

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CHIEF JAMES MARLOWE, in his personal capacity and on behalf of  
ŁUTSEL K'E DENE FIRST NATION

Applicants

-and-

MIRZA MOHAMMAD IMRAN KARIM BARLAS (AKA RON BARLAS),  
ZEBAR BARLAS, NORTHERN CONSULTING GROUP INC., EQUIPMENT  
NORTH INC., DENE AURORA ENVIRONMENTAL TECHNOLOGIES INC.,  
BARLAS FAMILY TRUST, TSA CORPORATION, TA'EGERA COMPANY  
LTD., DENESOLINE CORPORATION LTD. and DENESOLINE COMMUNITY  
DEVELOPMENT CORPORATION

Respondents

**RULING ON APPLICATION FOR STANDING**

**BACKGROUND**

[1] The Applicants, Chief James Marlowe in his personal capacity and on behalf of the Łutsel K'e Dene First Nation (together, "LKDFN") have filed notice of an application for leave to commence a derivative action pursuant to ss 250 to 253 of the *Canada Not-for-profit Corporations Act*, SC 2009, c 23 ("CNCA") and ss 240 to 243 of the *Business Corporations Act*, SNWT 1996, c 19 ("BCA") in the name and on behalf of the proposed plaintiffs, Tsa Corporation, Ta'egera Company, and Denesoline Corporation Ltd (collectively, the "Corporations"). The proposed defendants are Reynolds Mirth Richards and Farmer, LLP and four lawyers from that firm in their personal capacities (collectively, "RMRF"), who previously acted as the Corporations' solicitors.

[2] LKDFN alleges RMRF aided the Corporations' former Chief Executive Officer, Mirza Mohammad Imran Karim Barlas ("Barlas"), in self-dealing and fraud, causing financial losses to the Corporations. To recover the losses, LKDFN wants to commence a derivative action against RMRF for breach of fiduciary duty, conspiracy, breach of contract, professional negligence, and knowingly assisting Barlas in breaching his fiduciary duty as Chief Executive Officer.

[3] The leave application has not been heard. RMRF seeks standing to participate in it.

## **LEGAL FRAMEWORK**

[4] The provisions governing applications for leave to commence a derivative action under the CNCA and the BCA are substantially the same. For convenience, only the provisions from the BCA are reproduced below:

240. In this Part,

"action" means an action under this Act or any other law;

"complainant" means

(a) a registered holder or beneficial owner, or a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,

(b) a director or an officer or a former director or officer of a corporation or of any of its affiliates, or

(c) any other person who, in the discretion of the Court, is a proper person to make an application under this Part.

241. (1) Subject to subsection (2), a complainant may apply to the Court for leave to

(a) bring an action in the name and on behalf of a corporation or any of its subsidiaries; or

(b) intervene in an action to which a corporation or any of its subsidiaries is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the corporation or subsidiary.

(2) No leave may be granted under subsection (1) unless the Court is satisfied that

(a) the complainant has given reasonable notice to the directors of the corporation or its subsidiary of his or her intention to apply to the Court under subsection (1) if the directors of the corporation or its subsidiary do not bring, diligently prosecute, defend or discontinue the action;

(b) the complainant is acting in good faith; and

(c) it appears to be in the interests of the corporation or its subsidiary that the action be brought, prosecuted, defended or discontinued.

[5] As authority for its application, RMRF points first to r 92 of the *Rules of the Supreme Court of the Northwest Territories*, which pertains to motions to intervene as *amicus curiae*.<sup>1</sup> Respectfully, this does not assist RMRF. The purpose of appointing *amicus curiae* is to assist the Court as required, typically in unusual cases where one side of a case cannot be presented, preventing the matter from being justly adjudicated. *R v Kahsai*, 2023 SCC 20 at para 57. An *amicus* is not a party to a proceeding and, importantly, has no interest in the proceeding. *Borowski v Minister of Justice of Canada and Minister of Finance of Canada and Canadian Civil Liberties Association, Canadian Abortion Rights Action League and Campaign Life Canada*, 1983 CanLII 2022 (SKQB) at para 42; *Legal Questions Act (Re)*, 1997 CanLII 3466 (NWTSC) at paras 19-21; *Ontario v Criminal Trial Lawyers Association of Ontario*, 2013 SCC 43 at paras 49-54. RMRF is the proposed defendant and thus has a direct interest in the proposed derivative action. It has expressly stated its contrary interests and positions in its written submissions. In the circumstances, RMRF may not rely on r 92 as a basis to apply for standing.

