Court of Appeal for Saskatchewan
Docket: CACV3926

Citation: *Kashuba v Wilton (Rural Municipality)*, 2022 SKCA 37
Date: 2022-03-18

Between:

Terence Kashuba and Tracy Kashuba

Applicants/Prospective Appellants (Plaintiffs)

And

Rural Municipality of Wilton #472

Respondent/Prospective Respondent (Defendant)

Before:	Leurer J.A. (in Chambers)
Disposition:	Applications dismissed
Written reasons by:	The Honourable Mr. Justice Leurer
On application from: Applications heard:	QBG 33 of 2021, Battleford December 8, 2021
Counsel:	Terence Kashuba and Tracy Kashuba on their own behalf Gerald Heinrichs for the Respondent

Leurer J.A.

I. INTRODUCTION

[1] Terence Kashuba and Tracy Kashuba are plaintiffs in a lawsuit against the Rural Municipality of Wilton #472 [RM]. A Court of Queen's Bench judge in Chambers has made various orders, the overall effect of which is to (a) grant the Kashubas leave to make certain amendments to their statement of claim, (b) deny them leave to make other amendments, and (c) temporarily stay the prosecution of their action pending the outcome of other proceedings: *Kashuba v Rural Municipality of Wilton #472* (October 7, 2021) Battleford, QBG 33 of 2021 [*Chambers Decision*].

[2] The Kashubas seek to appeal from the *Chambers Decision.* They require leave to do so because, for the most part at least, the orders made by the Chambers judge are interlocutory. In addition, the Kashubas missed the deadlines applicable to appeals from both final and interlocutory orders.

[3] As I will explain, I am not prepared to grant the orders necessary for the Kashubas' appeal to go forward.

II. BACKGROUND

[4] The Kashubas reside in the hamlet of Lone Rock, which is organized in the RM. Their home is owned by Ms. Kashuba, although other land is titled in both their names.

[5] As described by the Chambers judge, the dispute between the Kashubas and the RM "concerns whether or not the RM has an obligation to provide residents of the Hamlet of Lone Rock … with water and sewer services" (*Chambers Decision* at para 3). In this regard, according to the Kashubas' draft amended statement of claim [draft amended Claim], the RM undertook certain demolition work on November 19, 2018. This resulted in the loss of water service to their home. The draft amended Claim asserts that the RM has billed the Kashubas for water services that they have not received. The draft amended Claim further alleges that the RM has been engaged in a campaign that has as its object "to diminish the property values in [Lone Rock] so they [*sic*]

could be acquired at a discounted price favourable to the RM". Overall, the draft amended Claim seeks an award of $15,247.34 in special damages, unspecified "General and Moral Damages" and declaratory relief.

[6] The disagreement between the Kashubas and the RM is part of a larger dispute between the RM and its residents. All of this has led to several different legal proceedings.

[7] In November 2018, Lone Rock's board requested that an appeal board be constituted pursuant to s. 77 of *The Municipalities Act*, SS 2005, c M-36.1. Section 77 provides that if a dispute arises between the counsel of a rural municipality and the board of an organized hamlet, "the council and the hamlet board shall refer that matter to an appeal board". Lone Rock's board sought the appointment of an appeal board to address a range of disputes relating to water and sewer services and land purchases by the RM [Appeal Board].

[8] Ms. Kashuba was initially appointed to the Appeal Board. However, the RM applied to remove her. This issue came before Zuk J., who held that "the RM had established the existence of a reasonable apprehension of bias and, accordingly, disqualified [Ms.] Kashuba from sitting on the Appeal Board" (*Chambers Decision* at para 6). The proceedings before the Appeal Board are ongoing.

[9] In 2019, Mr. Kashuba and Lloyd Ludwig, the chair of Lone Rock's board acting in his personal capacity, served an originating application seeking to "quash certain bylaws and decisions of the RM relating to water and sewer services and billing" (*Chambers Decision* at para 4). The summary of material facts contained in that initiating document identified many of the issues between Lone Rock, and its residents, on the one hand, and the RM on the other, that are being dealt with in the Appeal Board proceedings. The RM met the originating application with a notice of application of its own. In it, the RM asked that the originating application be struck as an abuse of process or because it was duplicative of the proceedings before the Appeal Board.

[10] These competing applications came before Zuk J. He refused to strike the originating application because the parties to it and the Appeal Board proceedings were different: *Kashuba v Wilton (Rural Municipality)* (6 March 2020) Battleford, QBG 239 of 2019 [*Zuk Fiat*]. In reaching this conclusion, Zuk J. noted that, although "there is significant overlap between the actions of the

applicants acting in their personal capacity and their involvement in the Organized Hamlet Board, there is not sufficient evidence to establish that the applicants are acting as proxies for the Hamlet Board" (at para 20).

[11] Nonetheless, Zuk J. found that the Appeal Board process was first in time and had "been instituted to address the precise issues raised by the applicants" in the matter before him (at para 21). For this reason, he ordered that the proceedings pursuant to the originating application be adjourned *sine die* pending completion of the proceedings before the Appeal Board. No appeal was taken from the *Zuk Fiat*.

[12] On May 27, 2020, the Kashubas filed a six-paragraph statement of claim in the Provincial Court of Saskatchewan. In it, they sought damages against the RM associated with the discontinuance of water and waste services totalling $6,540, and an order that would remove liens registered against the property owned by Ms. Kashuba. The core allegations made in this statement of claim were found in the following single paragraph:

> 4. On or around the beginning of January 2019 water/sewer utility bills began to arrive in residents mail this was opposed by the Organized Hamlet Board as lacking procedural fairness & is an illegal process as indicated by the legislation as the Defendant RM of Wilton failed to take the steps necessary to enact the bylaw that supports issuing water/sewer utility bills & in the Plaintiff's case especially for not providing the services due to a negligent action of RM of Wilton to which they have a direct liability under the legislation. The Plaintiff's did not pay for service they were not getting. The monthly amounts were then attached as Tax arrears & forwarded to defendant Taxervice Inc. for collection.

[13] The RM defended the action. On January 27, 2021, O'Hanlon P.C.J. ordered that the small claims action be transferred to the Court of Queen's Bench. The *Chambers Decision* was made in this transferred proceeding.

[14] Justice Danyliuk was appointed case management judge. He presided at a case conference on June 11, 2021. His fiat of that date records that the parties "acknowledged that the plaintiffs' claim requires amendment". Justice Danyliuk therefore directed the Kashubas to serve and file an application to amend their statement of claim to be returnable in Chambers on August 26, 2021.

