Court of Appeal for Saskatchewan
Docket: CACV3097

Citation: *Onion Lake Cree Nation v Stick*, 2018 SKCA 20
Date: 2018-03-26

Between:

Onion Lake Cree Nation

Appellant (Respondent)

And

Charmaine Stick and Canadian Taxpayers Federation

Respondents (Applicants)

Before:	Jackson, Ottenbreit and Ryan-Froslie JJ.A.
Disposition:	Appeal dismissed
Written reasons by:	The Honourable Madam Justice Ryan-Froslie
In concurrence:	The Honourable Madam Justice Jackson The Honourable Mr. Justice Ottenbreit
On Appeal From:	2017 SKQB 176, Regina
Appeal Heard:	December 13, 2017
Counsel:	Robert W. Hladun, Q.C., and Michael Marchen for the Appellant Jason M. Clayards for the Respondents

Ryan-Froslie J.A.

I. INTRODUCTION

[1] Charmaine Stick and the Canadian Taxpayers Federation [collectively, the "respondents"] brought an originating application in the Court of Queen's Bench seeking an order that Onion Lake Cree Nation [Onion Lake] disclose and publish its 2014 and 2015 audited consolidated financial statements and the schedule of remuneration and expenses paid to its Chief and Band councillors for those years. The respondents' application was made pursuant to the *First Nations Financial Transparency Act*, SC 2013, c 7 [*FNFTA*], and in the case of Ms. Stick, who is a member of Onion Lake, the application was also made pursuant to the common law and s. 8(2) of the *Indian Bands Revenue Moneys Regulations*, CRC, c 953 [*Regulations*].

[2] Onion Lake applied to the Court of Queen's Bench to stay the respondents' application. It did so on the basis it had challenged the constitutional validity of the *FNFTA* in the Federal Court of Canada in an unrelated action between Onion Lake (and other First Nations) and the Attorney General of Canada [Canada]. Onion Lake contended allowing the respondents' application to continue would result in a multiplicity of legal proceedings dealing with the same issue, namely, whether Onion Lake must disclose and publish its financial information, and that those proceedings have the potential for conflicting outcomes.

[3] The stay application by Onion Lake and the respondents' originating application were heard together. The Chambers judge dismissed Onion Lake's request for a stay and granted the respondents an order for disclosure and publication of the requested financial information. Onion Lake now appeals against the decision not to grant a stay.

[4] In my view, Onion Lake's appeal must be dismissed. The Chambers judge did not err in exercising his discretion by refusing to grant the stay, nor is his decision so plainly wrong as to amount to an injustice.

II. BACKGROUND

[5] The factual context giving rise to this appeal is not in issue.

[6] On March 27, 2013, the *FNFTA* received royal assent. The purpose of the *FNFTA*, as stated in s. 3 thereof, is to "enhance the financial accountability and transparency of First Nations by requiring the preparation and public disclosure of their audited consolidated financial statements and the schedules of remuneration paid and expenses reimbursed to a First Nation's chief and each of its councillors …".

[7] On November 26, 2014, Onion Lake issued a statement of claim in the Federal Court [Federal Court action] against the Crown, the Attorney General of Canada and the Minister of Aboriginal Affairs, challenging the constitutional validity of the *FNFTA*. Onion Lake's challenge is based on the collective Aboriginal and treaty rights of its membership, the fiduciary duty owed by the Crown to Onion Lake's members and s. 15 of the *Canadian Charter of Rights and Freedoms*. Onion Lake also seeks damages in that action for breach of fiduciary duty by Canada and for other "transgressions".

[8] On December 8, 2014, Canada applied by originating notice for an order compelling Onion Lake to publish its financial records pursuant to s. 11 of the *FNFTA*. Onion Lake applied to stay that application pending determination of the constitutionality of the *FNFTA* in its Federal Court action.

[9] The Federal Court Chambers judge who heard Onion Lake's application stayed Canada's originating motion "until further order of the court". He did so pursuant to s. 50(1) of the *Federal Courts Act*, RSC 1985, c F-7, which allows the court to stay one proceeding in favour of another where the issues raised are substantially the same (*Canada (Attorney General) v Cold Lake First Nations*, 2015 FC 1197 at paras 10 and 11, [2016] 1 CNLR 1).

[10] It is uncontroverted that Onion Lake has not complied with ss. 7 or 8 of the *FNFTA*. It has not published online the documents set out in s. 8, which documents include copies of its audited consolidated financial statements for 2014 and 2015 and the schedule of remuneration and expenses relating to its Chief and councillors for those years, nor has it provided to Ms. Stick copies of those documents as contemplated by s. 7. Rather, Onion Lake has offered to

"accommodate" Ms. Stick by allowing her to review the financial records at the band office with Onion Lake personnel present who would be available to "assist her review as necessary and to answer any questions Ms. Stick has in relation to those documents" (affidavit of Dolores Pahtayken at paras 7–9). Onion Lake is not prepared to provide copies of the documents to Ms. Stick or allow her to examine them outside the confines of the band office.

[11] As a result of Onion Lake's failure to publish and its refusal to provide copies of the documents in issue to Ms. Stick, the respondents brought an originating application for disclosure and publication pursuant to ss. 10 and 11 of the *FNFTA*. In response, Onion Lake applied to stay the respondents' application.

