

KING'S BENCH FOR SASKATCHEWAN

Citation: 2026 SKKB 87

Date: 2026 04 23
Docket: QBG-RG-00762-2019
Judicial Centre: Regina

BETWEEN:

101266783 SASKATCHEWAN LTD., o/a HAPPY HOMES

Plaintiff
(Defendant by Counterclaim)

- and -

HARMANDEEP SINGH and JASPREET KAUR

Defendants
(Plaintiffs by Counterclaim)

- and -

BALDEEP DHINDSA

Third Party

Appearances:

M. Danish Shah
Eric D. Miller

for the plaintiff
for the defendants

FIAT
April 23, 2026

DANYLIUK J.

*We can ignore reality, but we cannot ignore the consequences of
ignoring reality.*

Ayn Rand

Introduction

[1] Sticking one's head in the sand is a dangerous business. It leads to

unsupported and unsupportable misconceptions in the mind of the person with his head in the sand. He thinks with his head in the sand nothing bad can happen, because he is ignoring reality. The consequences, however, inexorably advance upon the person with his head in the sand. Those consequences, while flowing from his own conduct and which are entirely predictable, nonetheless somehow come as a surprise to the person with his head in the sand.

[2] Such is the situation in the case at bar. I made an order that had two distinct attributes. First, it was absolutely clear and unequivocal. Do a thing by a set date. If you don't do the thing, your claim will be struck. Second, that order represented an arrangement made directly between the parties; in other words, this was a consent order.

[3] The order I granted was breached by the plaintiff. Consequences accrued. The statement of claim was struck, just as the order said it would be. Now, after the fact, the plaintiff tries to resile from its agreement that led to the consent order. Now, the plaintiff twists the facts, points fingers, lays blame on everyone except itself. Now, the plaintiff – quite incredibly – pleads that it is the subject of a lack of fairness.

[4] But now, it is judgment day for the plaintiff.

Facts

[5] The nature of both the underlying application and the current one before me do not require a deep dive into the facts. This lawsuit has not been proceeding briskly. It was commenced in 2019 and only now was it limping toward trial. Albeit in the criminal law context I agree with what was said at para. 1 of *R v Jordan*, 2016 SCC 27, “Timely justice is one of the hallmarks of a free and democratic society.”

[6] In December 2024 the defendants applied for an order that the plaintiff post security for costs to the credit of this action. The matter was adjourned by consent,

then it came before me on January 30, 2025. During chambers counsel asserted they had an arrangement, but the terms of same were unclear to me and appeared unsettled. The terms had not been reduced to writing. To avoid ambiguity and a future dispute, I directed counsel to confer and then, if there was an agreement, to file a draft order to my attention. The endorsement of January 30, 2025 reflects those dealings.

[7] On February 11, 2025 correspondence was faxed to the Regina Registrar. Enclosed was a draft order. The covering correspondence of same date was from Kevin A. Clarke, solicitor for the defendants. It stated as follows:

This matter was in Chambers on Thursday, January 30, 2025 before Justice Danyliuk. Justice Danyliuk granted an Order, but the precise wording of the Order was to be settled between counsel and then to be provided to Justice Danyliuk for review. Counsel have now settled the wording of the Order.

Attached hereto please find the proposed Order. Could you please forward the proposed Order for Justice Danyliuk for review, and advise if it may be issued.

I look forward to hearing from you.

The correspondence was copied to Mr. Shah, for the plaintiff.

[8] On February 11, 2025 I directed the court file to be endorsed as follows: “Draft order faxed in by Kevin Clarke may issue”. The issued order provided as follows:

The Court Orders:

- (a) THAT the Plaintiff (Defendant by Counter-Claim) shall pay into Court the amount of \$16,000.00 (the “Initial Deposit”), within Thirty (30) days of the date of this Order.
- (b) THAT until the Initial Deposit is paid into Court, the within proceedings are hereby stayed.
- (c) THAT upon the Plaintiff (Defendant by Counter-Claim)

paying the Initial Deposit into Court, the Local Registrar shall be directed to set this matter for Pre-Trial Settlement Conference.

