Court of Appeal for Saskatchewan

Citation: ***Farms and Families of North America Inc. (Farmers of North America) v AgraCity Crop & Nutrition Ltd.*****, 2024 SKCA 22**

Date: 2024-03-05

Docket: CACV3536
Between:

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

Appellant
(Plaintiff/Applicant/Non-party)

And

AgraCity Crop & Nutrition Ltd.

Respondent
(Defendant/Respondent/Non-party)

And

Jason Mann

Respondent
(Defendant/Non-party/Plaintiff by Counterclaim)

And

James Mann and Robert Friesen

Non-parties
(Non-parties/Non-parties/Defendants by Counterclaim)

Docket: CACV3634
Between:

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

Appellant
(Plaintiff/Defendant by Counterclaim)

And

AgraCity Crop & Nutrition Ltd. and Jason Mann

Respondents
(Defendants/Plaintiffs by Counterclaim)

And

James Mann and Robert Friesen

Non-parties
(Non-parties/Defendants by Counterclaim)

Before:	Leurer C.J.S., Tholl and Kalmakoff JJ.A.
Disposition:	Appeals 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 1336 of 2018 and QBG 948 of 2017 (Sask QB), Saskatoon September 20 and 22, 2023
Counsel:	Wendy Kelley, arguing the law, for the Appellant James Mann, arguing the facts, for the Appellant Khurrum Awan, Allen Berriault and Daniel Cherian for AgraCity Crop & Nutrition Ltd. Matthew Scott for Jason Mann

Leurer C.J.S.

I. INTRODUCTION

[1] These two appeals are new chapters in ongoing, multi-fronted litigation between, on the one side, Farms and Families of North America Inc., which does business as Farmers of North America [FNA], and James Mann and, on the other side, AgraCity Crop & Nutrition Ltd. [AgraCity] and Jason Mann. The appeals relate to interim orders made by the Court of Queen's Bench judge [Chambers judge] who has had supervision of the litigation.

[2] The first interim order [First Membership Injunction] arose out of competing applications filed by FNA and AgraCity decided by a fiat in December of 2019: *Farms and Families of North America Inc. v AgraCity Crop & Nutrition Ltd.* (6 December 2019) Saskatoon, QBG 1336 of 2018 (Sask QB) [*First Membership Decision*]. The First Membership Injunction sets the terms relating to the sale of "memberships" in FNA while more fundamental matters in dispute between the parties are litigated.

[3] The second order [Second Membership Injunction] arose out of an application by AgraCity to enforce the First Membership Injunction. The reasons for its grant are contained in a fiat made in April of 2020: *Mann v Mann* (7 April 2020) Saskatoon, QBG 948 of 2017 (Sask QB) [*Second Membership Decision*]. The Second Membership Injunction clarifies and, to a degree expands upon, the first injunction.

[4] FNA appeals against the grant of the orders and asks that this Court substitute them with an injunction on the terms it requested when the applications leading to the First Membership Injunction came before the Chambers judge. As I will explain, I am unpersuaded that this Court should interfere with either order. Therefore, I would dismiss FNA's two appeals.

II. BACKGROUND

A. The business context

[5] 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.

[6] 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. Another part of the dispute is about which of the companies should be involved in the sale and pricing of FNA memberships.

[7] A somewhat more in-depth summary of the affairs of these companies and their affiliates is found in a judgment that the Chambers judge delivered in an earlier chapter of the litigation between the two brothers: *Mann v Mann* / *Farms and Families of North America Inc. v AgraCity Crop & Nutrition Ltd.* (28 September 2018) Saskatoon, QBG 948 of 2017 / QBG 1336 of 2018 (Sask QB) [*September 2018 Decision*]. In that decision, the Chambers judge explained as follows:

> [3] FNA started as a company vehicle that established a system allowing it to import into Canada farm products from the United States. Its first success seems to have come from importing glyphosate, a generic form of Roundup. Originally, glyphosate was a non-discriminate herbicide with much popularity in the farming community. FNA was able to import and sell to farmers glyphosate at much reduced prices. In order to purchase glyphosate and other agricultural products that were added to FNA's inventory, a farmer had to purchase a "membership" in FNA.
>
> [4] FNA's business grew and more sophisticated systems of product procurement and sales were developed by James and Jason. Eventually, AgraCity was incorporated and appears to be the primary seller of agricultural products to farmers. In order to purchase products from AgraCity, however, you must be an FNA member. The two corporations are inextricably linked by this relationship.
>
> [5] The business model appears to have continued to be nuanced with the addition of other retail suppliers within the business fold and the use of an offshore corporation to maximize business profits. There are significant disputes between who was responsible for the creation of the current business model, how that business model operates, the relationship between FNA and AgraCity, and the responsibilities of James and Jason within those corporations. James and Jason each have different views of all of the above matters. Each of them seems to grudgingly acknowledge the other one is involved in the operations of the corporations. Each of them maximizes their contribution to the ongoing success of the operations and minimizes the contribution of the other. The reality may fall somewhere between the two truths as each of them perceive them to be, but that is for another time.
>
> [6] FNA received its income solely from the sale of memberships to farmers. AgraCity received its income from the sale of agricultural products to FNA members.

> [7] James and Jason have differing views as to the agreements by which the two corporations operate with each other. No written agreements respecting the relationship have been presented to the court. No written agreements between James and Jason as to the respective duties and operations within the corporations have been presented to the court. It is not uncommon for this court to see disputes between family members in which no written ground rules exist. That is precisely why the matters end up in court when disagreements arise.

[8] I would expand on this summary in only one way. Paragraph 6 of the passage that I have just quoted states that FNA "received its income solely from the sale of memberships to farmers". Elsewhere in the *September 2018 Decision*, the Chambers judge identified as an undisputed fact that, prior to conflict arising between James and Jason, AgraCity also regularly provided money to FNA to supplement the revenue it received from membership sales. The principal issue in the dispute leading to the *September 2018 Decision* was whether AgraCity had an obligation to do so. One of the outcomes of the *September 2018 Decision* was that the Chambers judge directed that AgraCity continue to make monthly payments to FNA during the pendency of the litigation between them.

B. The litigation context

[9] To put the issues in this appeal in their proper context, it also helps to have an understanding of some of the many legal proceedings that have arisen out of these complicated business arrangements.

[10] In 2017, James took steps to oust Jason from positions of authority within AgraCity. James's actions resulted in the grant of an order by Danyliuk J. of the Court of Queen's Bench: *Mann v Mann* (19 July 2017) Saskatoon, QBG 948 of 2017 (Sask QB) [*Danyliuk Order*]. In substance, the *Danyliuk Order* preserved the status quo of the business arrangements between the brothers in relation to AgraCity and at least some of the affiliates of FNA while matters in dispute are litigated. The *Danyliuk Order* was later affirmed by an order made by Gabrielson J. on December 21, 2017, who 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.

[11] The *Danyliuk Order* and those that followed it have been repeatedly referred to by the parties and the Chambers judge as establishing a benchmark expectation that until the litigation is resolved, they will carry on with the ordinary course of business. In this regard, James stated as follows in an affidavit sworn on September 27, 2019:

> 12. To be clear, the Fiats and Orders require that both FNA, AGC, myself, my brother, Jason Mann, and those that work for us and with us, conduct ourselves within the ordinary course of business since we are all under an injunction to do so. In effect, it is my belief that the Courts are to be protecting the commercial interests of both companies until, as this Court has stated, either we negotiate a resolution or trial is completed. *See* Fiat, March 6, 2019, paragraph [14].

[12] In July of 2018, on the without notice application of Jason and AgraCity, Rothery J. granted a further interim order relating to these matters: *Mann v Mann* (17 July 2018) Saskatoon, QBG 948 of 2017 (Sask QB) [*Rothery Order*]. Among other things, it directed James to repay $60,000 that he had withdrawn from AgraCity's bank account on July 12, 2018.

[13] On August 22, 2018, FNA commenced an action against AgraCity and Jason, assigned the case number QBG 1336 of 2018 [*1336/2018*]. The statement of claim alleged that AgraCity was incorporated as a vehicle to sell and deliver agricultural products and services to FNA's members and that there existed an agreement between FNA and AgraCity that "AgraCity will on a regular basis pay to [FNA] an amount sufficient to ensure that [FNA] can pay all reasonable costs of operation in the ordinary course of business". It further alleged that AgraCity had stopped making those payments and that this was in breach of the *Danyliuk Order*. A year later, FNA filed an amended statement of claim in *1336/2018*, to expand the scope of the allegations it made to include the operations of other affiliated corporations.

[14] Shortly after *1336/2018* was commenced, FNA applied for an order setting aside the *Rothery Order* and directing AgraCity to continue to make payments that it claimed were due to it. This application came before the Chambers judge, who dealt with both requests in the *September 2018 Decision*. That judgment had two broad outcomes. First, while the Chambers judge left in place the majority of the *Rothery Order*, he set aside Rothery J.'s direction that James must repay the $60,000 he had withdrawn from AgraCity on July 12, 2018. He found that there was conflicting evidence about this and that further evidence, "and likely *viva voce* testimony, would be necessary to determine that" issue (*September 2018 Decision* at para 33).

