Court of Appeal for Saskatchewan **Citation: *Mann v Mann*, 2024 SKCA 24**

Docket: CACV4066 **Date: 2024-03-05**

Between:

James Mann and Farms and Families of North America Inc.
(carrying on business as Farmers of North America)

Appellants
(Applicants)

And

Jason Mann and AgraCity Crop & Nutrition Ltd.

Respondents
(Respondents)

Before:	Leurer C.J.S., Tholl and Kalmakoff JJ.A.
Disposition:	Appeal dismissed
Written reasons by: In concurrence:	The Honourable Chief Justice Leurer The Honourable Mr. Justice Tholl The Honourable Mr. Justice Kalmakoff
On appeal from: Appeal heard:	QBG 656 of 2022 (Sask QB), Saskatoon September 20 and 22, 2023
Counsel:	James Mann on his own behalf Wendy Kelley, Alex Baboi and Rajan Bains for Farms and Families of North America Inc. Khurrum Awan, Allen Berriault and Daniel Cherian for AgraCity Crop & Nutrition Ltd. Matthew Scott for Jason Mann

Leurer C.J.S.

I. INTRODUCTION

[1] This appeal is another in the ongoing litigation between Farms and Families of North America Inc., which does business as Farmers of North America [FNA] and James Mann, on the one hand, and AgraCity Crop & Nutrition Ltd. [AgraCity] and Jason Mann, on the other.

[2] More specifically, in this case, FNA and James appeal against the dismissal of their application to prevent AgraCity from independently participating in the Ag in Motion agricultural trade show in 2022 [AIM Trade Show]: *Mann v Mann* (18 July 2022) Saskatoon, QBG 656 of 2022 (Sask QB) [*Chambers Decision*].

[3] The appeal is moot, as the AIM Trade Show has long since come and gone. Nonetheless, all parties ask that this Court decide it because the issue of AgraCity's independent participation in trade shows is likely to arise again in the context of their ongoing relationship. For this reason, I am prepared to decide this moot appeal.

[4] I would dismiss this appeal. My reasons follow.

II. BACKGROUND

A. A brief overview of the litigation

[5] While all of this is well-known to the parties, it will assist other readers of this judgment to provide some brief background.

[6] James and Jason are equal shareholders in AgraCity. Although both are also directors and officers of AgraCity, for many years Jason has been responsible for its day-to-day management. James is the sole registered shareholder of FNA and is its operating mind. Jason has no formal role in FNA. However, he claims an ownership stake in it.

[7] AgraCity's and FNA's business affairs intertwine. In short, AgraCity sells agricultural products. Historically, it has done so only to farmers who have purchased "memberships" in FNA. The business affairs of AgraCity and FNA also involve many other affiliated corporations and business organizations. One of the principal sources of conflict between James and Jason relates to the question as to whether AgraCity and FNA's other affiliates exist to serve only the interests of FNA and its members.

[8] In 2017, James took steps to oust Jason from positions of authority within AgraCity. Proceedings were commenced by Jason against James and AgraCity, which were assigned the case number QBG 948 of 2017 [*948/2017*]. There are also several other extant actions involving these parties and FNA.

[9] In the context of *948/2017*, Danyliuk J. of the Court of Queen's Bench made the first of several orders that have served to preserve the status quo of the business arrangements between these two companies and the two brothers: *Mann v Mann* (19 July 2017) Saskatoon, QBG 948 of 2017 (Sask QB) [*Danyliuk Order*].The following two terms of the *Danyliuk Order* are the origin of the dispute that lies at the heart of this appeal:

> 2. Between today and the next return date neither Jason Mann nor James Mann (nor anyone acting on their behalf) shall take any action to hire, terminate, oust, promote or demote, or discipline any employees or management or officers/directors of Agracity Crop & Nutrition Ltd., *nor take any action whatsoever that is outside the ordinary of business*.
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> …
>
> 4. Until the matter adjourned to August 22, 2017 is determined Jason Mann shall continue to act as president and managing director of Agracity Crop & Nutrition Ltd. and in that role *he shall not take any steps or conduct himself in a manner that is outside the ordinary scope of business*.
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> (Emphasis added)

[10] The *Danyliuk Order* was later affirmed by an order made by Gabrielson J. on December 21, 2017. Justice Gabrielson also directed a trial of the issue surrounding the validity of the AgraCity shareholders' meeting that purported to remove Jason as a director of that company. Further orders made by other judges of the Court of Queen's Bench (now the Court of King's Bench) have affirmed the continued vitality of the *Danyliuk Order*. Therefore, although in first instance that order was intended to operate for a short time only, it has become a fixture in the relationship among the parties while matters are sorted out through the litigation process.

[11] The *Danyliuk Order* and those orders that have followed it have been repeatedly referred to by the parties as creating a benchmark expectation that they must carry on with the ordinary course of business until the conclusion of the litigation between them. FNA and James's amended factum describes the purpose of the *Danyliuk Order* to be "to ensure that the parties maintain the status quo of the ordinary course of business between them". AgraCity's factum similarly states that the "[*Danyliuk Order*] commanded Jim, Jason, AgraCity, and FNA [the Parties] not to take any action outside the ordinary course of business". Jason likewise says in his factum that the order prohibits "both James and Jason from taking any action that is outside the ordinary course of AgraCity's business".

