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Niessner v Lunemann, 2025 SKKB 13

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KING'S BENCH FOR SASKATCHEWAN

Citation: **2025 SKKB 13**

Date: **2025 01 22**
Docket: KBG-SA-00734-2023
Judicial Centre: Saskatoon

BETWEEN:

W. CHARLES NIESSNER, MADELYN K. NIESSNER, and KEELEY LAKE LODGE (1989) LTD.

APPLICANTS

- and -

RICHARD C. LUNEMANN, and TIMOTHY CIMMER

RESPONDENTS

Appearances:

Samuel W. Edmondson and Valerie J. Warwick	for the applicants
Adam D. Hnatyshyn	for the respondent, Richard C. Lunemann
E.F. Anthony Merchant, K.C.	for the respondent, Timothy Cimmer

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JUDGMENT
January 22, 2025

GERECKE J.

A. INTRODUCTION

[1] The applicants apply for registration of a foreign judgment made against the respondents. The foreign judgment, including the amending and clarifying judgments made subsequently, would become a judgment of this Court. The judgment

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was granted in an action commenced on September 15, 2015, in the Superior Court of New Jersey, Camden County, Law Division, as Docket No. CAM-L-3587-15 [NJ Action].

[2] The judgment is comprised of the following:

(a) Order of Final Judgment made February 21, 2019;

(b) Amended Order of Final Judgment made March 26, 2019 (regarding set-off rights);

(c) Order made April 9, 2019 (regarding charging lien in favour of Giansante & Assoc., LLC and related matters); and

(d) Clarifying order made May 23, 2019 (regarding amounts owing and tax consequences).

In this judgment I will refer to the foregoing collectively as [Judgment].

[3] The application is governed by *The Enforcement of Foreign Judgments Act*, SS 2005, c E-9.121 [*Act*].

[4] Several actions were commenced in Saskatchewan that pertain to the disputes. In this application, the applicants focus on the NJ Action and the Judgment. The party opposing this application is Mr. Cimmer. He places substantial focus on the Saskatchewan actions. Mr. Lunemann was adverse to the applicants in earlier matters, including the NJ Action, but now consents to this application.

[5] For the reasons that follow, the application to register the Judgment is granted. It is necessary to consider the precise terms of the judgment this Court would grant, for which I create a streamlined process below in the conclusion section to this judgment.

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B. BACKGROUND

[6] Considerable water has passed under the bridge on this matter. I will not attempt to summarize the background myself. Much of that background was set out by the Court of Appeal in *Cimmer v Niessner*, 2022 SKCA 60 at paras 4 – 26, [2023] 2 WWR 153 [*Cimmer CA*]. In addition, Bardai J. (as he then was) provided his own summary of events in his fiat of June 12, 2023, in *Niessner v Cimmer* (12 June 2023) Saskatoon, QBG-SA-00859-2016 (Sask QB):

> [3] Keeley Lake Lodge (1989) Ltd. [Lodge] was incorporated in Saskatchewan pursuant to *The Business Corporations Act*, RSS 1978, c B-10 (rep), in 1988. The company operates a hunting lodge located at Keeley Lake. The corporation issued 100 Class A voting shares to the plaintiff, Charles Niessner [Mr. Niessner], who, as of 1998, owned all the Class A voting shares in the Lodge.
>
> [4] Mr. Niessner and his wife, Madelyn Niessner [Ms. Niessner], collectively [Niessners], live in the United States. The Niessners have an acquaintance, Mr. Lunemann, who was involved in the operation of the Lodge, providing marketing support, acting as a hunting guide to American hunters and providing other services to the Lodge.
>
> [5] In 1998, Mr. Lunemann had some problems with Canadian immigration which affected his ability to act as a hunting guide in Canada. In order to enter into Canada, Mr. Lunemann needed to show that he held a controlling interest in a Canadian business.
>
> [6] According to the statement of claim, when the immigration issue arose, the Niessners consulted with their counsel, Benjamin Partyka. On the advice of counsel, Mr. Niessner entered into an agreement with Mr. Lunemann whereby 60 of his Class A shares in the Lodge were sold to Mr. Lunemann for $60,000. A handwritten schedule shows that between 1991 and 1997, payments were made on account of the $60,000 promissory note. The handwritten notations suggest the entirety of the $60,000 payable was paid as of December 1997 by Mr. Lunemann. These payments were not made by cash or cheque but, rather, through the provision of services. The

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Lodge's corporate records show the transfer of shares from Mr. Niessner to Mr. Lunemann.

[7] A dispute then arose between Mr. Lunemann, the corporation and the Niessners resulting in an action being commenced in New Jersey. The New Jersey action dealt with a dispute over the 60 shares as well as other matters, including loans and rental property located in New Jersey. In the context of that action, Mr. Niessner asserted that the agreement to purchase shares between himself and Mr. Lunemann was a sham and that the shares should be transferred back to him.

[8] While the dispute between Mr. Lunemann and Mr. Niessner was going on, Mr. Lunemann entered into a share option agreement and a demand loan agreement with a Saskatchewan acquaintance of his, the defendant, Timothy Cimmer [Mr. Cimmer]. Mr. Lunemann needed funds to finance the litigation and took a demand loan from Mr. Cimmer, the consideration of which included a share option agreement, giving Mr. Cimmer a security interest in the 60 shares which Mr. Lunemann purported to hold. The share option agreement granted to Mr. Cimmer an irrevocable option to purchase the 60 shares for a set price, with the loan to be forgiven as payment for the shares.

[9] In July 2016, the Niessners, the Lodge and Mr. Lunemann entered into a settlement whereby Mr. Lunemann agreed that the Lodge would redeem 30 of his Class A shares, leaving Mr. Niessner holding a controlling interest in the company, being 40 Class A shares of the outstanding 70 shares.

[10] Mr. Cimmer, upon learning of the deal between the Niessners and Mr. Lunemann, responded to the settlement by issuing a notice under the share option agreement for the 60 shares. Mr. Lunemann thereafter agreed to transfer "all of the undersigned's shares" to Mr. Cimmer. Mr. Lunemann's understanding is that he was transferring only 30 shares to Mr. Cimmer. Mr. Lunemann does not take issue with the suggestion of the Niessners that the initial share transaction resulting in his acquisition of the 60 shares was a sham.

[11] In the late summer of 2016, Mr. Cimmer purported to take control of the Lodge at a shareholders meeting, and Mr. Niessner says he was effectively shut out of the business as a result. The corporate records for the Lodge were amended to reflect Mr. Cimmer as the owner of the disputed 60 shares.

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[12] In September 2016, as a result of litigation between the parties in the United States, the New Jersey Superior Court granted an order impounding the 60 shares, taking possession of the shares and appointing James Gruccio as the custodial receiver of the disputed shares. A corporate profile report for the corporation dated November 28, 2016, shows the disputed shares to be held by Mr. Gruccio.

[13] On May 8, 2017, the New Jersey Superior Court found that Mr. Cimmer had no interest in the 60 shares, that he was enjoined from claiming any interest and that he must cease and desist from claiming an interest in the shares based on findings by the court that:

> … this Court is convinced that Lunemann was treated as the unsuspecting pawn in the scheme by Cimmer to obtain majority ownership of the Lodge. It was obvious that Cimmer was not interested in simply getting his loan repaid. …
>
> …
>
> Cimmer never paid Lunemann the remainder of the exercise price that was due under the Option Agreement. He admits that he owed Lunemann approximately $97,000.00 but the money was never paid. …
>
> …
>
> … it was clear that he [Cimmer] knew that the initial documents that created a 60 share interest in the Lodge to Lunemann were what he believe [*sic*] were a sham. …
>
> …
>
> …Cimmer caused lawyers to fraudulently register with the Saskatchewan Corporate Registry that he owned the dispute [*sic*] shares. … Cimmer knew or believed from the start that the back dated Agreement between the Niessners and Lunemann to transfer shares to Lunemann to enable him to continue to operate the fishing and hunting trips was a sham. …
>
> …
>
> The Court has made the determination that Cimmer has in fact engaged in the type of wanton, reckless, malicious conduct needed to support an award of punitive damages ….

[14] The decision from New Jersey was appealed by Mr. Cimmer and all avenues of appeal have now been exhausted. The decision of the New Jersey court is, therefore,

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> now final, though it has not been recognized in Saskatchewan and is, accordingly, not enforceable in our province.

[7] Much of that background was further reproduced in a further Bardai J. (as he then was) fiat in this proceeding in which he made several evidentiary rulings: *Niessner v Cimmer* (18 April 2024) Saskatoon, KBG-SA-00734-2023 (Sask KB) [*Evidentiary Fiat*].

C. PROCEDURAL MATTERS

(a) Affidavits on which Mr. Cimmer seeks to rely

[8] On May 13, 2024, Mr. Merchant advised on Mr. Cimmer's behalf that he would seek to have the Court consider Mr. Cimmer's affidavit sworn April 27, 2023, in respect of this application. At the time, Mr. Merchant did not identify the other affidavits on which he intended to rely. It later became apparent that Mr. Cimmer would ask the Court to consider three affidavits filed on other Court files:

(a) Affidavit of Mr. Cimmer sworn August 26, 2020 [2020 Cimmer Affidavit], filed on QBG-SA-01211-2016;

(b) Affidavit of Mr. Cimmer sworn April 27, 2023 [2023 Cimmer Affidavit], filed on QBG-SA-00859-2016 (a brief affidavit that attaches a recording of a conversation); and

(c) Affidavit of Mr. Lunemann sworn June 14, 2016 [Lunemann Affidavit], which Mr. Merchant says was filed on QBG-SA-00921-2016 (which is actually the wrong file number – the correct file was QBG-RG-00921-2016 – it was then transferred to Saskatoon and became QBG-SA-01211-2016). Mr. Cimmer's purpose in referring to this affidavit is to establish that at one time Mr. Lunemann averred to owning 60 shares in Keeley Lake Lodge (1989) Ltd. [Keeley

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Lake].

Mr. Cimmer relies on Rule 13-38(1) of *The King's Bench Rules* for his request.

[9] The applicants oppose this request by Mr. Cimmer for three main reasons. First, in this proceeding, Bardai J. (as he then was) issued a fiat that imposed filing deadlines for this application: *Niessner v Lunemann* (3 August 2023) Saskatoon, KBG-SA-00734-2023 (Sask KB), QBG-SA-00859-2016, [*Filing Deadline Fiat*]. The deadline for respondent affidavits to be served and filed was October 20, 2023. Mr. Merchant's first indication that he intended to rely on affidavits from other court files was May 13, 2024, nearly seven months later. Thus, the applicants contend that Mr. Cimmer's request violates the filing deadlines in the *Filing Deadline Fiat.*

[10] Second, much of what Mr. Cimmer wished to rely on was essentially identical to material that was the subject of evidentiary rulings made by Bardai J. in the *Evidentiary Fiat.*

[11] Following is how that unfolded:

(a) First, Mr. Cimmer filed the lengthy 2023 Cimmer Affidavit in compliance with the *Filing Deadline Fiat*. In the *Evidentiary Fiat*, Bardai J. ordered substantial portions of the 2023 Cimmer Affidavit struck.