III. THE CHAMBERS JUDGE'S DECISION

[12] Onion Lake's request for a stay was primarily grounded on the argument that the respondents' application for disclosure and publication raised issues that were already before the Federal Court. It contended that, if the respondents' originating application were allowed to proceed, the Court of Queen's Bench and the Federal Court could render conflicting decisions – the Federal Court potentially ruling the *FNFTA* is not constitutionally valid and the Court of Queen's Bench potentially ordering financial disclosure pursuant to the Act. Onion Lake conceded before the Chambers judge that the respondents, "absent the constitutional and stay issues", were entitled to the orders they sought (judgment at para 41). Thus, the only contested issue before the Chambers judge was whether the respondents' originating application should be stayed.

[13] Onion Lake did not challenge the constitutional validity of the *FNFTA* in the Court of Queen's Bench. It is uncontroverted that, at the hearing of the applications, the Chambers judge advised counsel for Onion Lake that the failure to raise a constitutional challenge in the proceedings before him "might affect the outcome of the stay application". The Chambers judge gave Onion Lake's counsel the opportunity to adjourn both applications – that is, the respondents' application for disclosure and publication and Onion Lake's application for a stay – so that instructions could be sought on the constitutional question and to raise such a question if Onion Lake so desired. Counsel for Onion Lake declined the adjournment.

[14] Onion Lake based its claim for a stay on the inherent jurisdiction of the Court of Queen's Bench to prevent an abuse of its process and on s. 37(1) of *The Queen's Bench Act, 1998*, SS 1998, c Q-1.01. Onion Lake contended the respondents' application constituted an abuse of process because it resulted in two lawsuits that dealt with the same subject matter. Onion Lake also argued that refusing to grant a stay would undermine the "practical effect" of the Federal Court stay, which Onion Lake asserted prevented disclosure and publication of the financial information the respondents had requested.

[15] The Chambers judge found that "flexibility" is a key feature of the doctrine of abuse of process. He rejected the respondents' suggestion that the burden of proof on Onion Lake to establish the respondents' action should not be allowed to continue was "beyond all reasonable doubt" (judgment at paras 25–26). Rather, the Chambers judge concluded access to the court must not be lightly refused. He found that was the test adopted by Sherstobitoff J.A. of this Court in *Sagon v Royal Bank of Canada* (1992), 105 Sask R 133 (CA) at para 19.

[16] The Chambers judge then went on to consider Onion Lake's two key arguments. He found, relying on *Boehringer Ingelheim (Canada) Ltd. v Englund*, 2007 SKCA 62 at para 29, 299 Sask R 298 [*Boehringer Ingelheim*], that, while it may be an abuse of process to commence two lawsuits between the same parties that effectively deal with the same subject matter, that was not the situation before him. This was so because the respondents' application involved different parties. Moreover, he determined the Federal Court action did not engage the underlying concern of "parallel or duplicative proceedings" because the constitutional issue at the heart of the Federal Court action was not raised in the respondents' application. As such, there was no risk the Chambers judge's decision would be inconsistent with any decision rendered in the Federal Court. The Chambers judge saw nothing improper in the respondents seeking relief in the Court of Queen's Bench for Saskatchewan as opposed to seeking intervenor status in the Federal Court action. Further, he concluded a decision in the Federal Court action would not dispose of the respondents' application before him:

> [37] ... The applicants would be entitled to pursue this application, <u>regardless</u> of the Federal Court's jurisdiction. A judge hearing such an application in this Court would not be bound by a declaration as to the constitutionality of the *Act* in the *Onion Lake Action*. He or she would be obliged to decide on the basis of the record before the court, and to reach his or her own conclusions in relation to the constitutional issues. Counsel for

> Onion Lake conceded that point. As in *Garber* (see para 21), a stay would merely postpone, but not resolve, the potential for inconsistent verdicts.

[17] The Chambers judge also determined a failure to grant Onion Lake's stay would not undermine the "practical effect" of the Federal Court stay, which Onion Lake contended prevented the publication of materials specified in s. 7 of the *FNFTA*. His conclusion on this point is set out at paragraph 40 of his judgment:

> ... Barnes J. did not decide that Onion Lake should not be ordered to publish the consolidated financial statements, at large. He decided on the facts, in a dispute between particular parties, for particular reasons. Here, the facts and parties are different. There are no duplicative proceedings. Further, an order to disclose in favour of Ms. Stick and the CTF [Canadian Taxpayers Federation] does not raise the same concerns as an order in favour of Canada. [Ms.] Stick and the CTF are not players in the consultation process. The order sought by the applicants will not undermine the Federal Stay.

[18] Finally, the Chambers judge determined Onion Lake's offer to provide Ms. Stick access to the audited consolidated financial statements at the band office fell "far short of providing the copies and public internet posting required by the *Act*." The Chambers judge concluded that, as the *FNFTA* had not been found unconstitutional on any ground by any court, Onion Lake could not ask for a stay on the basis that "non-compliance is good enough, or that the *Act* is unjust" (judgment at para 38).

[19] As a result of his conclusions, the Chambers judge denied Onion Lake's application for a stay. Given Onion Lake's concession that, absent the constitutional and stay issues, the respondents were entitled to the relief requested by them, the Chambers judge ordered financial disclosure and publication of the financial information requested as required by ss. 7 and 8 of the *FNFTA*.

IV. ISSUES

[20] The sole issue on this appeal is whether the Chambers judge erred in exercising his discretion not to grant the stay requested by Onion Lake. In that context, Onion Lake raises what it views as errors of law made by the Chambers judge in exercising his discretion and, in particular, submits the Chambers judge erred in concluding: (i) that "constitutional issues were not raised by any party" in the application before him; and (ii) that there were no valid concerns regarding the "parallel or duplicative nature" of the Federal Court action.

V. PRELIMINARY MATTERS

[21] Onion Lake made two preliminary applications to this Court, namely to amend its notice of appeal and to have the Court consider additional material.

