NOVA SCOTIA COURT OF APPEAL
Citation: *Link v. Link*, 2022 NSCA 14

Date: 20220210
Docket: CA 503359
CA 505887
Registry: Halifax

Between:

Jay Link

Appellant

v.

John E. Link, Troy Link, John Hermeier, and Link Snacks, Inc.

Respondents

Judge: The Honourable Justice Cindy A. Bourgeois

Appeal Heard: September 16, 2021, in Halifax, Nova Scotia

Subject: Leave to bring derivative action – s. 4 of the Third Schedule, the *Companies Act*, R.S.N.S. 1989, c. 81

Summary: In March 2020, the appellant brought an application in the Supreme Court of Nova Scotia seeking leave to bring an action in the name of Jack Link's Canada Company ("Link Canada"), a Nova Scotia corporation. He wished to pursue action against his father, John E. Link; brother, Troy Link; John Hermeier; and Link Snacks, Inc. ("Link Snacks"), a Wisconsin company. The application was strenuously by the respondents.

The application judge dismissed the application. His reasons are reported at 2020 NSSC 293. There was no dispute as to the statutory provisions that applied. The parties framed their evidence and arguments around s. 4(1) and (2) of the Third Schedule of the *Companies Act*, R.S.N.S. 1989, c. 81, which provide:

> 4(1) Subject to subsection (2) of this Section, a complainant may apply to the court for leave to bring an action in the name and on behalf of the company or any of its subsidiaries, or intervene in an action to which any such body corporate is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the body corporate.
>
> (2) No action may be brought and no intervention in an action may be made under subsection (1) of this Section unless the Court is satisfied that
>
> (a) the complainant has given reasonable notice to the directors of the company or its subsidiary of his intention to apply to the court under subsection (1) of this Section if the directors of the company or its subsidiary do not bring, diligently prosecute or defend or discontinue the action;
>
> (b) the complainant is acting in good faith; and
>
> (c) it appears to be in the interests of the company or its subsidiary that the action be brought, prosecuted, defended or discontinued.

The judge found the appellant had failed to establish two of the criteria required. In particular, he concluded the appellant had not demonstrated he was acting in good faith, nor that the proposed action appeared to be in the interests of Link Canada. These conclusions were fatal to the granting of leave, and the application was dismissed.

The parties could not agree to costs arising from the application. After receiving written submissions, the judge ordered the appellant pay lump sum costs of $40,000 to the respondents, plus disbursements of $625.14. His written reasons are reported as 2021 NSSC 114.

The appellant filed a Notice of Appeal challenging the Merits decision on January 15, 2021. He later filed a Notice of Application for Leave to Appeal and Notice of Appeal relating to the Costs decision on April 29, 2021. The parties requested both matters be heard together.

Issues:

(1) What are the legal principles governing applications for leave to bring a derivative action, in particular, those relative to s. 4(2)(b) and (c) of the Third Schedule?

(2) Did the judge err in applying those principles when he concluded the appellant had failed to establish he was acting in good faith?

(3) Should leave to appeal the issue of costs be granted?

(4) Does the costs award necessitate appellate intervention?

Result:

The Merits appeal, CA 503359, is dismissed. Leave to appeal granted and the Costs appeal, CA 505887, is dismissed.

The general principles governing the approach to derivative leave applications are summarized as follows:

- The granting of leave is a discretionary remedy and is governed by s. 4(1) and (2) of the Third Schedule of the *Act*;

- The Third Schedule is remedial legislation. As such, the wording of its provisions must be interpreted liberally and in favour of an applicant. This liberal approach is applied where statutory provisions are open to differing interpretation, and mandates accepting the meaning that favours an applicant. It does not serve to lessen a burden or obligation placed upon an applicant by unambiguous provisions;

- To bring an application for leave, an applicant must establish they fall within the statutory definition of "complainant" (s. 4(1));

- An applicant must establish on a balance of probabilities all three of the criteria set out in s. 4(2) to be granted leave;

• Whether an applicant has provided "reasonable notice" (s. 4(2)(a)) is a finding of fact. An applicant is required to establish on a balance of probabilities that notice was provided and it was "reasonable" in the circumstances;

• Section 4(2)(b) is not ambiguous. Whether a complainant is acting in good faith is a finding of fact. The burden rests upon an applicant to adduce evidence that establishes on a balance of probabilities (not some lesser standard) that they are acting in good faith. In assessing this criterion, a judge should look to the entirety of the record, including the pleadings, submissions and evidence adduced by all parties. There is no need to attempt to define good faith, but rather a judge should analyse the evidence for the existence of bad faith on the part of the applicant. If bad faith is found, then the requirement of good faith has not been met. Like any other finding of fact that must be made, a judge can use the tools at their disposal, including drawing inferences from the evidence and making assessments of credibility;

• Determining whether an applicant is acting in good faith is a necessary pre-condition to granting leave. It must be resolved at the leave stage—it is not an issue for trial. Therefore, the admonition against assessing credibility does not apply here. If an applicant has not established they are acting in good faith on a balance of probabilities, there is no "benefit of the doubt" that applies in his favour; and

• Section 4(2)(c), whether the proposed action "appears to be in the interests" of the company, has historically been subject to interpretative debate. However, given the remedial nature of the legislation, an approach favourable to an applicant has been endorsed. The threshold for meeting this criterion is low. An applicant does not have to show that the proposed action **is** in the interests of the company, only that it **appears** to be. In considering whether this criterion has been met, a judge should not delve into the merits of the proposed action, but rather look

> to whether the issues raised are arguable. Because potential trial issues are not to be resolved at this stage, an application judge should refrain from credibility assessments relating to the ultimate merits of those matters.

The application judge did not err in the application of the above principles in his determination that the appellant had failed to establish that he was acting in good faith. Because all three criteria in s. 4(2) must be established for leave to be granted, the judge was correct to dismiss the application.

With respect to the costs appeal, leave was granted, but the appeal dismissed. The appellant failed to demonstrate the judge erred in principle in his award of costs or that it would constitute a manifest injustice.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 29 pages.

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Between:

Jay Link

Appellant

v.

John E. Link, Troy Link, John Hermeier, and Link Snacks, Inc.

Respondents

Judges:	Beveridge, Bourgeois and Van den Eynden JJ.A.
Appeal Heard:	September 16, 2021, in Halifax, Nova Scotia
Held:	Appeals dismissed with costs, per reasons for judgment of Bourgeois J.A.; Beveridge and Van den Eynden JJ.A. concurring
Counsel:	Scott R. Campbell and Jennifer Taylor, for the appellant Michelle C. Awad, Q.C. and Michael Richards, for the respondents

Reasons for judgment:

[1] On September 16, 2021, this Court heard two appeals. Both related to an application for leave to bring a derivative action pursuant to s. 4 of the Third Schedule of the *Companies Act*, R.S.N.S. 1989, c. 81 (the "*Act*").

[2] In March 2020, the appellant, Jay Link, brought an application in the Supreme Court of Nova Scotia seeking leave to bring an action in the name of Jack Link's Canada Company ("Link Canada"), a Nova Scotia corporation. He wished to pursue action against his father, John E. Link; brother, Troy Link; John Hermeier; and Link Snacks, Inc. ("Link Snacks"), a Wisconsin company. The application was strenuously opposed by the respondents.

[3] The application judge, Justice Peter P. Rosinski, dismissed the application. His reasons are reported at 2020 NSSC 293 (the "Merits decision"). There was no dispute as to the statutory provisions that applied. The parties framed their evidence and arguments around s. 4(1) and (2) of the Third Schedule, which provide:

> 4(1) Subject to subsection (2) of this Section, a complainant may apply to the court for leave to bring an action in the name and on behalf of the company or any of its subsidiaries, or intervene in an action to which any such body corporate is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the body corporate.
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> (2) No action may be brought and no intervention in an action may be made under subsection (1) of this Section unless the Court is satisfied that
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> > (a) the complainant has given reasonable notice to the directors of the company or its subsidiary of his intention to apply to the court under subsection (1) of this Section if the directors of the company or its subsidiary do not bring, diligently prosecute or defend or discontinue the action;
> >
> > (b) the complainant is acting in good faith; and
> >
> > (c) it appears to be in the interests of the company or its subsidiary that the action be brought, prosecuted, defended or discontinued.