(b) Mr. Cimmer now asks the Court to admit the 2020 Cimmer Affidavit, much of which is essentially identical to the 2023 Cimmer Affidavit that was largely struck by Bardai J.

[12] Third, that evidence is part of a continuing attempt by Mr. Cimmer to relitigate the issues determined in the Judgment by the New Jersey court.

[13] As context, on February 28, 2024, Mr. Cimmer sought leave to file a

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further affidavit that he filed on February 26, 2024 [Late Cimmer Affidavit], even though the filing deadline had passed months earlier. Bardai J. held at para. 14 of the *Evidentiary Fiat* that the Late Cimmer Affidavit was filed contrary to the *Filing Deadline Fiat*, and that a satisfactory explanation was not given as to why it could not have been filed earlier. He also held that it was not relevant to this application.

[14] Mr. Cimmer's demand – and it truly is a demand as Mr. Merchant frames it – that the Court consider the three affidavits raises the following issues to be determined:

> Issue #1: Is Rule 13-38(1) mandatory or discretionary?
>
> Issue #2: Should the Court permit Mr. Cimmer to rely on the three affidavits in light of the filing deadlines in the *Filing Deadline Fiat* and the evidentiary rulings made in the *Evidentiary Fiat*?

[15] After I heard argument concerning Mr. Cimmer's application under Rule 13-38(1), I ruled as follows so that the parties had clarity on the evidence before the Court for the purpose of oral argument of the application on the merits:

> Where Justice Bardai struck a portion of an affidavit, and Mr. Cimmer seeks to bring in a different affidavit that has identical language or virtually identical language, including quotes from some other document, and including exhibits that are identical, those will not be admissible for the purpose of this application. I will give reasons in my written decision on the substantive application to register the foreign judgment, but there is zero chance that any consideration will be given to those passages or exhibits.

[16] Thus, I determined during oral argument that much of the 2020 Cimmer Affidavit was inadmissible. The following discussion addresses both my reasons for that finding, and my determinations and reasons concerning the remainder of that

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affidavit and the other two affidavits.

Issue #1: Is Rule 13-38(1) mandatory or discretionary?

[17] Mr. Cimmer contends that Rule 13-38(1) is mandatory, or at least that I am left with a very narrow discretion, and as a result I am essentially required to consider the three affidavits. For the following reasons, I do not agree. I have discretion as to how to apply Rule 13-38(1) to this situation.

[18] Rule 13-38 states as follows:

> **13-38**(1) All affidavits that have been made and filed in any cause or matter may be referred to and used at any stage of the proceedings in any application in chambers.
>
> (2) The Court may:
>
> (a) receive any affidavit sworn or affirmed for the purpose of being used in any cause or matter, notwithstanding any defect by mis-description of parties or otherwise in the title or jurat, or any other irregularity in the form of the affidavit; and
>
> (b) direct a memorandum to be made on the document that it has been so received.
>
> (3) An affidavit filed after the deadline set out in these rules or set by order of the Court must not be used without leave of the Court.
>
> (4) On applications founded on affidavits, either party may, by leave of the Court, make affidavits in answer to the affidavits of the opposite party as to new matters arising out of those affidavits.

[19] Mr. Cimmer argues the following concerning Rule 13-38(1):

(a) Once an affidavit is properly filed in any matter, it is admissible and available for reference at any subsequent stage in any application in chambers. All it takes is for a party to invoke Rule 13-38(1) and the

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material is, in essence, automatically admissible in the matter currently before the Court.

(b) The use of "may" in Rule 13-38(1) does not create discretion for the Court.

(c) The Court should give no consideration to relevance at this stage.

(d) Rule 3-52 (which sets out filing deadlines) does not override Rule 13-38(1) because the former creates a general rule and the latter a specific one.

[20] Mr. Cimmer cites numerous decisions of this Court that he says support his interpretation, some of which I discuss below.

[21] He also argues that, irrespective of Rule 13-38(1), this Court has the authority to examine its own records and take notice of their contents. He cites *R v Tysowski*, 2008 SKCA 88 at para 19, 311 Sask R 113 [*Tysowski*]; *U.F.C.W. Local 1400 v F.W. Woolworth Co.* (1992), [1993] 2 WWR 657 (Sask QB) [*UFCW*]; and *Petrelli v Lindell Beach Holiday Resort Ltd.*, 2011 BCCA 367, 340 DLR (4th) 733 [*Petrelli*].

[22] In response, the applicants point out that the 2020 Cimmer Affidavit is largely the same as the 2023 Cimmer Affidavit, most of which was ordered struck by Bardai J. Their brief helpfully includes a version of the 2020 Cimmer Affidavit with colour-coded highlighting to show, firstly, language that is essentially identical that was struck and, secondly, non-struck language that is essentially identical to language in the 2023 Cimmer Affidavit that was not struck and thus is already on the record of this application. Through paragraph 171 (of 186 paragraphs) of the 2020 Cimmer Affidavit, the vast majority falls into one of those two categories.

[23] The applicants further argue that much of the remainder of the 2020

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Cimmer Affidavit (they point to paras. 10, 90-94, 123, 125, 127, 138, 147, 153, 157, 166, 181 and 186) are attestations as to the advice and opinions of Mr. Merchant as Mr. Cimmer's counsel as to various matters including legal interpretations. As such, they are either hearsay, opinion, expert opinions expressed by Mr. Merchant, or argument, all of which would be inadmissible.

[24] Mr. Cimmer's arguments concerning Rule 13-38(1) cannot succeed for the following reasons.

[25] First, Rule 13-38(1) has consistently been treated as a rule of convenience that assists the Court. In *Klev v Lowes,* 2023 SKKB 279, Robertson J. observed that Rule 13-38 "can be of assistance when there are related court files": para. 38. He characterized Rule 13-38 as a tool for allowing reference between related files. In *Atrium Mortgage Investment Corporation v Koh,* 2020 SKQB 179, Robertson J. relied on Rule 13-38 because a pertinent affidavit was missing on the file before him, but present on a related file: paras. 20 to 21. Neither decision (nor any other) characterizes Rule 13-38 as mandatory. Not a single case referred to me by Mr. Cimmer supports his contention that Rule 13-38(1) leaves me without discretion. None of them even hint at that.

[26] Second, Rule 13-38(1) does not exist in isolation among all other Rules of this Court. Indeed, it is conveniently placed within Rule 13-38, nearly adjacent to Rule 13-38(3), which states:

> **13-38** …
>
> (3) An affidavit filed after the deadline set out in these rules or set by order of the Court must not be used unless by leave of the Court.

Rule 13-38(1) contains nothing to suggest that it was intended to override other Rules concerning the filing and admissibility of affidavit evidence. Nor does its placement suggest that.

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[27] Third, in one case cited by Mr. Cimmer, *DeMaria v Law Society of Saskatchewan*, 2012 SKQB 454, 407 Sask R 139 [*DeMaria*], this Court actually exercised discretion concerning portions of an affidavit. There, the Court stated regarding former Rule 332, the predecessor of Rule 13-38(1):

> [30] With regard to the September 18th affidavit, apart from issues of hearsay, the Law Society objects to para. 6 which purports to attach Mr. DeMaria's Notice of Motion of July 6th, 2012 filed in Q.B. 1170 of 2012, on the footing it is argumentative. Rule 332 allows this Court to consider affidavits filed on other files, but the Rule does not encompass the motion itself. Paragraph 6 will therefore be struck.
>
> [31] Objection is also taken to para. 25 on grounds of speculation, hearsay and being scandalous. The first full sentence consists of Mr. DeMaria's impression of the disciplinary status of the Law Society vis-á-vis three other members of his law firm. He goes on to express surprise that none of them have been disciplined. Clearly this constitutes speculation on his part and not first hand knowledge. The first two sentences of para. 25 will therefore be struck. The balance of para. 25 is opposed on hearsay grounds, and similar objection is raised with regard to para. 21. For the reasons set out above, a ruling on this objection will be deferred to the chambers judge following full submissions and in consideration of the applicable legal test.
>
> [Emphasis added]

[28] The discussion underlined above was clearly premised on the notion that the Court has discretion about what portions of an affidavit from another file would be admitted. *DeMaria* therefore stands for the proposition that I do have discretion under Rule 13-38(1) about what to admit.

[29] Mr. Cimmer's argument also assumes that judges have no authority to control the cases before them where there is a broad rule that might in some way be applicable. Rule 13-38(1) enshrines the judge's authority to take note of affidavits filed in other matters. It does not shackle the judge's authority to make evidentiary rulings as to what will be admissible, nor to follow previously made rulings in the same matter.

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[30] The applicants argue that Mr. Cimmer has it backwards as to which of Rule 13-38(1) and Rule 3-52 is the general provision and which is the specific one. I generally agree. Rule 13-38(1) is a general rule that permits recourse to affidavits on other court files. Rule 3-52 might also be viewed as a general rule. In this case, the *Filing Deadline Fiat* represents the specific – it set filing deadlines for this specific application. Rule 13-38(1) cannot be interpreted to override those filing deadlines. Nor can it override the specific evidentiary rulings made in the *Evidentiary Fiat*. In light of those two fiats, I need not determine whether Rule 13-38(1) would override other Rules or rules of evidence that govern the admissibility of affidavit evidence.

[31] In at least this particular case, the Court has discretion as to what to admit under Rule 13-38(1). That discretion might extend to all cases depending on the context, but again I do not need to decide that here.

[32] I turn now to Mr. Cimmer's argument concerning the Court's authority to examine its own records and take notice of their contents. This argument, which was made largely to support the use of Rule 13-38 here, fails for the following reasons.

[33] I accept that the Court has authority to examine its own records. *Tysowski* and *UFCW* described it as a matter of judicial notice while *Petrelli* was less comfortable with that characterization because judicial notice usually relates to matters of general knowledge or that are easily ascertainable by anyone with resort to widely available resources, which *Petrelli* did not consider an apt description of court records.

[34] Of course, having the authority cannot be equated to having an obligation to take notice of the contents of other court files.

[35] Moreover, none of *Tysowski*, *UFCW* and *Petrelli* involved situations anything like this one. They did not even involve affidavits from other proceedings. In *Tysowski*, the Provincial Court had referred to an order made by that Court in another

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matter rather than insisting that the Crown produce a certified copy of it. In *Petrelli*, although there was an affidavit involved, the issue was whether the Court could look at pleadings from another matter. *UFCW*'s consideration of this question related to a certificate proving the filing of an order by the labour board.

[36] The message of *Tysowski*, *Petrelli* and *UFCW* was that the Court is able to take notice of materials on related court files where doing so will promote the administration of justice. That is no different than the objective underlying Rule 13-38(1). Each situation was dramatically different than a party stating (in effect): "I am entitled to rely on a 186-paragraph affidavit with 67 exhibits from another court file, even though I didn't mention it until 7 months after the filing deadline ordered by the Court."