[15] I have already mentioned the second outcome of the *September 2018 Decision*, which was the finding that it was in the ordinary course of AgraCity's business for it to make regular transfers of money to FNA to supplement the membership fees FNA was receiving. In this regard, the Chambers judge concluded that there was a "strong *prima facie* case that money has ordinarily flowed from AgraCity to FNA, but the evidence does not link the flow with any particularity to how much, what for and how they are to be characterized" (at para 44). He directed that AgraCity continue to make payments to FNA "for payroll, marketing, corporate project development and membership initiatives" according to a formula he set out in the *September 2018 Decision* (at para 58(a)) [*Monthly AgraCity Payments*].

[16] The Chambers judge specifically rejected FNA's request that the *Monthly AgraCity Payments* "not be shown as shareholders' loans to James or FNA or any other type of loan" since the "legal relationship between these companies and the precise basis upon which payments have been flowing from AgraCity to FNA over the last number of years cannot be determined on the affidavit evidence". Instead, the Chambers judge stated that "it will be left for agreement of the parties or a trial determination for a characterization of these payments" (at para 61). As a result, the question as to whether the *Monthly AgraCity Payments* represent income to FNA is presently unresolved.

[17] In a later fiat, the Chambers judge fixed the amount of the *Monthly AgraCity Payments* at $55,104.42: *Farms and Families of North America Inc. v AgraCity Crop & Nutrition Ltd.* (8 July 2019) Saskatoon, QBG 1336 of 2018 (Sask QB). Since that decision, AgraCity has been paying this sum to FNA monthly. Depending on how these payments are later categorized, it may turn out that not all of FNA's income is from the sale of memberships to farmers.

[18] James commenced yet another action in 2018, assigned the case number QBG 1548 of 2018 [*1548/2018*]. Through it, James sought an order against Jason and AgraCity, affording him access to certain of AgraCity's business records. That request was satisfied by the grant of a consent order issued on October 25, 2018. The order gave to James, his legal counsel, and his financial advisors wide-ranging access to AgraCity's general ledger and accounting databases as well as supporting accounting records including bank statements, supplier invoices, customer files and borrowing documents.

[19] In 2019, James and Jason made separate applications within the procedural context of *1548/2018* for orders under s. 234 of *The Business Corporations Act*, RSS 1978, c B-10 [*SBCA*]. James alleged in his application that he had been oppressed by how Jason had conducted AgraCity's affairs. For this reason, James asked for an order removing Jason as a director and officer of AgraCity and for the appointment of a receiver or receiver manager of that corporation [receiver], as well as other relief. For his part, Jason alleged that James had acted oppressively as a director of AgraCity and the affiliated corporations. Jason asked to be declared a 50 per cent owner of FNA. He also asked for an order directing the sale of James's interests in AgraCity and the other corporations or directing the sale of the companies to a third party, as well as other ancillary orders.

[20] The 2019 applications came before the Chambers judge. As a bottom line, the Chambers judge dismissed James's application but granted substantial portions of the relief requested by Jason. In the result, the Chambers judge ordered a sale of AgraCity and other unspecified corporations but recognized that many issues would require a trial to resolve: *Mann v Mann* (30 April 2020) Saskatoon, QBG 1548 of 2018 (Sask QB) [*Sale Order*]. James then appealed against the *Sale Order*. In a judgment delivered in August of 2023, this Court set aside part of the *Sale Order*: *Mann v Mann*, 2023 SKCA 100. This outcome was largely based on the conclusion that the Chambers judge "erred in making critical findings of fact relating to James's and Jason's reasonable expectations concerning the management of AgraCity in the face of the conflicting affidavit evidence that was before him" (at para 6).

C. The dispute over FNA memberships: applications leading to the First Membership Injunction

[21] As I have noted, apart from receiving the *Monthly AgraCity Payments*, FNA's sole source of income is from the sale of memberships to farmers. It follows from this that its revenues are largely a product of the number of memberships it can sell and the price it can charge for them. FNA's consistent position has been that AgraCity must only sell its products and services to FNA members. The record tends to reflect that, prior to the present disputes arising between them, James and Jason together set the fee that farmers would pay for a FNA membership. That said, for some time at least, FNA has maintained that it has the right to unilaterally set its membership fees.

[22] In contrast, AgraCity principally receives its income from the sale of agricultural products. It follows that its revenues will be constrained if it is limited to selling products only to FNA members, as FNA insists it is.

[23] In September of 2019, FNA filed an application without notice in the context of *1336/2018*. It requested broad ranging "injunctive relief and/or enforcement of the prior injunctions" in the form of an order that, if granted, would have confirmed that FNA had the exclusive control over memberships. Overarching its claims for this type of relief was the contention that it was being financially starved because AgraCity would not agree to increase the price of FNA memberships. FNA also said that AgraCity was frustrating FNA's ability to sell memberships by selling agriculture products and services to farmers who were not FNA members in breach of their arrangement.

[24] Notice of FNA's application was given to AgraCity and Jason who both opposed it. AgraCity also served its own competing application. In it, AgraCity requested "an interim mandatory injunction compelling [FNA] to accept new FNA memberships and membership renewals on the basis agreed to between FNA and AgraCity in 2017, and specifically that such memberships shall be sold at an annual membership fee of $500 plus GST, and the sale or renewal may be solicited by either AgraCity or FNA staff". AgraCity's notice of application also requested a "declaration that it has no contractual obligation to sell its products exclusively to members of FNA".

[25] The parties filed affidavits that were highly contradictory. Much of the evidence related to the history of the sale of FNA memberships. As explained in the *First Membership Decision*, the parties also placed reliance on "affidavits that have been filed on previous motions for previous purposes and each party points to the comments made by the opposing party on affidavit material filed in relation to other unrelated applications" (at para 10).

[26] The two applications were argued in Chambers on October 30, 2019. The *First Membership Decision* addresses both matters. It is dated December 6, 2019.

D. The *First Membership Decision*

[27] The Chambers judge began his reasons with an overview of the applications. He noted the existence of certain matters that are not the subject of this appeal and provided some contextual comments, including a lament that the parties had been unable to resolve their dispute. He described the applications as "yet another skirmish between the brothers arising out of their dispute" (at para 3). He then explained that the Court "as part of its case management duties has been relying substantially on the [*Danyliuk Order*] that in part provides that neither of the parties shall take any action that is outside the ordinary course of business of AgraCity" (at para 5).

[28] Following this, the Chambers judge summarized the parties' respective positions. He saw a linkage between the applications before him and the *September 2018 Decision* pursuant to which he had directed that the *Monthly AgraCity Payments* be made. As part of this, he pointed out that the *September 2018 Decision* had never been appealed but he also acknowledged that it "appears though as a result of that decision that FNA believes it needs to increase its membership cost to generate more revenue" (at para 12).

[29] The Chambers judge next reviewed the conflicting evidence relating to the pricing of FNA memberships and the positions each applicant before him took on that issue. He recorded FNA's position to be that "if $500 was the amount of a membership cost in 2017, it was the result of various promotions that were intended to be short-lived" and that "neither it nor AgraCity intended that no review of the membership cost or provision of services could occur in the future". He observed that "AgraCity has its own take on the membership pricing issue which does not allow FNA to make the unilateral decisions it has" (at para 13). He then continued as follows:

> [13] … The issue of membership pricing for FNA is a complex one and involves a large number of factors which include the nature and extent of the services provided to members, the cost of those services and other sources of income to cover those costs. I cannot accept that FNA and AgraCity would never consider an increase or decrease in membership costs as such decisions would have to respond to internal membership issues and external competition. At the same time I doubt that the parties considered FNA would have carte blanche to determine membership pricing and to a large degree potentially control who AgraCity could sell to. FNA in seeking a mandatory injunction to allow it to make the membership pricing decision argues that without that ability it cannot operate as an independent corporation and will fail as it requires the additional revenue to be generated from increased cost of membership. Unfortunately, in relying on this argument FNA has failed to provide detailed information regarding its finances, specifically its financial statements expected to be generated in the normal course of business. An argument of financial ruin cannot be made in the absence of financial information of a detailed nature.

[30] Following this, the Chambers judge identified the legal test for the grant of a mandatory injunction as established in *R v Canadian Broadcasting Corp.*, 2018 SCC 5, [2018] 1 SCR 196 [*CBC*]. He observed that the "requirements are: (1) a strong *prima facie* case that the applicant will succeed at trial; (2) irreparable harm if the injunction is not granted; [and] (3) a balance of convenience favouring the applicant" (at para 14). After setting out these criteria, the Chambers judge stated that the "conflicting assertions in the affidavits accompanied by documentation also of a conflicting nature presents a problem", which he then explained as follows:

> [14] … Although it is clear that at this point in time AgraCity was allowed to sell FNA memberships, the legal basis for such a situation has not been established and cannot be without a trial. The statement that FNA is entitled to control of all membership related matters is contrary to the factual arrangement that had previously occurred. It may be that after the trial the legal determination is in favour of FNA; that will depend on the evidence. I cannot say that a strong *prima facie* case that the applicant will succeed at trial has been shown.

