KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 54**

Date: **2024 03 27**
File No.: KBG-PA-00172-2023
Judicial Centre: Prince Albert

BETWEEN:

NODRAN LTD.

APPLICANT

\- and -

SUNDOWNER FARMS LTD., INTERMAR DRILLING LTD., MIRAGE HOLDINGS LTD., and MURCO LTD.

RESPONDENTS

CORRECTED JUDGMENT: The text of the original judgment has been changed *per* the corrigendum released April 17, 2024. (A copy of the corrigendum is appended to this corrected judgment.)

Counsel:

Clayton B. Barry	for Nodran Ltd.
Timothy E. Turple	for Murco Ltd.
Nicholas P. Conlon	for Intermar Drilling Ltd. and Mirage Holdings Ltd.

DECISION GERECKE J.
March 27, 2024

A. OVERVIEW

[1] Four holding companies are proxies for four brothers embroiled in a longstanding dispute about the fate of a farm corporation and its underlying assets. Sundowner Farms Ltd. [Sundowner] is the farm corporation. It has four equal

2024 SKKB 54 (CanLII)

shareholders. Most individuals involved in this matter have the Gordon surname. I will use last names only for those with a different surname. The parties other than Sundowner are:

a. Nodran Ltd. [Nodran], whose principal for most of the relevant period was Brian Gordon [Brian], who passed away in early 2023. Nodran is now controlled by Brian's widow Cathy Gordon [Cathy];

b. Murco Ltd. [Murco], whose principal is Murray Gordon [Murray];

c. Intermar Drilling Ltd. [Intermar], whose principal is Barry Gordon [Barry]; and

d. Mirage Holdings Ltd. [Mirage], whose principal is Darrell Gordon [Darrell].

Brian, Murray, Barry, and Darrell were brothers. Only Brian is deceased. The remaining brothers range from about 70 to 76 years of age. At least two have children who want to succeed them in the farm business. Sheldon Gordon [Sheldon] is one of Brian and Cathy's sons. Mark Gordon [Mark] is Barry's son.

[2] In 2007, Nodran and Brian brought an originating notice of motion [First Application] alleging that Nodran's interests as shareholder of Sundowner had been oppressed by the other three shareholders, Murco, Intermar and Mirage, and their principals.

[3] The First Application sought an order for the liquidation of Sundowner so Nodran could extract its share and have paid to it outstanding shareholder loans. For jurisdiction, Nodran relied on ss. 234, 240 and 241 of *The Business Corporations Act*, RSS 1978, c B-10 (since rep) [*BCA*] then in force.

[4] The First Application proceeding [First Proceeding] went through a pre-

2024 SKKB 54 (CanLII)

trial conference, document disclosure, questionings, and case management. At one point a trial was scheduled but changes in legal representation necessitated adjournment of the trial. No new trial date was ever set, and the First Application remains outstanding. No steps have been taken in the First Proceeding since 2018.

[5] Cathy wants two of her sons to share in what she and they consider their birthright, and points to opportunities given at least to Barry's son in exclusion to her children, making this a multigenerational dispute.

[6] Now Nodran brings a new originating application [New Application] dated August 23, 2023, seeking similar relief but in a new and separate proceeding. The New Application is brought pursuant to ss. 16-5, 16-6 and 26-9 of *The Business Corporations Act, 2021*, SS 2021, c 6 [*BCA 2021*]. It seeks liquidation of Sundowner. Under Court supervision, the liquidator would have effective authority to decide disputes among the parties.

[7] There are many factual disputes concerning a variety of issues. In the New Application, the Court received many affidavits and reply affidavits from Cathy (three affidavits in total), Murray (two affidavits), Barry (one), Sheldon (one), Darrell (one affidavit that adopts what Barry attested to), the proposed liquidator, David Lewis (two), Mark (two), and Wayne Giesbrecht (one).

[8] The Court also received crisscrossing applications to strike portions of affidavits.

[9] The matters in dispute trace back at least to the 1990s. The disputes continued beyond commencement of the First Proceeding. Some parties characterize them as new disputes, others as the continuation of disputes. Now a rift has arisen between Barry and Darrell, who orchestrated a joint venture [JV] between Sundowner and Mark, and Murray who says he was unaware of and did not approve of the JV.

2024 SKKB 54 (CanLII)

[10] A brief recounting of the disputes will assist in illustrating the many controversies. These controversies exist concerning the New Application but most also are in dispute in the First Application:

a. Nodran alleges that Brian was forced out as a director of Sundowner in 2007. The respondents say that Brian voluntarily withdrew as director.

b. Nodran claims that the respondents refused repayment of Nodran's shareholder loan while having their holding companies repaid. They reject that, contending that Nodran had no shareholder loan to be repaid because in years preceding 2007 it inappropriately charged to Sundowner considerable personal expenses of Brian and Cathy.

c. Cathy says that the respondents have been removing substantial funds from Sundowner since 2007, while sharing none with Nodran. They say that was all earned, and that Nodran received nothing because it stopped contributing to the operations of Sundowner.

d. Brian is alleged to have improperly taken funds and used assets of Sundowner for his own benefit. Cathy denies that.

e. Brian and Cathy are alleged to have improperly subdivided a portion of SW 12-47A-24 W2 in 1987, on which they built their home. Cathy disputes any wrongdoing.

f. Nodran alleges that it has not been provided with corporate information, that shareholder meetings have not been held, and that director resolutions have been passed without proper authorization.

g. Nodran alleges that Sundowner, without valid authority, entered into a joint venture with Mark and his corporation, and thereby effected a

2024 SKKB 54 (CanLII)

fundamental change in the operations of Sundowner.

2024 SKKB 54 (CanLII)

[11] In the New Application, Nodran seeks to bypass the mire in which the First Proceeding is stuck. It contends that the New Application is an elegant and efficient solution to the disputes in which the family and corporation are deadlocked.

[12] The respondents vehemently oppose the liquidation order sought by Nodran. Murco applies to strike the New Application on the basis that it is essentially the same as the First Application and thus is an abuse of process. In the alternative, Murco asks that the First Application and New Application be consolidated. Intermar and Mirage support Murco's application, particularly in respect of the request to strike the New Application. The respondents also say the First Application is a collateral attack on a March 5, 2008, fiat of Konkin J. [*Konkin Fiat*] that directed the First Application to a trial of the issues.

[13] For the reasons that follow, I find the New Application to be an abuse of process and order that it be struck in its entirety.

B. FIRST APPLICATION AND ITS PROCEDURAL HISTORY

[14] Brian and Nodran brought the first application, naming Sundowner as a respondent along with Barry, Murray, Darrell and their three holding companies (no individual was made a party to the New Application but the same corporations are parties). The relief sought was repayment of shareholder loans to Nodran and Barry, and liquidation and dissolution of Sundowner with equal distribution of its assets after repayment of its debts.

[15] As grounds, Nodran and Brian alleged that the respondents had oppressed their interests and failed to honour the terms of a unanimous shareholder agreement.

[16] In 2008 the First Application came before Konkin J. (To avoid confusion, I note that the *Konkin Fiat* refers to Brian as Robert. They are the same person. Brian's

full name was Robert Brian Gordon.)