A. Onion Lake's application to amend its notice of appeal

[22] Onion Lake applied to amend its notice of appeal to request alternative relief, namely: "an Order setting aside the Judgment ... and granting the Appellant leave to file a Notice of Constitutional Question ... in the Court of Queen's Bench" with respect to the *FNFTA*.

[23] At the hearing of the appeal, this application was denied with full reasons to follow. These are those reasons.

[24] Rule 13 of *The Court of Appeal Rules* provides that a notice of appeal may be amended at any time with leave of the court or a judge thereof.

[25] In *Phillips Legal Professional Corporation v Vo*, 2016 SKCA 82, 480 Sask R 311, Richards C.J.S. set out the approach taken by this Court to such applications:

> [27] ... Speaking broadly, it tends to allow amendments unless they involve a new ground or argument in relation to which it might have been necessary to adduce evidence in the court below or unless they would otherwise prejudice the respondent. See: *R v Perka*, [1984] 2 SCR 232 at 240; *Howell v Stagg*, [1937] 2 WWR 331.

[26] Onion Lake's application to amend was denied, primarily for two reasons. First, the amendment requested would have no practical effect or consequence as by its wording the relief sought – the filing of a notice of constitutional question in the Court of Queen's Bench – depends on this Court determining that the Chambers judge's decision should be set aside. If that occurs, there would be no need to grant Onion Lake leave to file a notice of constitutional question in the Court of Queen's Bench. As the matter would be reheard, Onion Lake could, if it chose to, file such a notice without further order of this Court.

[27] Second, to allow the amendment would be to undercut the fundamental basis on which Onion Lake's application before the Chambers judge was framed and argued. Onion Lake was asked by the Chambers judge if it wanted to adjourn to seek instructions on filing a notice of

constitutional question with respect to the validity of the *FNFTA*. Onion Lake declined to do so. The application thus proceeded without such a notice being filed.

B. Application to consider additional material on appeal

[28] Onion Lake sought leave to file additional material before this Court. It did so on the basis the material it wished to advance was before the Chambers judge and so should be considered by this Court or, alternatively, if it was not part of the record before the Chambers judge, it should be admitted as fresh evidence.

[29] The test for admission of fresh evidence on appeal was articulated in *Maitland v Drozda* (1983), 22 Sask R 1 (CA), where the Court identified four factors that must be satisfied before fresh evidence will be accepted. Those factors are:

> (a) the evidence will not be admitted if, by due diligence, it could have been adduced at trial;
>
> (b) the evidence must be relevant in the sense that it bears upon a decisive, or potentially decisive, issue in the action;
>
> (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
>
> (d) it must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

This test has been reaffirmed by this Court in numerous decisions including: *Wal-Mart Canada Corp. v Saskatchewan (Labour Relations Board)*, 2006 SKCA 142 at para 4, 289 Sask R 20; *Gadd v Busse*, 2011 SKCA 32 at para 3, 366 Sask R 291; and *Pederson v Saskatchewan (Minister of Social Services)*, 2016 SKCA 142 at para 22, 408 DLR (4th) 661.

[30] The material Onion Lake seeks to adduce is as follows:

> (a) Court-certified copies of Onion Lake's statement of claim filed in the Federal Court, which, among other things, challenges the constitutional validity of the *FNFTA*.

(b) Court-certified copies of Canada's originating application in the Federal Court seeking enforcement of the provisions of the *FNFTA* against six First Nations, including Onion Lake.

(c) Court-certified copies of two affidavits sworn by Okimaw Fox on March 4, 2015, and May 14, 2015, respectively, both of which were filed by Onion Lake in the Federal Court in response to Canada's originating application.

(d) A court-certified copy of the notice of constitutional question filed by Onion Lake in its Federal Court action.

(e) Copies of a May 5, 2017, letter from Onion Lake's legal counsel to the Queen's Bench Chambers judge enclosing Onion Lake's notice of constitutional question filed in the Federal Court, together with a certificate of service of that notice on the federal Attorney General and the Attorney General of each province.

(f) A copy of a May 8, 2017, letter from legal counsel for the respondents to the Court of Queen's Bench objecting to the filing of the documents included with Onion Lake's May 5, 2017, letter.

[31] Onion Lake's statement of claim and Canada's originating notice were attached to the affidavit of Dolores Pahtayken, which was before the Chambers judge, and those documents are included in the appeal book. Onion Lake indicated it wanted to file "court certified copies" of those documents in this Court in compliance with s. 39 of *The Evidence Act*, SS 2006, c E-11.2. A review of the documents as they appear in the appeal book shows they are court-certified copies (A63 and A85). As such, Onion Lake's request to file those documents should not be granted as it would result in unnecessary duplication.

[32] The respondents contend the two affidavits of Okimaw Fox were not part of the record in the Court of Queen's Bench and thus should not form part of the record in this Court. The affidavits bear stamps certifying them as documents filed in the Federal Court. They do not have attached to them any of the exhibits referred to therein.

[33] I begin by noting the two affidavits in issue were not referred to in Onion Lake's notice of application for a stay in the Court of Queen's Bench, nor were they listed as materials or documents that would be relied upon by Onion Lake in its application. In addition, the affidavits were not served with Onion Lake's application as required by Rule 6-12(1) of *The Queen's Bench Rules*:

> Except with leave of the Court, every affidavit to be used in a cause, matter or proceeding must be filed before being used.