[31] The Chambers judge then identified the "second issue [to be] the question of irreparable harm if the injunction is not granted". He found that the "failure of FNA to provide detailed financial information is fatal to [its] success on this issue". He explained that this was because the "court is not in a position to determine the cogency of such argument without that information". This led him to conclude that the "balance of convenience cannot be determined without coming to some conclusion on irreparable harm", which he found to be impossible (at para 15).

[32] He then continued:

> [16] That does not end the matter and that is also why the court prefers to rely on enforcement of the [*Danyliuk Order*] in refereeing the dispute between the parties. The conflicting affidavit material and attempts in chambers to explain conflicting information leads me to conclude that the best course of action is to set the cost of membership in FNA at $500 plus GST for a one-year membership.

[33] Following this, the Chambers judge addressed issues other than the pricing of FNA membership. He found the evidence to be "more clear" that the ordinary course of its business allowed "AgraCity's sales people to sell [FNA] memberships and product at the same time" and therefore this "operational reality should continue" (at para 17). He noted that there was conflicting evidence relating to "the issue of control of the membership lists, control of the membership information, ownership of the software utilized for management of membership and sales by AgraCity, and ownership of the hardware that the various databases used by AgraCity and FNA to operate" (at para 18). He found there to be no "need to come to any determination as to whose

assertions are correct" because it "matters little who owns or manages the information or the hardware". He said that, instead, "what is important for the purpose of these interim applications rests primarily on what were AgraCity's normal business operations in relation to FNA" (at para 19).

[34] The Chambers judge ended his discussion of these matters by reporting that at the conclusion of oral argument he had indicated that his intention was to "attempt to reflect as much as possible a continuation of the [*Danyliuk Order*]". He found that a draft order that had been filed by AgraCity after oral argument "captures that request" and he directed that it issue (at para 20). This is the First Membership Injunction, against which FNA appeals.

[35] Paragraph 1 of the First Membership Injunction directs that the *Danyliuk Order* "remains in effect and, without limitation, neither Jason Mann nor James Mann (nor anyone acting on their behalf) shall take any action that is outside the ordinary course of business of AgraCity". The First Membership Injunction contains the following additional terms that specifically relate to FNA membership issues:

> 2. In keeping with the ordinary course of business of AgraCity in effect at the date of the [*Danyliuk Order*]:
>
> > (a) Subject to this Order, AgraCity sales staff are authorized to sell and renew FNA memberships during the course of AgraCity staff making sales of AgraCity products to customers who do not hold unexpired memberships of FNA;
> >
> > (b) The cost of a one-year FNA membership sold or renewed by AgraCity staff shall be $500 plus GST;
> >
> > (c) When AgraCity staff sell or renew an FNA membership, they shall collect the $500 plus GST from customers at the same time as AgraCity receives payment for AgraCity products, and AgraCity shall promptly remit such membership fees when received to FNA;
> >
> > (d) Upon receipt of membership fees remitted by AgraCity, FNA shall issue memberships to such customers;
> >
> > (e) AgraCity shall offer to each new customer that purchases an FNA membership a $500 credit off their first purchase of a minimum of $5,000 of AgraCity product; and
> >
> > (f) AgraCity will sell only to customers who are FNA members.

[36] In short, the Chambers judge agreed with FNA that AgraCity should, during the pendency of the litigation between the parties, sell its products only to FNA members, but he allowed AgraCity to continue to sell FNA memberships at the $500 price. The First Membership Injunction

states that it is to "remain in force until further Order of the Court" (at para 4). The First Membership Injunction also provides that any party "may apply to the Court to vary this Order or for further directions on seven days' notice" (at para 5).

E. The *Second Membership Decision*

[37] As noted, the *First Membership Decision* is dated December 6, 2019. FNA's notice of appeal against it was filed with the Registrar on December 16, 2019, and the appeal was assigned court file number CACV3536. FNA adopted the position that the filing of its notice of appeal stayed the operation of the First Membership Injunction. As context for this, although *The Court of Appeal Rules* [*Rules*] have been since amended, at the time Rule 15 provided, in part, as follows:

> **Stay**
>
> 15(1) Unless otherwise ordered by the judge appealed from or by a judge, the service and filing of a notice of appeal does not stay the execution of a judgment or an order awarding *mandamus*, an injunction, alimony, or maintenance for a spouse, child or dependant adult. Unless otherwise ordered by a judge, the service and filing of a notice of appeal stays the execution of any other judgment or order pending the disposition of the appeal.
>
> …
>
> (4) Where the execution of a judgment or order is stayed pending an appeal, all further proceedings in the action, other than the issue of the judgment and the taxation of costs under the judgment, are stayed unless otherwise ordered.

[38] For its part, AgraCity's position was that, because the order was injunctive in nature, no stay was in place. It soon applied to find James and FNA in contempt of it and for an order expanding the terms of the injunctive relief that had been ordered.

[39] AgraCity filed evidence of FNA's non-compliance with the First Membership Injunction. For example, it attempted to show that FNA was communicating to farmers that "any offers of a $500 1 Year membership renewal fee are unauthorized by FNA" and would not be honoured. For its part, although FNA's position was that a stay was in place, James denied that it was not complying with the terms of the injunction. He specifically stated that "FNA is, in good faith, issuing new memberships at $500 per year as directed" by the First Membership Injunction. Many more affidavits were filed by the parties.

[40] The Chambers judge addressed AgraCity's application in the *Second Membership Decision*. It is dated April 7, 2020.

[41] As a matter of first business, the Chambers judge held that his earlier order was injunctive in nature. For this reason, and several others, he found that the First Membership Injunction had not been stayed by the filing of FNA's appeal against it. This point is not at issue in the appeal against the Second Membership Injunction.

[42] Having made this determination, the Chambers judge turned to the contempt application. He focused on paragraph 2(d) of the First Membership Injunction which stated that "[u]pon receipt of membership fees remitted by AgraCity, FNA shall issue memberships" to customers. The evidence filed by AgraCity related to steps taken by FNA and James to frustrate the sale of memberships for the annual price of $500. After a review of the evidence, the Chambers judge concluded that he was "satisfied on a balance of probabilities that FNA as a result of direction from James Mann is breaching paragraph 2(d)" of the First Membership Injunction, but he was "not satisfied beyond a reasonable doubt that this has occurred" (at para 19). For this reason, he dismissed the contempt application.

[43] The Chambers judge then addressed AgraCity's request that he expand the terms of the injunction. He stated that he was "guided" by the principles set out in *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-MacDonald*], and *Mosaic Potash Esterhazy Limited Partnership v Potash Corporation of Saskatchewan Inc.*, 2011 SKCA 120, 341 DLR (4th) 407[*Mosaic*] (at para 22).

[44] He identified the issue he was called to decide as being whether he "should grant injunctive relief to require FNA to sell annual memberships, whether new or by renewal, for the sum of $500.00, plus GST, going forward" and whether AgraCity should "be allowed to sell new or renewal FNA memberships at the same price and require FNA to accept such memberships". The Chambers judge also stated that he was relying "on the factual considerations referred to in" the *First Membership Decision* (at para 22).

[45] The Chambers judge then continued with his analysis as follows:

> [23] The first item to discuss is whether AgraCity has established a serious issue to be tried. The issue that I identify is whether AgraCity is entitled, as it had in the past, to sell FNA memberships on a new or renewal basis through their own operations and have those memberships accepted by FNA. A second aspect of the issue is whether FNA is required to sell one year annual memberships for $500.00, plus GST, on a new or renewal basis in FNA.

> [24] The evidence before me suggests this was the working relationship and implied contractual obligation of the two entities when dealing with memberships. I do not have to determine if, in fact, that contract existed but rather [whether] the allegation it exists brings into play a serious issue to be tried. On the evidence I believe it does.

[46] The Chambers judge went on and reviewed the evidence relating to the issues of irreparable harm and the balance of convenience. I will discuss this part of the *Second Membership Decision* later in these reasons. He concluded by directing the issuance of the Second Membership Injunction, on the following terms:

> (a) FNA staff shall accept and process one-year new applications or one-year renewal applications of FNA memberships for an annual membership fee of $500.00, plus GST;
>
> (b) AgraCity staff is authorized to sell one-year new applications or one-year renewal applications of FNA memberships at an annual cost of $500.00, plus GST, per year, and FNA staff shall accept and process such memberships sold by AgraCity staff;
>
> (c) FNA shall cease and desist communicating with AgraCity customers and/or FNA members, that FNA membership renewals at a cost of $500.00 per year, plus GST, will not be accepted; and
>
> (d) when AgraCity staff sell or renew a FNA membership, they shall collect the $500.00, plus GST, from customers at the same time as AgraCity receives payment for AgraCity products and AgraCity shall promptly remit such membership fees, when received, to FNA;
>
> (e) FNA shall provide a complete list of all AgraCity customers and/or FNA members to whom FNA has sent a FNA Agricultural Product Guide or membership renewal notice since January 1, 2020.