[37] Having been referred to *UFCW* by Mr. Cimmer, I noted the following highly apt observation made by Armstrong J. in that case:

> [49] Rules are meant to facilitate, not obstruct the administration of justice. There should be compliance with the rules and compliance should be insisted upon in every application except where such insistence results not in assisting but rather in obstructing the administration of justice. …

[38] Though it relates to different conduct in that case, the passage highlights what is truly offensive about Mr. Cimmer's demand that the Court consider the three affidavits. My discussion of Issue #2 will show that what Mr. Cimmer seeks to do in his application under Rule 13-38(1) is obstruct the administration of justice, rather than assist in it. The Court retains discretion under the Foundational Rules to ensure the fair administration of justice. Rule 13-38(1) exists to facilitate that, not constrain it. The same is true for the Court's authority to examine its own records.

[39] Accordingly, I determine that I have discretion under Rule 13-38(1) to determine whether to consider affidavits located on other court files. Rule 13-38(1) is

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not mandatory.

Issue #2: Should the Court permit Mr. Cimmer to rely on the three affidavits in light of the filing deadlines in the *Filing Deadline Fiat* and the evidentiary rulings made in the *Evidentiary Fiat*?

[40] None of the three affidavits are admissible. Each was filed late. Portions that have not already been struck do not provide relevant information that is not already on the record of this application. Mr. Cimmer's attempt to rely on these materials is a collateral attack on the *Filing Deadline Fiat* and the *Evidentiary Fiat* and is an abuse of process. These issues are particularly acute regarding the 2020 Cimmer Affidavit. My reasons are as follows.

[41] Mr. Cimmer asserts that the three affidavits should not be treated as filed late because they already were on other court files. Further, he contends Rule 13-38(1) overrides essentially anything else, including Bardai J.'s rulings in the *Evidentiary Fiat*. I disagree.

[42] Had Mr. Cimmer brought the three affidavits to the Court's attention prior to the filing deadline, and they were relevant to the questions before the Court, and not duplicative of other evidence already struck and/or on the record, it would have been appropriate, and perhaps necessary, for the Court to treat them as part of the record of this application, subject to rules of evidence, applicable Rules, and proper objections.

[43] However, while he was seized with this application Bardai J. imposed deadlines for filing and service of affidavits in this matter in the *Filing Deadline Fiat*. He directed the applicants were directed to serve and file affidavits by September 6, 2023. Affidavits in response, which would include any affidavits on which Mr. Cimmer wanted to rely, had to be served and filed by October 6, 2023. Mr. Cimmer had a full month. If the applicants wished to file rebuttal affidavits, the deadline was October 20, 2023. The deadlines set by Bardai J. contemplated no further filing of evidence, only

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briefs.

[44] Mr. Cimmer's attempt in February 2024 to file the Late Cimmer Affidavit was rejected by Bardai J. in the *Evidentiary Fiat*, which stated:

> [12] An order, including a scheduling order, is just that. It is not a suggestion or a recommendation, it is a requirement. If a party is unable to meet the requirements of an order, they must apply to vary the order. They cannot simply ignore it. The most recent affidavit of Mr. Cimmer was filed February 26, 2024, months after the deadline for receipt of material from him. …
> …
>
> [15] The late filed affidavit was filed contrary to a scheduling order, is irrelevant, and an explanation as to why it could not have been filed sooner other than a bare assertion is not provided. This affidavit would not bear decisively on the outcome of the *EFJA* application and will not be considered in the context of the application proper.

[45] Whether to admit the three affidavits is now my decision to make. That said, they are no more relevant than what Bardai J. already dealt with in the *Evidentiary Fiat* (including what he struck from other affidavits), they are far later, and no explanation for the late attempt to rely on them was provided.

[46] Mr. Cimmer did not appeal either the *Filing Deadline Fiat* or the *Evidentiary Fiat*. Nor did he apply to vary them. They are decisions of this Court that bind him.

[47] I fail to see how the later effort to rely on the three affidavits located on other files should be treated any differently than what Bardai J. ordered. For the purpose of this application, they are "late-filed". On that basis alone, they should not be considered.

[48] The truly objectionable nature of Mr. Cimmer's application becomes apparent, however, on assessing the 2020 Cimmer Affidavit in the context of the

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Evidentiary Fiat's discussion of the 2023 Cimmer Affidavit. The *Evidentiary Fiat* stated:

> [43] The affidavit of Mr. Cimmer is 242 paragraphs in length. The Niessners have no objection to paragraphs 1, 96, 112, 133, 161, 193, 194, 195 and 204-207. In short, the Niessners object to 230 of the 242 paragraphs.
>
> [44] The objections fall into the categories of relevance, opinion, hearsay, speculation, argument and scandalous.
>
> [45] The affidavit of Mr. Cimmer clearly runs afoul of the rules of evidence and rules of court. Mr. Cimmer seeks to tell his side of the story from start to finish without regard for the rules of evidence or consideration of what is relevant. For example:
>
> a. he provides evidence about what other persons knew or intended in respect of certain documents and communications;
>
> b. he speculates;
>
> c. he provides evidence about agreements between other persons;
>
> d. he provides his opinion on pleadings and argues about inconsistencies in the positions of others;
>
> e. he provides excerpts of documents that align with his view. To the extent documents are admissible, the Court will review them in their entirety;
>
> f. he testifies about the qualifications of others; and
>
> g. he testifies about what documents mean.
>
> …
>
> [50] In summary, in order to be admissible in the context of the Niessners' application, the evidence must:
>
> (a) relate to facts within the affiant's personal knowledge and exclude hearsay;
>
> (b) help prove or disprove one of the statutory criteria required to be satisfied pursuant to the *EFJA* as it is the

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> criteria of the *EFJA* which governs materiality. Again, this application is not about relitigating the N.J. Decision, it is about whether the criteria of the *EFJA* are met such that the N.J. Decision can or should be registered in Saskatchewan;
>
> (c) not include opinion or argument, but be restricted to the facts rather than what those facts mean or how they should be interpreted; and
>
> (d) not use repulsive language or cast a derogatory light on the other party's moral character.
>
> [51] The reason for these rules is to ensure the evidence is reliable. Where parties violate these rules, hearings can go off track and result in numerous applications which carry a cost that would otherwise be avoided. Countless hours are then spent arguing about the propriety of specific language in the various affidavits rather than dealing with the merits of the matter. That is what has happened here. Again, parties should consider whether they are objecting because they can or because the objection might affect the outcome.
>
> [52] Often the Court will go paragraph-by-paragraph through an affidavit giving reasons on each paragraph that is struck. Such an approach is untenable where hundreds of paragraphs or portions of paragraphs are being challenged. The parties therefore suggested, and I agree, that rather than providing reasons on a paragraph-by-paragraph basis, it would be more useful to provide general comments on the content of the various affidavits, attach the impugned affidavits and redline them showing what is struck. Accordingly, attached are the affidavits of each of Mrs. Niessner and Mr. Cimmer as Schedules "A" and "B" respectively, which I have redacted to remove the offending material.

[49] Bardai J. struck out far more than half of the 2023 Cimmer Affidavit's body. It is 56 pages in length. Bardai J. struck the vast majority of what appears on pages 20 to 46 of that affidavit along with a portion of the remainder. Most exhibits were not struck.

[50] Shortly after I was assigned to replace Bardai J. on this matter,

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Mr. Cimmer asked me to receive the 2020 Cimmer Affidavit, dozens of paragraphs of which correlate closely to what Bardai J. struck. I have compared the two affidavits. As well, I have reviewed a marked-up version of the 2020 Cimmer Affidavit filed by the applicants that shows what correlates to struck portions of the 2023 Cimmer Affidavit – a considerable portion of it – and what correlates to portions of the 2023 Cimmer Affidavit that were not struck. The latter portions matter because they are already in evidence via the 2023 Cimmer Affidavit.

[51] Much of the 2020 Cimmer Affidavit that does not fall in those categories is either irrelevant or otherwise inadmissible. As just one example, the entirety of para. 157 is argument.

[52] Thus, the 2020 Cimmer Affidavit is almost entirely:

a. duplicative of struck portions of the 2023 Cimmer Affidavit and thus highly objectionable;

b. duplicative of portions of the 2023 Cimmer Affidavit that were not struck and thus are in evidence; or

c. inadmissible for some other reason.

[53] The applicants characterize this tactic as an abuse of process and a collateral attack on orders of Bardai J. in this matter. I agree with the applicants for the following reasons.

[54] First, the effort to have the three affidavits form part of this record is a collateral attack on the *Filing Deadlines Fiat*. The attempt to rely on the 2020 Cimmer Affidavit is also a collateral attack on the *Evidentiary Fiat*. In *R v Litchfield*, [1993] 4 SCR 333 at 348, the Supreme Court of Canada defined the collateral attack rule:

> … This rule holds that "a court order, made by a court having

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> jurisdiction to make it," may not be attacked "in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment" (*Wilson v. The Queen*, [1983] 2 S.C.R. 594, per McIntyre J., at p. 599). The lack of jurisdiction which would oust the rule against collateral attack would be a lack of capacity in the court to make the type of order in question, such as a provincial court without the power to issue injunctions. …
>
> [Emphasis added]

[55] As I observed in *Nodran Ltd. v Sundowner Farms Ltd.*, 2024 SKKB 54, the rule against collateral attack exists to ensure fairness and the justice system's integrity. The rule applies to the vast majority of court orders, with only limited exceptions: *R v Envirogun Ltd*., 2018 SKCA 8 at paras 39 to 46, [2018] 3 WWR 247. It also ensures finality in litigation. Parties are not allowed to decide that court orders do not apply to them, and to conduct themselves in subsequent proceedings as if those orders were never made. They cannot use an "institutional detour" to attack the validity of an order by seeking a different result in a different forum: *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52 at para 38, [2011] 3 SCR 422.

[56] Bardai J. ordered filing deadlines in the *Filing Deadlines Fiat* and confirmed this Court's intention to enforce them in the *Evidentiary Fiat*. He struck most of the 2023 Cimmer Affidavit. Mr. Cimmer now seeks to achieve a different result in the same forum only a few months later. That is a collateral attack.

[57] Second, this effort is an abuse of process. That concept was explained in the widely cited *Bear v Merck Frosst Canada & Co.*, 2011 SKCA 152, 385 Sask R 76 [*Bear*]:

> [36] The doctrine of abuse of process reflects the inherent power of a judge to prevent an abuse of his or her court's authority. It is a flexible concept not restricted by the requirements of issue estoppel, such as those relating to privity. The doctrine can be engaged by a variety of circumstances including what might be

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called those concerning the "re-litigation" of issues or claims.

[37] Goudge J.A., in *Canam Enterprises Inc. v. Coles* (2000), 194 D.L.R. (4th) 648 (Ont. C.A.), dissenting but approved at [2002] 3 S.C.R. 307, explained the applicable concepts as follows at paras. 55-6:

> [55] The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite,* [1990] 3 W.L.R. 347 (C.A.) at 358.
>
> [56] <u>One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined.</u> …

[38] The need to maintain the integrity of the adjudicative process sits at the heart of the concept of abuse of process. The Supreme Court of Canada explained this point as follows in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77:

> 51 Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

See also: *Cameco Corp. v. Insurance Co. of State of Pennsylvania*, 2010 SKCA 95, [2010] 10 W.W.R. 385 per Cameron J.A. at paras. 47-50.