- (d) THAT if this matter is not settled and is scheduled for Trial, the Plaintiff (Defendant by Counter-Claim) shall pay into Court an additional amount of \$11,000.00 (the “Second Deposit”) within Sixty (60) days of the Trial dates being scheduled.
- (e) THAT in the event that the Plaintiff (Defendant by Counter-Claim) does not pay either the Initial Deposit or the Second Deposit into Court in accordance with this Order, the Plaintiff’s Statement of Claim shall be dismissed with costs payable to the Defendants, without further Order.
- (f) The Defendants will have costs of and incidental to this Application.

[9] That ended my involvement in this matter until about a year later, in late February 2026. In the intervening year the matter went to pre-trial conference with no settlement resulting. There were other steps taken in the litigation and at the time of the events leading to the present application, other chambers applications were pending.

[10] As stated, my next involvement came on February 27, 2026. On that date the Registrar’s staff contacted me because of a request from the defendants’ lawyer to have the plaintiff’s claim struck out, as the second installment of security for costs had not been paid pursuant to the order. While on this application plaintiff’s counsel insisted upon referring to this as a “ruling” or “decision”, it was not. The registrar contacted me via telephone and I simply provided the endorsement verbally. It was transcribed onto the file.

[11] The endorsement of February 27, 2026 that I directed to be placed on the court file read as follows:

Counsel advises no funds have been paid into court within 60 days of setting trial dates. Accordingly, **the statement of claim**

is struck through the operation of that order.

[Emphasis added]

[12] The last sentence is important. There was no application before me. Due to the wording of the order, there did not need to be. The order spoke for itself. There was no fresh adjudication; the terms of the existing consent order were applied to the facts as they existed on that date. More on this below.

[13] Upon the striking of the claim in late February 2026 plaintiff's counsel brought the within application, asking me to reconsider my endorsement.

Issues

[14] The issues in this application are:

1. Were the defendants obliged to make another application to strike out the statement of claim?
2. Did the defendants' course of action in the litigation somehow give rise to estoppel or some other reason to not strike the claim?
3. What is the proper order as to costs?

Analysis

1. ***Were the defendants obliged to make another application to strike out the statement of claim?***

[15] The short answer to this is "no".

[16] Respectfully, the plaintiff mischaracterizes the nature of the order agreed to by the parties and granted by this Court. When I repeatedly asked plaintiff's counsel what was the understanding of both he and his client as to what the order meant, I never received a clear answer. However during the ensuing chambers argument plaintiff's

counsel dealt with this in two ways:

- He first asserted that notwithstanding the clear language of the order, somehow it was up to the defendants to make another application to strike the claim.
- Secondly, he said that my February 27, 2026 fiat amounted to an adjudication of a legal issue on the merits without my providing the plaintiff with the ability to be heard.

[17] The plaintiff will not acknowledge that this was a consent “drop dead” order. That is exactly what it was. The order itself is clear: in the event of the plaintiff’s failure to deposit either sum, its claim would be struck out.

[18] While some judges have expressed the view that “drop dead” orders are “questionable, if not outright improper” (*Sigfusson Northern Ltd. v Signal Energy LLC*, 2016 SKQB 46 at para 14, per Elson J.) that is not my own view. While such orders are granted sparingly, that is a matter of preferred practice and members of this Court do have the jurisdiction to grant such orders, especially where they proceed by consent.

[19] In this regard the controlling authority is *Gustafson v Future Four Agro Inc.*, 2019 SKCA 68. The factual matrix is succinctly summarized at paras. 1 and 2 of that decision:

[1] On December 19, 2017, a Queen’s Bench judge granted a consent order [Consent Order] which provided that if the appellant failed to serve his affidavit of documents on the respondent by January 31, 2018, the appellant’s statement of defence and counterclaim would be struck. The appellant failed to meet that deadline and the respondent applied to have the appellant’s statement of defence and counterclaim struck. In response, the appellant served his affidavit of documents and applied to the Court of Queen’s Bench for an order extending the deadline for service of the affidavit of documents to the date on which it was served, namely February 12, 2018.

