KING'S BENCH FOR SASKATCHEWAN

Citation: **2025 SKKB 76**

Date: **2025 06 10**
Docket: QBG-SA-00994-2021
Judicial Centre: Saskatoon

BETWEEN:

DARIUSZ CZERNEWCAN

Plaintiff

- and -

BLUE CROSS LIFE INSURANCE COMPANY OF CANADA and JOHN DOE CORPORATION

Defendants

Counsel:

James W. Ludwar — for the plaintiff
Robert J. Affleck — for the defendant, Blue Cross Life Insurance Company of Canada

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FIAT
June 10, 2025

ELSON J.

Introduction

[1] The plaintiff was previously employed by two companies that carried on joint trucking operations. When his employment was terminated in 2016, the plaintiff

filed complaints to challenge his termination under the *Canadian Human Rights Act*, RSC 1985, c H-6, and the *Canada Labour Code*, RSC 1985, c L-2. He subsequently settled both complaints in return for financial consideration. As part of the settlement, the plaintiff signed minutes of settlement and a release.

[2] In this action, the plaintiff pursues a claim for long-term disability benefits from the defendant, Blue Cross Life Insurance Company of Canada [Blue Cross]. Blue Cross served as the provider of group disability insurance for employees of one of the joint employers. The claim against Blue Cross is partly based on the plaintiff's successful request for disability benefits prior to losing his job.

[3] Blue Cross now contends that the protection afforded by the settlement and release extends to it as well. Aside from this amounting to a defence to the plaintiff's claim, Blue Cross posits that the plaintiff's action defies the settlement and release, thereby justifying it being struck as an abuse of the Court's process pursuant to Rule 7-9(2)(e) of *The King's Bench Rules*.

[4] The argument advanced by Blue Cross engages two principal considerations: (1) the judicial approach to the interpretation of release documents, including interpretations that might afford protection to third parties; and (2) the circumstances under which an action can or should be struck as an abuse of process.

[5] For the reasons that follow, I find that the application must be dismissed.

Background

[6] This description of the relevant background is drawn from the pleadings and the affidavit of the Director of Life and Disability Services for Medical Services Incorporated, which operates Saskatchewan Blue Cross [SBC]. SBC is the third-party administrator for Blue Cross. The affidavit exhibited considerable material, including documents produced by the plaintiff during questioning and disclosure proceedings.

Some of these documents pertain to the plaintiff's complaint to the Canadian Human Rights Commission [CHRC] and its resolution. To the extent the evidence is described here, I understand there is no issue about its accuracy.

[7] It should be noted that the documents relating to the plaintiff's CHRC complaint include a written narrative he prepared for that complaint. That narrative disclosed some background information related to the plaintiff as well as his history with the employers in question.

[8] The plaintiff, a resident of British Columbia, had worked as a long-haul truck driver prior to starting work for Ron Foth Trucking [RFT] and Q-Line Trucking [Q-Line] in September 2014. The narrative described RFT as a small trucking company headquartered in Saskatoon. It was contracted exclusively to Q-Line, also headquartered in Saskatoon. It is agreed that both companies were properly identified as the plaintiff's joint employers.

[9] The plaintiff's narrative goes on to describe the circumstances that led to his complaint, beginning in 2015. For the purposes of this fiat, I will touch briefly on these circumstances and confine my review to those facts that pertain, even in a collateral way, to this application. Briefly summarized, the relevant circumstances, as described in the narrative, included the following:

a. In September 2015, the plaintiff refused to perform work which he regarded as unsafe and contrary to federal Occupational Health & Safety regulations (*Canada Occupational Health and Safety Regulations*, SOR/86-304).

b. In December 2015, the plaintiff was told that he would no longer be paid "layover pay", something he regarded as an industry standard.

c. The plaintiff's assigned truck developed a water leak inside the cabin,

which was left unrepaired and ultimately produced rot and mould, leading to the plaintiff developing certain health issues.

d. The plaintiff's health issues could not be adequately addressed by his healthcare providers due to his schedule.

e. In February 2016, the plaintiff had a confrontation with a Q-Line dispatcher who threatened to withhold his wages, whereupon the plaintiff informed his employer he would be seeking a new job.

f. On March 21, 2016, while the plaintiff remained employed with RFT/Q-Line, his family physician advised him that his health problems had worsened and recommended he not return to work. The physician issued a medical certificate to allow the plaintiff to apply for Employment Insurance sickness benefits. The plaintiff sent the medical certificate to both RFT and to Q-Line that same day.

g. The narrative then describes three-way email communication between the plaintiff and relevant personnel from both RFT and Q-Line. Blue Cross regards the wording of this part of the narrative as significant. Verbatim, it reads as follows:

> Between March 21-23, 2016, in 3-way email communication between myself, Colleen Foth and Lindsay Downing, I was advised that instead of Employment Insurance, I had to apply for Short Term Disability Insurance through Q-Line Trucking's insurer, and that Ron Foth Trucking and Q-Line trucking would continue my Blue Cross health benefits for the duration of my disability.
>
> On March 24, 2016, I submitted a Short Term Disability application for Blue Cross, which was approved and I collected said benefits.

