KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 105**

Date: **2024 05 28**
Docket: QBG-SA-01227-2021
Judicial Centre: Saskatoon

BETWEEN:

MERVIN BROWN

Plaintiff

- and -

HCC GROUP OF COMPANIES LTD.

Defendant

Docket: QBG-SA-00469-2022
Judicial Centre: Saskatoon

BETWEEN:

HAMILTON CONSTRUCTION CORP.

Plaintiff
(Defendant by Counterclaim)

- and -

MERVIN BROWN

Defendant
(Plaintiff by Counterclaim)

Counsel:

Michael R. Scharfstein and Christine K. Libner	for Mervin Brown
Randy T. Klein, K.C.	for the HCC Group of Companies, Hamilton Construction Corp. and HCC Mining Demolition Ltd.

FIAT ROTHERY J.
May 28, 2024

Introduction

[1] Section 6-4 of *The King's Bench Act*, SS 2023, c 28 [*Act*], states:

> **6-4**(1) The court shall grant to the parties to an action or matter all remedies to which the parties appear to be entitled with respect to any legal or equitable claims that they have properly brought forward so that:
>
> (a) all issues in controversy between the parties are determined as completely and finally as possible; and
>
> (b) a multiplicity of legal proceedings concerning the issues is avoided.
>
> (2) Relief pursuant to subsection (1) may be granted either absolutely or on any terms and conditions that a judge considers appropriate.

[2] This legislation and the corresponding Rule 3-72 and Rule 3-81 of *The King's Bench Rules* are central to the applications by Mervin Brown [Brown] to amend his statement of claim by adding Hamilton Construction Corp. [Construction] and HCC Mining and Demolition Inc. [Mining] to his action against HCC Group of Companies Ltd. [Group], as well as consolidating the action commenced against Brown by Construction in QBG-SA-00469-2022 with the action in QBG-SA-01227-2021.

[3] The corporate profile from the ISC Corporate Registry for Group states its directors and officers are Kenneth Hamilton, Rylan Colwell, Robert Daniels, Randy Colwell and John Hyshka.

[4] The corporate profile for Construction states that Kenneth Hamilton, Robert Daniels and Randy Colwell are directors; Rylan Colwell and John Hyshka are directors and officers. Group is the shareholder of Construction.

[5] The corporate profile for Mining states that Kenneth Hamilton, Rylan Colwell, Robert Daniels, John Hyshka and Randy Colwell are directors.

[6] Brown alleges that he is owed monies for services provided in the workings of "HCC". It is unclear to him which corporation, or combination of corporations, owes him the monies. Thus, Brown bas brought both the application to add parties and to consolidate the two actions.

[7] In response to Brown's application, Group has brought an application pursuant to Rule 7-9 to strike Brown's claim against it, both on the basis that it discloses no reasonable cause of action, and on the basis that Brown's claim is frivolous, vexatious and an abuse of the court's process.

[8] It is agreed by counsel that if Group is successful in striking Brown's claim, the applications by Brown to amend the pleadings in QBG-SA-01227-2021 and to consolidate QBG-SA-00469-2022 with it become moot.

Background

[9] Brown commenced his claim against Group on December 6, 2021, seeking damages in the amount of approximately $324,000 for breach of an oral contract and, alternatively, fraudulent or negligent misrepresentation, and unjust enrichment. Group filed its defence on March 17, 2022, denying any contractual relationship with Brown, and asserting that Brown was an employee of Construction and Brown has been remunerated by Construction. Group also alleges that Brown's claim is statute-barred.

[10] On May 6, 2022, Construction commenced an action in trespass against Brown, claiming that Brown intentionally sabotaged and damaged a large piece of mining equipment, with the resulting losses in excess of $50,000. In the same action, Construction also sued Brown for wrongfully and unlawfully detaining three other

pieces of mining equipment and claiming damages in excess of $630,000. Construction also sought an order for return of the three pieces of mining equipment.

[11] On July 22, 2022, Brown filed his defence to Construction's claim, denying liability for damage to the one piece of mining equipment and asserting a commercial lien over the other three pieces of mining equipment for unpaid services.