[Emphasis added]

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[58] As *Bear* explains at para. 41, there often is no individual indicator of whether something is an abuse of process. Instead, it requires a contextual analysis. In *Métis Nation – Saskatchewan v Saskatchewan (Environment)*, 2023 SKCA 35 [*Métis Nation*], 479 DLR (4th) 345, the Court observed that one factor that tilts toward a proceeding being abusive is where a party seeks to relitigate an issue that has already been decided in another forum: because such attempts, "waste the resources of the parties, courts and witnesses alike, while risking inconsistent results and undermining the credibility of the entire judicial process": para. 46.

[59] Here, the matter of admissibility was decided in the same forum. Except for that, Mr. Cimmer's attempted reliance on the 2020 Cimmer Affidavit falls squarely within the description that I excerpt above from *Métis Nation*. All parties were given deadlines for filing materials. Only Mr. Cimmer has repeatedly refused to abide by those deadlines. Mr. Cimmer seeks, in effect, to "file" an affidavit from another matter when the highly similar one he filed on this matter had most of it struck. That is unquestionably an abuse of process, which is unaffected by Mr. Cimmer's invocation of Rule 13-38(1).

[60] Third, for reasons I discuss below regarding Mr. Cimmer's opposition to the application to register the Judgment, little (if any) of the evidence in the three affidavits is relevant to an application to enforce a foreign judgment under the *Act*.

[61] Bardai J.'s orders would not preclude me from admitting late-filed affidavits in appropriate (but rare and well-supported) circumstances. That said, these are not appropriate circumstances, nor is the application supported by any sort of rational explanation. Nothing is before me to support an extraordinary exercise of discretion to permit the filing of these affidavits.

[62] Having discussed the 2020 Cimmer Affidavit at some length, I will briefly discuss the remaining two affidavits.

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[63] Mr. Cimmer seeks to refer to his affidavit sworn April 27, 2023, to get before the Court an audio/video file that is attached as an exhibit. The applicants note that the audio/video file is at most an excerpt from a recording that lacks context or explanation such that its reliability is incapable of being tested. Out of caution, I viewed the recording. It lasts less than 10 seconds, containing a mere statement (allegedly made by Mrs. Niessner) that "Rich was 60% owner of that". There is nothing to indicate whether the recording was made with the knowledge of all participants. Nothing in the recording itself identifies the participants. The recording is obviously incomplete. Mr. Cimmer does not aver that the recording has not been altered or manipulated. On the contrary, the affidavit states that he spent considerable time trying to get it into a "shareable format". Even if it were not barred by the *Filing Deadline Fiat*, I would find it inadmissible because it lacks reliability and is also not relevant to this application.

[64] The final affidavit is one sworn by Mr. Lunemann on June 14, 2016. Mr. Cimmer wants it considered because in paragraph 6 Mr. Lunemann states that he owns 60 Class A common voting shares in Keeley Lake. It is well-known to the Court that once was Mr. Lunemann's position. This Court already knows that he was formerly listed as owning those shares. Multiple paragraphs in the 2023 Cimmer Affidavit that survived the *Evidentiary Fiat* speak to that. The New Jersey court accepted that the sham transaction involving the 60 shares occurred and was documented.

[65] Mr. Lunemann's affidavit does not explore how that state of affairs (his ownership of the 60 shares) came to be, whether it was legitimate, why he entered into the settlement agreement that formed the basis of the Judgment, or anything else. It simply states that he owns those 60 shares. The affidavit adds nothing.

[66] The only potentially new information is the obviously inadmissible audio/video recording attached to the Affidavit of Mr. Cimmer sworn April 27, 2023. The other two affidavits speak only to matters that could have been led in the NJ Action.

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All of it could have been led in the NJ Action (and in accordance with the filing deadlines in this application) with the exercise of reasonable diligence.

[67] The inescapable conclusion is that Mr. Cimmer is trying to get already struck and time-barred evidence into the record through the back door by invoking Rule 13-38(1).

[68] For the foregoing reasons, I therefore determine that no portion of the three affidavits is admissible on this application. In the event of an appeal, I note that the three affidavits may be found in the following locations:

(a) The affidavit of Mr. Cimmer sworn August 26, 2020, is filed on QBG-SA-01211-2016. It is a separately bound document of two volumes.

(b) The affidavit of Mr. Cimmer sworn April 27, 2023, is located in Volume 10 of QBG-SA-00859-2016.

(c) The affidavit sworn by Mr. Lunemann on June 14, 2016, is located at Exhibit M of the affidavit of Mr. Cimmer sworn March 1, 2018 at Volume 2 of this Court's file in QBG-SA-01211-2016.

(b) Requirement of the *Act* to file a certified copy of the foreign judgment

[69] The second preliminary issue arises from the state of the court file when I heard this application, and the requirements of the *Act*. Specifically, s. 12(4)(a) requires the filing of "a copy of the foreign judgment certified as true by a proper officer of the court that made the order". During argument of this application, it became apparent that certified copies of the Judgment [certified copies] were not present on the court file. The Court further had no record of them having been filed.

[70] During oral argument, I asked applicants' counsel to investigate whether

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certified copies had been filed. Counsel did so. They advised by letter that they received certified copies in July 2023, and that they recalled sending them to the Court for filing at around that time. Their file no longer contained the certified copies (which led them to believe they must have been filed), but it also contained no filing sheet or correspondence to evidence the filing.

[71] The applicants ordered new certified copies, which they filed on November 18, 2024.

[72] Mr. Cimmer objects to the Court considering the certified copies. If the Court declines to do so, that will necessarily result in dismissal of this application due to failure to satisfy s. 12(4)(a) of the *Act*.

[73] Thus, the issue before me is whether to permit the late-filing of the certified copies. I conclude that I have discretion to do so, and that I should do so. My analysis follows.

[74] Mr. Merchant wrote the following in a letter dated October 15, 2024 addressed to the Court:

> As submitted by me in Chambers, the Court should not, and possibly may not, allow the Applicants to patch and remedy their case. The application was long scheduled. We raised the issue of the absence of the judgments as one of our arguments. Litigants may not come to court and be advised or discover failures in their case and then a month later, or whenever, be allowed to remedy those failures.

[75] I will not dwell on the palpable irony of that stance. Instead, I will consider the applicable legislation and Rules.

[76] Section 12(4)(a) requires the filing of a certified copy of the Judgment. It does not express when the certified copy must be filed. That is governed by this Court's Rules and rulings in this matter.

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[77] *The King's Bench Rules* also contain relevant provisions. Rule 1-6 authorizes the Court to cure any contravention, non-compliance or irregularity if doing so would not cause a party irreparable harm and it is in the interests of justice to do so. The Court must also consider whether any conditions or sanction should be imposed. The Court of Appeal held in *Hunter v McCorriston*, 2016 SKCA 144 at para 48, 86 RFL (7th) 260, that Rule 1-6 empowers judges to cure procedural errors only, not to alter substantive or statutory laws.

[78] The *Filing Deadlines Fiat* ordered the applicants to serve and file the affidavit materials to support their application by September 6, 2023. It did not set a deadline to file a certified copy of the Judgment. A certified copy need not be attached to an affidavit. Uncertified versions of the four judgments comprising the Judgment were, however, attached to the affidavit of Gregory Lomax sworn June 22, 2023 [Lomax Affidavit], which was filed on June 27, 2023.

[79] Thus, even before the *Filing Deadlines Fiat*, Mr. Cimmer was fully apprised of all information and orders contained in the Judgment (even if somehow they were not brought to his attention when they were issued). That alone cannot be determinative, as I did not accede to Mr. Cimmer's argument to the same effect when he applied for admission of the 2020 Cimmer Affidavit.

[80] There are, of course, substantial differences between this issue and the one involving the 2020 Cimmer Affidavit.

[81] Filing a certified copy of the Judgment is a formal requirement under the *Act*, but merely to establish that what is before this Court is exactly what was issued by the foreign court. Beyond that formal requirement, there seems to exist no reason why attaching it to an affidavit (as was done in the Lomax Affidavit) would not suffice. It is important and necessary, but little turns on the contents of the certified copy unless it differs from other copies filed with this Court.

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[82] A certified copy of the Judgment has now been filed. The certified copy's authenticity is not challenged by Mr. Cimmer. If the *Act* required a certified copy of the foreign judgment to be filed at the same time as the application, for example, I might not have the power to cure the failure to file the certified copy by the time I heard the application. But the *Act* does not require that. Nor has either party raised that the issue before me is impacted by a limitation period. The applicants' slip is thus procedural rather than substantive. Rule 1-6 exists to authorize the curing of procedural slips where it would be just to do so. I consider it just to do so. The discussion I excerpt above from *UFCW* is apt here.

[83] I therefore conclude that it is appropriate to exercise my discretion to cure the failure by the applicants to file the certified copy before the application was heard. Some consequence is appropriate for the late filing. I address that below in my discussion concerning costs.

D. THE SUBSTANTIVE APPLICATION

[84] In addition to the certified copy of the Judgment, the record of this application contains the following affidavits:

(a) Affidavit of Madelyn Niessner, sworn May 18, 2023 [Niessner Affidavit] (portions of which were struck by Bardai J.);

(b) Affidavit of Jill A. Guldin, sworn June 25, 2023 [Guldin Affidavit]. The Guldin Affidavit provides expert evidence concerning New Jersey law as it pertains to the Judgment and this application;

(c) The Lomax Affidavit;

(d) Affidavit of Louis Giansante, sworn August 25, 2023 [Giansante Affidavit]. Mr. Giansante represented Mr. Lunemann in the New

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Jersey action;

(e) Affidavit of Richard Lunemann, sworn August 29, 2023; and

(f) The 2023 Cimmer Affidavit (portions of which were struck by Bardai J.).

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1. Issues

[85] The following issues must be determined in connection with this application.

Issue #3 Have the applicants met the requirements under the *Act* for registration?

Issue #4: Has Mr. Cimmer established a basis for the Court to refuse to register the Judgment?

2. Analysis

Issue #3 Have the applicants met the requirements under the *Act* for registration?

[86] Section 12 of the *Act* sets out the *Act's* requirements for registration of a foreign judgment. As stated by this Court in *Yapi ve Kredi Bankasi Anonim Sirketi v Arslan*, 2023 SKKB 126 [*Arslan*], appeal dismissed at *Arslan v Yapi ve Kredi Bankasi Anonim Sirketi*, 2024 SKCA 68, the *Act* constitutes a complete code for registrations of foreign judgments.

[87] The relevant requirements of s. 12 may be summarized as follows:

(a) The foreign judgment must be enforceable pursuant to the *Act*.

(b) The judgment creditor must give the judgment debtor notice of

intention to register the foreign judgment, including notice as to the grounds from s. 8 on which the judgment creditor relies to establish the foreign court's jurisdiction to make the judgment, and identifying what parts of the foreign judgment are to be registered.

(c) A certified copy of the foreign judgment must be filed with the Court.

(d) If the foreign judgment needs to be modified to render it enforceable, an application to do so must be filed.

[88] Section 3 lists certain types of foreign judgments that cannot be registered under the *Act*. The opinion provided at paragraph 52 of the Guldin Affidavit confirms that none of the exclusions in s. 3 of the *Act* apply here. As well, I have satisfied myself that none apply. Next, I deal with the requirements of s. 12.