Rather, Onion Lake included the affidavits in its book of authorities[1]. Onion Lake asserts that inclusion was sufficient to make the affidavits part of the court record on the Chambers application. Alternatively, Onion Lake argues the affidavits were part of "the pleadings and other materials" filed in the Court of Queen's Bench and that Onion Lake had identified those pleadings and other materials as something it would rely on in advancing its arguments.

[34] In my view, Onion Lake's arguments are without merit.

[35] Identifying what a party intends to rely on in a Chambers application serves two key purposes. First, it provides notice to the responding party of the case that must be met and, second, it identifies the material relevant to the court's consideration of the issues raised. Court actions can, depending on their nature, involve reams and reams of paper and documents. Accordingly, indicating in a notice of application that a party intends to rely on "the pleadings and other materials filed" in the action does not properly identify the material to be relied upon. Neither a responding party nor the court should be put to the task of reviewing each and every document on a court file in preparation for a Chambers application because a party **might** rely on something not specifically mentioned. As indicated, in some actions, that would be a daunting task. Moreover, it is highly unlikely every pleading and document on a court file will be relevant to any given Chambers application. In short, a party bringing an application has an obligation to identify, with some specificity, the evidence and materials he, she or it intends to rely on.

[36] Moreover, Onion Lake's general reference to all pleadings and materials filed cannot reasonably be seen as including the Fox affidavits as those affidavits did not form part of the

[1] The book of authorities was originally served and filed on February 24, 2017. It was later re-served on the respondents and filed with the Court as a "book of documents" on March 2, 2017. There was no material change to its contents. The only change was to its title.

Queen's Bench pleadings. Rather, they were filed in the Federal Court. Neither the respondents nor the Queen's Bench judge had access to the Federal Court file. Including an affidavit from another court proceeding in a "book of authorities" does not make that affidavit evidence a court should consider; nor would such an affidavit automatically become part of the court record for appeal purposes. On this point, I agree with the Alberta Court of Appeal's statements in *Brewer v Fraser Milner Casgrain LLP*, 2008 ABCA 435 at para 15, 306 DLR (4th) 171, and *Langan v Watson*, 2007 ABCA 94 at para 5, 404 AR 98, to the effect that evidence may not be included in a book of authorities. That Onion Lake refiled its book of authorities as a "book of documents" does not change the fact that the affidavits in issue had not been properly tendered as evidence before the Chambers judge and thus did not form part of the court record.

[37] Further, I am not of the view those affidavits or, indeed, the notice of constitutional question filed in the Federal Court should be admitted as fresh evidence in this Court. First, the affidavits and the notice of constitutional question were in existence at the time Onion Lake brought its stay application and could have, with due diligence, been produced at the hearing.

[38] Second, the affidavits of Okimaw Fox are only marginally relevant to Onion Lake's stay application. I say this because a significant portion of those affidavits deals with matters unrelated to the constitutionality of the *FNFTA*. A significant portion of the affidavits deals with issues relevant only to the Federal Court action such as whether certain agreements were signed by Onion Lake under "duress" and what damages Onion Lake may have sustained due to the alleged wrongful actions of the Government of Canada or its Ministry. That material was clearly irrelevant to the motions before the Chambers judge.

[39] Third, the affidavits are not credible as the exhibits referred to therein are missing. In addition, it is unknown whether the facts attested to in those affidavits were contradicted by affidavit or other evidence filed in the Federal Court. Because the respondents had no notice of Onion Lake's intention to rely on those affidavits, they had no opportunity to file evidence in response thereto.

[40] Finally, it cannot be said that the Fox affidavits or, for that matter, the mere existence of a notice of constitutional question in the Federal Court action could reasonably, when taken with the evidence adduced before the Chambers judge, be expected to have affected the result. I say

this because it was uncontroverted in the Court of Queen's Bench that Onion Lake had challenged the constitutional validity of the *FNFTA* in the Federal Court. This was accepted by the Chambers judge. The grounds for that challenge were clearly set out by Onion Lake in its statement of claim filed in the Federal Court action. That statement of claim was before the Chambers judge. The Fox affidavits and the notice of constitutional question add nothing of importance, either contextually or otherwise, to the issues to be determined by the Chambers judge, namely, whether the fact the constitutional validity of the *FNFTA* was being challenged in the Federal Court should result in a stay of proceedings in Saskatchewan and whether there were parallel or duplicative proceedings in the Federal and Queen's Bench Courts so as to amount to an abuse of process.

[41] In short, neither the notice of constitutional question nor the Fox affidavits meet the test for admission of fresh evidence.

[42] I am also of the view that the two letters from the lawyers to the Court of Queen's Bench that Onion Lake seeks to file (including the attachments thereto) are not relevant to this appeal and would have had no effect on the Chambers judge's decision.

[43] Given that the documents Onion Lake seeks to file do not meet the test for admission of fresh evidence because of relevancy and credibility issues, it is not necessary to consider Onion Lake's argument that the requirement for due diligence should, as found by the British Columbia Court of Appeal in *Petrelli v Lindell Beach Holiday Resort Ltd.*, 2011 BCCA 367, 340 DLR (4th) 733, be relaxed to allow admission of those documents in the context of this appeal.

[44] Onion Lake's application to consider additional materials is denied.

