Date: January 14, 2026
Docket: S-1-CV 2024-000241
S-1-CV 2024-000419
S-1-CV 2023-000128

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

TSA CORPORATION, TA'EGERA COMPANY, AND DENESOLINE CORPORATION LTD.

Plaintiffs/Respondents

-and-

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

Applicant/Respondent

-and-

KPMG LLP

Defendant/Applicant

Applications to Stay Actions and for Direction

Heard at Yellowknife: March 26, 27, 28, 2025; supplementary written submission received September 19, 26, 2025.

Written Reasons filed: January 14, 2026

REASONS FOR JUDGMENT

OF THE HONOURABLE JUSTICE N.E. DEVLIN

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Overview

[1] This is the latest procedural chapter in the quest of the Łutsël K'é Dene First Nation ("LKDFN") to recover millions of dollars misappropriated by the former CEO of its companies, Ron Barlas ("Barlas"). This Court has determined that Barlas' actions in that capacity were oppressive in the "extreme" towards the companies to which he owed fiduciary loyalty: ***Marlowe et al v Barlas et al***, 2024 NWTSC 38, at paras 211-214 and 217 ["the Oppression Decision"] aff'd 2025 NWTCA 6. A trial to quantify the LKDFN's losses has yet to be held, but the evidence to date suggests the First Nation has suffered upwards of $10 million in damages.

[2] In addition to the declaratory and equitable relief granted against Barlas and his wife in the Oppression Decision, the Court also approved derivative actions against KPMG, who acted as accountants and tax advisors for both the LKDFN Companies and Barlas between 2016 and the end of his reign in 2023, and the law firm of Reynolds Mirth ["RMRF"], who served in a similar legal capacity during this time: ***Marlowe et al v Barlas et al***, 2024 NWTSC 39.

[3] The suit against Reynolds Mirth is proceeding apace: ***Tsa Corporation et al v Reynolds Mirth Richards & Farmer LLP et al***, 2025 NWTSC 16. KPMG, however, insists that any action against it must take place through arbitration seated in British Columbia, pursuant to the standard form terms of their retainer agreements.

[4] This decision addresses three overlapping motions to determined whether the actions against KPMG should be stayed in favour of arbitration in whole or part.

Background Facts

[5] Łutsël K'é is a remote Dene community, located on the eastern arm of Great Slave Lake. Accessible only by plane or boat, it is home to just over 300 residents.[1] While Łutsël K'é is small, its territorial lands are rich. The resident members of the LKDFN are the rightful beneficiaries of these natural resources, which they seek to realize through a number of related corporations (the "LKDFN Companies").

[6] The following background summarizes the findings of fact made by Justice Shaner (as she then was) in the Oppression Decision, as supported by the similar record presented before the Court on the present motions.

i. The LKDFN Companies' corporate structure

[7] Every member of the LKDFN who lives in Łutsël K'é is a member of TSA Corporation. Tsa is incorporated under the *Canada Not-for-Profit Corporations Act*, SC 2009, c 23 [*"CNFPCA*"], and serves as the LKDFN's master holding company. In turn, Tsa has two subsidiaries, Denesoline Corporation and Ta'egera Company, both of which are incorporated under the Territories' *Business Corporations Act*, SNWT 1996, c 19 [*"NWTBCA*"].

[8] Denesoline is the principal economic development arm of the LKDFN, and enters into contracts and joint ventures with companies that wish to develop and extract the natural riches and resources of its lands. Ta'egera is the First Nation's real estate holding company. Denesoline is a party to numerous Participation Agreements or Impact Benefit Agreements with resource developers, which provide the lion's share of its income.

[1] Some 500 further members of the First Nation have other primary residences.

ii. A rogue takes a stranglehold

[9] The LKDFN Companies are the mainstay of the First Nation's economic life. In 2014, the community entrusted them to a new CEO, Ron Barlas. Rather than nurture the Companies as the jewel of the community, Barlas pillaged them for his family's enrichment. Barlas ruled over the LKDFN Companies with an iron fist, threatening and intimidating community and board members alike if they had the temerity to ask questions aimed at accountability. By the time of his removal, Barlas had enacted corporate bylaws and employment contracts that gave him total control.

iii. Barlas' massive misappropriation of funds

[10] Beginning in 2016, Barlas began to misappropriate funds from the LKDFN Companies. Monies were siphoned off into two entities: Northern Consulting Group Inc. ["Northern Consulting"] and Equipment North Inc. [together the "Barlas Companies"]. Barlas' wife, Zeba Barlas, was initially the sole shareholder and director of the Barlas Companies. In 2018, the shares of the Barlas Companies were transferred from Barlas' wife to Barlas himself to hold as the trustee of the Barlas Family Trust, the beneficiaries of which were Barlas, Barlas' wife, and their two adult children. Barlas' wife remained the sole director of the Barlas Companies.

[11] Barlas' misappropriation of funds took several forms, the most egregious of which was a "joint venture agreement" between Denesoline and Northern Consulting, effective September 16, 2016 [the "JVA"]. Under the JVA, Northern Consulting became entitled to 49% of the gross revenues coming into Denesoline from new sources, for no obvious reason, as Barlas was already fiduciarily obligated to maximize Denesoline's income.

[12] The JVA was amended repeatedly between 2016 and 2020, each time with terms that were progressively more outrageous and unfavourable to Denesoline. In August 2017, the scope of the JVA was expanded to include Denesoline's contracts to supply goods and services to local mines, effectively allowing Northern Consulting to divert off half of Denesoline's main source of revenue.

[13] The core oppression findings were that the LKDFN companies derived no benefit from these agreements, which effectively gave Barlas fifty-cents on the dollar of the LKDFN Companies' income, for no good reason whatsoever.

[14] In late 2018, the JVA was amended to provide that Northern Consulting would be entitled to a $4.25 million termination fee, payable to Northern Consulting in the event that either Denesoline or Northern Consulting terminated the agreement. This right was secured with a general security agreement over all of Denesoline's assets. This again valueless agreement existed to cement Barlas' misappropriation pipeline.

[15] The final amendments to the JVA occurred in May 2020. Barlas compelled Denesoline to enter an "assignment and assumption agreement" under which Denesoline would pay Northern Consulting approximately $2.2 million to acquire Northern Consulting's interest in its contracts under the JVA [the "Assignment and Assumption Agreement"]. Barlas thus performed the remarkable feat of making Denesoline buy-back the income stream he had stolen from it.

[16] During his tenure as CEO, Barlas also caused the LKDFN Companies to enter into several other self-dealing transactions with the Barlas Companies, and amended his employment agreement to significantly increase his compensation, taking his salary from $170,000 to $221,000 per year, with a guaranteed 46% annual bonus. Barlas was also found to have utilized LKDFN Company assets and resources for his personal benefit in other, smaller ways.

[17] Although the trial to quantify the losses caused by Barlas has not yet taken place, the amount of funds misappropriated is said to exceed $11 million.

iv. Barlas replaces The LKDFN Companies' Accountants

[18] In 2016, the same year he began wrongfully diverting the LKDFN Companies' income to himself, Barlas replaced their previous, local accountants with KPMG. He specifically chose a partner in the Langley, British Columbia office, with whom he had a prior relationship. KPMG is a respected firm, and the new retainer likely seemed innocent to them at the time. However, a retrospective view of the overall circumstances compels a finding that Barlas made this change to better facilitate his illicit takings, and that it was an instrumentality of his oppression.