[4] The judge found the appellant had failed to establish two of the criteria required. In particular, he concluded the appellant had not demonstrated he was acting in good faith, nor that the proposed action appeared to be in the interests of Link Canada. These conclusions were fatal to the granting of leave, and the application was dismissed.

[5] The parties could not agree to costs arising from the application. After receiving written submissions, the judge ordered the appellant pay lump sum costs of $40,000 to the respondents, plus disbursements of $625.14. His written reasons are reported as 2021 NSSC 114 (the "Costs decision").

[6] The appellant filed a Notice of Appeal challenging the Merits decision on January 15, 2021. He then filed a Notice of Application for Leave to Appeal and Notice of Appeal relating to the Costs decision on April 29, 2021. The parties requested both matters be heard together. In these reasons, I will refer to the two matters as the "Merits appeal" and "Costs appeal" respectively.

[7] In the reasons to follow, I will explain why both appeals should be dismissed.

Background

[8] The factual background giving rise to the appeals before this Court is complex and lengthy. Much of it is set out in the judge's Merits decision and will not be repeated here. However, to provide necessary context, I will provide a brief summary:

- The respondent Link Snacks is a Wisconsin corporation and is a producer and distributor of "Jack Link's" meat snack products. It was founded in 1986 by Jack Link from the back of a pick-up truck and has grown to one of the largest protein snack companies in the world;
- In or around 1995, Jack Link gifted stock in Link Snacks to his two sons—the appellant and the respondent Troy Link. Both sons worked for and served in various capacities with the company for some time. During this time frame, various other companies were created to manage Link Snacks' global operations, including in Canada;
- In his factum, the appellant sets out the chain of corporate structures relevant to this dispute:

> 9. Link Canada is a Nova Scotia unlimited liability corporation that was in the business of distributing meat snacks in Canada until 2016.
>
> 10. Link Canada is one of three companies in a corporate chain, the other two being Link Snacks Global, Inc. ("Link Global") and LSI Canada Holdings, Inc.:
>
> > (a) **<u>Link Global</u>** is the 'grandparent' corporation in this corporate family. Link Global is a Wisconsin corporation. As discussed below, it has been under the control of a receiver since 2009. The Appellant owns 50%

> of the shares in Link Global. Jack E. Link, Troy Link, and John Hermeier (the "Individual Respondents") are the directors and officers.
>
> (b) **LSI Canada Holdings, Inc.** is a Wisconsin corporation, a wholly-owned subsidiary of Link Global, and Link Canada's parent corporation. The Individual Respondents are directors and officers.
>
> (c) **Link Canada** is a wholly-owned subsidiary of LSI Canada Holdings, Inc. As noted, Link Canada is a Nova Scotia unlimited liability corporation.

(Footnotes omitted)

- In 2005, the appellant's employment with Link Snacks was terminated. Litigation ensued to enforce a Buy-Sell Agreement between Link Snacks and its shareholders, which required the appellant to sell his shares back to the company. In 2009, the appellant, in accordance with court direction, sold his shares back to Link Snacks Inc. At that time, the Wisconsin court further ordered that a Receiver be appointed to oversee the winding up of Link Global (the grandparent company of Link Canada);
- Link Canada is not presently an operating company. Its sole director is the Receiver;
- There has been an extensive history of other litigation between the appellant and the respondents in both Wisconsin and South Dakota; and
- The respondent John Hermeier is a Director and Officer of Link Snacks and serves in the role of Executive Vice President of Business Development and International Sales. He is not related to the Link family.

[9] In his Notice of Application in Chambers, the appellant set out the grounds for seeking leave to bring a derivative action on behalf of Link Canada and requested this relief:

> 31. In this context, Jay now seeks leave of this Honourable Court to bring the Derivative Action, alleging the Corporate Misappropriation in the name and on behalf of Link Canada.
>
> 32. Jay also seeks an Order authorizing him to control the conduct of the Derivative Action, along with directions that the Derivative Action may be commenced and proceed in the Wisconsin Circuit Court (or, in the event that this Court, or any other court of competent jurisdiction, determines that this Court, sitting in Nova Scotia, must also hear the merits of the derivative claims, Jay alternatively requests an Order directing that the Derivative Action may be commenced and proceed in the Supreme Court of Nova Scotia, in accordance with the *Nova Scotia Civil Procedure Rules*).

[10] The appellant specifically pled reliance on the *Act*, as well as Chapter 180 of the Wisconsin Statutes.

[11] In his affidavit filed in support of the application, the appellant set out the nature of the claims he sought to make on behalf of Link Canada. He referred to them as the "Transfer Pricing Claims" and the "Theft of Link Canada Claims" respectively. With respect to the Transfer Pricing Claims he explained:

> 19. The alleged misconduct includes manipulation of the "transfer prices" paid by Link Canada to Link Snacks. I assert that the Individual Respondents caused Link Canada to overpay for the product it was buying from Link Snacks, thereby siphoning money away from Link Canada and into Link Snacks. …
>
> 20. In December 2010, I filed a claim against the Respondents in Wisconsin (Washburn County Circuit Court Case No. 2011CV62, a proceeding which the parties have historically referred to as "***Link II***"). The 2010 complaint filed included the Transfer Pricing Claims.

[12] With respect to the "Theft of Link Canada Claims" the appellant asserted:

> 21. In February 2016, the Individual Respondents then brought the operations of Link Canada to an end:
>
> > (a) as directors and officers of Link Snacks, the Individual Respondents authorized and directed Link Snacks to acquire every operating asset of Link Canada for itself; and
> >
> > (b) at the same time, and as the directors and officers of Link Canada, the Individual Respondents authorized and directed Link Canada to relinquish the entirety of its operating assets to Link Snacks at no cost and with no benefit to Link Canada, LSI Holdings, or Link Global.
>
> …
>
> 23. The material result of the Theft of Link Canada Claims was to deprive the shareholdings in Link Canada of all their value, to the benefit of Link Snacks.
>
> …
>
> 25. I amended my *Link II* complaint in May 2016 to add the Theft of Link Canada Claims, a true copy of which is attached to this Affidavit as **Exhibit "F"**.

[13] After conducting a lengthy review of the litigation undertaken in Wisconsin, the appellant turned to whether he had met the criteria for derivative leave. He asserted:

- He met the statutory criteria of "complainant" and as such was an appropriate person to bring an application for leave;

- He had repeatedly asked the Receiver to bring the claims on behalf of Link Canada to no avail;
- It was in the interests of Link Canada that the claims be permitted to proceed as "[t]he value of Link Canada's claim, if the Corporate Misappropriation is proven, could be around $80 million–$100 million USD"; and
- It was his wish to bring the proposed derivative action in Wisconsin.

[14] The appellant filed an initial brief affidavit of Andrew Erlandson, a Wisconsin attorney, which attached Chapter 180 of the Wisconsin Statutes. The appellant subsequently filed a second more extensive "rebuttal" affidavit from Mr. Erlandson. The appellant sought to have Mr. Erlandson qualified as an expert in the subject of Wisconsin law and his opinion regarding limitation periods for bringing claims in that jurisdiction accepted by the court.

[15] The respondents filed an extensive Notice of Contest in response to the appellant's request for leave. It was supported by affidavits filed by John Hermeier, Brian Norton (the respondents' US litigation attorney) and Brian Smigelski (a proposed expert on Wisconsin corporate law).

[16] The Notice of Contest set out two grounds for dismissing the application. The first was that the claims the appellant wished to bring were time-barred:

> 1. All of the material facts which are the bases for the claims which the Applicant seeks leave to bring in the name of and on behalf of Jack Link's Canada Company ("Link Canada") were known to the Applicant by at least May 2016, and are therefore time-barred by virtue of the Nova Scotia *Limitation of Actions Act*, R.S.N.S, 1989, c. 258 and the Nova Scotia *Limitation of Actions Act*, S.N.S. 2014, c. 35.