> On April 29, 2016, I received an email from Blue Cross advising me that I was no longer an employee of Q-Line Trucking and that my benefits had been terminated.

[10] The narrative essentially concludes by saying that the plaintiff sent numerous email messages to RFT and Q-Line, asking for his Record of Employment and reasons for the termination of his employment and his benefits. After receiving no reply, he filed a complaint of unjust dismissal under the *Canada Labour Code* on June 7, 2016, followed by two essentially identical complaints with the CHRC on November 15, 2016. One CHRC complaint was filed with respect to RFT and the other with respect to Q-Line. In the CHRC complaints, the matters in which the plaintiff alleged discrimination included employment, discriminatory policy or practice, and equal wages. The grounds of discrimination alleged were confined to his disability.

[11] The plaintiff's CHRC complaints proceeded to mediation, following which the parties achieved a settlement on March 23, 2017. Under the settlement, RFT and Q-Line agreed to pay the plaintiff $25,000.00 as general damages pursuant to s. 53 of the *Canadian Human Rights Act*. The terms of the settlement also required the plaintiff to withdraw his complaint under the *Canada Labour Code* within 30 days of the CHRC advising that it had approved the settlement. The Minutes of Settlement [Minutes] included a provision relating to releases and discharges required by the settlement. This provision, in para. 3 of the Minutes, reads as follows:

> 3. The Complainant and Respondents agree that this settlement is in full and final resolution of all issues raised and incidents alleged in complaints (20161408 & 20161409). The Complainant forever, releases and discharges the Respondents, Directors, Officers and all other employees from all claims or causes of action and demands of every nature arising out of or in any way related to the complaints or the facts surrounding the complaints. For further certainty, the Complainant will forthwith execute the form of release attached hereto as Schedule A and provide the same to the

> Respondent at the same time a signed copy of these Minutes of Settlement are provided.
>
> [Emphasis added]

[12] The plaintiff signed the release document [Release] on March 27, 2017, the same date he signed the Minutes. It consists of eight substantive paragraphs immediately preceding the signature paragraph. Those eight paragraphs read as follows:

> **RELEASE**
>
> **DARIUSZ CZERNEWCAN**, (hereinafter referred to as the "Releasor"), for and in consideration of the One Dollar ($1.00) and such further and other consideration, the sufficiency of which is hereby acknowledged, paid by Ron Foth Trucking Ltd. and/or Q-Line Trucking, (hereinafter collectively referred to as the "Releasee"), the receipt and sufficiency of which is hereby acknowledged, does remise, release and forever discharge the Releasee from any and all actions, causes of actions, contracts, covenants, whether, expressed or implied, claims and demands for damages, indemnity, costs, interest, loss or injury of every nature and kind whatsoever and howsoever arising whether statutory or otherwise, which the Releasor may heretofore have had, may now have, or may hereinafter have in any way relating to the hiring of, employment by and cessation of the employment of the Releasor by the Releasee and in the provision or extension of benefits to the Releasor by the Releasee.
>
> **AND FOR THE SAID** consideration the Releasor agrees, in addition to the above, to withdraw his complaints filed under the *Canadian Human Rights Code* and the *Canada Labour Code*.
>
> **AND FOR THE SAID** consideration the Releasor further covenants and agrees to save harmless and indemnify the Releasee from and against all claims, charges, taxes, penalties or demands which may be made by the Minister of National Revenue requiring the Releasee to pay income tax, charges, taxes or penalties under the *Income Tax Act* (*Canada*) in respect of income tax payable by the Releasor in excess of the income tax previously withheld.
>
> **AND FOR THE SAID** consideration the Releasor further covenants and agrees to save harmless and indemnify the Releasee in respect of any and all claims, charges, taxes or

> penalties and demands which may be made on behalf of or related to the Employment Insurance Commission and the Canada Pension Commission under the applicable statutes and regulations with respect to any amounts which may in the future be found to be payable by the Releasee in respect of the Releasor.
>
> **AND IT IS HEREBY DECLARED** that the terms of this settlement are fully understood; that the amount of the consideration therein is the sole consideration of this Release and that the said consideration is accepted voluntarily, uninfluenced by representations on the part of the Releasee or any one representing the Releasee, for the purpose of making a full and final compromise, adjustment and settlement of all claims for injury, loss or damage arising out of or connected in any way with the issues and claims aforementioned.
>
> **IT IS FURTHER** acknowledged and agreed by the Releasor that the Releasee has fulfilled its obligations, if any, to the Releasor pursuant to any applicable provincial or federal labour and human rights legislation, the *Canada Labour Code* and the Releasor will not pursue nor commence any proceedings thereunder or under any other legislation or contract in respect of the Releasor's employment with the Releasee, the Releasor's termination therefrom or the provision or extension of benefits by the Releasee to the Releasor.
>
> **IT IS ACKNOWLEDGED** and agreed that the Releasee, by the payment of the consideration and aforesaid does not in any way admit liability to the Releasor.
>
> **THIS RELEASE** binds as well the Releasor and his administrators, successors and assigns and each of them and enures to the benefit as well to the Releasee, and its administrators, successors, assigns and insurers of the Releasees and each of them and wherever the singular number is used in this Release, the same shall include the plural where the context so requires.
>
> [Emphasis added]