[19] Specifically, replacing local accountants, with accrued knowledge of the client companies, makes sense if one wants to avoid questions about new contracts and structures. Replacing those accountants with someone who has a prior relationship with the CEO, and not the companies, makes sense from a trust and loyalty perspective, for the CEO. Both of these conditions proved useful when Barlas later hired KPMG for himself to advise on structuring his most oppressive moves.

[20] Hiring accountants far away, and likely at greater cost, also made no independent sense for the Companies. Barlas, however, later leveraged the perceived prestige and credibility of KPMG to his advantage at Annual General Meetings in the community. This also did not benefit the LKDFN Companies, but rather Barlas. Finally, subjecting the LKDFN Companies' rights against KPMG to an out-of-jurisdiction arbitration agreement made no sense for the companies Barlas managed. It was inconsistent with their interests.

[21] For all these reasons, I find that retaining KPMG was an instrument of the oppression executed by Barlas, and a part of his overall scheme. None of this, of course, entails any finding against KPMG at this stage. They may well have been innocent and well-meaning in taking the retainers, and it is for the plaintiffs to prove otherwise.

v. Decimation of Corporate governance

[22] In parallel to the misappropriation of funds, Barlas undertook several initiatives to overhaul the governance of the LKDFN Companies. These moves ultimately allowed him to acquire near-total unilateral control. Ironically, he purported to undertake these initiatives to shield the LKDFN Companies from the influence of various members of the community who he accused of having "conflicts of interest" and not acting in the best interests of the companies. He repeatedly used this (self-serving nonsense) line to stifle dissent and inconvenient questioners.

[23] In this vein, Tsa adopted a conflict-of-interest policy along with amendments to its by-laws at the September 2017 annual general meeting. The by-law amendments introduced various new criteria for being a member of Tsa, including being a "person of good repute" and supporting the objectives of Tsa. The by-law amendments also provided that the Board could remove Tsa members on the recommendation of the President or CEO.

[24] At the same meeting, Barlas announced that each Tsa member household would receive a $1,000 cheque, to be distributed *after* the approval of the conflict-of-interest policy and amended by-laws, which were ultimately approved without any substantive discussion. No mention was made of the JVA at this meeting.

[25] At the 2018 and 2019 annual general meetings, the $1,000 payments continued, but as in 2017, there no mention was made of the JVA with the companies Barlas functionally controlled.

[26] No annual general meetings were held after 2019. Barlas did however continue to distribute the $1,000 cheques. Denesoline staff were dispatched to the community to distribute cheques in exchange for members signing resolutions providing, among other things, that they had had a chance to review the financial statements.

[27] In 2022, Barlas convened a "community meeting" and feast in Łutsël K'é, where cheques were distributed, and Community members were given financial statements, which once more omitted any mention of the payments to Northern Consulting.

[28] During Barlas' tenure as CEO, certain community members raised concerns about Barlas' management of the LKDFN Companies or simply sought to have Barlas be more accountable to the Chief and Council. In response, Barlas would threaten to take legal action against them and to have them removed from Tsa under the amended by-laws, creating an atmosphere of fear in the community, and serving to further immunize Barlas' actions from scrutiny.

[29] For instance, after one board member suggested an agenda item to discuss a meeting between Barlas and the Council, Barlas circulated a report to the other board members accusing her of misconduct and later told her that she was no longer a director, notwithstanding that her term had not yet expired.

[30] Further corporate governance changes occurred in 2020 in the form of a unanimous shareholder agreement among Denesoline, Tsa, Ta'egera, and Northern Consulting. The USA provided Barlas near-total control of Denesoline and Ta'egera, by reducing the number of board seats to two, one of which was to be held by Barlas or a nominee of Northern Consulting, and giving Barlas or the Northern Consulting nominee the tie-breaking vote.

[31] Astonishingly, Barlas once went so far as to reject a meeting between himself as CEO of the LKDFN Companies and the LKDFN Chief and Council, in part on the basis that "the proposed meeting cannot take place because Denesoline as part of Tsa is a sovereign entity". Though legally meritless, this assertion became functionally correct, with Barlas reigning as if by divine right.

vi. The LKDFN fights to take back its companies

[32] In 2023, Barlas' right-hand man came forward as a whistle-blower, disgusted with what he had learned was going on. The LKDFN secured legal assistance and, in April 2023, took action. Chief Marlowe, acting on behalf of the community and the members of TSA, obtained a *Mareva* injunction freezing the worldwide assets of Barlas and the companies he had setup to defraud his employers, and a Receivership Order to vest control over the LKDFN Companies in a trustworthy, professional manager while the catastrophe that had befallen them was unwound.

[33] The LKDFN then pursued an oppression action against Barlas, naming him and his wife, who nominally controlled the Barlas Companies. After a lengthy and comprehensive evidentiary process, Justice Shaner ruled entirely in the LKDFN's favour. This result has now been upheld and is final.

[34] The *Mareva* injunction captured approximately $5.5 million in assets. Of that, just over $1 million has been released to Barlas and his family for living expenses

and legal fees, ending with funding for their appeal of the foundational Oppression Decision: ***Marlowe et al v Barlas et al***, 2025 NWTSC 3.

[35] It has already cost the LKDFN millions in legal fees to obtain the oppression remedy and recoup as much as possible from Barlas and his family. The Receiver reports that the LKDFN Companies are roughly in a break-even position with what has been recouped against the cost of doing so. Overall, the LKDFN remains in a significant loss position as a result of the wrongdoing perpetrated against it.

vii. The actions against KPMG and RMRF

[36] The LKDFN has aggressively pursued compensation from RMRF and KPMG. The derivative actions brought on behalf of their companies, allege negligence, breach of contract, breach of fiduciary duty, and knowing assistance of breach of fiduciary duty against both sets of professionals. Mincing no words, they say that both the accountants and the lawyers knew, or were willfully blind, to what Barlas was doing, and continued to aid him in his plunder regardless.

[37] In their Statement of Claim in the derivative action against RMRF, the LKDFN asserts that four of its lawyers knowingly assisted Barlas in oppressing, deceiving, and intimidating the members of the LKDFN in their capacity as members of Tsa. They allege that the RMRF lawyers did so by drafting the contracts and corporate structures that were the tools of Barlas' wrongful takings and his shield from scrutiny or removal, going so far as to attend meetings in Łutsël K'é during which cash was handed to community members in exchange for assent to oppressive and unlawful corporate actions.

[38] Similar to their allegations against RMRF, the LKDFN alleges that KPMG knowingly assisted Barlas in defrauding the LKDFN Companies. They allege that KPMG prepared inaccurate and misleading financial statements that covered up the self-dealing transactions with the Barlas Companies, including those undertaken through the JVA and the Assignment and Assumption Agreement.

[39] The derivative action against KPMG further alleges that the payments to Northern Consulting under the JVA were wrongfully omitted altogether from the financial statements, at Barlas' behest. The LKDFN allege that a draft of the 2019 financial statements would have disclosed approximately $1.3 million in payments to Northern Consulting under the JVA but that, at Barlas' direction, KPMG omitted these payments from the final version.

[40] They also allege that, again at Barlas' direction, KPMG used intentionally vague language to conceal the true nature of the $2.2 million payment to Barlas under the Assumption and Assignment Agreement.