[15] In accordance with the direction given by Danyliuk J., the Kashubas served a notice of application seeking leave to amend their statement of claim, together with an affidavit sworn by Mr. Kashuba on July 27, 2021, and the draft amended Claim. As described by the Chambers judge,

because of the proposed amendments, the claim had "gone from a simple two-page, six-paragraph document to an 11-page, 47-paragraph document, which includes an additional 7½ page annex" (*Chambers Decision* at para 16).

[16] The RM then brought its own application. It sought orders (a) "striking out the entirety [of] the Plaintiffs' claim whereas [*sic*] it is duplicitous and an abuse of process"; (b) striking out portions of Mr. Kashuba's affidavit; and (c) "striking out any claim by [Mr.] Kashuba because he is not an owner of the property in question".

III. THE *CHAMBERS DECISION*

[17] The Chambers judge dealt with the two applications in a single judgment. After providing background, he turned to consider the details of the draft amended Claim. He began by observing that it "does not comply with the rules governing pleadings in that the amendments are not underlined as required by Rule 3-73(3)" of *The Queen's Bench Rules* [*Rules*] (at para 12). However, he stated that, because the Kashubas were not represented by counsel, he was "prepared to overlook the non-compliance with Rule 3-73(3) in the circumstances" (at para 13).

[18] The Chambers judge agreed with the RM's contention that the draft amended Claim was "confusing, unfocussed and rambling". However, he found the "basic facts alleged are actually quite straightforward", which he stated to be as follows (at para 21):

> (a) the Kashubas live in the Hamlet and since 2006 were getting their water from the RM (paras. 1-4);
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> (b) the Kashubas were paying for the water they received (para. 11);
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> (c) in November 2018, the RM completed demolition work on a property neighbouring the Kashubas and the Kashubas' water was cut off (paras. 13-14);
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> (d) the Kashubas requested that their water be restored and the RM failed to restore the service (paras. 16-17);
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> (e) the RM started billing the Kashubas for water that was not being received (para. 21); and
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> (f) when the Kashubas refused to pay for the water that was not received, the RM commenced enforcement proceedings and asserted lien rights (para. 24).

[19] Although the Chambers judge was able to distill the core alleged facts underpinning the draft amended Claim, he had greater difficulty in determining the causes of action being asserted by the Kashubas in it. He nonetheless concluded several were potentially in play, stating as follows:

> [22] It is difficult to determine exactly what causes of action are being advanced by the Kashubas against the RM from these basic facts. This of course places the RM at a significant disadvantage. They are certainly entitled to know the exact legal basis on which claims are being advanced against them. As far as I am able to determine, it seems the Kashubas are alleging:
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> (a) breach of contract (para. 32);
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> (b) breach of statutory duties (paras. 32, 34 and 43);
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> (c) breach of procedural fairness (para. 35); and
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> (d) misfeasance of Public Office (paras 36–43).

[20] Having determined what basic alleged facts underpinned the Kashubas' claim and the causes of action they were seeking to advance, the Chambers judge scrutinized the pleadings. He considered whether the draft amended Claim was consistent with the *Rules*. He also noted that affidavit evidence was properly taken into account for some, but not all, parts of his analysis as to whether the draft amended Claim was compliant with the *Rules*. This observation caused the Chambers judge to consider whether parts of Mr. Kashuba's affidavit should be struck, as requested by the RM.

[21] After a detailed examination of these matters, the Chambers judge summarized the "net effect" of his judgment to be that:

(a) all or parts of paragraphs 7, 9, 10, 29, 33, 34, 43 and 44 and Annex 1 of the draft amended Claim "are struck for violating the requirements of Rule 13-8 and Rule 1-3 in that they plead evidence and are unnecessarily lengthy in terms of pleading legislation as opposed to simply references" (at para 74(a));

(b) paragraph 35 of the draft amended Claim, relating to the breach of procedural fairness, "is struck for failing to disclose a reasonable cause of action" (at para 74(b));

(c) all or parts of paragraphs 18, 19, 20, 25, 36, 37, 38, 39, 40, 41, 42, 46 and 47, making allegations against non-parties, "are struck as an abuse of the Court's process as they would undermine the trial fairness to which such parties are entitled" (at para 74(c));

(d) the claim by Mr. Kashuba for breach of contract is "struck as it is a frivolous claim and unable to succeed" (at para 74(d));

(e) the claim by Ms. Kashuba for breach of contract "is stayed as its outcome will depend on the findings of the Appeal Board" (at para 74(e));

(f) the claim for misfeasance in public office, advanced by both plaintiffs, is stayed "pending the outcome" of the Appeal Board process; (at paras 74(f) and (g));

(g) Ms. Kashuba's claim for breach of contract "is stayed to allow the Appeal Board process to conclude first so as not to give rise to potentially inconsistent results" (at para 74(h)); and

(h) paragraphs 3 and 6 through 13 of Mr. Kashuba's affidavit are struck (at para 74(i)).

IV. ISSUES

[22] Several preliminary considerations help frame the questions that must be answered to resolve the applications before me.

[23] The first consideration relates to a proper understanding of the orders made by the Chambers judge. I say this because any analysis of whether this proposed appeal should be allowed to proceed must begin with a proper understanding as to what will be in dispute in the proposed appeal.

[24] As I have noted, the application that the Kashubas made to the Court of Queen's Bench was for leave to amend their statement of claim from the form in which it had existed when their action was transferred from the Provincial Court to that court. Although the Chambers judge made various orders that state that parts of the draft amended Claim are "struck", that document was not a pleading. It was only a *draft* statement of claim. Therefore, properly understood, the *Chambers*

Decision does not *strike* any existing pleading. Rather, the intent and effect of the *Chambers Decision* was to *grant leave* to the Kashubas to amend their statement of claim by filing a fresh amended statement of claim, but to not allow the fresh amended statement of claim to include any of the parts that the Chambers judge ordered to be removed from the draft amended Claim. Based on this understanding, the *Chambers Decision* could be seen to have made a *single* order in relation to the pleadings, that is, to grant to the Kashubas leave to amend their existing statement of claim by filing a modified version of the draft amended Claim they presented for approval.

[25] Although that is one way to view the *Chambers Decision*, I consider it appropriate to proceed on the basis that several separate orders were made. Apart from the fact that the *Chambers Decision* and issued order are structured in this manner, the various determinations made by the Chambers judge have the potential to affect the lawsuit in a variety of different ways. Only by parsing the *Chambers Decision* can these differences be teased out. Therefore, I find it both appropriate and necessary to approach my consideration of the *Chambers Decision* by analyzing each of the directions given by the Chambers judge separately.

