
Court of Appeal for Saskatchewan
Docket: CACV4386

Citation: *Yapi ve Kredi Bankasi Anonim Sirketi v Arslan, 2026 SKCA 6*
Date: 2026-01-12

Between:

Yapi ve Kredi Bankasi Anonim Sirketi

Appellant
(Applicant/Proposed Plaintiff)

And

Huseyin Arslan and Murad Al-Katib

Respondents
(Respondents/Defendants)

And

Alternatifbank A.Ş.

Respondent
(Respondent/Plaintiff)

And

Şekerbank T.A.Ş.

Non-Party
(Respondent/Plaintiff)

Before: Schwann, Kalmakoff and Drennan JJ.A.

Disposition: Appeal dismissed

Written reasons by: The Honourable Justice Lian M. Schwann
In concurrence: The Honourable Justice Jeffery D. Kalmakoff
The Honourable Justice Jillyne M. Drennan

On appeal from: 2024 SKKB 115, Regina
Appeal heard: September 15, 2025

Counsel: Michael Milani, K.C., and William Lane for the Appellant
Kevin Mellor, K.C., for Huseyin Arslan
Deron Kuski, K.C., and Shawna Sparrow for Murad Al-Katib
No one appearing for Alternatifbank A.Ş.
No one appearing for Şekerbank T.A.Ş.

Schwann J.A.

I. INTRODUCTION

[1] In 2013, Şekerbank T.A.Ş. [Şekerbank], a Turkish bank, commenced a fraudulent conveyance action in Saskatchewan against Huseyin Arslan and Murad Al-Katib: QBG 2314 of 2013 (SKQB) [2013 action]. Pursuant to a court order made in 2017, Alternatifbank A.Ş. [AB Bank] was added as a plaintiff to the 2013 action: *Şekerbank T.A.Ş. v Arslan*, 2017 SKQB 205, aff'd 2018 SKCA 77.

[2] Şekerbank settled with Messrs. Arslan and Al-Katib in 2022, leaving AB Bank as the sole plaintiff. In December of 2023 Messrs. Arslan and Al-Katib applied to strike the 2013 action on limitation of actions grounds. That application prompted another Turkish creditor, Yapi ve Kredi Bankasi Anonim Sirketi [YK Bank], to apply to the Court of King's Bench to be added or substituted as a plaintiff in the 2013 action [joinder application]. However, before the joinder application could be heard, AB Bank, with the consent of Messrs. Arslan and Al-Katib, wholly discontinued the 2013 action [consent discontinuance].

[3] YK Bank applied to the Court of King's Bench for an order setting aside the consent discontinuance. A judge of that Court dismissed the application, which, in consequence, meant that "there exists no action to which YK Bank can be joined" (*Şekerbank T.A.Ş. v Arslan*, 2024 SKKB 115 at para 46 [*Discontinuance Decision*]).

[4] YK Bank appeals from the *Discontinuance Decision*. It submits the judge failed to recognize and give effect to how its joinder application had been undermined by the alleged procedural maneuvering of Messrs. Arslan and Al-Katib. YK Bank says the judge erred in reasoning that its application to strike the consent discontinuance would force AB Bank to litigate and by ignoring the representative nature of the 2013 action and the rights of class members to be substituted as a representative plaintiff.

[5] For the reasons set out below, I conclude the YK Bank appeal must be dismissed.

II. BACKGROUND

[6] The matter before the judge has a lengthy and complex history. I will only set out the background facts that are necessary to address YK Bank's grounds of appeal.

A. The 2013 action

[7] Şekerbank is a Turkish bank that loaned money to several Turkish companies in that country. Mr. Arslan personally guaranteed all or part of those corporate debts. When the debtor companies failed to repay the Şekerbank loan, Şekerbank commenced legal action in Turkey against the corporate borrowers and Mr. Arslan as the personal guarantor of those debts.

[8] Mr. Arslan held a significant number of shares in Alliance Grain Traders Inc. [AGTI], a Saskatchewan-based pulse trading company. Mr. Al-Katib is the chief executive officer and director of AGTI. Mr. Arslan transferred several million dollars worth of his AGTI shares to Mr. Al-Katib in his capacity as trustee of a family trust that had been constituted for the benefit of the Arslan and Al-Katib families. That share transfer led Şekerbank to commence a fraudulent conveyance action in Saskatchewan against Mr. Arslan and Mr. Al-Katib.

[9] Pending determination of the 2013 action, Şekerbank applied under s. 5 of *The Enforcement of Money Judgments Act*, SS 2010, c E-9.22, for an order prohibiting Mr. Al-Katib, as trustee, from disposing of the 850,000 AGTI shares. That application was granted by a Court of Queen's Bench judge (as the Court of King's Bench then was) in 2013. Notwithstanding the consent basis on which the preservation order was granted, over the ensuing years Mr. Arslan and Mr. Al-Katib routinely applied to the courts of this province to have it set aside. None of those applications met with success.

[10] In 2017, AB Bank was added as a plaintiff to the 2013 action. Much like Şekerbank, it too is a Turkish bank that had pursued judgment in Turkey against Mr. Arslan on personal guarantees he had provided to secure payment of the debts of various companies that had borrowed money from AB Bank.

[11] Meanwhile, YK Bank, yet another Turkish creditor, obtained a judgment in Turkey against Mr. Arslan in 2017. After exhausting appeal remedies in that country, YK Bank took steps to register its Turkish judgment in Saskatchewan under *The Enforcement of Foreign Judgments Act*, SS 2005, c E-9.121. Its application was granted by a Court of King's Bench judge (i.e., *Yapi ve Kredi Bankasi Anonim Sirketi v Arslan*, 2023 SKKB 126); that decision was affirmed on appeal (i.e., *Arslan v Yapı ve Kredi Bankası Anonim Şirketi*, 2024 SKCA 68, leave to appeal to SCC refused 2025 CanLII 33150).

[12] In July of 2022, YK Bank became aware of a possible settlement of the 2013 action between Şekerbank and Messrs. Arslan and Al-Katib. That caused legal counsel for YK Bank to send a letter to legal counsel for Messrs. Arslan and Al-Katib, Şekerbank, and AB Bank, alerting them to Mr. Arslan's debt with YK Bank and staking out its position regarding the rumoured settlement. Counsel wrote as follows (as quoted in the *Discontinuance Decision* at para 12):

YK Bank understands that one or more transactions is contemplated whereby Mr. Arslan may pay an amount or amounts to one or more of the Other Creditors on accommodate [sic] or, or in settlement of, their respective claims.

YK Bank takes the position that any such transaction or transactions will be improper and void. Among other matters:

- a) any such transaction or transactions would be made at a time when Mr. Arslan is in insolvent circumstances, is unable to pay his debts in full, and knows that he is on the eve of insolvency;
- b) any such transaction or transactions would be made with the intent of defeating, hindering, delaying or prejudicing his creditors, including YK Bank, and would have that effect;
- c) the recipient of any payment would have the intent of defeating, hindering, delaying or prejudicing Mr. Arslan's creditors, including YK Bank, and the receipt of any payment would have that effect;
- d) such payment or payments would result in the recipient receiving amounts that are greater, proportionately, than could be realized by unsecured creditors generally;
- e) such a transaction or transactions would be a transaction in favour of an arm's length creditor with a view to giving that creditor a preference over another creditor; and
- f) such payment or payments would not have been made in good faith.

If such a transaction or transactions occur, YK Bank will take all steps available to it in law and equity against those who participated in or facilitate the transaction, or transactions.

[13] As noted by the judge in the within matter, despite YK Bank’s protestations, “YK Bank seemingly has not taken any legal action to claim a fraudulent preference respecting the Settlement Payment” (*Discontinuance Decision* at para 13).

[14] While YK Bank’s application to register its Turkish judgment in Saskatchewan wound its way through the Saskatchewan courts, Şekerbank and Messrs. Arslan and Al-Katib came to terms on settlement: Şekerbank agreed to dismiss both its Turkish and Saskatchewan actions in exchange for payment to it of the security that had been posted by Messrs. Arslan and Al-Katib in the 2013 action.

[15] The parties’ settlement led Messrs. Arslan and Al-Katib, with the consent of Şekerbank, to apply to the Court of King’s Bench for an order *dismissing* the Şekerbank action and terminating the preservation order. The case management judge declined to dismiss the action but granted the following order on December 11, 2023: “I granted the consent order that Şekerbank’s action ‘be discontinued’ (not ‘dismissed’ as the notice of application requested) and that the preservation order be terminated” (*Discontinuance Decision* at para 7).

[16] While the Şekerbank discontinuance ended its involvement in the 2013 action, it did not affect the action as it pertained to the remaining plaintiff, AB Bank. That result led Messrs. Arslan and Al-Katib to apply for an order striking what was then AB Bank’s 2013 action on the basis that its claim was statute barred or, alternatively, that the foreign judgment on which it was based could not be registered in Saskatchewan.

[17] A summary of the key sequence of events that followed provides a helpful understanding of the basis for the within appeal:

Date	Action
February 13, 2024	YK Bank applied to be added as a plaintiff in the 2013 action “on a date and time to be arranged with the Local Registrar” [joinder application]. That application was scheduled to be heard on April 25, 2024.
March 15, 2024	In a case management conference held before the judge, it became known that AB Bank had settled its action against Messrs. Arslan and Al-Katib as reflected in its proposed consent discontinuance application. Given YK Bank’s resistance to the issuance of an order of discontinuance, and because the joinder application was to be heard on April 25, 2024, the judge reserved his decision respecting the dismissal of the 2013 action.