[41] Finally, they allege that both sets of professionals came into Łutsël K'é and attended TSA's annual general meetings, at Barlas' behest. They accuse KPMG of giving knowingly misleading presentations to the LKDFN members at the 2017, 2018, and 2019 annual general meetings. They plead that this intentionally lent legitimacy to Barlas' actions as CEO, his mode of governance, and the financial health and hygiene of the enterprises, when in fact the KPMG partners involved were possessed of knowledge that revealed Barlas' wrongful intent and actions.

viii. Cause of action based on KPMG's direct relationship with Barlas

[42] Importantly, the LKDFN also alleges that KPMG knowingly assisted Barlas' breach of fiduciary duty through separate, direct engagements with the Barlas Companies and Barlas personally [the "Barlas Advice Claim"]. Most significantly, they allege that KPMG privately advised Barlas on structuring the transactions that would culminate in the Assignment and Assumption Agreement, in which he made the LKDFN Companies buy-back their own misappropriated income stream. Thus, the Derivative Action contains a claim that KPMG committed knowing tortious harm separate and apart from their work under the Engagement Letters.

[43] That claim extends beyond KPMG's involvement in the Assignment and Assumption Agreement, encompassing alleged wrongdoing in KPMG's direct advice to Barlas in creating the Barlas Family Trust, and in acting as the accountants for the Barlas Companies from 2016 onward. It alleges that the same KPMG partners who worked for the LKDFN companies were the ones personally retained by Barlas.

ix. The present complex of motions

[44] KPMG promptly responded to the Derivative Action against it by bringing an application for a stay in favour of arbitration under section 8 of the *Arbitration Act*, SNWT 2022, c 14 [the "*Act*"]. It says that all the claims in that action are captured by arbitration agreements contained in the Engagement Letters the LKDFN Companies signed to retain KPMG. It argues that a stay is mandatory and that none of the exceptions to granting one apply in this case. Moreover, it argues that the arbitrator should make all initial jurisdictional determinations about the applicable arbitration agreements, pursuant to the competence-competence principle.

[45] Concurrently, KPMG commenced an arbitration in British Columbia by way of Notice to Arbitrate ["the Arbitration"]. While KPMG refuses disclosure of the full Notice, it has described the Arbitration as seeking a declaration that its work for the LKDFN Companies complied with all relevant professional standards and that the limitation of liability provisions in the Engagement Letters are enforceable. The Arbitration has been held in abeyance pending resolution of these motions.

[46] Two weeks after KPMG brought its application to stay the Derivative Action, the LKDFN countered by bringing a new and separate oppression application, directly against KPMG [the "KPMG Oppression Application". The allegations in this claim mirror those in the Derivative Action, although the relief sought is somewhat different. The LKDFN asks for a declaration that KPMG knowingly assisted Barlas' oppressive conduct and breaches of fiduciary duty, as well as an order setting aside the arbitration agreements with KPMP accordingly.

[47] KPMG responded by bringing a parallel application to stay the new KPMG Oppression Application. While KPMG acknowledges that the LKDFN is not a signatory to any of the operative arbitration clauses, it argues that the First Nation is bound by them for the purposes of the *Act* by the operation of various legal doctrines. In the alternative, KPMG says that this new and duplicative application should be stayed under section 27 and subsection 29(2) of the *Judicature Act*, RSNWT 1988, c J-1, on the grounds that doing so is necessary to avoid a multiplicity of proceedings.

[48] Finally, upon learning of KPMG's insistence on arbitration, the Receiver entered the fray, seeking two forms of relief. Analogizing the present oppression-driven receivership to the Supreme Court's decision in ***Peace River Hydro Partners v Petrowest Corp***, 2022 SCC 41 [***Peace River***], the Receiver asks that the arbitration agreements with KPMG be set aside and declared unenforceable. It submits that requiring the LKDFN Companies to participate in parallel arbitration proceedings to advance the derivative claims against KPMG would impose significant duplicative costs, invite conflicting outcomes, and compromise the recovery from Barlas' oppression. It also seeks an order that KPMG produce all its working papers in accordance with paragraphs 5 through 7 of the Receivership Order.

[49] KPMG opposes both of the Receiver's motions. It says that the holding in ***Peace River*** is restricted to the insolvency context and that the set-aside of arbitration contracts is not available as an oppression remedy. Further, to the extent that ***Peace River*** could apply in the context of an oppression action, KPMG says that it does not apply here because the Receiver has not demonstrated that going to arbitration would prejudice the LKDFN Companies.

[50] With respect to production of its working papers, KPMG characterizes the request as a form of improper pre-discovery investigation, and not a legitimate use of the Receiver's powers. KPMG says the Court must ensure that use of those broad powers is carefully tailored and backed by a legitimate business purpose, to avoid undue interference with the rights of third parties who were not present when the Receivership Order was granted.

The relevant contractual terms

[51] The arbitration agreements that KPMG relies on are contained in two engagement letters with the LKDFN Companies, dated June 1, 2016, and June 1, 2018 [collectively the "Engagement Letters"]. Under the terms of the Engagement Letters, KPMG was to prepare financial statements as well as provide income tax advisory and compliance services to the LKDFN Companies. The Engagement Letters explain that KPMG will "review" the LKDFN Companies' financial statements but will not provide audit-level assurance.

[52] Each of the Engagement Letters includes separate terms governing the review engagement and the tax engagement. Four sets of provisions are relevant to the present applications: the arbitration provisions, the choice of law provisions, the limitation of liability provisions, and the severability provisions.

[53] Each of the Engagement Letters contains essentially identical arbitration clauses [collectively "the arbitration agreement"], the key terms of which are that:

- the Arbitration Agreement applies to "any dispute arising out of or relating to this Engagement Letter or the services provided under [it]";
- the seat of arbitration will be the city in which the KPMG office performing the work is located, which in this case is Langley, British Columbia;
- the arbitration will be governed by the Arbitration Rules of the ADR Institute of Canada, Inc.; and
- there will be no right of appeal from the arbitrator's decision, nor any right to seek "judicial review."

[54] The 2016 Engagement Letters also include limitation of liability provisions, purporting to limit KPMG's exposure for damages to the aggregate of the fees paid to it under the engagement. These provisions are relevant to the LKDFN's argument that the arbitration agreement is void for unconscionability.

[55] The limitation of liability provision in clause 9 of the terms and conditions governing the review engagement in the 2018 Engagement Letter is slightly different, limiting KPMG's liability to the lesser of $1 million and two times the fees paid to KPMG for the engagement. Finally, the Engagement Letters also include severability provisions. These are relevant to the argument that the Arbitration agreement is void for illegality.

Issues and summary of decisions

[56] Given the length and complexity of this judgment, I will begin by laying out the legal issues that the Court must decide and providing a summary of the answers reached, together with a reference to the paragraphs where each issue is dealt with.

[57] The Receiver's application to set-aside the arbitration agreement is granted, and is determinative at this stage. However, given that all facets of this matter were fully argued, may be reviewed by higher courts, and raise questions of general importance regarding the NWT's new *Act*, I have provided answers to most of the issues raised.

i. Which version of the *Arbitration Act* governs?

The current version of the Act, and in particular s 8, govern all of these applications. The transitional provisions of the previous Act are included to provide continuity for arbitrations taking place in the NWT at the time the changes in the law brought in by the new Act occurred, and do not apply to this case. (Paragraphs 58-66)

ii. What is the proper framework of analysis for stays under the *Act*?

The modern approach to arbitration stays is governed by the competence-competence principle which respects arbitration as a co-equal modality of dispute resolution with court proceedings, and gives priority to arbitrators to decide all issues of jurisdiction where the technical prerequisites to arbitration are made out on the low arguable case standard.

*The two-step **Peace River** framework guides the analysis of whether these are established and whether any exceptions to a stay have been clearly shown on balance of probabilities by the party resisting arbitration. The **Peace River** framework dovetails harmoniously with the Act.* (Paragraphs 67-94)

iii. Has KPMG Established the Technical Prerequisites for a Stay?

a. Does an arbitration agreement exist?