[26] The second preliminary consideration that assists in identifying the issues to be decided is that, as a matter of principle, the appropriateness of a proposed pleading is to be tested in the same way as if a request had been made to strike an existing pleading. In this regard, Rule 3-72 governs the making of amendments to a pleading. Among its provisions, Rule 3-72(3) provides that parties "*shall* make all amendments to their pleadings that are *necessary to determine the real questions in issue between the parties*" (emphasis added). Rule 7-9(2) identifies when an order striking a pleading may be made:

> **7-9**(2) The conditions for an order pursuant to subrule (1) are that the pleading or other document:
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> (a) discloses no reasonable claim or defence, as the case may be;
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> (b) is scandalous, frivolous or vexatious;
>
> (c) is immaterial, redundant or unnecessarily lengthy;
>
> (d) may prejudice or delay the fair trial or hearing of the proceeding; or
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> (e) is otherwise an abuse of process of the Court.

[27] In *Alves v Sunquest*, 2011 SKCA 116 at para 13, 342 DLR (4th) 395, Richards J.A. (as he then was) stated, with reference to many authorities, that "an amendment under Rule 165 [now Rule 3-72] should not be allowed if the result would be a pleading that could be struck pursuant to

Rule 173 [now Rule 7-9]". Justice Herauf turned this negative proposition into a positive one in *Rekken v Saskatchewan (Health Region #1)*, 2015 SKCA 36 at para 11, 384 DLR (4th) 174, when he stated that "a Chambers judge should only refuse to amend pleadings where the proposed amended pleadings can be struck under the predecessor to Rule 7-9[(2)]". See also, *Boart Longyear Inc. v Mudjatik Enterprises Ltd.*, 2016 SKCA 22 at para 24, 476 Sask R 58. I would add only that these statements of law assume that the proposed pleading otherwise complies with the *Rules* governing a proper pleading.

[28] The net effect of these decisions is that many of the same basic rules are at play when a court determines whether to allow an amendment to a pleading as when a request is made to strike an existing pleading. Considering this, even if the Chambers judge misspoke when he characterized his order as striking a pleading, I can discern no substantive effect that this had on his analysis.

[29] The final preliminary considerations that assist in identifying the questions that need answers are related. They concern the requirement that the Kashubas obtain leave to appeal from the *Chambers Decision* and an extension of time for them to pursue their appeal.

[30] The *Chambers Decision* is dated October 7, 2021. Section 8(1) of *The Court of Appeal Act, 2000*, SS 2000, c C-42.1 states that, subject to exceptions that are not applicable in this case, "no appeal lies to the court from an interlocutory decision of the Court of Queen's Bench unless leave to appeal is granted by a judge or the court". Section 9(3) of *The Court of Appeal Act, 2000* requires that "an application for leave must be made within 15 days after the date of the decision for which leave to appeal is being sought or within any time ordered by the court or a judge". As I will explain, having become aware of these provisions, on November 8, 2021, the Kashubas served two applications on the RM. In the first, they sought an order "extending the time within which [they] may serve a notice of motion to extend time for leave to appeal" from the *Chambers Decision*. In the second application, they requested an order for leave to appeal from the *Chambers Decision*.

[31] At the hearing of their applications, the Kashubas asserted that several of the orders made by the Chambers judge are final in nature and therefore no leave to appeal is required to appeal from the *Chambers Decision*. They acknowledged, however, that they need an extension of time

to appeal from these orders because they have not filed a notice of appeal within the time required by s. 9(2) of *The Court of Appeal Act, 2000*. Section 9(2) requires generally that "a notice of appeal must be served within 30 days after the date of the decision being appealed from". This deadline may be extended "where, in the opinion of the judge or court, it is just and equitable to do so" (s. 9(6)).

[32] Considering all of this, with respect to the orders of the Chambers judge that are interlocutory, the Kashubas require both an extension of time to obtain leave to appeal and a grant of leave to appeal. With respect to the orders, if any, that are final, the Kashubas require an order granting them an extension of time to serve and file a notice of appeal.

[33] I will separately analyze each of the orders made by the Chambers judge for the purposes of determining if the Kashubas should be granted the orders required for their proposed appeal to go forward. Before doing this, I will briefly discuss several legal principles that frame my analysis.

V. ANALYSIS

A. Legal principles

1. The distinction between interlocutory and final orders

[34] I must sort the interlocutory orders made by the Chambers judge from those that are final, as the Kashubas require leave to appeal only in connection with the former.

[35] At the most general level, the basic distinction between the two types of orders is easy to state. As explained by Ottenbreit J.A. in *Saskatchewan Medical Association v Anstead*, 2016 SKCA 143, it "has long been the law in this jurisdiction that orders which do not finally dispose of the 'substantive issue' in an action are not final but interlocutory". Conversely, "an order is final when, if allowed to stand, it finally disposes of the rights of the parties" (at para 56). More recently, Kalmakoff J.A. explained that, "[a]t a very general level, an interlocutory decision is one made during the progress of an action or other proceeding that relates to some intermediate matter at issue in the case, not to the ultimate matter in issue" (*Poffenroth Agri Ltd. v Brown*, 2020 SKCA 68 at para 15, [2021] 5 WWR 302 [*Poffenroth*], referring to Stuart J. Cameron, *Civil Appeals in Saskatchewan: The Court of Appeal Act & Rules Annotated*, 1st ed (Regina: Law

Society of Saskatchewan Library, 2015) at 118). Later, Kalmakoff J.A. also stated that the "determination of whether an order is final or interlocutory in nature turns on whether the order effectively disposes of the rights of the parties, in a final and binding way, with respect to a *substantive issue*" (at para 18, emphasis added). If an order has this effect, it is final in nature.

[36] Many judgments of this Court have expanded on this general direction. I will draw on *Poffenroth*, as well several other decisions, to assist in my sifting through of the orders made by the Chambers judge for the purposes of identifying those that are interlocutory and those that are final.

2. Test for the grant of an extension of time

[37] As explained, regardless of whether particular orders of the Chambers judge are viewed to be final or interlocutory, the Kashubas require an order extending the time within which to pursue an application for leave to appeal or, in the case of any orders that are final, to file a notice of appeal. Although sometimes expressed in slightly different language or in a different order, judges of this Court have consistently identified four factors as bearing on the question as to whether an extension of time to appeal should be granted. These are whether:

(a) the party seeking the extension possessed a bona fide intention to appeal within the time limited for appeal;

(b) the party seeking the extension has acted with reasonable diligence or has a reasonable explanation for the delay;

(c) the respondent will suffer prejudice, beyond what would be incurred in the usual appeal process, if the extension is granted; and

(d) there is an arguable case to be made to a panel of the Court.