[13] After the settlement, the plaintiff commenced this action, originally out of the Judicial Centre of Regina but later transferred to the Judicial Centre of Saskatoon. In his statement of claim (which includes some improper pleading of evidence), the

plaintiff asserts that the defendant wrongfully denied him long-term disability benefits, which he had sought on July 19, 2016. The claim's prayer for relief seeks general damages in the amount of the benefits he should have received, special damages, damages for mental distress, pre-judgment interest and costs on a solicitor-client basis.

[14] In its original statement of defence, Blue Cross simply pleaded assertions that the plaintiff did not qualify for long-term disability benefits under the group policy. Specifically, it asserted that the evidence did not support any medical or functional impairment or limitations that would justify receipt of long-term disability benefits. No other substantive defences were pleaded.

[15] Following oral questioning of the plaintiff, Blue Cross brought this application to strike the statement of claim on the grounds that it amounted to an abuse of process. More particularly, Blue Cross asserted that, due to the Minutes and the Release, the plaintiff was estopped from pursuing the claim. Among the grounds raised, Blue Cross asserts issue estoppel, collateral attack, and/or *res judicata*. In support of this application, Blue Cross presented evidence it gained from the questioning of the plaintiff, which is essentially the evidence I have described in this fiat.

[16] After the matter was initially argued before me, I wrote an interim fiat in which I expressed concerns about the propriety of Blue Cross raising these issues in the manner it did. My concerns were twofold. The first concern pertained to whether Blue Cross's argument properly engaged an abuse of process submission. In this regard, I commended to the parties' attention the then recent judgment of the Saskatchewan Court of Appeal in *Nelson v Teva Canada Limited*, 2021 SKCA 171. There, the Court concluded, among other things, that a defendant's abuse of process argument – also based on the assertion of a collateral attack on an earlier proceeding – reflected a potential defence on the merits. This conclusion prompted the Court of Appeal to set aside the chambers judge's finding in this Court.

[17] The second concern surrounded the fact that, in its statement of defence, Blue Cross had not pleaded any of the material facts it was relying on in its application.

[18] Following the interim fiat, the defendant presented the Court with a draft amended defence. The parties also filed supplemental briefs. Due to scheduling issues, primarily related to my availability, the Court could not rehear the application until the fall of 2024.

Positions of the Parties

[19] Blue Cross makes two interrelated submissions in respect of this application. The first submission relates to the propriety of it asserting that the circumstances, now pleaded in its statement of defence, support a finding that the plaintiff's claim is an abuse of process. The second submission, which it has maintained throughout, is that the only reasonable interpretation of the Settlement and Release is that its protection extends to the plaintiff's claim against Blue Cross.

[20] The plaintiff's argument simply counters the two submissions advanced by Blue Cross. He contends that the circumstances surrounding the negotiation and signing of the Release do not support the position advanced by Blue Cross. Moreover, the plaintiff also argues that, at best, Blue Cross's position amounts only to a defence that can be addressed at trial.

Issues

[21] Although some of the arguments advanced by Blue Cross engaged concepts such as issue estoppel and *res judicata*, I am satisfied that all the arguments advanced come down to only one issue. That issue, presented in the form of a question, is this: Does the interpretation of the Release make it plain and obvious that the plaintiff's action against Blue Cross amounts to an abuse of the process of the Court?

Applicable Law

[22] In my analysis of the applicable law, I think it best to begin with a discussion of the legal issues relating to the interpretation of release documents, including interpretations that may, or may not, involve persons or entities who are not parties to release agreements. While the discussion will not be as extensive as it would be for a trial judgment, I think it will be sufficient to allow for a focused consideration of Blue Cross's application to strike.

Interpretation of Releases

[23] At the outset of this discussion, I am obliged to acknowledge the assistance and guidance I gained from certain published material. Aside from my basic review of the relevant case law, I found two published works to be especially helpful. One of these works is a text, Fred D. Cass, *The Law of Releases in Canada* (Aurora, Ont: Canada Law Book, 2006). The other published work is an article, Daniele Bertolini, "Releasing the Unknown: Theoretical and Evidentiary Challenges in Interpreting the Release of Unanticipated Claims" (2023) 48:2 Queen's LJ at 61 (2023 CanLIIDocs 2125). I extend my regards to the authors of both publications for their work and analysis.