Yes. Each Engagement letter between KPMG and the LKDFN Companies contained arbitration clauses that the parties agreed to. (Paragraphs 95-98)

b. Are all the LKDFN Companies parties to the arbitration agreement?

Yes. A full reading of the contracts, taken together with the record before the Court, makes it clear that they bound Tsa Corporation, Ta'egera Company, and Denesoline Corporation Ltd (Paragraphs 99-103)

c. Do the claims advanced by the LKDFN Companies fall within the scope of the arbitration agreement?

All of the claims in the Derivative Action meet the minimum threshold of being arguably covered by the arbitration agreement. (Paragraphs 104-109)

iv. Have the LKDFN Parties refuted any technical prerequisites or established any exceptions to a balance of probabilities?

Yes.

a. Is the Barlas Advice Claim the subject of the arbitration agreement?

No. This claim is based on work done by KPMG for Barlas and Northern Consulting, under separate engagement agreements between them. The tort of knowing assistance of breach of fiduciary duty is made out on the pleadings and record without reference to the direct LKDFN-KPMG engagement. (Paragraphs 111-127)

b. Is the arbitration agreement void due to illegality?

No. The clause prohibiting any court review of an award whatsoever is inconsistent with both the NWT and BC Arbitration Acts, and is unenforceable. However, the underlying contract, its aims, its consideration, and its means of execution are all legal. The minor conflict with minimum statutory protections is properly remedied by severing this clause. (Paragraphs 128-138)

c. Is the arbitration agreement void due to unconscionability?

No. A contract's preference for arbitration does not make it improvident per se. The negatives of the arbitration agreement for the LKDFN Companies fall well short of unconscionability. Limits of liability are common provisions and not often unconscionable per se. The LKDFN has not made out this exception on a superficial review of the record. Substantive final determination of unconscionability of any part of the arbitration agreement is left for the arbitration or trial in which the matter is ultimately heard. (Paragraphs 139-153)

v. If only a partial stay is granted under the *Arbitration Act*, should the excluded portion be stayed, under the *Judicature Act,* pending the outcome of the Arbitration?

No. The Act very clearly intended for non-included parts of a case to proceed before the Court, and the Judicature Act's broad, general, discretionary powers should not be used to undermine this specific legislative design. Moreover, the balance of convenience, efficiency, and fairness favour allowing the Barlas Advice Claim to proceed without delay. (Paragraphs 154-173)

vi. Should the KPMG Oppression Application be stayed?

Yes. The KPMG Oppression Application is stayed under the Judicature Act. It is in pith and substance an attempt to end-run the arbitration agreement, and fully duplicative of actions and applications already before the Court. KPMG is also not an entity amenable to a direct oppression application by the members of the LKDFN Companies.

All but one aspect of the application is more appropriately dealt with through the derivative claim in contract and tort brought by the LKDFN Companies who suffered the harm. The remaining piece – the issue of whether the arbitration agreement should be set aside – is more properly, before the Court in the Receiver's Motion. (Paragraphs 174-206)

vii. Should the Receiver be permitted to set aside the arbitration agreement, rendering it unenforceable?

Yes. In the special factual context of this case, exercise of the exceptional power to set aside an otherwise valid arbitration agreement is justified when the interests at stake are appropriately balanced.

Both the Receivership Order, and the federal and territorial legislation creating the oppression remedy, expressly allow contractual set-aside where this is a just and proper part of the remedy for oppression.

In this case, Barlas signed the Engagement Letters as part of his oppressive scheme. The arbitration agreement created by those contracts now aggravates the theft of a First Nation's resources and risks perpetuating the loss of economic self-determination that was the hallmark of Barlas' oppression. This arbitration agreement was not a carefully considered consensual bargain. Its existence and consequences are outside the reasonable expectations of the LKDFN Companies' members, further making set-aside a suitable part of the oppression remedy in this case. Enforcing it would, in this case, increase the cost and complexity of correcting the oppressive condition and the damage it has done.

KPMG will suffer, at worst, secondary tactical disadvantages in this set-aside, and can be compensated through enhanced costs if appropriate. (Paragraphs 208-306)

viii. Is KPMG required to produce its working papers to the Receiver?

No. The working papers are not "property" subject to the Receivership Order, and the record review and investigation power should not be used as a pre-discovery litigation tool. (Paragraphs 307-327)

I. Which iteration of the *Arbitration Act* Governs?

[58] The first question to be resolved is whether these motions are governed by section 8 of the newly in-force *Act*, or section 10 of the previous *Arbitration Act*, RSNWT 1988, c A-5 [the "1988 *Act*]. This matters because s 10 of the 1988 *Act* gave the Court significantly wider latitude to decline to stay proceedings in favour of arbitration. In keeping with contemporary legislative and jurisprudential directions, the new *Act* is generally more restrictive of court proceedings continuing in the face of a superficially valid arbitration agreement.

[59] The *Act* came into force on April 1, 2024, and would obviously govern, save and except for the less-than-clear transitional clause contained in s 71(1).

> Applicability to arbitral proceedings under agreement
>
> **71**. (1) Subject to subsection (3), this Act applies to arbitral proceedings if the proceedings are commenced on or after the date this section comes into force, whenever the arbitration agreement under which the proceedings are commenced was made.

[60] The LKDFN Companies say that, because arbitral proceedings were commenced by KPMG on March 21, 2024, a week before the coming into force of the *Act* on April 1, 2024, the transitional rule in s 71(1) applies and the 1988 *Act* governs KPMG's stay applications. With respect, this misconstrues the purpose of s 71.

[61] The *Act* serves a dual purpose. It both regulates arbitrations conducted under NWT law, and defines the jurisdictional status of the NWT Courts in the face of arbitration agreements. Applying the contemporary, contextual approach to statutory interpretation, I find that s 71 is only meant to provide continuity of governance over NWT-seated arbitrations which were already underway when the *Act* came into force: ***Piekut v Canada (National Revenue)***, 2025 SCC 13 at paras 42-50. It therefore does not apply in this case for at least four reasons:

[62] First, the language of the transitional provision states that the new *Act* applies to "arbitral proceedings" commenced after a certain date. The question in this case has nothing to do with the conduct of any arbitral proceedings, much less any governed by NWT law. Rather, it concerns the regulation of court proceedings.

[63] Second, the *Act* does not apply to the Arbitration in this case at all. Since that proceeding is governed by British Columbia law, the arbitral practice changes in the *Act* have no impact on it. It does not require, and is unaffected by, NWT transitional provisions.

[64] Third, it would make no sense that selection of which stay provision governs the NWT court-actions in this case somehow depends on the bare existence of an Arbitration Notice in another jurisdiction.

[65] Fourth, the underlying purpose of the *Act* is modernization: Northwest Territories, *Hansard*, 19-2, No 125 (25 October 2022) at 1383 (Hon RJ Simpson). Leaving the old, more highly discretionary stay powers in place for an arbitrary group of proceedings does not accord with this purpose.

[66] There is good reason to conclude that the legislature did not intend that the transitional rule in s 71 would apply to stay applications brought under s 8. Therefore, the new *Act* governs these applications.

II. Deciding who decides: the proper framework for determining stay applications in favour of arbitration under the *Act*

[67] Conflicting assertions of court and arbitral jurisdiction raise the meta-decisional problem of whether the court or the arbitrator should decide which forum should hear and decide the jurisdictional dispute. Modernized arbitration acts across the country have dovetailed with the evolving jurisprudence to create a regime that grants maximum regard to consensual arbitration, while reserving to the courts the minimum threshold screening authority to ensure that no one is improperly denied access to public justice.