[2] In a September 11, 2018 fiat [*Chambers Decision*], the Chambers judge declined to extend the deadline for service and ordered that the appellant's statement of defence and counterclaim be struck. The appellant asks this Court to overturn those decisions. For the following reasons, we would dismiss the appeal.

[20] Thus the overall fact pattern is markedly similar to the case at hand.

[21] *Gustafson* further explores the nature of, and ability to grant, "drop dead" orders at paras. 45 to 52. It is worth citing that decision in detail:

[45] Just as potential litigants can choose to go another route entirely, those who choose to pursue a claim in the Court of Queen's Bench are entitled to do so in the manner permitted by *The Queen's Bench Rules*. They are, to the extent and in the manner contemplated by *The Queen's Bench Rules* and permitted by the court, entitled to make agreements as to how they will conduct an action. They may commence an action and agree to settle on terms to be incorporated in a consent order, which may include a release of all actions and causes of action. They may agree to forego access to the full litigation menu, and, if the court agrees, deal with their dispute by stating an issue or applying for summary judgment.

[46] **They may also agree to take a certain position in response to an application by another party. In particular, they may agree to a consent order under a procedural rule such as Rule 13-7, including a consent order that has consequences for a failure to comply.** Again, they are not, by doing so, waiving or contracting out of a benefit provided by legislation with the kind of public policy purpose at issue in cases such as *Etobicoke* [1982 CanLII 15, [1982] 1 SCR 202 (SCC)].

[47] Second, even if the right to apply under Subrule 13-7(2) could be characterized as a legislation that engages the contracting out principle, the contracting out issue does not arise on these facts. The Consent Order enlarged the time appointed by the *Rules* to serve the affidavit of documents. As such, it constituted the exercise by a Queen's Bench judge of his discretion pursuant to Subrule 13-7(2), on terms he considered just. **The parties did not contract out of Subrule 13-7(2). To**

the contrary, they agreed to and received the “benefit” of a judge considering and granting an application for the Consent Order pursuant to that Subrule. The appellant received the benefit of an enlargement of the time provided to serve his affidavit of documents and avoided legal costs related to preparing for Court to deal with the respondent’s action. The respondent received the benefit of a hard deadline.

[48] Third, if the Chambers judge had the jurisdiction to grant the Consent Order—which, in our view, he did—the parties were entitled to agree that such an order should be granted. It cannot be contrary to public policy for parties to an action to agree that a judge will make an order that he or she has the jurisdiction to make pursuant to *The Queen’s Bench Rules*. Orders fixing deadlines and orders striking pleadings are granted as a matter of course. Where the issue is a failure to disclose documents, Rule 5-14 applies:

[Reproduction of the Rule omitted]

[49] Orders of this kind do not deny access to justice or the benefit of *The Queen’s Bench Rules*. They are part and parcel of providing a means to resolve disputes in a timely and cost-effective manner pursuant to *The Queen’s Bench Rules*, which is an essential element of access to justice.

[50] The appellant relies on *Sigfusson Northern Ltd. v Signal Energy LLC*, 2016 SKQB 46, 88 CPC (7th) 416. In that case, Elson J. refused to make an order in this form, which, as he notes, is sometimes referred to as a “drop dead” order. He explained his reasons for doing so, as follows:

[14] In my view, such an order is questionable, if not outright improper. In effect, the ‘drop dead’ order purports to do away with, or fetter, the court’s discretion, at a future time, to consider all circumstances related to the alleged or demonstrated non-compliance, including those circumstances which might arguably excuse non-compliance. While the court obviously expects its orders to be observed, it should not anticipate non-compliance by attaching an automatic and potentially prejudicial consequence to it. This is not to say that non-complying parties will not bear the burden of presenting strong and compelling evidence to excuse their failure. Clearly, they will. That said, the court should not,

before the fact, deny them the opportunity to present such evidence.