[24] The law relating to the interpretation of release documents has undergone somewhat of an evolution in the last 150 years. At one time, releases were simply interpreted according to what became known as the "Blackmore Rule", drawn from the 1870 House of Lords judgment in *London & South Western Railway v Blackmore* (1870), LR 4 HL 610. There, at pp. 623-24, Lord Westbury articulated what came to be seen as a special rule for the interpretation of release documents at pp. 623-24:

> The general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties when the release was given. But a dispute that had not

> emerged, or a question which had not at all arisen, cannot be considered as bound and concluded by the anticipatory words of a general release.

[25] As I note later in this decision, the Blackmore Rule has now become subsumed within an analytical framework that applies equally to the interpretation of contracts. Even so, it seems to me that the Blackmore Rule has had a robust history in Canadian law that cannot be easily ignored. This history is represented by varying interpretations of the Rule, some of which have arguably narrowed its scope. An important part of that history is the judgment of the New Brunswick Court of Appeal in *White v Central Trust Co.* (1984), 7 DLR (4th) 236 (NBCA) [*White*]. In *White*, La Forest J.A. (as he then was) offered some general observations on the application of the Blackmore Rule, followed by a commentary on the suggestion, arguably apparent in Lord Westbury's words, that the reference to "contemplation of the parties" called for evidence of the parties' *subjective* understanding. In these regards, La Forest J.A. wrote the following at page 247:

> Before entering into an examination of the particular releases involved in this case and the circumstances under which they were executed, it may be useful to make some general remarks regarding the manner in which releases are to be construed. Like other written documents, one must seek the meaning of a release from the words used by the parties. Though the context in which it was executed may be useful in interpreting the words, it must be remembered that the words used govern. As in other cases, too, the document must be read as a whole. This is particularly important to bear in mind in construing releases, the operative parts of which are often written in the broadest of terms. Thus reference is frequently made to recitals to determine the specific matters upon which the parties have obviously focused to confine the operation of general words. As Lord Westbury stated in the House of Lord's case of *Directors of London & South Western R. Co. v. Blackmore* (1870), L.R. 4 H.L. 610 at 623: "The general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given."
>
> By referring to what was in the contemplation of the parties,

> Lord Westbury was, of course, not opening the door to adducing evidence of what was actually going on in their minds, still less to making inferences about it. Such considerations are relevant solely to issues such as undue influence, mistake, fraud and the like which have no application here. What the statement quoted means is that in determining what was contemplated by the parties, the words used in a document need not be looked at in a vacuum. The specific context in which a document was executed may well assist in understanding the words used. It is perfectly proper, and indeed may be necessary, to look at the surrounding circumstances in order to ascertain what the parties were really contracting about. …
>
> [Emphasis added]

The above passage was later cited with approval by the Supreme Court of Canada in *Hill v Nova Scotia (Attorney General)*, [1997] 1 SCR 69 at para 20.

[26] The jurisprudential history on the interpretation of releases now culminates with the judgment of the Supreme Court of Canada in *Corner Brook (City) v Bailey*, 2021 SCC 29, [2021] 2 SCR 540 [*Corner Brook*], which is now regarded as the leading and most clarifying authority on the subject. An understanding of *Corner Brook* and its significance is assisted by a brief description of its facts. The case involved two civil actions, both arising from a collision between a motor vehicle driven by Plaintiff B and a pedestrian, Plaintiff T. At the time of the collision, Plaintiff T was engaged in road work as an employee with the City of Corner Brook. Plaintiff B commenced an action against the City for property damage and personal injury arising from the collision. Meanwhile, Plaintiff T brought a separate personal injury action against Plaintiff B. The City, unaware of Plaintiff T's action, settled Plaintiff B's claim. Plaintiff B, who had already been served with Plaintiff T's claim, signed a broadly worded release in consideration for the settlement funds received from the City. Later, Plaintiff B brought third party proceedings against the City for contribution and indemnity in respect of Plaintiff T's claim. The City responded by applying for a summary trial during which it argued that Plaintiff B's release barred her right to pursue

a third party claim.

[27] The decisions at the trial and first appellate levels differed. At first instance, the City was successful. The application judge concluded that the parties to the release had contemplated all claims Plaintiff B might have relating to the collision. In particular, the application judge focused on the fact that Plaintiff B knew of the other action at the time she signed the release. The Court of Appeal of Newfoundland and Labrador unanimously allowed the appeal. It concluded that the words and the surrounding circumstances, including the related exchange of correspondence between the parties, were all consistent with the release being interpreted as pertaining only to the action commenced by Plaintiff B.