(a) The judgment in question must be a foreign judgment as defined by the Act

[89] The term "foreign judgment" is defined in s. 2 of the *Act*. It means a final decision in a civil proceeding by a court of a foreign state by means of judgment, order, decree or similar instrument in accordance with the laws of that state.

[90] Paragraph 40 of the Guldin Affidavit opines that the Judgment is a final decision in the NJ Action. Ms. Guldin was engaged by the applicants as an independent expert to provide opinion evidence. Mr. Cimmer challenges neither her expertise nor her independence. I accept her opinions concerning the status of the Judgment in New Jersey. It was rendered in 2019 as a judgment. It was not a default judgment, which I discuss further below.

[91] I determine that the Judgment is a "foreign judgment" as defined in the *Act*.

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(b) Enforceability of the Judgment pursuant to the Act

[92] Although s. 12 requires that a foreign judgment be enforceable to be registered, the term "enforceable" is not defined in the *Act*. In *Double Diamond Distribution Ltd. v Garman Turner Gordon LLP*, 2021 SKCA 61 [*Double Diamond*], the Court of Appeal appears to me to have largely equated the concept of enforceability with the foreign court having had jurisdiction over the subject matter of the action: para. 22.

[93] Jurisdiction is listed in s. 4(a) as a bar to registration, but it makes sense to analyze the jurisdiction question as something that an applicant must establish to this Court's satisfaction, rather than to leave it as something for the respondent to disprove. As a result, I conclude that an applicant should bear the onus to establish that the foreign court had jurisdiction even though (as I discuss below) a respondent seeking to resist registration bears the onus concerning other matters falling within s. 4.

[94] Section 8 outlines circumstances in which the foreign court will be considered to have jurisdiction, stating in part:

> **Jurisdiction**
>
> 8 A court in the state of origin has jurisdiction in a civil proceeding that is brought against a person if:
>
> (a) the person expressly agreed to submit to the jurisdiction of the court;
>
> (b) as defendant, the person submitted to the jurisdiction of the court by appearing voluntarily;
>
> (c) the person commenced a counterclaim to the proceeding;
>
> …; or
>
> (f) there was a real and substantial connection between the state of origin and the facts on which the proceeding was based.

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[95] The Guldin Affidavit expresses an opinion that the New Jersey court had subject matter jurisdiction.

[96] Mr. Cimmer contends that he could not attorn to the New Jersey court's jurisdiction because it lacked jurisdiction in the first place. He says that is a basis to refuse to enforce the foreign judgment pursuant to s. 10 of the *Act*. Mr. Cimmer's argument rests on two main pillars. First, the shares in issue were shares in a Saskatchewan corporation. Second, Mr. Cimmer is not a U.S. national, nor did he reside in New Jersey. Accordingly, he says, no real and substantial connection existed between New Jersey and the facts of the action.

[97] Although the Guldin Affidavit opines that the New Jersey court had subject matter jurisdiction over that action, Mr. Cimmer contends that this Court cannot rely on that opinion because it is a question of Saskatchewan law in which Ms. Guldin has no expertise.

[98] I will address those arguments in reverse order. First, I agree with Mr. Cimmer that Ms. Guldin's opinion as to real and substantial connection does not supersede this Court's duty to determine the jurisdiction question in accordance with the *Act*'s provisions. On that point, her opinion is of little assistance.

[99] Other than that narrow point, Mr. Cimmer's arguments concerning jurisdiction are grounded in a misapprehension of how the *Act* operates, particularly the interplay between s. 8 and s. 9.

[100] Mr. Cimmer approaches this as if this Court is expected to conduct a full and thorough, front-to-back assessment into whether the New Jersey court had jurisdiction. For several reasons, I conclude that that is not how the *Act* was designed to operate.

[101] Mr. Cimmer's arguments are predicated on s. 9 applying here. Section 9

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itself states that it applies in cases where the foreign judgment is allowed by default. It need not be used in any other cases. (It also need not be used in every default judgment case because there are other paths in s. 8 for establishing sufficient connection, such as that the defendant was ordinarily resident in the state of origin).

[102] Where a defendant attorns to the foreign court's jurisdiction expressly, by voluntary appearance, or by commencing a counterclaim in the proceeding, a real and substantial connection need not be separately established. Attornment in any of those methods is sufficient under s. 8: the six subsections to s. 8 are disjunctive, such that only one needs to be established. Because of that, if the applicants satisfy any of the first five criteria in s. 8, they need not also meet the real and substantial connection test found in s. 8(f), which links into s. 9.

[103] The policy basis for not always requiring a real and substantial connection is sound: "… a requirement that the defendant have a real and substantial connection with the enforcing court in the sense of being present or having assets in the province would only undermine order and fairness": *Chevron Corp. v Yaiguaje*, 2015 SCC 42 at para 56, [2015] 3 SCR 69 [*Chevron*].

[104] In this case, at least two of the s. 8 paths are established before me. First, Mr. Cimmer appeared voluntarily before the New Jersey court. Second, he commenced a counterclaim within the NJ Action.

[105] Mr. Cimmer submitted to the New Jersey court's jurisdiction by filing an Answer to the Amended Complaint of the Niessners. He did so after his application to dismiss the Amended Complaint was dismissed by that court. Mr. Cimmer also filed a counterclaim against the Niessners and a crossclaim against Mr. Lunemann. See paras. 47-48 of the Guldin Affidavit on which I rely. Mr. Cimmer also participated in written discovery, requested discovery, and attended depositions in New Jersey. All that was preceded by valid service on him of the proceedings. Mr. Cimmer participated actively

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in the trial. He sought to appeal the trial decision. This application was brought only after Mr. Cimmer's appeals were exhausted. Notably, he does not dispute his active participation in the New Jersey proceeding.

[106] As is obvious from the foregoing, Mr. Cimmer was a full and active participant in the NJ Action, which he does not dispute. He cannot and does not argue that the Judgment was a default judgment. Because of his participation, particularly with respect to his attornment and his counterclaim, s. 8 is easily satisfied to establish jurisdiction and s. 9 does not apply.

[107] Thus, Mr. Cimmer's arguments that there was no real and substantial connection between New Jersey and the facts of the case are entirely beside the point and I need not address them.

[108] All of this was explained in *Double Diamond* by reference to a decision of the Ontario Court of Appeal, as follows:

> [40] A very similar argument to that made by Double Diamond was raised and was rejected in *Stern Estate v Solehdin*, 2011 ONCA 286, 75 CBR (5th) 69 [*Stern Estate*]. In that case, the respondents were awarded summary judgment in the Louisiana Bankruptcy Court against the appellants on their personal guarantees in support of a loan to a company in Louisiana that subsequently went bankrupt. The respondents applied to have those judgments recognized and enforced in Ontario. The appellants did not dispute that there was a real and substantial connection to Louisiana. Instead, they argued that the Louisiana Bankruptcy Court lacked subject matter jurisdiction to decide the issue of whether the guarantors were liable on their guarantees and that that issue should have been decided in the Louisiana State Court. They also argued that, on the state of the existing law, the originating court must have jurisdiction and that, as a matter of general principle, the enforcing court must inquire into the originating court's jurisdiction over the subject matter. These arguments were rejected in single paragraph of the *per curiam* judgment of the Ontario Court of Appeal, which stated as follows:

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> [3] Having regard to the fact that the appellants participated in the Louisiana proceedings, specifically raised the issue of the Louisiana Bankruptcy Court's subject matter jurisdiction, and failed to appeal the Louisiana Bankruptcy Court's determination that it had subject matter jurisdiction, we are of the opinion that it was not open to the appellants to re-litigate the issue of subject matter jurisdiction in Ontario.
>
> [41] In one respect, the facts in *Stern Estate* were different than those here. There, the judgment debtor opposing the registration of the foreign judgment had specifically raised the issue of the jurisdiction before the foreign court. However, in my respectful view, this distinction makes no difference. Rather, based on the authorities I have reviewed, I am satisfied that if there is validity to Double Diamond's substantive or procedural concerns as to the scope of the authority of the Nevada Court, those concerns are properly raised in that forum, not in opposition to GTG's request to register the Nevada judgment in this province. Somewhat ironically, if Double Diamond is correct and it had (contrary to the evidence of Ms. Gray Kozlowski) the ability to appeal the Nevada judgment or to apply for a reconsideration of it in that jurisdiction, there is, or at least was, an obvious and ready forum in which to raise its arguments on this point.
>
> [Emphasis added]

[109] This issue must be determined on the tests set out in s. 8 of the *Act*, not some fanciful notion that it is impossible to attorn to jurisdiction that does not exist prior to attornment and that this Court must conduct a deep dive into that question of jurisdiction. That notion is inconsistent with a proper interpretation of ss. 8 and 9 and with the principles expressed in *Chevron*.

[110] After his application to dismiss on the basis of the New Jersey court lacking jurisdiction failed, Mr. Cimmer had an option to not participate in the NJ Action. Had he not participated, when the Niessners applied to register the default judgment here, he could then have relied on the grounds contained in s. 9 to argue that no real and substantial connection to New Jersey existed. But that was not the choice he made. He defended the action voluntarily and commenced a counterclaim against

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the Niessners and a third-party claim against Mr. Lunemann.

[111] Accordingly, I find that Mr. Cimmer voluntarily submitted to the New Jersey court's jurisdiction of the New Jersey court and commenced a counterclaim in that proceeding. Pursuant to ss. 8 (b) and (c) of the *Act*, the New Jersey court had jurisdiction concerning the NJ Action.

[112] Provided that the other requirements of s. 12 are met, the Judgment is enforceable within the meaning of the *Act*.

(c) Remaining requirements of s. 12 of the Act

[113] Section 12(3) requires the applicants to have given Mr. Cimmer notice of intention to enforce the Judgment. That occurred. Mr. Cimmer had notice of this proceeding, in which he participated fully.

[114] The notice must set out the grounds on which the applicants rely to establish the foreign court's jurisdiction. The originating application in this matter did so. It focused in one place on real and substantial connection but in paragraph 13 also referenced Mr. Cimmer's willing participation in the NJ Action and the fact that he filed claims against the Niessners and Mr. Lunemann. This requirement is satisfied.

[115] The notice must identify the parts of the foreign judgment to be registered. This was accomplished in the originating notice by referring to portions of the Judgment that had been satisfied. This requirement is met.

[116] The applicants were required to file a certified copy of the foreign judgment, which I discuss above. This requirement is met.

[117] The applicants were required to file an application to modify the foreign judgment where necessary to render it enforceable. That was accomplished by including the requests for modification in the originating notice. This requirement is

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met.

[118] No additional requirements apply here. The applicants have satisfied s. 12 of the *Act*. That leaves consideration of the grounds for refusing to register provided for in s. 4. I turn to that now.

Issue #4: Has Mr. Cimmer established a basis for the Court to refuse to register the Judgment?

[119] With respect to the grounds under s. 4 for refusal to register a foreign judgment, the evidentiary burden rests on the respondent, Mr. Cimmer: *Arslan* at para 20 and *Yantai Huahai International Trade Co. Ltd. v Yang*, 2024 SKKB 24 at para 34. As above, that onus should not be borne by Mr. Cimmer concerning jurisdiction of the New Jersey court.