[17] Konkin J. determined that too much was in dispute for a summary disposition of the First Application, though he made certain findings:

a. Brian was no longer a director "by his own choice" and had been excluded from day-to-day operations and from receiving financial information.

b. The resolution of whether the majority shareholders had acted oppressively would require a trial of the issue.

[18] Konkin J. ordered a trial of certain issues (which amounted to essentially all the issues raised by the First Application): the calculation of the shareholder loans owing to Nodran and Brian, whether their interests had been oppressed by the majority shareholders, and (if there was no oppression) whether a unanimous shareholder agreement that had been put into evidence was in force and obligated Sundowner to buy out Nodran's shareholder interest. Konkin J. also made the following orders concerning the conduct of the First Proceeding:

a. Nodran and Brian would be the notional plaintiffs, with the respondents to be the notional defendants.

b. A pre-trial conference could be set if the parties wished.

c. To foster a pre-trial conference, he directed Sundowner to provide a calculation of shareholder loans of Nodran and Brian along with sufficient backup information so the parties could see how it was calculated.

d. He directed Sundowner to deliver its three most recent financial statements and established a process for Brian and Nodran to obtain

2024 SKKB 54 (CanLII)

further documentation from Sundowner.

e. If the pre-trial did not resolve the disputes, he directed the setting of a date for the trial of the issue.

2024 SKKB 54 (CanLII)

[19] Konkin J.'s orders were not appealed.

[20] In August 2008, several months following the *Konkin Fiat*, Nodran and Brian applied to have all respondents held in contempt and for Barry, Murray, and Darrell to be jailed. The respondents had met the 30-day deadline for providing the accounting of the shareholder loan, serving it by April 1, 2008. The contempt application was brought to obtain follow-up information when the respondents had also expressed that Brian had documents he had not shared. The contempt application was dismissed with costs to the respondents in any event of the cause. From my review it appears that it was effectively determined that the contempt application was premature because Nodran and Brian had never taken out a formal order with respect to the *Konkin Fiat* – a necessary step to formal enforcement of it.

[21] The pre-trial conference was held November 8, 2008. No settlement was achieved. The presiding judge ordered that the First Application proceed in accordance with *The Queen's Bench Rules*, now *The King's Bench Rules*, set a deadline for disclosure of documents, directed the parties to complete questioning, and that once those steps were complete the parties could return to the pre-trial.

[22] Barry was examined by Nodran's counsel in April 2009, which generated numerous undertakings. In September 2009, Nodran and Brian applied to require Barry to answer the undertakings. It would have been preferable for him to have done so without an application, but they were furnished in short order. It seems that when Nodran changed counsel to Jay Watson in 2011 those responses to undertakings did not make their way to him, though that does not appear to have been Barry's responsibility.

[23] Document disclosure appears to have occurred promptly, with amended document lists exchanged in 2010 and 2011. Barry was questioned by the applicants' then counsel on April 1, 2009. Barry attests that Brian failed or refused to submit to questioning so that was not completed. Brian and Nodran engaged new counsel, Jay Watson, in the fall of 2011.

[24] Cathy attests that the parties engaged in mediation in 2012 with an experienced mediator and further pre-trial conference sessions with Rothery J. in 2013. That is uncontroverted. Those attempts at settlement did not resolve the matters in dispute.

[25] A trial date was set for late 2014. It did not proceed because Murray and Murco had to find a new lawyer. The respondents had started with a single lawyer. Grant Carson, K.C., who had been representing the three individual respondents and their holding companies found himself in a conflict of interest. Murray and Murco engaged their own counsel – Mr. Turple, who still represents them – and the trial was adjourned because of Mr. Turple's unavailability for the scheduled dates. Mr. Carson continued as counsel for Barry and Darrell and their holding companies.

[26] In February 2015, Mr. Carson wrote to Mr. Watson to ask whether the Court had been contacted to reschedule the trial. No response to that inquiry is in evidence.

[27] In 2016 Mr. Carson withdrew as counsel for Barry and Darrell and Intermar and Mirage and was replaced by Anil Pandila, K.C.

[28] Brian and Nodran applied in June 2017 for an order requiring the respondents to attend for further questioning. He also claimed that Barry had never provided the undertakings arising from the 2009 examinations. That led Barry to file an affidavit demonstrating that those had been provided in October 2009 as discussed above. The several-year gap of Nodran not having Barry's responses was not the fault

2024 SKKB 54 (CanLII)

of the respondents.

[29] Barry says Brian insisted on the additional questioning in 2017 before a new trial date could be scheduled. In his affidavit for the June 2017 application, Brian attested that Sundowner's "assets, finances, and ongoing business (generally) will be issues in any trial" arising from the First Application. By then 10 years had passed and Brian was asserting that the ongoing operations of Sundowner would be in issue at that trial. As well, the June 29, 2017 notice of application asserted that "… the Applicants have accused the Respondents of ongoing oppressive conduct and believe that the oppression has continued from March of 2009 to present" as a ground for why further questioning would be required.

[30] Thus, in 2017, Brian resisted setting down new trial dates until the questioning resumed so that the alleged ongoing oppression could be explored.

[31] In response to the June 2017 application, Popescul C.J. appointed himself as case management judge on August 22, 2017, and directed that all parties could further question the other parties given "the time that this action has laid dormant". Popescul C.J. also directed that any further issues concerning conduct of the First Proceeding could be brought before him for resolution.

[32] In 2018 Brian and Nodran changed lawyers again, to Grant Scharfstein, K.C. On May 24, 2018, Popescul C.J. as case management judge set certain deadlines for steps. He directed that the parties exchange updated affidavits of documents by July 2018, with all questioning to be completed before November 2018. His fiat provided that in the event of any scheduling issues, a party could request a conference call to set dates.

[33] On or about July 19, 2018, Barry, Darrell, and Murray provided their updated affidavits of documents.

2024 SKKB 54 (CanLII)

[34] On September 17, 2018, Mr. Scharfstein withdrew as counsel for Brian and Nodran. They did not engage new counsel, and the questionings ordered by Popescul C.J. did not proceed by the deadline of October 31, 2018. That is not the fault of the respondents.

2024 SKKB 54 (CanLII)

[35] No further steps were taken in the First Proceeding until after the New Application was served in August 2023. In an affidavit sworn by Cathy on October 24, 2023, in the New Application, she states:

> 15. It is my belief that any further attempts without the involvement, assessment and recommendations of an independent liquidator and the implementation of a court supervised liquidation plan, will simply result in the continuation of the situation which has existed over the past 20 years.

C. PROCEDURAL MATTERS CONCERNING NEW APPLICATION

[36] After the New Application was served, the respondents took several steps. They sought adjournments, which were granted. Nodran wanted an interim order to preserve Sundowner's assets but did not obtain it. The chambers judge cautioned the respondents that they should do nothing in the meantime such as sell land or cause Sundowner to pay legal fees.

[37] The respondents applied both to strike the New Application and, in the alternative, to consolidate it with the First Proceeding. On the application of Murco the New Application, which had been filed in the Judicial Centre of Saskatoon, was transferred to the Judicial Centre of Prince Albert.