[47] FNA has separately appealed against the *Second Membership Decision*. That appeal has been assigned court file number CACV3634.

F. Other preliminary matters

[48] I must mention three additional matters before I turn to discuss the two appeals.

[49] First, it was FNA that initiated both appeals. I take note of this fact because some documents were filed with the Registrar that incorrectly identify James as an appellant in these two matters. I add that, while I am satisfied from my review of the record that these are FNA's appeals alone, a different conclusion would not change their outcome, other than to raise a question as to whether James should also bear some of the costs that I order FNA to pay to AgraCity and Jason. In the circumstances of this case, the fact that James is not an appellant shields him from the personal responsibility for paying any part of these costs.

[50] Second, FNA approached the Chambers judge in the matters that came before him, as it did in its arguments in this appeal, on the understanding that what it was seeking was *injunctive* relief. The grant or refusal of interlocutory injunctive relief involves the exercise of discretion. This Court will interfere with a King's Bench decision involving 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). I have organized my discussion of FNA's many arguments around the framework that is provided by these principles.

[51] Finally, FNA has also filed two applications in the appeals for orders under Rule 59 of the *Rules* for leave to adduce new evidence in both appeals. The first such application [First New Evidence Application] seeks the admission of an affidavit sworn by James on July 7, 2023 [James's July 2023 Affidavit]. After the hearing of this appeal, FNA filed a second application [Second New Evidence Application] seeking the admission of an affidavit sworn by James on October 27, 2023 [James's October 2023 Affidavit]. I will consider those two applications in the context of discussing the other issues in these two appeals.

III. CACV3536: APPEAL RE THE FIRST MEMBERSHIP INJUNCTION

[52] The outcome of FNA's appeal against the First Membership Injunction is determined by the answers to the following questions:

(a) Did the Chambers judge err in law by applying the wrong test for the grant or refusal of an injunction?

(b) Did the Chambers judge err in law by failing to recognize that "a membership organization has the exclusive right to the control of its membership fee"?

(c) Did the Chambers judge err in law by failing to act as a conservator or fiduciary for the parties?

(d) Did the Chambers judge err in law by failing to decide a point of controversy between the parties?

(e) Did the Chambers judge disregard or misapprehend any material facts?

(f) Did the Chambers judge fail to act judicially?

(g) Is the *First Membership Decision* so plainly wrong as to amount to an injustice?

A. The issue as to the applicable test

[53] FNA's argument under this head is that "the pricing and marketing part" of its application amounted to a request for a prohibitory interlocutory injunction and that the Chambers judge should have applied the three-part test set out in *RJR-MacDonald* and *Mosaic* rather than the test for a mandatory interlocutory injunction as established in *CBC*. The difference between the two tests is that an applicant for a prohibitory interlocutory injunction need only show a serious issue to be tried. As discussed, *CBC* established that an applicant for a mandatory interlocutory injunction must show a strong prima facie case. FNA suggests that the Chambers judge erred in law by applying the latter test when he considered its application leading to the making of the First Membership Injunction.

[54] As noted before, the Chambers judge began his substantive analysis with a reference to the legal test for the grant of a mandatory injunction as established in *CBC* including its requirement that the applicant for such an order establish a strong prima facie case. A mandatory injunction "directs the defendant to undertake a positive course of action, such as taking steps to restore the *status quo*, or to otherwise 'put the situation back to what it should be'" (*CBC* at para 15, referring to Robert J. Sharpe, *Injunctions and Specific Performance*, 4th ed (Toronto: Canada Law Book, 2012) at paras 1.510, 1.530 and 2.640). In *CBC*, Brown J. identified several reasons for requiring that an applicant for a mandatory, as opposed to a prohibitory, interlocutory injunction should meet this higher threshold, rather than simply showing the existence of a serious question to be tried. These reasons are linked to the fact that mandatory injunctions are tied to the adverse consequences

to a defendant against whom they are granted in the face of the possibility that the applicant fails to prove at a later stage of the proceedings that it was entitled to the relief claimed.

[55] In *CBC*, Brown J. also commented on the sometimes-difficult task of distinguishing mandatory from prohibitory injunctions:

> [16] … I acknowledge that distinguishing between mandatory and prohibitive injunctions can be difficult, since an interlocutory injunction which is framed in prohibitive language may "have the effect of forcing the enjoined party to take … positive actions". For example, in this case, ceasing to transmit the victim's identifying information would require an employee of CBC to take the necessary action to remove that information from its website. Ultimately, the application judge, in characterizing the interlocutory injunction as mandatory or prohibitive, will have to look past the form and the language in which the order sought is framed, in order to identify the substance of what is being sought and, in light of the particular circumstances of the matter, "what the practical consequences of the … injunction are likely to be". In short, the application judge should 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.
>
> (Footnotes omitted, emphasis in original)

[56] In keeping with this direction, it is appropriate to examine more closely the orders that FNA was seeking in its application without notice. In this regard, paragraph 2 of the application stated as follows:

> 2. The Applicant, Farms and Families of North America ("FNA"), seeks the following injunctive relief and/or enforcement of the prior injunctions in the form of an Order confirming:
>
> > a. That FNA has exclusive right to an[d] control over its memberships, pricing and marketing and communication that neither disparages AgraCity nor Jason Mann;
> >
> > b. That FNA has exclusive right to and control over its membership list and database, known as the Customer Relations Management software ("CRM");
> >
> > c. That AgraCity is to sell products and services only to FNA members;
> >
> > d. That AgraCity is not to sell FNA memberships or memberships of any kind;
> >
> > e. That the weekly meetings between AgraCity an[d] FNA regarding product supply and member services be continued[.]

[57] Subparagraphs (a) and (b) are not, strictly speaking, a request for injunctive relief. Instead, these two subparagraphs amounted to a request that the Chambers judge make certain interim determinations that might form a reason or basis to grant interim injunctive relief. I see no need to consider these subparagraphs as containing a request for any other form of stand-alone interim relief.

[58] Subparagraph (e) of the application is properly understood as a request for a mandatory injunction, since, if granted, it would compel the parties to undertake a particular type of action or activity. However, the Chambers judge did not direct that these weekly meetings take place and FNA does not base its appeal on the failure by the Chambers judge to do so. All of this means that there is no need to further consider subparagraph (e). This leaves for consideration subparagraphs (c) and (d) from FNA's application without notice.

[59] Subparagraph (c) of the application is stated in terms that would affirm a positive obligation on the part of AgraCity "to sell products and services only to FNA members". Although worded as requesting that AgraCity undertake a particular activity, and hence can be seen as a request for a mandatory injunction, it can easily be recast as a request for an order that would restrain AgraCity from selling products and services to any person who is not an FNA member. If understood in this way, FNA could be seen, in this subparagraph, as seeking a prohibitory injunction. Likewise, subparagraph (d) is best seen as seeking a prohibitory injunction. It requests an order that "AgraCity is *not* to sell FNA memberships or memberships of any kind" (emphasis added).

[60] I have discussed the orders that FNA was seeking. It is appropriate also to examine the orders the Chambers judge actually made. *CBC* directs that a court "characterizing the interlocutory injunction as mandatory or prohibitive, will have to look past the form and the language in which the order sought is framed, in order to identify the substance of what is being sought and, in light of the particular circumstances of the matter" (at para 16). In this case, several orders contain mandatory language, when considered in the context of the prohibition against AgraCity selling products and services to non-FNA members, the order as whole might be viewed as having granted prohibitory injunctions subject to the beneficiary of that injunction, FNA, fulfilling the conditions that were attached to the imposition of the prohibitory order that was made. More specifically, the injunction against AgraCity selling products and services to persons who are not FNA members can be understood to have been ordered on the condition that FNA process memberships at the price of $500 plus GST. I will return to this idea later in my consideration of the appeal against the Second Membership Injunction.

