

Date: 2024 07 31
Docket: S-1-CV 2023 000 128

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CHIEF JAMES MARLOWE, in his personal capacity and on behalf of the
LUTSEL 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

MEMORANDUM OF JUDGMENT

INTRODUCTION

[1] The Applicants, Chief James Marlowe in his personal capacity and on behalf of the Lutsel K'e Dene First Nation, seek leave to commence derivative actions 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 "LKDFN Companies").

[2] In a related application, indexed as *Marlas et al v Barlas et al*, 2024 NWTSC 38, (the “oppression application”), I found the LKDFN Companies’ former Chief Executive Officer, Mirza Mohammad Imran Karim Barlas (“Mr. Barlas”) had engaged in oppressive conduct *vis-à-vis* the LKDFN Companies and that the Applicants were entitled to relief. The relationships between the LKDFN Companies are described in reasons for the oppression application cited above.

[3] The LKDFN Companies are currently subject to a receivership order.

[4] The proposed defendants are Reynolds Mirth Richards and Farmer, LLP and four lawyers from that firm in their personal capacities, namely Rick Ewasiuk, Fred Kozak, Anthony Purgas, and Tess Layton (collectively, “RMRF”), who previously acted as the LKDFN Companies’ corporate solicitors; and KPMG LLP, who acted as the LKDFN Companies’ accountants and auditors.

[5] The Applicants allege RMRF and KPMG aided Mr. Barlas in oppressive conduct, including self-dealing and fraud in his role as Chief Executive Officer, causing financial losses to the LKDFN Companies.

[6] The Application is supported by the Receiver and Tsa’s newly elected Board of Directors.

STATUTORY FRAMEWORK

[7] 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.

DISCUSSION

[8] The requirements the Applicants must satisfy are these:

- a. the Applicants are the proper persons to bring the actions;
- b. the Applicants have given proper notice to the corporation's directors;
- c. the Applicants are acting in good faith; and
- d. the derivative action appears to be in the LKDFN Companies' interest.

Are the Applicants proper complainants?

[9] The Applicants are complainants for the purpose of commencing a derivative action.

[10] This issue was addressed in the oppression application. The same definition of "complainant" applies. Having found both Chief Marlowe and the LKDFN fell

within the definition of complainant in that application, (*Marlowe et al v Barlas et al, supra*, at paras 180-185) it is unnecessary to repeat the same analysis here.

Has proper notice been provided?

[11] Proper notice has been provided.

[12] As noted, the LKDFN Companies are currently under the management of a Receiver, pursuant to an order of this Court. While Tsa has since elected a new Board of Directors, it is the Receiver who is authorized to initiate and prosecute proceedings. The Receiver has indicated, through a report filed by Receiver's counsel, its view that the proposed derivative actions are the most appropriate way to proceed and would be in the interests of the LKDFN Companies. The new Board has nevertheless been provided notice and has unanimously approved proceeding by way of derivative action.

Are the derivative actions being brought in good faith?

[13] In *2538520 Ontario Ltd v Eastern Platinum Limited*, 2020 BCCA 313, leave to appeal denied 2021 CanLII 44590 (SCC), Griffith, JA summarized the law surrounding "good faith" in this context:

[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), 1997 CanLII 4375 (BC SC), 40 B.C.L.R. (3d) 43 at paras. 117–118 (S.C.) [*Discovery Enterprises* (S.C.)]; aff'd (1998), 1998 CanLII 7049 (BC CA), 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 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.

[14] I am satisfied the good faith requirement has been made out. First, the Receiver has assessed the merits of the proposed derivative actions and has determined they could represent potential significant revenues, and therefore benefit, for the LKDFN Companies. Second, Chief Marlowe, in affidavits sworn March 18 and November 7, 2023, has expressed his belief, based on evidence he reviewed as an Applicant in the oppression application, that the LKDFN Companies could potentially recover a substantial amount of money from both RMRF and KPMG as a result of their alleged assistance of Mr. Barlas. As noted, Mr. Barlas was found to have engaged in oppressive conduct.

Do the derivative actions appear to be in the LKDFN Companies' interests?

[15] It is useful to start with an overview of the allegations against the proposed defendants. I emphasize, however, that these are unproven allegations at this point.

Allegations against RMRF

[16] The proposed Statement of Claim against RMRF and the four individual lawyers alleges they are liable to the LKDFN Companies by reason of having engaged in several acts and omissions. These include:

- a. Preparing and/or giving legal advice on transactions and agreements Mr. Barlas used to defraud LKDFN Companies and advising Barlas on legal strategies to avoid scrutiny of his self-dealing;
- b. Developing and implementing legal strategies to undermine proper corporate governance, to establish Mr. Barlas' unilateral power over the LKDFN Companies; and to lend credibility through presentations to the LKDFN Companies and Tsa members, despite knowing Mr. Barlas was breaching his fiduciary duty;
- c. Providing advice to Mr. Barlas on how to circumvent proper corporate governance procedures and to induce Tsa members to sign resolutions at annual general meetings "in order to get their cheque" of \$1,000.00 per household;
- d. At Mr. Barlas' direction, sending threatening cease and desist letters to members of the LKDFN Companies who questioned or challenged Mr. Barlas' management;