[38] Shortly after filing the New Application, counsel for Nodran wrote to the Court to ask that its commencement be brought to the attention of Popescul C.J. Popescul C.J. then wrote the following as part of an internal Court email that has been made available to the parties. For clarity, the Saskatoon file that he refers to is the New Application and the Prince Albert file is the First Proceeding.

> … I did get a copy of the letter. I reviewed it and wondered why I am being notified about that, since even though I am the case management judge on the Prince Albert file, I am not the case management judge the [*sic*] Saskatoon file. … If the parties want me to be the case management judge on both files, they can file a formal request pursuant to Rule 4-5. …

2024 SKKB 54 (CanLII)

[39] On November 6, 2023, Murco made a formal request to have Popescul C.J. appointed as case management judge in respect of the New Application. To my knowledge, Popescul C.J. has not made a determination regarding that request. I presume that he is awaiting my reserved decision. The parties agreed that I could consult with Popescul C.J. to ensure that I understood his intent in writing that communication and I did so. In brief, he wrote that email merely to express that unless and until he is made the case management judge of the New Application, he has no role in it. He was not in any way speaking to the merits of the New Application.

[40] The Court received multiple applications to strike portions of affidavits filed in the New Proceeding. The objections related to late filing, reply affidavits that were not confined to new matters raised by others without having first obtained leave, a surreptitious recording of an incident between certain individuals, hearsay, argument, opinion, and speculation, and evidence of settlement negotiations.

[41] Upon review, I determined that it was not feasible to hear all the applications at the same time. On November 22, 2023, I directed that I would receive argument only on the applications to strike portions of affidavits and the application to strike or consolidate.

[42] During oral argument on November 24, 2023, the parties agreed that it would be appropriate for me to review such portions of the court file for the First Proceeding as I saw fit.

[43] Also during oral argument, the parties agreed that I need not render decisions on the applications to strike portions of affidavits, nor make rulings on

individual objections. Instead, they each agreed that it would be sufficient for me to attribute such weight as I consider appropriate to the evidence, which is what I have done.

[44] For the benefit of the parties, I offer the following observations concerning the objections to affidavit evidence.

[45] This is a complex matter. Since the New Application was filed, the Court has received a full box of some 13 crisscrossing affidavits and multiple briefs. Allowing some latitude on multiple affidavits from the same individual saves the Court from having to review the entirety of the court file for the First Proceeding. In this rare instance, it enhances efficiency, while in my view no party has been prejudiced.

[46] As well, it appears to me that the affidavits filed late were nonetheless filed sufficiently in advance of oral argument for every party to put forward the case that it wished.

[47] Therefore, I have not disregarded evidence simply for having been filed late or where a second or third affidavit was not confined to new matters raised elsewhere. Given the volume of evidence filed on this application, I also see no prejudice arising from Darrell having filed a brief affidavit stating that he agrees with his brother's evidence. Darrell being a party, the Court benefits from his sworn affirmation of that even if there is an element of hearsay. That Darrell swears that he agrees with the contents of Barry's affidavit does not render Barry's evidence more credible.

[48] The surreptitious recording mentioned above relates to an altercation or incident between Cathy and Mark. I have not reviewed it, nor the transcript that was filed. There are good policy reasons to avoid or minimize the use of surreptitious recordings in court. I do not need a recording of an altercation to establish that the parties are in conflict, nor that multiple parties may be guilty of untoward conduct

2024 SKKB 54 (CanLII)

toward others involved in this matter. Further, the incident as described in Mark's affidavit does not bear on whether the majority shareholders have engaged in oppressive conduct or the similarity between the two applications.

D. ANALYSIS

[49] The respondents contend that the existence of the First Proceeding and the *Konkin Fiat* is fatal to the New Application. For several interrelated reasons, I agree. Below is a summary. In subsequent sections I explore those reasons in greater detail.

[50] First, *Pelletier Estate v Uteck*, 2008 SKQB 218, 315 Sask R 304 [*Pelletier Estate*] establishes that where two matters that are the same are commenced, the second one should not be permitted to continue. In this judgment, I use the term "substantially similar", as the test is not that the matters be identical in every respect. It is within the Court's discretion to strike a multiplicitous action as an abuse of process.

[51] I find the two matters to be substantially similar such that the New Application is an abuse of process. Though the New Application goes beyond the First Application in time and events occurring after 2007, those later events can be addressed in the First Application by amending pleadings. Indeed, as late as 2017 Nodran and Brian stated on the record that they intended to litigate ongoing oppression within the First Proceeding.

[52] Second, although Nodran asks me to order the appointment of a liquidator on the basis of what it says are uncontroverted examples of oppression, a recent Court of Appeal decision instructs that to do so would be an error because a Court that orders an oppression remedy must approach the situation holistically. Such a holistic approach would engage the full background of disputes between the parties and magnify the significance of the overlap with the First Application.

[53] Third, the *Konkin Fiat* ordered that the issues raised in the First

2024 SKKB 54 (CanLII)

Application be determined at a trial. The New Application may or may not represent a collateral attack on that order – I discuss that below – but its existence is a very real factor. Parties do not get to select which orders to obey.

[54] Each of those might be sufficient reason for me to deny Nodran the relief that it seeks. Together they comprise an overwhelming basis to do so.

[55] My detailed reasons concerning the foregoing follow.

1. If it were possible to determine that the respondents' conduct inside and outside the litigation warranted approval of a shortcut approach, Nodran has failed to establish that the responsibility rests largely or entirely on the respondents

[56] In its written and oral submissions, Nodran suggested that the conduct of the respondents should motivate the Court to find a quick way to resolve the disputes. They even suggested to me that cooler heads would prevail once a liquidator is appointed. I am not certain whether that springs from naiveté or disingenuousness.

[57] I already set out some history for the First Proceeding. Nodran was the party seeking a remedy and was directed by Konkin J. to carry the role of plaintiff and as such bore the most significant burden to advance the First Proceeding. Nodran asserts that it would be impossible to achieve a resolution in the First Proceeding.

[58] Above I outline a broad history of the First Proceeding. It is deeply concerning that a trial has yet to occur. My view is that the applicants bear at least equal and probably greater responsibility for that. Cathy essentially characterizes the respondents as being consistently and constantly obstructionist in respect of the First Proceeding. I agree that the First Proceeding file reflects that Nodran and Brian had to do some "chasing" from time to time to keep things moving, but it was not one-sided. That is apparent from the procedural history set out above.

2024 SKKB 54 (CanLII)

[59] In addition, it appears to me that the dormant period from 2018 to 2023 was entirely the responsibility of Nodran and Brian. The only explanation for their inaction offered to the Court relates to legitimate and severe health concerns. If I were faced with an application to dismiss the First Application for want of prosecution, those health concerns would represent a strong basis for Nodran to argue that the delay was justified. However, Cathy's stance is essentially that the respondents are so obstructionist that she can never get a fair proceeding so a new one must be started. I am unpersuaded of that.

2024 SKKB 54 (CanLII)

[60] Nodran also filed evidence that, outside of the First Proceeding, Cathy and her family have been subjected to threats and acts of violence. Those allegations are denied by the respondents, who accuse Brian and Cathy of improper conduct including obstructing farm operations. None of that can be determined on affidavit evidence.