See also *Lussier v Meabry*, 2018 SKQB 302, at paragraphs 26-29, 18 RFL (8th) 159, where the court cited these comments with approval.

[51] **With the greatest respect, we are of a different view. The Consent Order does not purport to fetter the discretion of the court at a future time. It does not tell another judge what to do. It provides that the statement of defence and counterclaim “shall be struck”. Although the respondent chose to apply for a further order, that application was not necessary.**

[52] **As a matter of practice, Chambers judges may be reluctant to make drop dead orders, regardless of whether they are by consent. However, practice is one thing, and jurisdiction is another. Judges have the discretion to make such orders under Subrule 13-7(2) in appropriate circumstances.** Indeed, it would be an error for a judge to conclude that the court has no discretion to make such an order, regardless of the circumstances. Further, **judges may often find that the consent of the parties is a very important consideration in deciding whether to do so.**

[Emphasis added]

[22] This is precisely the situation before me in February 2025. The defendants wanted security for costs. The plaintiff wanted time to post same. In turn, the defendants wanted consequences if the plaintiff took more time than was agreed to. The parties therefore entered into a consent arrangement wherein the plaintiff got to post security in two tranches rather than one. The defendants got hard deadlines, with strict consequences if either temporal deadline was not observed by the plaintiff.

[23] This is exactly what happened. The plaintiff missed posting the second deposit for security for costs. It does not really matter how far past the deadline the plaintiff was. What is important, given the wording of the consent order, is that the deadline was missed. In *Gustafson* the deadline was missed by 12 days. This Court

struck the claim and the Court of Appeal upheld that decision.

[24] *Gustafson* has been applied by this Court. For example see *Federated Co-operatives Limited v Ajit Transport Inc.*, 2022 SKQB 53. Justice Gerecke stated the following at paras. 12 to 15, and 18:

[12] **There are numerous decisions, including *Gustafson*, that have held that a consent order is not only an order but also the embodiment of a contract. The court governs its procedure through the Rules. That allows a judge of the court certain latitude as to how to interpret or cure contraventions of the Rules. Variation of a consent order is a different matter. The Court of Appeal explained in *Gustafson* that the Rules do not “change the substantive law or grant a Chambers judge the discretion to ignore the substantive law in what he or she perceives to be the interests of justice”: paragraph 24. A consent order is not merely a procedural thing, but a matter of substantive law as it represents a contract. As described at paragraph 26 of *Gustafson*:**

[26] ... The Contract provided that the appellant’s statement of defence and counterclaim would be struck if the affidavit of documents was not filed by January 31. The Consent Order implemented that agreement. The appellant, having received the consideration for which he bargained—that the respondent’s application would be withdrawn and the time to serve extended to January 31, 2018—sought to resile from that fully performed contract by seeking relief from that bargain.

[13] **Where a party asks the court to assist it in resiling from such a contract, the court’s discretion to vary will generally arise only in circumstances such as common mistake, fraud, collusion, misrepresentation, duress, illegality or where there has been a slip in drawing the order: *Gustafson*, at para 27. Similarly, frustration could be another basis.**

[14] That being the legal context, FCL argues that I am bound to strike AJIT’s statement of defence. But the matter is not so simple. In *Gustafson*, the consent order was set out in paragraph 6. It read as follows:

The Court orders:

1. The Defendant, Terry Gustafson, shall serve his Affidavit of Documents on the Plaintiff on or before January 31, 2018.
2. The Defendant's Affidavit of Documents shall include all documents related to his 2015 and 2016 crop years currently in the possession of Saskatchewan Crop Insurance Corporation (the "SCIC Documents").
3. Should the Defendant fail to serve his Affidavit of Documents (along with the SCIC Documents) on or before January 31, 2018, the Defendant's Statement of Defence and Counterclaim shall be struck.

[15] **The consent order in *Gustafson*, i.e., the contract, thus contained an unambiguous consequence for failing to serve the affidavit of documents by the deadline.** Finding no basis in contract law to vary the consent order, the chambers judge had declined to vary the consent order and struck the defendant's pleadings. The Court of Appeal upheld that decision.