[12] Brown also filed a counterclaim against Construction, pertaining to the monies owed to him by Construction, stemming from the same allegations of providing services as referred to in his action commenced against Group. That is, Brown seeks damages against Construction, of which Group is its sole shareholder, for approximately $324,000 for breach of contract and, alternatively, unjust enrichment. Construction defended Brown's counterclaim against it on September 22, 2022, denying Brown is owed any monies.

[13] Brown filed his applications to amend and consolidate the actions on August 22, 2023, along with a draft amended statement of claim in QBG-SA-01227-2021. The applications set for September 5, 2023, were adjourned *sine die* with the consent of the parties.

[14] When Group filed its application to strike Brown's claim against it, counsel agreed to have all applications returnable April 4, 2024.

Group's application to strike Brown's claim

[15] Group applies for an order under Rule 7-9(2)(a) on the basis that Brown's claim against it discloses no reasonable cause of action. Furthermore, Group applies to have Brown's claim against it struck on the basis that it is frivolous and vexatious as defined in Rule 7-9(2)(b) and an abuse of the court's process as defined in Rule 7-9(2)(e).

[16] In considering Group's application to strike Brown's claim on the basis that it discloses no reasonable claim, no evidence is admissible for the court's consideration. The court is to consider only the statement of claim, any particulars furnished pursuant to a request for particulars, and any document referred to in the claim itself. See: *Sagon v Royal Bank of Canada* (1992), 105 Sask R 133 (CA) at para 16.

[17] In this case, no particulars were provided. The alleged contract is an oral agreement.

[18] The allegations in Brown's claim pertain to breach of an oral agreement, fraudulent and/or negligent misrepresentation and unjust enrichment. These are all established causes of action. All material facts necessary for each of these causes of action have been properly pled. Indeed, Group responded to Brown's claim over two years ago with its defence. There is no basis for Group to allege that Brown's claim against it discloses no cause of action. Group's application framed pursuant to Rule 7-9(2)(a) is dismissed.

[19] The application advanced by Group that Brown's claim is frivolous, vexatious and an abuse of the court's process may be accompanied by affidavit evidence. Affidavits in this application have been filed by Brown, Kenneth Hamilton [Hamilton], and the acting president and secretary of Group and Construction, Rylan Colwell [Colwell].

[20] As stated in *Solgi v College of Physicians and Surgeons of Saskatchewan*, 2022 SKCA 96 at para 43, 473 DLR (4th) 421 [*Solgi*]:

> [43] Rule 7-9(2)(b) allows a pleading to be struck if it "is scandalous, frivolous or vexatious". Unlike when an application is made to strike a pleading because it does not disclose a reasonable claim or defence, an application under Rule 7-9(2)(b) engages with the merits of the claim. This was explained by Sherstobitoff J.A. in *Sagon v Royal Bank of Canada* (1992), 105 Sask R 133 [*Sagon*], as follows:

> [18] Striking out an entire claim on the ground that it is frivolous, vexatious or an abuse of process of the court is based on an entirely different footing [than disclosing no reasonable cause of action]. Instead of considering merely the adequacy of the pleadings to support a reasonable cause of action, it may involve an assessment of the merits of the claim, and the motives of the plaintiff in bringing it. Evidence other than the pleadings is admissible. Success on such an application will normally result in dismissal of the action, with the result that the rule of *res judicata* will likely apply to any subsequent efforts to bring new actions based on the same facts. *Odgers on Pleadings and Practice*, 20th ed. says at pp. 153-4:
>
> > If, in all the circumstances of the case, it is obvious that the claim or defence is devoid of all merit or cannot possibly succeed, an order may be made. But it is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases. Its exercise would not be justified merely because the story told in the pleadings is highly improbable, and one which it is difficult to believe could be proved. [footnotes omitted]

[21] *Solgi* also confirms the overlap between Rule 7-9(2)(b) and (e) in determining if a party's pleading constitutes an abuse of process when it stated at paragraph 61:

> [61] There is an overlap between the Court's ability to strike a pleading as constituting an abuse of process and the other grounds found in Rule 7-9, and the Court's ability to control its own processes. This point was made by Sherstobitoff J.A. in *Sagon*:
>
> > [19] Finally, a separate mention should be made of the power of the court to prevent abuse of its process, a power which is inherent as well as conferred under Rule 173 [now Rule 7-9]. Bullen & Leake defines the power as follows at pp. 148-9:
> >
> > > The term 'abuse of the process of the court' is a term of great significance. It connotes that the process of the court must be carried out properly, honestly and in good faith; and it means that the court will not allow its function as a court of law to be misused but will in a proper case, prevent its machinery from being used as a means of vexation or oppression in the process of litigation. It follows that where an abuse of process has taken place, the intervention of the court by the stay or even dismissal of proceedings, 'although it should not be lightly done, yet it may often be required by the very essence of justice to be done.' The term 'abuse of process' is often used interchangeably with the terms 'frivolous' or 'vexatious' either separately or more usually in conjunction. [footnotes omitted]

[22] *GHC Swift Current Realty Inc. v BACZ Engineering (2004) Ltd.*, 2022 SKCA 38, 29 CLR (5th) 294 [*GHC*], is authority for the court's appropriate use of the

affidavit evidence in applications to strike pleadings based on allegations of vexatious pleadings or those that constitute an abuse of the court's process. *GHC*, at para 26, states:

> [26] A judge faced with an application to strike a pleading under Rule 7-9(2)(e) is entitled to consider affidavit evidence to assess the merits of the claim or defence (*Sagon* at para 18). However, the requirement to apply the "plain and obvious" standard at this stage means that it is not appropriate for the judge to weigh the evidence or determine legitimate triable issues (*Paulsen v Saskatchewan Ministry of Environment*), 2013 SKQB 119 at para 42, 418 Sask R 96). Where only one side has filed affidavit evidence on a material point in a strike application, the facts stated in that affidavit are generally to be taken as true (*Mann* [2011 SKCA 146, 385 Sask R 59] at para 21; *Robin Hood Management Ltd. v Gelmich*, 2014 SKQB 347 at paras 41-42, 459 Sask R 183; *Landry v Rural Municipality of Edenwold No. 158*, 2020 SKQB 218 at para 20). Where both sides have filed affidavit evidence, a strike application is not the appropriate place to resolve conflicts in the evidence or make credibility findings. The presence of conflicting evidence on a material point means it is not plain and obvious that the claim is devoid of all merit and, where that is so, an application to strike the claim cannot succeed (*Mann* at paras 31-33; *Bank of Montreal v Schmidt et al.* (1989), 75 Sask R 157 at paras 9-10 (CA); *Shinkaruk v Neufeld Building Movers Ltd.*, 2014 SKQB 12 at para 25, 432 Sask R 255; *Marciano v Landa*, 2005 SKQB 58 at para 47, 1 BLR (4th) 281). [Emphasis added]

[23] The affidavit evidence filed on behalf of Brown and, oppositely, on behalf of Group is highly controverted. Although Brown initially filed his first affidavit sworn July 19, 2023, in support of his applications to add proper parties to his action against Group and to consolidate the actions, Brown's affidavit evidence is pertinent to Group's application to strike. The same observation can be made of the affidavit of Hamilton sworn July 19, 2023.

[24] Brown's affidavit outlines the basis for his claim against Group, that being, monies owed to him on account of services he provided over a span of several years, pursuant to an oral agreement with officers of Group. Brown alleges that Group was referred to as "HCC" in conversations with persons he had been working with. Brown states that the oral agreement which is the issue in the litigation was made

between him and representatives of a corporation referred to as “HCC”, specifically, Kenneth Hamilton, Rylan Colwell and John Hyshka.

[25] Brown’s legal counsel conducted a corporate registry search and found Kenneth Hamilton, Rylan Colwell and John Hyshka to be included as officers of Group. Brown believed this to be the corporate entity he had been dealing with, and his counsel commenced the action against Group in December 2021. Group filed its defence to the action in March 2022, denying that neither Group nor any of its related corporations were indebted to Brown.

[26] When Construction sued Brown in May 2022 alleging trespass and detinue, the corporate registry search of Construction showed the same directors and officers of Group, and Group as the sole shareholder of Construction. Brown defended that action and brought a counterclaim against Construction for his unpaid services, as well as storage costs incurred for Construction’s equipment on Brown’s property.