[61] I am unaware of any provisions in the Rules that contemplate a shortcut approach to litigation because of parties' misconduct outside of court. Such misconduct, if established, could result in interim injunctive relief, but Nodran seeks final orders. In any event, Cathy's allegations fail to persuade that the proper course is to permit the New Application to proceed. Further, misconduct within litigation may be addressed through costs.

2. If the New Application is not struck, the issues raised in it would need to be determined at a trial

[62] Because I heard only the respondents' counter-application, I did not receive full oral submissions on the New Application. That said, it was addressed fully in the materials and touched on extensively in oral argument. I am satisfied that if I were not striking the New Application as an abuse of process, I would be unlikely to find that it could be determined without a trial of the issue.

[63] Intermar and Mirage cite *Stromberg v Olafson*, 2023 SKCA 67 [*Olafson*], which was a 2-1 decision of the Court of Appeal. *Olafson* is relevant for several reasons, the first of which I address in this section. Writing for the majority, Barrington-Foote J.A. held that summary determination was not available because of the procedure chosen by the applicant and because it was not amenable to summary determination. Both findings apply here as well.

[64] *Olafson* involved allegations of oppressive conduct between shareholders of a corporation. The action was commenced by statement of claim, though that matters little. Ten months after issuance of the claim, one party applied within the action seeking interim and final relief based on an alleged act of oppression not pleaded in the statement of claim. The alleged oppression had not yet transpired when the claim was issued. The chambers judge granted relief that ordered the respondents to purchase the applicant's shares for a specified sum.

[65] Relevant to the current discussion, Barrington-Foote J.A. found that, as an application for final relief, the oppression application should have been brought as an application for summary judgment. A chambers judge cannot grant summary judgment if there is a genuine issue to be tried unless the parties have agreed to have the issue determined by summary judgment and the judge is satisfied that it is appropriate to grant summary judgment. As there were genuine issues for trial, "justice demanded a trial" because of the nature and complexity of the issues and the amounts at stake: para. 11. Later, Barrington-Foote J.A. stated:

> [87] … A litigant cannot avoid the requirements imposed by the summary judgment process – which was specifically designed to ensure that a claim will not be decided summarily on the merits unless that would result in a fair and just adjudication – by asserting that they could not have met that standard but that the procedural path they chose was nonetheless good enough. That would allow them to end run the principal goal embodied by the summary judgment rules and which underpins the *Rules* as a whole – that is, absent settlement, a fair process that results in a just adjudication of the dispute, should adjudication be necessary. The explanation by Kyle's counsel as to

2024 SKKB 54 (CanLII)

> why Kyle did not seek summary judgment on the main action confirms that the Oppression Application was fundamentally misconceived from a procedural perspective from the outset.

[66] Here, Nodran did not apply for summary judgment. Leaving to one side the respondents' application to strike, could Nodran have done so?

[67] The mere fact that Nodran's applications were commenced by originating application did not bar access to the summary judgment procedure. In *Heebner v Heebner*, 2017 SKQB 343, Chow J. was faced with a summary judgment application within an action commenced by originating application. He made procedural orders that would potentially facilitate a summary judgment application and cast no doubt on whether the summary judgment procedure would be available if the normal tests were satisfied.

[68] *A.C. Forestry Ltd. v Big River First Nation*, 2023 SKCA 96, [2023] 10 WWR 563, was an appeal from summary judgment. That proceeding was commenced by two originating applications. In allowing the appeal, Jackson J.A. found that the chambers judge's error was in granting summary judgment on a partial basis for the principal reason that the judge failed to consider whether partial summary judgment was appropriate in the context of the litigation as a whole. (As a secondary reason, she concluded the partial summary judgment provided minimal time or financial efficiency.)

[69] Finally, I find support in para. 86 of *Olafson*, which was commenced by statement of claim rather than originating application. In holding that the application there should have been brought under Rule 7-2, Barrington-Foote J.A. stated:

> [86] … That the appellants did not expressly object to the fact it was in the wrong form does not mean that the Chambers judge could use the enhanced fact-finding powers granted by Rule 7-5. Nor, and more importantly, did it mean that he could grant summary judgment on oppression, even if there was no genuine issue for trial. <u>That would have been equally true if the application for an order that the 2017 allocation was oppressive, and for the relief granted, had been made</u>

2024 SKKB 54 (CanLII)

> in the form of an originating application. …
>
> [Emphasis added]

[70] Thus, summary judgment was procedurally available to Nodran. That is not how Nodran proceeded. It invoked none of the summary judgment rules.

[71] The evidentiary disputes in this matter trace back several decades. They permeate every aspect of this proceeding. The parties agree on little concerning the time since 1990 or at least 2000. Nodran's application would not only have the Court determine hotly contested issues of fact summarily to determine that oppression has occurred, but also delegate to the liquidator the first instance determination of issues crucial to the parties.

[72] If I were to not dismiss Nodran's application, the principles discussed above from *Olafson* would necessarily take centre stage.

[73] Even if Nodran were to utilize the summary judgment procedures, I likely would order a trial of the issue. The enhanced fact-finding ability under the summary judgment proceeding would be wholly inadequate to resolve the factual disputes in this matter. Because of my findings herein I need not detail those factual disputes, but they are plentiful and deep. Nodran contends that the intractable nature of those disputes is exactly why I should grant the relief it seeks, but that is backwards. Those disputes are why there must be a trial. As Barrington-Foote observed in *Olafson*:

> [115] … *Hryniak* [2014 SCC 7] was not an invitation to sacrifice fairness – the foundational consideration that has always informed the cautious approach to the resolution of disputes based on affidavit evidence – to efficiency. Proportionality never calls for a court to lose track of the principal goal, which is a fair process that results in a just adjudication of the dispute.
>
> [Emphasis added]

[74] For reasons similar to those given in *Olafson* and the *Konkin Fiat*, and by Bardai J. in *Bell v Angus Holdings Ltd.*, 2023 SKKB 258, there appears to be too much conflict in the evidence for the Court to determine summarily what are the parties'

2024 SKKB 54 (CanLII)

reasonable expectations, and whether any breaches of those expectations were oppressive, unfairly prejudicial, or unfairly disregarded the applicant's interests.