B. The application

[12] The AIM Trade Show was scheduled to begin on Tuesday, July 19, 2022. Because of the disagreement between the parties, AgraCity and FNA were registered to have separate booths at it, although FNA was of the view that the two companies should participate in the show together.

[13] On Tuesday, July 12, 2022, FNA and James commenced an action by way of originating application naming both AgraCity and Jason as respondents. As I will explain, the relief requested in that originating application was vaguely pleaded. However, I have no doubt that the proceeding was intended to stop AgraCity from participating in the AIM Trade Show except under the direction of, and in conjunction with, FNA.

[14] Concurrently with the issuance of the originating application, FNA and James filed two separate applications without notice, four affidavits, a brief of law and a draft order. The first application without notice was for an order abridging the time for service of the originating application to make it returnable on July 14, 2022. The second application without notice requested four substantive orders relating to the participation of AgraCity in the AIM Trade Show. I will review the details of those filings later in these reasons.

[15] FNA and James's materials came before the Chambers judge who granted only an order abridging the time for service of the originating application, to allow it to be argued on July 15, 2022.

[16] On July 14, 2022, AgraCity and Jason filed three responding affidavits and a brief of law.

[17] The matter was argued, as scheduled by the Chambers judge, on Friday, July 15, 2022.

C. The *Chambers Decision*

[18] The *Chambers Decision* was rendered on Monday, July 18, 2022. The Chambers judge began his analysis by summarizing the disagreement between the parties over AgraCity's independent participation in the AIM Trade Show. As part of this, he explained that time had not permitted him to craft his reasons in the manner he would have liked. He said that he had "deliberately omitted certain references to the facts and the law" to make sure that his decision could be rendered that day. He added that he had satisfied himself that "the omitted references would definitely not have materially altered the final decision" (at para 5).

[19] The Chambers judge then reviewed the broader dispute that existed between the parties. He provided his understanding of the *Danyliuk Order* which he stated contained the direction to the parties "not to take any action that is 'outside the ordinary course of business'". He observed that the *Danyliuk Order* had been "extended in subsequent fiats" and that, for the purposes of the application before him, "the parties acknowledge and accept that this direction remains in place" (at para 9).

[20] Having laid this foundation, the Chambers judge turned to a review of the evidence under the heading "Conduct of Trade Shows". He first observed that "the conflict between James and Jason turns on their differing perspectives about the link between FNA and AgraCity". He noted that, while "Jason appears to acknowledge the existence of the link, he does not share James' view about its nature" but instead "believes that AgraCity has, and should continue to have, more independence than James is prepared to accept" (at para 12). The Chambers judge then explained how this general disagreement over the relationship between FNA and AgraCity had manifested itself into a dispute about the way in which the two companies would participate in agricultural trade shows:

> [14] The differing perspectives have now spilled over into the conduct of trade shows. In the supporting affidavits of James and various employees of FNA, the applicants assert that the two companies have always conducted trade shows together at the same booth. The applicants argue that the joint conduct and attendance at trade shows is part of the "ordinary

> course of business" between the companies. The respondents disagree. They acknowledge a degree of collaboration in some trade shows but say this has not always been the case.

[21] After setting all of this out, the Chambers judge discussed the evidence relating specifically to the AIM Trade Show. This included the evidence from several employees of the two companies explaining how AgraCity had initially come to register for that event without the participation of FNA. He recounted some back-and-forth actions taken by both companies that eventually resulted in them both being registered for the trade show but with separate booths. Following this discussion about the AIM Trade Show, the Chambers judge reviewed parts of the evidence regarding the companies conduct of trade shows more generally:

> [21] The Court also received affidavit evidence from Jason and from Brian Rumberg, AgraCity's national sales manager, to the effect that AgraCity has arranged for and attended trade shows without FNA's participation. Mr. Rumberg specifically deposed to trade shows conducted in Alberta and Ontario. He also exhibited copies of email messages, describing AgraCity's involvement with trade shows, without FNA participation. This includes email messages pertaining to the AIM trade show in 2019 and the planned, but subsequently cancelled, trade show in 2020.
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> [22] As part of their evidence in support of the application, the applicants say that FNA will suffer irreparable harm if the respondents are not prevented from operating a separate booth at the AIM trade show. The evidence in support of this assertion is confined to one paragraph of James' affidavit. Reciting paragraph 22 of his affidavit, word-for-word, James deposed to the following (identifying AgraCity as "Agracity" or "AGC"):
>
> > 22. If Agracity is allowed to attend a trade show in a booth that is different from FNA's booth, it will have the effect of irreparably harming FNA's business reputation, make it appear that the AGC is not part of the FNA Group that generates the most significant value to the membership. Further, it does not allow FNA to attend the trade show financially given the normal sharing of costs. FNA of the membership that Agracity solely *(sic)* sells to and farmers need to see this relationship in the normal scope and course of business" FNA's membership Agracity cannot appear publicly to be seen as seperate *(sic)* from FNA.