VI. LEGISLATIVE PROVISIONS

[45] This appeal engages ss. 7, 8, 10 and 11 of the *FNFTA*, the relevant portions of which read as follows:

> **Copies – members**
> **7**(1) A First Nation must, on the request of any of its members, provide the member with copies of any of the following documents:
>
> (a) its audited consolidated financial statements;

> (b) the Schedule of Remuneration and Expenses;
>
> (c) the auditor's written report respecting the consolidated financial statements; and
>
> (d) the auditor's report or the review engagement report, as the case may be, respecting the Schedule of Remuneration and Expenses.
>
> …
>
> **Internet site – First Nation**
> **8**(1) A First Nation must publish the documents referred to in paragraphs 7(1)(a) to (d) on its Internet site, or cause those documents to be published on an Internet site, within 120 days after the end of each financial year.
>
> ...
>
> **Application by member of First Nation**
> **10** If a First Nation fails to provide copies of any document under section 7, any member of that First Nation may apply to a superior court for an order requiring the council to carry out the duties under that section within the period specified by the court.
>
> **Application by any person**
> **11** If a First Nation fails to publish any document under section 8, any person, including the Minister, may apply to a superior court for an order requiring the council to carry out the duties under that section within the period specified by the court.

VII. ANALYSIS

[46] The Court of Queen's Bench has inherent jurisdiction to control its own process. This includes the power to direct a stay of proceedings where appropriate: *Boehringer Ingelheim* at paras 33–35. That inherent jurisdiction is reaffirmed by s. 37 of *The Queen's Bench Act, 1998*, which reads:

> **37**(1) Nothing in this Act prevents a judge from directing a stay of proceedings in any action or matter before the court if the judge considers it appropriate.
>
> (2) Any person, whether a party or not to an action or matter, may apply to the court for a stay of proceedings, either generally or to the extent that may be necessary for the purposes of justice, if the person may be entitled to enforce a judgment, rule or order, and the proceedings in the action or matter or a part of the proceedings may have been taken contrary to that judgment, rule or order.
>
> (3) On an application pursuant to subsection (2), a judge shall make any order that the judge considers appropriate.

[47] The court's power to grant a stay of proceedings is discretionary. As stated in s. 37 of *The Queen's Bench Act, 1998*, such stays may be granted if the judge considers it "appropriate" in the circumstances. Section 37 provides no guidance as to how judges should exercise their

discretion, but jurisprudence from both this Court and the Court of Queen's Bench provides assistance.

[48] In *Leier v Shumiatcher* (1962), 39 WWR 446 (Sask CA) [*Leier*], Davies J. (*ad hoc*), writing for this Court stated:

> [2] Considerable argument was addressed to the court as to the circumstances under which a discretion to stay proceedings may be exercised, and the extent and limitation thereof. There is the principle, sanctioned by high and respected authority, that the discretion should be exercised only under extraordinary circumstances: *Rowe v. Brandon Packers Ltd.* (1961) 35 WWR 625, 35 CR 410 (Man. C.A.), and the cases therein considered. **I am, however, respectfully of the opinion that the right to exercise a discretion should not be curtailed by any inflexible rule of law, but should be guided in each instance by the merits of the matter under review.** I am convinced that a judge, whose duty it is to exercise the discretion, has not only an inherent right to do so, but where the attainment of justice demands, an obligation and an unfettered right to do so, subject to any limitations imposed by statute or the rules of court: *Re Trade Union Act; Re Blackwoods Beverages Ltd. and Dairy Employees, Truck Drivers and Warehousemen, Local No. 834* (No. 1) (1956) 18 WWR 481, at 486. **The exercise of the discretion must not, of course, be capricious or arbitrary, but must have as its foundation admissible evidence of record from which the judge may reasonably draw conclusions.** Where a discretion has been exercised without evidence, or (what is tantamount to it) evidence from which no reasonable conclusion should be drawn, the discretion has been based on a wrong principle of law and cannot stand: *Boychuk v. Korzenowski*, [1924] 2 WWR 750 (Sask. C.A.). …
>
> (Emphasis added)

See also *Laxton Holdings Ltd. v Non-Marine Underwriters, Lloyd's, London*, [1987] 3 WWR 570 (Sask CA) at 572–573 [*Laxton*].

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

[50] The onus rests with the person seeking the stay to establish the basis for it. To do so, he or she must show prejudice should the proceedings be allowed to continue (*Laxton* at 574; *Leier* at 447).

[51] It is uncontroverted that one basis upon which a stay of proceedings may be granted is where the proceedings constitute an abuse of process.

[52] The doctrine of abuse of process is also a flexible one. There is no set test or rules for determining what amounts to an abuse of process. Rather, the doctrine engages a court's inherent power to prevent the misuse of its judicial proceedings. As Arbour J. stated in *Toronto (City) v CUPE, Local 79*, 2003 SCC 63, [2003] 3 SCR 77, the doctrine of abuse of process focusses on the integrity of the adjudicative process:

> [43] … In all of its applications, the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of courts. Whether it serves to disentitle the Crown from proceeding because of undue delays … or whether it prevents a civil party from using the courts for an improper purpose … the focus is less on the interest of parties and more on the integrity of judicial decision making as a branch of the administration of justice. …

See also *Insurance Company of the State of Pennsylvania v Cameco Corporation*, 2010 SKCA 95 at paras 47–51, [2010] 10 WWR 385.