3. Where two substantially similar matters are commenced, the second one should not be permitted to continue

[75] Saskatchewan jurisprudence contains few reported decisions where a party commenced a second proceeding that was substantially similar to a prior one that remained extant. The starkest example cited to me was *Pelletier Estate*. The Pelletier Estate's executor caused it to sue the Utecks in separate actions in different judicial centres. Though the pleadings contained differences, the alleged wrongs in both amounted to the wrongful taking of moneys through fraud, breach of trust and other alleged wrongs. The Utecks applied to strike the second-in-time claim as an abuse of process. Currie J. referred to the following passage from *Sagon v Royal Bank of Canada* (1992), 105 Sask R 133:

> [19] Finally, a separate mention should be made of the power of the court to prevent abuse of its process, a power which is inherent as well as conferred under rule 173. Bullen and Leake [Bullen and Leake's *Precedents of Pleadings*, 12th Ed] defines the power as follows at pp. 148-149:
>
> > "The term 'abuse of the process of the court' is a term of great significance. It connotes that the process of the court must be carried out properly, honestly and in good faith; and it means that the court will not allow its function as a court of law to be misused but will in a proper case, prevent its machinery from being used as a means of vexation or oppression in the process of litigation. It follows that where an abuse of process has taken place, the intervention of the court by the stay or even dismissal of proceedings, 'although it should not be lightly done, yet it may often be required by the very essence of justice to be done'.
> >
> > …

[76] Currie J. observed that the only difference between the first and second actions was the relief sought. Other than that relief, the circumstances were identical. He noted that the Rules recognize that sometimes related actions exist and should be heard together, but that is a circumstance where there merely is overlap. He determined,

2024 SKKB 54 (CanLII)

however, that the claims by the estate were “the same claim”: para. 15. He then ruled out consolidation of the two actions because that would represent approval of the abuse of court inherent in commencing the second action:

> [16] The claim for different relief does not make the Weyburn action different from the Regina action. To paraphrase the principle adopted by Chief Justice Johnson in *Continential Auctions*: Mr. Pelletier has commenced the Regina action, by which he can recover everything to which he is entitled, and so he ought not to have commenced the Weyburn action. Having decided that he wanted to expand the relief that he was seeking, arising from the wrong that he alleges to have been committed by the Utecks, he ought to have sought an amendment of the statement of claim in the Regina action, under Rule 165 or Rule 166.
>
> [17] <u>The Weyburn action constitutes an abuse of the process of the court, because it creates a multiplicity of actions.</u> Typically a multiplicitous claim is dismissed, but Mr. Pelletier has applied instead to consolidate his Weyburn action with the Regina action. If I do that, he says, the problem of multiplicity will be resolved.
>
> [18] <u>If I consolidate the actions, though, effectively I will approve the abuse of the court’s process. Regardless of how strongly I may disapprove in words of the commencement of a second action for the same claim, if that second action is simply consolidated with the first action Mr. Pelletier will conclude that he made the right choice in commencing the second action. Likewise, litigants in other actions who look to this matter for guidance will conclude that, while commencing a second action for the same claim technically is an abuse of process, doing so still is effective because there is no adverse consequence</u>.
>
> [Emphasis added]

[77] I cannot state it more effectively, and I adopt Currie J.’s reasoning here.

[78] In *Pelletier Estate*, the circumstances of the two actions were identical, though Currie J. noted differences in the relief sought. If the First Application and New Application are sufficiently similar, *Pelletier Estate* stands as compelling authority on what the Court should do.

[79] Here, however, Nodran contends that substantial differences exist between the First Application and this one, such that I should not apply *Pelletier Estate*. I turn to that question now.

2024 SKKB 54 (CanLII)

4. Are the First Application and New Application substantially the same action?

(a) Similarity of the two proceedings

[80] I find they are substantially similar.

[81] The two applications seek similar relief. In each, Nodran asks for an order under provincial business corporations legislation that Sundowner be liquidated and its assets distributed among its shareholders.

[82] Nodran contends that the *BCA* was not cited in the First Application but that is factually incorrect. It invoked oppression remedy provisions of the *BCA*, just as the New Application does with the *BCA 2021*.

[83] The originating notice for the First Application expressly seeks repayment of shareholder loans to Nodran and Brian. Though the New Application's originating application does not contain a corresponding request, that is undoubtedly part of what Nodran seeks. Nodran's evidence is that the other shareholders have obtained repayment of their shareholder loans while it has not, and the draft order contains provisions that address this heading. How could it not? The liquidation and unwinding of Sundowner would necessitate the reconciliation and repayment of all shareholder loans owing to or by Sundowner.

[84] The New Application goes somewhat further than the First Application by also seeking an accounting of payments or benefits accorded to Murco, Mirage and Intermar and their principals since 2001, but there can be no question that any such payments and benefits were put into issue by the First Application. In that proceeding, Nodran alleged that it had been frozen out of the farm operation and that Murco, Mirage and Intermar and their principals unfairly received payments and other benefits not shared with Nodran and Brian.

2024 SKKB 54 (CanLII)

[85] Thus, the relief sought by the applicants in the two proceedings is substantially the same.

[86] The parties also are substantially the same. The principals of corporations have not been named in the New Application, but that matters little. The holding companies appear to have served as proxies for their principals throughout. Suppose that I were to permit the New Application to survive and proceed, and Nodran obtained recovery. Would Brian's estate be able to later claim for the same recovery? Obviously, it could not. The substitution or omission of a party does not make it a different claim, and the corporate parties are identical. In essence, the identity of the parties in the two proceedings is no distinction at all.

[87] Thus, any difference in relief sought and parties is superficial. In substance, they are the same parties trying to obtain the same relief.

[88] The next question is similarity of the circumstances.

[89] What are the new issues that Nodran says distinguishes the New Application from the First Proceeding? They say the respondents continue to act in an oppressive manner. That is not new, but Nodran contends that some actions are new in character. Nodran says that Sundowner has ceased operating because of the JV. Barry caused Nodran to cancel its crop insurance, and Nodran asks the Court to conclude that the respondents are winding up Sundowner in their own unlawful way.

[90] The respondents contend that, at most, the New Application alleges the continuation of conduct alleged in the First Application. Perhaps some additional matters have arisen, but it all falls under the umbrella of alleged oppression. They say that all the new allegations can be swept into the First Proceeding through amendments to the pleadings.

[91] Intermar and Mirage argue that the two actions are so intertwined that it

2024 SKKB 54 (CanLII)

is not possible to decide whether there has been oppression to grant the order sought in the New Application without making findings that would overlap considerably with what would necessarily be decided in adjudicating the First Application. If I do not dismiss the New Application or consolidate the two proceedings, and different judges hear the two applications, the respondents contend that could lead to inconsistent findings. That is a legitimate concern, similar to what Barrington-Foote J.A. articulated at para. 11 of *Olafson*. There exists that much overlap between the two proceedings.

2024 SKKB 54 (CanLII)

[92] Also, Nodran's stance that the two matters are distinct is contradicted by the assertion by Nodran and Brian in their June 29, 2017 application that they would litigate ongoing oppression within the First Proceeding.

[93] Further, in bringing the New Application Nodran did not limit itself to adducing evidence of the last handful of years; it went back to the beginning. Nodran's evidence on the New Application of the history of Sundowner and the family farm before it, how issues arose between the Gordon brothers, and the early years of those disputes, is in many respects more detailed than what it filed on the First Application (that is not the case concerning conflict arising in 2006 and 2007, where Brian's affidavits filed in 2007 delved into more detail than here).

[94] Cathy's affidavits in the New Application further illustrate the point. They relate the history of the family farm, the history of Sundowner, which was incorporated in 1975 when Brian's father was a director and officer along with Brian, Murray, Barry, and Darrell. The oppressive acts alleged by Cathy include (for convenience I have followed her usage of naming individuals rather than their holding companies):

a. Brian being unilaterally prevented from participating in Sundowner by Barry, Murray and Darrell starting in 2007, with the latter three making all decisions concerning Sundowner since then.

b. In the years prior to 2007, Barry, Darrell and Murray had their shareholder loans repaid in full by Sundowner while Brian's shareholder loan to Sundowner was not. The respondents say that was because Brian had caused Sundowner to pay for personal items, but Cathy says that in paying Darrell's shareholder loan in 2017, no adjustments for personal items were made. The adjustments made concerning Brian's shareholder loan traced back at least to 2001.

c. Cathy avers that since at least 2007, Barry, Murray and Darrell have failed to include Cathy and Brian's children in succession planning while involving some of their own children. It is unclear from her affidavits whether she views that as oppressive, but that appears to be so, as she argued before me that the involvement of the next generation represents a "new set of facts".

d. Starting in 2007, Brian was frozen out of Sundowner's bank account, with his signing authority revoked, and locked out of its shop.