[120] Mr. Cimmer advances numerous arguments as to why this Court should refuse to register the Judgment. They include the following:

(a) The Judgment was rendered in circumstances where this Court was already seized with actions dealing with the shares in Keeley Lake. Those shares are central to the disputes between the parties. It appears that this is raised to ground a complaint of forum shopping.

(b) The Judgment should not be registered because it is manifestly contrary to public policy in Saskatchewan. This is essentially an argument that the Judgment was obtained by fraud, which is a ground for refusing to enforce a foreign judgment found at s. 4(e) of the *Act*. The public policy ground is found at s. 4(g).

(c) The Judgment provides for declaratory relief.

(d) The NJ Action violated Saskatchewan law because it was a

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> derivative action commenced in the New Jersey court contrary to s. 18-2(2) of *The Business Corporations Act, 2021*, SS 2021, c 6.

[121] I conclude that Mr. Cimmer has failed to establish a basis under s. 4 for this Court to refuse to register the Judgment. Below I set out my reasons for that.

(a) Principles governing applications to register foreign judgments

[122] On an application to enforce a foreign judgment, this Court is not tasked with evaluating the underlying claims that gave rise to the dispute, but "to assist in enforcing an already-adjudicated obligation": *Chevron* at para 44.

[123] This application cannot serve as an opportunity to relitigate the issues that were before the New Jersey court. The Court of Appeal explained the correct approach in *Double Diamond* as follows:

> [36] The fundamental reason why a Saskatchewan court asked to register a foreign judgment does not have broad-based authority to inquire into the details of the substantive and procedural law on which that judgment is based is because of the nature of the obligation it is being called to enforce. In *Chevron*, Gascon J. explained that an action on a foreign judgment was "based not on the original claim the plaintiff had pursued against the defendant but rather on the obligation created by the foreign judgment" (at para 43, quoting from Stephen G.A. Pitel and Nicholas S. Rafferty, *Conflict of Laws* (Toronto: Irwin Law, 2010) at 159). This explains why "the purpose of an action for recognition and enforcement is not to evaluate the underlying claim that gave rise to the original dispute, but rather to assist in enforcing an already-adjudicated obligation" (*Chevron* at para 44). For this reason, "the facts underlying the original judgment are irrelevant, except insofar as they relate to potential defences to enforcement" (at para 45).
>
> [Emphasis added]

[124] That extends even to consideration of the grounds to refuse enforcement found in s. 4 of the *Act*. Thus, in *Arslan*, this Court concluded that on an application to register a foreign judgment, the Court's role is to "focus on the requirements of the *Act*

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and avoid straying into other territory": para. 19. The term "requirements of the *Act*" is properly understood as it was explained by Kalmakoff J. (as he then was) in *Britton v Simon (Estate)*, 2016 SKQB 30, 395 DLR (4th) 139 [*Britton*]:

> [25] Accordingly, my task at this stage is not to adjudicate the original rights of the parties, or consider the merits of the claim that led to the judgment and award of damages against Mr. Britton. That has already been decided by a court which had jurisdiction over the parties and the subject matter in dispute. Furthermore, this is not an appeal. It is not my duty, nor do I have discretion, to review the correctness of the trial court's decision. My role on this application is to determine whether any of the circumstances outlined in the *EFJA* for refusing to enforce the judgment in Saskatchewan, in whole or in part, have been established. As Justice Gascon noted, at para 48 of *Chevron*, "[t]he manner in which the court exercises control over the parties is thus different -- and far less invasive -- than in an action at first instance."

[125] *Britton* also contains a helpful discussion of the standard to which the foreign court must be held, which is one of a minimally adequate process and fairness, not one approaching perfection:

> [30] In order for a foreign judgment to be enforceable, the process by which it was produced does not have to be perfect, nor does it have to be the fairest process imaginable. It must simply be one which satisfies the enforcing court that minimum applicable standards of fairness were met: *Beals* [2003 SCC 72], at para 60. Generally speaking, minimum standards of natural justice and procedural fairness require that defendants in a civil action be given adequate notice of the claim being made against them, the opportunity to defend the case, and the opportunity to be heard ….

[126] In general, applications of this nature hinge on whether the requirements of s. 12 are met (which they are in this case) and whether the judgment debtor under the foreign judgment can point to a valid reason why the Court should refuse to enforce it for one of the reasons set forth in s. 4. No fresh adjudication of underlying issues should occur. That will become even clearer when I address Mr. Cimmer's arguments

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concerning fraud and public policy below.

> *(b) Should the Court refuse to register the Judgment on the basis that this Court was already seized with actions dealing with the shares in Keeley Lake?*

[127] The answer to this question is no. The relevant provision of the *Act* is s. 4(h), which states as follows:

> 4 …
>
> (h) at the time the judgment was submitted for registration or an action for enforcement was commenced, a civil proceeding based on the same facts and having the same purpose:
>
> (i) was pending before a court in Saskatchewan, having been commenced before the civil proceeding that gave rise to the foreign judgment was commenced;
>
> (ii) has resulted in a judgment or order rendered by a court in Saskatchewan; or
>
> (iii) has resulted in a judgment or order rendered by a court of a foreign state, other than the state of origin, that meets the conditions for its registration and enforcement in Saskatchewan.

[128] There are two preconditions to any applicability of s. 4(h): a civil proceeding must first have been commenced in Saskatchewan having the same facts, and it must have been for the same purpose.

[129] In relying on s. 4(h), Mr. Cimmer accuses the applicants of forum shopping, asserting that one or more Saskatchewan actions were commenced prior to the NJ Action. However, the only relevant tests are set out in s. 4, and in particular s. 4(h).

[130] This issue was already adjudicated in the NJ Action. On August 10, 2017, Mr. Cimmer moved for a comity stay in the New Jersey action, which the New Jersey

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court denied on August 31, 2017. It provided reasons that are attached to the Lomax Affidavit as Exhibit "H". The New Jersey court's determinations may be summarized as follows:

(a) The Saskatchewan litigation was not the first filed action concerning these disputes. The New Jersey action was filed first. Prior to filing of the Amended Complaint that served as the initiating document thereafter, an initial complaint was filed in New Jersey that preceded the issuance of a claim in Saskatchewan.

(b) The Saskatchewan action and the NJ Action are different, did not have the same parties, and did not have the same legal issues. Each action involved parties distinct from the other action. The New Jersey court determined that Mr. Lunemann was not originally a party to the Saskatchewan action and the Saskatchewan action involved parties who were not in the NJ Action. Claims in the Saskatchewan action involved the corporate and management structure of Keeley Lake. That was not the case in the NJ Action. The NJ Action sought resolution of ownership of the disputed shares, while the Niessners' claim in Saskatchewan related to shareholder oppression and conspiracy to commit shareholder oppression.

(c) By the time Mr. Cimmer applied for the comity stay in New Jersey, that court had already determined ownership of the disputed shares. What remained to be litigated involved a determination of damages.

[131] When it refers to "Saskatchewan claims", the New Jersey comity stay decision must mean to refer to QBG-SA-00859-2016. That is the action commenced on April 20, 2016 by the Niessners against Keeley Lake, Mr. Lunemann and Mr. Cimmer,

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among others. My review indicates that the New Jersey court's determination that Mr. Lunemann was not initially a party to that action is incorrect. He was named as a defendant in the Statement of Claim in QBG-SA-00859-2016. However, that error is not of such significance that it would prompt this Court to intervene; other findings by the New Jersey court are easily verified, including that there were differences in the matters in issue and relief sought pursuant to the pleadings, and that there were parties to QBG-SA-00859-2016 that were not named in the NJ Action.

[132] As background, the initial New Jersey complaint referred to above was attached to Mr. Cimmer's affidavit as Exhibit 33. It was filed September 17, 2015. The plaintiffs were the Niessners and Keeley Lake. The sole named defendant was Mr. Lunemann. In 2016 the amended complaint was filed. It added Mr. Cimmer as a defendant, but in the same action (Docket No.: CAM-L-3587-15).

[133] Mr. Cimmer applied for leave to appeal the comity order, which was denied by the New Jersey appellate division.

[134] Thus, Mr. Cimmer's core contention (that a Saskatchewan action was commenced first) was considered and dismissed by the New Jersey court. I have no basis to second-guess that conclusion. Indeed, if the situation were reversed, I expect that a Saskatchewan court would hold that an action started first here, even if the statement of claim were amended later to add defendants, was the first one commenced. As an analogy, it is possible to amend pleadings or add additional defendants to an action pursuant to s. 20 of *The Limitations Act*, SS 2004, c L-16.1 (assuming its conditions are satisfied) even though the limitation period has expired. Although that arises from a statutory provision, the concept is well-established in law.

[135] In any event, the approach mandated by *Chevron*, *Double Diamond*, *Britton*, and other cases requires me not to sit in appeal of the New Jersey decision or review its correctness. Which action was first commenced has been decided already by

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the New Jersey court and Mr. Cimmer has failed to raise arguments to overcome the validity of that decision in the context of s. 4(h) of the *Act*.

[136] Similarly, it is not for this Court to sit in appeal of the New Jersey court (and its appellate division) as to whether the respective civil proceedings were based on the same facts or had the same purpose. There was overlap, but that does not render the actions co-extensive.

[137] As with other arguments made by Mr. Cimmer in this application, he asks this Court to drill down into the New Jersey proceedings to take a fresh view of everything considered and determined there. Jurisprudence binding on me requires me to not do so.

[138] To summarize, Mr. Cimmer's arguments on this issue rely on a Saskatchewan action having been commenced first. That did not occur. He further relies on the actions having involved the same facts and issues. There was overlap, but as determined by the New Jersey court – in which I would concur, if required of me – there were meaningful differences in parties, claims and issues. As a result, the preconditions to applicability of s. 4(h) are not met.

[139] Mr. Cimmer's argument on this issue therefore must fail.

(c) Is the Judgment contrary to public policy? Was it obtained by fraud?

[140] The answer to both questions, which involve application of ss. 4(e) and (g), is no.

[141] Once again, Mr. Cimmer's approach involves exactly what *Chevron*, *Double Diamond*, and other authorities instruct courts to avoid doing in such matters. He views this application as a search for the underlying truth. But those facts were already determined by the New Jersey court and will not be determined afresh by this

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Court.

[142] The public policy argument boils down to fraud. As Mr. Merchant put it during oral argument, “You can’t help bank robbers.” At another moment, he asserted that where a person enters into an illegal contract, courts will not intervene to assist. He offered no authority to support that proposition.