[53] In *Behn v Moulton Contracting Ltd.*, 2013 SCC 26, [2013] 2 SCR 227, LeBel J., writing for the Court, described the doctrine in these terms:

> [39] In *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, Arbour J. wrote for the majority of this Court that the doctrine of abuse of process has its roots in a judge's inherent and residual discretion to prevent abuse of the court's process: para. 35; see also P. M. Perell, "A Survey of Abuse of Process", in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation 2007* (2007), 243. Abuse of process was described in *R. v. Power*, [1994] 1 S.C.R. 601, at p. 616, as the bringing of proceedings that are "unfair to the point that they are contrary to the interest of justice", and in *R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667, as "oppressive treatment." **In addition to proceedings that are oppressive or vexatious and that violate the principles of justice, McLachlin J. (as she then was) said in her dissent in *R. v. Scott,* [1990] 3 S.C.R. 979, at p. 1007, that the doctrine of abuse of process evokes the "public interest in a fair and just trial process and the proper administration of justice".** Arbour J. observed in *C.U.P.E.* that the doctrine is not limited to criminal law, but applies in a variety of legal contexts: para. 36.
>
> [40] **The doctrine of abuse of process is characterized by its flexibility.** Unlike the concepts of *res judicata* and issue estoppel, abuse of process is unencumbered by specific requirements. In *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), Goudge J.A., who was dissenting, but whose reasons this Court subsequently approved

(2002 SCC 63, [2002] 3 S.C.R. 307), stated at paras. 55-56 that **the doctrine of abuse of process**

> **engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute.** It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 [(C.A.)], at p. 358 ….
>
> One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. See *Solomon v. Smith*, *supra*. It is on that basis that Nordheimer J. found that this third party claim ought to be terminated as an abuse of process.
>
> (Underline emphasis in original, bold emphasis added)

See also, the decision of this Court in *Bear v Merck Frosst Canada & Co.*, 2011 SKCA 152 at paras 36–38, 345 DLR (4th) 152.

[54] As this Court stated in *Boehringer Ingelheim*, it is an abuse of process to commence two lawsuits between the same parties that effectively deal with the same subject matter. The commencement of such actions in two or more jurisdictions may also constitute an abuse of process (*Boehringer Ingelheim* at para 36). This is so because the doctrine of abuse of process covers a wide variety of circumstances including those where the requirements of issue estoppel and *res judicata* may not apply, and where the doctrine of *forum non conveniens* may apply. The ultimate question for the court must always be whether the circumstances giving rise to the actions bring the administration of justice into disrepute or result in unacceptable unfairness to one of the parties.

[55] With these legal principles in mind, I turn to consider whether the Chambers judge erred in exercising his discretion by not granting Onion Lake's application for a stay.

A. Did the Chambers judge err in exercising his discretion not to stay the respondents' application?

1. Did the Chambers judge err in concluding there was no constitutional question before him?

[56] Onion Lake contends the constitutional validity of the *FNFTA* was sufficiently identified and raised by it before the Chambers judge. Its argument is summarized at paragraph 37 of its factum as follows:

> ... The Appellant respectfully submits that constitutional issues were sufficiently identified and raised by Onion Lake before the chambers Justice, by way of reference to its pleadings in Federal Court. They were practically incorporated in its request for relief by way of a stay on essentially the same grounds as were argued in Federal Court.

[57] In my view, this position is without merit for several reasons.

[58] First, as already indicated, Onion Lake deliberately chose **not** to challenge the constitutional validity of the *FNFTA* in the Court of Queen's Bench, despite being advised by the Chambers judge that its failure to do so might adversely affect the outcome of its stay application. Having failed in its application, Onion Lake cannot now resile from that position: *Linn v Frank*, 2014 SKCA 87 at paras 33 and 34, 442 Sask R 126; *Eagle Resources Ltd. v MacDonald*, 2002 ABCA 1 at para 3, [2002] 3 WWR 217; *Re National Trust Co. and Bouckhuyt* (1987), 61 OR (2d) 640 (CA).

[59] Second, a constitutional challenge to legislation cannot be incorporated into an action "by reference" to such a challenge in another action. As pointed out by counsel for the respondents, Onion Lake has not provided any judicial authority to support such a proposition, which on its face is contrary to the statutory requirements of *The Constitutional Questions Act, 2012*, SS 2012, c C-29.01. Section 13 of that *Act* states: "no court shall hold any law to be invalid, inapplicable or inoperable if a constitutional question is raised nor shall it grant any remedy **unless notice is served on the Attorney General of Canada and on the Attorney General for Saskatchewan in accordance with this Part**" (emphasis added).

[60] Finally, while the Court of Queen's Bench has inherent jurisdiction to deal with constitutional questions, it can only do so if notice is provided in accordance with s. 13 of *The Constitutional Questions Act*. That legislation imposes a procedural step – notice – as a

precondition to judicial consideration of a constitutional question. The purpose of that notice, as pointed out by Professor Peter W. Hogg in his text, *Constitutional Law of Canada*, loose-leaf (2017-1) 5th ed, vol 2 (Toronto: Carswell, 2007) at 58.3, is not to impede judicial consideration of such questions but "to facilitate it by ensuring that the constitutional issue is fully argued, not only by the private litigants, but by the appropriate Attorney General, who has the resources and the interest to mount an argument in support of the legislation". This was made clear by the Supreme Court of Canada in *Guindon v Canada*, 2015 SCC 41 at para 19, [2015] 3 SCR 3. Onion Lake did not serve notice of a constitutional question on either the Attorney General for Saskatchewan or the Attorney General of Canada. In the absence of such notice, the Chambers judge in accordance with the legislation could not grant "any remedy" to Onion Lake involving the constitutional validity of the *FNFTA* (*Saskatchewan Government Insurance v Gorguis*, 2013 SKCA 32, 414 Sask R 5).

[61] Onion Lake contended its constitutional challenge of the *FNFTA* in the Federal Court should have prevented enforcement of that legislation by the Chambers judge. This argument has little merit.