[28] Before the Supreme Court of Canada, the appeal was allowed. While the Court agreed that the surrounding factual matrix was an important factor in the analysis, it rejected the perspective adopted by the Court of Appeal. In this respect, Rowe J., described the Court's perspective of the surrounding circumstances at para. 53:

> [53] … Both the City and the Baileys were aware that Mrs. Bailey had struck a City employee with her car, and both were aware that the other knew. This is obvious from the pleadings exchanged by the City and the Baileys in the Bailey Action. Both the City and Mrs. Bailey therefore knew, or ought to have known on an objective basis, that the City employee who had been hit may have an outstanding claim against Mrs. Bailey, or the City, or both, and that such a claim could put the City and Mrs. Bailey in an adverse position to one another, where it would be to both of their advantages to blame the damage on the other. This aspect of the factual matrix weighs in favour of interpreting the words of the release as including Mrs. Bailey's third party claim in the Temple Action. …

[29] In his analysis of the judgment in *Corner Brook*, Prof. Bertolini notes, at pp. 80-81 of his article, three clarifications which he regards as crucial. The first clarification is that the Blackmore Rule no longer stands by itself. In this respect, Rowe J. noted, at paras. 33-34, that the Blackmore Rule is now subsumed in the

approach to the interpretation of contracts articulated in *Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53, [2014] 2 SCR 633 [*Sattva*]. As described at para. 47 of *Sattva*, the proper approach for a court in the interpretation of the written contract is that it "must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract." (Emphasis added)

[30] The second clarification noted by Prof. Bertolini is drawn from the comment of Rowe J., in *Corner Brook* at para 27, that a sufficiently broadly worded release could cover unknown claims and that a releasor bears a degree of risk when signing such a document. In this respect, Rowe J. wrote the following:

> [27] A release can cover an unknown claim with sufficient language, and does not necessarily need to particularize with precision the exact claims that fall within its scope. In entering into a release, the parties bargain for finality, or as Lord Nicholls put it, "to wipe the slate clean": *Ali* [[2001] UKHL 8, [2002] 1 AC 251], at para. 23. The releasor takes on the risk of relinquishing the value of the claims he or she might have had, and the releasee pays for the guarantee that no such claims will be brought. The uncertainty or risk that is allocated to the releasor is precisely what the releasee pays for. Of course, difficulty can arise in deciding what wording is sufficient to encompass the unknown claim at issue in a given case. However, it is clear that releases can encompass such claims, and the Blackmore Rule has not been interpreted to hold otherwise.
>
> [Emphasis added]

[31] The third clarification that Prof. Bertolini regards as crucial involves the suggestions by the Court about the type of language parties could use to reduce uncertainty over the scope of a release. In particular, at para. 41, Rowe J. observed that "releases that are narrowed to a particular time frame or subject matter are less likely to give rise to tension between the words and what the surrounding circumstances indicate the parties objectively intended."

[32] Before leaving Prof. Bertolini's article, I found it noteworthy that, at p. 81 of his article, he identified four specific principles that Canadian courts have observed when interpreting releases. In his view, these principles apply irrespective of whether a court is inclined to follow a broad or narrow interpretation. The four principles, and the authorities Prof. Bertolini cites to support them, are as follows:

> 1. The goal of contractual interpretation is to ascertain the objective *intention* of the parties at the time of contract formation; [*Sattva*, at paras 47-48]
>
> 2. The scope of the release is limited to what was *in the contemplation of the parties* when the release is given; [*White*, at 248]
>
> 3. To determine the objective intention of the parties and the issues within their specific contemplation, courts should consider the *language* of the release in light of the *surrounding circumstances*; [*Corner Brook*, at para 43] and
>
> 4. A sufficiently broadly worded release can cover claims unknown to the parties at the time the release is given. [*Corner Brook*, at para 27]
>
> [Emphasis in original]

Interpretation of Releases and Third Parties

[33] As forms of contract, release documents are governed by the usual principles and concepts recognized in contract law. This understanding has become especially clear with the judgment in *Corner Brook.*

[34] One well known concept of contract law is the doctrine of privity of contract. Simply stated, this doctrine stipulates that the terms of the contract are binding only on the parties to the contract, each of whom gives consideration as part of the contractual obligation. Where the doctrine applies, third parties or other strangers to the contract have no rights or obligations under it.

[35] Having said this, contract law also recognizes specific exceptions to the doctrine of privity, the application of which will depend on the express or implied intention of the parties. The most notable exceptions arise in circumstances where trustees, agents, or assignees become involved in the formation or conduct of a contract. These exceptions can also apply to contracts incorporating releases from liability.

[36] Two judgments of the Supreme Court of Canada in the 1990s recognized a special exception to the doctrine of privity in the context of agreements to limit liability. These decisions were *London Drugs Ltd. v Kuehne & Nagel International Ltd.*, [1992] 3 SCR 299 [*London Drugs*], and *Fraser River Pile & Dredge Ltd. v Can-Dive Services Ltd.*, [1999] 3 SCR 108 [*Fraser River*]. From these decisions, the notion of a "principled exception" to privity of contract arose, applicable to both limitations of liability and release contracts.