[27] Brown believed the entity for whom he did work was “HCC”. He stated that he took most of his directions from Hamilton, whom he knew to be president and CEO of “HCC”.

[28] Brown explained that throughout the years of working for HCC, he worked as a mechanic on both mining and construction equipment. He also stored equipment in both industries in his yard site at Parkside, Saskatchewan. He also transported equipment to various mining and construction sites.

[29] Brown stated that, in May or June 2023, he had a discussion with Hamilton as to the related companies to Group. Hamilton told Brown that Brown had done work for Construction and Mining, as well as Group. Brown stated that whatever entity he did work for was treated as one entity, called “HCC”.

[30] Hamilton filed an affidavit dated July 19, 2023, in support of Brown’s

applications. He explained that he is a shareholder of Group. He founded a numbered company in June 2011 with the shareholders being Hamilton, his wife and his daughter. On December 16, 2013, the corporation's name was amended to "Hamilton Construction Corp."

[31] Hamilton stated that in 2014, he hired Colwell, his accountant, on a part-time basis pursuant to an agreement that Colwell would gain a sweat equity share of Construction. In 2016, Construction purchased Mining. In order to raise capital, new investors were brought in. A corporate reorganization was completed in 2017. Group became the parent company of several other companies, including Construction and Mining.

[32] Hamilton's affidavit evidence is that, in 2020, members of the board of directors of Group voted to remove Hamilton as president and CEO, and Group has operated in a state of hostility since 2020. Hamilton remains a shareholder but alleges that the remaining directors continue to operate Group in violation of its unanimous shareholders agreement and to make decisions without proper board approval.

[33] Hamilton outlined in his affidavit that Brown has been an integral part of Group and its related entities. Brown has provided significant labour, mechanical services, transportation, equipment repairs and storage to Group. Hamilton stated that Brown provided services to Construction and to Mining.

[34] Hamilton stated that, in about 2019, when Hamilton instructed Colwell to calculate what was owed to Brown by that point, the amount was sufficiently large to pose a financial burden on the company. Hamilton stated that Brown agreed to defer the payment of monies owed to him, in turn for treating the money owed as an investment with a return of 2:1.

[35] Colwell swore an affidavit dated February 21, 2024, in support of

Group's application to strike Brown's claim. Colwell identified himself as the acting president and secretary of Construction and of Group. Colwell stated that he denies Hamilton's characterization of the issues between Hamilton and Group, and the matters between Hamilton and Group are the subject of other legal proceedings.

[36] Colwell stated that Brown provided some services to Construction as an employee and has been paid except for an amount from 2020.

[37] Colwell pointed out that Brown's claim states that there was an oral agreement between Brown and Group in 2015. However, Group was not incorporated until October 18, 2017. Furthermore, Colwell noted that Hamilton did not provide any particulars of what services Brown would have provided to Group.

[38] Brown stated in a rebuttal affidavit, sworn February 29, 2024, that the T4 slip issued to him by Construction was for a narrow scope of work in 2018. Brown reiterated that the work he has done for Group, Construction and, later, Mining began in 2015 when Hamilton was a director and officer of the companies.

[39] As cautioned by the Saskatchewan Court of Appeal in *GHC*, "the presence of conflicting evidence on a material point means it is not plain and obvious that the claim is devoid of all merit". That is the situation here. Brown's claim cannot be referred to as frivolous or vexatious; it is the opposite. There is a genuine issue regarding who the parties were that Brown was providing services for. That Hamilton is in litigation against the same parties as Brown does not mean the court ought to simply disregard Hamilton's evidence. Group's application to strike Brown's claim is hereby dismissed.

Brown's application to amend his claim against Group by adding Construction and Mining

[40] Brown seeks an order permitting amendments to the claim against Group,

which reflect the allegations that an oral agreement was entered into with Group and Construction and Mining, as Group's affiliates. Alternatively, the oral agreement was between Brown and each of Group, Construction and Mining. Brown refers to the three corporations as the defendants. The amended claim for breach of contract, misrepresentation and unjust enrichment are against all three defendants.