[62] First, absent a constitutional challenge, the Chambers judge was obligated to interpret and apply the *FNFTA*. This is in accordance with the presumption that legislation is constitutionally valid: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, Ont: LexisNexis, 2014) at 16.10. This principle was alluded to by Iacobucci and Arbour JJ., writing for a majority of the Supreme Court of Canada, in *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 SCR 248. In that case, the Court was dealing with the constitutionality of certain anti-terrorism provisions contained in the *Criminal Code*, RSC 1985, c C-46, Iacobucci and Arbour JJ. stated the following:

> [34] The modern principle of statutory interpretation requires that the words of the legislation be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. This is the prevailing and preferred approach to statutory interpretation: see, e.g., *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26. The modern approach recognizes the multi-faceted nature of statutory interpretation. Textual considerations must be read in concert with legislative intent and established legal norms.

> [35] **Underlying this approach is the presumption that legislation is enacted to comply with constitutional norms, including the rights and freedoms enshrined in the *Charter*: R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 367.** This presumption acknowledges the centrality of constitutional values in the legislative process, and more broadly, in the political and legal culture of Canada. Accordingly, where two readings of a provision are equally plausible, the interpretation which accords with *Charter* values should be adopted: see *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1078; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at p. 660; *R. v. Lucas*, [1998] 1 S.C.R. 439, at para. 66; and *Sharpe*, *supra*, at para. 33.
>
> (Emphasis added)

[63] Second, the fact Onion Lake has challenged the constitutional validity of the *FNFTA* in the Federal Court does not mean enforcement of that legislation has been stayed. No order has been made to that effect in the Federal Court or in any other court. As Professor Hogg stated in his text, *Constitutional Law of Canada*, at s. 58.2:

> … [w]hen proceedings are brought to obtain a ruling that a law is unconstitutional … will a court stay or enjoin the continued enforcement of the law pending a decision as to its validity? The short answer to this question is usually no. The applicable principles were laid down in *Manitoba v Metropolitan Stores* (1987) …

[64] The case referred to by Professor Hogg, *Manitoba (Attorney General) v Metropolitan Stores*, [1987] 1 SCR 110, involved an application to stay specific provisions of Manitoba's *Labour Relations Act*, CCSM c L10, pending a determination of the constitutionality of those provisions. On appeal to the Supreme Court of Canada, Beetz J., writing for the Court, concluded that the public interest must be taken into account when determining whether provisions of legislation should be stayed pending a determination of their constitutional validity. He found that the public interest is usually better served by the continued enforcement of laws as opposed to their temporary suspension (at 149). See also *RJR – MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311; *Harper v Canada (Attorney General)*, 2000 SCC 57, [2000] 2 SCR 764; *143471 Canada Inc. v Quebec (Attorney General)*; and *Tabah v Quebec (Attorney General)*, [1994] 2 SCR 339.

[65] Third, raising a constitutional challenge to legislation in one jurisdiction does not have the effect of rendering similar challenges in other jurisdictions redundant. Both the Federal Court and the Court of Queen's Bench have jurisdiction to consider the constitutional validity of the *FNFTA* or specific provisions thereof if that issue is raised in proceedings that are legitimately before those courts. Neither court is bound by the decision of the other. In other words, even if

the Federal Court found the *FNFTA* invalid in its entirety, that decision would be no more than "persuasive" authority in the Court of Queen's Bench. As pointed out by the British Columbia Court of Appeal in *Garber v Canada (Attorney General)*, 2015 BCCA 385 at para 27, [2016] 4 WWR 216, "… the path of two or more cases proceeding on similar or overlapping issues is well trod in Canada, and reflects the essential character of confederation, with architecture that respects the beauty of the differences between jurisdictions". In short, the existence of a constitutional challenge to the validity of the *FNFTA* in the Federal Court does not mean the Court of Queen's Bench must stay any action brought pursuant to that Act in this province. The existence of the Federal Court action is merely one of many factors to be considered in determining whether a stay should be granted.

[66] Finally, constitutional questions are, of necessity, contextual in nature. The circumstances giving rise to such challenges are key to their determination. If the circumstances giving rise to the challenges are different or if different provisions of the Act are engaged, the result of such challenges may well be different yet in no way inconsistent. In this case, there is no government actor involved. Moreover, Ms. Stick is a member of Onion Lake and, as a result, not only are different provisions of the *FNFTA* engaged, but the common law and *Regulations* (not associated with the *FNFTA*) have been raised as a basis for granting the relief requested.

[67] As a result of the above, in my view, the Chambers judge did not err either in determining no constitutional question had been raised in the proceedings before him or in applying the *FNFTA* in the circumstances before him. Those determinations were important to the Chambers judge's analysis of Onion Lake's stay application and, in particular, the question of whether the respondents' application constituted an abuse of process or was a parallel or duplicative proceeding with respect to the Federal Court action.

2. Were the pleadings parallel or duplicative in nature?

[68] Onion Lake contends the Chambers judge erred by finding the respondents' application and the Federal Court action were not "parallel or duplicative" in nature. Onion Lake asserts both actions engaged the same issue; namely, the requirement for financial disclosure and publication of financial documents by Onion Lake pursuant to the *FNFTA*. It argues the respondents' application is "substantially similar" to the enforcement application made by Canada and stayed

in the Federal Court. Moreover, Onion Lake submits that because of the overlap in legal issues there is a potential for inconsistent outcomes. It also submits the Chambers judge's decision is inconsistent with the Federal Court's stay decision.

[69] In my view, the Chambers judge did not err in concluding that the proceedings in the Court of Queen's Bench and in the Federal Court are not "parallel or duplicative". The Chambers judge's decision on this point was grounded in findings that were well supported by the evidence:

(i) Other than Onion Lake, the parties in the proceedings were different (judgment at para 34). While Onion Lake contends the Canadian Tax Payer's Federation [CTF] is a surrogate of the federal government, the evidence before the Chambers judge did not support that contention. According to that evidence, the CTF is a non-profit corporation. Its mandate is to promote the responsible and efficient use of taxpayers' money. There was no evidence CTF has any affiliation with the Government of Canada. Thus, both the CTF and Ms. Stick constituted members of the public.