2024 SKKB 54 (CanLII)

[95] In opposing the relief sought by Nodran, the respondents point to alleged wrongdoing by Brian (part of which they remedied in a self-help manner by applying offsets to his shareholder loan) that preceded 2007 by several years. As I discuss below, the concept expressed in *Olafson* is that it all must be treated as being all of a piece where an oppression remedy is involved. But here it ***is*** all of a piece. Everything is inextricably intertwined.

[96] Nodran conceded in oral argument that there is no legal impediment to resolving all issues in the First Proceeding. Instead, they point to practical impediments, i.e., that the respondents will not deal with Nodran. As I observe above, I am not persuaded of the factual basis for that. More importantly, it is difficult to conceive of a circumstance where practical impediments would justify the same party commencing a

new proceeding against the same parties for the same very final relief on essentially the same grounds. Finally, had the parties followed the orders made in the First Proceeding, including those of Popescul C.J., it probably would have been resolved long ago.

(b) Conclusion on similarity of the two actions

[97] I conclude that the two proceedings are sufficiently similar that the New Application is an abuse of process, and that *Pelletier Estate* applies. Both the New Application and the First Proceeding feature oppression as the primary complaint. The remedy sought in both is liquidation. To the extent that the circumstances diverge, that is attributable to the passage of time. Ongoing oppression was alleged by Nodran within the First Proceeding. They are multiplicitous actions.

[98] To the extent that any differences exist, I cannot imagine this Court allowing two such similar actions to proceed on parallel tracks, particularly in the face of *Pelletier Estate*.

5. *Olafson* and how oppression claims must be analyzed

[99] Beyond my findings above, *Olafson* provides important guidance that further impacts on my view of the actions' similarity to one another. Specifically, this point relates to the manner in which *Olafson* directs that oppression claims be analyzed.

[100] Barrington-Foote J.A. found that the chambers judge erred by attempting "to discern oppression based on isolated uncontroverted facts, without consideration of the surrounding circumstances": *Olafson* at para 125. As Barrington-Foote J.A. explained at para. 126: "oppression is an equitable remedy that deals with reasonable expectations that depend on the circumstances and the entire context".

[101] Among the authorities cited by Barrington-Foote J.A. to support that finding was *Olszewski v Millennium III Properties Corporation*, 2007 SKQB 257, 300 Sask R 128 [*Olszewski*]. There had been a series of court applications arising from an

2024 SKKB 54 (CanLII)

oppression claim by a minority shareholder. One respondent, Mr. Kearley, offered to buy out the applicant. The applicant still wanted to proceed with his oppression claims but then complained in a cross-appeal that his oppression application should have been granted summarily. While the cross-appeal was still outstanding, the applicant applied again to the Court to advance oppression claims focused on what he considered an inadequate allocation of consulting fees. Mr. Kearley acknowledged the reduction from consulting fees that would have been payable but offered explanations. Thus, the legitimacy of the reductions was in dispute. Wilkinson J. stated:

> 48) There are many reasons to refrain from dealing with the extensive issues between the parties in a piecemeal fashion. There has been a trial of an issue directed on the issue of oppression. That order is presently under appeal. The very issue before me was added to the applicant's notice of cross-appeal, and is also before the Court of Appeal. The respondents take the position in their appeal that the offer to purchase the applicant's shares at fair market value renders oppression proceedings moot. How that will resolve issues with respect to valuation (the appropriate date of valuation; the appropriate methodology, and whether, or to what extent, a minority discount, should apply) is not explained.
>
> …
>
> 51) Added to those concerns, it is not simply the value of the shares, *per se*, that is in dispute here. There is the matter of the shareholders' loan accounts and the withdrawals from those accounts. There are issues regarding the related "GPs" or partnership units, the applicant's claim for loss of business opportunity, and Mr. Kearley's claim that losses were incurred as a result of the applicant's failure to invest in the units committed to in the fiscal year 2006. There are issues relating to other items that could be considered "shareholder compensation", regardless of whether they are considered as salary or service fees. Whether these can all be addressed within the context of an oppression proceeding is a question for another day ….
>
> 52) As the case law indicates, the fundamental objective is to ascertain what the reasonable shareholder expectations would be in the circumstances of the case. Here, the principals operated under a rather loosely worded profit-sharing arrangement that is open to interpretation. The interpretation is tied to other so-called verbal agreements and understandings, although the principals disagree as to what the verbal agreements were. The history of their dealings, their customary practices, and the pattern of conduct during the course of their relationship must all be scrutinized. Credibility determinations have to be made. Agreements must be interpreted. A trial is necessary.

2024 SKKB 54 (CanLII)

> For all the foregoing reasons, piecemeal orders should not be made. As noted in *Budd v. Gentra Inc*., [1995] O.J. No. 3043 (Gen. Div.), the summary application procedure is not appropriate to deal with complex situations involving evidence other than documentary evidence, and rulings on the credibility of witnesses.
>
> [Emphasis added]

2024 SKKB 54 (CanLII)

[102] In *Olafson*, Barrington-Foote J.A. quoted that passage with approval and concluded that the chambers judge in *Olafson* had decided that oppression occurred "based on a very thin slice of the evidence". That is exactly what Nodran asks me to do when it asserts that I may find oppression or grounds for liquidation based on the four factors from *Keho Holdings Ltd. v Noble*, 1987 ABCA 84, 38 DLR (4th) 368 [*Keho*] (discussed below). As Barrington-Foote J.A. makes abundantly clear in *Olafson*, I must not accede. The various disputes between the parties are "inextricably intertwined": *Olafson* at para 137.

[103] *Olafson* instructs that I cannot decide some of the parties' complaints in isolation from others. To do so would risk going "further than necessary to correct the injustice or unfairness between the parties": *Wilson v Alharayeri*, 2017 SCC 39 at para 27, [2017] 1 SCR 1037.

[104] The discussion in this section was prompted by *Pelletier Estate* and the resultant question of whether the First Application and New Application are substantially similar. I conclude that *Olafson* mandates that, to the extent that differences may exist, the two actions still must be <u>treated</u> as substantially similar because the surgical approach to parsing out complaints proposed by Nodran is not available. The Court cannot grant the relief sought in the New Application without delving deep into the entirety of the surrounding circumstances.

[105] Given *Olafson*'s direction as to how oppression matters must be approached, I must treat the two actions as substantially the same.

6. Effect of the *Konkin Fiat*

[106] The *Konkin Fiat* directed a trial of the issue and was never appealed. To grant the relief sought in the New Application would summarily decide issues – and the choice of remedy – that Konkin J. directed be determined through a trial.