[143] Although Mr. Cimmer’s public policy argument is really a disguised argument about fraud, I will nonetheless first address his label of it as one of public policy. Mr. Cimmer relies on para. 72 of *Beals v Saldanha*, 2003 SCC 72, [2003] 3 SCR 416 [*Beals*]. Following are paras. 71 to 73:

> 71 The third and final defence is that of public policy. This defence prevents the enforcement of a foreign judgment which is contrary to the Canadian concept of justice. The public policy defence turns on whether the foreign *law* is contrary to our view of basic morality. As stated in Castel and Walker, *supra*, at p. 14-28:
>
> > . . . the traditional public policy defence appears to be directed at the concept of repugnant laws and not repugnant facts. . . .
>
> 72 How is this defence of assistance to a defendant seeking to block the enforcement of a foreign judgment? It would, for example, prohibit the enforcement of a foreign judgment that is founded on a law contrary to the fundamental morality of the Canadian legal system. Similarly, the public policy defence guards against the enforcement of a judgment rendered by a foreign court proven to be corrupt or biassed.
>
> 73 The appellants submitted that the defence of public policy should be broadened to include the case where neither the defence of natural justice nor the current defence of public policy would apply but where the outcome is so egregious that it justifies a domestic court’s refusal to enforce the foreign judgment. The appellants argued that, as a matter of Canadian public policy, a foreign judgment should not be enforced if the award is excessive, would shock the conscience of, or would be unacceptable to, reasonable Canadians. The appellants claimed

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> that the public policy defence provides a remedy where the judgment, by its amount alone, would shock the conscience of the reasonable Canadian. It was argued that, if the respondents and their witnesses were truthful in the Florida proceeding, it must follow that the laws in Florida permit a grossly excessive award for lost profits absent a causal connection between the acts giving rise to liability and the damages suffered. Such a result, the appellants submitted, would shock the conscience of the reasonable Canadian. I do not agree.
>
> [Underlined emphasis added]

[144] As is readily apparent, *Beals* does not support Mr. Cimmer's position. The "manifestly contrary to public policy" concept that is embodied by s. 4(g) is directed at repugnant laws, not repugnant findings of fact. Mr. Cimmer points to no New Jersey law, or law of any jurisdiction, that is repugnant such that this Court would refuse to enforce the Judgment. The public policy argument therefore fails.

[145] Mr. Cimmer's real argument under this heading is that the judgment was obtained by fraud. The fraud he refers to was multi-faceted, he argues. He says that a sham agreement was made between the Niessners and Mr. Lunemann to perpetrate a fraud on the Director of Corporations in Saskatchewan. A sham agreement that permitted Mr. Lunemann to work in Canada was a fraud on Canada's immigration and citizenship service. And paying Mr. Lunemann in the United States for work done in Canada was a fraud on Canada Revenue Agency. Mr. Cimmer asserts that the New Jersey court did not care about those instances of fraud, while this Court would be deeply concerned. To be clear, those are Mr. Cimmer's contentions, not this Court's findings.

[146] Mr. Cimmer misapprehends how the fraud exception operates in the context of such an application. *Beals* explained how the fraud defence is to be assessed in such applications:

> 44 Inherent to the defence of fraud is the concern that defendants may try to use this defence as a means of relitigating an action previously decided and so thwart the finality sought in

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> litigation. The desire to avoid the relitigation of issues previously tried and decided has led the courts to treat the defence of fraud narrowly. It limits the type of evidence of fraud which can be pleaded in response to a judgment. If this Court were to widen the scope of the fraud defence, domestic courts would be increasingly drawn into a re-examination of the merits of foreign judgments. That result would obviously be contrary to the quest for finality.
>
> …
>
> 50 What should be the scope of the defence of fraud in relation to foreign judgments? *Jacobs, supra* [(1887), 14 OAR 242], represents a reasonable approach to that defence. It effectively balances the need to guard against fraudulently obtained judgments with the need to treat foreign judgments as final. I agree with Doherty J.A. for the majority in the Court of Appeal that the "new and material facts" discussed in *Jacobs* must be limited to those facts that a defendant could not have discovered and brought to the attention of the foreign court through the exercise of reasonable diligence.
>
> 51 … [F]raud going to jurisdiction can always be raised before a domestic court to challenge the judgment. On the other hand, the merits of a foreign judgment can be challenged for fraud only where the allegations are new and not the subject of prior adjudication. Where material facts not previously discoverable arise that potentially challenge the evidence that was before the foreign court, the domestic court can decline recognition of the judgment.
>
> 52 Where a foreign judgment was obtained by fraud that was undetectable by the foreign court, it will not be enforced domestically. "Evidence of fraud undetectable by the foreign court" and the mention of "new and material facts" in *Jacobs, supra*, demand an element of reasonable diligence on the part of a defendant. To repeat Doherty J.A.'s ruling, in order to raise the defence of fraud, a defendant has the burden of demonstrating that the facts sought to be raised could not have been discovered by the exercise of due diligence prior to the obtaining of the foreign judgment. …

[147] On such an application, a judgment debtor can establish the fraud exception by pointing to fraud going to the foreign court's jurisdiction. Mr. Cimmer

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has not done that.

[148] In addition, a judgment debtor can raise new and material facts that were not before the foreign court. As a precondition, the new and material facts could not have been discovered and brought to the foreign court's attention even with the exercise of reasonable diligence. The new facts must support new allegations that have not already been adjudicated.

[149] The applicants submit that all of the evidence of fraud relied on by Mr. Cimmer was (or could have been, with reasonable diligence) led in the NJ Action. This Court does not have a complete record of those proceedings, but that matters not. It was for Mr. Cimmer to identify for this Court precisely the evidence of fraud that went to the New Jersey court's jurisdiction. He has pointed to none. It was for Mr. Cimmer to identify the evidence of fraud that was "undetectable by the foreign court", i.e., discoverable only after the New Jersey trial concluded and judgment was rendered (before which he could have applied to lead fresh evidence). He has pointed to none. If he had such evidence, one would expect him to lead with it rather than ask this Court to delve deep into issues already examined by the New Jersey court.

[150] It may not be fatal, but Mr. Cimmer has not sought to place the record of evidence before the New Jersey court before this Court. Other than by review of the New Jersey court's decision following the trial [*NJ Decision*] (which does not bear a date but is located at Exhibit "I" to the Lomax Affidavit), this Court has no ability to determine what evidence was before that court.

[151] Careful review of the *NJ Decision* is revealing. It contains the following passages:

> At page 13: "Interestingly, as Cimmer makes these arguments the Court is reminded of his early testimony wherein it was clear that he knew that

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> the initial documents that created a 60 share interest in the Lodge to Lunemann were what he believe [*sic*] were a sham."
>
> At page 17: "Mr. Cimmer's first affirmative defense is that of unclean hands. He asserts that the Niessners and Lunemann concocted a ruse with the help of their attorney Mr. Partyka in order to dupe Canadian immigration. Partyka prepared documents, back dated them, had Lunemann and Niessners signed [*sic*] them and then had Charles Niessner use a variety of pens to make entries for credit into a notebook to appear as though the entries had been made at different times. No one has denied that this is the accurate set of facts. As previously stated, this behavior is troubling but not fatal to plaintiffs lawsuit. Cimmer, knowing this and further asserting that this was a ruse, had Lunemann sign the Option Agreement granting Cimmer a right to shares that he knew were "granted" to Lunemann under this false agreement. Asserting the unclean hands doctrine in the case as an affirmative defense, cuts both ways."

[152] The scheme by the Niessners and Mr. Lunemann to defraud Canadian immigration was discussed even further in the *NJ Decision* at page 23. Thus, the allegation by Mr. Cimmer of the scheme to defraud Canadian immigration, and its effect on the Niessners' claim, was considered and adjudicated by the NJ court. Although Mr. Cimmer says the NJ court did not care about that fraud, that is contradicted by the *NJ Decision*. Rather than find that the allegations advanced by Mr. Cimmer were irrelevant, the *NJ Decision* clearly held that Mr. Cimmer also had unclean hands, finding that he relied on what he knew to be a sham transaction involving the 60 shares to seek majority ownership of Keeley Lake. The *NJ Decision* characterized that as "the scheme that was being concocted by Cimmer": page 24.

[153] The *NJ Decision* does not discuss Mr. Cimmer's allegations of fraud on

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the Director of Corporations; instead, the *NJ Decision* found at page 14 that Mr. Cimmer caused lawyers to make fraudulent registrations at the Saskatchewan corporate registry. It also does not discuss fraud on Canada Revenue Agency. That said, Mr. Cimmer's fraud allegations all trace directly back to the same sham transaction to set up the 60 shares in Mr. Lunemann's name. Mr. Cimmer is not pointing to any newly discovered fraud. At best, he identifies two additional government agencies that may have been impacted by the underlying fraud. The NJ Action may have featured evidence concerning them as well, but I cannot determine that. I conclude that Mr. Cimmer has not satisfied the onus of establishing that they were not before the New Jersey court, but beyond that, how could he prove that when the underlying sham transaction involving the 60 shares was squarely before the NJ court and was adjudicated there?

[154] The fundamental problem faced here by Mr. Cimmer is that he offers nothing new (or material) that might undermine the findings that led to the Judgment. He has failed to point to evidence of fraud that was undetectable by the New Jersey court because it was undiscoverable through the exercise of due diligence at the time. Indeed, the parties are not arguing about the exercise of diligence at all because Mr. Cimmer identifies no new evidence (apart from the brief recording from the phone call which is not on the record of this application and which in any event proves nothing).

[155] Instead, Mr. Cimmer seeks to rehash and relitigate on the basis that the New Jersey court was insufficiently troubled by the evidence of fraud that he led in that proceeding. That court may have been right or wrong to not be as troubled as Mr. Cimmer wanted it to be, but that is not this Court's determination to make within this application and is exactly what *Beals* cautioned against at para. 44.

[156] Accordingly, Mr. Cimmer's fraud argument fails.

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(d) Should the Court refuse to register the Judgment because it contains declaratory relief?

[157] The answer to this is no, though some modifications to the Judgment may be appropriate.

[158] Mr. Cimmer relies on *Shell Canada Limited v CIBC Mellon Trust Company*, 2003 ABQB 1058, [2004] 4 WWR 393 [*Shell Canada*] for the proposition that foreign declaratory judgments are not enforceable in Canada. He points to the following excerpt:

> [29] A New York declaratory judgment may be unenforceable in Canada. Foreign in personam judgments are not directly enforceable in Canada. In order to be enforceable by Canadian courts, a foreign judgment must be for a definite sum of money: J.-G. Castel and J. Walker, ***Canadian Conflict of Laws***, 5th ed. (Markham: LexisNexis 2003) at 271. In order to be enforceable by a Canadian court, a foreign judgment must be for a definite sum of money: *ibid* at 289. If this Court were to decline jurisdiction therefore, DTC and Cede, if successful in a New York action, would likely find a declaratory judgment made in the New York court to be unenforceable in Canada. They would then be required to re-litigate this issue in Canada in order to obtain an enforceable judgment. The potential for such a result suggests that New York is not the appropriate forum for this action. This potential constitutes an advantage if the within proceeding is allowed to continue in this Court.

[159] In this case, Mr. Cimmer points to two instances of declaratory relief in the Judgment that he says are incapable of enforcement here.

[160] First, the New Jersey court ordered that the settlement agreement between the Niessners and Mr. Lunemann was enforceable, and any interpretation or enforceability issues were to be presented to a specific judge.

[161] Second, the New Jersey court ordered that certain option and loan agreements between Mr. Cimmer and Mr. Lunemann were void *ab initio*.

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[162] For the following reasons, I cannot agree to Mr. Cimmer's position that those declarations cannot be enforced in Saskatchewan, nor that they render the Judgment incapable of being enforced.

[163] First, s. 7 of the *Act* specifically contemplates that non-monetary foreign judgments may be enforced, though it may be appropriate to modify such a judgment or make other orders to govern its enforcement.

