**Court of Appeal for Saskatchewan** | **Citation: *Erickson v Johnson*, 2026 SKCA 93**
**Docket: CACV4563** | **Date: 2026-08-25**

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)*

| | |
|---|---|
| Before: | Leurer C.J.S., Tholl and Kilback JJ.A. |
| Disposition: | Appeal allowed |
| Written reasons by: | The Honourable Chief Justice Robert W. Leurer |
| In concurrence: | The Honourable Justice Jerome A. Tholl<br>The Honourable Justice Keith D. Kilback |
| On appeal from: | 2025 SKKB 71, Saskatoon |
| Appeal heard: | January 8, 2026 |
| Counsel: | Grant Scharfstein, K.C., and Samuel Edmondson for the Appellants<br>Amanda Quayle, K.C., for Mile Two Church Inc.<br>Adam Touet, K.C., for Randy Donauer<br>James Ehmann, K.C., for John Thuringer<br>Scott Spencer for Aaron Benneweis<br>Todd Parlee for Darcy Schuster<br>Justin Stevenson for the Government of Saskatchewan<br>No one appearing for Keith Johnson, John Olubobokun, Ken Schultz, Nathan Rysavy, Duff Friesen, Lynette Weiler, Joel Hall, Lou Brunelle, James Randall, Kevin MacMillan, Dawn Beaudry, Nathan Schultz, and Deidre Benneweis |

## Leurer C.J.S.

## I. INTRODUCTION

[1] This appeal concerns the obligation of a plaintiff in a multi-party lawsuit to disclose the terms of a partial settlement to non-settling defendants.

[2] Caitlin Erickson, Jennifer Soucy (Beaudry) and Stefanie Hutchinson are plaintiffs in a proposed class action. The lawsuit alleges the systemic abuse of attendees of an independent school and church operated by Mile Two Church Inc. [Mile Two] in Saskatoon. The defendants to this lawsuit are Mile Two, the Government of Saskatchewan, as represented by the Ministry of Education [Government], and individuals associated with the school and church over the many years it has operated.

[3] Before statements of defence were filed or a certification application was served, the plaintiffs entered into settlement agreements with three of the individual defendants, Stephanie Case, Fran Thevenot and Tracey Johnson. However, the plaintiffs did not disclose the existence of these settlements, let alone their terms, to the non-settling defendants until some months later, when a demand was made by some of those parties.

[4] A judge of the Court of King's Bench found that the plaintiffs' failure to immediately disclose the terms of the settlement agreements to the non-settling defendants gave rise to an abuse of process and granted a permanent stay of the action (*Erickson v Mile Two Church Inc.*, 2025 SKKB 71 [*Stay Decision*]). In reaching this conclusion, the judge relied on what she referred to as the "immediate disclosure rule" (at para 2). As summarized by the judge, the immediate disclosure rule dictates that a plaintiff in a multi-party litigation, who enters into a settlement with some, but not all, of the defendants that has the effect of significantly altering the litigation landscape, commits an abuse of process by not immediately disclosing the existence and terms of the settlement agreement to the non-settling parties.

[5] The plaintiffs appeal from the *Stay Decision*. They argue that the so-called immediate disclosure rule is not the law of this province and therefore the judge erred in finding that they had

abused the court's processes. Further, they submit that even if an abuse of process occurred a stay of their action was not an appropriate remedy.

[6] I agree with the plaintiffs that the immediate disclosure rule is not the law in this province. More specifically, an abuse of process does not occur in *every* instance where there is not an immediate disclosure of a partial settlement that can be said to have the effect of significantly altering the litigation landscape. Moreover, a stay should not be granted automatically, even if an abuse of process can be said to have occurred because of a delay in the disclosure of the terms of a partial settlement.

[7] In this case, the delay in the disclosure of the terms of the settlement created a risk that the integrity of the litigation process could have been compromised because the non-settling defendants and the court did not know the reality of the adversity between the parties. This created the spectre of an abuse of process. However, there was no evidence that the integrity of the adjudicative process had yet been compromised. There was also no evidence that the defendants were prejudiced by the delay in the making of this disclosure or that the non-disclosure was part of a plan to subvert the integrity of the litigation process. For these reasons, an abuse of process did not occur. Accordingly, the plaintiffs' appeal must be allowed, and they should be permitted to proceed with their action.

## II. BACKGROUND

### A. The action

[8] For many years, Mile Two has operated a church and an independent school for students attending kindergarten to grade 12, in Saskatoon. Although the school once bore a different name, it is now known as Legacy Christian Academy.

[9] On August 8, 2022, Ms. Erickson and one other person commenced an action in connection with the school's operations. The statement of claim indicates that the plaintiffs are seeking to certify the lawsuit as a class action pursuant to *The Class Actions Act*, SS 2001, c C-12.01.

[10] Although the statement of claim has been amended several times, and the named plaintiffs other than Ms. Erickson have changed, the essence of the action has remained unaltered since it

was commenced. In broad strokes, the plaintiffs allege the systemic commission of torts by Mile Two, educators and administrators of the school, and Mile Two's church against attendees of the school and the church, as well as a failure by the Government to fulfil its oversight responsibilities.

[11] On September 15, 2023, the defendants were relieved of the obligation to file statements of defence until after the certification application is heard (*Erickson v Johnson*, 2023 SKKB 191). Most defendants have demanded particulars and, dissatisfied with the responses received, have applied for further and better particulars. Those applications have not been heard.

[12] On March 20, 2025, the plaintiffs served their certification application and supporting materials. That application has also yet to be heard.

### B. The settlements and discontinuances

[13] Between November 7, 2023, and February 21, 2024, the plaintiffs discontinued the claims against Ms. Case, Ms. Thevenot and Ms. Johnson.

[14] The other defendants were not advised of these discontinuances. However, their existence eventually came to the attention of Mile Two. On March 7, 2024, it demanded that the plaintiffs formally serve the notices of discontinuance and produce copies "of all communications or other documents relating to the arrangements on which the discontinuances were provided".

[15] The plaintiffs replied to this demand by providing Mile Two with a copy of the discontinuances. However, they refused to formally serve these documents, stating that there was no obligation to do so under *The King's Bench Rules*. They also asserted that they were under no obligation to provide copies of any communications or other documents relating to the discontinuances.

[16] On March 11, 2024, Mile Two reiterated its demand for disclosure of the documents relating to the arrangements pursuant to which the discontinuances were provided. This demand was repeated on April 3, 2024, at which time Mile Two threatened that if no response was received by April 12, 2024, it would bring an application to compel production of these documents.

[17] On April 8, 2024, the plaintiffs provided the defendants with copies of the separate settlement agreements between the plaintiffs and each of Ms. Case, Ms. Thevenot and Ms. Johnson. The agreements are dated November 1, 2023, February 24, 2024, and February 20, 2024, respectively.

[18] The three settlement agreements are broadly similar. Under the terms of each, the parties agree that: (a) the action is to be discontinued against the settling defendant without costs; (b) the settling defendant is to make no payment to the plaintiffs; and (c) the settling defendant is not to take an adversarial position against the plaintiffs in the action. The Thevenot and Johnson settlement agreements include a provision stating that the latter covenant does not "restrict the Settling Defendant from giving honest and forthright answers to questions asked of her under oath, even if such answers may be perceived as adverse to any individual, including any Plaintiff or member of any certified class action". The Case settlement agreement does not include this additional provision.

[19] Each settlement agreement also provides that the settling defendant will assist in the prosecution of the action. In this regard, each settling defendant is required to reasonably cooperate and make herself available to the plaintiffs, and their counsel, in the investigation and prosecution of the matters which are the subject of the action against the non-settling defendants. This cooperation is stated to include providing responses to written questions. Beyond these provisions, the specifics of the cooperation that each settling defendant has covenanted to give vary slightly.