Date	Action
March 18, 2024	Legal counsel for AB Bank and Messrs. Arslan and Al-Katib filed the consent discontinuance with the Court of King's Bench, which contained the following terms: "1. The action commenced by Alternatifbank against Huseyin Arslan and Murad Al-Katib in QBG-RG-2314-2013 be dismissed and discontinued. 2. Murad Al-Katib agrees to discontinue the Counterclaim". The proposed consent order was supported by AB Bank's formal discontinuance of the 2013 action against Messrs. Arslan and Al-Katib and Mr. Al-Katib's discontinuance of his counterclaim.
March 19, 2024	YK Bank applied to strike the notice of discontinuance [strike application] on the bases that, if allowed to stand, the Court of King's Bench would lack jurisdiction to adjudicate YK Bank's pending joinder application and its right to prosecute the 2013 action for the benefit of all of Mr. Arslan's creditors.
March 20, 2024	Newly engaged legal counsel for AB Bank informed the Court of King's Bench that, since AB Bank no longer wished to participate in the 2013 action, it consented to the discontinuance.
April 25, 2024	The judge heard YK Bank's strike application. Neither Şekerbank nor AB Bank participated or took a position on the application.
June 18, 2024	<i>Discontinuance Decision</i> is issued.

B. The *Discontinuance Decision*

[18] The judge framed the issue in the *Discontinuance Decision* as engaging two questions:

- (a) Whether the consent discontinuance should be set aside? and, if so,
- (b) Whether YK Bank should be added as a plaintiff to the 2013 action?

As he saw it, if he declined to set aside the consent discontinuance, that was a complete answer to the second question.

[19] Turning to the first issue, the judge applied the analytical framework set out in Rule 4-49 of *The King's Bench Rules* and the decision in *McCredie v Kilbach Estate; Kilbach v McCredie Estate*, 1987 CanLII 4821, 59 Sask R 14 (CanLII) (SKQB) [*McCredie*], observing that the parties had agreed with that approach. The wording of Rule 4-49(1), he said, allows a plaintiff to discontinue an action as of right before a statement of defence is filed (or after but before other proceedings are taken in the action) *or* by consent of the parties, if the conditions stipulated in that rule are met.

[20] In response to the first issue, YK Bank took the position that, pursuant to the inherent jurisdiction of the Court of King's Bench, a discontinuance filed *as of right* may nonetheless be reviewed, struck, or set aside. The judge summarized YK Bank's position in this regard as follows (*Discontinuance Decision*):

[28] YK Bank accepts that Rule 4-49(1) permits a plaintiff to discontinue an action as a right before receipt of a statement of defence or after a statement of defence but before any other proceedings in the action or by the consent of the parties. However, YK Bank states that a discontinuance filed as a right may nonetheless be reviewed under the court's inherent jurisdiction and may be struck or set aside.

[21] While YK Bank provided multiple authorities to support its submission that the consent discontinuance in this case amounted to an abuse of process, the judge found none of them directly on point. He said the closest (and only) factually analogous decision was *Glasjam v Freedman*, 2014 ONSC 3878 [*Glasjam*], where a non-party to an action had applied to set aside a consent discontinuance. As I discuss below, the judge found *Glasjam* unhelpful.

[22] Next, the judge turned to YK Bank's argument that a different analytical lens was called for because the matter in question concerned an alleged fraudulent conveyance, which necessarily meant that AB Bank could not discontinue an action that was for the benefit of Mr. Arslan's creditors. Unless the 2013 action were allowed to continue, it said, Mr. Arslan's other creditors would "be deprived of the ability to benefit from a declaration of a fraudulent conveyance" (*Discontinuance Decision* at para 37).

[23] The judge rejected that argument. Relying on *Driffill v Ough* (1906), 13 OLR 8, 8 OWR 496 (Lexis) (ONHCJ) [*Driffill*], and *Canadian Bank of Commerce v Tinning* (1893), 15 PR 401 (Lexis) (ONHCJ) [*Tinning*], he held that, up to the date of judgment, a plaintiff creditor is the *dominus litis*, or master of the proceedings, and as such, other creditors cannot prevent the original creditor from stopping or settling the action.

[24] The judge saw no support in the evidence for a finding that AB Bank had abused the court's process by deciding that it no longer wanted to prosecute the 2013 action. Nor did he see any merit to YK Bank's submission that it should be added as a plaintiff to protect the interest of other creditors. Having made those findings, the judge saw no compelling reason to set aside the consent discontinuance, a result that necessarily meant that YK Bank could not be added to an action that had been discontinued.

III. ISSUES

[25] The fundamental issue on this appeal is whether the judge's analysis of YK Bank's strike application was tainted by legal or factual errors that warrant appellate intervention. More particularly, YK Bank says its appeal gives rise to two overarching questions, which it frames in this way:

- (a) Did the judge err by reasoning that granting YK Bank's application to strike the consent discontinuance would force AB Bank to litigate?
- (b) Did the judge err by ignoring the representative nature of the action and the rights of class members to apply to be substituted as a representative plaintiff?

IV. STANDARD OF REVIEW

[26] The parties are of one mind that the *Discontinuance Decision* involved the exercise of judicial discretion. Broadly speaking, that type of decision attracts deference on appeal: *Strom v Saskatchewan Registered Nurses' Association*, 2020 SKCA 112 at para 60. An appellate court is not entitled to substitute its exercise of discretion for that of the judge merely because it would have come to a different conclusion: *Friends of the Oldman River Society v Canada (Minister of Transport)*, 1992 CanLII 110, [1992] 1 SCR 3 at para 112 (WestLaw) (SCC).

[27] However, discretionary decisions are not insulated from appellate review. YK Bank suggests the following passage from this Court's decision in *Fausser Energy Inc. v Skjerven*, 2019 SKCA 81 [*Fausser*], reflects the principles governing appellate review of a discretionary decision:

[55] ... The decision not to exercise [discretion] is accordingly entitled to deference. This Court is only entitled to set aside the refusal of the stay in this case if we are prepared to say the Chambers judge *abused his discretion, erred in principle, disregarded a material matter of fact or failed to act judicially or rendered a decision that is so plainly wrong as to amount to an injustice* (*Rimmer v Adshead*, 2002 SKCA 12 at para 58, [2002] 4 WWR 119).

(Emphasis added)

[28] There is no disagreement on the standard of review for questions of law: it is correctness. Errors of law include a failure to identify the legal criteria that governs the exercise of discretion or a misapplication of the governing criteria. The parties also agree that the palpable and overriding error standard is the measure for appellate review of errors of fact or mixed fact and law, absent an extricable error of law: see *Housen v Nikolaisen*, 2002 SCC 33 at para 37 [*Housen*].

[29] Beyond those bases, YK Bank submits that appellate intervention is also warranted where the decision under appeal is so plainly wrong as to amount to an injustice or the judge failed to act judicially. It extracts this additional prong for intervention from the dicta in *Fausser* (see emphasized words above).

[30] As is evident from that passage in *Fausser*, the standard of review for discretionary decisions was drawn from the earlier, often-referenced decision of this Court in *Rimmer v Adshead*, 2002 SKCA 12 [*Rimmer*]. In *Rimmer*, Cameron J.A. appears to have sourced the *failed to act judicially* or *so clearly wrong it would amount to an injustice* language from two House of Lords decisions where these statements were treated as a residual category warranting appellate intervention apart from errors of law or fact: see *Hadmor Productions Ltd. v Hamilton*, [1983] 1 AC 191, [1981] 3 WLR 139 (HL), and *Campbell (Donald) & Co v Pollak*, [1927] AC 732 (HL).

[31] However, the standard of review for discretionary decisions has been clarified by this Court in a series of cases since *Rimmer* and *Fausser*. Beginning with *Kot v Kot*, 2021 SKCA 4 [*Kot*], the standard was reframed to bring it into line with the *Housen* framework. That approach led to this Court's decision in *Kot*, where it characterized the basis for appellate intervention of discretionary decisions in this way:

[20] ... appellate intervention in a discretionary decision is appropriate where the judge made a palpable and overriding error in their assessment of the facts, including as a result of misapprehending or failing to consider material evidence. Appellate intervention is also appropriate where the judge failed to correctly identify the legal criteria which governed the exercise of their discretion or misapplied those criteria, thereby committing an error of law. Such errors may include a failure to give any or sufficient weight to a relevant consideration.

[32] This Court subsequently revisited the standard of review for discretionary decisions in *MacInnis v Bayer*, 2023 SKCA 37 [*MacInnis*], once again emphasizing the need to align the standard with the Supreme Court's decision in *Housen*. *MacInnis* is also helpful for making the important point that, although the *type* of decision under appeal may have engaged the exercise of judicial discretion, for appellate review purposes, the applicable standard turns on the *nature* of the alleged error. The Court said as follows:

[38] ... The standard of review in relation to alleged errors of law is correctness, where no deference is called for. An appellate court may intervene in a discretionary decision if there has been an error of law, including an error in the identification or application of the legal criteria that govern the exercise of the discretion: "Such errors may include a failure to give any or sufficient weight to a relevant consideration" (*Kot v Kot*, 2021 SKCA 4 at para 20, 63 ETR (4th) 161).

[39] An appellate court may also intervene if there has been a palpable and overriding error of fact or of mixed fact and law: see also, for example, *676083 B.C. Ltd. v Revolution Resource Recovery Inc.*, 2021 BCCA 85 at para 30, 49 BCLR (6th) 101; *Ernst & Young v Koroluk*, 2022 SKCA 81 at paras 25–26; *Finkel v Coast Capital Credit Union*, 2017 BCCA 361 at para 55, 2 BCLR (6th) 300; *AIC Limited v Fischer*, 2013 SCC 69 at para 65, [2013] 3 SCR 949 [*Fischer*]; and *Lewis v WestJet Airlines Ltd.*, 2022 BCCA 145 at paras 30–31, 468 DLR (4th) 713. However, an appellate court is not entitled to substitute its own decision for that of the judge merely because it would have exercised the discretion differently: *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 76–77.