[17] As an alternative ground, the respondents alleged the appellant could not meet the statutory criteria to be granted leave:

> 2. In the alternative, the Applicant cannot demonstrate that he should be granted leave to bring an action in the name of and on behalf of Link Canada as the Applicant cannot satisfy one or more of the requisite elements set out in section 4(2) of the Third Schedule to the Nova Scotia *Companies Act*, R.S.N.S. 1989, c. 81 (the "*Companies Act*"). Specifically:
>
> (i) the Applicant has not satisfied the notice requirements;
>
> (ii) the Applicant cannot demonstrate to the Court that he is acting in good faith. In fact, this Application is just the latest tactic the Applicant

has employed in his fourteen-year odyssey of harassing and vengeful legal claims against the Respondents, all of which have been brought in furtherance of his own private agenda to harm his father, brother, and the family parent corporation with which he was previously affiliated; and

[iii] the Applicant cannot demonstrate to the Court that it appears to be in the interests of Link Canada that the action be brought because:

(a) the claims are barred by the provisions of the Nova Scotia *Limitation of Actions Act*, R.S.N.S. 1989, c. 258 and the Nova Scotia *Limitation of Actions Act*, S.N.S. 2014, c. 35;

(b) the claims are without merit; and

(c) an independent Receiver, appointed by the Wisconsin Court to dissolve Link Canada's parent company's parent company, is the sole Director of Link Canada and has repeatedly refused to bring the claims which the Applicant seeks to advance.

[18] A detailed affidavit was filed by the respondent John Hermeier. He summarized the purpose of his affidavit as follows:

4. In this affidavit, I first provide historical context of the business relationship between the parties. I then discuss the events leading to the various lawsuits the Applicant, Jay Link ("Jay" or the "Applicant"), has pursued for almost 15 years and their results to-date. Next, I explain how the two claims Jay seeks leave to bring by way of this proceeding - what he refers to in his affidavit as his "Transfer Pricing Claims" (paragraph 19) and his "Theft of Link Canada Claims" (paragraphs 21-22) were all claims that, by his own admission, were known to exist long ago - more than nine years ago for the Transfer Pricing Claims and more than three years ago for the Theft of Link Canada Claims. Finally, as a member of the Link Canada Board of Directors for 16 years, I set forth facts as to why the proposed derivative claims are not in Link Canada's best interest. I also provide information as to why Jay is not acting in good faith.

5. I understand that Brian Norton, an attorney for myself and the other Respondents during previous litigation between the parties (the “Historical Litigation), will swear an affidavit in this proceeding providing additional details on the Historical Litigation.

6. I have reviewed the affidavit of Jay sworn April 24, 2020 and Jay’s Notice of Application in Chambers. I note that both Jay’s affidavit and the Notice of Application in Chambers misstate or ignore material facts related to the Historical Litigation and the relationship between Link Canada and Link Snacks (both defined below).

7. I correct many of Jay’s misstatements in this affidavit. However, the fact that I have not addressed any specific fact or allegation in Jay’s affidavit should not be construed as an admission that said fact or allegation is true.

[19] The Hermeier affidavit described the historic litigation in great detail but was summarized as follows:

> 13. In addition to the lawsuit contemplated by this proceeding, Jay has personally sued me, along with Jack, Troy, and Link Snacks, in the following lawsuits:
>
> > a. *Link Snacks, Inc., et al. v. Jay E. Link, et al.*, Washburn County, Wisconsin Circuit Court Case No. 2005-CV-000127 (filed Sep. 23, 2005) ("*Link I*"); and
> >
> > b. *Jay E. Link, et al. v. John E. Link, et al.*, Washburn County, Wisconsin Circuit Court Case No. 2011-CV-000062 (filed December 6, 2010) ("*Link II*").
> >
> > c. *Jay E. Link v. L.S.I., Inc., et al.*, Jerauld County, South Dakota Circuit Court Case No. CIV. 05-12 (filed November 17, 2005) (the "South Dakota Litigation") (the South Dakota Litigation together with *Link I* and *Link II* comprise the Historical Litigation).

[20] His evidence addressed the departure of the appellant from Link Snacks:

> 26. On August 4, 2005, Jay entered a "Departure Memorandum" under which he agreed, among other things, to be terminated as an employee and/or officer of Link Snacks and other companies and to negotiate an amicable buy-out of his interests in Link Snacks and related companies.
>
> 27. Prior to his departure, Jay expressed dissatisfaction with his role as COO and demanded that he be appointed CEO of Link Snacks. When members of management expressed their views that Jay was not yet ready or qualified to be CEO, Jay became increasingly hostile. As a result, his ability to work with members of senior management, as part of a cohesive team, became strained.
>
> 28. Ultimately, Jay refused to report to his father, Jack, who was the Chief Executive Officer, or consult with other members of Link Snacks' management, he failed to communicate about what he was doing for the company and he did not timely perform his responsibilities.
>
> 29. Jay stated to me, at or about the time of his departure, that if Jack and Troy did not accept his terms, Jay would make life miserable for [them and] Link Snacks with a bunch of lawsuits which he had ready to file. He threatened that management would be spending all of its time responding to his lawsuits and would have no time to operate the business. His stated goal was to "bring the company to its knees" through the litigation process.

[21] Under the heading "**Jay's Claims Are Not Brought in Good Faith and Are Not in Link Canada's Interest**", Mr. Hermeier asserted:

> 70. I have known Jay since 2002. Based on my experience personally working with Jay at Link Snacks, my personal interactions with Jay, the statements Jay has made to me, and my observations of his demeanor, it is my belief that Jay is driven by personal animus toward his father, brother, Link Snacks, and me, and not by a genuine concern for Link Canada.
>
> 71. The person who was and remains in a position to independently determine whether it would be in Link Canada's best interest to pursue the claims at issue is the Receiver. He has always had the power and authority to vote the shares of Link Global and LSI Canada Holdings to elect the directors of Link Canada, and as set forth in the Affidavit of Brian Norton, he has known about Jay's allegations concerning wrong done to Link Canada since at least July 2017. Yet, the Receiver has never caused Link Canada to file a direct action and has repeatedly refused Jay's request that he do so.
>
> 72. Moreover, Jay did not file his Notice of Application in Chambers for leave to pursue the Transfer Pricing Claims until over nine years after he learned the material facts giving rise to that claim. Jay also did not file the Notice of Application in Chambers for leave to pursue the Theft of Link Canada Claims until almost four years after he learned the material facts upon which it is based. Jay failed to commence this proceeding until March 2020 even though he was aware by no later than February 2016 that the alleged claims involved injuries directly to Link Canada, and no later than July 2017 that he needed to obtain leave from the Nova Scotia Supreme Court in order to pursue claims derivatively on Link Canada's behalf.

[22] The respondents also filed a very lengthy (two volume) affidavit from their American trial counsel. Brian Norton identified the three pieces of litigation commenced by the appellant in Wisconsin and South Dakota against the respondents and advised he had acted as counsel from the outset of those respective proceedings. With respect to the purpose of his affidavit he said:

> 6. I have read the Applicant Jay Link's ("Jay") Notice of Application and accompanying affidavit. Jay, who is not a lawyer, spends considerable time in those submissions providing an incomplete and sometimes inaccurate history of the *Link I* and *Link II* proceedings. I submit this affidavit in response. As counsel of record to the Respondents throughout *Link I, Link II*, and the *South Dakota Action*, I here attempt to set forth an accurate and comprehensive summary of what occurred in those cases beginning in 2005. I apologize in advance for the length of this affidavit but, because those proceedings have been hotly contested for almost 15 years now, even a summary is long.
>
> 7. While a more detailed description follows, I confirm that Jay previously commenced what he refers to as the "Transfer Pricing Claims" against the Respondents in *Link II* by filing a state court lawsuit in December 2010. In May 2016, he then amended this claim to include what he refers to as the "Theft of

> Link Canada Claims.” Together, Jay refers to these two sets of claims in his affidavit in the present proceeding as the “Corporate Misappropriation Claims.” It is my understanding that the Corporate Misappropriation Claims represent the entirety of the claims Jay is presently seeking leave to pursue on Link Canada’s behalf. Accordingly, Jay, at the very latest, became aware of the Corporate Misappropriation Claims in December 2010 and then May 2016. In July 2018, the *Link II* Court dismissed the Corporate Misappropriation Claims on the basis that: (i) as the Respondents [have] consistently advised Jay, these claims did not belong to him but to Link Canada; and (ii) as the Respondents have advised Jay at least 23 times, any derivative action brought on behalf of Link Canada needed to be initiated in Nova Scotia. The decision of the *Link II* Court was subsequently upheld on appeal.