[61] When matters are looked at from a bit of a distance, things are even slightly more complicated than all of this might suggest. FNA and AgraCity were both seeking an order that, when taken as a whole, would set the commercial basis pursuant to which they would carry on their business together pending the conclusion of the litigation between them, and the two brothers. Both were also asking for orders that would address broadly similar issues. Reduced to the core, FNA was asking for a continuation of the order that AgraCity would sell products exclusively to FNA members, but on terms that would allow FNA to set the price of its membership. While AgraCity was not requesting that the Chambers judge set aside the prohibition against it selling products to non-FNA members, its position was that the membership cost should not be changed from what they were then offered for. Viewed in this broader context, it is easier to see why the Chambers judge made the earlier-quoted statement that FNA was "seeking a mandatory injunction to allow it to make the membership pricing decision" (*First Membership Decision* at para 13). Indeed, if one looks past the relief that FNA requested and considers the actual terms of the order the Chambers judge made, the First Membership Injunction can be understood to contain mandatory features. In this regard, it directs certain things, namely, that when "AgraCity staff sell or renew an FNA membership, they shall collect the $500 plus GST from customers … [and] remit such membership fees when received to FNA" (at para 2(c)). For its part, the order directs that upon receipt of membership fees remitted by AgraCity, "FNA shall issue memberships to such customers" (at para 2(d)).

[62] Nonetheless, for the purposes of deciding this appeal, I will proceed on the basis that FNA is correct that its requests that AgraCity be ordered "to sell products and services only to FNA members" and that "AgraCity is not to sell FNA memberships or memberships of any kind" are properly read in isolation and should be understood as seeking prohibitory injunctions and that the Chambers judge should not have tested the request to grant them by using the strong prima facie case threshold. However, and in any event, *assuming* that the Chambers judge should have looked at FNA's application through the lens applicable when a request is made for a prohibitory and not a mandatory interlocutory injunction, his mistake is of no consequence in the context of this appeal. The reason for this is two-fold.

[63] First, the Chambers judge *granted* the key relief requested by FNA in terms that were nearly identical to what it had asked for. In this regard, the First Membership Injunction directs that "AgraCity will sell only to customers who are FNA members" (at para 2(f)). Therefore, if the Chambers judge looked at the request contained in subparagraph (c) of FNA's application through the wrong lens, his mistake had no effect or consequence. This prohibitory injunction was the lynchpin on which all other injunctive orders made by the Chambers judge rested.

[64] Second, the Chambers judge did *not* ultimately deny the request FNA made in subparagraph (d) of its application because it had not demonstrated that it had a strong prima facie case on this point. Instead, his reasons disclose that he did so because he was unconvinced that FNA would suffer irreparable harm if this relief was refused, or that the balance of convenience required an injunction. On this, the Chambers judge stated as follows:

> [15] The second issue is the question of irreparable harm if the injunction is not granted. The failure of FNA to provide detailed financial information is fatal to success on this issue. The court is not in a position to determine the cogency of such argument without that information. The balance of convenience cannot be determined without coming to some conclusion on irreparable harm. That conclusion is not available on the evidence and so it is impossible to determine if the balance of convenience favours FNA.

[65] I would add that the Chambers judge's reasons also demonstrate that he was alive to the reality that *both* parties had asked, and the situation demanded, that he set the rules surrounding the sale of memberships in FNA and the product and services sales by AgraCity. It was in this context that the Chambers judge fell back to making an order that would preserve the status quo, as best as he could find it to be, before the conflict between the parties arose. (See, in this regard, paragraph 16 of the *First Membership Decision*, previously quoted in these reasons.)

[66] Ultimately, although the Chambers judge refused to grant *some* of the relief FNA had requested – and I would re-emphasize that he did order what might be considered the most important part of what it had sought – the outcome of FNA's application was not impacted by his use of the strong prima facie case test. For this reason, I would dismiss FNA's first ground of appeal.

B. Membership organization issue

[67] FNA argues in its amended factum that the Chambers judge erred in law because he failed to recognize that it is a "well-established principle in Canadian law that membership organizations have the exclusive right to control their membership fees".

[68] Although AgraCity has tied the sale of its products and services to whether the purchaser is a "member" of FNA, and FNA may hold itself out as a membership organization, the simple fact is that FNA has shareholders, not members; it is a business corporation, incorporated under the *SBCA*, since repealed by *The Business Corporations Act, 2021*, SS 2021, c 6. As I noted in the Background section of this judgment, James is the sole registered shareholder of FNA.

[69] The cases that FNA relies on for this part of its argument do not involve business corporations. Rather, they are concerned with entities that were differently constituted. Therefore, for example, in *Canadian Broadcasting Corporation v Canada (Labour Relations Board)*, [1995] 1 SCR 157, the issue concerned the membership of a trade union. Whatever promises or commitments FNA, James or others may have made to FNA's customers, or assertions that they make in this Court regarding the rights and status of the members, they do not turn FNA into something it is not.

[70] The foundation of the claims made in *1336/2018*, within which the First Membership Injunction was granted, is an allegation of a contract between FNA and AgraCity by which AgraCity is to subordinate itself to FNA. As the case has been pleaded, the question as to whether FNA can unilaterally set the terms for the sale of its memberships reduces to one of contract between FNA and AgraCity, and not the terms of contract that govern the "membership" relationship between FNA and its customers. FNA may ultimately succeed in proving the existence of a contract between itself and AgraCity that contains the terms that allow it the control over AgraCity that it asserts. It might also gain assistance in doing so by drawing an analogy between its relationships with its customers and the relationship that exists between membership-based entities and their members. However, I have seen nothing to convince me that, as a matter of law, the legal principles that relate to these other types of organizations would give rise to the right that FNA claims to have to unilaterally set its membership dues or fees without input from AgraCity.

C. Fiduciary duty issue

[71] FNA further argues in its amended factum that the Chambers judge erred in law because he failed to recognize that "the court acts as a conservator and/or fiduciary for the parties". It did not advance this position in its oral submissions. This may have reflected the fact that, between the writing of the amended factum and the offering of oral submissions, this Court considered and rejected this same argument in the context of an earlier appeal involving many of the same parties (*Mann v Mann*, 2023 SKCA 100 at paras 42–48). This submission has, similarly, no merit in the context of this appeal.

D. The alleged refusal to decide

[72] FNA argues that the Chambers judge erred in law by failing to decide a point of controversy between the parties. The focus of its submission on this point is on the following passage from the *First Membership Decision*:

> [18] Much material was filed on this application dealing with the issue of control of the membership lists, control of the membership information, ownership of the software utilized for management of membership and sales by AgraCity, and ownership of the hardware that the various databases used by AgraCity and FNA to operate. As is normal, each side presented select and competing information that would tend to show that the factual assertions are accurate as presented by each of them.
>
> [19] I do not find there is a need to come to any determination as to whose assertions are correct. I continue to rely on and emphasize the [*Danyliuk Order*] dealing with the ordinary course of business. It matters little who owns or manages the information or the hardware. Instead what is important for the purpose of these interim applications rests primarily on what were AgraCity's normal business operations in relation to FNA.
>
> [20] At the conclusion of argument, I indicated to counsel that I would be making an order that would attempt to reflect as much as possible a continuation of the Danyliuk order. AgraCity has filed a draft order that captures that request. The order filed on November 5 by AgraCity shall issue.

[73] In its amended factum, FNA submits that the Chambers judge "erred in law in assuming that ownership and control of the intellectual property rights in the membership relationship and database is irrelevant when determining the ordinary course". In oral argument, FNA clarified its position somewhat and said that a trial is not required to determine these issues in its favour.

[74] As I interpret paragraphs 18 to 20, the Chambers judge found that he did not have to sort out these ownership issues in order to make an interim order pertaining to financial matters. I see no error in law in his conclusion on this point.

[75] I would reiterate that FNA's application was initiated as an application without notice in the context of *1336/2018*. The statement of claim commencing that action requested an "interim, interlocutory and permanent injunction requiring AgraCity to make payment in the ordinary course of its business of such sums as are necessary to permit [FNA] to meet its reasonable operating expenses". It also asked for damages and other financial remedies. It contains no express request for an order or declaration pertaining to ownership of membership lists or other intellectual property.

[76] In this context, it was appropriate for the Chambers judge to view the request contained in FNA's without notice application for an order that it "has exclusive right to and control over its membership list and database, known as the Customer Relations Management software ('CRM')" as being in aid of the dispute over membership fees, which both parties presented as an issue that was to be sorted out on an *interim* basis. Simply put, I would not have seen in these pleadings a basis for the Chambers judge to have made a final determination of the parties' rights concerning membership lists and so on, even *if* he had been asked to do so.

[77] Before concluding on this issue, I would point out that nothing in the *First Membership Decision* or in the judgment in this appeal precludes FNA from seeking a final determination of the ownership of membership lists or other intellectual property in the context of proceedings or pleadings where it is properly put into issue.

E. The treatment of the evidence

[78] FNA argues that, in granting the First Membership Injunction, the Chambers judge disregarded or misapprehended material evidence. I will divide my consideration of its submissions into three parts.

1. Membership pricing

[79] There was much conflicting evidence before the Chambers judge dealing with the history and practices surrounding the pricing of FNA memberships. Yet, two points were not in dispute. The first was that when the *Danyliuk Order* was issued, FNA memberships were being sold at the net price, after rebates, of $500. Second, AgraCity was making additional monthly payments to FNA. As I have reviewed, although the parties had disagreed about AgraCity's obligation to do so, by the time matters came before the Chambers judge in the present case, the amount of these payments had been fixed by him in the *September 2018 Decision*, in the amount of $55,104.42.