...

[18] **The crucial factor in both *Gustafson* and *Procyshyn* was the presence of a stipulated consequence of ending the party's right to defend or pursue an action.** The consent order agreed to between FCL and AJIT contained no such consequence, nor even an allusion to a consequence. It simply set a deadline.

[Emphasis added]

[25] While Justice Gerecke declined to strike the pleading in *Ajit* this was because the order in that case did not clearly delineate a consequence – a crucial factual distinction. That was not so in *Gustafson*, and it is not so here.

[26] Also see *Saskatchewan Crop Insurance Corporation v Gustafson*, 2022 SKQB 5 at para 40, per Robertson J.

[27] With respect to this issue – that the defendants had to make another application – the order does not say that. It does not even imply it. Regarding the missed

second payment the order says the security must be deposited sixty days after trial dates are set. The court file reveals trial dates were set on November 12, 2025. The 60 days expired January 11, 2026. By the latter part of February 2026 the money still had not been paid into Court. This was over a month late. This is a more serious breach than was the case in *Gustafson*.

[28] In a case such as this, with an unequivocal order containing a drop dead provision with tangible consequences, there is absolutely no reason for the defendants to make an additional application. In *Gustafson* such an application was deemed unnecessary.

[29] In the alternative, the plaintiff argued that my February 27, 2026 fiat amounted to an adjudication of a legal issue on the merits without my providing the plaintiff with the ability to be heard. Respectfully, this is a mischaracterization of the endorsement from that date. The “drop dead” order was already in place. I have already set out the inquiry from the registrar and my direction as to the wording of an endorsement.

[30] The plaintiff also ignores the wording of that endorsement. It was expressly recognized that the striking of the claim arose from the operation of the order itself, not any application pursuant to the order. This is a distinction with a difference.

[31] While the plaintiff “invited” me to consider *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699, [1999] 2 SCR 817 (SCC), this case is miles apart from *Baker*. There, an application for an exemption to deportation was involved. Clearly there was a right to be heard because no relief had been granted *vis-à-vis* the exemption application. Here, the issue of security for costs had already been passed upon. There was no “heightened duty of fairness”. There was only a valid and subsisting order from which no appeal had been taken. It was the operation of that order’s terms that governed.

[32] The plaintiff also misses the point that if it became apparent the 60-day deadline for posting the second fund of security would be missed, the plaintiff could have applied for an extension or some other relief. Instead, the plaintiff did nothing.

[33] As well, the order in the case at bar was a consent order. The variation of a consent order is legally distinct from the variation of other orders. This was canvassed in *Gustafson* at paras 22, and 27 to 29:

[22] Two points bear emphasis in relation to this reasoning. First, Culliton J.A.’s comments as to the existence of an “almost complete discretion to relieve against any irregularity” related to matters within the scope of a predecessor to Rule 1-6. This is not such an application. The appellant does not seek relief in relation to a contravention of or failure to comply with *The Queen’s Bench Rules*. He seeks to vary a consent order, which is a very different matter. *Coulthard* [1952 CanLII 187, 5 WWR (NS) 662 (SKCA)] does not stand for the proposition that a Chambers judge always has almost complete discretion to extend a time limit, in the interests of justice, regardless of the context or the nature or source of the time limit.

...

[27] The question, then, is whether the Chambers judge correctly identified the substantive law—that is, the law of contract—which limited the exercise of his discretion. *Procyshyn* [2014 SKQB 349] and *Wall Estate* [2017 SKQB 149] adopted the reasoning in *R v Gray* (2004), 284 NBR (2d) 31 (CA) [*Gray*], which had been adopted in *Elmtree Environmental Ltd. v Fredericton (Region) Solid Waste Commission*, 2011 NBQB 108, at para 15, 377 NBR (2d) 71 [*Elmtree*], with one difference. In *Gray*, Robertson J.A. said a consent order could be set aside only on grounds that would vitiate a contract, and referred to common mistake, fraud, collusion, misrepresentation, duress and illegality as *examples* of such grounds. *Procyshyn* and *Wall Estate*, on the other hand, say that one of these six listed grounds must be present, absent a slip in drawing the order. The Chambers judge adopted the same approach, stating that he had the discretion to vary the Consent Order “only in those instances where there is proof of a common mistake, fraud, collusion, misrepresentation, duress or illegality, or where there has been a ‘slip’ in drawing the order” (*Chambers*

Decision at para 22).