[41] This proposed amendment of Brown's claim engages Rule 3-72(1) and Rule 3-78(2), which state:

> **3-72**(1) A party may amend the party's pleading, including an amendment to add, remove, substitute or correct the name of a party, as follows:
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> …
>
> (c) after a statement of defence is filed:
>
> (i) by agreement of the parties filed with the Court; or
>
> (ii) with the Court's prior permission, in any manner and on any terms that the Court considers just.
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> …
>
> **3-78**(2) Persons may be joined as defendants or respondents if:
>
> (a) a remedy is claimed against them, whether jointly or severally or in the alternative, arising out of the same transaction, occurrence or series of transactions or occurrences;
>
> (b) a common question of law or fact may arise in the proceeding;
>
> (c) there is doubt as to the person or persons from whom the plaintiff, petitioner or originating applicant is entitled to a remedy;
>
> (d) damage or loss has been caused to the same plaintiff, petitioner or originating applicant by more than one person, whether or not:
>
> (i) there is any factual connection between the several claims apart from the involvement of the plaintiff, petitioner or originating applicant; and
>
> (ii) there is doubt as to the respective amounts for which each may be liable; or

> (e) their presence in the proceeding may promote the convenient administration of justice.

[42] The Saskatchewan Court of Appeal has succinctly set out the key principles for a presiding judge's exercise of discretion pursuant to Rule 3-72(1)(c)(ii) in *Cupola Investments Inc. v Zakreski*, 2021 SKCA 86 [*Cupola*]. *Cupola*, at paras 44-46 and 49-52, discuss the relevant principles that are applicable:

> [44] Because I have determined that the appropriate approach in this case was to center the analysis in the principles applicable to the amendment of pleadings pursuant to Rule 3-72, it is useful to summarize three such principles that inform that Rule.
>
> [45] The first principle relates to *purpose*. Amendments are allowed to enable the court to determine the true points of controversy that require a judicial determination. In keeping with the overarching purpose for allowing amendments, they are liberally granted when required for this reason. In *Frobisher Ltd. v Canadian Pipelines & Petroleums Ltd.* (1957), 10 DLR (2d) 338 at 432 (Sask CA) [*Frobisher*], Culliton J.A. (as he then was), stated:
>
> > While leave to amend is a discretionary right to be exercised by the Court, I think it can be said that the practice is for the Court to allow amendments to pleadings whenever it can be done without injustice to the other side and where it is necessary to determine the issues between the parties. …
>
> [46] Similarly, Rule 3-72(3) *requires* that the parties "shall make all amendments to their pleadings that are necessary to determine the real questions in issue". Of course, there would be a bit of circularity if this provision alone were to be used to justify the addition of a defendant – since an issue cannot be said to exist between a plaintiff and a defendant until the defendant is before the court. However, Rule 3-72(3) reflects the policies inherent in s. 29 of the *Act* [now s. 6-4 of *The King's Bench Act*], and the other Rules I have mentioned, that a multiplicity of proceedings is generally to be avoided. Where a proposed amendment relates to a statement of claim, since the issues are in first instance those that are defined by the plaintiff, this means that the analysis of an amendment request must be centered on the issues the plaintiff presents for resolution.
>
> …
>
> [49] The third principle of importance here is also mentioned in Frobisher and relates to *potential prejudice*. This is what Culliton J.A. was referring to when he said that the court's practice is to "allow amendments to pleadings whenever it can be done *without injustice to*

> *the other side*" (*Frobisher* at 432, emphasis added). This is most often the key point of controversy when an amendment application is considered. When considering an amendment request, the court is also concerned with the question of whether material prejudice will be caused by the change in the pleading. For example, subject now to the legislative intervention on this issue, the expiration of a limitation period between the time of an initial pleading and an amendment may be a reason to deny an amendment (*vis*, *The Limitations Act*, SS 2004, c L-16.1, s 20).
>
> [50] If a party will be materially prejudiced by the amendment, the subsidiary question that arises is whether there is a way to ameliorate that prejudice or to prevent the injustice that would otherwise be occasioned by allowing the amendment. If the prejudice can be sufficiently ameliorated, then it will not generally stand in the way of allowing the amendment. *Beemer v Brownridge*, [1934] 1 WWR 545 at para 62 (CanLII) (Sask CA) is a *locus classicus* on pleadings amendments in this province. In it, Martin J. (as he then was) found the general rule to be as stated by Lord Esher in *Steward v North Metropolitan Tramways Co.* (1886), 16 QBD 556 (CA) at 558 [Steward] (citing *Clarapede & Co. v Commercial Union Association* (1883), 32 WR 262 (CA)), as follows:
>
> > … "The rule of conduct of the Court in such a case is that, however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed, if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs: but, if the amendment will put them into such a position that they must be injured, it ought not to be made." …
>
> [51] Justice Martin also referred, to like effect, to the following passage from the judgment of Lord Justice Lindley in *Steward* (at 559):
>
> > … I entirely agree with the terms in which the rule as to amendments has been laid down in the cases cited by the Master of the Rolls. I think an amendment ought always to be allowed except when the other party cannot be placed in the same position, but an injury would be occasioned to him by the amendment which could not be compensated by costs. …
>
> [52] In addition to costs, another way that prejudice associated with the grant of an amendment can often be ameliorated is through the grant of an adjournment.