[68] The three interrelated maps to navigating these delicate border lands are: (i) the common law competence-competence principle favouring respect for freely chosen private arbitration; (ii) the two-step screening process laid out by the Supreme Court in ***Peace River***, which defines the applicable onuses and standards of proof on a stay application; and (iii) the statute governing arbitration in the jurisdiction where conflict between forums arises.

[69] The first task is thus to understand how these sources of guidance interact to resolve the threshold question of who decides whether the courts or the arbitrator should resolve the jurisdictional conflicts in this case.

i. The competence-competence principle

[70] The competence-competence principle, as articulated in the Supreme Court's decisions in ***Dell Computer Corp v Union des consommateurs***, 2007 SCC 34 at para 163, per Bastarache and LeBel JJ (dissenting, but not on this point) [***Dell***]; and ***Uber Technologies Inc v Heller***, 2020 SCC 16 at para 122, per Brown J (concurring) [***Uber***], can be understood as having two components:

- an arbitrator has the jurisdiction to decide issues of their own jurisdiction; and
- the arbitrator *should* decide such issues before a court does.

[71] The first component of the competence-competence principle vests arbitrators with the power to answer all questions within a dispute to which an arbitration agreement applies, *including* preliminary questions of their own jurisdiction and any asserted exceptions to it: ***Russian Federation v Luxtona Limited***, 2023 ONCA 393 at para 31 [***Russian Federation***]. This principle is echoed in s 24(1) of the *Act*.

[72] The second component – temporal priority for the arbitrator to decide jurisdictional challenges – is driven by a policy desire to prevent delay and give maximum effect to the intention of the parties to resolve their disputes through arbitration: ***Dell*** at para 70; ***Peace River*** at para 41.

[73] Notwithstanding this default position of deferral to arbitral jurisdiction, the Supreme Court in ***Dell*** adopted two exceptions to this rule. Specifically, it held that a court may resolve a challenge to the jurisdiction of the arbitrator if: (i) that challenge engages a pure question of law; or (ii) the challenge engages a question of mixed fact and law that can be determined based on a "superficial consideration of the evidentiary record": ***Dell*** at paras 84–85. The Court defined the parameters of this limited inquiry as permitting judicial decision on questions of jurisdiction where: "the necessary legal conclusions can be drawn from facts that are either evident on the face of the record or undisputed by the parties": ***Uber*** at para 36.

ii. The Two-stage Peace River framework

[74] In ***Peace River***, at paras 76–90, the Supreme Court articulated a two-stage framework for assessing stay applications, applicable across all modern provincial and territorial arbitration statutes. At the first stage of the test, the party seeking a stay of proceedings must establish an "arguable case" that:

- an arbitration agreement exists;
- court proceedings have been commenced by a "party" to the arbitration agreement;
- the court proceedings are in respect of a matter that the parties agreed to submit to arbitration; and
- the party applying for a stay in favour of arbitration does so before taking any "step" in the court proceedings.

[75] These four criteria are known as the "technical prerequisites" for a stay, and essentially require a basic showing that the parties have agreed to arbitrate disputes such as the one before the Court, and that the stay-seeker has not attorned to the Court's jurisdiction. In the NWT, these technical prerequisites are embodied in s 8(1) and 8(2) of the *Act*, as shown below.

[76] In order to avoid turning the hearing on whether the matter should go to arbitration into a *de facto* trial of the very jurisdictional questions the arbitrator presumptively has chronological priority to decide, the stay-seeker need only demonstrate these elements to the *arguable case* standard (aka "*prima facie* basis"): ***Peace River*** at 85, citing ***Clayworth v Octaform Systems Inc***, 2020 BCCA 117 at para 30 [***Clayworth***]; ***Russian Federation*** at para 34.

[77] At the second stage of the test, the party opposing the stay is given the opportunity to establish on a *balance of probabilities* that one of the exceptions set out in the statute is met: ***Peace River*** at paras 88–89. This can include refuting the *prima facie* showing of the technical prerequisites. However, this proof must take place on a *superficial review of the record* per ***Dell***, or the matter is reserved to the arbitrator. Again, the party opposing the stay is not permitted to turn the stay hearing into a trial on the merits.

[78] Simply put, the defect in the arbitral jurisdiction being asserted must be obvious on the face of the record. Otherwise, the substantive determination of those defects falls to the arbitrator, per the competence-competence principle.

iii. The applicable legislative provisions

[79] In the NWT, an application to stay court proceedings in favour of arbitration is governed by section 8 of the *Act*, which makes stays mandatory once a *prima facie* showing of the technical prerequisites has been made, but-for a discrete set of exceptions. The relevant provisions read as follows, with annotations as to how they correlate to the competence-competence principle and the technical prerequisites and exceptions to arbitration treated at the two stages of the ***Peace River*** analysis.

Application for stay of proceedings

8. (1) If a party commences court proceedings in a court in the Northwest Territories in respect of a matter that a party to the court proceedings believes is the subject of an arbitration agreement, the party may, before submitting their first response on the substance of the dispute, apply to that court to stay the court proceedings.

} *Technical Prerequisites that*
} *(i)an arbitration agreement*
} *exists; (ii) the plaintiff/applicant*
} is a *party to the agreement,*
}*(iii) the dispute falls within the*
} *scope of that agreement and*
} *(IV) the moving party has not*
} *attorned to the court*

Stay of court proceedings

} *Mandatory stay favouring*
} *arbitration per competence-*
} *competence principle*

(2) In an application under subsection (1), the court shall make an order staying the court proceedings unless it determines that

} *Exception for matters*
} *shown to fall outside the*
} *arbitration agreement*

(a) the court proceedings are not in respect of any matter that is the subject of an arbitration agreement;

} *Exception for arbitration*
} *agreement entered into*
} *under incapacity*

(b) a person against which an arbitration agreement is sought to be enforced entered into the arbitration agreement while under a legal incapacity;

} *Exception where arbitration*
} *agreement shown not to exist*
} *or proven void or unenforceable*

(c) the alleged arbitration agreement does not exist, is void or is unenforceable; or

} *exception for specifically*
} *excluded subject matter*

(d) the dispute is not capable of being the subject of arbitration under the laws of the Northwest Territories.

Arbitral proceedings may be commenced or continued

(3) Unless otherwise ordered by the court, an arbitration may be commenced or continued and an arbitral award made even if an application has been brought under subsection (1) and the issue is pending before the court.

Tribunal not precluded from determination of circumstance

} *preserves dual jurisdiction*
} *to substantively rule on*
} *exceptions*

(4) If the court stays the court proceedings in whole or in part without making a finding concerning the existence of a circumstance described in paragraphs (2)(a) to (d), an arbitral tribunal is not precluded from determining whether the circumstance exists.

If court refuses stay

} *mandates partial stays*
} *where part of the court*
} *proceeding falls outside*
} *scope of the arbitration*
} *agreement*

(5) If the court finds that one or more of the circumstances described in paragraphs (2)(a) to (d) exists in respect of all or some of the matters in the court proceedings, then, in respect of those matters,

(a) the court proceedings continue;

(b) no person may commence arbitral proceedings in respect of the dispute; and

(c) if a person has brought arbitral proceedings in respect of the dispute, the arbitral proceedings are terminated and anything done in the arbitral proceedings is without effect.

…

Jurisdiction of Arbitral Tribunal

24. (1) An arbitral tribunal may rule on its own jurisdiction to conduct the arbitration, including whether [any of the exceptions to arbitral jurisdiction enumerated in s 8(a-d) apply].