[20] In the Case settlement agreement, the cooperation requirement extends to "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". In contrast, Ms. Thevenot has specifically covenanted to respond to "the twenty-two (22) Written Questions provided to [her] on or about September 19, 2023 within a without prejudice document, which shall be protected by litigation privilege". Under the terms of their settlement agreements, Ms. Case and Ms. Johnson agree to produce relevant documents in their possession within 90 days of their respective agreement whereas in her settlement agreement, Ms. Thevenot states that she "has no relevant documents in her possession, custody, or control", but if she discovers any or comes into possession of any she "shall promptly disclose such documents to the Plaintiffs".

[21] Finally, each agreement contains an identical confidentiality covenant. In the Case settlement agreement, it is clause 14, which states as follows:

> 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, except to the extent that such disclosure is required by law or Court Order, or is necessary to obtain advice of professional advisors, or to carry out the terms of this Agreement, provided that the fact that this Agreement has been entered into, and the general terms, but not the amounts to be paid by the Settling Defendant, may be disclosed to the Court and to the extent required by law, the Other Defendants.

[22] After it had been given a copy of the three settlement agreements, on April 10, 2024, Mile Two demanded that the plaintiffs produce copies of the documents referred to in the agreements, including the written questions provided on September 19, 2023, as referred to in the Thevenot settlement agreement, and the responses to written interrogatories and relevant documents as referred to in the Case and Johnson settlement agreements.

[23] The plaintiffs declined to produce these additional documents. In an April 15, 2024 letter, they took the position that disclosure and production would occur when an affidavit of documents was delivered in accordance with the procedures prescribed in *The King's Bench Rules*, which was "expected to occur *after* certification [of the action as a class action] and after pleadings have closed" (emphasis in original).

[24] In late April of 2024, the plaintiffs filed notices of discontinuances of the action against four other individuals, Anne MacMillan, Catherine Randall, Deidre Benneweis and Simbo Olubobokun. Mile Two promptly demanded production of the settlement agreements and other documents pertaining to these discontinuances. The plaintiffs' counsel later advised that there were "no agreements or arrangements" made with any of these individuals.

## C. The production application

[25] By notice of application dated June 18, 2024, Mile Two applied for an order requiring the plaintiffs to "disclose and produce all documents connected to the arrangements that led to the settlement and discontinuance of the claim" against Ms. Case, Ms. Thevenot, Ms. Johnson, Ms. MacMillan, Ms. Randall, Ms. Benneweis and Ms. Olubobokun, defined in the notice of application as the "Settling Defendants".

[26] The production application further described the documents Mile Two was seeking as "correspondence between the plaintiffs and the Settling Defendants, or their counsel, transcripts or written and/or audio recordings of any questionings conducted of the Settling Defendants, written questions and replies to written questions provided to or by any of the Settling Defendants, and copies of any statements and/or Affidavits sworn by the Settling Defendants (the 'Cooperation Documents')". The production application also requested an order that "if the Plaintiffs settle and discontinue the claim against any other Defendant that they are required to immediately disclose and produce all Cooperation Documents relating to those settlements and discontinuances".

[27] In support of the production application, Mile Two filed an affidavit that narrated the procedural history of the action, as generally recounted in this judgment. It also explained that Mile Two was in possession of a letter dated September 19, 2023, sent by the plaintiffs' counsel to counsel for Ms. Randall, seeking "to explore an opportunity to have [the Plaintiffs] discontinue" the action against Ms. Randall. The letter described the process that the plaintiffs envisaged would be followed leading to the discontinuance, as set forth below:

> As the first step in making the determination as to whether to discontinue the action as against your client we would want to meet with your client (and counsel) to have a general discussion and conversation, without prejudice and without any promise that we would move on to the next step. Based on how that meeting goes and if we decide to discontinue the claim against your client, we would require your client to sign the attached Settlement Agreement and swear an Affidavit responding to the questions attached. At that point, we would then discontinue the action against your client.

[28] In response, the plaintiffs filed an affidavit from Ms. Erickson. It explained that the plaintiffs had been acting in conformity with their understanding of their litigation responsibilities and they had only provided Mile Two with copies of the settlement agreements pertaining to Ms. Case, Ms. Thevenot, and Ms. Johnson after determining that those individuals "took no position on the disclosure of the settlement agreements".

[29] Ms. Erickson's affidavit asserted that the plaintiffs "are claiming settlement privilege and litigation privilege over any and all documentation which has arisen in relation to the discontinuance of the action against any of the former defendants". It specifically disclosed that Ms. Case "has provided an affidavit answering some written questions, which was obtained solely for the purpose of this litigation" but that no decision had been taken as to whether this affidavit would be used during the litigation and asserted "we do not waive litigation privilege". The

affidavit also stated that Ms. MacMillan, Ms. Randall, Ms. Benneweis and Ms. Olubobokun did not sign settlement agreements nor had they provided any further documentation at this time.

### D. The stay applications

[30] Before the production application was heard, Mile Two filed a second notice of application, dated November 1, 2024. In it, Mile Two requested an order staying the action against it as an abuse of process, on the grounds that the plaintiffs had breached their obligation to immediately disclose the settlement agreements to the non-settling defendants.

[31] Mile Two supported its stay application with another affidavit. It reiterated much of the information set out in the affidavit filed in connection with the production application and repeated parts of the contents of Ms. Erickson's affidavit.

[32] The Government filed its own notice of application, dated November 28, 2024, mirroring that filed by Mile Two. Most of the remaining defendants followed suit, with a third notice of application, dated November 29, 2024.

[33] Affidavits filed by the applicants confirmed that, prior to April 8, 2024, the defendants were unaware of the settlements between the plaintiffs and Ms. Case, Ms. Thevenot and Ms. Johnson. They also disclosed that several of the discontinuances against other defendants had been filed after those defendants had rebuffed overtures much like that extended to Ms. Randall in September of 2023, as described earlier in these reasons.

[34] In response to the stay applications, the plaintiffs filed an affidavit of Mark Drapak. In it, Mr. Drapak stated that he had attended the Christian Centre Academy and Mile Two's church, and that if the action was certified as a class action, he would be a member of the class. His affidavit also states that if the action is stayed, he "intend[s] to bring a new proposed class action lawsuit in substantially the same form as the current proposed class action lawsuit".

### E. The *Stay Decision*

[35] After summarizing the factual background, the judge turned to examine the relevant case law from other provinces. She found that these cases established what she described as the

"immediate disclosure rule", as I have summarized it above. The judge explained that the "rationale underlying the rule is fairness and preserving the integrity of the court process", and that "[w]here a settlement significantly alters the litigation landscape, fairness dictates that it must be disclosed to non-settling parties" (at para 25).

[36] The judge found that the five-month delay by the plaintiffs in providing copies of the three settlement agreements meant that the terms of the settlements had not been immediately disclosed. The judge indicated that the "more difficult question in this matter is whether the settlement agreements altered the litigation landscape" (at para 34).

[37] On the latter issue, the judge observed that, prior to being removed from the lawsuit, the settling defendants had joined with the other defendants in the motion to defer the filing of statements of defence and two of them had served requests for particulars (see para 41). She found that the "settlement agreements had the effect of [the settling defendants] switching sides and cooperating with the plaintiffs", with the result that "the three settlement agreements in this case did have the effect of significantly altering the litigation landscape" (at para 45). In the judge's view, all of this meant that the plaintiffs had breached their obligation to immediately disclose the three settlement agreements.

[38] On the question of remedy, the judge stated that 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" (at para 47). She observed that the plaintiffs had argued that none of the defendants had suffered prejudice because of their failure to disclose the settlement agreements, but she found that "no actual prejudice is required for the immediate disclosure rule to be triggered" (at para 50).

[39] The judge did not accept that the adoption of the immediate disclosure rule would be inconsistent with the provisions of *The King's Bench Rules* governing the disclosure and production of documents (see paras 26-28). Finally, the judge rejected the plaintiffs' argument that the absence of prior Saskatchewan case law applying the rule rendered it unfair and unjust to impose a stay (see para 57).

[40] The judge concluded the substantive part of her decision as follows:

> [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.

## III. ISSUES

[41] The outcome of this appeal is determined by answering these questions:

(a) Did the judge err by adopting the immediate disclosure rule as the law of Saskatchewan? If the immediate disclosure rule is not the law of this province, what obligation does a plaintiff have to disclose the terms of a partial settlement?