[6] Although not codified in the *Rules*, this Court has inherent jurisdiction to grant standing to a non-party. *5142 NWT Ltd. v Hay River (Town)*, 2007 NWTSC 51 at paras 16 and 17. It is under this inherent authority that RMRF's application must be considered.

[7] The decision to grant standing to a non-party is discretionary. In exercising its discretion, the Court must inquire into whether the party seeking standing has a direct interest which will not otherwise be adequately addressed and whether granting the party standing will aid the Court in determining the questions before it. The Court must consider the nature of the proceeding in which standing is sought. There are no cases from the Northwest Territories which consider applications for standing in the context of an application for leave to bring a derivative action;

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<sup>1</sup> RMRF cited a number of other procedural rules, but none pertain directly to standing.

however, the question has been considered in other jurisdictions in relation to legislative provisions equivalent to those at play here, namely: *Lederer v 372116 Ontario Limited*, 2000 CanLII 22408 (ONSC), aff'd 2001 CanLII 24159 (ONCA), *Blankstein et al v Memrad Holdings Ltd*, 2010 MBQB 230, and *Pierce v Chalice Capital Inc*, 2016 BCSC 785. The key principles which emerge from those cases are discussed below.

[8] First, a proposed defendant in a derivative action has no standing as of right to participate in, or oppose, a leave application. An application for leave, whether under the CNCA or the BCA, is a proceeding between the complainant and the corporation and the directors. This is borne out by s 251(2) of the CNCA and s 241(2) BCA, which require the complainant to give advance notice of the intention to apply for leave *only* to the directors of the corporation. Nothing in either statute suggests a proposed defendant will play any role in the application.

[9] Second, the statutory provisions governing the leave application contemplate an expeditious process so that litigation, if deemed necessary in the interests of the corporation, will not be delayed. Granting standing to a proposed defendant will necessarily add time and complexity to the procedure. A proposed defendant seeking standing must establish its contribution will be sufficient to counterbalance this. Standing for a proposed defendant must be the exception, not the rule.

[10] Third, having an interest in the potential derivative action and being able to offer information or evidence which will pertain to the substance of the potential action is not the same as having an interest in the outcome of a leave application. The Court does not determine the merits of the proposed suit on the leave application. The questions are limited: whether the proposed complainant is the proper person or entity to bring the action; whether the complainant has given proper notice to the corporation's directors; whether the complainant is acting in good faith; and whether the derivative action is in the corporation's interest. Other than in exceptional of circumstances, it is not clear how a proposed defendant could provide any meaningful assistance to the Court in determining these questions.

[11] Fourth, if leave is granted, the proposed defendant will have a full opportunity to defend the claims against it and to utilize the tools available to any defendant in a lawsuit.

[12] Finally, the fact that a proposed plaintiff in a derivative action requires leave to commence the action does not bestow a proposed defendant with special status

not enjoyed by defendants in other types of suits. Defendants generally have no say in whether actions are brought against them.

## **ISSUE**

[13] The issue is whether RMRF, as a non-party and proposed defendant, has established there are exceptional circumstances to justify granting it standing.

## **THE PARTIES' POSITIONS**

[14] LKDFN argues there are no exceptional circumstances which would justify granting standing to RMRF.

[15] RMRF says even though a proposed defendant will generally have no standing to oppose an application for leave to commence a derivative action, there are exceptional circumstances in this case which warrant it. It argues having standing will allow it to provide pertinent information to the Court which the Court must have before it to properly decide LKDFN's application for leave. Moreover, the issues which LKDFN plans to raise in the derivative action, should leave be granted, would have a direct and significant effect on RMRF as well as the Corporations.

[16] RMRF says without hearing submissions on its behalf, the Court may not be made aware of a number of issues, including the following:<sup>2</sup>

- a. LKDFN is not a complainant with the meaning of either the CNCA or the BCA;
- b. Tsa Corporation's constitution expressly directs that LKDFN will not take control of any aspect of its or its subsidiaries' affairs;
- c. There are alternatives to a derivative action;
- d. The LKDFN's and the Corporations' interests do not align, and the Corporations therefore ought to represent their own interests;
- e. It is a conflict of interest for LKDFN's lawyers to act for the Companies in a derivative action; and

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<sup>2</sup> This is a summary.