[80] These facts provided two beacons of certainty in a sea of uncertainty. They also provide the context for the Chambers judge to have stated as follows (parts of which are repeated here for reference):

> [13] As is usual, there is very little common ground in the parties' affidavits. FNA states that if $500 was the amount of a membership cost in 2017, it was the result of various promotions that were intended to be short-lived. FNA argues that neither it nor AgraCity intended that no review of the membership cost or provision of services could occur in the future. AgraCity has its own take on the membership pricing issue which does not allow FNA to make the unilateral decisions it has. The issue of membership pricing for FNA is a complex one and involves a large number of factors which include the nature and extent of the services provided to members, the cost of those services and other sources of income to cover those costs. I cannot accept that FNA and AgraCity would never consider an increase or decrease in membership costs as such decisions would have to respond to internal membership issues and external competition. At the same time I doubt that the parties considered FNA would have carte blanche to determine membership pricing and to a large degree potentially control who AgraCity could sell to. FNA in seeking a mandatory injunction to allow it to make the membership pricing decision argues that without that ability it cannot operate as an independent corporation and will fail as it requires the additional revenue to be generated from increased cost of membership. Unfortunately, in relying on this argument FNA has failed to provide detailed information regarding its finances, specifically its financial statements expected to be generated in the normal course of business. An argument of financial ruin cannot be made in the absence of financial information of a detailed nature.

[81] FNA points to several parts of this passage that it says demonstrates a misapprehension or disregard of material evidence. However, its arguments reduce to the suggestion that this Court find certainty where the Chambers judge could not, without identifying the uncontradicted evidence that would have allowed for findings of fact in the face of the conflicts that existed in the evidence.

[82] I will illustrate this point with reference to a statement made by James in an affidavit sworn on May 31, 2019, that had been filed in *1336/2018*. This was part of the evidence from other proceedings that the parties had brought before the Chambers judge for consideration. In his May 31, 2019 affidavit, James gave the following evidence:

> 24. The membership fee evolved after all loyalty discounts etc., to being $500/yr which is roughly 50% of the basic cost of operation. On a normalized basis, without subsidies or membership offsets from [AgraCity], membership fees would be between $1000 and $1500 per year.

[83] FNA offered detailed submissions explaining how this evidence should have led the Chambers judge to have understood that the membership fee he had set in the First Membership Injunction was based on a promotion that was not reflective of its ordinary course of ongoing operations. However, this evidence falls within the scope of the evidence reviewed in paragraph 13 of the *First Membership Decision* quoted above. I see no foundation for the suggestion that this or any other evidence was overlooked or misunderstood by the Chambers judge.

[84] I can also find no basis to conclude that the Chambers judge committed a palpable and overriding error in finding the facts he did. As I have mentioned, by the time of the *Danyliuk Order*, FNA memberships were sold at what amounted to a net price of $500. As noted above, James gave evidence that the "membership fee evolved after all loyalty discounts etc., to being $500/yr". To be clear, he stated that this was "50% of the basic cost of [FNA's] operation" and that "without subsidies or membership offsets from [AgraCity], membership fees would be between $1000 and $1500 per year". Of course, at the point of the grant of the First Membership Injunction, the Chambers judge had ordered that AgraCity continue making the *Monthly AgraCity Payments*.

[85] It is important to add that there was much more evidence than James's on this point. For example, in a November 2, 2019 affidavit, Jason provided the Chambers judge with a calculation, and supporting documents, to show that the average sale price per year of memberships sold between January 1, 2017 and July 31, 2017 was $378.13. I accept that FNA, in turn, referred to evidence that was at odds with this. The important point is that the Chambers judge cannot be faulted for having fallen back on the fact that, outside of the two certain facts I have mentioned, there was a conflict on the key issue of membership pricing that could not be resolved in the context of the hearing of the two competing applications he was called upon to decide.

[86] Finally, it bears reiteration that the Chambers judge also *agreed* with FNA that it was unreasonable to conclude, based on the evidence of what had occurred in the past, that there would never be an increase in membership prices. As I interpret it, it was at least in part with an eye to this that the *First Membership Decision* allowed for the amendment of the First Membership Injunction.

[87] Yet, FNA argues that the Chambers judge misconstrued or disregarded the evidence when he wrote in paragraph 13 that "FNA has failed to provide detailed information regarding its finances, specifically its financial statements expected to be generated in the normal course of business". Later, the Chambers judge also stated that FNA's "failure … to provide detailed financial information is fatal to success" in showing it would suffer irreparable harm if it were not allowed to increase membership fees (at para 15).

[88] FNA invites this Court to find, in the material that was before the Chambers judge, the "detailed information" that it says supports its argument that it would suffer such harm. I accept that there were financial statements in evidence from previous applications that provide much financial detail. I also accept that FNA was relying on the evidence given in previous applications in support of its positions on the two applications before the Chambers judge. However, as demonstrated by the submissions made by James in oral argument, these financial statements could not be meaningfully understood without a lengthy explanation and interpretation, which were absent in the *evidence*. Submissions made in oral argument providing that explanation and interpretation do not constitute evidence. The Chambers judge was not wrong therefore to say that FNA did not provide detailed financial information to support its positions regarding membership pricing. This means that FNA's overall argument in relation to that issue reduces to a rearguing of what was considered by the Chambers judge. Given the applicable standard of review, I can see no basis for this Court to interfere with the conclusions he reached.

[89] For these reasons, I find no error in the Chambers judge's consideration of the evidence. I will further explain this conclusion by referring to FNA's two applications seeking the admission of additional evidence in this appeal.

2. The First New Evidence Application

[90] It is in the context of its attempt to show that the Chambers judge erred in assessing the harm that it will suffer if membership fees do not rise that FNA seeks the admission of James's July 2023 Affidavit under Rule 59.

[91] Evidence that was not before the court whose judgment is under appeal may be admitted by an appellate court if the evidence: (a) could not, even with the exercise of due diligence, have been adduced in the court from which the appeal is taken; (b) is relevant in the sense that it bears upon a decisive, or potentially decisive, issue in the action; (c) is credible, in the sense that it is reasonably capable of belief; and (d) is of such a nature that, if believed, it could reasonably, when taken with the other evidence adduced in the proceedings under appeal, be expected to have affected the result. This four-part test, derived from *R v Palmer*, [1980] 1 SCR 759, "applies whenever a party seeks to adduce additional evidence on appeal for the purpose of reviewing the decision below, regardless of whether the evidence relates to facts that occurred before or after trial" (*Barendregt v Grebliunas*, 2022 SCC 22 at para 3, 469 DLR (4th) 1 [*Barendregt*]). The "overarching consideration is the interests of justice, regardless of when the evidence, or fact, came into existence" (at para 3).

[92] Paragraph 2 of James's July 2023 Affidavit states that it is intended to address three issues, as follows:

> A. The right of FNA to offer memberships and fees apart from the mandatory $500 one-year membership.
>
> B. The adherence of FNA to consistently and intentionally offer, for renewals and new memberships, the $500 one-year membership in compliance with the December 6th, 2019 order by Mills, J.
>
> C. The potential breach of the December 6th, 2019 order by Mills, J by [AgraCity] management.

The affidavit is then organized into sections that correspond to the three described categories of evidence.

[93] AgraCity and Jason oppose the admission of James's July 2023 Affidavit. As part of this, they bring forward an affidavit sworn by Jason on September 11, 2023 [Jason's 2023 Affidavit]. Jason's 2023 Affidavit explains, and at many places contradicts, the evidence proffered by James. Among the points AgraCity and Jason make is that James's July 2023 Affidavit cannot be admitted

without admitting Jason's 2023 Affidavit but, overarchingly, they say that the test for the admission of the new evidence is not met in this case.

[94] I will first consider the evidence that may be said to fall within category A as described in James's July 2023 Affidavit. This includes the statements found in paragraphs 3 to 9.

[95] None of what is said in paragraph 3 is relevant to this appeal. It confirms that FNA members have been granted the $500 membership option, thus evidencing that FNA has complied with part of the First Membership Injunction. It also contains a statement of James's belief that the First Membership Injunction does not prevent FNA from offering other membership options and explains why James holds this belief. Neither the asserted fact that FNA has complied with part of the First Membership Injunction, nor James's interpretation of the First Membership Injunction, bear on whether it should have been made.

[96] Paragraphs 4, 5 and 6 explain why FNA made certain decisions around the pricing of its memberships. All of this relates to events that pre-date the *First Membership Decision*. I would refuse to admit this evidence for the simple reason that, with due diligence, it could have been presented to the Chambers judge. While there are circumstances when the failure of a party to exercise due diligence in the assembly of their evidence may be overlooked, this is not one of them.