See, for example only: *Bank of Nova Scotia v Saskatoon Salvage Company (1954) Ltd.* (1983), 29 Sask R 285 (CA) at paras 18–19; *Dutchak v Dutchak*, 2009 SKCA 89 at para 12, 337 Sask R 46 [*Dutchak*]; *Saskatoon (City) v Walmart Canada Corp.*, 2016 SKCA 123 at para 30, 1 CPC (8th) 380; *MacInnis v Bayer Inc.*, 2021 SKCA 160 at para 10; and *Choquette v Viczko*, 2022 SKCA 11 at para 17 [*Choquette*].

[38] The case law emphasizes that these four factors "are not prerequisites but only customary considerations in the analysis of what is just and equitable" (*Patel v Whiting*, 2020 SKCA 49 at para 35 [*Patel*]). As explained by Ryan-Froslie J.A., "[i]n order to succeed in his application, [the applicant] does not need to establish each of the factors .... Rather, he must show that, taking those factors into account, it is just and equitable to extend the time for appeal" (*Taheri v Vujanovic*, 2018 SKCA 40 at para 22, 36 CPC (8th) 82 [*Taheri*]).

[39] The inclusion of a merits review as part of the consideration as to whether to grant an extension of the time to appeal is to filter appeals that are destined to fail. In *Taheri*, Ryan-Froslie J.A. described it this way:

> [40] The issue [...] is not whether the Chambers judge's decision should be upheld but, rather, whether [the proposed appellant] has an "arguable case". To establish an arguable case, a proposed appellant need not show his appeal is likely to succeed, only that the appeal raises a debateable issue. …

As I will later note, requests for leave to appeal are assessed against a similar merits test.

[40] In this case, I am satisfied that the decision as to whether to grant an extension of time – whether that be to appeal from a final order or to seek leave to appeal from an interlocutory order – should stand or fall primarily on the fourth consideration, that is whether there is an arguable case to be made to a panel of the Court. In this regard, as previously noted, the *Chambers Decision* is dated October 7, 2021. Thirty-one days later, on November 8, 2021, the Kashubas served their two applications. One application is dated November 3, 2021. The other is dated November 5, 2021. Mr. Kashuba's evidence is that it was only as a result of contacting court staff on November 3 that he learned that the orders under appeal were likely interlocutory and, as such, required an application for leave to appeal. His affidavit describes how he then scrambled to prepare the necessary material. This evidence stands unchallenged and supports the conclusions that (a) the Kashubas had an intention to appeal from the *Chambers Decision* within 30 days of it being made, and (b) they moved reasonably promptly in the circumstances, based on their imperfect understanding of the applicable deadlines. Although this is outside of the 15-day period for seeking leave to appeal, I accept that this is because of misunderstanding on the part of the Kashubas and that they, generally, have a reasonable explanation for their delay.

[41] I am also satisfied that the RM will not be prejudiced by the grant of an extension. In this regard, the type of prejudice that is relevant is that which flows from the delay of the appeal, rather than that which flows from the fact of the appeal itself. See, *Patel* at para 42, *Taheri* at para 49, *Dutchak* at para 12 and *Choquette* at para 20. The RM is in no substantially different position today than it would have been had the Kashubas filed their application for leave to appeal and notice of appeal in a timely way.

[42] The result of this is that the barrier standing in the way of the grant of an extension is provided by the merits part of the test. Considering this, for the most part, I will approach my consideration of the Kashubas' applications without regard to the fact that they would require an extension of time to pursue their appeal. I will only enter into an analysis of the need for an extension where the outcome of their application depends on whether an extension should be granted. In that context, my focus will be on the question as to whether their proposed appeal has sufficient merit to be allowed to go forward.

3. Test for the grant of leave to appeal

[43] The Kashubas' request for leave to appeal from the *Chambers Decision* is to be tested against the criteria specified by this Court in *Rothmans, Benson & Hedges Inc. v Saskatchewan*, 2002 SKCA 119, 227 Sask R 121 [*Rothmans*]. Broadly speaking, the proposed appeal must be: (a) "of *sufficient merit* to warrant the attention of the Court of Appeal"; and (b) "of *sufficient importance* to the proceedings before the court, or to the field of practice or the state of the law, or to the administration of justice generally, to warrant determination by the Court of Appeal". These "constitute conventional considerations rather than fixed rules", they are "case sensitive", and "their point by point reduction is not exhaustive" (at para 6, emphasis in original).

[44] The bar for assessing merit is not set high. In *Rothmans*, Cameron J.A. suggested questions such as the following should be considered (at para 6):

- Is it prima facie frivolous or vexatious?
- Is it prima facie destined to fail in any event, having regard to the nature of the issue and the scope of the right of appeal, for instance, or the nature of the adjudicative framework, such as that pertaining to the exercise of discretionary power?
- Is it apt to unduly delay the proceedings or be overcome by them and rendered moot?
- Is it apt to add unduly or disproportionately to the cost of the proceedings?

[45] Justice Cameron also identified some of the questions relevant to an assessment of the importance of a proposed appeal (at para 6):

- does the decision bear heavily and potentially prejudicially upon the course or outcome of the particular proceedings?
- does it raise a new or controversial or unusual issue of practice?
- does it raise a new or uncertain or unsettled point of law?
- does it transcend the particular in its implications?

B. Proposed appeal

1. Orders striking parts of Mr. Kashuba's affidavit

[46] As noted previously, Mr. Kashuba had filed an affidavit in support of the application to amend the statement of claim. Rule 13-30 governs the content of an affidavit in proceedings in the Court of Queen's Bench. It provides as follows:

Affidavit to be on knowledge or belief

13-30(1) Subject to subrule (2), an affidavit must be confined to facts that are within the personal knowledge of the person swearing or affirming the affidavit.

(2) In an interlocutory application, the Court may admit an affidavit that is sworn or affirmed on the basis of information known to the person swearing or affirming the affidavit and that person's belief.

(3) If an affidavit is sworn or affirmed on the basis of information and belief in accordance with subrule (2), the source of the information must be disclosed in the affidavit.

(4) The costs of every affidavit that unnecessarily sets forth matters of hearsay or argumentative matter, or copies of or extracts from documents, must be paid by the party filing the affidavit.

(5) If an affidavit based on information and belief is filed and does not adequately disclose the grounds of that information and belief, the Court may direct that the costs of the affidavit shall be paid personally by the lawyer filing the affidavit.