[22] Under the heading "Law and Analysis", the Chambers judge noted the existence of "confusion in the relief being requested in this case" and summarized the positions taken before him by FNA and James (at para 23). He concluded that, despite "the applicants' confusion about the relief they seek, I am satisfied that it is essentially that of an interlocutory injunction, premised on the [*Danyliuk Order*]". He also stated that he had "serious reservations" about this being pursued by way of originating application, but that he "need not determine the point here" as he intended to "address the interlocutory injunction request as if the application was properly brought" (at para 25).

[23] The Chambers judge next observed that the parties had agreed that "the essential elements involved in determining whether an interlocutory injunction can be granted are as articulated in *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311" (at para 26). He then reproduced the summary of that three-part test as set out by Richards J.A. (as he then was) in *Mosaic Potash Esterhazy Limited Partnership v Potash Corporation of Saskatchewan Inc.*, 2011 SKCA 120 at para 113, 341 DLR (4th) 407 [*Mosaic*]. In short, *Mosaic* holds that a court that is engaged in the assessment of whether to grant an interlocutory prohibitory injunction is to consider whether the applicant has established that: (a) there is a serious issue to be tried; (b) there is a meaningful risk that it will suffer irreparable harm if the injunction is not granted; and (c) the balance of convenience favours the grant of the injunction.

[24] The Chambers judge's substantive analysis of the situation then concluded with the following two paragraphs:

> [28] Leaving the strength of case issue aside for a moment, I must say that I have serious concerns about the applicants' submission that jointly conducted trade shows was an ordinary part of the two companies' course of business. The evidence of Ms. Pollard and Mr. Rumberg, both supported by corroborating exhibits, suggests otherwise. This appears particularly so with the AIM trade show, where the renewal of the online registration was already pre-populated in AgraCity's name. I suspect there is at least a modest history of AgraCity participating in trade shows without any FNA involvement. Whether FNA was aware of this, I cannot say.
>
> [29] The bigger issue in this application, however, pertains to the applicants' claim of irreparable harm that is not reasonably compensable in damages. In my view, it is not strong. As mentioned in my description of the relevant facts, the applicants' argument is based entirely on James' opinion, expressed in his affidavit. At best, the opinion is vague and non-specific. Moreover, James presents no facts to premise his opinion. In saying this, I appreciate that damage to reputation is difficult to measure objectively. That difficulty does not compel the conclusion that such loss is incapable of monetary calculation. More importantly, I am satisfied that something more than a general opinion of an interested party, without details, is necessary before the Court can be satisfied that the irreparable harm requirement has been met. In short, I am satisfied that the applicants have failed to meet the irreparable harm factor. It follows from this that the applicants have also failed to show that the balance of convenience favours them in this analysis.

[25] As a bottom line, the Chambers judge dismissed the application. It is against this result that FNA and James now appeal.

III. ISSUES

[26] The outcome of this appeal is determined by the answers to the following two questions:

(a) Did the Chambers judge misconstrue the application as a request for an injunction?

(b) Did the Chambers judge misapply the injunction test?

IV. ANALYSIS

A. The Chambers judge correctly understood the nature of the application

[27] FNA and James's first argument is that the Chambers judge misconstrued the nature of their application. More specifically, they say that they were not seeking an injunction, but instead were asking for a declaration that the *Danyliuk Order* required AgraCity to only participate in agricultural trade shows under the direction of FNA. They then argue that, because the Chambers judge was mistaken as to the nature of the application he was called to decide, he erroneously considered their request through the three-part test applicable to the grant of an interlocutory prohibitory injunction. This submission serves as the foundation for them to finally argue in relation to this ground of appeal that they should not have been required to show that FNA would suffer irreparable harm or that the balance of convenience favoured the grant of an injunction.

[28] A consideration of FNA and James's argument requires that careful attention be paid to the relief they asked the Chambers judge to grant to them. Understandably, this begins with a reading of their originating application, which stated as follows:

> The applicant seeks the following remedy or order:
>
> > 1. That the order made by Justice Danyliuk in QBG 948 of 2017 on July 19, 2017 is valid and still subsists.
> >
> > 2. That paragraphs 2 and 4 of the Order require parties to maintain the "ordinary course of business" and prohibit parties from taking any action that goes outside of the ordinary course of business.
> >
> > 3. That paragraph 2 and 4 of the Order further restricts parties from taking action outside of the ordinary course or scope of business.
> >
> > 4. That paragraph 2 and 4 of the Order allows any Judge to extend the order in the future.
> >
> > 5. That the Order of Justice Danyliuk has been extended by Justice N.G. Gabrielson in paragraph 12 of the fiat of December 21, 2017 in QBG 948 of 2017.

> 6. That the Order of Justice Danyliuk in QBG 948 of 2017 has been extended to FNA by the order of Justice Mills dated September 28, 2018 in QBG 948 of 2017 and QBG 1336 of 2018. Therefore, the said order binds FNA, Agracity, James Mann, and Jason Mann.
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> 7. That the ordinary course of business ordered by Justice Danyliuk requires parties to continue operating, in the same manner, they have been operating historically.
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> 8. That since Agracity was created to assist FNA in achieving its purpose of maximizing farmers' profitability, Agracity has never attended a tradeshow where it had its own presence independently or separately from FNA.
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> 9. That historically, FNA has always led all the entities under it (including Agracity) at tradeshows where FNA books the booth and prepares the logistics for participation by FNA, Agracity and other entities under FNA.
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> 10. That the Order of Justice Danyliuk requires Agracity to continue to follow FNA's lead in attending tradeshows.
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> 11. That the Order of Justice Danyliuk prevents Agracity from participating in a trade show separately from FNA without authorization from FNA and that any contrary action is outside of the ordinary course and would constitute a violation of the said order.