[28] In *Sekerbank* [2016 SKCA 77], Caldwell J.A. adopted a less restrictive approach, stating the test this way:

[97] ... I agree with the analysis in *Elmtree*, where the court had faced arguments similar to those advanced by the appellants in this case and concluded that it could not terminate a consent order absent proof of grounds that would vitiate a contract — i.e., fraud, common mistake, or illegality, etc. — or of a material change in circumstances. This conclusion is supported by the decisions in *Spender* and *Ontario Sugar Co.*, *Re* cited by the Chambers judge and by the recent decisions in *Procyshyn v. Gabruch*, 2014 SKQB 349 (Sask. Q.B.) at paras 28-29, (2014), [2015] 5 W.W.R. 320 (Sask. Q.B.), *Yan v. Chen*, 2014 ONSC 3111 (Ont. S.C.J. [Commercial List]) at paras 83-85, as well as *Simonelli v Ayron Developments Inc.*, 2010 ABQB 565, [2011] 3 W.W.R. 140 (Alta. Q.B.) at paras 64-87, and in *Kolodziejski v. Kolodziejski* (May 20, 2016), Doc. Saskatoon CACV 2813 (Sask. Q.B.).

[Emphasis (underlining) in original]

[29] This language recognizes that there are circumstances in which a consent order could be varied or set aside which do not constitute common mistake, fraud, collusion, misrepresentation, duress or illegality. However, it does not mean a court can vary a consent order if there has been a “material change of circumstances” which would be insufficient to either vitiate the underlying contract or justify non-performance based on the law of contract.

[34] In this case there is no basis to tinker with the consent order. In essence, the plaintiff wishes to resile on its earlier assent to the terms of the consent order and rewrite that order retroactively. In these circumstances that cannot be done.

[35] On the basis of the construction of the “drop dead” order and on the basis of the facts existing in this situation, there was absolutely no requirement on the defendants to make some other application. The defendants were entitled to proceed as they did.

2. *Did the defendants' course of action in the litigation somehow give rise to estoppel or some other reason to not strike the claim?*

[36] The plaintiff puts forth somewhat convoluted arguments. By taking steps to move the litigation along while the parties were in the waiting period for the posting of the two deposits for security for costs, it is argued, the defendants somehow lulled the plaintiff into some false sense of security and/or they are estopped from asserting their rights under the order.

[37] This argument was difficult to follow in the plaintiff's notice of application (which contained written arguments better put in a brief) and in oral submissions. It seems to boil down to an assertion that because the defendants did not stand on their rights and demand the claim be struck on day 61 following the assignment of trial dates, and by taking further steps in the litigation in the interim, the defendants are estopped from relying upon the order's clear terms.

[38] In a way, this argument is captured in para. 32 of the plaintiff's notice of application:

32. The timeline for the second payment for security for costs would have been before the Appearance of January 13, 2026 before Justice Robertson. The Defendants did not pursue a dismissal on January 13, 2026, leading the Plaintiff to believe that strict observance of the timelines in the Order of Justice Danyiuk was not being pursued.

[39] Somehow, the plaintiff argues, the failure of the defendants to seize immediately upon the advantage conferred by the order works against the enforcement of the order on its own terms. The defendants' failure to act forthwith somehow converts the order into an unenforceable thing. While this proposed form of a doctrine of legal transubstantiation is novel it is, alas, unknown in law. Neither the order itself nor the law generally imposed any obligation on the defendants to act immediately or even with alacrity.