[97] As explained in *Barendregt*, the *Palmer* test's due diligence criterion "ensures that litigants put their best foot forward when first called upon to do so" (at para 38). This is related to the important principle of finality of litigation which has both an individual and systemic dimension. On an individual level, the principle of finality "speaks to the profound unfairness in providing 'a party the opportunity to make up for deficiencies in [their] case at trial'" (at para 39, quoting *Stav v Stav*, 2012 BCCA 154 at para 32, 31 BCLR (5th) 302). On a systemic level, the "principle preserves the distinction between the roles of trial and appellate courts" (at para 40). This, "in turn, sustains the proper functioning of our judicial architecture" (at para 41).

[98] The present appeal illustrates why the due diligence requirement exists and why the admission of the bulk of the contents of James's July 2023 Affidavit should be denied because it could have been brought before the Chambers judge in the first instance. Were this Court to look

past the fact that this evidence could have been put forward earlier, it would completely frustrate the principle of finality of litigation and transform this appeal from a review for error into a forum for a "do over".

[99] Paragraphs 8 and 9, and I add also paragraph 15, of James's July 2023 Affidavit stand on a somewhat different footing than do paragraphs 3 to 6. They are focused on the alleged financial impacts of the First Membership Injunction. As part of this, these paragraphs offer some evidence about matters that post-date the making of the First Membership Injunction. In this regard:

(a) in paragraph 8, James asserts that the "court-ordered $500 one-year membership has significantly affected the cash flow and profitability of the business, as well as hindered the growth of all FNA group of companies". He then refers to Exhibits "E" and "G", which he says, "illustrate the financial impact that these court decisions have had on FNA". Exhibit "E" is a collection of unaudited financial statements for FNA for the years ending September 30, 2014, to September 30, 2021. Exhibit "G" is a more limited set of financial data for the same fiscal years;

(b) in paragraph 9, James states that the "limitation on cost recovery and membership fee subsidies following [the *Second Membership Decision*] forced FNA to increase the membership fee due to significant reductions in membership fee subsidy and cost recovery"; and

(c) in paragraph 15, James asserts that it was "not accurate" for the Chambers judge to have stated in the *First Membership Decision* that the financial statement of FNA was not included in the original application.

[100] As can be seen, much of the financial information conveyed through these paragraphs existed before the *First Membership Decision* and could have been adduced at the hearing of the applications leading to it and the First Membership Injunction. Somewhat ironically, the attempt to adduce this evidence now assists in illustrating why the Chambers judge said what he did about the lack of details in the financial information he had been provided at the point argument was made before him.

[101] Nonetheless, the pre-argument information that is tendered through paragraphs 8, 9 and 15 of James's July 2023 Affidavit appears to be offered for the purposes of contrasting FNA's finances in the period before the making of the First Membership Injunction to its finances after its making. If it were proper to admit the evidence of FNA's post-decision finances, FNA *might* be able to overcome the argument that it should not be allowed to tender the pre-decision evidence based on the due diligence criteria. However, I am satisfied that the post-decision financial information should not be admitted.

[102] The purpose of an appeal is to determine if an order or judgment under appeal should have been issued in the first instance. FNA has pointed to no case law that suggests that, in a context such as this, an appellate court should admit new evidence to show that an order has had deleterious results or has operated or had the effect as may not have been intended by the judge who made it. Moreover, even were I to leave this aside, I am satisfied that the evidence contained in paragraphs 8, 9 and 15 cannot possibly affect the outcome of this appeal.

[103] As already noted, James relies on the unaudited financial documents that he attaches to his affidavit to illustrate the financial impact these court decisions have had on FNA. However, without more information than is found in those exhibits, it is impossible to draw from the financial statements the conclusion that James invites us to reach. A simple recording of those numbers, without an accompanying analysis, cannot allow a reader to draw any conclusion about the impact or effect of the First Membership Injunction on FNA's operations. Moreover, the completeness and accuracy of the information is substantially challenged in Jason's 2023 Affidavit. It would be unfair to admit James's July 2023 Affidavit without also admitting Jason's 2023 Affidavit. The addition of another round of substantively contradictory evidence cannot demonstrate error in the Chambers judge's decision.

[104] The evidence falling into categories B and C, found in paragraphs 10 to 14, pertain to whether AgraCity and Jason complied with the First Membership Injunction. This was the subject of the application leading to the *Second Membership Decision*. I observe that a nearly identical affidavit was presented for admission in CACV3634, and that James's July 2023 Affidavit does not attach any exhibits. Instead, it incorporates by reference those that were filed with the similar affidavit filed in CACV3634. It would seem, therefore, that the evidence in categories B and C

was intended to relate to CACV3634. However, and regardless of the reason for why the evidence in categories B and C appear in the version of James's July 2023 Affidavit filed in this appeal, that evidence is irrelevant to the question as to whether the First Membership Injunction should have been ordered, which is, of course, the issue in this appeal. For this reason, I will not consider paragraphs 10 to 14, inclusive, of the affidavit because they are irrelevant.

[105] For these reasons, I would dismiss the First New Evidence Application.

3. The Second New Evidence Application

[106] At the conclusion of the oral hearing, this Court granted the parties leave to file a short supplemental written *argument*. We did not grant leave to any party to seek to reopen the evidentiary record on which the appeal would be decided.

[107] Nonetheless, as I have noted, after the hearing of this appeal, FNA submitted for filing the Second New Evidence Application seeking the admission of James's October 2023 Affidavit. It also filed a brief of law explaining its application. All of this prompted AgraCity to submit a reply brief for filing. Although none of this was within the contemplation of the *Rules* or this Court's direction allowing for further filings after oral argument was made, at the instructions of the panel, the Registrar accepted these documents for filing, but a further hearing was not convened.

[108] As I have already noted, the administration of justice demands that there be finality to litigation. In this regard, the *Rules* do not contemplate the making of an application for the admission of new evidence after an appeal has been argued, and judgment is reserved.

[109] In the brief of law that it filed in connection with the Second New Evidence Application, FNA stated that it relied on s. 9(6) of *The Court of Appeal Act, 2000*, SS 2000, c C-42.1, as a basis for making its application and for this Court to admit James's October 2023 Affidavit. However, s. 9(6) simply allows a judge or the Court to "extend an appeal period" where it is equitable to do so. Here, FNA is not seeking to extend the time to appeal against any judgment or order. Instead, it is seeking to disturb the usual procedures applicable when an appeal is made.

[110] FNA also referred to Rules 25, 48(1) and 59(1) as a basis for the admission of James's October 2023 Affidavit. However, none of these rules provide assistance to it.

[111] Rule 25 simply directs an appellant to "require the local registrar to transmit to the registrar the file in the court appealed from". Rule 25 is therefore inapplicable in this case.

[112] Rule 48(1) sets out how and when an application to a single judge of this Court should be made returnable. FNA therefore cannot ground its application in Rule 48(1).

[113] Rule 59 contains two directions that are relevant in the present context. Rule 59(1) provides that a "party desiring to adduce evidence on appeal that was not before the court appealed from shall apply to the court for leave to do so by notice of application returnable *on the date fixed for hearing the appeal*" (emphasis added). Rule 59(2) requires that the application be filed "at least 10 days before the date fixed for hearing the appeal". Both rules contemplate that an application to adduce evidence will be served *before* the hearing of the appeal. Needless to say, as FNA's most recent application was served *after* the hearing of the appeal, these Rules have not been complied with.

[114] Nonetheless, since a rehearing may be held (Rule 47), I am prepared to accept that this Court would have the discretion to reopen its hearing for the purpose of admitting new evidence. FNA referred to no case authority that might guide us in the exercise of this power. However, given the general principle of finality, I am satisfied that the circumstances in which it would be appropriate to do so would have to be extraordinary and, whatever scope there might be to consider new evidence after the hearing of an appeal has been held, this is not an occasion to do so.

[115] James's October 2023 Affidavit explains that it contains evidence falling into three categories that are said to relate to this appeal: (a) "evidence tendered through counsel's letter" to the Chambers judge; (b) "evidence omitted at the lower court by mistake"; and (c) "new evidence". I will consider each category of evidence separately.

[116] Dealing with the first category, what FNA is seeking to adduce was not *evidence* before the Chambers judge at all. The documents were attached to a November 4, 2019 *letter* sent from its former counsel to the Chambers judge. These documents were not proven through an affidavit. While I have no reason to doubt their authenticity, the documents do not become evidence simply because counsel has sent them to the Court. Even were I to ignore this, the mere proof of the authenticity of a document does not prove the truth of its contents.

[117] Dealing with the second category, as the appellant in an expedited appeal, FNA was responsible under Rule 43(2)(b) for preparing the appeal book. In contrast to an appeal following a trial, no agreement as to its contents is required, but its contents are determined by reference to Rule 23 and Rule 22(4), which urges the party assembling the appeal book "to exclude irrelevant material from the appeal book, avoid duplication and otherwise confine the contents to that which is necessary for the purposes of the appeal". Under Rule 32 an "appellant shall serve the appellant's factum at the same time and in the same manner as the appeal book". Taken together, these rules mean that even *before* the respondents were required to file their factums, it was the responsibility of FNA to collect, index and make available to the respondents and the Court the parts of the record that were relevant to its appeal. Therefore, if there was something relevant that was missing from the appeal books, the responsibility lies at the feet of FNA.