[29] As can be seen, notwithstanding that these 11 paragraphs were prefaced by the statement that the applicants were requesting "the following remedy or order", none of them contain an explicit statement of the relief that FNA and James were asking the Chambers judge to grant. Instead, paragraphs numbered 1 to 7 amount to a summary of the terms of the *Danyliuk Order* and those extending it. Paragraphs 8 and 9 are assertions of fact. Paragraphs 10 and 11 amount to statements of what FNA and James believe the effect of the *Danyliuk Order* to be. All of this was the fodder for confusion over the relief that they were seeking when the parties presented themselves before the Chambers judge.

[30] It seems from the *Chambers Decision* that the position taken by FNA and James evolved during the course of the argument they presented to the Chambers judge. In this regard, the Chambers judge wrote as follows:

> [23] As counsel for the respondents have accurately pointed out, there is some confusion in the relief being requested in this case. At first, counsel for FNA indicated that he was not seeking an injunction to enforce the Danyliuk order, at all. Rather, he argued that the Court should simply find there is a threatened violation of the Danyliuk order and then exercise its inherent jurisdiction to impose an order that restrains the violation. Counsel presented no authority to support this approach. When later pressed on the point, FNA's counsel acknowledged that his client was seeking an injunction and that it would be a permanent one. This flatly conflicted with the oral submission given by James, who acknowledged that the relief requested was more in the nature of an interlocutory injunction.

[31] This passage might be interpreted as evidencing a concession by FNA and James that they were seeking injunctive relief. Therefore, the first question I must confront is if it is open to FNA and James to raise this ground of appeal, given how they presented their oral argument before the Chambers judge. In this regard, AgraCity and Jason submit that because FNA and James acknowledged to the Chambers judge that they *were* seeking injunctive relief, they should not be heard in this Court to say otherwise.

[32] The idea that FNA and James are attempting to resile from the position they took before the Chambers judge is undercut by the fact that two paragraphs after the Chambers judge set out the evolving positions taken by FNA and James, he prefaced his analysis of the substance of the matter with the statement that I have earlier quoted, namely that despite FNA and James's confusion about the relief they were seeking, he was "*satisfied* that it is essentially that of an interlocutory injunction, premised on the [*Danyliuk Order*]" (at para 25, emphasis added). I take from this statement that the Chambers judge was not relying on the existence of a concession by FNA and James as the foundation for his conclusion that he would apply the interlocutory injunction test.

[33] Given that the Chambers judge did not reason on the basis that the point was *conceded*, I do not consider it appropriate for this Court to proceed on that basis. Accordingly, I am satisfied that it is open to FNA and James to *argue* that the Chambers judge misconstrued their application when he characterized it as a request for an interlocutory injunction.

[34] Nonetheless, I am equally satisfied that the Chambers judge approached the application in the only way he could. My explanation for this conclusion will begin with an overview of the dispute that came before the Chambers judge. I will then review other documents filed by FNA and James. Finally, I will make mention of how FNA and James presented their argument in this Court. All of this leads me to conclude that, although the originating application did not set out in express terms the nature of the relief that FNA and James were seeking, the Chambers judge correctly concluded that it was presented to him as an application for an interlocutory prohibitory injunction, with a request that other determinations be made by him in aid of that relief.

[35] Since the proceedings were initiated by the originating application, it is appropriate to look to it for a definition of the dispute between the parties. Outside of the ambiguous statement of the relief that was requested in it, FNA and James asserted that AgraCity must "continue to follow FNA's lead in attending tradeshows" and cannot participate in trade shows "separately from FNA without authorization from FNA". These claims were part and parcel of their contention that AgraCity exists to serve the needs of FNA and its members alone. This is evident from the summary of material facts contained in the originating application, which include the followings statements:

> 1. James Mann is the owner of Farmers of North America (FNA) and created Agracity to help FNA achieve its purpose of helping farmers maximize their profits.
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> …
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> 7. At all times since Agracity was created, and throughout its entire history, FNA has always led all the companies under it (including Agracity) to tradeshows. It has always been under FNA's direction that tradeshows are booked including the booth. FNA provides the logistics and direction for participation while the entities under FNA (including Agracity) share in FNA's presence at the tradeshows while operating under FNA's direction.
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> …
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> 12. This action by Jason Mann is one of a number of targeted attempts to destroy FNA and dismantle its mission for the personal financial benefit of Jason Mann. If Agracity should use a separate booth at the AIM trade show in addition to the significantly increased costs of not sharing a booth (pavilion), which FNA cannot afford on its own at this time (due to financial mismanagement of Jason) and outside the direction of FNA, it will give the impression to farmer members that [AgraCity] is no longer part of FNA and that the value that FNA created in [AgraCity] is no longer for the benefit of FNA members. [AgraCity], since the company that was created to help it achieve FNA's mission, would appear to be separating its affairs from FNA. Hence, farmers will not see the FNA membership in the same way which will lead to significantly reduced revenue in FNA and irreparable reputational harm.