- e. Implementing the oppressive transactions effected by Mr. Barlas with knowledge that the LKDFN Companies had not and could not have obtained independent legal or financial advice, and when they ought to have known the transactions were contrary to the interests of the LKDFN Companies;
- f. Failing to bring obvious *indicia* of fraud to the attention of the LKDFN Companies' directors or the members of Tsa;
- g. Failing to withdraw from representing the LKDFN Companies, despite a direct and ongoing conflict of interest, including knowledge of Mr. Barlas' self-dealing transactions and his efforts to avoid scrutiny;
- h. On Mr. Barlas' instructions, intervening in the application for relief from oppression, ostensibly on behalf of the LKDFN Companies, in an attempt to oppose an application to place the LKDFN Companies in the hands of a receiver and to conceal their own conduct.

Allegations against KPMG

[17] The proposed claim against KPMG pleads the following acts or omissions:

- a. KPMG acted in a conflict of interest by acting for both the LKDFN Companies and Mr. Barlas personally, while knowing of his self-dealing transactions.
- b. On Mr. Barlas' instructions, KPMG issued misleading financial statements;
- c. On Mr. Barlas' instructions, KPMG gave misleading presentations to Tsa members.

[18] The key purpose behind the requirement for leave to commence a derivative action is to prevent actions which are not in the interest of the corporation to litigate. *BCE Inc v 1976 Debentureholders*, 2008 SCC 69 at para 43.

[19] On this type of leave application, the Court is not to determine whether the derivative action will *actually* be in the corporation's interest, but rather, whether it *appears* to be in the corporation's interest. Further, this exercise does not require

the Court to assess credibility or resolve other issues in the proposed lawsuit. That is the purview of the judge who hears the trial, should leave be granted.

[20] While a complainant need not demonstrate that a claim is bound to succeed, it is not enough to demonstrate simply that the claim is not bound to fail. *1719349 Alberta Ltd v 1824766 Alberta Ltd*, 2023 ABKB 207 at paras 40-42. The Court must be satisfied “there is a reasonable basis for the complainant” and that the action it seeks to bring “is a legitimate or arguable one”. *Richardson Greenshields of Canada Ltd v Kalmacoff*, 1995 CanLII 1739 (ONCA).

[21] Finally, even where the success of the proposed action could be certain, there are circumstances when it would clearly not be in the corporation’s interest to pursue an action, such as where the costs to bring the action will be disproportionate to what might be recovered in damages or where pursuing the claim would harm important and ongoing business relationships. *Jahnke v Johnson*, 2018 SKCA 59 at para 68.

[22] While I do not purport to make any findings on the actual merits of the proposed derivative actions, the evidence discloses a legitimate and reasonable basis for the allegations in the proposed statements of claims and in turn, for bringing derivative actions against both RMRF and KPMG. The LKDFN Companies suffered substantive losses due to the actions of Mr. Barlas and, allegedly, the support of corporate counsel and accounting professionals. The potential damages which may be recovered from both RMRF and KPMG, as alleged by the Applicants, are proportionate to the costs of which would be incurred in bringing the suits. In all of the circumstances, it appears to be in the interest of the LKDFN Companies to pursue actions against the RMRF and KPMG.

[23] Leave is granted in both Applications.

RELIEF GRANTED

[24] I order the following:

- a. The Applicants are granted leave to commence and control the conduct of derivative actions in the name and on behalf of the name Tsa Corporation, Ta’egera Company, and Denesoline Corporation Ltd. against Reynolds, Mirth, Richards and Farmer, LLP, Rick Ewasiuk, Fred Kozak, Anthony Purgas, and Tess Layton;

- b. The Applicants are granted leave to commence and control the conduct of derivative actions in the name and on behalf of the name Tsa Corporation, Ta'egeera Company, and Denesoline Corporation Ltd. against KPMG LLP;
- c. The Applicants are granted leave to file Statements of Claim in both derivative actions in substantially the form as presented at the hearing of this Application;
- d. The Applicants are entitled to the costs of this application, to be assessed as part of the derivative actions against the proposed defendants; and
- e. The Applicants shall have their costs for RMRF's application for standing indexed at 2024 NWTSC 12, on a party-party basis.

K. M. Shaner
J.S.C.

Dated at Yellowknife, NT, this
31st day of July, 2024

Counsel for the Applicants:

Matthew P. Sammon
Jessica Kras
Larry D. Innes

Counsel for the Barlas Respondents:

G. James Thorlakson
Sara E. Hart, KC

Counsel for the Receiver:

Toby Kruger

**IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES**

BETWEEN:

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

Applicants

-and-

MIRZA MOHAMMAD IMRAN KARIM BARLAS
(AKA RON BARLAS), ZEBBA 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

MEMORANDUM OF JUDGMENT