(b) If the judge applied incorrect principles, should this Court decide the remaining issues or remit them to the Court of King's Bench?

(c) If this Court should decide the remaining issues, did an abuse of process occur?

## IV. ANALYSIS

### A. The obligation of a plaintiff to disclose the terms of a partial settlement

#### 1. The immediate disclosure rule

[42] In this case, the judge's finding of abuse of process was predicated on her dual conclusions that (a) the plaintiffs had failed to disclose the terms of the settlement agreements "immediately" (at para 33), and (b) the three agreements had "the effect of significantly altering the litigation landscape" (at para 45). In determining that an abuse of process had occurred, the judge rejected, as irrelevant, the plaintiffs' submission that the non-settling defendants had suffered no prejudice, stating that "the cases in this regard are clear – no actual prejudice is required for the immediate disclosure rule to be triggered" (at para 50). She also found an abuse of process notwithstanding that there was no evidence that the integrity of the litigation process itself had been compromised.

[43] The judge's approach was grounded in case law from other provinces. She referred to eight decisions of the Ontario Court of Appeal, including *Handley Estate v DTE Industries Limited*,

2018 ONCA 324 [*Handley Estate*], and trial level decisions from Alberta (*Ball v 1979927 Alberta Ltd*., 2024 ABKB 229) and British Columbia (*Kim v 1048656 B.C. Ltd.*, 2023 BCSC 192). The judge found that the principles to be drawn from these cases were "aptly summarized" in *CHU de Québec-Université Laval v Tree of Knowledge International Corp.*, 2022 ONCA 467 [*Tree of Knowledge*]. Those principles included the following (at para 23, quoting from para 55 of *Tree of Knowledge*):

> 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* [*Waxman Estate v Waxman*, 2022 ONCA 311], at para. 24;
>
> …
>
> f) The standard is "immediate", not "eventually" or "when it is convenient": *Tallman* [*Tallman Truck Centre Limited v K.S.P. Holdings Inc.*, 2022 ONCA 66], 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* [*Poirer v Logan*, 2022 ONCA 350], 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.

[44] As I will shortly review, the immediate disclosure rule is inconsistent with long-standing decisions of this Court and the Supreme Court of Canada, which have emphasized the flexibility of the abuse of process doctrine, and the relevance of precisely the kind of factors that the judge found to be irrelevant to her determination that an abuse of process had occurred in this case and to her assessment of the appropriate remedy.

[45] The judicial foundation for the immediate disclosure rule rests largely on the *Handley Estate* line of cases in Ontario. Those cases have recently been repudiated by that province's Court of Appeal in *1086289 Ontario Inc. (Urban Electrical Contractors) v Welland (City)*, 2026 ONCA 352 [*Welland*]. This change of course in Ontario occurred after the *Stay Decision*.

[46] I therefore agree with the plaintiffs that the judge erred in law by adopting the immediate disclosure rule as part of the law of this province. I make this statement understanding fully that

the law outside of Saskatchewan has changed with the release of *Welland*, of which the judge could not have been aware.

**2. Abuse of process for delay in disclosing partial settlements**

[47] Before expanding on these conclusions, it is important to note that the defendants did not suggest that the plaintiffs were required, at this juncture of the proceedings, to disclose the settlement agreements or their terms under *The King's Bench Rules*. I make this point to be clear that the defendants' request for a stay rested entirely on the application of the principles that govern when there is an allegation that the court's processes have been abused. This observation invites comment about the abuse of process doctrine.

[48] The "doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure" (*Toronto (City) v C.U.P.E., Local 79*, 2003 SCC 63 at para 37 [*Toronto*], quoting *Canam Enterprises Inc. v Coles*, 2000 CanLII 8514 at para 55, 194 DLR (4th) 648 (ONCA) [*Canam*], approved 2002 SCC 63). For this reason, this Court has emphasized that the "need to maintain the integrity of the adjudicative process sits at the heart of the concept of abuse of process" (*Bear v Merck Frosst Canada & Co*., 2011 SKCA 152 at para 38 [*Bear*]). It is also for this reason that "[i]n all of its applications, the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of courts" (*Toronto* at para 43).

[49] Because the adversarial system is one designed to resolve disputes between parties, it follows that an inquiry into whether conduct has had a negative effect on the judicial process must also examine the effect of the impugned conduct on the parties to the litigation. As explained in *Canam* at para 55, 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 the Supreme Court of Canada and in this Court's jurisprudence. See, for example only, *Toronto* at para 37; *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 at para 35 [*Abrametz*]; *Behn v Moulton Contracting Ltd.*, 2013 SCC 26 at para 40 [*Behn*]; and *Herold v Wassermann*, 2022 SKCA 103 at para 51 [*Herold*]. In *Collins v Saskatchewan Beach (Resort Village)*, 2013 SKCA 12 at para 30, Richards J.A. (as he then was) described abuse of process as a "relatively flexible doctrine that engages the

inherent power of a court to prevent the misuse of its procedures, either in a fashion which would be clearly unfair to a party or which would otherwise bring the administration of justice into disrepute".

[50] Thus, when it is alleged that an abuse of process has occurred, it is necessary to examine if the impugned conduct had an adverse effect on the court's ability to fulfill its adjudicative process, on the fairness of the proceedings or might in some other way undermine the judicial process, such as by causing prejudice to another party.

[51] The Supreme Court has repeatedly emphasized the flexibility of the abuse of process doctrine. In *Saskatchewan (Environment) v Métis Nation – Saskatchewan*, 2025 SCC 4 [*Métis Nation*], the Supreme Court observed 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'" (at para 34, quoting *Abrametz* at para 35, citing *Behn* at para 40, and *Toronto* at paras 37-38).This comment echoed this Court's statement in its judgment in the same case that the "doctrine of abuse of process is a flexible tool employed to prevent the administration of justice from being misused", emphasizing that "[t]here is often no individual marker indicating when a proceeding will be an abuse of process, and it will typically be necessary to consider all the relevant context and background of a matter" (*Métis Nation - Saskatchewan v Saskatchewan (Environment)*, 2023 SKCA 35 at para 46, referring to *Bear* at para 41, and *Canadian Pacific Railway Company v Kelly Panteluk Construction Ltd*., 2020 SKCA 123 at para 58 [*Canadian Pacific*]).

[52] Many of the cases that have stressed the malleability of the abuse of process doctrine were decided in a context where the courts have been called to invoke it in novel circumstances. However, all the decisions to which this Court has been referred in the context of this appeal root a finding of abuse of process in the reasons for the doctrine's existence. While the courts have developed some categories of conduct that potentially amount to an abuse of process, the determination of whether an abuse of process has occurred must be responsive to the facts of the case and not the application of rigid categories.

[53] An example of conduct that will *often* amount to an abuse of process in a civil litigation context is the relitigation of issues decided in other proceedings, or where a party has commenced

several proceedings seeking the same relief. This type of conduct has been found to be an abuse of process in many cases (see, for example, *Toronto* and, in this Court, *Boehringer Ingelheim (Canada) Ltd. v Englund*, 2007 SKCA 62 [*Boehringer Ingelheim*], *Insurance Company of the State of Pennsylvania v Cameco Corporation*, 2010 SKCA 95, *Bear*, *Saskatchewan Medical Association v Anstead*, 2016 SKCA 143, and *Abbott Laboratories, Ltd. v Spicer*, 2023 SKCA 55). However, "[t]here may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system" (*Toronto* at para 52). Thus, in *Métis Nation*, the Supreme Court explained that "the fact that there are two or more ongoing legal proceedings which involve the same, or similar, parties or legal issues, is in itself not sufficient for an abuse of process" (at para 39). Accordingly, even where there is relitigation – a type of conduct that has often been found to amount to an abuse of process – consideration must be given to the overall facts of the case, mindful of the interests that animate the abuse of process doctrine. The Supreme Court in *Métis Nation* put it this way:

> [40] Thus, the abuse of process analysis does not end when multiple or similar proceedings exist. Rather, the analysis needs to focus on whether allowing the litigation to proceed would violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice, as discussed above. Where, for example, having duplicative proceedings would waste the resources of the parties, courts and witnesses, or risk inconsistent results and therefore undermine the credibility of the judicial process, this can amount to an abuse of process.
>
> (Emphasis added)

[54] In the matter at hand, the judge's first error in principle is found in her conclusion that an abuse of process occurs in *every* case where a plaintiff partially settles multi-party litigation on terms that substantially alter the litigation landscape and fails to immediately disclose the terms of the settlement to non-settling defendants. This categorical approach is incompatible with the more nuanced inquiry that is demanded when an abuse of process is alleged.