[37] In *London Drugs*, the Supreme Court of Canada held that a limitation of liability clause in an equipment storage contract also afforded protection to the employees of the storage company (warehouseman). In *The Law of Releases in Canada*, citing from para. 257 of the judgment, the author concisely described the basis of the Court's analysis at page 110 (footnotes omitted):

> … The Court in *London Drugs Ltd.* took the view that special considerations apply when employees seek to rely on a limitation of liability clause contained in a contract between their employer and a customer of the employer. It held that, in order for employees to obtain the benefit of such a contractual provision, the following requirements must be met:
>
> (1) the limitation of liability clause must, either expressly or impliedly, extend its benefit to the employees (or employee) seeking to rely on it; and
>
> (2) the employees (or employee) seeking the benefit of the limitation of liability clause must have been acting in the course of their employment *and* must have been performing the very services provided for in the contract between their

> employer and the plaintiff (customer) when the loss occurred.
>
> [Emphasis added]

In *Fraser River*, a Court reaffirmed the principle articulated in *London Drugs* but extended it beyond employer-employee relationships.

[38] In the context of release contracts, it may be difficult to determine whether the benefit of the release extends to persons who are not parties to the contract, which is the first requirement set out in *London Drugs*. This difficulty may even arise where the non-party, or "third party beneficiary", is named as a releasee. In *The Law of Releases in Canada* at 111, Mr. Cass made some general observations about situations involving third party beneficiaries, including the risk of uncertainty and the potential need for evidence of surrounding circumstances to resolve any such uncertainty:

> A strict application of the doctrine of privity of contract to a release would place others not mentioned in the document (that is, complete strangers) outside the scope of its protection and, moreover, would mean that those not party to the release, yet named as releasees (that is, third party beneficiaries), would be unable to rely on it as a bar to a proceeding. It must be said, however, that the application of the third party beneficiary rule to a release is not without uncertainty, for a number of reasons. To begin with, a release often will take the form of a deed, as opposed to an agreement that requires consideration for its validity. Also, the document is signed only by the releasor. The effect of this is that, on the face of such a document, there may well be nothing to distinguish between a releasee who is a party and one who is a third party beneficiary. Of course, the surrounding circumstances may reveal that consideration for the release did not move from all of the named releasees and that, in fact, one releasee secured a promise in favour of others who were not party to the underlying negotiation. This would arise, for example, where a corporate defendant settles litigation and bargains for a release that extends to officers and directors who were not party to the litigation or the settlement.

[39] Another potentially complicating factor arises in a situation where the

releases are said to protect against "claim over" proceedings, where releasors subsequently seek relief from parties who may be entitled to claim contribution or indemnity from the named releasees. From my reading of select cases on this issue, the question whether a release will protect against such claims suggests that the outcome will largely depend on the specific wording of the release and the surrounding circumstances. Two cases, which I regard as having precedential value, illustrate this point. They are *Marble (Litigation Guardian of) v Saskatchewan*, 2003 SKQB 282, [2004] 7 WWR 580 [*Marble*], and *Attis v Canada (Minister of Health)* (2003), 29 CPC (5th) 242 (Ont Sup Ct), aff'd 2003 CanLII 22724 (Ont CA), leave to appeal to SCC refused, [2004] SCCA No 41 (QL), collectively [*Attis*].

[40] In *Marble*, the plaintiff brought an action against individual healthcare providers and a hospital for medical malpractice related to a serious brain injury. The action was settled against all the defendants except for one physician, who was judgment proof. In the settlement, the plaintiff executed a release that expressly permitted her to continue with the action against the remaining defendant. In respect of the other defendants/releasees, the release contained a covenant in which she agreed "not to make any claim or take any proceedings against any other person or corporation who might claim contributory indemnity under the provisions of the *Contributory Negligence Act* and any amendments thereto or any statute or otherwise from the Releasees ...." (*Marble*, para 25). After executing the release, the plaintiff brought an action against the Government of Saskatchewan alleging liability for it having failed to require physicians to carry professional liability insurance. The Government then sought contributory indemnity from the hospital for having failed to require the physician to carry the liability insurance. It also applied for an order striking the plaintiff's claim as an abuse of process.

[41] The application was allowed. In his analysis, Baynton J. found that the terms of the release covenant were clear and unambiguous. More importantly, he held

that, as worded, they satisfied both threshold requirements articulated in *London Drugs* and *Fraser River*. As to why the action amounted to an abuse of process, Baynton J. found it plain and obvious that the action against the Government was an "innovative afterthought" designed to supplement the settlement proceeds received from the hospital. He was also satisfied that this was a step the plaintiff would not likely have taken in the initial litigation.

[42] In *Attis*, the plaintiffs commenced class action proceedings against the Government of Canada, alleging negligence in its decision to permit the import, distribution and sale of breast implants in specific provinces. Although the action was not manufacturer specific, the two representative plaintiffs had received implants manufactured by one manufacturer, D. Corp. Previously, there had been manufacturer specific proceedings brought against the major manufacturers of breast implants, which had been certified and settled with court approval. The companies that paid the settlement funds in those proceedings were described as the "Settled Entities". The Attorney General applied for orders to add the Settled Entities as defendants for the limited purpose of joining in its second motion, which was for an order to stay, limit or dismiss the action on various grounds. One of those grounds was that the plaintiffs were in breach of the settlement agreement in the earlier actions. Although the wording of the specific release clause was reasonably broad, the settlement documents also contained a reservation of rights clause permitting settlement class members to pursue "their other rights and remedies against persons and/or entities other than the Defendants and the Released Parties."