[23] Mr. Norton’s affidavit attached numerous exhibits, including transcripts and decisions arising from the American legal proceedings. He described the outcome of the *Link I* proceedings as follows:

> 14. Following nearly two years of discovery, the Court conducted two bench trials and a six-week jury trial from May through July 2008.
>
> …
>
> 16. At the close of the *Link I* trial, the jury found that (1) Jay breached the Departure Memorandum; (2) Jay tortiously interfered with Link Snacks’ prospective contractual rights with a third-party; (3) Jay breached his fiduciary duty to Link Snacks and another Link-owned company, either intentionally or in reckless disregard of Link Snacks’ rights; (4) Jack breached his fiduciary duties to Jay; (5) Troy breached his fiduciary duties to Jay, but caused Jay no damages; and (6) Hermeier and the other officers and directors of the Link companies did not breach any fiduciary duties to Jay. A true copy of the October 2, 2008 *Link I* Judgment is attached to this Affidavit as **<u>Exhibit B</u>**.
>
> 17. In assessing the equities, the *Link I* Court also stated the following in relation to Jay’s misconduct:
>
>> One, when faced with changes in his job responsibilities, Jay disobeyed the chief executive officer and refused to ever submit to the boss’ direction.
>>
>> Two, Jay threatened to harm the corporation, to seek vengeance, and to hamper the business of Link Snacks, Inc.
>>
>> Three, Jay threatened with the foulest of language to cut off the raw supply of beef product necessary for the continued existence of the business.
>>
>> Four, notwithstanding the clear and unequivocal obligations Jay had in the 1995 Buy-Sell Agreement entered into, Jay entered into a transaction with J&F, also known as Friboi, where the largest beef producer in the world

> would have the option to purchase shares in all of the Link-related companies and thereby become that very large, quote, third party, end quote, that can interfere with the management and control of Link Snacks. Specifically, the joint venture agreement with JF provided… . We know what it provided: J&F has the option to purchase any shares, any interest, that Jay has or may acquire in the Link-related companies.
>
> Five, notwithstanding knowledge that unless and until this Court's ruling on the condition precedent is reversed by the appellate courts of this state Jay is not entitled to any payment for his shares until he signs a noncompetition agreement, notwithstanding that, Jay went forward with a, quote, competitive business, individually and with Friboi. That new enterprise, although small, presently presents a serious business risk to the long-term viability of Link Snacks, Inc.
>
> Six, Jay tortiously interfered with the prospective contract between Friboi and Link Snacks, Inc., that, although proof of damages was inadequate, the conduct was wrong as to Link Snacks, Inc.; and the jury so found.
>
> Seven, Jay breached the Departure Agreement by instead of exercising good faith in the negotiation for the sale of his shares pursuant to the agreement he signed, he proposed that he purchase Jack and Troy's shares. That counterproposal was completely contrary to the intent and the purpose of both the Departure Memorandum and the 1995 Buy-Sell Agreement.
>
> Eight, Jay disclosed confidential business information that is almost impossible to determine the value as to that disclosure of confidential information.

[24] With respect to the South Dakota litigation, Mr. Norton asserted:

> 21. At the same time Jay filed his counterclaims in *Link I*, he filed the *South Dakota Action*, a separate state court lawsuit in Jerauld County, South Dakota, in which he sought judicial dissolution of another Link company, L.S.I., Inc. ("LSI"). Jay also sought to recover the same damages from Jack, Troy, and Hermeier that he sought to recover from them in *Link I* for alleged breaches of fiduciary duties to him as officers and directors of LSI.
>
> 22. On December 2, 2009, the South Dakota Court dismissed Jay's claims for breach of fiduciary duty. The Court also made specific findings that "Jay has consistently tried to destroy LSI and was found to have breached his fiduciary duties to LSI either intentionally or in reckless disregard of LSI's rights." It further found that, "in fact, Jay Link has consistently tried to destroy the company." A true copy of the December 2, 2009 Findings of Fact, Conclusions of Law and Order Directing the Purchase of Jay Link's Shares in L.S.I., Inc. in the *South Dakota Action* is attached to this Affidavit as **Exhibit D**.

[25] The appellant did not seek to file a reply affidavit to refute or contest any of the detailed allegations of bad faith made in Mr. Hermeier's affidavit or the strong findings in the American litigation made against him. Nor did he seek to cross-examine any of the respondents' affiants. The appellant's sole response was, as I described earlier, a "rebuttal" affidavit from Mr. Erlandson about Wisconsin law.

[26] In fact, there was no cross-examination on any of the affidavits. The parties did, however, file an agreed statement with respect to a number of relevant dates.

[27] In post-hearing submissions, the parties were at odds as to how the court should view the evidence before it and approach the issues. The respondents asserted the application should be dealt with simply on the basis of its limitation argument—the claims the appellant sought to bring were time-barred. In the alternative, the respondents submitted the appellant had not met the three necessary criteria to grant leave. Specifically, they asserted the evidence before the court demonstrated bad faith on the appellant's part, and that he had failed to establish the proposed action appeared to be in the interest of Link Canada.

[28] The appellant took a very different view, anchoring his approach in this Court's decision in *Budd v. Bertram,* 2018 NSCA 95 ("*Budd*"). He submitted the judge should not consider the limitation issues, as that would be wading into the merits of the action—something clearly prohibited. Further, with respect to the criteria for leave, he said this Court has mandated a very liberal approach that favours an applicant. This sentiment was expressed succinctly by the appellant in his post-hearing written reply submissions:

> 1. The parties have starkly different views of the scope and purpose of an application for leave to bring a derivative action. The Applicant respectfully says that this Honourable Court must adopt a liberal approach, in accordance with the Court of Appeal's direction in *Budd v. Bertram*. At this early stage, areas of uncertainty should be resolved in the Applicant's favour – as the Court of Appeal confirmed in *Budd*.

(Footnotes omitted)

[29] I will now turn to the resulting decisions.

Decisions under Appeal

The Merits decision

[30] The Merits decision spans over 145 paragraphs and includes several lengthy footnotes. The judge set out the positions of the parties and made detailed references to the law and the evidence. These will not be set out here. However, his conclusions can be summarized as follows:

- He declined to consider the limitations argument as a preliminary issue as requested by the respondents; rather, the issue of whether the claims were likely time-barred would be considered in relation to the interests of the company criterion;
- He determined the appellant had given reasonable notice to Receiver Peter Herrell, the sole Director of Link Canada pursuant to s. 4(2)(a) of the Third Schedule;
- He was satisfied from the evidence before him that the appellant was acting in bad faith and therefore failed to meet the required criterion of good faith in s. 4(2)(b); and
- He found the appellant had failed, as required by s. 4(2)(c), to demonstrate the proposed action was in the interests of Link Canada.

The Costs decision

[31] Following release of the Merits decision, and upon the parties being unable to reach agreement, the judge requested submissions on the issue of costs. The judge received written submissions from the parties as well as an affidavit of respondents' counsel outlining the legal fees and disbursements billed in relation to their response to the application.

[32] The respondents submitted the matter was "exceptional" and as a result, it would not be just to base costs on Tariff C of *Nova Scotia Civil Procedure Rule* 77. They sought "substantial indemnity" of their total billed fees of $171,810.50, namely $40,000, plus disbursements of $625.15.