[36] It was, therefore, understandable that the Chambers judge situated his analysis in the broader context of the disagreement as to whether AgraCity exists simply to serve the interests of FNA and its members. On this, he wrote as follows:

> [12] As I have reviewed the fiats in question, it is apparent that the conflict between James and Jason turns on their differing perspectives about the link between FNA and AgraCity. While Jason appears to acknowledge the existence of the link, he does not share James' view about its nature. Jason believes that AgraCity has, and should continue to have, more independence than James is prepared to accept.

[37] The nature of the dispute that the Chambers judge was called to decide was also summarized in the affidavit sworn by James in support of the originating application. It set out the immediate facts leading to the service of the originating application. It then described the purpose for the proceedings in the following terms:

> 21. *FNA and I have now decided to bring an originating application to stop Agracity from violating the* [*Danyliuk Order*]; for the interpretation of the [*Danyliuk Order*] on whether it applies to all the entities in this application; and whether the ordinary course of business [provision of the [*Danyliuk Order*] requires Agracity to continue to attend tradeshows jointly with FNA and only inside the FNA booth as is customarily done and directed by FNA.
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> 22. *If Agracity is allowed to attend a trade show in a booth that is different from FNA's booth, it will have the effect of irreparably harming FNA's business reputation, make it appear the [AgraCity] is not part of the FNA Group that generates the most significant value to the membership.* Further, it does not allow FNA to attend the trade show financially given the normal sharing of costs. FNA is the owner of the membership that Agracity solely sells to and farmers need to see this relationship in the normal scope and course of business. FNA's membership Agracity cannot appear publicly to be seen as seperate from FNA.
>
> (Emphasis added)

[38] The statement that FNA and James have "now decided to bring an originating application *to stop Agracity* from violating the [*Danyliuk Order*]" and the further assertion that "*[i]f Agracity is allowed* to attend a trade show" certain consequences will follow are expressed in the language of a prohibitory injunction. *R v Canadian Broadcasting Corp.*, 2018 SCC 5 at para 16, [2018] 1 SCR 196 [*CBC*], instructs the judge before whom an injunction application is brought to "examine whether, in substance, the overall effect of the injunction would be to require the defendant to *do* something, or to *refrain from doing* something" (emphasis in original). Although this guidance was given in the context of distinguishing a mandatory from a prohibitory injunction, it provides a helpful benchmark to understand the essence of a prohibitory injunction. I am satisfied that this is what FNA and James asked that they be granted.

[39] As I have previously mentioned, at the same time that they issued their originating application, FNA and James also filed two applications without notice. In the second of these they explicitly stated that they *were* seeking an injunction. Under the heading "Remedy claimed or sought" that document said as follows:

> 3. An Order determining that the [*Danyliuk Order*] requires parties to maintain the ordinary course of business in existence before that order was made.

> 4. An Order recognizing that as part of maintaining the ordinary course of business till date, [AgraCity] and FNA have always booked and utilized only one and the same booth for all purposes whatsoever at all trade shows in Saskatchewan.
>
> 5. An Order determining that any attempt by [AgraCity] to book and utilize a separate booth at Ag in Motion (AIM) trade show coming up from July 19 to 21, 2022 is a violation of the [*Danyliuk Order*] directing parties to maintain the ordinary course of business.
>
> 6. *An injunction restraining [AgraCity] from booking and utilizing any booth other than the booth already booked by FNA for use by both FNA and [AgraCity] at the AIM trade show between July 19 to 21, 2022*.
>
> (Emphasis added)

[40] The paragraphs numbered 3, 4 and 5 might be seen as a request for declaratory relief. However, the paragraph numbered 6 clearly stated that FNA and James were asking for an "injunction restraining [AgraCity] from booking and utilizing any booth other than the booth already booked by FNA for use by both FNA and [AgraCity] at the AIM trade show".

[41] FNA and James reiterated the same four requests for relief in their "Applicants' Written Argument in Respect of the Application Without Notice" dated July 12, 2022. That document is organized under headings. One of these is titled "Are the applicants entitled to an order of injunction"? This is further broken down into two sub-headings, "The serious question test" and the "Irreparable harm test". A review of these parts of their written argument convinces me that FNA and AgraCity were advancing the position that all parts of their application should be assessed against the test applicable when there is a request for an interlocutory prohibitory injunction. The file transmitted by the Court of King's Bench to this Court does not show the filing of a later separate brief of law for consideration by the Chambers judge at the argument made on July 15, 2022. Therefore, as at least as far as I have been able to determine, the only test that FNA and James asked the Chambers judge to apply is that applicable when an interlocutory prohibitory injunction is requested.