[40] At para. 37 of its notice of application the plaintiff places substantial – if not exclusive – reliance upon *ADAG Corporation Canada Ltd. v SaskEnergy Incorporated*, 2021 SKCA 74. Cited is para. 21:

[21] With regard to the law related to estoppel by election, the trial judge referenced *Coward v Kramer Ltd.*, 2018 SKCA 63 [Coward]; *Charter Building Company v 1540857 Ontario Inc.*, 2011 ONCA 487, 336 DLR (4th) 471 [Charter Bld.]; and *Motor Oil Hellas (Corinth) Refineries S.A. v Shipping Corporation of India*, [1990] 1 Lloyd's Rep 391 (HL). The trial judge adopted SaskEnergy's summary of the required steps – as set out in *Coward* – for estoppel by election to operate (*SaskEnergy 2* at para 73):

- (a) Party A has two alternative and inconsistent courses of action in relation to a contract;
- (b) Party A makes an election as to which course of action to follow;
- (c) Party A then conducts itself to cause Party B to believe it has elected one course of action and rejected the alternative and inconsistent course of action;
- (d) As a result, Party A is estopped from subsequently adopting the rejected course of action.

Leave to appeal *ADAG* was refused at 2022 CanLII 1938 (SCC).

[41] *ADAG* was applied in the very recent decision of Justice Smith in *Orano Canada Inc. v Uex Corporation*, 2026 SKKB 35. This was an application of *ADAG* to a purely contractual situation. In particular Orano sought a declaration that the rights and obligations of the parties under an option agreement expired on a set date because that date was established by the contract. Justice Smith adopted the *ADAG* analysis and found UEX was attempting to use estoppel as a sword, not a shield, against Orano. This was compounded as UEX was itself in breach of the agreement.

[42] Justice Smith cited the conclusion was driven by the “plain language of

the Option Agreement” (*Orano* at para 42). He ruled in favour of Orano since the intentions of the parties were clear from the unequivocal nature of their agreement. I note Justice Smith wrote the original trial decision in *ADAG*.

[43] The same is true here. The parties set two deadlines with consequences if either was breached. The plaintiff breached. It cannot now seek to renege on its bargain because it has determined it does not like those consequences. Further, there are important distinctions between *ADAG* and the case at bar:

- *ADAG* involved only a contract. Here, that contract has been enshrined in an order of this Court and the applicable legal principles are not the same as those applicable solely to a contract. Respectfully, the plaintiff conflates these on a conceptual level. The plaintiff ignores the principles pertaining to setting aside or modifying consent orders as set out in *Gustafson*.
- Here, the second branch of *ADAG* is not met as the defendants did not make any election as to which of two alternative and inconsistent courses of action to follow. It would be both ludicrous and inconsistent with the principles set out in the Foundational Rules of this Court to suggest that the defendants should have done absolutely nothing *vis-à-vis* this action, then jumped on the terms of the order the second the time limit expired. That suggested course of action is inconsistent with the way in which litigation is conducted in this province.
- I also find that the defendants did not conduct themselves in any way as to convince the plaintiff that they would not rely upon the terms of the consent order. There was no reliance on the part of the plaintiff. The plaintiff knew exactly what the Court was requiring it to do. This

argument stretches estoppel until it snaps.

- There is no legal impediment to the defendants adopting the “rejected” course of action, i.e., relying upon the consent order.

[44] What the plaintiff misses here is that this is not a purely contractual situation wherein two mutually exclusive courses of action were open to the defendants. Nothing detracted from their ability to rely upon the consent order entered into by these very parties.

[45] I have concluded that by applying the legal principles to these facts, this form of estoppel cannot avail the plaintiff.

[46] The plaintiff switched gears and opted to argue a case provided by defendants’ counsel, 2238649 *Alberta Ltd. v Graham Carillion NBJV*, 2025 SKKB 14. In fact, this case militates **against** the relief sought by the plaintiff. In that case the plaintiffs were ordered to post security for costs within 60 days. They did not meet that deadline so Graham NBJV applied to strike the claim. After those applications were served the plaintiffs filed the security for costs but Graham continued with the application to strike.