See also *Kolodziejewski v Maximiuk*, 2023 SKCA 103 at para 24; *Loraas v Loraas Disposal North Ltd.*, 2023 SKCA 131 at paras 31–32; *Abrametz v Law Society of Saskatchewan*, 2023 SKCA 114 at paras 26–27 [*Abrametz*]; and *4 Star Ventures (2012) Ltd. v 1983283 Ontario Inc. (Secure Digital Markets)*, 2024 SKCA 82 at para 29.

[33] The majority in *Stromberg v Olafson*, 2023 SKCA 67 [*Stromberg*], affirmed the reasoning in *MacInnis* and took the analysis one step further. Adopting the approach employed by Stratas J.A. in *Decor Grates Incorporated v Imperial Manufacturing Group Inc.*, 2015 FCA 100 at paras 14–29 [*Imperial Manufacturing*], Barrington-Foote J.A., writing for the majority in *Stromberg*, described what constitutes a discretionary decision in this way:

[119] ... The description of a decision as discretionary is best understood as a shorthand statement that the legal principles that govern the decision such that they contemplate more than one potential outcome, based on the application of the judgment of the court with the authority to find the facts and applies those principles. That may be so, for example, because there are a number of factors that may or may not properly be found to apply on the facts, the weight that may properly be accorded to different factors, or the nature of a governing principle.

[34] Significantly, neither *MacInnis* nor *Stromberg* referred to the tag end language found in *Rimmer* and *Fausser*, i.e., that appellate intervention may be warranted where a result is “so plainly wrong as to amount to an injustice” or the judge failed to act judicially (*Rimmer* at para 58). However, this Court turned to that issue in *Abrametz*. Although the Court did not go so far as to say those aspects of the *Rimmer* formulation were obsolete, for purposes of clarity, and to rationalize them with the *Housen* standards, it concluded those phrases were merely shorthanded for the *Housen* standards. Which meant, the Court said, if a result is so clearly wrong that it would amount to an injustice, this “‘is another way of saying that there has been an obvious error that affects the outcome of the case — in other words, palpable and overriding error’” (*Abrametz* at para 30, quoting *Imperial Manufacturing* at para 23). To the same effect, the phrase “failed to act judicially” speaks of a breach of procedural fairness (*Abrametz*):

[30] Second, *Kot*, *MacInnis* and *Stromberg* do not use language such as “failed to act judicially, or reached a decision so clearly wrong that it would result in an injustice” to describe the Discretionary Standard. Rather, they describe the discretionary standard in accordance with *Housen*. In *Imperial Manufacturing*, Stratas J.A. suggested that “a decision that is so clearly wrong that it resulted in an injustice is another way of saying that there has been an obvious error that affects the outcome of the case — in other words, palpable and overriding error” (at para 23). I agree. Even if there may be other ways to explain the meaning of this kind of language, Stratas J.A.’s explanation demonstrates the important point that shorthand descriptions of this kind of the Discretionary Standard can be reconciled with the appellate standards – and for the sake of clarity and consistency, should be. The same is true of the phrase “failed to act judicially”, which I would understand as referring to a breach of procedural fairness.

[35] Thus, with the foregoing summary of the law in mind, the standard of review expressed in *Fausser* must be understood through the language and framework of *Housen*, as clarified by *Abrametz*, *Stromberg*, and *MacInnis*. This means that YK Bank’s allegation that the *Discontinuance Decision* is so clearly wrong that it would result in an injustice must be understood as shorthand for an obvious error that affected the outcome of the case – in other words, a palpable and overriding error: *Abrametz* at para 30.

[36] All of that said, I recognize that in *Canada (Transportation Safety Board) v Carroll-Byrne*, 2022 SCC 48 [*Carroll-Byrne*], the Supreme Court appears to have provided a new gloss on the discretionary standard in a way that could be interpreted as breathing life into what was the third wing of *Rimmer* (failing to act judicially and a decision so clearly wrong that it results in an injustice). The Supreme Court said as follows on this point (*Carroll-Byrne*):

[40] The parties disagree on the standard of review for the second issue. The Board argues that the standard is correctness, as it relates to whether the Chambers judge applied the correct legal test. Some of the respondents disagree. They say that the Board is, instead, asking this Court to reweigh the factors and to revisit findings of fact, which are entitled to deference.

[41] The disagreement is more apparent than real. A discretionary decision, such as the one contemplated by Parliament ... 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”) (*Canada (Attorney General) v. Fontaine*, 2017 SCC 47, [2017] 2 S.C.R. 205, at para. 36, quoting *P.(W.) v. Alberta*, 2014 ABCA 404, 378 D.L.R. (4th) 629, at para. 15).

(Emphasis added)

[37] *Carroll-Byrne* is undoubtably helpful to the extent that it affirms the familiar basis for appellate intervention of discretionary decisions respecting errors of law and errors of fact and mixed fact and law. These points have never been in dispute. What is less clear is whether the Court intended that the phrases *failed to act judicially* and the *so clearly wrong as amount to an injustice* to represent a third residual category for appellate intervention of discretionary decisions.

[38] One way to read *Carroll-Byrne* is that the Supreme Court intended the *so clearly wrong as to amount to an injustice* phrase to constitute a distinct basis for intervention separate from legal or factual errors. Or perhaps, without saying so, it intended this wing of the standard to refer to allegations of error respecting mixed fact and law. That was the conceptual approach taken in *Abrametz*, where, as noted, this Court characterized these phrases as no more than judicial shorthand descriptions that had to be reconciled with *Housen*. To reiterate, a decision that is *so clearly wrong as to amount to an injustice* must be understood as alluding to an error of fact or mixed fact and law, thus engaging the palpable and overriding error standard of review. And the phrase *failure to act judicially* refers to a breach of procedural fairness. Viewing this third wing of *Carroll-Byrne* through the *Housen* lens, as this Court has suggested should be done, leads to consistency in approach and interpretation.

[39] I note as well that the Ontario Court of Appeal in *Carcillo v Ontario Junior Hockey League*, 2025 ONCA 652, approached *Carroll-Byrne* in a similar fashion:

[53] ... Absent legal error, palpable and overriding factual error, or a failure to exercise discretion judicially, appellate courts must not interfere. This last category, failure to exercise discretion judicially, permits intervention only if the decision was arbitrary, unreasonable, or so clearly wrong that it amounts to an injustice. Appellate courts cannot intervene merely because they might have weighed factors differently.

[40] I also recognize that in *Parsons v Burkart*, 2021 SKCA 2 [*Parsons*], this Court set aside a discretionary decision, stating it was unjust and plainly wrong. However, that decision did not, in my view, breathe life into the *plainly wrong so as give rise to an injustice* basis for appellate intervention. Not only did *Parsons* predate *Kot*, *MacInnis*, *Stromberg*, and *Abrametz*, but the result in *Parsons* was predicated on an error of law, i.e., a failure to consider the relevant legal criteria that governed the matter at issue and not as a stand-alone basis for appellate intervention.

[41] Indeed, my analysis of *Parsons* echoes the observations of the majority in *Stromberg*:

[122] As an aside, I acknowledge that it has been relatively common for courts to state that intervention in a discretionary decision is also appropriate if the result is “unjust” or, for example, “manifestly unjust”. *I cannot conceive of a decision that, having passed muster under the Kot test – that is, a decision that is based on proper findings of fact and on the correct identification and application of the law – could nonetheless be set aside on the basis that it is unjust. Justice, after all, is the result of the proper application of the law to the facts.*

(Emphasis added)

Which is to say, the observations of Stratas J.A. in *Imperial Manufacturing* are apposite.

[42] To conclude, although the standard of review for discretionary decisions has been described in different ways by different courts at different times, the essence of the standard remains the same. The correctness standard applies to allegations of errors of law, of principle, or of the misapplication of the law, while the palpable and overriding error standard applies to allegations of errors of fact or mixed fact and law (excluding extricable questions of law). The third wing laid out in the *Carroll-Byrne* formulation was reconciled in *Abrametz* within the *Housen* standards. In that respect, where it is alleged that the decision is so clearly wrong as to amount to an injustice, the palpable and overriding error standard of review is engaged and, when the allegation is of a failure to act judicially, that refers to a breach of procedural fairness for which the correctness standard is considered applicable. Moreover, and to reiterate the observation of the majority in *Stromberg*, it is hard to conceive of a circumstance where, in the absence of an error of law or a palpable and overriding error of fact or mixed fact and law, a discretionary decision should be set aside because it is so plainly wrong as to amount to an injustice.

V. ANALYSIS

A. Granting the application would not force litigation

1. The parties’ positions

[43] YK Bank contends the judge erred in dismissing its application to strike the consent discontinuance by reasoning that AB Bank would be forced to litigate its claim. The judge’s finding, it says, reflects two errors: it ignores the principle that a discontinuance may be set aside where it constitutes an abuse of process, and second, it fails to appreciate that YK Bank had sought to be substituted as plaintiff in the 2013 action.

[44] Messrs. Arslan and Al-Katib maintain that their efforts to bring the 2013 action to a conclusion were not the product of procedural maneuvering but the natural and anticipated outcome flowing from the applications they brought in December of 2023 and January of 2024 to dismiss the 2013 action. It was those events, coupled with AB Bank's change in legal counsel, that led the parties to jointly agree to discontinue the action. They emphasize the absence of any case law where a non-party to an action has succeeded in having a consent discontinuance set aside.

[45] The logical starting point in my analysis is with the jurisprudence concerning the test to set aside a discontinuance.

2. The legal test for setting aside a discontinuance

a. Where a party to the action applies

[46] In Saskatchewan, a plaintiff may discontinue an action as of right prior to receipt of the statement of defence, or after, but before any other proceedings are taken in the action. This principle is reflected in Rule 4-49(1) and Rule 4-49(2) of *The King's Bench Rules*:

Discontinuance or withdrawal of claim

4-49(1) At any time before receipt of the statement of defence of any defendant, or after the receipt of the statement of defence and before taking any other proceeding in the action other than an interlocutory application, the plaintiff may wholly discontinue the plaintiff's action against the defendant or withdraw any part of the action by serving and filing a notice in Form 4-49.