[55] After this appeal was argued, the Ontario Court of Appeal released its decision in *Welland*. In deciding four appeals in a common set of reasons, a five-judge panel of that Court overruled *Handley Estate* and found that the rule espoused in that case and the line of decisions that followed it was "the antithesis of the discretionary approach that is at the heart of the abuse of process doctrine" (at para 15). The Court recognized that the "question of whether there has been an abuse of process depends upon a host of factors, including the existence of prejudice, and the impact of the conduct on the repute of the justice system" (at para 16). The Court went on and explained in even clearer terms why the approach set out in *Handley Estate*, as summarized in *Tree of*

*Knowledge* and as applied by the judge in this case, was inconsistent with the principles that apply when an abuse of process is alleged:

> [26] Thus, the first question to be asked – whether there has been an abuse of process – is not governed by categorical pre-determinations. Common to the application of the doctrine across the areas of law is judicial discretion. The doctrine is characterized by its flexibility. It is not encumbered by specific requirements. Yet that is precisely what the *Handley Estate* rule does. It compels a finding of abuse of process, whether or not the failure to disclose the settlement has resulted in unfairness, prejudice, or oppression to a party, and whether or not there is prejudice to the integrity of the judicial system. This is inconsistent with the traditional analysis of whether there has been an abuse of process, which calls for sensitive attention to the context and circumstances of the case.
>
> (Emphasis added, footnotes omitted)

[56] The Ontario Court of Appeal also held that a stay of proceedings is not an appropriate remedy in every instance where an abuse of process has occurred. Instead, the remedy must be tailored to the facts of the case. As I will shortly review, this conclusion is also consonant with well-established principles.

[57] While *Welland* does not displace the trial-level decisions from British Columbia and Alberta that have applied the immediate disclosure rule, it overturned and replaced the appellate-level authority that endorsed the approach taken by the judge in this case and aligned the Ontario jurisprudence with how the abuse of process doctrine had historically been treated in this context in Saskatchewan. However, even if the Ontario Court of Appeal had not overruled its previous decisions in this area, I would have rejected the idea that an abuse of process occurs whenever there is not an immediate disclosure of the terms of a partial settlement agreement, even if it might be said that such an agreement had the effect of significantly altering the litigation landscape.

[58] Of course, there are circumstances in which it *will* be abusive for a plaintiff to continue with litigation without disclosing the terms of a partial settlement. For example, this will be the case when a party advances litigation without disclosing a partial settlement agreement with the result that the integrity of the litigation process is compromised or the non-settling defendants are prejudiced in some other way.

[59] The case law discloses the use of a range of phrases or expressions to identify agreements that might, by their terms, negatively affect the integrity of the litigation process. In one early decision, the Ontario Court of Appeal referred to the need to disclose settlement agreements that

"change entirely the landscape of the litigation" (*Aecon Buildings v Stephenson Engineering Limited*, 2010 ONCA 898 at para 13). In *Handley Estate*, the Court stated that the "disclosure obligation extends to any agreement between or amongst parties to a lawsuit that has the effect of changing the adversarial position of the parties set out in their pleadings into a co-operative one" (at para 39). Other decisions have recognized an obligation to give immediate disclosure of agreements that "significantly alter[ed] the relationship among the parties to the litigation" (*Laudon v Roberts*, 2009 ONCA 383 at para 39) or agreements that have "the effect of changing entirely the landscape of the litigation in a way that significantly alters the dynamics of the litigation" (*Crestwood Preparatory College Inc. v Smith*, 2022 ONCA 743 at para 57).

[60] For the purposes of deciding this appeal, nothing turns on these different ways of identifying the type of partial settlement agreement that demands disclosure. This is because the thought that stands behind each of these statements is that there is a risk of prejudice to the proper functioning of the judicial process if the terms of the settlement are not disclosed to the non-settling defendants and to the court itself.

[61] A forceful explanation for why disclosure of partial settlement agreements that alter the litigation landscape is necessary was given by Perell J. in *Moore v Bertuuzzi*, 2012 ONSC 3248. He observed that the "court needs to understand the precise nature of the adversarial orientation of the litigation in order to maintain the integrity of its process, which is based on a genuine not a sham adversarial system and which maintenance of integrity may require the court to have an issue-by-issue understanding of the positions of the parties" (at para 76). He expanded further on why a settlement that alters the relationship among the parties or former parties can impact the fairness of the judicial process and the court's ability to fulfil its judicial role, commenting as follows:

> [77] As a matter of ensuring procedural fairness, as an element of its assessment of evidence, as a factor in determining the truth of the facts, and as a factor in administering justice, the court needs to know the reality of the adversity between the parties. The court's interest in knowing the genuine state of adversity explains why so much attention is paid by the court: (a) to standing and status; (b) to whether a person is a proper or necessary party; (c) to whether a person is affected by a proceeding and entitled to notice and an opportunity to be heard; (d) to the order of openings, the presentation of evidence, closings, and argument; (e) to the right to cross-examine; (f) to whether a party or affected person consents, does not oppose, or opposes the relief sought in a proceeding, be it interlocutory relief or a final order; (g) to the doctrines of res judicata, issue estoppel and abuse of process; and (h) to the avoidance of a multiplicity of proceedings.

[62] I accept all of what Perell J. describes, and the similar statements that appear in other cases. However, this does not mean that because the parties have entered into a partial settlement agreement that has the *potential* to interfere with the fairness of the proceedings or the Court's judicial role, or to cause some other form of prejudice to the non-settling defendants, such a deleterious effect has been suffered.

[63] In further explanation for this conclusion, it is important to remain mindful of the aspects of the plaintiffs' conduct that *cannot* be said to be abusive. In this case, there is no credible argument that the plaintiffs committed an abuse of process by *settling* their claims against Ms. Case, Ms. Thevenot and Ms. Johnson. The law encourages, not discourages, settlements. As a general proposition at least, such agreements "allow parties to reach a mutually acceptable resolution to their dispute without prolonging the personal and public expense and time involved in litigation" (*Sable Offshore Energy Inc. v Ameron International Corp.*, 2013 SCC 37 at para 11 [*Sable Offshore Energy*]). Accordingly, the fact of settlement of the action against these three defendants was not abusive.

[64] Equally, the terms of the settlement themselves cannot be said to be abusive, even though they called for Ms. Case, Ms. Thevenot and Ms. Johnson to assist the plaintiffs in the prosecution of their lawsuit. In this regard, the three settlement agreements are not, by their terms, far removed from others that have been accepted as proper.

[65] In *Sable Offshore Energy*, the Supreme Court effectively endorsed a particular kind of multi-party settlement agreement known as a Pierringer Agreement (*Pierringer v Hoger*, 124 N.W.2d 106 (U.S. Wis. S.C. 1963)). Under the terms of that settlement, the liability of the settling defendants was capped by the amount of their payment to the plaintiffs, but non-settling defendants continued to enjoy rights of discovery, and so on, against the settling parties (see para 25). The only issue that came before the Supreme Court was if the non-settling defendants were entitled to know before the trial the amount of payment made to the plaintiffs by the settling defendants. The Supreme Court held that the plaintiffs were not required to give this disclosure. In doing so, the Court accepted that knowing the settlement amounts might allow the defendants to revise their estimate of how much they wanted to invest in the case, but this did not rise to a sufficient level of importance to displace the public interest in promoting settlements. The Court referred to

P.B. Knapp, "Keeping the *Pierringer* Promise: Fair Settlements and Fair Trials" (1994), 20 *William Mitchell Law Review* at p 5, as providing a summary of the "value – and complexity – of trying to settle multi-party litigation" (at para 21), and then continued by endorsing the particular benefits of partial settlements in complex litigation:

> Settlement of complicated multi-defendant civil litigation is particularly valuable, because complicated civil trials can consume enormous amounts of a judge's time and can be expensive for the parties. However, settling multi-defendant civil litigation can be especially difficult. Different defendants have different tolerances for risk, and some defendants are simply far less willing to settle than others.