[33] The appellant argued there was nothing extraordinary about the application and, as a result, costs should be based on Tariff C—$2,000. In the alternative, if the judge felt increased costs were warranted, the appellant submitted a multiplier, as contemplated by the Tariff, could be applied. At most, this would result in costs payable of $6,000.

[34] The judge found the matter was "not an ordinary Application in Chambers". He observed:

> [11] A significant difference between the parties' positions arises as a result of the Respondents' addition of much more expansive evidence, in response to Jay's self-described "minimalist" evidence.
>
> [12] In my opinion, it was entirely appropriate for the Respondents to expand the narrow factual tapestry presented by Jay in order to permit the court to gain a better appreciation of the relevant factual and legal background regarding *inter alia*, the history of the Link Group of Companies and the associated litigation in the United States – all of which had been raised by Jay in his filings.
>
> [13] The Respondents' position implicates the interests of various corporations, but significantly also three individuals – each of whom likely have distinct legal needs and perspectives in relation to Jay's allegations against them. Had they each had separate counsel their combined costs to defend against this proposed derivative action could well have been even greater. They were each entitled to take Jay's claims of up to $60-$80 million US liability seriously and have their counsels counter with their own positions.
>
> [14] Notably, both sides considered the matter sufficiently serious to each have two senior counsel in court to argue the matter.
>
> [15] Assessing the factors relevant to whether leave should be granted was made more challenging than usual for the court, as a result of, *inter alia*: the lengthy history between the Link corporations and individuals involved; the multi-jurisdictional and integrated nature of the closely-held corporations; the intersection of an argued limitation period – including when/how the court should treat that issue in this context, and the anticipated effects on the potential main proceeding of which jurisdiction's limitation period would likely be applicable.

[35] The judge concluded:

> [16] This proceeding was consequently extraordinary, *inter alia*, insofar as it placed especial corollary demands on counsel for the Respondents in particular. While heard in one day, the preparation and arguments far exceeded the norm.
>
> [17] Bearing in mind the relevant Rules and the jurisprudence, including those argued by the parties for their respective positions, I find that the application of tariff "C" would not do justice between the parties.
>
> [18] That tariff would not provide a "substantial contribution to, but not… a complete indemnity" for the reasonable legal fees proposed by the Respondents. The $40,000 costs plus disbursements ($625.14 - HST included) claim is approximately 23.5% of the claimed (reasonable) $170,000 costs of the Respondents.

Issues

[36] In his factum the appellant sets out the issues arising in relation to the Merits decision as follows:

> (a) Did the Application Judge misapply the legal test governing applications for leave to bring a derivative action?
>
> (b) Did the Application Judge err in finding that Nova Scotia law applied, whether by reaching an incorrect legal conclusion or by not giving the parties the opportunity to make further submissions?
>
> (c) Did the dismissal of the Application result in a patent injustice?

(Footnotes omitted)

[37] With respect to the Costs appeal, the appellant sets out the issues as:

> (a) Should this Court grant leave to appeal?
>
> (b) Should the Costs Order be set aside?

[38] After having reviewed the record and considering the submissions of counsel, I would re-state the issues as follows:

1. What are the legal principles governing applications for leave to bring a derivative action, in particular, those relative to s. 4(2)(b) and (c)?
2. Did the judge err in applying those principles when he concluded the appellant had failed to establish he was acting in good faith?
3. Should leave to appeal the issue of costs be granted? and
4. Does the costs award necessitate appellate intervention?

[39] Although the Court heard extensive submissions relating to the criterion contained in s. 4(2)(c)—whether it appeared to be in the interests of Link Canada to bring an action—as will become apparent, it is not necessary to address that issue in order to resolve the Merits appeal.

Standard of Review

[40] In *Budd* this Court set out the standard for reviewing a judge's decision on a derivative leave application as follows:

> [23] The decision under appeal is interlocutory and discretionary. The applicable standard of review is set out in *L&B Electric v. Oickle*, 2006 NSCA 41:
>
>> [13] The standard of review on an appeal such as this is well settled: this court will not interfere with the discretionary interlocutory decision of the judge unless wrong principles of law have been applied or a patent injustice would result, *Minkoff v. Poole and Lambert* (1991), 1 N.S.R. (2d)

> 143 (N.S.C.A.) at p. 145. An appeal from a discretionary order is not an occasion that permits this court to re-weigh the various relevant considerations and exercise its discretion in place of that of the judge of first instance. *Cluett v. Metro Computerized Bookkeeping Ltd.* (2005), 233 N.S.R. (2d) 237 at ¶ 2.

[41] An award of costs is also a discretionary decision attracting deference from this Court. Again, we will not interfere unless a clear error of law can be demonstrated or the award results in a patent injustice (*Casavechia v. Noseworthy*, 2015 NSCA 56).

Analysis

1. What are the legal principles governing applications for leave to bring a derivative action, in particular, those relative to s. 4(2)(b) and (c)?

[42] At the heart of the appellant's challenge to the judge's denial of leave is the allegation he applied wrong principles of law. In particular, it is suggested the judge failed to adhere to the "touchstone" directions of this Court when considering whether the appellant was bringing the application in good faith and whether the proposed action appeared to be in the interests of Link Canada. The appellant relies on *Budd* in support of its argument that the judge erred.

[43] The respondents agree *Budd* is the most recent statement of the law in this Province regarding derivative actions, but say the appellant is misinterpreting and overextending it. They submit a proper reading demonstrates the application judge did not err as alleged.

[44] Because of the divergence of opinion regarding the correct principles and the import of *Budd*, it is useful to affirm the relevant legal principles. After reviewing the statutory provisions, I will consider *Budd*, as well as this Court's earlier decision of *L & B Electric Ltd. v. Oickle*, 2006 NSCA 41 ("*Oickle*"). I will then review a recent decision of the British Columbia Court of Appeal and conclude with a summary of general principles to guide applications for leave to bring a derivative action.

Statutory provisions

[45] As noted earlier, the Third Schedule of the *Act* governs the commencement and management of derivative actions in Nova Scotia. It is useful to repeat the statutory provisions. Section 4(1) provides:

> 4(1) Subject to subsection (2) of this Section, a complainant may apply to the court for leave to bring an action in the name and on behalf of the company or any of its subsidiaries, or intervene in an action to which any such body corporate is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the body corporate.

[46] There was no issue that the appellant was a "complainant" within the meaning of s. 4(1).[1]

[47] Of greater significance are the pre-conditions for a complainant to bring an action. Set out in s. 4(2), these were of central importance in the decision under appeal. The section provides:

> (2) No action may be brought and no intervention in an action may be made under subsection (1) of this Section unless the Court is satisfied that
>
> (a) the complainant has given reasonable notice to the directors of the company or its subsidiary of his intention to apply to the court under subsection (1) of this Section if the directors of the company or its subsidiary do not bring, diligently prosecute or defend or discontinue the action;
>
> (b) the complainant is acting in good faith; and
>
> (c) it appears to be in the interests of the company or its subsidiary that the action be brought, prosecuted, defended or discontinued.

[48] The appellant acknowledges, correctly in my view, that for leave to be granted, all three of the above criteria must be established by an applicant.

Case authorities

[49] In *Oickle*, a falling out amongst shareholders resulted in one, Mr. Oickle, seeking leave to bring a derivative action in the name of L & B Electric Ltd., against two others. Leave was granted, and that decision was appealed to this Court. In dispute was whether the application judge erred in his consideration of two criteria: whether the complainant was acting in good faith, and whether it appeared to be in the interests of the company that an action be brought.

[50] With respect to the issue of good faith, Justice Hamilton, writing for the Court, noted the onus identified by the application judge:

[1] "Complainant" is defined in s. 7(5)(b) of the Third Schedule.