(2) If the plaintiff serves and files a notice in accordance with subrule (1), the defendant is entitled to:

- (a) if the action is wholly discontinued, the costs of the action; or
- (b) if the action is not wholly discontinued, the costs occasioned by the part of the action that has been withdrawn.

[47] After the close of pleadings, a plaintiff may only discontinue with leave of the court or the consent of the parties against whom discontinuance is sought. In that regard, Rule 4-49(8) provides as follows:

Discontinuance or withdrawal of claim

4-49(8) Except as provided in this rule, a plaintiff shall not discontinue in whole or in part, unless:

- (a) it is with the consent of the party or parties against whom discontinuance is sought; or
- (b) it is with the leave of the Court.

[48] It is settled law that a court has the inherent jurisdiction to review and, in proper circumstances, set aside a discontinuance on application by a plaintiff who seeks to withdraw it: see, for example, *McCredie* at para 17; *Singh v Street*, 1990 CanLII 7820 at para 14, [1990] 5 WWR 518 (SKCA) [*Singh*]; *Hunt v Mutual Life Assurance Company of Canada*, 2004 SKQB 89 at para 9 [*Hunt*]; and *Boychuk v Boychuk Estate*, 1993 CanLII 6686, 110 DLR (4th) 228 at para 25 (WestLaw) (SKCA). Even in situations where a plaintiff discontinues as a matter of right, the court retains jurisdiction to review and have it set aside where appropriate circumstances exist for doing so: see *Poffenroth Agri Ltd. v Garret Brown*, 2020 SKQB 31 at para 22, aff'd 2020 SKCA 121 [*Poffenroth*].

[49] The jurisprudence in this area uniformly holds that, while a court has jurisdiction to permit a plaintiff to withdraw a discontinuance, an application of that sort rarely succeeds. Special circumstances must exist: *McCredie* at para 17. The potential for prejudice to the other party is an important consideration in an application of this sort. In *Adam v Insurance Corporation of British Columbia*, 1985 CanLII 584, 2 CPC (2d) 285 (CanLII) (BCCA) [*Adam*], the British Columbia Court of Appeal envisioned the application of a more stringent test where a limitation period expires before an application is brought to set aside the discontinuance. In such a situation, it has been said that the discretion to set aside a discontinuance or permit its withdrawal should be exercised only in the face of *very special* circumstances: see *Hunt* at para 11.

[50] This Court in *Singh* adopted the approach taken in *Adam*, summarizing the controlling principle in this way: “leave to withdraw a discontinuance should not be allowed where there has been prejudice, in this case a limitation period has intervened, unless ‘special’ circumstances are demonstrated” (at para 14). To similar effect, in *McCredie*, the Court expressed concern about an expired limitation period and the resulting prejudice to the defendant if the action was to be resurrected, describing it as “a real factor” (at para 19): see also *Hunt* at para 10.

[51] In *Neis v Yancey*, 1999 ABCA 272 at para 27, the Alberta Court of Appeal identified the following examples of what might constitute special circumstances:

[27] ... where a plaintiff discontinued the wrong action, or where the defendant breached conditions upon which the discontinuance was given. Special circumstances have also been defined to include cases of “inadvertence, mistake or misapprehension of relevant procedural matter”: *Adam and Adam v. Insurance Corporation of British Columbia* (1985), 66 B.C.L.R. 164 at p. 170 (C.A.); *Morten (Litigation guardian of) v. Fanzutti*, [1994] O.J.

No. 1129 (Q.L.) (Gen. Div.); *Singh v. Street, Bernt and Traditional Holdings Ltd*, [1990] 5 W.W.R. 518 at p. 523 (Sask. C.A.). Such circumstances suggest oversight rather than the sort of substantive mistakes of law in this case. Hence ... special circumstances in the nature of a slip must be established before a discontinuance may be withdrawn.

However, at bottom, *Neis* reinforces the idea that “special circumstances *must include* an absence of actual prejudice to the defendant ... as well as a consideration of the circumstances giving rise to the discontinuance” (emphasis added, at para 27).

[52] The prejudice component of the analysis can include instances where procedural issues arise with some hint of wrongdoing amounting to an abuse of process or where (as noted above) setting aside the discontinuance would defeat an expired limitation period. The former circumstance usually arises when the discontinuance was found to have been used to undermine or escape from legitimate judicial processes already underway. Examples of where this has occurred include the following: *Poffenroth*; *De Shazo v Nations Energy Company Ltd.*, 2006 ABCA 400 at para 15; *Arnston v Arnston*, 2024 ABCA 226 at para 44 [*Arnston*]; and *Kawaguchi v Kawa Investments Inc.*, 2021 ONCA 770 at para 35 [*Kawaguchi*].

[53] Most of the jurisprudence involving a plaintiff’s request to withdraw their discontinuance focusses on the rights of the parties to the action and their legitimate expectations concerning judicial process. Where an abuse of process allegation emerges, the analysis tends to explore a procedural process the defendant was expecting would occur or was entitled to (e.g., summary judgment to dismiss or interim relief) and whether the plaintiff–applicant has any “collateral purpose” driving the discontinuation notice which was aimed at defeating that legitimate judicial process: see, for example, *Tsiopoulos v Commercial Union Assurance Co.*, 1986 CanLII 2531, 32 DLR (4th) 614 (WestLaw) (ONHCJ), and *Angelopoulos v Angelopoulos*, 1986 CanLII 2716, 9 CPC (2d) 285 at paras 35–38 (WestLaw) (ONHCJ). In *Tsiopoulos*, an abuse of the court process was described in this way:

[7] It is well settled that there is at law a tort known as abuse of process. This cause of action arises when the processes of law are used for an ulterior or collateral purpose. It is defined as the misusing of the process of the Courts to coerce someone in some way entirely outside the ambit of the legal claim upon which the Court is asked to adjudicate. It occurs when the process of the Court is used for an improper purpose and where there is a definite act or threat in furtherance of such purpose.

It goes without saying that a significant factor in reinstating an action is a finding that the plaintiff has abused the court’s process by discontinuing it.

b. When a non-party applies to set aside

[54] Thus far, the decisions I have mentioned involved circumstances where a plaintiff applied to withdraw their discontinuance. There, the case law tends to focus on the rights of the parties to the action and their legitimate expectations concerning the judicial process. What, then, are the principles to be applied where a non-party to the action applies to set aside a discontinuance?

[55] YK Bank submits *Glasjam* represents just such a situation; indeed, it is the only decision cited for that proposition. As I discuss below, the crux of its argument is that *Glasjam* was either binding or persuasive and that the judge in the present matter erred in his interpretation and application of that decision.

i. *Glasjam*

[56] The facts in *Glasjam* are these. Glasjam Investments Ltd., a business consulting company, brought an action against Josh Freedman to recover fees for consulting services that Glasjam Investments had allegedly provided to him [main action]. Not only did Mr. Freedman vigorously defend against that action, but he also commenced a separate action against several lawyers who had provided advice on the consulting agreement, alleging they were in a conflict of interest at the time and professionally negligent [second action]. Mr. Freedman only commenced the second action to protect the limitation period that applied to it and had no intention of proceeding with it unless he was unsuccessful in the main action. On discovering the second action, legal counsel for Rose-Anne Prizant (a plaintiff in the main action) applied to consolidate the two matters. However, before her consolidation motion could be heard, the second action was discontinued by Mr. Freedman with the consent of the defendants. Ms. Prizant applied to set aside the notice of discontinuance, arguing that it was an abuse of process on Mr. Freedman's part.

[57] While the Master in *Glasjam* accepted that, in theory, a notice of discontinuance filed as a procedural device to thwart a court process could amount to an abuse of process entitling a court to set it aside, he was alert to the fact that Ms. Prizant (who brought the motion) was a non-party to the second action. He found this to be problematic because it engaged the issue of standing, which he posed in the form of a question: "As a stranger to the action, has she any standing to interfere in the action and in effect to force the parties to continue with that litigation notwithstanding their agreement to put it on hold?" (at para 63).

[58] Master MacLeod went on to hold that, even if he accepted that Ms. Prizant was a potential party to the second action (the relief she had sought), at most, it provided her with “bare standing to bring the present motion” (at para 63). As the decision maker saw it, the only conceivable basis to have the notice of discontinuance set aside was Ms. Prizant’s submission that it deprived her of the opportunity to have the two matters consolidated. However, as he was quick to add, “The prejudice to her rights would have to be extreme before she could possibly be given the right to force other parties to litigate. Generally speaking one party may not be forced to sue another and each party is free to determine what rights it seeks to assert against whom” (at para 64).

[59] Ultimately, Master MacLeod dismissed the application to set aside that consent discontinuance for two reasons: (a) Ms. Prizant lacked standing, and (b) even if she had standing, she was unable to demonstrate how she would suffer an injustice if the application was denied.

ii. YK Bank misunderstands the ratio in *Glasjam*

[60] YK Bank claims the judge erred in his interpretation of *Glasjam* because, unlike the present matter, *Glasjam* involved a situation where the plaintiff would be forced to litigate had the application to set aside the discontinuance been granted. In contrast to the reasoning in *Glasjam*, YK Bank says it has a real interest in the 2013 action as demonstrated by its desire to be substituted as plaintiff to prosecute that action. Those nuances, says YK Bank, were ignored by the judge who superficially focussed on the *forced to litigate* possibility and the *stranger to the action* concerns. It contends the judge failed to appreciate the factual differences between the matter at hand and those in *Glasjam* and that the result in *Glasjam* turned on Ms. Prizant’s underlying desire to force Mr. Freedman to litigate an action he had no interest in litigating and in which she had no material interest. More to the point, YK Bank asserts the reasoning in *Glasjam* did not turn on the fact that Ms. Prizant was a non-party to the second action. It follows, says YK Bank, that the judge’s misinterpretation of *Glasjam* amounts to an error of law, reviewable on the correctness standard.