[66] Before and after *Sable Offshore Energy,* many courts have endorsed other variations of agreements to settle multi-party litigation. For example, in *Pettey v Avis Car Inc.*, 1993 CanLII 8669, 13 OR (3d) 725 (Westlaw) (ONCTGD) [*Pettey*], the Court refused to grant a stay in the middle of a jury trial after the plaintiffs had entered into a so-called Mary Carter Agreement (*Booth v Mary Carter Paint Co.*, 202 So. 2d 8 (Fla. 2d DCA 1967)) with several of the defendants. Under the terms of the settlement, the settling defendants advanced $3 million to the plaintiffs, which guaranteed the plaintiffs a recovery in that amount. However, the settling defendants remained in the action, but were indemnified against crossclaims, effectively capping their exposure to the claim, with the possibility that they would obtain a return of some of the settlement monies paid to the plaintiffs depending on the outcome of the claims against the non-settling defendants. The non-settling defendants moved for a stay of proceedings on the grounds that the agreement was an abuse of process or contrary to public policy. Justice Ferrier held that the agreement was not inherently abusive.

[67] *Sable Offshore Energy* and *Pettey* are but two examples of decisions that have allowed for the partial settlement of multi-party litigation. In *Pettey*, while Ferrier J. found that the settlement agreement was not inherently abusive, he also held that an abuse of process would have occurred had the agreement not been immediately disclosed (see para 32). This fact was referred to in many of the decisions in the *Handley Estate* line of cases as an explanation for the second prerequisite for a finding of abuse of process based on the failure to disclose a partial settlement, namely, that the terms of the settlement agreement were not immediately disclosed.

[68] I leave open the possibility that some partial settlements may give rise to an abuse of process that cannot be avoided by disclosure. However, in this case, no party argued that the *terms*

of the settlement agreements themselves constituted an abuse of process. Accordingly, the abuse of process, if one occurred here, must be found in the plaintiffs' *continuation of the litigation* when the existence of the settlements and their terms had not been disclosed.

[69] Prior to *Welland*, the state of the case law in Ontario on the timing of the required disclosure was accurately summarized in *Tree of Knowledge* where the Court stated that the "standard is 'immediate', not 'eventually' or 'when it is convenient'" (at para 55(f), referring to *Tallman Truck Centre Limited v K.S.P. Holdings Inc.*, 2022 ONCA 66 at para 26). In *Pettey*, the explanation for the requirement of immediate disclosure was obvious, as the settlement occurred mid-trial. Even in other less urgent situations where a plaintiff has entered an agreement that has the potential to affect litigation dynamics, it is well advised to disclose its terms immediately. This is because of the possibility that a failure to make such a disclosure may in fact have an effect that gives rise to an abuse of process. However, again, it does not mean that a delay in disclosure will, in every case, have such effect.

[70] Several other points should be made about the dual conditions that the pre-*Welland* case law had attached to finding an abuse of process pursuant to the immediate disclosure rule. First, both of the inquiries under it – the first being whether the agreement altered the litigation dynamics (or some similar phrase), the second being whether the disclosure was "immediate" – are apt to be relevant to whether an abuse of process has occurred. However, both embed nuances that can give rise to uncertainty and, even when taken together, neither captures the breadth of the proper inquiry into the issue of whether an abuse has occurred, at least in many cases.

[71] Whether an agreement alters litigation dynamics is often a matter of degree and subtlety. Moreover, the question of whether the disclosure was "immediate" can be context specific. A delay of hours may have significance if the settlement occurs mid-trial. On the other hand, in a lawsuit distinguished by inaction, the notion of immediacy would tend to invite the application of a different measuring stick.

[72] The nuances inherent in both inquiries meant that many litigants struggled to identify when disclosure would be required. It also led to case law that, at times, was difficult to reconcile, in part as courts grappled with the unfairness of ordering a stay when a binary answer to the two inquiries led automatically to the grant of a stay (see, generally, K.T. Di Tomaso et al, "Obligation

to Immediately Disclose a Partial Settlement Agreement that Changes the Litigation Landscapes in Multi-Party Litigation" (2024) 55 *The Advocates' Quarterly* 86 at pp 117-125).

[73] The nuanced but inflexible nature of these two inquiries – whether the partial settlement agreement substantially altered the litigation landscape and whether disclosure was immediate – served to distract from what should be the proper focus of the court in a case like this. This conclusion provides a further reason to continue to reject the immediate disclosure rule. The question a court is called to answer is this: has the plaintiff, through its conduct, undermined the integrity of the judicial process in a way that fits within the broad and flexible parameters of the abuse of process doctrine or otherwise caused some other form of prejudice to the non-settling defendants?

[74] In argument, the defendants sought to justify a more categorical approach. They submitted that, without an absolute rule that an abuse of process should be found in every instance where a plaintiff delays in disclosing a partial settlement agreement that substantially alters the litigation landscape, plaintiffs will be incented to withhold such information from defendants and the court itself. In substance, what the defendants are seeking is the creation of an exception to the application of the general abuse of process rules to serve the ends of general deterrence in the context of partial settlements of a multi-defendant lawsuit. In support of this idea, the defendants argue that without an absolute rule, plaintiffs will withhold disclosure and generally run amok. I cannot agree with this proposition.

[75] I am unpersuaded that the application of the general principles of abuse of process will not sufficiently motivate plaintiffs to provide disclosure of partial settlement agreements. A plaintiff who is tardy in disclosing the terms of an agreement that may interfere with the litigation process risks a court finding that an abuse of process has occurred. In that circumstance, the plaintiff faces the possibility that they will suffer the adverse consequences of an order remedying their abusive conduct, which may in some cases be the grant of a stay of proceedings. Simply put, any delay in disclosure is at their peril.

[76] I also see no justification for creating a one-off rule to address what is hardly a unique concern in litigation. Although there is a compelling reason for disclosure of partial settlement agreements, and for that disclosure to occur at an early date, the same can be said about many other

obligations that exist when litigating a claim, the breach of which may compromise the judicial process or create prejudice to another party. When asked, counsel for the defendants could not identify any analogous circumstance in which a breach of a litigation obligation gives rise to a conclusion that an abuse of process has occurred, let alone one that justifies a permanent stay of proceedings.

[77] In summary, the immediate disclosure rule, as adopted by the judge in this case, is inconsistent with the previous direction given by the Supreme Court, as amplified and applied in many decisions of this Court. It is also an approach that has now been rejected by the only appellate court that had previously endorsed it.

[78] Confronted with an allegation that these plaintiffs had committed an abuse of process because of the timing of their disclosures relating to the settlement of the claims against Ms. Case, Ms. Thevenot and Ms. Johnson, the judge was required to engage in an analysis that focused on the effect of the impugned conduct on the integrity of the litigation process. As part of this, and contrary to her specific conclusion otherwise, the judge was required to consider if the delay by the plaintiffs in providing disclosure of the terms of the settlement agreements – which was the gravamen of the alleged abuse of process – caused material prejudice to, or otherwise oppressed, the defendants.

[79] Based on all of this, I am left to conclude that the judge erred in law by applying the wrong legal principles when she considered whether the plaintiffs had committed an abuse of process.

### 3. A stay is not required in every case of an abuse of process associated with the non-disclosure of a partial settlement agreement

[80] The judge similarly erred when she concluded that, once she had decided that an abuse of process had occurred, the law demanded that the action be permanently stayed.