[118] I would add that none of what is alleged to have been omitted from the appeal book related to the record that was filed specifically for the hearing of the two applications that came before the Chambers judge. Instead, the allegedly "missing" evidence formed parts of the record from other proceedings between the parties that might have been referred to in the course of argument on the two motions. The time for sorting that out was before the appeal book was finalized, not well after the appeal was argued.

[119] The final category of evidence is so-called "new" evidence. This is described in James's October 2023 Affidavit as "independent critical and definitive information about what exactly was the membership fees". Although James states that this information is "highly relevant compared to the conflicting evidence of Jason to the just, equitable and fair determination" of this appeal, this is argument. I am satisfied that, even if admitted now, it would not impact the outcome of this appeal for the simple reason that it would not help resolve the core conflicts that the Chambers judge found to exist in the evidence on file.

[120] Wrapping all of this up, I see no basis to admit James's October 2023 Affidavit as evidence in this appeal.

4. Conclusion regarding treatment of the evidence

[121] The *First Membership Decision* is not a product of the Chambers judge disregarding or misapprehending any material facts or evidence.

F. The Chambers judge acted judicially

[122] This Court can intervene if the Chambers judge failed to act judicially. A judge may fail to act judicially for a wide array of reasons. Although the guidance was offered in a different context, the definition of acting judicially given in *R v Biniaris*, 2000 SCC 15 at para 40, [2000] 1 SCR 381, is encompassing, as meaning "not only acting dispassionately, applying the law and adjudicating on the basis of the record and nothing else. It means, in addition, arriving at a conclusion that does not conflict with the bulk of judicial experience". I see no basis to interfere with the First Membership Injunction on this, or any similar, ground.

G. The *First Membership Decision* does not create an injustice

[123] Finally, I see no basis to intervene in this matter because the *First Membership Decision* is so plainly wrong as to amount to an injustice. I would make three final points that supplement what I have already written.

[124] First, much of what FNA had to say in this Court was focused on the economic hardships it claims to face because the costs of its business are not adequately covered by the *Monthly AgraCity Payments* and the membership fees it receives from farmers. However, the adequacy of FNA's revenue stream was clearly in the forefront of the Chambers judge's reasons, just as he had front of mind that, because he had ordered AgraCity not to sell its products and services to farmers who were not members of FNA, its financial well-being depended on there being a control on the price of FNA memberships.

[125] More specifically, the parties presented themselves to the Chambers judge to sort out what arrangements should be in place regarding the sale of FNA memberships while the larger issues that divided them were litigated. They approached the Chambers judge seeking an interim set of rules governing this aspect of their relationship. However, while the specifics of the orders they were seeking were different, they were united in asking him to determine the basic arrangements regarding the sale of FNA memberships during the pendency of the litigation. As I see it, the Chambers judge did the best that could be done, in the face of a heavily controverted record, to sort out what would be an equitable business arrangement *until the matter could be finally resolved, through trial, summary judgment or settlement*. There is no inequity in this.

[126] Second, the Chambers judge accounted for the possibility that there might be a need to amend or change the *First Membership Decision*. Without commenting on the test that would be applied should FNA seek an amendment, this Court cannot take the First Membership Injunction as being immutable.

[127] Third, and finally, the hardship that FNA describes is, at least in part, a product of the time that the First Membership Injunction has been required to operate. This Court is not privy to all the reasons for why the litigation between the parties has yet to reach a conclusion. However, I cannot help but observe that this appeal was filed in December of 2019. The *Rules* contemplate that appeals from chambers matters are to be expedited. FNA bears most of the responsibility for the fact that this appeal was not argued until September of 2023.

IV. CACV3634: APPEAL RE THE SECOND MEMBERSHIP INJUNCTION

[128] FNA makes many of the same arguments as it did in connection with the first appeal. However, changing the position somewhat from that taken in connection with the appeal against the *First Membership Decision*, it argues in the context of this appeal that the Chambers judge erred because he did not apply the *CBC* test that he had referenced in the *First Membership Decision*.

[129] Regarding the question as to whether the Chambers judge applied the correct legal test, the Second Membership Injunction was, in substance, simply an elaboration on the First Membership Injunction. Paragraphs (a) and (b) require FNA to "accept" and "process" the $500 memberships that AgraCity sells. This simply clarifies the command contained in paragraph 2(d) of the First Membership Injunction that, upon receipt of membership fees remitted by AgraCity, "FNA shall issue memberships to such customers". With rather simple wordsmithing, these parts of the Second Membership Injunction can be turned into a prohibition. I would also reiterate that these parts of the injunction can be easily recast as conditions that would be attached to the imposition of the prohibitory injunctions that were granted. For example, the prohibition against AgraCity selling products and services to persons who are not FNA members can be understood to have been ordered on the condition that FNA process memberships at the price of $500 plus GST. In this regard, FNA offered no argument that the processing of memberships sold at $500 was more

burdensome than processing memberships sold at a higher price, or that it did not understand the tasks that were required of it to comply with this part of the injunction. To the contrary, the injunction simply directed that it conduct its business in a way that it historically had.

[130] Finally, to the extent that the strong prima facie case test might be applicable in these circumstances, FNA's arguments misidentify what the fundamental issue was before the Chambers judge in this situation. The question the Chambers judge was asked to decide was *not* the price at which memberships should be sold. The Chambers judge had already decided that question in the *First Membership Decision*. The issue he had to determine in the context of the application that led to this appeal was whether there had been compliance with the First Membership Injunction. On this point, while the Chambers judge was not satisfied beyond a reasonable doubt that it had been breached, as already noted, he was "satisfied on a balance of probabilities that FNA as a result of direction from James Mann is breaching paragraph 2(d) of the order" (at para 19). Therefore, there *was* more than a strong prima facie case on the decisive question.

[131] The Second Membership Injunction *does* expand in one way on the First Membership Injunction. It does so by imposing a prohibition against FNA from communicating with farmers that a $500 membership will not be accepted. There is absolutely no merit to the suggestion that this can be viewed as a mandatory injunction.

[132] All of FNA's remaining submissions, in one way or the other, reduce to the suggestion that the argument before the Chambers judge was an occasion to relitigate whether the First Membership Injunction should have been granted a few months previously. As I have just noted, the place to do that was in the context of the appeal against the First Membership Injunction.

[133] I will briefly mention FNA's two applications to adduce evidence into this appeal under Rule 59. I would say that no part of the two new affidavits meet the test for admission. Only a few paragraphs of James's July 2023 Affidavit relate to this appeal and most of the content could easily have been adduced by FNA to the Chambers judge. To the extent that this is not the case, the evidence does not have an impact on the outcome of this appeal.

[134] Paragraphs 11 and 12 repeat a denial of the allegation that FNA is not issuing new memberships in good faith at $500 per year as required by the two injunctions. Paragraph 16 says that FNA has always sold different types of memberships. None of this is new information.

[135] Paragraph 13 simply asserts that a "number of significant issues have arisen and continue to impact the business, reputation, viability, and future of FNA". Apart from being completely unparticularized and therefore of no evidentiary value, that statement cannot be seen to add to what is already before the Court.

[136] Paragraph 14 states that AgraCity and Jason "have made it very difficult, if not impossible, for FNA to sell anything but the $500 one (1) year membership". Paragraph 15 alleges that FNA and Jason have provided false and misleading information to customers. These statements might be relevant if what was at issue was an injunction against those parties (it is not), but even then, they suffer from the same defects as paragraph 16.

[137] James's October 2023 Affidavit seeks to introduce as evidence in this appeal a PowerPoint presentation that had been transmitted to the Chambers judge by counsel's letter. It cannot be admitted for the same reasons that it could not be admitted on the first appeal.

[138] For all these reasons, I would dismiss FNA's appeal against the Second Membership Injunction.

V. CONCLUSION

[139] For the reasons I have given, I would dismiss FNA's two appeals.

[140] I would grant to each of AgraCity and Jason costs in both appeals, to be calculated in accordance with Column 3 of the *Tariff of Costs in the Court of Appeal*. As part of this, both respondents are entitled to taxable costs in both appeals for responding to FNA's application under Rule 59 dated July 7, 2023. Additionally, AgraCity is entitled to costs in one appeal only associated with its response to what I have styled as the Second New Evidence Application. To avoid any controversy over the matter, the costs relating to the Second New Evidence Application form part

of the costs awarded in connection with the appeal against the First Membership Injunction (CACV3536).

"Leurer C.J.S."

Leurer C.J.S.

I concur. "Tholl J.A."

Tholl J.A.

I concur. "Kalmakoff J.A."

Kalmakoff J.A.