[61] There are several reasons why I do not accept this argument.

[62] First, while the facts in *Glasjam* may be more nuanced than the matter at hand, I am satisfied that the judge operated from a correct understanding of that case and the applicable legal principles. I read that decision differently than YK Bank. In *Glasjam* the judge dismissed Ms. Prizant’s application to set aside the discontinuance for two distinct reasons. First, he found it

significant, if not determinative, that Ms. Prizant was a non-party or stranger to the second action that had been discontinued. He drew attention to this point in paragraphs 62, 63, and 69 of his reasons, describing it as the “principal problem” with her application and wrote as follows:

[63] This is the principal problem with the relief sought by Ms. Prizant. As a stranger to the action, has she any standing to interfere in the action and in effect to force the parties to continue with that litigation notwithstanding their agreement to put it on hold? [Her counsel] could not point to any decision in which such a remedy had been granted. The cases he did refer to (and there are only two of them) were disputes between the parties to the litigation that was discontinued. The argument here is by analogy. Because the parties to the other action had been served with the notice of motion to consolidate the claims they were parties to the motion. And Ms. Prizant was a potential party to the consolidated action. This may give bare standing to bring the present motion but it is a very weak foundation on which to build an argument for relief. I say this because in my view there is no substantive interest in consolidation and I do not believe the deferral of the other action is of any legitimate consequence to Ms. Prizant.

[63] In short, Master MacLeod expressed doubt that a non-party to an action has standing to bring an application to strike a discontinuance and was troubled by the fact that no case law had been cited to him that favoured a different position. He provided a second reason to dismiss Ms. Prizant’s application: she had not identified any prejudice or grave injustice that would befall her should the order be denied, but I see that as secondary to the basis on which he refused the application.

[64] In the matter at hand, the judge’s reasons were brief, and he did not explore the nuances of in *Glasjam*. Nonetheless, I am satisfied that he was alert to the fact that YK Bank’s argument was primarily grounded on an abuse of process allegation, which he framed in this way: “YK Bank argues that the notice of discontinuance is an abuse of process because: 1) it is an improper attempt to usurp the court’s jurisdiction; 2) A[B] Bank is no longer the *dominus litis* in the 2013 action; and 3) it attempts to override substantive rights and obligations conferred by statute” (*Discontinuance Decision* at para 29). The judge made reference to the plethora of case law that YK Bank had offered in support of its position but noted (correctly, in my view) that *none* of those decisions addressed the circumstance of a *consent* discontinuance or where the application to set it aside is brought by a stranger to the action. *Glasjam* was the *only* analogous decision.

[65] Moreover, contrary to YK Bank’s submission, I do not read the judge as having reasoned that its application to strike the discontinuance should be dismissed because the parties to the 2013 action would be forced to litigate. Nothing in the *Discontinuance Decision* suggests this factor dominated, let alone distorted, his analysis. He considered several other factors:

- (a) the circumstances involved a consent discontinuance;
- (b) Rule 4-49(1) permits plaintiffs to discontinue their action as a matter of right before a statement of defence is filed;
- (c) YK Bank is a stranger to the litigation, implicitly inferring that it lacked standing; and
- (d) YK Bank was unable to provide any case law where a non-party to an action was successful in having a consent discontinuance set aside.

[66] In fact, the overall point the judge made was that *Glasjam* did *not* support YK Bank’s application, observing that “[t]hese statements do not assist YK Bank. Indeed, they are consistent with all the other cases cited by YK Bank. None is helpful to YK Bank’s claim that it, as a stranger to the 2013 action, has standing to set aside a consent discontinuance of an action. All the cases YK Bank has cited are completely of the same sentiment as Master MacLeod expressed in *Glasjam*” (*Discontinuance Decision* at para 34).

[67] Finally, even if *Glasjam* can be taken to have established new law for when a consent discontinuance may be set aside at the urging of a non-party, it was not binding on a Saskatchewan King’s Bench judge.

[68] YK Bank’s argument ignores the principle of *stare decisis*. Vertical *stare decisis* is a doctrine wherein courts lower in the judicial hierarchy must follow the *ratio* of decisions from courts higher in the hierarchy: M. Rowe & L. Katz, “A Practical Guide to Stare Decisis” (2020) 41:1 *Windsor Review of Legal and Social Issues* at p 6; however, “decisions from courts outside the direct hierarchy of the decision-making court are [considered] persuasive rather than binding authority” (at p 7). Persuasive authority generally captures a dynamic between courts not in a binding relationship. This persuasive dynamic exists between courts of different provinces or countries or even between higher and lower courts within the same jurisdiction.

[69] In my view, even if *Glasjam* can be read as YK Bank suggests it should, the judge in this case was not bound by it as it was decided by a provincially appointed master in Ontario, whereas the presiding judge in this matter sits as a federally appointed Court of King's Bench judge in Saskatchewan. At best – assuming for the sake of argument that *Glasjam* established a new legal test – that decision was persuasive but not binding.

c. Application for substitution

[70] YK Bank submits the judge misunderstood the nature of the relief it had sought, which was to be substituted as the plaintiff in the 2013 action. Had the judge understood its application in that light, YK Bank says he would not have given the *forced to litigate* concern much prominence.

[71] As I indicated above, I disagree with the premise of YK Bank's argument. The judge did not reason in the way it suggests. However, even if he did, YK Bank's argument cannot be sustained because I find the substitution request is not obvious from the pleadings.

[72] On the front page of its February 13, 2024, notice of application, YK Bank stated that it sought to be *added* as a plaintiff in the 2013 action, and in "The Remedy Sought" section, the document states, "The proposed Plaintiff, YK Bank, consents to being *added as a Plaintiff* to this action" (at para 45). In fairness, paragraph 48 of that document alludes to the Şekerbank settlement and the looming possibility of an application to strike AB Bank's claim and then concluded with this statement: "YK Bank should be entitled to be added as a Plaintiff in the within action, or *substituted as a Plaintiff* should A[B] Bank wish to discontinue its claim" (emphasis added).

[73] Without the benefit of a transcript, it is hard to say how the matter was argued before the judge. Nonetheless, the overall tenor of the application before the court was a request for YK Bank to be added as a party; substitution was mentioned only in passing. The point to be made here is that even if the judge improperly focussed on the prospect of AB Bank being forced to litigate (which I find he did not), one can readily understand how he might have misunderstood YK Bank's position since its prevailing request was to be added to the action.

d. The abuse of process argument

[74] YK Bank also claims the judge's misunderstanding of the reasoning in *Glasjam* caused him to overlook how the consent discontinuance in this case constituted an abuse of the court's process, which is a recognized basis for having it set aside. YK Bank points to several decisions where a discontinuance was set aside because its purpose was found to usurp the court's jurisdiction in relation to other pending matters before the court. YK Bank paints the parties' discontinuance in this matter as a sham: it characterizes it as nothing more than a blatant attempt to undercut and avoid its joinder application as evidenced by the fact that AB Bank had no interest in discontinuing its claim until YK Bank brought its application.

[75] As I have already discussed, in determining whether to strike a discontinuance, courts are sensitive to any procedural process of which a party to the action may be deprived of if the plaintiff discontinues the action. Although the bulk of the jurisprudence deals with allegations of abuse of process by a plaintiff and not, as here, on the part of the defendants, YK Bank submits the abuse of process principles should apply with equal vigor to non-parties in circumstances like the present.

[76] I am not persuaded by this argument.

[77] The judge was aware of YK Bank's abuse of process allegation but understood that it was levelled by a non-party to the action. The legitimate expectation of having YK Bank's joinder application heard is a markedly different circumstance from where, for example, a party to an action had a summary judgment pending (see *Kawaguchi*) or where the operation of interim relief was thwarted by a unilateral discontinuance (see *Arnston*). In any event, the fact there was an extant joinder application brought by a third party did not require the judge to draw an inference that the parties to the 2013 action had conspired to usurp a court's jurisdiction by what YK Bank sees as a hastily prepared consent discontinuance.

[78] In response to YK Bank's assertion that, prior to its joinder application being brought, AB Bank had shown no interest in discontinuing the 2013 action, the judge made the following finding: "I am unable to find any evidence that supports a finding that A[B] Bank was abusive of the court's process by deciding that *it* no longer wanted to prosecute the claim against the Defendants in the 2013 action" (emphasis added, *Discontinuance Decision* at para 41). That is a complete answer to YK Bank's argument.

[79] There are two points to be made here. First, the word emphasized above is intended to underscore that, although YK Bank may harbour suspicions about the motivation of Messrs. Arslan and Al-Katib, it conveniently ignores the fact that it was AB Bank as plaintiff who discontinued the action, albeit with the consent of the defendants. Second, this conclusion was grounded in a finding of fact that can only be set aside if it was the product of palpable and overriding error. I see no such error. YK Bank's argument under this heading reduces to a submission that the judge should have drawn a different inference or come to a different conclusion concerning its abuse of process argument. Respectfully, that is not a basis for appellate intervention.

e. Conclusion on discontinuance

[80] At bottom, YK Bank can be seen as indirectly taking issue with findings of fact and how the judge weighed the factors relevant to his decision-making. A disagreement with the amount of weight a judge gives to a piece of evidence gives rise to a question of fact that is assessed on the palpable and overriding error standard of review: see *McCabe v Kowalyshyn*, 2022 SKCA 56 at para 24. An appellate court is not entitled to overturn a discretionary decision simply because it would have balanced the factors and considerations differently: see *Housen* at para 23.

[81] To conclude, the judge's reasons do not reveal any deviation from the legal principles governing applications to set aside a discontinuance. Although there may be circumstances in which a non-party might successfully apply to set aside a consent discontinuance, the fact that the judge did not grant the relief sought does not demonstrate error. Framed in the language of the applicable standards of review, I see no error of law nor any palpable and overriding error in the judge's handling of the evidence or the inferences he drew from it.