[81] The authority of a Court of King's Bench judge to order a stay of proceedings based on an abuse of process is inherent (see *Boehringer Ingelheim*, referring to I.H. Jacob, "*The Inherent Jurisdiction of the Court*" (1970), 23 Current Legal Problems at p 25).

[82] As discussed above, the doctrine of abuse of process is intended to be flexible to fit the circumstances of a particular case. This approach informs not only the decision as to whether an abuse of process has occurred, but also what remedy should be granted if it has.

[83] In numerous contexts, the Supreme Court of Canada, and this Court, have emphasized that a stay of proceedings is to be granted in only the clearest of cases. Thus, for example, in *R v O'Connor*, 1995 CanLII 51 at para 68, [1995] 4 SCR 411 (SCC), a case involving s. 24(1) of the *Canadian Charter of Rights and Freedoms*, the Supreme Court directed that "the threshold for obtaining a stay of proceedings remains, under the *Charter* as under the common law doctrine of abuse of process, the 'clearest of cases'".

[84] In *Abrametz*, the Supreme Court observed that abusive conduct falls on a continuum, and the remedy that is selected must be appropriate to address the abuse that has occurred on the facts of the case:

> [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.

[85] On the spectrum described by the Supreme Court, a stay of proceedings is itself at the furthest end of the range of available remedies and is to be used as a remedy of last resort. Again, *Abrametz* speaks to 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 should be granted only in the "clearest of cases", when the abuse falls at the high end of the spectrum of seriousness: *Blencoe* [*Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44], at para. 120, citing *Power* [*R v Power*, 1994 CanLII 126, [1994] 1 SCR 601 (SCC)], at p. 616.

[86] Most recently, in *SS&C Technologies Canada Corp. v Bank of New York Mellon Corp.*, 2026 SCC 29 at para 105 [*SS&C Technologies*], the Supreme Court summed up these authorities by stating that "[f]ixing a remedy for abuse of process is discretionary in order to allow judges to do justice in the array of circumstances in which abuses may arise". See also *R v Brunelle*, 2024 SCC 3 at para 29.

[87] Each of these decisions are factually distinguishable from this case. As mentioned, *O'Connor* was decided under s. 24(1) of the *Charter*. *Abrametz* was a case about abuse of process due to delay in administrative law proceedings. *SS&C Technologies* was about the spoliation of evidence. In *Brunelle*, the abuse of process was an accumulation of *Charter* breaches giving rise to a remedy under s. 24(1). However, the statements that appear in these cases are of general application. In this regard, this Court has also consistently endorsed the need for there to be a nuanced, rather than a categoric, approach to the granting of remedies for abuse of process.

[88] In *Leier v Shumiatcher*, 1962 CanLII 330, 39 WWR (ns) 446 (SKCA) [*Leier*], Davis J. (*ad hoc*), writing for this Court, stated that the right to exercise the discretion to order a stay "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" (at para 2). A longer passage from *Leier* containing this guidance was quoted with approval in *Laxton Holdings Ltd. v Non-Marine Underwriters, Lloyd's, London*, 1987 CanLII 4867, [1987] 3 WWR 570 (SKCA) at para 8 [*Laxton Holdings*]. In *Onion Lake Cree Nation v Stick*, 2018 SKCA 20 [*Onion Lake*], Ryan-Froslie J.A. referred to these two cases before offering the following summary:

> [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.

[89] To be clear, "none of this is to say that there are not framework principles that govern the exercise of judicial discretion in relation to the grant of a stay" (*Herold* at para 46). Indeed, a consistent feature of the case law is that, in most cases at least, one consideration is the prejudice to the parties caused by the impugned conduct. For example only, in *Onion Lake*, after referring to the onus resting on a party seeking a stay to establish the basis for it, Ryan-Froslie J.A. stated, with reference to *Leier* and *Laxton Holdings*, that the applicant for a stay "must show prejudice should the proceedings be allowed to continue" (at para 50). See also: *Home Mortgage Ltd. v Robertson*, 1984 CanLII 2416 at para 2, [1984] 3 WWR 287 (SKCA); and *Canadian Pacific* at para 55.

[90] Most of this case law was reviewed in *Herold*, where this Court set aside an order imposing a temporary stay of individual actions because of the existence of an outstanding proposed class action. This Court found that the judge who granted the stay had erred because he did not consider what actual prejudice or injustice the applicant would suffer if the stay was not granted (see paras 52-54).

[91] The judge, in this case, did not address any of the Supreme Court authorities, perhaps because they were not referred to in argument before her. She did, however, distinguish *Herold* on the basis that it "did not involve an abuse of process" (*Stay Decision* at para 54). While this is a correct statement, it does not recognize that *Herold* discusses many of these cases and, more particularly, that the decision in *Onion Lake*, on which *Herold* placed emphasis, involved an abuse of process.

[92] It is evident that the judge felt compelled by the *Handley Estate* line of cases to order a stay, once she had found that an abuse of process had occurred. In this regard, she did not misstate the Ontario jurisprudence, as it existed pre-*Welland*, when she wrote that 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" (*Stay Decision* at para 51). However, as with the determination of whether an abuse of process has occurred flowing from the failure to immediately disclose a partial settlement agreement, the case law on this point was overruled in Ontario by *Welland* in favour of a more flexible approach (see paras 16-17 and 26-30). In doing so, the Ontario Court of Appeal stated the law of that province to be that a permanent stay based on an abuse of process "will be justified [only] in cases where the unfairness or prejudice to a party or to the integrity of the judicial process is so egregious that it outweighs the interest in allowing the case to proceed" (at para 29). I wholeheartedly agree with this statement as an expression of the law of this province. The judge erred in law when she did not approach the question of remedy with this principle in mind.

### 4. Summary of principles and the judge's errors in principle

[93] A plaintiff in a multi-party lawsuit who enters into a partial settlement that changes the litigation landscape and allows the lawsuit to continue may, in some circumstances, commit an abuse of process if the terms of the settlement are not disclosed to the non-settling parties. Such a

plaintiff may be said to be subject to an obligation to disclose the terms of the settlement. More precisely, the obligation is to not commit an abuse of process, which occurs in some cases when the litigation continues without the disclosure of a partial settlement agreement having been given.

[94] However, an abuse of process does not occur in every instance where a partial settlement is not immediately disclosed, even where the agreement has the effect of significantly altering the litigation landscape. In every case, it is necessary to examine the impugned conduct in the context of all the interests and concerns that inform whether an abuse of process has occurred in the circumstances of that particular case. Relevant considerations include, but may not be limited to, whether the conduct had an adverse effect on the court's ability to fulfill its adjudicative process, whether it impinged on the fairness of the proceedings, or whether it might otherwise have undermined the judicial process, such as by causing prejudice to another party. In some cases, the risk of these consequences, combined with other factors, may give rise to an abuse of process. For example, a long delay before disclosure occurs during a period of active litigation may be perceived to be a deliberate intent to subvert the litigation process, which might give rise to an abuse of process, even if the judicial process was not undermined. That, however, is an issue for another day, as these are not the facts in this case. I will have more to say on this later in these reasons.

[95] Any remedy should address the abuse that has occurred. A stay should not be granted automatically, even if an abuse of process can be said to have occurred because of a delay in disclosing the terms of a partial settlement.

[96] In this case, the judge erred by approaching the matter differently than I have described. She should have focused on the effect of the impugned conduct on the integrity of the litigation process in the circumstances of this case. As part of this, and contrary to her specific conclusion otherwise, the judge should have considered if the delay by the plaintiffs in providing disclosure of the terms of the settlement agreements caused material prejudice to the defendants.

[97] Because the judge applied incorrect principles in her analysis, the *Stay Decision* must be set aside. This conclusion invites the question of whether this Court should decide the issue of abuse of process and the related question of a remedy should one be found, or if it should remit the matter to the Court of King's Bench.

### B. This Court should decide the issues of whether an abuse of process has occurred and, if so, what remedy is appropriate

[98] In an appeal of this nature, this Court may "make any decision that could have been made by the court or tribunal appealed from" (*The Court of Appeal Act, 2000*, SS 2000, c C-42.1, at s 12(1)(d)). The question arises whether this Court should determine the abuse of process issue or if it should remit the matter to the judge.