(6) An affidavit filed in a subsequent proceeding for the same action must not repeat matters filed in earlier affidavits, but may make reference to earlier affidavits containing those matters.

[47] The Chambers judge ordered that parts of Mr. Kashuba's affidavit be struck for violating Rule 13-30, stating as follows:

> [60] Mr. Kashuba's affidavit is full of speculation, evidence concerning the intentions of others, and argument. For example, the affidavit attaches case law, provides Mr. Kashuba's opinion as to what conduct is illegal, includes matters that have nothing to do with the application like access to information requests, provides his opinion of who may or may not be able to have wells, and includes statutory excerpts with his opinion of such excerpts. The result is that I strike paras. 6-13 of the affidavit. To the extent that

> Mr. Kashuba alleges unilateral conduct by the RM, at para. 3 of his affidavit, alleging unilateral action in a pleading is different than putting it in an affidavit. Mr. Kashuba can say whether the RM consulted with him as he would have knowledge of this, but he cannot say the RM consulted with no one as this would not be information within his personal knowledge. Accordingly, para. 3 of his affidavit is also struck.

[48] I do not need to decide whether, in every context, an order striking parts of an affidavit is interlocutory. For present purposes, it is sufficient to observe that the Chambers judge's decision to strike the challenged paragraphs of Mr. Kashuba's affidavit from the evidentiary record was preliminary to his decision as to what parts of the draft amended Claim should be considered to be scandalous, frivolous or vexatious. Therefore, the order striking parts of the affidavit is interlocutory to the application to amend the statement of claim, in that it was "made during the progress [of that application] that relates to some intermediate matter at issue [in the application], not to the ultimate matter in issue" (*Poffenroth* at para 15). Leave to appeal from this order is also therefore required.

[49] The request for leave to appeal from the order striking parts of Mr. Kashuba's affidavit does not satisfy either wing of the *Rothmans* test. As for merit, the draft notice of appeal fails to identify a ground relating to the decision by the Chambers judge to strike these paragraphs from Mr. Kashuba's affidavit. As for importance, the impugned parts of Mr. Kashuba's affidavit did not bear on the contentious issues in the application before the Chambers judge. So far as I can tell, the decision to strike these paragraphs had no impact the *Chambers Decision*. I also cannot see how the correctness of the decision to strike these paragraphs could affect any aspect of an appeal from it. Accordingly, I am not prepared to grant leave to appeal from this aspect of the *Chambers Decision*.

2. Order refusing to allow amendments that violate Rule 1-3 and Rule 13-8

[50] The Chambers judge refused to allow the Kashubas to make certain amendments because they violated the requirements of Rule 1-3 and Rule 13-8. Rule 1-3 sets out the purpose and intent of the *Rules*. This includes the idea that the Rules are intended to be used "to identify the real issues in dispute" (Rule 1-3(2)(a)). Rule 13-8 provides more detailed guidance on the requirements of a proper pleading. Among the requirements found in Rule 13-8 is that a pleading is to "contain only a statement in summary form of the material facts on which the party pleading relies for the

party's claim or defence, but not the evidence by which the facts are to be proved" (Rule 13-8(1)(c)) and that a pleading "be as brief as the nature of the case will permit" (Rule 13-8(1)(d)). The Chambers judge found that many of the proposed amendments were offside these Rules because, if granted, they would plead evidence and unnecessarily reproduce the specific provisions of legislation. He explained this conclusion as follows:

> [24] The Kashubas have included many pages of excerpts from legislation as part of their claim. This is not what is intended by Rule 13-8(4). The claim can reference sections of regulations, legislation and bylaws without reproducing all those sections in their entirety. It is sufficient to allege a material fact and say that such material fact amounts to a contravention of a specific statute and then reference the statute and section within the statute relied upon.
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> [25] The claim further includes considerable evidence. For example, at para. 29 of the proposed amended claim, the Kashubas allege that they resisted the RM's claims for the invoiced sums. They then provide particulars of the evidence they intend to submit to establish that material fact, their communications with the RM, the appointment of Mrs. Kashuba to the Appeal Board and the difficulties they have had in proceeding with the Appeal. This approach runs afoul of Rule 13-8(c).
>
> [26] The result is that the following paragraphs which plead evidence by which the plaintiffs hope to prove their material allegations of fact will be struck along with those paragraphs which simply reproduce large passages of legislation and case law. The paragraphs in issue that are to be struck are portions of paragraph 7, 9, 10, 29, 33, 34, 43, 44 and Annex 1.
>
> [27] To avoid any dispute as to what is being struck and what is not being struck, attached as Schedule "A" is a copy of the claim in which the paragraphs being struck have been crossed out.

[51] The Kashubas have not explained how the decision not to allow these amendments could affect the rights of any party. For this basic reason, I am satisfied that this order is interlocutory and leave to appeal from it is required (see, *Poffenroth* at para 15).

[52] The Kashubas' draft notice of appeal asserts several grounds that relate to the order refusing amendments that were found by the Chambers judge to be in violation of Rules 1-3 and 13-8. These grounds convey generally the idea that the proposed pleadings were intended to capture the breadth of the Court of Queen's Bench's jurisdiction as a "court of record [with] common law jurisdiction in contrast to the [Provincial Court] whose jurisdiction is statutory". As well, various of these grounds suggest that the proposed amendments were intended to allow the Kashubas to fully present their case. For example, the draft notice of appeal states in part that, by these proposed amendments, they were seeking "to flesh out and annotate [their statement of claim] by introducing substantiations" to their allegations.

[53] However, none of these ground get to the heart of the Chambers judge's finding that these pleadings are redundant to the material facts (as opposed to evidence) pleaded elsewhere in the draft amended Claim. Accordingly, I fail to see in these proposed grounds any basis to argue that the Chambers judge erred in his analysis. I therefore conclude that an appeal from this order fails the merits part of the *Rothman* test.

[54] My conclusion on this point is further informed by the standard of review that would be applied if leave to appeal were to be granted. The decision to allow or deny a party the ability to amend a pleading is discretionary in nature: *Clements v Preece*, 2014 SKCA 128 at para 5, 446 Sask R 294. In *Western Canada Lottery Corporation v Harvey*, 2015 SKCA 75, 465 Sask R 1, Ottenbreit J.A. denied a party leave to appeal against a decision permitting representative plaintiffs to file a third amended statement of claim in a class action proceeding, giving as one reason, that the order was "procedural in nature and discretionary, [and] there would be a high standard of appellate review applicable" (at para 11). See also, *Kidd v Flad*, 2007 SKCA 130 at para 3.