B. The representative nature of the 2013 action

1. YK Bank's position on appeal

[82] In broad strokes, YK Bank submits the *Discontinuance Decision* demonstrates that the judge failed to appreciate the representative nature of fraudulent conveyance actions and how that type of claim must be brought on behalf of other creditors. This conceptual approach, it says, was fundamental to the analysis, but the judge's failure to grasp the proper context caused him to assess YK Bank's application through the wrong analytical lens.

[83] YK Bank makes several discreet arguments under this ground of appeal. I will briefly touch on the law respecting fraudulent conveyance actions before addressing each of its arguments.

2. Fraudulent conveyance actions

[84] Fraudulent conveyance law in Saskatchewan is derived from three sources: the *Fraudulent Conveyances Act 1571*, 13 Eliz 1, c 5 (UK) [*Statute of Elizabeth*], *The Fraudulent Preferences Act*, RSS 1978, c F-21, and the common law. The *Statute of Elizabeth* is often referred to as the basis for challenging a debtor's transfer of property to defeat creditors' claims. Although flowing from English legislation, the *Statute of Elizabeth* has long been recognized as being in force in Saskatchewan: see, for example, *Hamm v Metz*, 2002 SKCA 11 [*Hamm*]; *Bank of Montreal v Reis*, 1925 CanLII 158, 3 DLR 125 (SKKB); *Scott v Scott*, 1965 CanLII 415, 52 DLR (2d) 666 (SKQB); M.A. Springman et al, *Fraudulent Conveyances and Preferences* (Carswell, 1994) (updated to 2007-Release 2) at pp 5-4 to 5-5 [*Fraudulent Conveyances*].

[85] Although *The Fraudulent Preferences Act* is primarily designed to address the rights of creditors and not impugn conveyances, there is some overlap with the *Statute of Elizabeth*: i.e., the section on transfers to defeat creditors provides that every assignment or transfer of securities or shares “made by a person at a time when he is in insolvent circumstances or is unable to pay his debts ... with intent to defeat, hinder, delay or prejudice his creditors or any one or more of them, is void as against the creditor or creditors injured, delayed or prejudiced” (s. 3 of *The Fraudulent Preferences Act*).

[86] The common law has not added clarity to the interpretation or application of these statutes: “In the service of interpretation, the courts have engrafted on the wording of the statutes requirements and presumptions that are not at all evident on their face, adding to rather than resolving the uncertainty resulting from the gaps, inconsistencies and anomalies in the legislation itself” (Law Reform Commission of Saskatchewan, *Reviewable Transactions Act*, Final Report (May 2021) at para 10).

[87] One of the uncertainties created by this array of law relates to the question of who has standing to challenge an alleged fraudulent conveyance. Section 3 of *The Fraudulent Preferences Act* has been interpreted to mean that only a person who is a creditor at the time of the alleged transaction has standing to sue. The *Statutes of Elizabeth*, in contrast, focusses on transfers

intended to harm creditors and others, with the word *others* interpreted to mean a person whose claim arose after the date of the impugned transaction: see *Hamm*.

[88] This brings me to the representative nature of a fraudulent conveyance type of action, the characterization of which is not disputed by Messrs. Arslan and Al-Katib. A useful summary of the law pertaining to that matter is found in the Ontario Law Reform Commission, *Report on Class Actions* (Ontario Ministry of Justice and Attorney General, 1982) at vol III, p 846-847, n 89:

At common law, if a creditor is *not a judgment creditor* and he wishes to impeach a transaction of his debtor as a fraudulent conveyance, the creditor *must bring the action* on behalf of himself and all other creditors of the debtor: see *Reese River Silver Mining Co. v. Attwell* (1869), L.R. 7 Eq. 347, 20 L.T. 163, and *Kroman's Electric v. Schultes*, [1970] 2 O.R. 548, at 553, 11 D.L.R. (3d) 425 (H.C.J.). If the creditor *is a judgment creditor*, it is not necessary, but is nonetheless permissible, that the action be commenced on behalf of all creditors: see *St. Gregor Mercantile Co. v. Halbach*, [1927] 1 D.L.R. 761, at 763-65, [1927] 1 W.W.R. 247 (Sask. K.B.).

(Emphasis added)

[89] In *St. Gregor Mercantile Co. v Halbach*, 1927 CanLII 275 at paras 4-6, 1 DLR 761 (CanLII) (SKKB), referred to in the foregoing extract, Mackenzie J. considered the question of when a claim must be brought in a representative capacity and when it can be brought on the plaintiff's own behalf. The judge in that case concluded that where a claim is brought under the *Statute of Elizabeth*, a non-judgment creditor must bring the action on behalf of themselves and all other creditors of the debtor; but, conversely, a judgment creditor is not required to do so. This is because an execution of a creditor's right to relief comes from "the auxiliary equitable jurisdiction which the Court of Chancery formerly exercised" and not from statute (at para 12).

[90] Although a mere creditor is obligated to sue on behalf of all creditors, failure to do so has been characterized as a procedural defect and an informality. The Supreme Court of British Columbia in *Owners, Strata Plan LMS 1328 v Marco Polo Properties*, 2000 BCSC 776, adopted passages from the Law Reform Commission of British Columbia, *Report on Fraudulent Conveyances and Preferences (LRC 94)* (January 1988) [BC Report], noting that failure to plead the action was representative in nature was a "common error" (at para 35), and an irregularity "of form only, which can be cured at trial or even on appeal" (at p 35).

[91] The authors of *Fraudulent Conveyances* offer some tentative thoughts on the matter (at pp 5-4 to 5-5):

The purpose of the rule respecting the obligation of certain creditors to sue in a representative capacity was stated by Homes J. in *Strata Plan LMS 1328 v. Marco Polo Properties* [2000 BCSC 776]: “The representative aspect of the action is procedural. It is intended all creditors will be present and represented in the proceeding”. Accordingly, any relief granted would enure to all represented creditors, not simply the plaintiff. But the explanation concerning precisely why certain types of creditors’ action must be commenced as a class action on behalf of the plaintiff and all other creditors, while others may be commenced in the name of the impeaching creditor alone, is complicated and ambiguous.

(Footnotes omitted)

[92] In the matter at hand, Şekerbank did not bring a representative action. It brought the action on its own behalf under *The Fraudulent Preferences Act* for, among other relief, a declaration that Mr. Arslan’s transfer of assets to the trust is null and void. However, even if the 2013 action should have been pleaded as being representative of all creditors, YK Bank’s remedy was to apply for an order amending the pleadings.

[93] In their factum, Messrs. Arslan and Al-Katib argue that the requirement for a non-judgment creditor to plead its action as a representative one “cannot be logically extended to suggest that an improperly pleaded fraudulent conveyance action may not be discontinued”. I agree with that statement. While the case law I refer to above describes the pleadings issue as being procedural in nature, YK Bank’s argument would require this Court to treat such a defect in the pleadings as having substantive effect. Further, YK Bank offers no case authority for the proposition that a consent discontinuance may be set aside because of improper pleadings.

3. The judge’s reasons on fraudulent conveyance

[94] The only issue before the judge was whether the notice of discontinuance should be set aside. He gave five reasons for why he dismissed YK Bank’s application. Accordingly, it necessarily followed that there was no action to which YK Bank could be joined either pursuant to *The King’s Bench Rules* or s. 20 of *The Limitations Act*, SS 2004, c L-16.1.

[95] First, the judge relied on two long-standing fraudulent conveyance decisions – *Driffill* and *Tinning* – for the proposition that “the creditor named as plaintiff is, up to judgment, master of the proceedings as *dominus litis*, and other creditors have, before judgment, the right to begin actions each for himself, because they cannot prevent the original creditor plaintiff from stopping or settling his action before judgment” (*Driffill* at para 7). At paragraph 40 of the *Discontinuance*

Decision, the judge also cited paragraph 14 of *Tinning* for the proposition that “[b]efore the judgment is obtained, the actual plaintiff may settle the action on any terms he thinks proper. He may discontinue it, he may dismiss it, and no other creditor can complain, but after judgment it enures to the benefit of all”.

[96] Second, as mentioned above, the judge found nothing in the evidence that was capable of supporting an inference that AB Bank’s discontinuance constituted an abuse of process. In fact, he went so far as to adopt several paragraphs from Messrs. Arslan and Al-Katib’s written submissions to the effect that YK Bank had itself to blame for failing to act diligently.

[97] Third, the judge saw no evidence that YK Bank represented the interests of other creditors, as it had claimed.

[98] Fourth, characterizing YK Bank’s application as a backdoor route to the plaintiff’s driver’s seat, the judge said setting aside the discontinuance would result in an inconsistent and illogical outcome as “two other Turkish banks, Fibabanka and Sardes, have been denied such a claim because they were outside the limitation period” (at para 44).

[99] Fifth, AB Bank’s discontinuance proceeded as of right under Rule 4-49(8)(a). And although the judge did not dwell on the matter, he noted how *The King’s Bench Rules* “contemplate the *finality* of two parties agreeing to discontinue an action” (emphasis added, at para 45).

[100] Reading the reasons as a whole, satisfies me that the judge was alert to the fact that the 2013 action was a fraudulent conveyance action. He said as much in the opening paragraph of the *Discontinuance Decision*, in how he described the factual nature giving rise to Şekerbank’s fraudulent conveyance allegation, and his understanding of the ramifications that may befall other creditors if he refused to set aside the discontinuance: see, inter alia, paragraphs 1, 3, and 18.

[101] I am also satisfied that the judge understood the thrust of YK Bank’s specific arguments in this regard, namely that a fraudulent conveyance action needs to be brought for the benefit of all creditors and that discontinuance from that type of claim must bear in mind the representative nature of that type of action. To that point, he addressed YK Bank’s argument directly in the *Discontinuance Decision* by framing its overall position in this way:

[37] YK Bank also argues that a fraudulent conveyance action *attracts a different analytical lens* because ss. 12(1) of *The Fraudulent Preferences Act*, RSS 1978, c F-21 states that such an action may be brought for either (i) “the benefit of creditors generally”, or (ii) “for the benefit of such creditors as have been injured, delayed, prejudiced or postponed by the impeached transaction”.