[99] In supplemental submissions filed after the Ontario Court of Appeal had delivered its decision in *Welland*, the defendants argued that if this Court finds that the judge erred in her analysis, it should remit the question of whether an abuse of process had occurred for redetermination in accordance with the correct principles. They justify this conclusion on the basis that they thought the law was as expressed in the *Handley Estate* line of cases, and they seek the opportunity to recast their application to meet the more subtle approach that the law demands.

[100] Generally, this Court may make any order that the court below should have made provided the record permits it to do so (*Hrycyna v Hood*, 2019 SKCA 30 at para 83). As I see it, there is no need to remit this matter to the judge, nor would it be fair to the plaintiffs to do so.

[101] In this case, the issue of the applicability of the *Handley Estate* line of cases was clearly before the judge to decide. The judge identified several issues that required her decision, the first of which was "Should the immediate disclosure rule for settlement agreements apply in Saskatchewan?" It was appropriate for the judge to cast the first question in this way. The issues in this appeal had not previously come before this Court and the parties were before the judge arguing about the applicability of the immediate disclosure rule.

[102] As I have explained, the immediate disclosure rule is inconsistent with the principles applicable when an abuse of process is alleged. Also, while prior to *Welland*, the law in Ontario had evolved to a point where the immediate disclosure rule had taken firm root, the seeds were not so firmly planted elsewhere. In this regard, as has been noted, the judge referred to trial-level decisions from Alberta and British Columbia that followed the pre-*Welland* Ontario line of cases. However, perhaps because her attention was not drawn to it, she did not mention that in *Margetts v Timmer Estate*, 1996 CanLII 10468 at para 21, [1997] 1 WWR 25 (ABQB), aff'd 1999 ABCA

268, it was held, albeit in obiter, that, in the absence of prejudice, a failure to disclose a Mary Carter agreement did not require a remedy.

[103] More significantly, as the judge pointed out, prior to the matter coming before her there were no Saskatchewan cases that had considered the issue of the applicability of the immediate disclosure rule (see *Stay Decision* at para 20). The only other Saskatchewan case that had brushed up against the issue was *Bioriginal Food & Science Corp. v Sascopack Inc.*, 2012 SKQB 469 [*Bioriginal*]. In that case, Smith J. referred to several of the earlier Ontario decisions referred to in this judgment that had established the immediate disclosure rule, including the notion that as soon as it is breached a stay must be ordered. However, notwithstanding the breadth of the rulings in those cases, Smith J. drew only the proposition that it "seems well settled that there is an obligation on the settling parties for immediate disclosure of at least the existence of such an agreement both to the court and to the other parties in the litigation" (at para 9). To be clear, though, disclosure of the partial settlement in that case had been made, and the issue the Court was called to decide was if it should be submitted to the Court for approval.

[104] Finally, I would observe that much of the *Stay Decision* contains the judge's reasons for why she intended to follow the *Handley Estate* line of cases. I take from this that the judge was aware that she had to justify why she was adopting the immediate disclosure rule and not applying the general abuse of process principles.

[105] In short, it is evident from the judge's reasons that the non-settling defendants should have gone into the hearing knowing that it was possible that the judge might find that the immediate disclosure rule should not be applied, just as they must have known that this Court might so conclude. This also means that the non-settling defendants were afforded the opportunity to meet the plaintiffs' arguments that no abuse of process had occurred or, if it had, that a stay was not an appropriate remedy, because of the absence of prejudice suffered by the defendants. The judge addressed this latter point, as follows:

> [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.

[106] At the end of the day, the non-settling defendants may have hoped that the judge would follow what was then the extant Ontario appellate case law, and the several trial-level decisions of other jurisdictions to which she had been referred. However, it would have been unreasonable for them to enter the hearing not recognizing the possibility that the matter would be decided with reference to the broader and more nuanced considerations that I have identified to be applicable in a case of this nature.

[107] In these circumstances, I see no need to remit to ensure the adequacy of the record, nor do I place stock in any concern over fairness if the non-settling defendants are not allowed to reformulate their case or buttress the evidence in some unidentified way. To the contrary, it would create an unfairness to the plaintiffs if a remittal were ordered for this purpose. To do so would afford the defendants what would amount to a second kick at the can, in circumstances where they would have been expected to marshal their case and bring all of the evidence and arguments they thought material for the Court to render a decision in connection with the application they presented for determination in first instance.

[108] I also see no need to remit this matter so that the judge can make contested findings of fact. The record in this case consists of affidavits, and the averments they contain are uncontradicted and not subject to cross-examination.

[109] Finally, while this Court has, on some occasions, remitted matters so that it will have the benefit of the reasons of the first-instance decision-maker, the defendants have not referred us to any case where this has been done in a proceeding of this nature. Indeed, the contrary is true. By way of example only, in *Herold*, this Court concluded that a Chambers judge had applied incorrect principles in ordering a stay of proceedings. The Court did not remit the matter to determine the issue afresh. Instead, the Court decided the matter itself and concluded that a stay was not an appropriate remedy (see paras 58-100).

[110] In summary, no proper purpose would be served by remitting the matter to the Court of King's Bench. This Court can and should determine whether an abuse of process has occurred, and if one did occur, what remedy should be granted.

### C. No abuse of process occurred

[111] I am satisfied that no abuse of process occurred. The explanation for this conclusion must, however, begin by recognizing that the opportunity for an abuse of process to have been occasioned was very real and the plaintiffs made a judgment error by not promptly disclosing the terms of the settlement agreements to the defendants.

[112] The settlement agreements contain terms that, to use the language of several of the cases, changed the dynamics of the litigation or significantly altered the litigation landscape. Most materially, the judge was correct to observe the agreements had the effect of inverting the adversarial position of Ms. Case, Ms. Thevenot and Ms. Johnson. Prior to entering the settlement agreements, not only were these three individuals named by the plaintiffs as defendants, but they participated with the non-settling defendants in contested applications. Moreover, these three individuals are not now simply removed from the litigation. Ms. Case, Ms. Thevenot and Ms. Johnson are contractually obligated to cooperate with the plaintiffs, meaning that the obligations that they have assumed exceed what would be required from a disinterested third party.

[113] As such, the settlement agreements have precisely the character that has been recognized as demanding disclosure to protect the integrity of the litigation process. To obviate the risk that non-disclosure might compromise the judicial process, or cause prejudice to the non-settling defendants, the plaintiffs would have been well-advised to make immediate disclosure of the terms of settlement or, at the very least, have set upon a path to determine the extent of disclosure that was required of them.

[114] Several of the Ontario cases allude to the ability of plaintiffs, who are uncertain if they are obligated to make disclosure of the terms of a partial settlement, to apply to the court for directions. In this case, no party provided submissions as to the availability of such an avenue in this province. However, what seems undoubted is that, rather than waiting for the fact of the settlements to have been discovered by the non-settling defendants, the plaintiffs could have given notice of the fact the action had been discontinued against the settling defendants, and that settlement agreements had been entered with them. This would have alerted the non-settling defendants to the existence of settlement agreements and set the stage for the parties to resolve the plaintiffs' disclosure obligation through an application by the non-settling defendants for production of documents

relating to the settlements. Indeed, this was the path that this case was on for several months, before the non-settling defendants served their second notice of application.

[115] Although the plaintiffs would have been well-advised to have promptly disclosed the terms of the settlements, several considerations compel me to conclude that no abuse of process has occurred. The first, and most significant, of these considerations is that the litigation process was not compromised, and the defendants did not suffer prejudice because they were unaware of the terms of the settlements. It may simply be serendipitous that this is the case, but it is a factor that bears heavily on my conclusion that no abuse of process occurred.

[116] As has been mentioned, the first settlement agreement was signed on November 1, 2023, and the last on February 24, 2024. The defendants were aware of the existence of the discontinuances within not less than three weeks of the latter date and immediately began pressing for disclosure of any settlement terms. The settlement agreements were provided on April 8, 2024. This Court's attention has not been drawn to any procedural step being taken in the Court of King's Bench during this period that was in any way affected by the delay in disclosure.