> [53] I will deal first with their argument relating to good faith. The judge found that the "onus" on Mr. Oickle to prove that he was acting in good faith was to satisfy the court by a preponderance of evidence, not some higher burden:
>
> > [52] In my respectful opinion, it is not appropriate to require the applicant to meet a burden that is any higher than what the statute provides. The statute provides "No action may be brought … under subsection (1) unless the court is satisfied that. . . . (b) the complainant is acting in good faith". This text is consistent with the ordinary rules on onus and burden. The proponent bears the onus of satisfying the Court. The Court will be satisfied by a preponderance of evidence. I have already discussed the history of this legislation towards ascertaining its purposes and scheme (see para. 34 to 42 above). With great respect for the contrary view expressed by Puddester, J. in *Tremblett*, the history, purposes and scheme of this legislation do not support the imposition of a higher burden than the statutory text provides. Particularly, there is no indication of Parliamentary or Legislative intent to restrict access to the derivative action out of deference to the principles of indoor management or majority rule.
>
> [54] The appellants have not argued that the judge erred in applying the ordinary burden. Accordingly, for the purposes of this appeal I have assumed, without deciding, that this is the correct burden.[2]

[51] In concluding the application judge had not erred in finding Mr. Oickle was acting in good faith, Justice Hamilton noted:

> [59] As set out by D. H. Peterson, *Shareholder Remedies in Canada* (Markham, ON: LexisNexis, 1989) at p. 17.22 **"good faith" is a question of fact**:
>
> > §17.39 Good faith is said to exist where there is *prima facie* evidence that the applicant is acting with proper motives, such as a reasonable belief in its claim, and **is ultimately a question of fact to be determined on all of the evidence** and the particular circumstances of the case.
>
> [60] This principle is restated in *Winfield v. Daniel* (2004), 352 A.R. 82:
>
> > ¶ 16 Section 240(2)(b) of the Act requires that the Court be satisfied that the complainant is acting in good faith. Good faith is said to exist where there is *prima facie* evidence that the complainant is acting with proper motives such as a reasonable belief in the merits of the claim. Good faith is a question of fact to be determined on the facts of each case. **The typical approach by the Courts is not to attempt to define good faith**

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[2] In *Oickle* the application judge rejected a line of authorities that suggested a higher civil burden of proof ought to be applied. He found that the "ordinary" preponderance of evidence was required. This issue was definitively resolved several years later by the Supreme Court of Canada. In *F.H. v. McDougall*, 2008 SCC 53, Justice Rothstein noted "that there is only one civil standard of proof at common law and that is proof on a balance of probabilities". The application judge in *Oickle* was correct in his identification of the requisite burden of proof.

> **but rather to analyse each set of facts for the existence of bad faith on the part of the applicant. If bad faith is found, then the requirement of good faith has not been met**: D.H. Peterson, *Shareholder Remedies in Canada*, (Markham, ON: LexisNexis, 1989) at 17.39.
>
> [61] The determination as to whether Mr. Oickle was acting in good faith was for the judge as the trier of fact. He made his determination after reviewing the pleadings and the affidavits and after hearing the cross-examination and submissions. In ¶ 30 of his decision he commented on his advantage in hearing cross-examination of the affiants. This court will not interfere with a finding of fact unless there is palpable and overriding error. *Housen v Nikolaisen*, [2002] 2 S.C.R. 235.
>
> [62] In reaching his decision the judge considered relevant factors. There was evidence before him from which he could conclude that Mr. Oickle was acting in good faith. The appellants have not satisfied me that this finding by the judge was a palpable and overriding error.

(Emphasis added)

[52] With respect to the criterion that the action appeared to be in the interest of the company, Justice Hamilton approved of the application judge's approach and noted:

> [76] After determining that the shareholders and directors were not impartial, the judge went on to consider whether there was an arguable issue raised by the proposed derivative action and what the amount at issue was, in order to determine whether it was in the interests of the Company to allow Mr. Oickle to commence a derivative action. He concluded:
>
> > [46] Whether the proposed suit will succeed is relevant to whether it is in the interests of the company. **The onus is not "particularly heavy"**: *Henry v. 609897 Saskatchewan Ltd.* (2002), 31 B.L.R (3d) 36 (SQB) at para. 20. According to the Ontario Court of Appeal in *Richardson Greenshields of Canada Ltd. v. Kalmacoff* (1995), 123 D.L.R. (4th) 628 (OCA) at p. 636: **"The court is not called upon at the leave stage to determine questions of credibility or to resolve the issues in dispute, and ought not to try. These are matters for trial."** The standard is similar to that on a summary judgment application. Mr. Goldberg referred me to *RE Marc-Jay Investments Inc. and Levy* (1975), 50 D.L.R. (3d) 45 (OHC) where the standard was expressed this way at para. 9: "the intended action does not appear frivolous or vexatious and could reasonably succeed". The British Columbia Court of Appeal referred to an "arguable case" in *Bellman* at para. 19, which the Court in *Primex Investments Ltd. v. Northwest Sports Enterprises Ltd.*, [1995] BCJ 2262(SC) at para. 39 took to mean "a reasonable argument which would not be dismissed out of hand". This is similar to our standard on summary

> judgment where the proponent must show there is no arguable issue to be tried, which is said to be the same as showing there is no genuine issue of material fact requiring trial: for the standard see *United Gulf Developments Ltd. v. Iskandar*, [2004] N.S.J. 66 (CA) at para. 9. The standard is the same but the onus is not, as the proponent bears it. **Thus, I should assess the prospects of success by asking whether the applicant has presented evidence demonstrating an arguable issue worthy of trial, a genuine issue of material fact requiring trial.**
>
> …
>
> [77] The judge's approach of considering whether there was an arguable issue raised by the proposed derivative action to determine whether it is in the interests of the Company, is in accordance with the cases cited by the judge in ¶ 46 of his decision set out above including **Marc-Jay, supra**, where the court stated in ¶ 9 that the standard is that "the intended action does not appear frivolous or vexatious and could reasonably succeed."

(Emphasis added)

[53] Before moving on to this Court's more recent decision, I would observe that in *Oickle* Justice Hamilton set out two different approaches and separately analyzed the criteria contained in s. 4(2)(b) and (c).

[54] In *Budd*, also penned by Justice Hamilton, there was a single narrow issue before the Court:

> [24] Did the judge err in granting leave to the respondents to bring the derivative action, by failing to conduct a cost/benefit analysis as part of her consideration of what "appears to be in the interests of the company", under s. 4(2)(c) of the Third Schedule to the *Act*?

[55] The Court was not called upon to consider the other criteria of s. 4(2). In their arguments before us, the parties cite a number of passages from *Budd*. I have noted in particular the following:

> [34] Granting leave to commence a derivative action is a discretionary remedy arising out of equitable principles, *Black Fluid Inc. v. Opulence Clothing Inc.,* 2014 ABQB 138, para 23. Leave should not be granted where there is an adequate alternate remedy available to the complainant, *Crescent (1952) Ltd. v. Jones*, 2011 ONSC 756, para 21 and authorities stated therein. The parties agree there is no alternative remedy in this case.
>
> [35] **The legislation governing derivative actions is drawn in broad terms and, as remedial legislation, should be given a liberal interpretation in favour of the applicant**, *Richardson Greenshields of Canada Ltd. v. Kalmacoff*, ONCA, 1995 OJ No 941, para 22. **A judge hearing a leave application is not called**

> **upon to determine questions of credibility or to resolve the issues in dispute, and ought not to try. These are matters for trial**, *Richardson Greenshields*, para 22; *Jahnke v. Johnson*, 2018 SKCA 59, para 63. **The threshold the applicant has to meet is low as the test is that it "appears" to be in the interests of the company, not that it is in the interests of the company**.
>
> [36] The Saskatchewan Court of Appeal in *Jahnke v. Johnson*, 2018 SKCA 59, recently stated that courts have used different phrases to explain how a judge should determine whether a proposed derivative action "appears to be in the interests of the corporation":
>
> > [64] Numerous cases have attempted to explain how a judge should determine whether a proposed action "appears to be in the interests of the corporation" by framing the relevant test in terms of the apparent strength or merit of the proposed claim. In this regard, courts have used terminology such as "an arguable issue worthy of trial" (*L&B Electric* at para 46); "a reasonable argument which would not be dismissed out of hand" (*Primex Investments Ltd. v Northwest Sports Enterprises Ltd.*, [1996] 4 WWR 54 (BC Sup Ct) at para 39); a claim that does not appear "frivolous or vexatious or is bound to be unsuccessful" (*Re Marc Jay Investments Inc. and Levy* (1974), 50 DLR (3d) 45 (Ont H Ct J) at 47); and "whether the proposed action has a reasonable prospect of success or is bound to fail" (*Jordan Enterprises Ltd. v Barker*, 2015 BCSC 559 at para 35).