(Emphasis added)

[102] Building on the thread of those submissions, I am satisfied the judge understood YK Bank to argue that AB Bank could not discontinue an action brought for the benefit of all of Mr. Arslan’s purported creditors and, further, that if its application were denied “the court would be deprived of its jurisdiction to decide YK Bank’s application to be substituted or added as a plaintiff to the 2013 action, and, as a consequence, YK Bank’s ability to continue the prosecution of the action *for the benefit of all of Mr. Arslan’s creditors* would be impossible” (at para 18): similarly repeated at para 37. Put simply, as illustrated in his reasons, none of that was lost on the judge.

4. Paragraph 42 does not reflect legal error

[103] Despite what the judge said in his reasons, YK Bank claims the following passage from the *Discontinuance Decision* evinces his misunderstanding of the law: “I also see little merit in YK Bank’s assertion that it should be added as a plaintiff so that it can protect the interests of other creditors of Mr. Arslan, that it will be a representative of these creditors. No evidence was provided that other creditors see YK Bank as representing their interests” (at para 42).

[104] There is some support for YK Bank’s argument in the Saskatchewan jurisprudence. In *Lankin v Walker*, 1909 CanLII 144 at para 11, 12 WLR 320 (SKSC), Wetmore C.J.S. concluded there must be some evidence of the existence of additional creditors in a representative action; otherwise, the pleading on behalf of others would be false. Contrastingly, in *Grunert v Jonat*, 1924 CanLII 128 at paras 6-7, 3 DLR 503 (CanLII) (SKKB), Mackenzie J. disagreed with the earlier decision in *Lankin*, concluding no evidence of other creditors was required. A creditor’s statement of claim need only allege that the action is brought on their behalf and on behalf of all other creditors of the debtor “in order to make the same proceedings potentially available for other creditors if there are any” (at para 7).

[105] Notwithstanding those decisions, I am not persuaded by YK Bank’s argument.

[106] First, YK Bank’s position latches onto one sentence in the *Discontinuance Decision*, presumably to make the point that the judge failed to recognize the representative nature of fraudulent conveyance actions, and invites this Court to engage in a dissecting exercise. Such an approach is inconsistent with the governing jurisprudence, which holds that appellate courts “must not finely parse the trial judge’s reasons in a search for error” (*R v G.F.*, 2021 SCC 20 at para 69): similarly, see *Sawatsky v Prince Albert Golf and Curling Club Inc.*, 2025 SKCA 16 at para 70. The Supreme Court has repeatedly instructed appellate courts to take a functional approach to its assessment of the reasons. This is so because “the reasons, read in context and as a whole, in light of the live issues at trial, explain what the trial judge decided and why they decided that way” (*G.F.* at para 69).

[107] Although the judge did not undertake a deep dive into fraudulent conveyance law or the representative nature of those types of actions, there is no doubt that he grasped the essence of the Şekerbank and AB Bank pleadings and the import of the discontinuance for YK Bank and perhaps other, yet unknown, creditors: see, for example, paragraphs 20 and 21 of the *Discontinuance Decision*. His reasons display an understanding of the position put forward by YK Bank: that fraudulent conveyance actions are for the benefit of all creditors. In short, the judge did not fail to grasp the conceptual approach advocated by YK Bank; he just found its arguments unpersuasive.

[108] Furthermore, the judge – who had case managed the 2013 action for many years – was familiar with the parties, the facts, and the nature of the underlying action, i.e. that a small group of Turkish banks and financial institutions had relied on Mr. Arslan’s personal guarantee as security for commercial loans they made to certain companies in that country. In addition to Şekerbank and AB Bank, the judge was aware of two other institutions – Fibabanka and Sardes – who claimed to be creditors, and he understood that after 11 years of litigation, YK Bank had attempted to enter the fray in this province. With that by way of backdrop, I interpret the impugned statement in paragraph 42 of the *Discontinuance Decision*, quoted above, as the judge simply saying that he found YK Bank’s argument disingenuous, by emphasizing once again the improbability of it representing other creditors when the interests of Fibabanka and Sardes had been determined and foreclosed by an earlier decision of the Court: see *Fibabanka A.Ş. v Arslan*, 2023 SKCA 13 [*Fibabanka*].

[109] Second, as Messrs. Arslan and Al-Katib correctly point out, while a fraudulent conveyance action is representative of all creditors, that principle of law does not lead inexorably to the conclusion that an alleged creditor can be added to an action at any time, in any circumstance, or that creditors should not commence their own actions to protect their interests.

5. A deficient pleading is not a sufficient basis to set aside a discontinuance

[110] As discussed above, the judge relied on the decisions in *Driffill* and *Tinning* for the proposition that prior to a judgment, a plaintiff in a fraudulent conveyance action is entitled to discontinue their action. YK Bank submits reliance on those decisions was misplaced because the 2013 action, unlike those in *Driffill* and *Tinning*, was not properly constituted.

[111] A good summary of the principle of law established in *Driffill* and *Tinning* (which was grounded in English law) is found in *James v British Columbia*, 2007 BCCA 547 [*James*], where Huddart J.A., speaking for the majority, wrote as follows:

[38] While neither leave nor a representation order was necessary under r. 16/9 to commence an action, as practice developed in England, a plaintiff could seek such an order, among other matters defining the class to be represented. Any member of that class could apply to be excepted from it and named a party in their personal capacity or as representing others with a common interest. A representative plaintiff, as *dominus litis* until judgment, could discontinue, compromise, submit to dismissal, as he pleased. He had no such power after judgment because the represented persons could not bring a further action. If the action was properly constituted, any person represented in, but not a party to it, was bound by any judgment given in the action, because he was present by representation.

[112] While YK Bank does not take issue with the basic proposition of law spelled out in *Driffill* and *Tinning*, or that AB Bank was the *dominus litis*, it submits those cases were distinguishable because they involved properly constituted representative actions. By this, I mean that the statement of claim stated that it was brought on behalf of all creditors. In contrast, the matter at hand was not pleaded as a representative action. That distinction is important, says YK Bank, because had the 2013 action been properly constituted, the interests of the other creditors would have been put before the courts, and the proceedings would have been subjected to judicial oversight.

[113] YK Bank cites no case authority for the proposition that an improperly pleaded statement of claim in a representative action is reason alone to set aside its subsequent discontinuance, or that it means the plaintiff cannot settle or discontinue the action before judgment. Moreover, even if the law should be applied in that way, I am not satisfied that it gives rise to a basis for appellate intervention in this matter.

[114] Unlike the other cases YK Bank refers to, this was *not* an application for court permission to discontinue; it was an application to set aside a discontinuance that proceeded as of right. That being so, the judge was required to apply the legal test set out in the *McCredie* line of cases to the facts as he found them. As set out above, the governing law respecting the setting aside of a discontinuance places the onus on the applicant to establish either the existence of special circumstance or an abuse of process.

[115] In terms of the latter, YK Bank forcefully argues that “the notice of discontinuance is an abuse of process because: 1) it is an improper attempt to usurp the court’s jurisdiction; 2) A[B]Bank is no longer the *dominus litis* in the 2013 Action; and 3) it attempts to override substantive rights and obligations conferred by statute” (*Discontinuance Decision* at para 29). However, as mentioned, the judge saw no evidence capable of supporting a finding that AB Bank was abusive of the court’s process when it decided that it no longer wanted to prosecute the 2013 action. I see no basis upon which this Court can intervene with that conclusion.

[116] The other footing on which a discontinuance may be set aside is where special circumstances exist. While the list of things that might fall within that basket is not closed, the judge considered but ultimately rejected YK Bank’s arguments in that regard. At the risk of repetition, there were two factors that guided his thinking. He was acutely aware that, as far back as mid-2022, YK Bank had learned of Şekerbank’s potential settlement. Although YK Bank threatened legal action against the persons or parties who had participated in those transactions, nothing materialized over the next two years when it was open to them to bring a joinder application. YK Bank’s dilatory response caused the judge to remark on the delay: “To the time of the immediate application before me, YK Bank seemingly has not taken any legal action to claim a fraudulent preference respecting” the Şekerbank settlement (at para 13). Although he did not explicitly say so, I take him to have assigned weight to the importance of finality in litigation.

[117] The judge was also alive to the strong possibility that, if YK Bank issued its own statement of claim alleging a fraudulent conveyance of the AGTI shares, it was at jeopardy of being struck because of an expired limitation period. While this factor could be seen as favouring YK Bank, the law expressed in the *McCredie* line of cases suggests the opposite. Justice Tallis made this point in *Singh* where he concluded the “controlling principle that emerges from these authorities

is that leave to withdraw a discontinuance should not be allowed where there has been prejudice, in this case a limitation period has intervened, unless ‘special’ circumstances are demonstrated” (at para 14): similarly, see *Hunt* at para 11. A defendant’s loss of a limitation defence is a recognized prejudice.

[118] As mentioned, the judge identified one other factor that bore on his consideration of the matter. As the case management judge, he was acutely aware that if YK Bank’s application were to succeed on the strength of the argument that it represented other creditors, it ignored the fact that other Turkish banks had been denied similar relief because of limitation reasons: see *Fibabanka*. That fact alone made YK Bank’s assertion – that it represented other creditors – simply not credible.

6. Rule 2-11 of *The King’s Bench Rules* (representation order)

[119] In its written submissions, YK Bank builds on its arguments about *Driffill* and *Tinning* to make this point: “Where a non-judgment creditor plaintiff commences a fraudulent conveyance action in a manner inconsistent with class interests, the Court must ensure the class’s interests are being protected. To do otherwise would allow a plaintiff to prosecute the action as a purely private claim, contrary to well-established law”.