[55] I also see no importance to an appeal on this issue. Whatever the intent may be behind these proposed pleadings, the substance of the Chambers judge's reasons is that the parts of the proposed pleadings he ordered to be "struck" under this head were unnecessary. In other words, the Kashubas' lawsuit will be unaffected by whether these pleadings are included in the amended statement of claim or they are not. To show importance, the Kashubas would need to explain how the prosecution of their action might be impacted by the exclusion of these specific allegations. Their inability to do so, at least in a way that I can understand, provides a second reason to deny them leave to appeal on this issue.

3. Order refusing to allow plea of breach of procedural fairness

[56] The Chambers judge refused to allow paragraph 35 of the draft amended Claim to be added to the Kashubas' amended statement of claim. This paragraph states as follows:

> **Doctrine of Legitimate Expectations and the rule of law**
>
> 35. The RM in dealing with the Plaintiffs owed the Plaintiffs duty of fairness. The RM breached that duty in that they did not adhere to the rules of natural justice and procedural fairness in its dealings with the Plaintiff it being the Plaintiffs legitimate expectations that the RM would follow its own processes, procedures policies and bylaws and secondly, adhere to the governance and legal requirement of the foundational legislation thereby acted unfairly and contrary to foundation Canadian democratic principles and the rule of law and procedural fairness that seeks to ensure all persons are treated fairly and equally.

[57] The Chambers judge interpreted paragraph 35 as "seeking judicial review [rather] than advancing a free-standing cause of action, though, frankly, the claim is not clear in this regard" (*Chambers Decision* at para 45). The Chambers judge then gave the following reasons for refusing to allow paragraph 35 of the draft amended Claim into the amended statement of claim:

> [46] In this case, the pleading offends Rule 1-3 as well as Rule 7-9. It creates confusion, rather than clarity, and makes it difficult for a defendant to understand the causes of action advanced against them. Is this allegation being advanced as a freestanding cause of action or is it being raised as the basis of some sort of judicial review application? Neither the defendant nor the Court should have to guess as to what causes of action are being pursued. Accordingly, to the extent that breach of procedural fairness is being advanced as an independent cause of action, it is struck. Paragraph 35 is therefore struck.

[58] Sometimes, an order striking a pleading that does not disclose a reasonable cause of action may constitute a final order. An example is where a pleading is struck because a cause of action does not exist as a matter of law. On the other hand, where a pleading is struck because the facts necessary to plead the recognized elements to a cause of action are not pleaded but a plaintiff is given leave to amend its statement of claim to plead those facts if available, the order may be seen as being interlocutory. See generally, *B.(D.) v C.(M.)*, 2001 SKCA 129, 213 Sask R 272, *Holmes v Jastek Master Builder 2004 Inc.*, 2008 SKCA 159, 314 Sask R 267 and *Forest Glen Wood Products Ltd. v British Columbia (Minister of Forests)*, 2008 BCCA 480, 303 DLR (4th) 474. Although these decisions were made in the context of applications to strike an existing statement of claim, my earlier analysis would tend to suggest that the orders refusing to allow the amendments should be seen to be equivalent to orders striking an existing pleading. However, I do not need to reach any determination in relation to this issue or the further issue as to whether an order refusing an amendment might constitute a final order. This is because, as I interpret paragraph 46 of the *Chambers Decision*, the Chambers judge refused to allow the amendment because it lacked clarity.

[59] The Kashubas might, in theory at least, attempt to correct this deficiency by seeking a further amendment. If they were to do so, their proposed pleading could be assessed to determine whether, as a matter of law, it could support a viable cause of action. Unless and until that is done, I consider the order refusing to allow proposed paragraph 35 of the draft amended Claim into the amended statement of claim to be clearly interlocutory in nature, requiring the grant of leave to appeal. The proposed appeal in relation to this order must, therefore, have sufficient merit and importance to justify a grant of leave to appeal. I see neither.

[60] For an arguable case to be presented on an appeal, an appellant must first identify a ground of appeal, that is, an argument or reason why that party says that the decision under appeal is wrong. Although the Kashubas are unrepresented, "they do receive assistance from a lawyer who is not on record" (*Chambers Decision* at para 13). Even taking a generous approach to an interpretation of their draft notice of appeal and memorandum of argument, I cannot discern a ground that asserts that the Chambers judge was wrong in his refusal to allow this amendment. For this reason, I fail to see how an appeal on this issue passes the merits bar. I also fail to see how this refusal bears in any way on the future course of their lawsuit. Therefore, I see no issue of sufficient importance to justify the grant of leave to appeal from this order.

[61] Based on all of this I would decline to grant leave to appeal from this order. I would add that, even if I viewed this order as being final, such that leave to appeal was not required, I would have declined to grant an extension of time to appeal because, in the absence of an identifiable ground of appeal, the proposed appeal lacks even an arguable basis.

4. Order refusing to allow allegations against non-parties

[62] The Chambers judge refused to allow amendments proposed in the draft amended Claim that would make allegations against non-parties. For example, he refused to allow amendments that would make the following allegations against a realtor:

> 18. On November 21, 2018 and on several occasions thereafter while the water and sewer remained out of commission, [name omitted] a realtor, made persistent inquiries advising he had an undisclosed buyer interested in acquiring their property.
>
> 19. In anticipation of the sewer and water being restored and in any event the realtor was advised that [the Kashubas] were not interested in selling their home.
>
> 20. It was subsequently disclosed by an investigation conducted by the Saskatchewan Real Estate Board through a discipline hearing to which he was sanctioned & filed that [the realtor] was employed directly or indirectly by a numbered company created by the RM and tasked with acquiring for the RM not less than all of the residential properties in the [Organized Hamlet].

[63] The Chambers judge also refused to allow as amendments all or parts of paragraphs 25, 36, 37, 38, 39, 40, 41, 42, 46 and 47 of the draft amended Claim. He noted that although the draft amended Claim "makes allegations against a host of individuals, not one of these individuals is listed as a defendant in the proceeding" (at para 19). After quoting the prayer for relief contained in paragraph 47 of the draft amended Claim, he noted that it was "evident" that "relief is being

sought against the Reeve, Councillors and the Administrator in addition to the RM" (at para 20). He later held that the proposed pleadings "making allegations against non-parties are struck as an abuse of the Court's process as they would undermine the trial fairness to which such parties are entitled" (at para 74(c)).

[64] As I understand these reasons, the Chambers judge was not, by denying these amendments, purporting to dispose of any substantive issue in dispute between the Kashubas and these people. The Kashubas are free to initiate a claim against them. I therefore treat this aspect of the order as being interlocutory, requiring the grant of leave to appeal.