And later:

> [52] Again, I am satisfied the judge did not make a reversible error. The record contains significant conflicting evidence on whether there were other proposals available to FTI to allow it to proceed with its Petit and Grand Passage projects. If the judge was referring to this cost argument of the appellants, when she stated in paragraph 46 of her reasons that she could not determine this issue because it would require her to make findings of credibility and consider the merits of each party's position, she did not err. **It is not for a judge on a leave application to determine questions of credibility or to resolve the issues in dispute.**

(Emphasis added)

[56] In argument on appeal, much is made of Justice Hamilton's directions that "it is not for a judge on a leave application to determine questions of credibility or to resolve the issues in dispute", and that "the threshold the applicant has to meet is low". The appellant asserts these "touchstone" statements apply to all three criteria found in s. 4(2), including the determination of whether he was acting in good faith.

[57] With respect, a contextual reading of *Budd* does not support the appellant's interpretation. Justice Hamilton's statements that the granting of leave is a discretionary remedy and that the legislation is remedial in nature are most certainly principles of general application. However, her admonition against "resolving the issues in dispute" has no application to whether an applicant has provided reasonable notice or if they are acting in good faith. The criteria contained in s. 4(2)(a) and (b) are often in dispute, and on the face of the legislation, they must be resolved in order to grant leave. Clearly, the caution levied by Justice Hamilton related solely to the "appears to be in the interests of the company" criterion—that was the only issue that was before the Court in that instance.

[58] *Budd* should be viewed as setting out the principles relating to the assessment of whether an applicant has met s. 4(2)(c). It did not consider the other two criteria. As such, *Oickle* remains this Court's most recent commentary on the good faith element. In particular, an assessment of an applicant's good faith, in accordance with *Oickle*, must be established on a balance of probabilities.

[59] A recent decision of the British Columbia Court of Appeal is particularly informative with respect to the good faith criterion.[3] In *2538520 Ontario Ltd. v. Eastern Platinum Limited*, 2020 BCCA 313 (leave to appeal denied May 27, 2021 at [2021] S.C.C.A. No. 16), the court had the opportunity to set out the principles relating to a good faith determination. Writing for the majority, Justice Griffin noted:

> [29] The requirement that the complainant be acting in good faith focuses on the primary purpose for the bringing of the derivative action. The primary purpose must be to benefit the company. The onus is on the applicant to provide evidence proving this question of fact: *Jordan Enterprises Ltd. v. Barker*, 2015 BCSC 559 at paras. 27–30.
>
> [30] The good faith requirement is a separate requirement that must be established by the complainant based on evidence. It cannot simply be presumed, even where the claim can be said to be in the best interests of the company: *Discovery Enterprises Inc. v. Ebco Industries Ltd.* (1997), 40 B.C.L.R. (3d) 43 at paras. 117–118 (S.C.) [*Discovery Enterprises* (S.C.)]; aff'd (1998), 50 B.C.L.R. (3d) 195 at para. 5 (C.A.) [*Discovery Enterprises* (C.A.)].
>
> [31] The evidence that may be considered by the court in determining the good faith requirement includes the applicant's stated belief in the merits of the

[3] Section 233(1)(c) of the British Columbia *Business Corporations Act*, S.B.C. 2002, c. 57 is identical to s. 4(2)(b) of the Third Schedule.

> proposed action. If this evidence is accepted by the court, it is a *prima facie* indication of good faith, but it is not necessarily determinative: *Jordan Enterprises* at para. 29; *Discovery Enterprises* (S.C.) at para. 117. The court must also consider evidence that indicates the applicant has ulterior motives, including considering any existing disputes between the parties.
>
> [32] A conclusion that there is an absence of "good faith" simply means that the applicant has not met the onus of showing that the primary purpose of the action is to benefit the company. There is no requirement that the respondent show the applicant is acting in bad faith.
>
> [33] A finding of good faith, or of a failure to prove good faith, is a finding of fact in the purview of the trial judge, typically based on inferences drawn from the record, and the appeal court will not interfere absent a palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 10; *Discovery Enterprises* (C.A.) at para. 7.

[60] The above principles are entirely consistent with those applied to the good faith criterion in *Oickle*. This Court's decision in *Budd* did not displace them.

General principles

[61] Having reviewed the above, I set out the following summary of the approach governing applications for leave to commence a derivative action:

- The granting of leave is a discretionary remedy and is governed by s. 4(1) and (2) of the Third Schedule of the *Act*;
- The Third Schedule is remedial legislation. As such, the wording of its provisions must be interpreted liberally and in favour of an applicant. This liberal approach is applied where statutory provisions are open to differing interpretation, and mandates accepting the meaning that favours an applicant. It does not serve to lessen a burden or obligation placed upon an applicant by unambiguous provisions;
- To bring an application for leave, an applicant must establish they fall within the statutory definition of "complainant" (s. 4(1));
- An applicant must establish on a balance of probabilities all three of the criteria set out in s. 4(2) to be granted leave;
- Whether an applicant has provided "reasonable notice" (s. 4(2)(a)) is a finding of fact. An applicant is required to establish on a balance of probabilities that notice was provided and it was "reasonable" in the circumstances;

- Section 4(2)(b) is not ambiguous. Whether a complainant is acting in good faith is a finding of fact. The burden rests upon an applicant to adduce evidence that establishes on a balance of probabilities (not some lesser standard) that they are acting in good faith. In assessing this criterion, a judge should look to the entirety of the record, including the pleadings, submissions and evidence adduced by all parties. There is no need to attempt to define good faith, but rather a judge should analyse the evidence for the existence of bad faith on the part of the applicant. If bad faith is found, then the requirement of good faith has not been met. Like any other finding of fact that must be made, a judge can use the tools at their disposal, including drawing inferences from the evidence and making assessments of credibility;

- Determining whether an applicant is acting in good faith is a necessary pre-condition to granting leave. It must be resolved at the leave stage—it is not an issue for trial. Therefore, the admonition against assessing credibility does not apply here. If an applicant has not established they are acting in good faith on a balance of probabilities, there is no "benefit of the doubt" that applies in his favour; and

- Section 4(2)(c), whether the proposed action "appears to be in the interests" of the company, has historically been subject to interpretative debate. However, given the remedial nature of the legislation, an approach favourable to an applicant has been endorsed. The threshold for meeting this criterion is low. An applicant does not have to show that the proposed action **is** in the interests of the company, only that it **appears** to be. In considering whether this criterion has been met, a judge should not delve into the merits of the proposed action, but rather look to whether the issues raised are arguable. Because potential trial issues are not to be resolved at this stage, an application judge should refrain from credibility assessments relating to the ultimate merits of those matters.

2. Did the judge err in applying those principles when he concluded the appellant had failed to establish he was acting in good faith?

[62] In his factum, the appellant focuses most of his argument on the "appears to be in the interests" criterion. Numerous arguments are advanced to demonstrate the judge erred by making determinations on critical issues that should have been left for trial and, in doing so, he made improper credibility assessments. It is not necessary to address these complaints to resolve the Merits appeal. I am of the

view that leave was properly denied on the basis of the judge's conclusion the applicant was acting in bad faith.