[120] Here, I understand YK Bank to argue that, when faced with a fraudulent conveyance action that puts the interests of other creditors into play, the Court must turn its mind to the interests of those creditors to ensure that the prosecution of the action is for the benefit of all members of a defined class. Implicit in YK Bank’s submission is the idea that representative actions stand on a different footing than conventional actions and that the Court must assume an enhanced supervisory role when faced with a motion to set aside a notice of discontinuance of that kind of action.

[121] YK Bank points to a court’s supervisory power over representative actions housed in Rule 2-11 of *The King’s Bench Rules* in support of its position. The relevant parts of that rule read as follows:

Representation order

2-11(1) In this rule:

“**absent person**” means a person for whom a representative is or may be appointed pursuant to this rule and includes an unborn person, an unascertained person, or a person or member of a class of persons who cannot readily be ascertained, found or served, who has a present, future, contingent or unascertained interest in, or may be affected by, a proceeding; (« *personne absente* »)

“**proceeding**” means a proceeding concerning:

- (a) the interpretation of:
 - (i) a deed, will, contract or other instrument; or
 - (ii) an enactment, order in council or municipal bylaw or resolution;
- (b) the determination of a question arising in the administration of an estate or trust;
- (c) the approval of a sale, purchase, compromise or other transaction;
- (d) the approval of an arrangement pursuant to *The Trustee Act, 2009*;
- (e) the administration of the estate of a deceased person; or
- (f) any other matter if the Court considers it necessary or desirable. (« *instance* »)

(2) In a proceeding, the Court may appoint one or more persons to represent an absent person.

(3) If an appointment is made pursuant to this rule, a judgment in the proceeding is binding on an absent person represented pursuant to subrule (2), unless the Court, in the same or a subsequent proceeding, orders otherwise.

(4) The Court may approve a settlement that it is satisfied is for the benefit of the represented or absent persons if, in a proceeding:

- (a) a settlement is proposed; and
- (b) either:
 - (i) a person is represented in the proceeding by a person appointed pursuant to this rule who consents to the settlement; or
 - (ii) some of the persons interested in the proceeding are not parties but to require service on them would cause undue expense and delay and there are other parties of the same interest who consent to the settlement.

[122] YK Bank posits that settlement of the 2013 action engaged the court’s supervisory jurisdiction over representative actions, which meant that, even though the action was discontinued with the consent of all parties, greater scrutiny (and perhaps weight) should have been applied to its application to set aside the discontinuance. The issue it poses on this appeal asks whether, in the context of exercising his discretion, the judge properly considered the process by which a representative plaintiff may discontinue an action.

[123] YK Bank hangs its hat on Rule 2-11. As a starting point, I observe that many of the elements specified in that rule are simply not met. Rule 2-11 only comes into play if the facts at hand satisfy the various elements of that provision, such as, (a) YK Bank being an absent person, (b) the application to set aside the discontinuance being a proceeding within the meaning of that rule, and (c) there was a settlement of the action. Without deciding the point, I remain doubtful that the features triggering the application of Rule 2-11 existed here.

[124] Second, while YK Bank may have wanted the Court to provide oversight over the basis on which AB Bank had settled with Messrs. Arslan and Al-Katib (presumably to establish that the discontinuance constituted an abuse of process), it offers no case law to support that approach. Its argument also ignores several of the judge's key findings of fact. AB Bank had retained new counsel who informed the judge that AB Bank initiated the discontinuance because it no longer wished to participate in the 2013 action: see paragraph 19 of the *Discontinuance Decision*. Apart from backing out of the action, there is no evidence of a monetary settlement with the respondents. Further, as I alluded to above, the judge found nothing to substantiate the suggestion that AB Bank's decision to discontinue amounted to an abuse of the court process.

[125] Lastly, YK Bank's submission conflicts with the plain wording of Rule 4-49(8)(a), which permits a plaintiff to discontinue *as of right* when it is accompanied by the consent of the parties to the action. To read in an additional layer of judicial oversight into a consent discontinuance implies the need for leave to discontinue, which is inconsistent with the plain wording and purpose of this rule.

7. No error regarding substitution

[126] YK Bank also suggests the judge erred by failing to consider its application to set aside the discontinuance with the prospect of substitution in mind. It points to the following case law said to stand for the proposition that, where other non-party creditors believe a plaintiff is not prosecuting the action for the benefit of the class (in this case, by AB Bank discontinuing the action), a member of that class may take carriage of the action: *Moon v Atherton*, [1972] 2 QB 435, [1972] 3 All ER 145 (CA) [*Moon*], *Watson v Cave (No. 1)* (1881), 17 ChD 19 (CA) [*Watson*], and *James*.

[127] I would not give effect to this argument. While all three decisions contain a discussion about the rights of an unnamed plaintiff in relation to the management of a suit by the named plaintiff, none of those cases contemplate a request for substitution *after* a plaintiff has discontinued its action. In addition, those decisions involved class actions, governed by the laws specific to those sorts of proceedings in their respective jurisdictions.

[128] In *Moon*, a tenant in a representative class proceedings sought substitution before the class action was discontinued. *Watson*, an older nineteenth-century English case, involved an application for leave to appeal brought by a dissatisfied class member. In my view, *Watson* simply concerned an allegation of procedural error, with the court concluding that an unhappy class holder should apply to remove the named plaintiff and not seek to appeal from the order.

[129] *James* contains a very detailed analysis of the representative proceeding rules in British Columbia. There, a union and a representative plaintiff brought a class action against the Crown for damages arising from the closure of a sawmill. In due course, the representative plaintiff and union realized they could not succeed with their claim and a consent dismissal order followed. Thereafter, a non-unionized employee commenced his own action, identical to the original one, and had it certified as a class action. On application by the defendant, the non-unionized employee's action was dismissed because it offended the *res judicata* principle. Although that ruling was overturned on appeal, I note the decision in *James* was not about substituting a representative plaintiff, but about the question of whether a non-represented party could bring their own class action after the first action was dismissed.

[130] A more apt case is *Farquhar v Liberty Mutual Insurance Company*, 2004 CanLII 28727, [2004] OTC 39 (CanLII) (ONSC), where an order had been sought to substitute a representative plaintiff in a class action proceeding after the action had been dismissed. That application was refused because the judge found it came too late. As noted in his reasons, the judge understood that the first order of business was to set aside the order before substitution could be entertained. He wrote as follows: “Before [the applicant] can be made a party to the action, the judgment dismissing the action will have to be set aside. The question then becomes whether there is justification to do so. I think not. In my view, the motion to add [the applicant] comes too late” (at para 8). Of note, he went on to observe, “There was ample opportunity prior to judgment to bring the necessary motion to add or substitute a plaintiff with a viable claim. The principle of fairness extends to all parties. ... There has to be some order and finality to the proceedings” (at para 9).

[131] The issues before the judge in the matter at hand were twofold: (a) whether the consent discontinuance should be set aside, and, if so, (b) whether YK Bank should be added as a plaintiff, either by joinder or pursuant to s. 20 of *The Limitations Act*. The judge did not lose sight of YK Bank’s joinder application. As he observed, “Implicit in the way the parties have advanced their respective positions, they accept that, *as a preliminary matter*, the court must decide whether to set aside the notice of discontinuance before deciding whether YK Bank can be added as a plaintiff” (emphasis added, *Discontinuance Decision* at para 24). That sequential approach to the two applications was, he said, consistent with the principle of law in *McCredie*: namely, “without setting aside the notice of discontinuance, YK Bank cannot be added to a discontinued action” (*Discontinuance Decision* at para 25).

[132] YK Bank does not take issue with the sequencing of applications, i.e., that the joinder application came *after* and was contingent upon the discontinuance being set aside. Given the dicta in *McCredie* – “The court has the power to add ... [a party] under the rule, but not ... so long as the discontinuance remains in place” (at para 13) – and YK Bank’s seeming agreement with the order in which the matters were to proceed, the joinder application could only be entertained if the discontinuance were set aside. That being so, YK Bank’s argument on appeal reduces to the proposition that the judge erred by not placing more weight on the representative nature of the proceedings and the fact its joinder application was in the wings.

8. Conclusion on the representative nature of these pleadings

[133] This brings me back full circle to the law pertaining to the setting aside of a discontinuance. Although YK Bank did not frame this ground of appeal in a way that is responsive to the test in *Singh* and *McCredie*, the judge understood that he had the jurisdiction to review the consent discontinuance and that he could set it aside if there were special circumstances or an abuse of the court’s process. That was the legal context in which he had to resolve YK Bank’s application. After considering the evidence and the parties’ submissions, he was simply not persuaded by YK Bank’s arguments about how the representative nature of the proceedings amounted to a special circumstance or that AB Bank had abused the judicial process sufficient to justify exercising his discretion to set aside the discontinuance.

VI. CONCLUSION

[134] Determining whether to set aside a discontinuance and the weighing of the relevant factors involves the exercise of judicial discretion. Discretionary decisions are not immune from appellate intervention; however, for a decision of that type to be set aside, an error of law (including the incorrect identification or application of the governing legal criteria) or a palpable and overriding error of fact or mixed fact and law must be evident. In my view, the *Discontinuance Decision* is not tainted in any of those ways. Nor do I see a basis for appellate intervention on the footing that the *Discontinuance Decision* is so clearly wrong as to result in an injustice. As discussed above, that phrase must be understood in the *Housen* context, which this Court has equated with the palpable and overriding error standard of review. As I noted, I see no such error.

[135] YK Bank’s appeal must, therefore, be dismissed. I would award Messrs. Arslan and Al-Katib one set of costs, taxed in the usual way. Since Şekerbank and AB Bank did not participate in this appeal, there will be no costs order made in their favour.

“Schwann J.A.”

Schwann J.A.

I concur.

“Kalmakoff J.A.”

Kalmakoff J.A.

I concur.

“Drennan J.A.”

Drennan J.A.