005] 1 SCR 401.

Housen v Nikolaisen, 2002 SCC 33, [2002] 2 SCR 235.

International Capital Corporation v Robinson Twigg & Ketilson, 2010 SKCA 48, 319 DLR (4th) 155.

Kingdom Construction Limited v Perma Pipe Inc., 2024 ONCA 593, 500 DLR (4th) 79.

Knuth v Best Western International Inc., 2019 SKQB 216, 49 CPC (8th)100.

AF 42

Law Society of Saskatchewan v Abrametz, 2022 SCC 29, [2022] 2 SCR 220.

Onion Lake Cree Nation v Stick, 2018 SKCA 20, [2018] 5 WWR 111.

Park Place Centre Ltd. v Manga Hotels (Dartmouth) Inc., 2022 NSSC 317.

Piett v Global Learning Group Inc., 2018 SKQB 144, 28 CPC (8th) 417.

RJR-MacDonald Inc. v Canada (Attorney General), [1994] 1 SCR 311.

R v Sullivan, 2022 SCC 19, [2022] 1 SCR 460.

Saskatchewan (Environment) v Metis Nation – Saskatchewan, 2025 SCC 4, 500 DLR (4th) 279.

Skymark Finance Corporation v Ontario, 2023 ONCA 234, 166 OR (3d) 131.

Toronto (City) v CUPE, Local 79, 2003 SCC 63, [2003] 3 SCR 77.

Yorkton (City) v Mi-Sask Industries Ltd., 2021 SKCA 43, [2021] 6 WWR 18.

Statutes

The Court of Appeal Act, 2000, SS 2000, c C-42.1