[42] Even in their filings with this Court, FNA and James made clear that they were seeking to prohibit AgraCity from separately participating in the AIM Trade Show. In their factum, they stated that the "dispute that gives rise to the current matter was summarized concisely" in the following paragraph from the *Chambers Decision*:

> [2] The dispute raised in this application relates to the participation of Farms and Families of North America Inc. dba Farmers of North America [FNA] and AgraCity Crop & Nutrition Ltd. [AgraCity] in an upcoming trade show, scheduled to start on July 19, 2022. The applicants posit that, in the ordinary course of their business, these companies

> have shared booth space at all previous trade shows, which were arranged by FNA. Based on an order of this Court that obliges the parties not to conduct themselves in a manner that is "outside the ordinary course of business", the applicants say that the companies must continue to share booth space at trade shows, something AgraCity has threatened not to do at this week's show. *To stop AgraCity's plan, the applicants ask the Court to rule that the threatened conduct would amount to a violation of the Court order and to enjoin or otherwise restrain AgraCity from conducting its own trade show without FNA's participation.*
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> (Emphasis added)

[43] The last sentence of this paragraph is clearly expressed in the language of a prohibitory injunction.

[44] Considering the entirety of the record, I am satisfied that the essence of what FNA and James *were* seeking was an order requiring AgraCity to refrain from participating in the AIM Trade Show except under FNA's direction. This precisely fits the description of a prohibitory injunction as set out in *CBC*.

[45] I would emphasize that FNA and James's request was also properly seen as being a request for an *interlocutory* injunction because it, like the *Danyliuk Order* on which the application was based, was only intended to preserve the status quo arrangements between the parties until the substance of their dispute could be resolved at trial or otherwise. The Chambers judge was therefore not wrong to judge the matter before him on that basis.

[46] I fully accept that FNA and James were also requesting that the Chambers judge make certain findings on the merits in support of their request for an injunction. However, these findings or determinations are properly seen as nothing more than as being in aid of the substantive relief the Chambers judge was being asked to grant. Moreover, I am satisfied that it was not possible for the Chambers judge, on the record he was given, to make anything more than the preliminary findings on the merits of the case that would be sufficient to ground a request for the grant of an interlocutory injunction. This latter comment merits a brief further explanation.

[47] FNA and James spent considerable effort in their factum, supplemental written argument and their oral submissions explaining why this Court should find that the evidence before the Chambers judge was sufficient for him to conclude that it was in the ordinary course of business that AgraCity only attend trade shows under the leadership of FNA and that therefore the separate

attendance by it at the AIM Trade Show would breach the *Danyliuk Order*. However, their submissions fail to come to grips with the existence of the conflicting evidence led by AgraCity on this point. In this regard, I simply highlight only one small part of the record, being the following paragraph from Jason's affidavit on this issue:

> 16. I have had overall oversight for AgraCity's participation in trade shows since 2008. At times I have been directly involved in arranging booths for AgraCity and FNA. AgraCity has always taken the lead on organizing our involvement in trade shows. AgraCity has invested hundreds of thousands of dollars in trade shows which have included promotional events such as truck and product giveaways through draws. AgraCity has also, on many occasions, attended trade shows without the participation of FNA.

[48] Jason was not cross-examined on his affidavit. This is understandable, given the speed with which the application was brought forward. However, it underscores why I find that there exists no basis to conclude that the Chambers judge erred in failing to reach a determination as to whether a breach of the *Danyliuk Order* was made out on the evidence.

[49] FNA and James say that they could succeed in their application without proving that AgraCity had *never* attended agricultural trade shows except with FNA or under its direction. I cannot agree. Their assertion was that AgraCity's trade show attendance was, as a matter of course, *always* under FNA's direction. This was the basis for them to seek an order that AgraCity should be enjoined from attending the AIM Trade Show.

[50] It is appropriate to discuss, in the context of the first part of the test, the suggestion that the Chambers judge erred when he considered the evidence about the participation by AgraCity in trade shows that post-dated the making of the *Danyliuk Order*. I accept that the *Danyliuk Order* was intended to preserve the companies' ordinary course of business as of the making of that order in the summer of 2017 (*Mann v AgraCity Crop & Nutrition Ltd.*, 2024 SKCA 23 at para 33). FNA and James assert that this means that the evidence of events after the making of the order should not have had any bearing on what the ordinary course of business was as of its date. For this reason, they say that the evidence of the renewal of the online registration, as referenced in paragraph 28 of the *Chambers Decision*, should not have been considered by the Chambers judge. They also say that much of the other evidence relied on by AgraCity and Jason related to matters that post-date the making of the *Danyliuk Order*. They say, therefore, that the evidence does not speak to the ordinary course of business before that order was made.

[51] I am not convinced that the evidence of conduct post-dating the making of the *Danyliuk Order* was irrelevant to the question of how the parties organized and conducted their business before or at the time that order was made. Indeed, as AgraCity and Jason point out, the affidavits filed by FNA and James contain some similar bits of evidence. Leaving these points aside, however, the evidence as to how the parties carried on their business after the *Danyliuk Order* was made is at the periphery of the question that the Chambers judge was required to confront. As I have explained, the essence of the dispute between the parties – and hence the key question on which the existence or non-existence of a serious issue to be tried turned – was whether AgraCity was *required* in the ordinary course of business to participate in trade shows only under the direction of FNA. As I have also explained, this question turned on what the evidence said about whether AgraCity had *always* participated in trade shows in this way. There was a contentious issue that could not be resolved in the context of the evidence before the Chambers judge.

[52] For the same reasons, I reject FNA and James's argument that the Chambers judge was wrong to have preferred the evidence of AgraCity and Jason to their own. The Chambers judge did no such thing. Appropriately, he reached no conclusion on this issue.