- f. Without input from RMRF, the leave application will essentially be *ex parte*.

[17] If granted standing, RMRF says it will oppose the leave application on a number of grounds. These include:<sup>3</sup>

- a. The requirements for leave to commence a derivative action have not been met;
- b. A derivative action is unnecessary as the Corporations can file a direct claim;
- c. Tsa Corporation's board of directors resolved to commence the derivative action. Accordingly, the action would not be brought in good faith, as required under both the CNCA and the BCA, rendering LKDFN's proposed action unnecessary. Moreover, if the claim was meritorious and made in good faith, the Receiver appointed to represent the Corporations would be bringing it;
- d. The application is premature, given the outstanding application against the Respondents named in this matter;
- e. The proposed Statement of Claim is 85 pages long, improperly pleads evidence, opinion and emotional statements, and includes egregious and salacious claims devoid of merit designed to discredit RMRF;
- f. There is a risk the Corporations will be liable for solicitor-client costs for pleading fraud and other intentional torts against RMRF and therefore, a derivative action would not be in their best interest;
- g. There is no evidence the Corporations have had independent legal advice; and
- h. Members of the community have interests which may not align with those of LKDFN.

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<sup>3</sup> RMRF lists 24 grounds upon which it would oppose the leave application. What is listed here is a summary.

## ANALYSIS

[18] RMRF has not established there are exceptional circumstances which would justify granting it standing, nor has it established any contribution it would make would counterbalance the increased complexity and time requirements which would follow from its involvement.

[19] I appreciate RMRF has a direct interest in the proposed derivative action; however, its interests are those of any other defendant and it can defend those interests and manage its side of the suit just as any other defendant can. It has no special status.

[20] Granting RMRF standing will not assist the Court in determining whether leave should be granted to commence the derivative action. I accept that many of the issues RMRF raises and upon which it proposes to provide evidence and submissions are valid considerations in a leave application, particularly from the Corporations' perspective. Given the nature of allegations set out in the proposed Statement of Claim, however, it is clear RMRF's interests conflict directly with those of the Corporations. The Court could not possibly rely on RMRF's submissions or representations with respect to them. It is for the parties on the leave application to raise and address these issues.

[21] Similarly, it would not assist the Court to hear submissions from RMRF on whether LKDFN is acting in good faith in applying for leave to bring the derivative action. The legislation does not contemplate hearing from a proposed defendant on this point and rightly so. A proposed defendant's interests are unlikely to align with a finding of good faith.

[22] None of RMRF's potential submissions respecting whether LKDFN is a "complainant" under either the CNCA or the BCA, whether the requirements for a derivative action have been met, whether bringing it at this point in time is premature, and whether there are better or alternative legal remedies available, would assist the Court. Whether an applicant qualifies as a "complainant" is a question the Court is expected to determine based on an applicant's evidence and submissions. This is what is contemplated by both the CNCA and the BCA. The mode of action and remedy a party chooses to pursue, whether there are alternatives available, and when that party decides to commence a proceeding, are not relevant considerations. It is not the Court's role to advise applicants on what remedies should be pursued or the timing of their applications. The Court is tasked only with

deciding on the merits of the particular proceeding before it. In this case, LKDFN has chosen to pursue a derivative action.

[23] Finally, RMRF's argument that unless it is granted standing the leave application will essentially be made *ex parte* is without merit. If the notice requirements requiring service on corporate directors under the CNCA and the BCA are met, the application is, by definition, on notice.

## **CONCLUSION**

[24] There is no basis to grant RMRF standing to make submissions in the leave application. It has not established there are "exceptional circumstances" which would justify granting it standing, nor that it can offer anything through its participation to assist the Court which would counterbalance the increased complexity and time requirements which would result. If leave is granted to LKDFN to bring the derivative action, RMRF's interests can be properly represented through the regular civil litigation process.

[25] RMRF's application is dismissed. Chief Marlowe and LKDFN are entitled to costs, which will be assessed in the cause once the application for leave to commence the derivative action is determined.

K. M. Shaner  
J.S.C.

Dated at Yellowknife, NT, this  
7<sup>th</sup> day of March, 2024



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Trust:

Sara E. Harte, KC

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