} *grants arbitrators*
} *jurisdiction over all*
} *jurisdictional questions*
} per *competence-competence*

[80] These provisions give the proponents of arbitration a pathway to stay court proceedings they say are brought in contravention of binding dispute-resolution agreements: s 8(1). In keeping with the contemporary approach favouring deferral to arbitration, the issuance of a stay is mandatory, unless one of the exceptions enumerated in ss 8(2)(a)-(d) is made out.

[81] The stay-seeker must first demonstrate the "technical prerequisites" for arbitration, as described in the ***Peace River*** analysis. Once that is done, the onus falls on the party advancing the court proceeding to prove one or more of the exceptions to the mandatory stay, clearly on a balance of probabilities, requiring no more than a superficial consideration of the record.

[82] Certain provisions of s 8(2) list the *absence* of technical prerequisites as exceptions to a stay. This confirms the ability of the respondent to refute these, on the appropriate standard, even if the applicant has made a *prima facie* showing of them under s 8(1). This is consonant with the ***Peace River*** approach and the reasons of Taylor J in ***Mid-West Design & Construction Ltd v IRC et al***, 2025 NWTSC 36.

[83] Notably, s 8(4) preserves the jurisdiction of an arbitrator to find any of the disqualifying conditions, where the court has not done so. This reinforces the preference to respect contractual arbitral jurisdiction, but also makes clear by implication that the court may pronounce definitively on jurisdictional questions during the stay process where appropriate.

[84] Finally, s 8(5) provides that the mandatory stay *must* be only partial, allowing excluded matters to proceed in court, where one or more of the exceptions in ss 8(2)(a-d) is made out in respect of some of the disputed claims.

iv. Applying the two-stage Peace River framework and the competence-competence principle to the Act

[85] When harmonized with the structure of the *Act*, I conclude that ***Peace River*** prescribes the following approach.

i. The party seeking a stay must establish an *arguable case* that an arbitration agreement exists, court proceedings have been commenced by a party to the arbitration agreement, the court proceedings are in respect of a matter that falls within the scope of the arbitration agreement, and they have not taken any step in the court proceedings.

ii. The onus then shifts to the party resisting the stay to demonstrate *on balance of probabilities* any statutory exception to the mandatory stay.

iii. The Court *may* resolve disputes over the technical prerequisites and exceptions, *if* these turn on questions of law or questions of mixed fact and law, *and* can be determined on a *superficial review* of the record.

iv. If either the objection to a prerequisite, or proof of an exception, cannot be determined based on a superficial review of the record, or involves purely conflicting facts, the stay must be granted to allow the arbitrator temporal priority in deciding the issue.

[86] The initial onus on the party seeking a stay recognizes that, notwithstanding the competence-competence principle, it is reasonable to ask the party seeking to preclude recourse to public justice to satisfy the court that there is at least an arguable basis to conclude that the dispute is properly subject to arbitration.

[87] For the same reason, a party seeking to defeat a stay application is not precluded from mounting a challenge to the existence of the technical prerequisites, even where an arguable case is shown by the stay proponent. Rather, the Court may make a final determination on any of the jurisdictional issues enumerated in ss 8(1) and 8(2) – regardless of whether classified as technical prerequisites or exceptions. I reach this conclusion for a number of reasons.

[88] First, holding that the analysis must grind to a halt once the applicant satisfies its initial onus entails adopting the maximally non-interventionist approach that the Supreme Court considered and ultimately rejected in ***Dell***: at paras 69-70 & 84-85. There is nothing in the Supreme Court's reasons in ***Peace River*** indicating that it intended to revisit the approach adopted in ***Dell***.

[89] Second, this approach is consistent with appellate cases decided after ***Peace River***: ***Husky Oil Operations Limited v Technip Stone & Webster Process Technology Inc***, 2024 ABCA 369 at para 23 (parties to arbitration agreement); ***Davidson v Lyra Growth Partners Inc***, 2024 BCCA 133 at paras 30 & 50 (scope of arbitration agreement); ***Pokornik v SkipTheDishes Restaurant Services Inc***, 2024 MBCA 3 at paras 25–33 (existence of an arbitration agreement); ***Husky Food Importers & Distributors Ltd v JH Whittaker & Sons Limited***, 2023 ONCA 260 at para 35 (existence of an arbitration agreement); ***Isagenix International LLC v Harris***, 2023 BCCA 96 at paras 24 & 54-55 (scope of arbitration agreement) [***Isagenix***]. In each of these cases, the court either made a final determination on issues that are classified as technical prerequisites or suggested that it would have been open to the court to do so.

[90] Third, this approach is also consistent with promoting the efficient resolution of this dispute. It would be wasteful for the parties to argue these issues multiple times, and even more wasteful for the parties to proceed with an arbitration only for the Court to set aside the award in whole or in part on the grounds that the arbitrator lacked jurisdiction (as permitted by s 60 of the *Act*).

[91] Indeed, the repetition under s 60 of the absence of technical prerequisites as bases for setting-aside arbitral awards made without jurisdiction both reflects the temporal priority of the arbitrator and provides a rational basis for allowing judicial determinations of these issues if it can be done summarily at the front-end of the process. This is sensible because there is no point delaying the inevitable.

[92] Finally, this approach is also consistent with s 8(4) of the *Act*, which expressly preserves arbitral competence on jurisdictional issues which the court has not ruled on. That provision clearly contemplates, by implication, the court making final, substantive pronouncements on technical prerequisites during the stay phase. Otherwise, this provision would be pointless.

[93] With this approach in mind, I turn to the substance of the applications.

III. Has KPMG Established the Technical Prerequisites for a Stay?

[94] Consistent with the ***Peace River*** approach, KPMG sought to establish the technical prerequisites on a minimal record, attempting to avoid substantive engagement on any merits-oriented disputes. Despite the vigorous counterattack mounted by the LKDFN Parties, I am satisfied that KPMG has met the low threshold set by the Supreme Court in keeping with the competence-competence principle.

i. An Arbitration agreement exists

[95] There is no real question that the Arbitration agreement in this case exists. LKDFN counsel engaged in a clever cross-examination of KPMG's straw affiants to demonstrate that the underlying contracts had not been proven. The game afoot below the surface was that the LKDFN wanted to substantively cross-examine a knowledgeable KPMG representative on the circumstances surrounding formation of the Engagement Letters, and KPMG resisted this as a contrivance to create a mini-trial within this proceeding.

[96] I am satisfied that a superficial review of the face of the relevant agreements shows they existed between the parties. There is no dispute that KPMG had a contractual relationship with the LKDFN Companies. Their pleadings rely on that fact. The LKDFN Companies also do not claim *non est factum* or the fraudulent foisting of terms in a document they had been unaware of.

[97] Rather, this is a scenario where the Supreme Court's admonition that courts ought not turn jurisdictional challenges to arbitration into full trial-like processes applies, and the documentation provided by KPMG, taken together with the broader, agreed factual landscape, allows superficial satisfaction on the technical prerequisite of the arbitration contract existing. This conclusion aligns with Justice Taylor's decision in ***Mid-West Design & Construction Ltd v IRC et al***, 2025 NWTSC 35, in which the existence of the arbitration agreement was even more tenuously demonstrated.

[98] I am satisfied that the Engagement Letters created an arbitration agreement.

ii. All the LKDFN Companies are parties to the arbitration agreement

[99] The LKDFN Companies argue that, even if an arbitration agreement exists, only Tsa is a party to it, and not Denesoline or Ta'egera. The LKDFN Companies point out that, on the signature page of both Engagement Letters, there is only a single signature block, above which reads "[t]he terms of the engagement <u>for Tsa Corporation</u> set out are as agreed" [emphasis added].