(ii) As no constitutional question had been raised in the Court of Queen's Bench, the issues in the two proceedings were not substantially the same and there was no risk of inconsistent decisions (judgment at paras 31 and 32).

(iii) The outcome of the proceedings in the Federal Court would not be determinative of the outcome of the proceedings in the Court of Queen's Bench as different interests were at play. This is so not only because the CTF and Ms. Stick were members of the public and thus different provisions of the *FNFTA* are engaged, but also because Ms. Stick's application was not grounded solely in the provisions of the *FNFTA*. Her application included a claim for disclosure pursuant to the common law and s. 8(2) of the *Regulations*.

(iv) Allowing the respondents' application to proceed would not cause any prejudice to Onion Lake. Onion Lake would not be called upon to assert or defend its constitutional position in two actions. The Chambers judge's decision would finally determine the application in the Court of Queen's Bench subject only to

appellate review and Onion Lake would not incur additional legal costs (judgment at para 32).

(v) Failure to grant a stay of the respondents' application would not undermine the "practical effect" of the Federal Court stay because that stay did not relate to enforcement of any of the provisions of the *FNFTA*. It did not provide that "Onion Lake had no obligation to publish its consolidated statements". Rather, it merely stayed Canada's application for enforcement as the issues germane to that application were, in the view of the Federal Court Chambers judge, better dealt with in Onion Lake's Federal Court action (judgment at para 40). I note that in Canada's application for enforcement in the Federal Court, Onion Lake did not raise any constitutional question. The Federal Court Chambers judge exercised his power to grant the stay pursuant to s. 50 of the *Federal Courts Act*, RSC 1985, c F-7. His basis for granting the stay was that there were two proceedings in the Federal Court and that a trial was the preferable method of dealing with the issues raised by **both** proceedings.

(vii) The Federal Court action was commenced two and a half years prior to the hearing of the respondents' application in the Court of Queen's Bench. At that point, the Federal Court action had not yet proceeded to discoveries (judgment at para 16). The status of the Federal Court action was a relevant factor to consider when determining whether to impose the stay requested.

[70] In my view, all of the factors considered by the Chambers judge were germane to the exercise of his discretion as to whether a stay of the respondents' application should be granted. Moreover, as indicated, his conclusions were well supported by the evidence. The fact Onion Lake does not agree with the Chambers judge's assessment of those factors does not amount to an error in principle nor, given the deferential standard of review to be applied, does it warrant interference by this Court.

3. Miscellaneous Arguments

[71] I wish to briefly address two other points raised by Onion Lake on this appeal, namely: that Onion Lake speaks for Ms. Stick, who is a member of the Onion Lake Cree Nation; and, that

Onion Lake provided “reasonable accommodation” so that Ms. Stick might have access to the financial information she had requested.

[72] With respect to the first argument, the fact Ms. Stick is a member of the Onion Lake Cree Nation does not mean Onion Lake or its leadership speaks for Ms. Stick as an individual. Onion Lake represents a collective, not the individual members of that collective. Onion Lake’s position or actions are not the positions or actions of its individual members.

[73] With respect to the second argument, pursuant to s. 7 of the *FNFTA*, Ms. Stick is entitled to receive **copies** of Onion Lake’s audited consolidated financial statements and the schedule of remuneration paid and expenses reimbursed to the Chief and councillors. In my view, providing Ms. Stick with an opportunity to examine such documents at the band office in the presence of individuals employed by the First Nation’s leadership is not a “reasonable accommodation”. It does not allow Ms. Stick an opportunity to review the information in a neutral setting nor does it give Ms. Stick time to consider the information or ask questions of professionals who are independent of the First Nation’s leadership. In addition, it does not satisfy the requirements of s. 7 of the *FNFTA*, which calls for **copies** of the applicable documents to be provided to First Nations’ members. Section 7 of the *FNFTA* has not been found constitutionally invalid and until it is or until there is an order staying its enforcement, Onion Lake has a legal obligation to comply with its terms. Moreover, the suggested accommodation does not address Ms. Stick’s right to the financial information requested pursuant to the *Regulations* or the common law.

B. Did the Chambers judge err in granting the respondents’ application for disclosure and publication of financial information pursuant to the *FNFTA*?

[74] While Onion Lake contended the Chambers judge erred in granting the disclosure order, I note its notice of appeal does not take issue with that portion of the Chambers judge’s decision. Further, in light of Onion Lake’s concession that, absent the constitutional and stay issues, the respondents would be entitled to the financial disclosure requested, Onion Lake cannot now resile from that position.

VIII. CONCLUSION

[75] The Chambers judge did not err in principle, disregard a material matter of fact or fail to act judicially when exercising his discretion by refusing to grant Onion Lake's request for a stay, nor is the Chambers judge's decision so plainly wrong as to amount to an injustice. Accordingly, there is no basis upon which this Court can interfere with that decision. Onion Lake's appeal is dismissed.

[76] There shall be an order that Onion Lake pay to the respondents costs on the applications to amend Onion Lake's notice of appeal and file additional materials as well as for the appeal proper, all to be assessed in the usual manner.

"Ryan-Froslie J.A."

Ryan-Froslie J.A.

I concur. "Jackson J.A."

Jackson J.A.

I concur. "Ottenbreit J.A."

Ottenbreit J.A.