[53] Before leaving the subject of the proper characterization of the application that the Chambers judge was called to decide, I will address three final points.

[54] First, the authorities that FNA and James cite do not assist in their appeal. They principally rely on *Kuang v Young*, 2023 ONSC 2429, as supporting their characterization of the dispute that the Chambers judge was asked to decide in this case. The opening sentence in that judgment states that the "only issue on this long motion is the interpretation of the term 'usual and ordinary course of business'" (at para 1). Nothing in the *Chambers Decision* suggests that the parties disagreed over the meaning of the *Danyliuk Order*. Rather, as I have stated, the dispute was over whether AgraCity's independent attendance at the AIM Trade Show was consistent with its ordinary course of business before that order was made. In short, the Chambers judge was not asked to interpret the *Danyliuk Order* at all.

[55] The second point concerns this Court's jurisdiction to hear this appeal. FNA and James ground their right to appeal against the *Chambers Decision* on *The Court of Appeal Act, 2000*, SS 2000, c C-42.1. Section 8(1) of that Act directs that "no appeal lies to [this] court from an

interlocutory decision of the Court of King's Bench unless leave to appeal is granted by a judge or the court". As I have explained, the order requested by FNA and James was interlocutory in nature. Section 8(2) provides several exceptions to the leave requirement when there is an attempt to appeal against an interlocutory order. However, the only exception that is possibly applicable is that found in s. 8(2)(a)(iii), which allows for a right of appeal, without leave, if the case involves "*the granting or refusal of an injunction*" (emphasis added). In this case, FNA and James have not obtained leave to appeal against the *Chambers Decision*. It follows from this fact that the only way that their appeal is properly before this Court is if the *Chambers Decision* is viewed as a refusal to grant an injunction.

[56] The third and final point I would make in relation to this ground of appeal is that my reasons should not be understood to suggest that, where it can be established on the evidence that a breach of a court order *has* occurred, it is necessary to establish the existence of irreparable harm or that the balance of convenience favours the enforcement of the order. I do not need to decide this point. The simple fact is that this record did not allow the Chambers judge to make such a conclusive finding, nor am I convinced that he was asked to make an order premised on doing so.

[57] For these reasons, I am satisfied that the Chambers judge properly identified the question he was called to decide. More specifically, the Chambers judge did not err in law by treating the application as one seeking an interlocutory injunction.

B. The Chambers judge properly applied the injunction test

[58] FNA and James agree that the Chambers judge identified the correct test for the grant or refusal of an interlocutory prohibitory injunction. Nonetheless, they argue that, if the Chambers judge did not err by viewing the application as seeking this relief, he misapplied the applicable test.

[59] It will assist in my explanation for why I do not consider FNA and James' various arguments to be persuasive to put them in the context of the applicable test. This is found in the following passage from *Mosaic* (at para 113):

> …
>
> (a) The judge should normally begin with a preliminary consideration of the strength of the plaintiff's case. The general rule in this regard is that the plaintiff must demonstrate a

> serious issue to be tried, *i.e.* the plaintiff must have a claim which is not frivolous or vexatious. If the plaintiff raises a serious issue to be tried, it is necessary for the judge to turn to the matters of irreparable harm and balance of convenience.
>
> (b) Irreparable harm is best seen as an aspect of the balance of convenience. The general rule here is that the plaintiff must establish at least a meaningful doubt as to whether the loss he or she might suffer before trial if an injunction is not granted can be compensated for, or adequately compensated for, in damages. Put another way, the plaintiff must demonstrate a meaningful risk of irreparable harm. If this is done, the analysis turns to the balance of convenience proper.
>
> (c) The assessment of the balance of convenience is usually the core of the analysis. In this regard, the relative strength of the plaintiff's case, the relative likelihood of irreparable harm, and the likely amount and nature of such harm will typically all be relevant considerations. Depending on the particulars of the case, strength in relation to one of these matters might compensate for weakness in another. Centrally, the judge must weigh the risk of the irreparable harm the plaintiff is likely to suffer before trial if the injunction is not granted, and he or she succeeds at trial, against the risk of the irreparable harm the defendant is likely to suffer if the injunction is granted and he or she prevails at trial. That said, the balance of convenience analysis is compendious. It can accommodate a range of equitable and other considerations.
>
> (d) The judge's ultimate focus in considering whether to grant interlocutory injunctive relief must be on the overall equities and justice of the situation at hand.

[60] This Court will interfere with a King's Bench decision concerning the grant or refusal of an interlocutory injunction only if the decision "involves an error of principle, the disregard or misapprehension of a material fact, a failure to act judicially or a result that is so plainly wrong as to amount to an injustice" (*101280222 Saskatchewan Ltd. v Silver Star Salvage (1998) Ltd*., 2019 SKCA 59 at para 14, [2019] 11 WWR 516. See also, *Turtle v Valvoline Canadian Franchising Corp*., 2021 SKCA 76 at para 29, and authorities cited therein and, more generally, *Stromberg v Olafson*, 2023 SKCA 67 at paras 117–122, 45 BLR (6th) 171, and *Ernst & Young Inc. v Koroluk*, 2024 SKCA 19).