[43] Winkler J. (as he then was) dismissed the Attorney-General's application. He concluded that the releases in the settlements of the earlier class actions were not "subject matter releases". Moreover, the inclusion of a reservation or rights clause expressly permitted subsequent actions against unnamed parties.

Striking a Pleading as an Abuse of the Process of the Court – Rule 7-9(2)(e)

[44] Applications to strike a pleading or other document, such as a statement of claim or a statement of defence, are governed by Rule 7-9 of *The King's Bench Rules*. Rule 7-9 is similar to former Rule 173. In the present case, the plaintiff's application specifically engages Rule 7-9(2)(e), which reads as follows:

> **7-9**(2) The conditions for an order pursuant to subrule (1) are that the pleading or other document:
>
> ...
>
> (e) is otherwise an abuse of process of the Court.

[45] It has long been understood that applications to strike under Rule 7-9, and the former Rule 173, can only succeed if the applicant persuades the Court that it is "plain and obvious" that the pleading must be struck on the ground asserted in the application. As for a definition of the plain and obvious test, a commonly cited authority in this regard is *Odhavji Estate v Woodhouse*, 2003 SCC 69, [2003] 3 SCR 263, where Iacobucci J. reaffirmed the definition articulated from an earlier judgment of the Court. At para. 15, Iacobucci J. wrote the following:

> [15] An excellent statement of the test for striking out a claim under such provisions is that set out by Wilson J. in *Hunt v Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980:
>
> > ... assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ... should the relevant portions of a plaintiff's statement of claim be struck out ...
>
> The test is a stringent one. The facts are to be taken as pleaded.

> When so taken, the question that must then be determined is whether there it is "plain and obvious" that the action must fail. It is only if the statement of claim is certain to fail because it contains a "radical defect" that the plaintiff should be driven from the judgment. See also *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.
>
> [Emphasis added]

[46] It follows from this that Blue Cross bears the burden of establishing that, for the reasons engaged in its application, it is plain and obvious that the plaintiff's statement of claim amounts to an abuse of the process of the Court. In Saskatchewan, one of the most frequently cited passages, defining the concept of an abuse of process, appears in *Sagon v Royal Bank* (1992), 105 Sask R 133 (Sask CA). There, after generally addressing the grounds for a court to strike a statement of claim, Sherstobitoff J.A. made a specific observation about the concept of an abuse of process. As part of that observation, he commented on the importance of a court's responsibility to ensure that its function is not misused as an instrument of vexation or oppression. In this regard, he wrote the following at para. 19:

> [19] ... [A] separate mention should be made of the power of the court to prevent abuse of its process, a power which is inherent as well as conferred under Rule 173. Bullen & Leake [*Precedents of Pleadings*, 12th ed] defines the power as follows at pp. 148-9:
>
> > The term 'abuse of the process of the court' is a term of great significance. It connotes that the process of the court must be carried out properly, honestly and in good faith; and it means that the court will not allow its function as a court of law to be misused but will in a proper case, prevent its machinery from being used as a means of vexation or oppression in the process of litigation. It follows that where an abuse of process has taken place, the intervention of the court by the stay or even dismissal of proceedings, 'although it should not be lightly done, yet it may often be required by the very essence of justice to be done.'
> >
> > ...
>
> [Emphasis added]

[47] Following this same theme, Arbour J. crafted a somewhat similar understanding of the concept in *Toronto (City) v C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 SCR 77. Although the discussion of the concept arose in the consideration of a judicial review from a labour arbitration proceeding, it has been recognized in contexts like the present application. Speaking for the majority, Arbour J. wrote the following at para. 37:

> [37] In the context that interests us here, 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 ... bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, *per* Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms, at paras. 55-56:
>
> > 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 at p. 358, [1990] 2 All E.R. 990 (C.A.).
> >
> > *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.* [Emphasis (italics) added by SCC]
>
> [Emphasis (underlining) added]

Analysis

[48] As already mentioned, I am persuaded that the success of Blue Cross's argument in this case depends on an interpretation of the Release, conducted in accordance with the instruction in *Corner Brook*, that conclusively and inescapably precludes the plaintiff from continuing with his action. Any uncertainty in the

interpretation will necessarily defeat application of the plain and obvious test.