[100] I conclude that Denesoline and Ta'egera are parties to the arbitration agreement. Notwithstanding that the signature block only refers to Tsa, it is clear that the Engagement Letters contemplate that KPMG would also be providing services to Denesoline and Ta'egera.

[101] The 2016 Engagement Letter begins by stating that "[t]he purpose of this letter is to outline the terms of our engagement for the TSA Corporation <u>and its subsidiaries</u>" [emphasis added], which are collectively defined as the "Entity," a defined term used throughout to refer to the organizations to whom KPMG will be providing services.

[102] Similarly, the 2018 Engagement Letter begins by stating that "[t]he purpose of this letter is to outline the terms of our engagement for the TSA Group". Further, below the first paragraph in each of the Engagement Letters is a table summarizing the services to be provided to Tsa, Denesoline, and Ta'egera, as well as to Denesoline Community Development Corporation.

[103] In my view, reading the Engagement Letters as a whole, it is apparent on their faces that they were intended to bind Denesoline and Ta'egera. KPMG has met the arguable case threshold and satisfied its onus to show that all the LKDFN Companies were parties to the relevant arbitration agreement.

iii. The claims have a nexus to the arbitration agreement

[104] The LKDFN Companies reasonably concede that their breach of contract and negligence claims are in-scope of any arbitration agreement. The margin of dispute concerns their claims for conspiracy and knowing assistance, and for work done by KPMG under direct retainers with Barlas and his companies, which are the subject of the Barlas Advice Claim. The LKDFN says that the Engagement Letters did not contemplate that KPMG would knowingly assist Barlas in defrauding the LKDFN Companies, either directly or in the course of their work for the LKDFN, and that any agreement that did in fact contemplate such a thing would be illegal.

[105] I conclude that KPMG has presented an arguable case that all the claims advanced in the Derivative Action possess at least a minimal nexus ***Clayworth*** at para 30) to the subjects of the arbitration agreement, for four reasons. First, it is settled that arbitration agreement should be given a "large and liberal interpretation": ***Eurofins Experchem Laboratories, Inc v BevCanna Operating Corp***, 2023 ONSC 4015 at para 22 [***Eurofins***]; ***Electek Power Services Inc v Greenfield Energy Centre Limited Partnership***, 2022 ONSC 894 at para 159 [***Electek***]; ***Hopkins v Ventura Custom Homes Ltd***, 2013 MBCA 67 at para 59 [***Hopkins***]; Geoff R Hall, *Canadian Contractual Interpretation Law*, 4th ed (Toronto: LexisNexis, 2020) at §9.2.4 Nothing in this case suggests any exception to this principle.

[106] Moreover, the law favours an interpretation that makes the dispute at issue subject to arbitration, where there is an arguable interpretation that it does: ***Electek Power Services*** at para 159; ***Hopkins*** at para 62; ***Ontario v Imperial Tobacco Canada Ltd***, 2011 ONCA 525 at para 60; Hall, *Canadian Contractual Interpretation Law* at §9.2.4.

[107] Second, the contractual language here extends the arbitration agreement to "any dispute arising [out of/under] or relating to the" engagement of KPMG's services. This is intentionally broad wording. A contract, such as an arbitration agreement, should be interpreted based on the ordinary meaning of the words used, considered in light of the contract as a whole and the surrounding circumstances known to both parties at the time of contract formation: ***Sattva Capital Corp v Creston Moly Corp***, 2014 SCC 53 at paras 47-48 [***Sattva***]. Reading the agreements as encompassing intentional conduct is consistent with this interpretive approach.

[108] Third, there is no exclusion for intentional wrongful conduct, and courts have found that such broad language should not be presumed to exclude it: ***Haas v Gunasekaram***, 2016 ONCA 744 at paras 38-39 [***Haas***]; ***James v Thow***, 2005 BCSC 809 at paras 72-76. Much of the intentionally wrongful conduct alleged against

KPMG has a nexus to the underlying commercial, contractual relationship between the parties: ***Clayworth*** at para 30. In simple terms, when the LKDFN Companies say KPMG did bad things at Barlas' behest *in the course of doing work for the LKDFN Companies*, those claims more than arguably fall under the arbitration agreement.

[109] Finally, KPMG made out the barest arguable case for the the Barlas Advice Claim falling within the arbitration agreement. At the broadest level of generality, this claim is about the KPMG's alleged role in the 'bad things' Barlas did to the LKDFN Companies. This provides the minimum rational connection necessary *to argue for* it being subject to the arbitration agreement, subject to closer consideration at the next stage in the ***Peace River*** analysis.

iv. KPMG has not attorned

[110] It is agreed that KPMG has not taken a substantive step in the NWT litigation.

IV. The LKDFN has established an exception

[111] The LKDFN argued against the existence of several technical prerequisites, but succeeded in rebutting only one, namely that the Barlas Advice Claim was "not in respect of any matter that is the subject of an arbitration agreement" pursuant to s 8(2)(i). They further argued for two statutory exceptions to a stay: that the arbitration agreement is void for illegality, and that it is either void or unenforceable for unconscionability, both pursuant to s 8(2)(iii), but were unsuccessful.

i. The Barlas Advice Claim falls outside the scope of the arbitration agreement

[112] A facial review of the Barlas Advice Claim, beyond the bare assertions made by KPMG to meet its initial onus, shows that it distinct, as it alleges discrete acts of wrongdoing, relating to services rendered by KPMG *directly* to Barlas and his company, under a *separate* contractual relationship between them. The relevant contracts between Barlas and KPMG, and correspondence in relation to those, are before the Court and are not the subject of any evidentiary dispute. They speak for themselves and show a direct client relationship between Barlas, his company Northern Consulting, and KPMG, concerning Barlas' business interests.

[113] KPMG made no attempt to factually refute the LKDFN Parties' allegations and evidence that this work, done privately for Barlas, was distinct from that done for the LKDFN Companies under the Engagement Letters. As such, I can find on a superficial review that the Barlas Advice Claim is not premised on any contractual or other obligation owed by KPMG to the LKDFN Companies.

[114] The Barlas Advice Claim is not a situation in which artful drafting has been used to recharacterize a claim that, in substance falls, within the scope of the arbitration agreement: ***Eurofins*** at para 25; ***Elton v 10 Star Events Inc***, 2018 BCSC 1974 at paras 69–70; ***Haas*** at para 21; ***Kaverit Steel & Crane Ltd v Kone Corp***, 1992 ABCA 7 at para 46 [***Kaverit***].

[115] While all the claims against KPMG relate to its alleged role in Barlas' oppression of the LKDFN Companies he managed, there exists a distinct and easily cognizable legal difference that removes the Barlas Advice Claims from the scope of the arbitration agreement. Specifically, the scope of the agreement is defined as extending to disputes "relating to [the] Engagement Letter or the services provided hereunder". The Barlas Advice Claim neither arises from, nor exists in relation to, the Engagement Letters nor any "service" rendered *to* the LKDFN Companies.

[116] The difference is thus between in-scope complaints about poor or even corrupt service *rendered under the Engagement Letters*, and out-of-scope claims that KPMG did bad things as a *service rendered to Barlas*, under entirely separate contracts, for separate consideration. That latter category of actions – being hired by Barlas to help him structure and tax-optimize his devices of defraudment – cannot be brought under even the broadest understanding of KPMG's "services" to the LKDFN Companies.