1. Serious issue to be tried

[61] FNA and James's first submission is that the Chambers judge erred in paragraph 28 of the *Chambers Decision*, quoted earlier in these reasons, writing in their factum as follows:

> 44. The issue of the strength of the case was left aside not just "for a moment" but permanently and the Court did not express an opinion on whether this component of the RJR MacDonald test favored the Applicants. But more importantly, the issue of whether jointly conducted trade shows were an ordinary part of the two companies' course of business is not one of the RJR MacDonald factors. It is not clear why Justice Elson addressed it while purportedly applying the RJR MacDonald analysis or what role it played in his final decision. The Honourable Justice did not make a clear finding of whether jointly conducted trade shows were an ordinary part of business and in any event, he should not

> have considered this when deciding whether the conditions for an injunction had been met. The Applicants submit that to the extent that Justice Elson imported an "ordinary course" component into the test for an injunction he was mistaken in law.

[62] I disagree that the Chambers judge erred in any of the ways that are suggested.

[63] First, contrary to FNA and James's submission, the Chambers judge *did* express a view about the strength of their case; he stated he had "serious concerns about the applicants' submission that jointly conducted trade shows was an ordinary part of the two companies' course of business" (at para 28). However, these concerns were not the reason why he declined the injunction. Instead, he dismissed the application because he was not convinced that FNA would suffer irreparable harm if AgraCity participated in the AIM Trade Show independently from FNA.

[64] Second, I see no error in the Chambers judge's introductory statement that he was "[l]eaving the strength of case issue aside for a moment". The requirement that an applicant for an interlocutory prohibitory injunction show the existence of a serious issue to be tried merely establishes a threshold, and a low one at that, for the grant of such relief. As directed in *Mosaic*, once "the plaintiff raises a serious issue to be tried, it is necessary for the judge to turn to the matters of irreparable harm and balance of convenience" (at para 113(a)). As I see it, that is the approach the Chambers judge took in this case. I read his reasons as stating that he would analyze the situation on the premise that FNA and James *had* raised a serious issue to be tried as to whether AgraCity was required to attend agricultural trade shows under the direction of FNA.

[65] Third, the Chambers judge did not err by considering the question of whether there was evidence concerning the participation by AgraCity in agricultural trade shows in the context of the first part of the injunction test. As I have explained, the existence of the *factual* dispute as to whether, at the time of the grant of the *Danyliuk Order*, AgraCity's trade show attendance was, as a matter of course, *always* under FNA's direction necessitated that the Chambers judge analyze the evidence on this crucial point when he considered if there was a serious question to be tried. Indeed, it was only if there was a serious question to be tried on this issue that it was necessary for the Chambers judge to go on and consider if the other parts of the injunction test favoured the grant of an interlocutory order.

2. Irreparable harm

[66] FNA and James's next argument is that the Chambers judge erred in his conclusion that they had "failed to meet the irreparable harm factor". It is to be recalled that he found the argument made to him to be "based entirely on James' opinion, expressed in his affidavit", which he characterized as being "vague and non-specific" (at para 29). The context for this statement is the following paragraph in James's affidavit (reproduced again for ease of reference):

> 22. If Agracity is allowed to attend a trade show in a booth that is different from FNA's booth, it will have the effect of irreparably harming FNA's business reputation, make it appear the [AgraCity] is not part of the FNA Group that generates the most significant value to the membership. Further, it does not allow FNA to attend the trade show financially given the normal sharing of costs. FNA is the owner of the membership that Agracity solely sells to and farmers need to see this relationship in the normal scope and course of business. FNA's membership Agracity cannot appear publicly to be seen as separate from FNA.

[67] The point that the Chambers judge appropriately focused on was whether the evidence showed that, if AgraCity was allowed to separately participate in trade shows *while the dispute between the parties was litigated*, FNA would suffer irreparably. He was right to approach the question of irreparable harm in this way.

[68] FNA and James acknowledge in their factum that it was "true that James did not address the issue of 'irreparable harm' in detail in his Affidavit", but they say that "irreparable harm becomes apparent when considering the Affidavits in their entirety and in their proper context". However, their arguments all build on the disputed contention that AgraCity exists to serve only FNA and its members. As I have emphasized, that is part of the core of the dispute between the parties that is destined for resolution at a trial or otherwise.

[69] I see no basis to find that the Chambers judge disregarded or misapprehended any material facts in relation to the issue of irreparable harm. Given this conclusion, the applicable standard of review prevents this Court from second guessing the findings that the Chambers judge made on that part of the injunction test.

3. Balance of convenience

[70] Based on his finding that "the applicants have failed to meet the irreparable harm factor", the Chambers judge concluded that it followed that they "have also failed to show that the balance of convenience favours them in this analysis" (at para 29). FNA and James did not allege any separate error by the Chambers judge in this part of his analysis.

V. CONCLUSION

[71] I would dismiss FNA and James's appeal. I would also grant to each of AgraCity and Jason one set of the costs of this appeal, payable jointly and severally by James and FNA, to be calculated in accordance with Column 3 of the *Tariff of Costs in the Court of Appeal*.

"Leurer C.J.S."

Leurer C.J.S.

I concur. "Tholl J.A."

Tholl J.A.

I concur. "Kalmakoff J.A."

Kalmakoff J.A.