[107] The respondents characterize the entirety of the New Application as a collateral attack on the *Konkin Fiat*. Nodran characterizes the *Konkin Fiat* as purely procedural, saying that the collateral attack rule does not apply. I am not so sure, but in any event the New Application need not be a collateral attack to represent an abuse of process.

[108] In *R v Litchfield*, [1993] 4 SCR 333 at page 348, the Supreme Court of Canada defined the collateral attack rule:

> … This rule holds that "a court order, made by a court having jurisdiction to make it," may not be attacked "in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment" (*Wilson v. The Queen*, 1983 CanLII 35 (SCC), [1983] 2 S.C.R. 594, per McIntyre J., at p. 599). The lack of jurisdiction which would oust the rule against collateral attack would be a lack of capacity in the court to make the type of order in question, such as a provincial court without the power to issue injunctions. …
>
> [Emphasis added]

[109] The rule against collateral attacks exists to ensure fairness and the integrity of the justice system by preventing duplicative proceedings. It is considered necessary to preserve the reputation of the administration of justice. With limited exception, it applies to all court orders. See *R v Envirogun Ltd.*, 2018 SKCA 8 at paras 39 to 46, [2018] 3 WWR 247.

[110] Nodran also argues that the New Application is not a collateral attack because the *Konkin Fiat* was a procedural order. They say the situation has changed since the *Konkin Fiat*, and that it has no application to the New Application. Even if it were to apply, they say, the Court can amend that order to provide an appropriate

2024 SKKB 54 (CanLII)

process to determine the parties' interests.

[111] Nodran refers to the following passage from *Kent v Watts*, 2019 ABCA 326 [*Kent*]:

> [23] However, both these orders were interlocutory orders. It is settled law that the doctrines of issue estoppel and *res judicata* do not apply to deny jurisdiction to entertain a subsequent interlocutory application. Rather, it is a matter of the exercise of judicial discretion: *Talbot v Pan Ocean Oil Ltd*, (1977) 1977 ALTASCAD 176 (CanLII), 5 AR 361 at para 7 (CA); *Alberta v Pocklington Foods Inc*, 1995 ABCA 111 at para 7; *Milne v Alberta (WCB)*, 2013 ABCA 379 at para 6.

[112] *Kent* has not been judicially considered in Saskatchewan, but the Court of Appeal has considered at least one case cited in that passage – *Alberta v Pocklington Foods Inc.*, 1995 ABCA 111, 123 DLR (4th) 141. It was discussed in *Insurance Company of the State of Pennsylvania v Cameco Corporation*, 2010 SKCA 95, 359 Sask R 174 [*Cameco*] as follows:

> [97] This view of the matter generally accords with the decision of the Alberta Court of Appeal in *Pocklington Foods Inc*. v. *Alberta (Provincial Treasurer)* (1995), 28 Alta. L.R. (3d) 96. That case featured a second attempt to obtain disclosure of documents, the first having failed. I should say the Alberta Court of Appeal prefers to address successive motions, seeking essentially the same relief, on the basis of abuse of process rather than issue estoppel. Thus the Court (having said counsel is not to be given a second opportunity to explain what ought to have been explained on the first occasion and, if not then, at least in the Court of Appeal) said this:
>
>> 14 …We do not agree that counsel, having made an application, argued it, and having taken out the order, should be permitted to re-argue the application on the basis that this time he might do a better job. It appears to us that to permit a party to reopen a decision on the merits on such a ground would merely encourage counsel to try again and to engage in re-litigation which is unfair to the other party and a waste of the valuable resources of the court. If the first argument failed, then another tactic might work. If the first argument failed before one judge, it might work in a slightly modified form before another. The case against permitting such process becomes even stronger when the party seeking review of the decision has appealed and been unsuccessful in the appeal. Where the second application seeks only to re-argue the first application, or to make arguments which were available at the time of the first, it should be dismissed as an abuse of the court

2024 SKKB 54 (CanLII)

> process, or as frivolous and vexatious.
>
> [98] The reason the Court referred to *re-argument* of the application is that the first and second motions in that case were brought on the basis of much the same material. That is not so of the case before us, because Global filed further affidavits the second time around. But as I say, re-applying for essentially the same relief on the basis of further affidavits is fraught with its own form of abuse of process. And there is no reason to suppose this form, while rooted in issue estoppel, as per *Leier*, does not carry over into the realm of abuse of process, as per *Pocklington Foods*.
>
> [99] That aside, I also find some support for my view in the decision of this Court in *Stevenson* v. *Bomac Construction*, [1986] 5 W.W.R. 21. There the Court acknowledged that issue estoppel did apply, but then went on to say this:
>
>> There is however concern based on public policy that the same issue should not be relitigated so that the parties should not be exposed to the same risk twice and also that there be an end to the litigation process. The Courts have not only viewed such matters under the established doctrines of "res judicata" and "issue estoppel", but also under the broader heading of the concept of abuse of process. …
>
> [Emphasis added]

[113] Thus, the fact that relitigating the same procedural question may not be strictly blocked by *res judicata* does not mean this Court is precluded from treating it as an abuse of process.

[114] The *Konkin Fiat* was more than a simple interlocutory procedural order. It was the outcome of an application brought on the merits. Nodran and Brian "took their shot". They assembled their evidence and arguments and asked Konkin J. to order liquidation of Sundowner and determination of the shareholder loan accounts. He said "no" because it was not possible to properly decide those issues on affidavit evidence. Since then, the factual basis of his conclusion – that the controverted affidavit evidence did not lend itself to a summary determination so a trial would be needed – has not changed. Most everything remains controverted, and the issues have increased in complexity. Nor has the law changed. The parties are bound by, and must follow, the *Konkin Fiat*.

2024 SKKB 54 (CanLII)

[115] Further, the evidence filed on the First Application represented only a fraction of what has already been filed on the New Application. No disputes have been resolved in the meantime; they have deepened and broadened. Konkin J. was unable to determine the First Application on the evidence filed at that time. Even if I am not bound by his reasoning, I am persuaded by it. Even if I can disregard or amend the *Konkin Fiat*, I would not do so, for all the reasons discussed above.

[116] For the reasons discussed in preceding sections, the New Application is an abuse of process. As well, the commencement of the New Application is contrary to the *Konkin Fiat*. I do not view the *Konkin Fiat* as merely procedural because it was the outcome of an application on the merits. The parties need to follow it, along with subsequent judicial directions given in the First Proceeding.

[117] Finally, and in any event, the New Application seeks a discretionary order. I exercise my discretion to conclude that the disputes raised in the New Application can and should be resolved in the First Proceeding.

7. Should I order liquidation in reliance on the four factors in *Keho*?

[118] I find it appropriate to analyse one further question – that of whether liquidation might be ordered in reliance on *Keho* and subsequent decisions that apply it. I conclude that I should not make such an order.

[119] Nodran argues that even without making findings of oppressive conduct, I should follow the lead of courts that have ordered the appointment of liquidators. It contends that the jurisprudence has moved from viewing liquidation as a bludgeon to be employed only as a final resort.