[43] Thus, Brown's proposed amendments to add Construction and Mining to his action against Group must be analyzed in this light. That is, the issue is whether Group, Construction or Mining, as stated at paragraph 66 of *Cupola*, "will suffer

material prejudice that is not subject to amelioration – for example, by way of a grant of an order of costs or by an adjournment."

[44] In addition to the evidence filed by the parties in these applications which have already been reviewed in this decision, Colwell filed a further affidavit sworn March 27, 2024, specifically addressing the issue of joining Mining as a party to Brown's action against Group. In his capacity as acting president and secretary of Group and Construction, Colwell states that the allegations made by Brown and Hamilton in their affidavits as to the involvement of Brown with Mining is simply untrue. Colwell further asserts that Hamilton is saying what he did about Brown to retaliate against the corporations for the legal problems Hamilton is having with the present directors.

[45] Colwell further asserts that any potential claim Brown has against Mining is statute-barred.

[46] Colwell's affidavit asserting that Brown's and Hamilton's evidence is untrue is not helpful at this point in the litigation. That is a matter for determination by the trial judge. What is important on this application is whether Group, Construction or Mining will suffer material prejudice. Certainly, which corporation Brown provided services for is an issue in his claim. As stated in Rule 3-78(2)(c), parties may be joined as defendants in an action if there is doubt as from whom a plaintiff is entitled a remedy. This is exactly the basis for adding both Construction and Mining to Brown's claim against Group.

[47] Furthermore, Brown brought this application to add Construction and Mining to his claim against Group in August 2023. There has been ample time for these corporations to respond to the proposed amendments. There has been no evidence filed to support an allegation of material prejudice.

[48] If a limitation period has expired against either Construction or Mining after Brown commenced his claim against Group, s. 20 of *The Limitations Act*, SS 2004, c L-16.1, permits the court to exercise the discretion to allow the amendment if the claim asserted by the amendment arises out of the same transaction as the original claim and no party will suffer actual prejudice from the amendment. Applying these tests to the facts in this litigation, Brown's claim pertains to services he provided arising from the same transaction; he asserts he does not know which of the parties he provided it for. No actual prejudice is asserted by any of the three corporations.

[49] While Group asserts that Brown's action is statute-barred, that is a matter to be determined at trial. There may well be discoverability issues which affect the calculation of the limitation periods.

[50] Therefore, in accordance with Rule 3-72(1)(c)(ii), Brown's claim is hereby ordered to be amended in the form of the draft amended statement of claim filed on August 22, 2023.

Brown's application to consolidate the two actions as QBG-SA-01227-2021

[51] As previously discussed, about five months after Brown sued Group, Construction commenced the action, being QBG-SA-00469-2022, against Brown in trespass and wrongful detention of its equipment. Brown defended that action and filed a counterclaim against Construction for monies owed for services he provided. Brown also claims a commercial lien against the equipment stored on his property.

[52] Counsel for Brown applies for an order to have the claim by Construction and Brown's counterclaim, in QBG-SA-00469-2022, consolidated with Brown's action against Group in QBG-SA-01227-2021. Counsel relies on Rule 3-81 for this relief, which states:

> **3-81**(1) The Court may order one or more of the following:

> (a) that 2 or more claims or actions be consolidated;
>
> …
>
> (2) An order pursuant to subrule (1) may be made for any reason the Court considers appropriate, including, without limitation, that 2 or more claims or actions:
>
> (a) have a common question of law or fact; or
>
> (b) arise out of the same transaction, occurrence or series of transactions or occurrences.