[164] Second, *Shell Canada* did not decide that foreign judgments containing non-monetary relief cannot be enforced in Canada. It spoke only to foreign judgments that were limited to non-monetary relief and did not contain a judgment for a definite sum of money. Here, the Judgment includes an award of a specific sum.

[165] Third, after *Shell Canada* was decided, *Pro Swing Inc. v Elta Golf Inc.*, 2006 SCC 52, [2006] 2 SCR 612 [*Pro Swing*], held that non-monetary foreign judgments, including for injunctive relief are capable of enforcement. There may be exceptions and nuances, but no general rule exists. As well, in *Specialist Hygiene Solutions Limited v Marsh*, 2017 SKQB 258, 12 CPC (8th) 355, this Court determined that in appropriate circumstances it is possible to enforce foreign judgments granting injunctive relief. Also see *PT ATPK Resources TBK (Indonesia) v Hopaco Properties Limited*, 2014 ONCA 466, and *Lanfer v Eilers*, 2021 BCCA 241, 460 DLR (4th) 599, on which the applicants rely.

[166] Fourth, the declarations made in the Judgment were not, on my reading, intended to exist independently (in the sense of a stand-alone declaration). Rather, they supported the New Jersey court's determination of damages.

[167] Fifth, even if this Court were to decline to grant judgment that expressly reflects those two heads of declaratory relief, *res judicata* would still operate to prevent Mr. Cimmer from relitigating those determinations by the New Jersey court.

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[168] Accordingly, I determine that even though the Judgment provides for declaratory relief, that does not prevent its registration and enforcement pursuant to the *Act*.

[169] The issue does not end there, however. The question remains whether the relief granted under the Judgment should be modified when it is registered here. At para. 30 of *Pro Swing*, the Supreme Court identified numerous considerations for guiding Canadian courts in crafting domestic orders to enforce foreign judgments. Most relevant here are whether the terms of the Judgment are clear and specific enough to ensure that the defendant knows what is expected from him, and whether the originating court retained the power to issue further orders.

[170] I am satisfied that the Judgment is clear and specific enough. Mr. Cimmer raises no issue concerning that – he objects simply to the fact that the Judgment contains declaratory relief. And there should be little question as to what is expected of him, which is to pay the amount of the Judgment after conversion to Canadian currency. As above, the declarations do not require action from him.

[171] The New Jersey court retained the power to make further orders, but that was 2019 and this matter was argued in 2024. Much has changed since 2019. Keeley Lake Lodge has been sold. All that remains is money held in trust. If I grant a domestic judgment to enforce the money portion of the Judgment, that will address what the applicants say is the final outstanding matter in issue. Given that, it seems improbable that a need exists to incorporate into a domestic judgment a *proviso* that the New Jersey court retains the power to make further orders regarding interpretation or enforceability issues when none should arise.

[172] At the time of oral argument in this matter, the applicants had not yet filed draft orders. Their failure is not a bar to obtaining relief, but it means that I have not yet received argument on the precise form of judgment to be granted by this Court. Below

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I will direct the opportunity for the parties to file concise written submissions as to the terms of the judgment this Court should grant.

> *(e) Should the Court refuse to enforce the Judgment because the NJ Action violated Saskatchewan law in that it was a derivative action commenced in the New Jersey court contrary to s. 18-2(2) of The Business Corporations Act, 2021?*

[173] The answer to this question is no.

[174] Mr. Cimmer appears to have advanced this argument for the first time during oral argument. He spent little time on it, mainly posing the question of how the Niessners could sue Keeley Lake in Saskatchewan while suing on its behalf in New Jersey. He contends that the Niessners did not comply with s. 18-2(2) of *The Business Corporations Act, 2021*.

[175] That might have been a valid concern in the past, but circumstances have changed. Mr. Cimmer applied in New Jersey to have that court defer to Saskatchewan. That failed, and the New Jersey court heard the trial and rendered judgment. In 2017, he applied in Saskatchewan for an anti-suit injunction to prevent the NJ Action from proceeding. That application was dismissed by this Court. Mr. Cimmer initiated an appeal that he then (according to the Saskatchewan Court of Appeal) allowed to languish, such that the appeal was not heard until March 2022. In *Cimmer v Niessner*, 2022 SKCA 60, [2023] 2 WWR 153, the Court of Appeal determined that Mr. Cimmer's appeal concerning the anti-suit injunction was moot and should not be heard, thus dismissing his appeal on that issue.

[176] In its decision, Court of Appeal expressly refrained from commenting on the correctness of the underlying determinations by the chambers judge. I therefore will not place any reliance on the chambers decision. However, the mootness determination is relevant. Mr. Cimmer had a live appeal that for several years he could have pursued before the NJ Action was decided. After he permitted that appeal to languish, the notion

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that I should refuse to enforce the Judgment now because the New Jersey court might later have improperly applied Saskatchewan legislation concerning derivative actions is offensive to the principle of judicial comity. Again, this is not an opportunity to relitigate the NJ Action, nor to hear an appeal of it.

[177] Moreover, the New Jersey court granted little or no relief in favour of Keeley Lake in the Judgment. The principal relief granted by the New Jersey court was made in favour of Niessners. Further, Mr. Cimmer filed no evidence or argument to show this Court how particular portions of the Judgment would offend Saskatchewan law. Nor has he explained what difference it could have made if Keeley Lake had not been included as a plaintiff. Even if the inclusion of Keeley Lake as a plaintiff in the NJ Action might be properly characterized as a derivative action on behalf of the corporation, what matters now is the orders made in the Judgment in favour of the Niessners.

[178] Ultimately, this issue is a pointless distraction. The remaining issue to be addressed among the parties relates to entitlement to the money held in trust that was derived from the sale of the business. The New Jersey court determined that Mr. Cimmer had no interest in Keeley Lake. The money judgment stemmed from that finding and the court's determination that the settlement agreement between the Niessners and Mr. Cimmer was valid.

[179] Therefore, I will not give effect to Mr. Cimmer's stance on the derivative action issue. His argument fails.

(f) Other potential grounds for refusal under s. 4 of the Act

[180] Mr. Cimmer raised no concerns about s. 4(b) (judgment having been satisfied). The applicants flagged certain aspects of the Judgment that were satisfied. Those elements of the Judgment will not be incorporated into this Court's judgment.

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[181] Mr. Cimmer did not argue anything under s. 4(c). The evidence establishes that no appeal in New Jersey remains pending, and all appeal periods have expired.

[182] Mr. Cimmer advanced no arguments under s. 4(d) (that he was not lawfully served, or that judgment was entered in default). He participated fully in the NJ Action.

[183] He also did not argue that the NJ Action was conducted contrary to the principles of procedural fairness and natural justice under s. 4(f). That of course would be his onus to establish.

[184] There are no remaining grounds in s. 4 to address.

Conclusion regarding grounds for refusal under s. 4 of the Act

[185] I therefore determine that Mr. Cimmer has failed to establish a basis to refuse to enforce under s. 4 of the *Act*. My analysis above addresses the issues raised by Mr. Cimmer, which implicated ss. 4 (a), (e), (g), and (h).

E. COSTS

[186] I begin by observing that Mr. Lunemann's counsel barely played a role beyond a watching brief. Accordingly, I order no costs for or against Mr. Lunemann. Nothing required him to send counsel to observe: *Polsfut v Sembalerus*, 2018 SKQB 137.

[187] The remaining discussion relates to Mr. Cimmer and the Niessners.

[188] There are three aspects to costs in this matter. The first concerns Mr. Cimmer's attempt to rely on affidavits on other court files under Rule 13-38. I order that Mr. Cimmer pay costs to the Niessners in respect of that. As should be apparent

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from my reasons above for dismissing Mr. Cimmer's application concerning the affidavits, that application was entirely unfounded and highly objectionable. It required the investment of considerable time by the Niessners' counsel to respond. I fix costs of that application at $8,000 in favour of the Niessners. I consider that to be an appropriate level of enhanced costs, but short of solicitor-client costs.

[189] The second aspect relates to the late filing of the certified copy of the Judgment. Mr. Merchant provided brief submissions during oral argument and then wrote a brief letter to the Court in response to correspondence from the Niessners' counsel. There is nothing to suggest that he invested much time into the issue at all. In contrast to the above issue concerning the affidavits, the failure to file the certified copy arose from a mere oversight. I fix costs in favour of Mr. Cimmer at $500, which shall be offset against the costs that I order Mr. Cimmer to pay.

[190] The substantive application is the third aspect. The Niessners are entitled to costs payable by Mr. Cimmer. They seek costs on a solicitor-client basis, or on column 3 under the tariff. If my notes are correct, Mr. Cimmer argues for costs on column 2 of the tariff.

[191] The principles governing awards of solicitor-client costs were outlined in *Siemens v Bawolin*, 2002 SKCA 84, 219 Sask R 282 [*Siemens*]. In brief, such costs are awarded only in rare and exceptional cases, and primarily where the party against which they are sought has behaved in a scandalous, outrageous or reprehensible manner in connection with the litigation itself.

[192] In my view, those factors could apply to Mr. Cimmer's conduct in bringing the application under Rule 13-38 concerning the affidavits, but I have fixed those costs at what I consider to be a level of enhanced costs.

[193] Mr. Cimmer's other conduct in this application was questionable. He

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made many arguments that were entirely and obviously unsupportable at law. It would be generous to characterize his positions as representing a misapprehension of the state of the law. He sought to file an affidavit far after the deadline that was held inadmissible in the *Evidentiary Fiat*. He filed another affidavit that had substantial portions struck in the *Evidentiary Fiat*, but that is also true of the Niessner Affidavit to a lesser extent. Bardai J. ordered in the *Evidentiary Affidavit* that costs of the applications decided there would follow the cause.

[194] I do not equate questionable with reprehensible and am therefore not persuaded that *Siemens* supports an order of solicitor-client costs in this case.

[195] That leaves the question of whether to fix costs or make an award under the tariff. I find it appropriate to use the tariff, which can be particularly useful in complex matters with multiple appearances. The column must then be determined. This was a complex matter that was made more complex than necessary by how it was approached by Mr. Cimmer. I conclude that an award under Column 3 is appropriate. The Niessners shall have costs of this application (except in relation to the application under Rule 13-38 which I addressed separately above) to be taxed under Column 3.

F. CONCLUSION

[196] The applicants have established an entitlement to have the Judgment registered in Saskatchewan, such that a domestic judgment should issue in their favour.

[197] On October 7, 2024, the applicants filed the form of draft order that they seek. There are two parts to that order, being the main body and Schedule 1, which represents the terms that this Court would order. The respondents shall have 14 days from the date of this judgment to serve and file brief and concise written submissions concerning the terms of the draft order, including Schedule 1. Following the expiry of the 14 days, or the service of such submissions by the respondents, whichever occurs

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first, the applicants shall have 7 days to serve and file brief and concise written submissions in response. This is not an opportunity to re-argue matters determined in this judgment, but merely to address the form of order. Of course, the parties are at liberty to agree on a form of judgment and to submit it by consent.

[198] Costs are ordered as discussed in the preceding section.

J.
D.G. GERECKE

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