[120] Those characterizations of the liquidation remedy as a bludgeon and last resort were employed by Wilkinson J. in the relatively recent *Sevaal Holdings Inc. v LCB Properties Inc.*, 2014 SKQB 47, 437 Sask R 249. Those comments were quoted

2024 SKKB 54 (CanLII)

with approval in *Esposito v Esposito*, 2022 BCCA 51, 469 DLR (4th) 250, and *Gordon v White*, 2020 SKCA 129. The concepts embodied by those comments are not outdated.

[121] Nodran's requested relief – liquidation of Sundowner – is the most final of conceivable remedies.

[122] In part Nodran relies on caselaw contemplating a "no-fault corporate divorce". It places heavy reliance on *Egger v Waisman*, 2022 SKKB 249 [*Egger*], and authorities discussed in *Egger*, for the proposition that the Court need not find oppression to order liquidation. Many of those authorities relied on by Nodran are distinguishable.

[123] In *Egger*, Scherman J. determined that the applicants were not seeking an oppression remedy. Further, nothing was to be liquidated. Rather, corporations that could operate independently were to be distributed between the two factions as continuing entities, with an equalization payment to ensure that the distributions were equitable. The application contemplated, and Scherman J. ordered, that the transactions occur in a tax-efficient manner to the extent possible. None of that equates with this situation, and it is unclear whether Scherman J. could have arrived at the same result if the case involved an oppression remedy and/or liquidation. Accordingly, *Egger* does not assist Nodran.

[124] *Keho* is widely cited for the four grounds set out therein as justification for ordering liquidation of a corporation under the "just and equitable" rule. It is unclear to me, however, whether that case featured the level of controverted allegations that exist here. In any event, I would not give effect to it in light of *Olafson* and the *Konkin Fiat*.

[125] The most persuasive authorities cited by Nodran are *Scozzafava v Prosperi*, 2003 ABQB 248, [2003] 6 WWR 351, [*Prosperi*], and *J&A Properties Ltd. v De Angelis*, 2020 BCSC 1254 [*J&A*]. In each of those cases, the Court ordered

2024 SKKB 54 (CanLII)

appointment of a liquidator based mainly on the existence of a deadlock.

[126] In *Prosperi* there were multiple actions, but I see nothing to suggest that they were substantially similar to one another. Rather, the respondents in the application for a liquidator were plaintiffs in a separate oppression action. The Court did not determine the form of liquidation order. That was left to the parties to negotiate, failing which they could return to court. In both related actions, which Read J. ordered stayed, the respondents wanted to be bought out – they <u>wanted</u> some form of corporate divorce. That is a significant distinguishing factor.

[127] *J&A* may be the most applicable of the cases cited by Nodran. Many of the contentious issues discussed in paras. 18 to 21 of *J&A* have counterparts in the allegations here. One significant distinction was highlighted in para. 23, however: less than two years earlier the parties had reached agreement to liquidate the corporation. (A subsequent agreement on procedural matters set that to the side.) At no point have all the Gordons agreed that liquidation would be appropriate. Although I do not suggest that unanimity on that is required, <u>it nonetheless is more palatable to impose liquidation on a party who has recently agreed in writing that it would be appropriate</u>. That factor argues for caution in relying on *J&A* as being broadly applicable.

[128] Finally, none of those authorities involve the features that dominate the New Application: the existence of a substantially similar extant action, and an order from that prior action that the issues must be determined at a trial. I have already addressed those distinguishing factors.

[129] Accordingly, on these facts, I am not satisfied that I should exercise my discretion to appoint a liquidator within the New Application based on the four factors outlined in *Keho*, i.e., in the absence of finding oppressive conduct.

2024 SKKB 54 (CanLII)

8. As the two applications are similar or must be treated as such, and the New Application is an abuse of process, what is the appropriate remedy?

[130] For the foregoing reasons, the New Application is an abuse of process. Its commencement should not be condoned by consolidating it with the First Proceeding. Moreover, the pleadings can probably be updated more coherently through an application by Nodran to amend. Consolidation is not the appropriate remedy.

[131] Similar to *Pelletier Estate*, I conclude that the appropriate order is to dismiss the New Application outright and I so order.

9. Final observations

[132] Counsel for each of Murco, Mirage and Intermar agreed during oral argument that their clients would consent to amendments to the pleadings in the First Proceeding to enable the issues raised by Nodran in the New Application to be determined as part of the First Proceeding. That agreement was given without reservation and to induce me to dismiss the New Application, though presumably they would need to be proper amendments. I set that out here merely because I have no role in the First Proceeding.

[133] In the following paragraphs I offer some comments as potential guidance regarding conduct of the First Proceeding. My views that follow are not binding on the parties or any judge hearing matters in the disputes between these parties.

[134] I urge the parties to quickly request a case management conference with Popescul C.J. If Nodran retains an appetite to move forward, it seems likely that Popescul C.J. can be of assistance to ensure that progress is made. At the end of oral argument before me, counsel for Intermar and Mirage expressed hope that with new counsel in place for those entities and Nodran, the parties can get to a resolution. Further questioning seems likely to be necessary, but the parties are sufficiently well-grounded in the disputes that not much time should be required. Trial dates should be set.

2024 SKKB 54 (CanLII)

[135] Further, as Wilkinson J. observed in *Olszewski* at para 42, the Court is empowered to make interim orders in oppression proceedings without making actual findings of oppression. That can be done to preserve parties' rights until final determinations are made. Nothing herein should detract from Nodran's right to remedies in the First Proceeding, and that any relief ordered should not be rendered meaningless because of actions taken by the majority of shareholders.

2024 SKKB 54 (CanLII)

E. CONCLUSION

[136] The applications of Mirage, Intermar and Murco to have the New Application struck as an abuse of process are granted pursuant to Rule 7-9(2)(e).

[137] Murco shall have costs payable by Nodran fixed at $5,000. Together, Intermar and Mirage shall have one set of costs payable by Nodran of $5,000. In my view those costs awards are proportionate to what the respondents have been required to do to answer the New Application, even considering that some of it would need to have been done on a resumption of the First Proceeding. The costs shall be payable within 30 days of the date of this decision.

[138] I direct a copy of this judgment be placed on file QBG-PA-00384-2007.

J.
D.G. GERECKE

QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 54**

Date: **2024 03 27**
Docket: KBG-PA-00172-2023
Judicial Centre: Prince Albert

BETWEEN:

NODRAN LTD.

APPLICANT

- and -

SUNDOWNER FARMS LTD., INTERMAR DRILLING LTD., MIRAGE HOLDINGS LTD., and MURCO LTD.

RESPONDENTS

Counsel:

Clayton B. Barry	for Nodran Ltd.
Timothy E. Turple	for Murco Ltd.
Nicholas P. Conlon	for Intermar Drilling Ltd. and Mirage Holdings Ltd.

April 17, 2024 CORRIGENDUM to March 27, 2024 DECISION (2024 SKKB 54) GERECKE J.

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[1] Paragraph 55 has been changed to read as follows:

> [55] My detailed reasons concerning the foregoing follow.

2024 SKKB 54 (CanLII)

[2] On page 25 the subheading *(d) Conclusion on similarity of the two actions* should read *(b) Conclusion on similarity of the two actions*.

J.

D.G. GERECKE

2024 SKKB 54 (CanLII)