[63] The appellant's assertion of error regarding the judge's failure to find he was acting in good faith is set out in his factum as follows:

> 64. Justice Hamilton's "touchstone" guidance in *Budd* also should have informed the analysis of the good faith criterion. But again here, the Application Judge fell into error by making an unwarranted credibility assessment and veering into the merits of the dispute. He did so by clearly preferring the affidavit evidence of John Hermeier over the Appellant's own evidence regarding the Appellant's motivations in pursuing the Derivative Action.
>
> 65. As the Appellant emphasized below, an element of self-interest; personal difficulties, and even personal animus between the parties; and/or "a financial interest in the outcome of the litigation" will not prevent a finding of good faith. Given the low threshold and liberal approach mandated in *Budd*, any doubt about the Appellant's motivations should have been resolved in his favour.

(Footnotes omitted)

[64] In oral submissions, Mr. Campbell drew the Court's attention to two passages in the judge's Merits decision that the appellant says demonstrate error:

> [56] He [the appellant] has made no specific statements to refute, and presented no specific evidence to counter, that of John Hermeier, who clearly, and credibly in my opinion, asserts that Jay's primary motivation is personal animus against his father, his brother, Link Snacks, and Mr. Hermeier.
>
> [57] Jay has been capable as a complainant of starting this Application for leave to file a derivative action since he became aware of what he calls "The Transfer Pricing Claims" since, at the latest, December 2010, and the "Theft of Link Canada Claims" since at the latest, May 2016. He gives no credible explanation as to why he did not start proceedings for such claims in Nova Scotia in his own name (or that of the corporation) during those years following his discovery of the material facts underlying these claims between December 2010 and May 2016, all the while having ongoing access to legal counsel. He has not asserted that he has had negligent legal advice.

[65] The appellant asserts the above clearly shows the judge, contrary to *Budd*, engaged in a forbidden credibility analysis in reaching his conclusion regarding the issue of good faith. He also suggests the judge improperly strayed into the limitations issue (a matter for trial) when considering this criterion.

[66] Based on the principles set out above, there is no merit to the appellant's complaint that the judge misapplied *Budd* in relation to the good faith criterion.

Further, I am not convinced the judge erred in law by considering the appellant's delay in seeking leave in Nova Scotia. It was one indicium, of many on this record, that was relevant to whether the appellant was bringing the proposed action in good faith.

[67] Whether the appellant was acting in good faith was a finding of fact the judge was required to make. There was evidence before the court, including the unrefuted evidence of Mr. Hermeier and Mr. Norton, that provided a clear evidentiary foundation for the judge's finding of bad faith. A finding of bad faith negates the existence of good faith. The appellant has not demonstrated the judge's conclusion regarding this criterion was based on an error of law, a palpable and overriding error of fact, or gave rise to a patent injustice.

[68] Given that a successful application for leave required the appellant to establish all three criteria, the Merits appeal can be dismissed on this basis.

3. Should leave to appeal the issue of costs be granted?

[69] Leave of the Court is required to challenge a costs award on appeal. To obtain leave the appellant must demonstrate an arguable issue—that is, an issue that arises on the record which could result in the appeal being allowed.

[70] I am satisfied leave ought to be granted in these circumstances. The quantum of the lump sum costs for a one-day application in chambers is not typical. On its face, it is arguable the quantum gives rise to a patent injustice. That is all that is required to grant leave.

4. Does the costs award necessitate appellate intervention?

[71] The appellant acknowledges the judge properly stated the governing principles relevant to the awarding of costs when he wrote in the Costs decision:

> [10] As an Application in Chambers, the starting point is tariff "C". A court may depart from that tariff if there are special or exceptional circumstances that suggest doing so is necessary to meet the fundamental objective of costs awards, which is to do justice as between the parties in the circumstances, and provide a substantial contribution to the successful party's reasonable costs and disbursements.

[72] However, the appellant argues on appeal the judge's departure from Tariff C costs in favour of a lump sum award was both an error in principle and constituted a patent injustice.

Errors in principle

[73] The appellant says the judge erred in principle in three ways:

1. He mischaracterized the proceeding before him as "extraordinary" and over-emphasized the complexity of the proceedings;

2. He misstated the appellant's position on costs by stating he did not disagree with the costs being sought by the respondents;

3. He improperly delved into the merits of Link Canada's allegations against the respondents in making the costs award and improperly focused on the potential damages of $80 million should the derivative action be successful.

[74] At the core of the appellant's submissions before this Court is the same assertion he made to the judge—this matter was straightforward, not complex and should have attracted costs in the usual course for a contested application in chambers. The appellant characterizes the matter placed before the court as not "overly complex" notwithstanding:

- He requested the derivative action be heard in Wisconsin and pled Chapter 180 of the Wisconsin Statutes, thus placing foreign law and choice of forum issues before the court;
- In his affidavit, he introduced the previous 15-year history of litigation between the parties as being relevant, including the nature of the claims previously advanced in two different States;
- He testified about his efforts to have the "Transfer Pricing Claims" and "Theft of Link Canada Claims" added to litigation in 2010 and 2016 respectively, thus introducing the potential for a limitations argument;
- He provided evidence regarding the appointment of a Receiver and made assertions regarding his failure to advance the claims on behalf of Link Canada;
- He asserted, if leave were granted, the value of the claims to be advanced against the respondents was 80 to 100 million US dollars and therefore in the interests of Link Canada; and
- He had met the other criteria contained in s. 4(2) of the Third Schedule.

[75] Although the value of a proposed claim does not necessarily mean the proceedings are complex, the appellant's assertion of the "stakes" involved certainly caught the attention of the respondents. They responded to the appellant's assertions by:

- Adducing evidence regarding the operation of Wisconsin law;
- Providing significantly more context to the litigation history referenced by the appellant;
- Advancing evidence to establish the appellant had not established reasonable notice had been provided;
- Advancing evidence to establish the appellant was acting in bad faith, and therefore, could not establish the required good faith criterion; and
- Advancing evidence to establish why it was not in the interests of Link Canada for the proposed action to proceed, including why the claims were not "arguable".

[76] Having considered the pleadings, evidence advanced by the appellant and the applicable law, the respondents' approach was reasonable. The additional evidence they placed before the court and their arguments were responsive to the issues raised, the history between the parties and "the stakes" involved.

[77] Given the above, I am satisfied the judge did not err in categorizing the matter as "extraordinary" and complex. Further, the judge was required to address the legitimate issues raised before him. However, the award of costs is not intended to reflect the work he performed, but rather the costs to the respondents. Whether he delved too deeply into the merits is irrelevant to whether the respondents should be compensated for their costs in reasonably defending against the application.

[78] Finally, a review of the Costs decision makes clear the judge knew the appellant was not agreeing to the costs being sought by the respondents. He had clearly set out the appellant's position that Tariff C should apply, not the lump sum being requested by the respondents.

Patent injustice

[79] The appellant says the lump sum award of $40,000 was manifestly unjust or plainly wrong for two reasons. First, he points to the costs awarded in *Budd* and

Oickle: $3,000 and $2,000 respectively. Second, he argues the disbursements ordered ($625.14) was double the appropriate amount.

[80] These arguments are unconvincing. An award of costs is responsive to the matter at hand. Although comparisons to other cases may at some times be informative, what was found appropriate in *Budd* and *Oickle* does not make an otherwise justified costs award, manifestly unjust or plainly wrong. Here, the judge exercised his discretion and awarded a lump sum he determined would do justice between the parties. The respondents presented their legal account and the judge awarded 25% in costs as "substantial indemnity". The appellant did not question the reasonableness of the legal accounts presented, nor that 25% would constitute a "substantial indemnity". He simply argued the Tariff should prevail.

[81] Finally, with respect to disbursements, the appellant says that the extra $312.58 awarded requires this Court's intervention. Given this record, and the deference afforded to the judge, I would decline to interfere.

Disposition

[82] For the reasons above, I would dismiss the Merits appeal. Although I would grant leave, I would dismiss the Costs appeal. I would order costs for both appeals in the total of $16,000, inclusive of disbursements, be paid forthwith by the appellant to the respondents.

Bourgeois J.A.

Concurred in:

Beveridge J.A.

Van den Eynden J.A.