[47] This case does not assist the plaintiff. First, the order directing the posting of security for costs specifically said in the event of breach any defendant could apply to dismiss the plaintiff’s claim (*Graham Carilion* at para 33). This is not a “drop dead” order. It is different in kind from the order granted herein. This is a crucial factual and legal distinction.

[48] Secondly, even in those circumstances the claim was struck. See Justice Norbeck’s decision at paras. 36 to 38:

[36] Graham NBJV and Graham Construction argue that the plaintiffs’ claims ought to be struck in any event. Deadlines are

not optional, and plaintiffs must follow *The King's Bench Rules* and decisions rendered by the Court without exception. The plaintiffs, they say, were on notice as to what may occur if they failed to post the security on time and failed even to provide an excuse for their breach.

[37] The plaintiffs do not explain the delay in posting security for costs. They simply say that it was paid late, and there was no prejudice to the defendants. However, that ignores the fact that the late payment directly disobeyed a Court order. I have little evidence or information to ground my discretion when the plaintiffs provide no evidence or explanation for the delay.

[38] I am left with the impression that the plaintiffs see no problem with disobeying or disregarding a Court order. The Actions should be dismissed for failing to adhere to the Security for Costs Orders.

If anything the plaintiff in the case at bar is in a worse position, given the nature of the order and given that no application from the defendants was required. This case does not assist the plaintiff at all.

[49] The plaintiff advanced yet another argument, this one related to a putative ethical breach by counsel opposite. The plaintiff relied upon s. 7-2 of the *Code of Professional Conduct* of the Law Society of Saskatchewan. Plaintiff's counsel alleged defendant's counsel did not act with courtesy and in good faith, and took advantage of an omission without fair warning. This ignores that "fair warning" would have emanated from the order itself. This was not a purely contractual obligation between the parties nor an arrangement between lawyers. The parties saw fit to put this deal into the form of a consent order.

[50] Casting aspersions of the integrity of another lawyer without any basis to do so is, in and of itself, a serious matter. There is no basis to impugn Mr. Miller's conduct. In any event that is a matter for the regulator, not this Court. It may be a time for Mr. Shah to engage in some introspection, given the nature in which he flung such an allegation without foundation.

[51] Finally, the plaintiff invoked the “clean hands” doctrine. It said the defendants had failed to pay a cost award in favour of the plaintiff on an interlocutory application, thus could not invoke the dismissal term of the consent order. This argument is easily disposed of. The plaintiff has entirely ignored Rule 11-8(1)(c) of *The King’s Bench Rules* which provides that the costs awarded on any interlocutory application “are not payable until final determination of the action or proceeding, unless the Court orders otherwise”. No such order was made. While the costs have been awarded against the defendants and the amount set, the actual obligation to pay is deferred by operation of law.

[52] None of these arguments avail the plaintiff. Its application must be dismissed.

3. What is the proper order as to costs?

[53] The plaintiff claimed \$3,000.00 as the costs of this application. Not only is that an excessive amount, costs generally follow the event and the plaintiff has failed in its application for relief.

[54] The defendants claimed costs, stating that \$3,000.00 should be awarded but in their favour.

[55] I agree the defendants should receive the costs of this application but I respectfully disagree that \$3,000.00 is the appropriate quantum. Notwithstanding this Court’s plenary jurisdiction as to costs (see, for example, Rule 11-1) this power is not to be exercised lightly and certainly not capriciously.

[56] Given the shotgun approach of the plaintiff in advancing arguments I assess the proper costs payable as falling within Column 2 of the Tariff. Because of these extra arguments and the nature of same, something more than the strict Tariff amount of \$1,250.00 is called for.

[57] Accordingly I award the defendants costs of this application which are hereby fixed in the sum of \$1,500.00, payable forthwith.

Conclusion

[58] Accordingly I make the following order:

1. The plaintiff's application is dismissed in its entirety.
2. The plaintiff shall pay to the defendants the costs of this application which are hereby fixed in the sum of \$1,500.00, payable forthwith.

"R.W. Danyliuk" J.

R.W. DANYLIUK