[65] The Kashubas advance several grounds of appeal that relate to this part of the *Chambers Decision*. Most of these grounds revolve around the idea that the allegations will assist in their claim for costs against the RM. They assert, for example, that the Chambers judge failed "to appreciate the allegations in relation to the RM officials, the Reeve, Councilors [*sic*] and Administration, was to establish a case for misfeasance in public office and bad faith which was offered up in support of the claim for relief for costs against the said municipal official as non-parties". They submit that the Chambers judge erred because "costs can be awarded as against non-parties irrespective of the causes of actions asserted overlooking promissory estoppel made by RM officials as a cause of action". By way of further example, they also say that the Chambers judge "erred in not appreciating the request for relief that the Reeve, Councilors [*sic*] and Administration, as the *alter ego* of the RM, be assessed cost, is contemplated by the inherent judicial authority of the Court of Queen's Bench whose authority to award costs is unfettered and untrammelled and that includes assessing costs as against a non-party".

[66] The Kashubas have not explained, in a way that I can understand, how the non-inclusion of these specific allegations will undermine their claim for costs against the RM. They certainly have offered no authority in support of this idea. For these reasons, I cannot find sufficient merit to justify the grant of leave to appeal this order.

[67] The Kashubas have also not convinced me that the failure to include these allegations in their statement of claim will adversely affect them in the presentation of their claim against the RM. Accordingly, an appeal on this issue also lacks the required importance to justify the grant of leave to appeal.

5. Order refusing to allow Mr. Kashuba's breach of contract claim

[68] The draft amended Claim describes both Mr. Kashuba and Ms. Kashuba to be "lawful users of the local municipal water and sewer services" provided by the RM (at para 4). It pleads that "the Plaintiffs Terry and Tracy in exchange, faithfully paid all sums charged for their usage in a timely and punctual fashion" (at para 11). It alleges that, as of November 19, 2018, "water service to their home had ceased" (at para 14) and, therefore, "in order to maintain their residence [they] have had to incur expense to purchase water … for all of their domestic usage needs" (at para 31). Finally, the draft amended Claim asserts that as of June 30, 2021, the "claim for expenses incurred because of the RM's breach of its contractual and statutory obligations to the Plaintiffs is $15,247.34" (at para 32).

[69] The Chambers judge concluded from this that the "elements of breach of contract are aptly pled". He found, however, that Mr. Kashuba's claim in this regard should be "struck" because it is "frivolous" (at para 72). Because this is a decision on the merits of Mr. Kashuba's right to sue the RM for breach of contract, I will treat it as a final order.

[70] Proceeding on this basis, the sole question is whether the Kashubas can meet the test for the grant of an extension of time to file a notice of appeal from this order. In that context, the only point to consider is whether the proposed appeal meets the merits test, that is, whether they have an "arguable case" or their proposed appeal "raises a debateable issue" (*Taheri* at para 40). Whether this threshold is crossed invites a close examination of the proposed amendments relating to Mr. Kashuba's claim based on breach of contract.

[71] As already noted, Rule 7-9(2)(b) allows a pleading to be struck if it "is scandalous, frivolous or vexatious". The Chambers judge identified *Sagon v Royal Bank of Canada* (1992), 105 Sask R 133 (CA) [*Sagon*] and *Siemens v Baker*, 2019 SKQB 99, [2019] 5 CTC 129 [*Siemens*], as aiding in defining when a claim may be struck on these three bases. In *Sagon*, this Court contrasted the circumstances when a claim may be struck for failing to disclose a reasonable cause of action from the power to strike a claim because it is scandalous, frivolous or vexatious:

> [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. 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. 153-154:
>
> > "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)

[72] In *Siemens*, Ryan-Froslie J. (as she then was) stated that a "pleading will qualify as 'frivolous' if it is plain or obvious or beyond reasonable doubt the claim it advances is groundless and cannot succeed" (at para 25).

[73] In this case, the Chambers judge observed that "Mr. Kashuba cannot maintain a breach of contract claim against the RM if he has no contract with the RM". He held further that it was obvious that Mr. Kashuba's claim could not succeed because "the evidence of the RM and Mr. Kashuba's own submissions confirm that he is not on title to the property at issue and that the bills from the RM were addressed to [Ms.] Kashuba" (at para 72).

[74] The Chambers judge is certainly correct that, *as a matter of law*, Mr. Kashuba cannot maintain a breach of contract claim against the RM if he has no contract with it. To justify an appeal, in the context where the issue is whether the proposed claim is frivolous, the Kashubas must therefore be able to point to an arguable basis to challenge the Chambers judge's conclusion that it is plain and obvious, or beyond reasonable doubt, that, *as a matter of fact*, no contract existed between Mr. Kashuba and the RM.

[75] The Kashubas' notice of appeal asserts, in effect, that the Chambers judge erred by considering it to be relevant that Mr. Kashuba's name was not on the title to the property to which water is delivered. I accept that the fact that Mr. Kashuba's name is not on the title does not preclude the possibility that a contract could exist between him and the RM. I say this because a person can contract to have water delivered to a property they do not own. However, I do not treat the *Chambers Decision* as suggesting otherwise. As I interpret the *Chambers Decision*, the observation that Mr. Kashuba's name was not on title was offered only to rule out the opposite possibility.

[76] In other words, the *Chambers Decision* is properly understood to be stating that, if Mr. Kashuba's name had been on title, there would be a sufficient factual basis to allow a claim for breach of contract to go ahead. However, because Mr. Kashuba was not a titled owner, he would have to point to something else to ground the alleged existence of a contract with the RM. Because nothing of this sort existed, the Chambers judge found the assertion of a breach of contract to be frivolous. This is why the Chambers judge noted that "the bills from the RM were addressed to [Ms.] Kashuba" (at para 41).

[77] In short, the Chambers judge looked for, but could not find, any factual basis for Mr. Kashuba to allege that a contract existed between himself and the RM. Absent such a factual basis, he concluded that it was plain and obvious that Mr. Kashuba's claim based on breach of contract was bound to fail. I cannot see an arguable flaw in the Chambers judge's analysis of this issue. Accordingly, Mr. Kashuba's proposed appeal on this issue is bound to fail.

[78] Therefore, I see no basis upon which I can grant an extension of time to appeal from the order refusing to allow Mr. Kashuba to pursue a breach of contract claim. The same reasoning would preclude me from granting leave to appeal from this order, were I to have considered it to be an interlocutory, and not final, order. Of course, neither of these conclusions has any impact on the continued vitality of the claim for breach of contract advanced by Ms. Kashuba.