[117] While Ms. Case, Ms. Thevenot and Ms. Johnson had joined with the non-settling defendants in some litigation activities prior to the settlements, there is no evidence that they did so after the settlement agreements were concluded. There is also no evidence that the non-settling defendants did anything – whether that be an actual or even a preparatory step in the litigation, or the making of any communication – in the mistaken belief that the interests of these three parties were aligned with their own after the settlements were reached and prior to their disclosure. None of the defendants provided any evidence describing how their litigation strategy or positions were affected by the timing of the disclosure to them of the settlement agreements.

[118] A telling indicator that the non-settling defendants suffered no prejudice by reason of the delay in the disclosure of terms of the settlement agreements is provided by the steps they took after they learned of the discontinuances. As I have previously reviewed, they demanded copies of the settlement agreements and, in one of the letters they wrote in March of 2024, referred to the previously quoted statement in *Bioriginal* that it "seems well settled that there is an obligation on the settling parties for immediate disclosure of at least the existence of such an agreement both to the court and to the other parties in the litigation" (at para 9). However, they did not suggest at that

stage that an abuse of process had occurred, let alone that there was a basis to stay the action. Later, after they were provided copies of the settlement agreement, in June of 2024, they brought an application for disclosure of other documents but did not suggest that they had been prejudiced by the non-disclosure of any documents. It was only months later, in November of 2024, that they moved for a stay, alleging an abuse of process associated with the delay in the disclosure of the terms of the settlements. Even in that context, other than asserting that the law required immediate disclosure and that the failure to do so constituted an abuse, the notices of application recite no facts that suggest that the processes of the court had actually been subverted or that they had suffered prejudice of any sort.

[119] The non-settling defendants argue that the judge should be taken to have found that they suffered prejudice when she answered in the negative the question "whether another remedy short of a stay could sufficiently address the abuse of process and restore fairness between the parties" (at para 55). However, this statement must be read in the context of the judge's earlier rejection of the relevance of the fact that the non-settling defendants had suffered no prejudice (see para 50) and her adoption of the instruction that "every breach of the immediate disclosure rule is an abuse of process for which the only appropriate remedy is a stay" (at para 51). In short, the simple fact is that there was no evidence that the delay in disclosure of the terms of the settlements had a single negative effect on the judicial process or the litigants.

[120] The second consideration that is material to my conclusion that no abuse of process occurred in this case is that the period of non-disclosure was short in the circumstances. While the actual settlement agreements were not provided until April 8, 2024, the non-settling defendants were aware of the discontinuances, and alert to the possibility of the existence of settlement agreements by March 7, 2024. Although this was several months after the first agreement was entered into (on November 1, 2023), it was less than three weeks after the third and final one was signed. Thereafter, the plaintiffs and the non-settling defendants were locked into a disagreement as to what disclosure the plaintiffs were required to make.

[121] As mentioned, the measure of relevant delay is apt to be influenced by what is occurring in the litigation. A delay of even hours mid-trial where witnesses are being prepared, examined and cross-examined may create the spectre of a serious risk of distortion to the integrity of the trial

process. However, this is not always the situation. In the case at bar, the period of non-disclosure occurred during a time when the only litigation activity was sorting out interlocutory procedural issues and there is no suggestion of a material risk to the adversarial process surrounding the resolution of the issues that were before the Court in early 2024.

[122] Third, there is no evidence of an effort by the plaintiffs to distort the integrity of the litigation process. While abuse of process is focused on the integrity of the adjudicative process, rather than the motive of the parties (*Toronto* at para 51), and abuse of process can be found even without bad faith, it remains relevant that none exists, just as it would be relevant if bad faith was present. In this case, there is no basis to suggest that the plaintiffs acted otherwise than in good faith, in the mistaken belief that they had no obligation to make disclosure of the terms of the settlement agreements outside of the requirement to give documentary, and potentially oral, discovery in accordance with *The King's Bench Rules*. I observe that the judge was of the same mind.

[123] In the *Stay Decision*, the judge reserved the question of costs. In a later fiat, she ordered the plaintiffs to pay Mile Two the taxable costs of the action (*Erickson v Johnson* (9 July 2025), Saskatoon QBG-SA-00766-2022 (SKKB)). In the context of doing so, the judge declined Mile Two's request to elevate the costs award to account for the plaintiffs' abuse of process because, in her view, "this is not a matter where the plaintiffs' conduct can be characterized as 'entirely unfounded or highly objectionable'" (at para 13).

[124] These reasons should not be interpreted as concluding that in no case will an abuse of process be found unless it is established that the court or a party has been misled. For example, I would leave open the possibility that a deliberate decision to delay disclosure in the context where the risks of a distortion to the litigation process are high might be found to be abusive and, depending on the context, demand a serious remedy, and perhaps even a stay. Such a scenario is not, however, congruent with the facts of this case.

[125] Here, however serendipitous it may have been, the relative delay was not long, it did not compromise the judicial process or cause any actual prejudice to the non-settling defendants and the plaintiffs were under the genuine, albeit mistaken, belief that their only obligation to make disclosure of the terms of the settlements arose under *The King's Bench Rules*, when in fact they

needed to do so to avoid the risk that an abuse of process may transpire. In the context of all of the facts, I find it impossible to conclude that an abuse of process occurred.

### D. Litigants would benefit if there was a rule of court

[126] The reasons in this case should serve as a direction to litigants to promptly disclose the terms of a partial settlement whenever there is a risk that a failure to do so may create an abuse of process. Yet, because the test for when an abuse of process arises is nuanced, and inherently fact-sensitive, there are bound to be circumstances in which litigants are uncertain as to their disclosure obligations. Also, this Court cannot be oblivious to the possibility that some litigants may seek to take advantage of the inherent ambiguities created by the fact that, presently at least, in this province the disclosure obligation is tied solely to the abuse of process doctrine.

[127] Overall, the administration of justice would be well-served if there were an obligation on plaintiffs to promptly disclose some information concerning all partial settlements in every case. However, I see no basis for this Court to recognize such an obligation without subverting the principles applicable to the abuse of process doctrine.

[128] Prior to the Ontario Court of Appeal reversing the *Handley Estate* line of cases, the Ontario Superior Court of Justice had enacted r 49.14 of the *Rules of Civil Procedure*, RRO 1990, Reg 194 to govern the disclosure of partial settlements. One of the reasons for this reform was the ambiguities associated with the immediate disclosure rule. The new rule expands and clarifies the obligation on a plaintiff to disclose the terms of a partial settlement and, even before *Welland* was decided, the scope of available remedies when the obligation was breached (see *Welland* at paras 46-50). While the details of r 49.14 might be debated, litigants in this province would be well-served if the Court of King's Bench were to undertake a similar reform of *The King's Bench Rules*.

## V. CONCLUSION

[129] For the reasons given, I would allow the plaintiffs' appeal. I would set aside the order staying the action and the award of costs in favour of Mile Two. In its place, I would order that the

defendants' applications for a stay of the action be dismissed. Finally, I would also order costs in the Court of King's Bench and in this Court in favour of the plaintiffs.

[130] The costs in both the Court of King's Bench and in this Court should reflect that the active protagonists in connection with the disclosure issue were Mile Two and the Government, and the plaintiffs should be entitled to costs against each. However, to account for duplication, and yet reflect the significance and complexity of the issue, I would order that the costs in the Court of King's Bench be calculated with reference to 0.75 times Column 3 of the *Tariff of Costs* against each of Mile Two and the Government. In this Court, costs should be calculated based on 0.75 times Column 4 of the *Tariff of Costs in the Court of Appeal* and include an allowance for second counsel. Overall, the intent is that the plaintiffs will receive costs totaling 1.5 times the applicable column in both courts.

"Leurer C.J.S."
Leurer C.J.S.

I concur.

"Tholl J.A."
Tholl J.A.

I concur.

"Kilback J.A."
Kilback J.A.