[53] The decision of *Qaisar v SGI Canada*, 2019 SKQB 68 at paras 111-112, is helpful in assisting the presiding judge's exercise of discretion to consolidate actions:

> [111] This Rule allows the court to consolidate two or more claims that have common questions of law or fact, or that arise out of the same transaction, series of transactions or occurrences. Consolidation of actions is rooted in considerations of economy and justice. Economy of time and expense to litigants is usually best realized by avoiding unnecessary multiple actions and trials. Justice and the perception of justice are often enhanced by joinder to avoid the risks of inconsistent determinations of common issues in separate actions and trials: *Remai Financial Corp. v 568320 Saskatchewan Ltd.* (1996), 150 Sask R 292 (QB).
>
> [112] The party seeking consolidation bears the onus of demonstrating that the actions should be consolidated: *Wong v Leung*, 2011 ABQB 722, 530 AR 91. Deciding whether to consolidate actions involves an exercise of discretion. It requires the court to consider a number of factors, including (i) the extent to which there are common claims and disputes, (ii) the possibility that consolidation may save time and resources in both pre-trial procedures and at trial; and (iii) the potential prejudice to parties that may arise from consolidation: *Munro v Munro*, 2011 ABCA 279, 341 DLR (4th) 635.

[54] The issue of whether, and to whom, Brown supplied services is the crucial matter in both lawsuits. The claim and counterclaim in each action arises out of the same series of transactions. The witnesses to each action are the same individuals; all three corporations have the same directors and officers. Brown has the same legal counsel in both actions. The three corporations have the same legal counsel.

[55] The only prejudice that counsel for Group, Construction and Mining has

articulated is that consolidation may make it difficult if Group wishes to proceed with a summary judgment application. Such perceived prejudice is unwarranted. Rule 7-2 allows for summary judgment "on all or some of the issues raised in the pleadings". Thus, consolidation would not prevent a summary judgment application.

[56] Section 6-4 of the *Act* requires the court to ensure that a multiplicity of proceedings concerning the issues in dispute is avoided. As stated in *Cupola*, at para 1:

> [1] The law gives plaintiffs a degree of discretion as to whom they sue, and for what causes of action, in a single lawsuit. This reflects several principles, including that a multiplicity of proceedings is to be discouraged. This principle advances the policy objectives of avoiding inconsistent verdicts and promoting efficiencies.

[57] Therefore, consolidation of the two actions is appropriate in this situation. It will prevent the possibility of inconsistent verdicts if tried separately. Furthermore, "HCC" and its workings through the various corporations can only be properly assessed by the court if all outstanding issues between Brown and the three corporations are identified and the evidence adduced at trial.

[58] The application by Brown's counsel to consolidate the actions into QBG-SA-01227-2021 is hereby granted.

Conclusion and Costs

[59] Group's application to strike Brown's claim is dismissed.

[60] Brown's application to amend his claim by adding Construction and Mining to his action against Group is granted and his claim shall be amended in the form of the draft amended statement of claim filed on August 22, 2023.

[61] Brown's application to consolidate QBG-SA-00469-2022 with QBG-SA-01227-2021 is granted. The consolidated action shall be cited as QBG-SA-01227-2021. However, to clarify the position of all parties, both actions will

be cited in the style of cause.

[62] Brown is entitled to costs against Group in the application commenced by Group to strike his claim, calculated in accordance with Schedule I "B" – General, Column 2, of the Tariff of Costs, payable forthwith.

[63] Brown is entitled to costs against Group and Construction, jointly and severally, in his application to amend his claim, calculated in accordance with Schedule I "B" – General, Column 2, of the Tariff of Costs, payable forthwith.

[64] Brown is also entitled to costs against Group and Construction, jointly and severally, in his application to consolidate the two actions, calculated in accordance with Schedule I "B" – General, Column 2, of the Tariff of Costs, payable forthwith.

"A.R. Rothery" J.
A.R. ROTHERY