6. Order imposing a temporary stay

[79] The result of the *Chambers Decision* is to allow parts of the Kashubas' claim to continue. These are the claims by Ms. Kashuba for breach of contract and the claims of both plaintiffs alleging misfeasance in public office. However, the Chambers judge nonetheless ordered a temporary stay in the prosecution of the lawsuit pending the outcome of the Appeal Board process. He gave slightly different reasons for staying the two plaintiffs' claims.

[80] The Chambers judge found that *Mr. Kashuba's* claim for misfeasance in public office should be stayed "on the basis of *res judicata* pending the outcome of the Appeal Board process, as that was the decision of Zuk J. and to rule otherwise would again allow the same parties to bring the same claims over and over again until they got the result they wanted" (at para 68). This line of analysis suggests that Mr. Kashuba should not be entitled to relitigate the question as to whether

his civil action should be stayed because Zuk J. had already determined that the application for judicial review should be stayed.

[81] In contrast, the Chambers judge concluded that *Ms. Kashuba's* claim for misfeasance in public office was not "subject to *res judicata* as she was not a party in the earlier proceeding before Zuk J.". Nonetheless, he found that "allowing multiple proceedings for the same relief is an abuse of the Court's process and is contrary to s. 29" of *The Queen's Bench Act, 1998*, SS 1998, c Q-1.01. He concluded that Ms. Kashuba was an active participant and claimant in the Appeal Board proceedings and to "allow similar allegations to proceed while that process is underway could lead to inconsistent results and, therefore, amounts to an abuse of the Court's process" (at para 69). Similarly, in relation to Ms. Kashuba's claim based in breach of contract, the Chambers judge found that, "given the fact that this matter is before the Appeal Board to decide whether the RM acted in accordance with its obligations and such a decision will obviously affect the outcome of [Ms.] Kashuba's contract claim, to avoid multiple proceedings and multiple results [he] stay[ed] this aspect of the claim pending the outcome of the Appeal Board process" (at para 72). Therefore, the focus of the Chambers judge's reasons for ordering a stay of Ms. Kashuba's claims was on the coincidence of issues in the Appeal Board process and Ms. Kashuba's civil claim.

[82] Because the action may continue once the Appeal Board has rendered its decision, I am satisfied that the stay order is interlocutory and leave is required to appeal from it: *Tahkar v Helicopter Transport Services (Canada) Inc.*, 2012 SKCA 114 at para 10, 405 Sask R 40. In this regard, a temporary stay stands on a different footing than an order for a permanent stay. See, generally, *Ammazzini v Anglo American PLC*, 2016 SKCA 73 at paras 14–25, 90 CPC (7th) 62, and *Bennett Jones LLP v Frank and Ellen Remai Foundation Inc.*, 2016 SKCA 136, 98 CPC (7th) 27.

[83] The Kashubas assert several grounds in their draft notice of appeal relating to the imposition of the temporary stay. These grounds center around the Chambers judge's alleged misunderstanding of the scope of the Appeal Board proceedings and the impact of this alleged misunderstanding on the legal doctrines of *res judicata* and abuse of process. These proposed grounds must be analyzed to determine if they meet the *Rothmans* test for the grant of leave to appeal.

[84] In relation to merit, it is at least arguable that *res judicata* should not have been invoked to prevent Mr. Kashuba from resisting the RM's request for a stay. The issue confronting Zuk J. was whether to allow the judicial review given the overlap with the Appeal Board proceedings. Because of the differences in the legal issues in the judicial review and the legal issues in the Kashubas' civil action, it is at least arguable that the required mutuality of issues in order for *res judicata* to arise do not exist, even though the factual underpinnings of the proceedings have much in common. For the same basic reason, it is arguable that the principles of abuse of process would not apply. Based on these two conclusions, I am satisfied that the merits part of the *Rothmans* test is met.

[85] However, possible merit is not a sufficient basis upon which to grant leave to appeal. In this regard, as explained in *Rothmans*, "the power to grant leave has been taken to be a discretionary power exercisable upon a set of criteria which, on balance, must be shown by the applicant to weigh *decisively* in favour of leave being granted" (at para 6, emphasis added). Considering this threshold, I am not satisfied that the importance part of the test for leave to appeal has been met. My conclusion on this point is swayed by three related considerations.

[86] The first is that the stay that has been ordered is temporary in nature. The Kashubas will have a right to proceed with their action once the Appeal Board's decision has been rendered. Their rights are not irrevocably altered.

[87] The second is the relationship between the issues at stake in an appeal, were leave to be granted on this singular issue, and proceedings before the Appeal Board. As I understand it, the Appeal Board proceedings are intended to answer at least some questions as to the legality of the RM's actions. Many of the same questions lay at the root of the Kashubas' civil claim. It was for this basic reason that Zuk J. adjourned the application for judicial review and this reason lies at the heart of the Chambers judge's invocation of the principles of *res judicata*, issue estoppel and abuse of process. Even though I see an arguable basis to say that these doctrines are not directly applicable, the practical reality remains that the outcome of the Appeal Board proceedings is likely to be important in the civil action.

[88] In reaching this conclusion, I am mindful that the relief claimed by the Kashubas in their civil action cannot be granted by the Appeal Board, nor is there an exact equivalence of legal issues between those proceedings and the civil claim. I also accept that the Kashubas are not parties to

the Appeal Board proceedings. Nonetheless, the evidence demonstrates that there is a significant overlap in issues. Moreover, although the Kashubas are not parties to the Appeal Board proceedings, they have been directly involved in them. Based on all of this, it seems inevitable to me that a resolution by the Appeal Board will impact in a practical way the trajectory of the Kashubas' civil claim.

[89] Third, it is appropriate to do a cost-benefit assessment as part of the consideration as to whether leave to appeal should be granted: *Goodman v Saskatchewan (Community Operations)*, 2020 SKCA 51 at para 29. In the context of this case, this invites a weighing of the costs of an appeal, the issues at stake in the proposed appeal and what will be gained if it is allowed to proceed. Considering that the stay of the civil action is time-limited only, and there are other good reasons why the prosecution of civil action should await the outcome of the Appeal Board proceedings, the expenses associated with the appeal add to the reasons why leave to appeal should be denied in this case.

[90] Taking all three of these factors into account, I decline to grant the Kashubas leave to appeal in relation to the order imposing a temporary stay of their civil action.

VI. CONCLUSION

[91] I am not prepared to grant the orders that would be required for this appeal to go forward. The Kashubas' applications are therefore dismissed. The RM is entitled to costs, which I would fix in the amount of $500.

"Leurer J.A."

Leurer J.A.