[49] From my reading of the Release, the paragraphs that factor in this application are the first, fifth, sixth and eighth paragraphs. The first and sixth paragraphs contain references to the plaintiff either releasing RFT/Q-Line in relation to the "provision or extension of benefits" or agreeing not to pursue claims for the provision or extension of benefits". The eighth paragraph contains wording that extends the protection of the Release to "insurers" of RFT/Q-Line. Finally, the fifth paragraph speaks of the finality of the parties' compromise and settlement. I am satisfied that it is permissible for the Court to assess each of these paragraphs provided the assessment is carried out in the context of the whole document.

[50] I will begin by addressing the first and sixth paragraphs of the Release. Each of these paragraphs contain the phrase "provision or extension of benefits to the Releasor by the Releasee". Where that phrase appears in the first paragraph, and giving the words their ordinary and grammatical meaning, they suggest or indicate that, among other things, the plaintiff released RFT/Q-Line from any claim he might have relating to the provision and extension of benefits by the releasee. Where the phrase appears in the sixth paragraph, and again giving the words their ordinary and grammatical meaning, they suggest or indicate that the plaintiff agrees not to pursue proceedings for, among other things, the provision or extension of benefits by the releasee.

[51] The reference to benefits in these two paragraphs raises the question whether they specifically include the kind of benefits that would have been provided by Blue Cross, such as disability benefits, as well as the related question whether this means that the protection afforded in these paragraphs extends to Blue Cross.

[52] In my view, the resolution of these two questions is uncertain. This uncertainty begins with the fact that, in the context of the entire Release, the term "benefits" is not expressly defined. As such, it could arguably include any form of

non-wage compensation. This uncertainty is further compounded by the wording that arguably indicates that the Release pertains only to non-wage compensation provided directly by RFT/Q-Line. This wording begs the question whether it refers only to such benefits as paid vacations or vehicle allowances, or whether it also includes benefits covered under an insurance policy wholly paid for by RFT/Q-Line. I do not see these matters as free from doubt.

[53] This uncertainty and doubt could easily have been addressed by either party to the Release in the negotiations leading up to its execution. The inclusion of an appropriately worded reservation of rights clause, as was done in *Attis*, would have preserved the plaintiff's right to pursue his claim for disability benefits against Blue Cross. Alternatively, a more specifically worded "claim over" clause or a clause that expressly extended the protection of the Release to Blue Cross, such as was done in *Marble*, would have precluded the plaintiff from pursuing his disability claim. In the context of the presented evidence, which suggests that both parties were aware of such a claim, the lack of more precise wording is both surprising and unfortunate. The result is that the uncertainty and doubt remain.

[54] I next turn to the eighth paragraph of the Release. As I understand part of the argument advanced by Blue Cross, it is that this paragraph's reference to the Release enuring to the benefit of "insurers of the Releasees" signifies the intention to extend the Release to cover the disability insurer. Again, I am not persuaded that this argument is as free from doubt as Blue Cross suggests. I say this for two reasons. First, the reference to "insurers" is rather general. It does not specify whether it denotes only liability insurers or whether it includes all insurers.

[55] Second, and perhaps more importantly, it is not entirely clear that Blue Cross could properly be regarded as the insurer of either RFT or Q-Line in the sense of a classic insured/insurer relationship. While Q-Line obviously holds the policy (a copy

of which was exhibited in evidence), that same policy identifies the insured parties as Q-Line's office staff, mechanics, employee drivers and owner operators. Again, if RFT/Q-Line wished to preclude the plaintiff from pursuing a claim against the disability insurer under the policy purchased by Q-Line, it could have accomplished this with specific wording. The fact that it did not do so may be significant.

[56] The last paragraph of the Release that deserves comment, albeit briefly, is the fifth paragraph. As I read this paragraph, it is principally an affirmation of the provisions that preceded it in the Release. To the extent that it purports to stipulate finality to the settlement, it offers no more certainty than is contained in the preceding provisions.

[57] The uncertainty and doubt reflected in my interpretation of the Release begs two considerations. The first consideration, presented in the form of a question, is whether further evidence of the surrounding circumstances, which could be admitted at trial or in summary judgment, might resolve this uncertainty and doubt. My reading of *Corner Brook* suggests that the surrounding circumstances assisted both the summary trial judge and the Supreme Court of Canada in their respective interpretations of the release in that case. In the context of the present application, I am not persuaded that the presented evidence served that purpose here.

[58] The second consideration speaks directly to the abuse of process issue. In my view, the uncertainty and doubt about the interpretation of the Release belies Blue Cross's entire argument. More to the point, it is inconsistent with the notion of a plainly and obviously revealed misuse of the Court's function or "radical defect" that would bring the administration of justice into disrepute.

Conclusion

[59] It necessarily follows that the plaintiff's action cannot be struck as an

abuse of the Court's process. Accordingly, Blue Cross's application is dismissed with costs under Column 2 of the Tariff of Costs, awarded in any event of the cause and payable within 60 days of the date the order is formally issued.

[60] Given the nature of the order that will issue from this fiat, Rule 10-4 of *The King's Bench Rules* is waived. That said, the Registry staff should present the draft order to me for review before it is issued.

J.
R.W. ELSON