[117] Indeed, as proof of its distinctness, the Barlas Advice Claim can be made out in the absence of any legal or contractual relationship between KPMG and the LKDFN Companies whatsoever. The elements of the tort of knowing assistance in breach of a fiduciary duty as defined in ***Extreme Venture Partners Fund I LP v Varma***, 2021 ONCA 853 at para 74; ***Air Canada v M & L Travel Ltd***, 1993 CanLII 33 (SCC), [1993] 3 SCR 787, at 811-13, are alleged and sought to be proven on the pleadings and record before the Court as follows:

i. there must be a fiduciary duty (owed by Barlas to the LKDFN Companies);

ii. the fiduciary (Barlas) must have breached that duty fraudulently and dishonestly (as conclusively found in the Oppression Decision);

iii. the stranger to the fiduciary relationship (KPMG) must have had actual knowledge of both the fiduciary relationship and the fiduciary's fraudulent and dishonest conduct (all of which KPMG could have learned within the four corners of their work for Barlas alone); and

iv. the stranger must have participated in or assisted the fiduciary's fraudulent and dishonest conduct (by privately, independently, under separate contract, advising Barlas and NCG on two of the most gratuitously self-serving and oppressive transactions).

[118] If proven, these elements would constitute a tortious wrong even if the Engagement Letters and their arbitration agreement never existed, KPMG never acted for the LKDFN in any capacity, and the LKDFN had never even heard of KPMG before discovering Barlas' misdeeds (illustrating why KPMG's attempt to characterize the Barlas Advice Claim as a conflict-of-interest allegation is incorrect).

[119] The fact that KPMG is alleged to have committed wrongs against a common victim (the LKDFN Companies) through two distinct modalities (under contract to the LKDFN Companies as their accountants, and under contract to Barlas as his advisor) suggests that it would be more efficient for the claims to be tried in a single proceeding. Critically, however, it does not provide any legal basis to expand the scope of the arbitration agreement beyond its tenable reach.

[120] The obligation to arbitrate is grounded in an autonomous bargain between the parties: ***TELUS Communications Inc v Wellman***, 2019 SCC 19 at para 52 [***Wellman***]. Reading arbitration agreements broadly does not extend to functionally rewriting them to reach outside their textual and intended scope: ***Isagenix*** at paras 56-58. The desire to avoid duplicative proceedings cannot animate an extension of arbitration agreements beyond their hard contractual bounds.

[121] Moreover, through the enactment of s 8(5), the legislature has made a clear choice to require that court proceedings continue in respect of matters falling outside the scope of an arbitration agreement, notwithstanding that this may result in a multiplicity of proceedings. It is not open to the Court to undo this clear legislative choice under the guise of contractual interpretation.

[122] In this case specifically, KPMG refused as irrelevant all questions posed to its deponents in cross-examination relating to the engagement letters it signed with Barlas and Northern Consulting, and the work done under them. It is difficult to square that position with their contention before me that the Barlas Advice Claim is "plainly tied to KPMG's relationship with the LKDFN companies as their accountants". In truth, the relevance objection was accurate. Any wrongs done by KPMG under its direct contractual relationship with Barlas are outside the scope of the Engagement Letters and the reach of its arbitration agreement.

[123] Finally, I note that, while KPMG has refused to produce the Notice to Arbitrate, the letter from its counsel summarizing the issues in that notice makes reference only to "the private company review engagements performed for the [LKDFN] Companies". The failure to include work done for Barlas and his companies is a further indication that even KPMG tacitly understands this to be out of scope of the arbitration agreement.

[124] In sum, the Barlas Advice claim represents the archetypal situation in which a court, applying the ***Peace River*** analysis, can review a factually uncontested record and documents, consider the legal elements and proposed pathways to proof of the contested claim, and conclusively determine the applicable question of mixed fact and law as to whether the plaintiff can be compelled to arbitration on a specific set of claims: ***Sattva*** at paras 50–52 & 55; ***Ledcor Construction Ltd v Northbridge Indemnity Insurance Co***, 2016 SCC 37 at paras 24, 46, & 48.

[125] Pursuant to ss 8(1) and 8(5) of the *Act*, I find, and determine conclusively, that the Barlas Advice Claim, being all claims related to KPMG's direct engagements with Barlas and any other entity directly or indirectly controlled by his family, are not subject to the arbitration agreement and may proceed before this court.

[126] But-for the determination below that the arbitration agreement is declared unenforceable on the application of the Receiver, all facets of the KPMG Derivative Action, other than the Barlas Advice Claim, would be stayed in favour of arbitration under s 8(1) of the *Act*.

ii. The arbitration agreement is not void for illegality

[127] The LKDFN Companies say that the arbitration agreement is void as illegal because it attempts to completely oust any right of judicial review, including on grounds of lack of jurisdiction or procedural fairness.

[128] Parties to an arbitration agreement may choose the extent to which awards made under it can be appealed, subject to statutory limits. Both the NWT and British Columbia *Arbitration Acts* allow appeals with leave to their courts of appeal from arbitral awards on questions of law alone, *unless* the parties have contracted out of such appeals. It follows that an arbitration agreement that restricts all appeals on the merits of the award is legal, as the law expressly contemplates this state of affairs.

[129] However, mirrored provisions in s 60 of the *Act* and s 58 of the BC *Arbitration Act*, allow for a party to apply to the court to "set aside" an arbitration award on enumerated grounds. These include the exceptions found in s 8(2)(a-d), and add basic natural justice failures, such as a lack of notice, arbitral bias or corruption, a failure of the right to be heard, and general frauds against the process. Neither statute allows for contractual opt-out from this review authority.

[130] Accordingly, I agree with the LKDFN Companies that the language in the arbitration clause in the 2016 Engagement Letter is inconsistent with the NWT and BC arbitration statutes, to the extent that it purports to oust the right to apply to the court to set aside an award on jurisdictional and procedural fairness grounds. This defect, however, does not doom the entire agreement to voidness for illegality.

[131] To begin with, the arbitration agreement writ-large is not illegal. Not the formation of the contract, nor its subject matter, nor its objective, nor the consideration passed are illegal or immoral: ***Scott v Golden Oaks Enterprises Inc.***, 2024 SCC 32 at paras 108-111. It is also proper for parties to define the scope of their appeal rights.

[132] This is simply a case of an otherwise unobjectionable contract containing terms exceeding minimum statutory protections. Those portions of the contract are unenforceable. The arbitration agreement thus falls into the category described by the Supreme Court as "contracts that, although they do contravene a statutory enactment, are otherwise unobjectionable"; ***Transport North American Express Inc. v New Solutions Financial Corp***. 2004 SCC 7, at para. 6 [***Transport North America***]: ***Lima v Kwinter***, 2021 ONCA 47 at para 27.

[133] Contracts of this nature, which suffer a small degree of inconsistency with a statute but suffer no normative defect, are more likely to attract severance of the problematic portion: ***2176693 Ontario Ltd et al. v The Cora Franchise Group Inc***., 2015 ONCA 152 at para 35. The choice of remedy depends on the overall context, with courts being reluctant to impose change that meaningfully ***alter*** the deal between the parties: ***Transport North American Express*** at para 28; ***Shafron v KRG Insurance Brokers (Western) Inc***, 2009 SCC 6 at para 32 [***Shafron***].

[134] Here, the single impugned term is not an integral part of the agreement. It evidenced the parties' intention to minimize the extent either could resort to the courts for appeals or reviews of the award. That is a legitimate aim. The contract just overstepped its statutory bounds.

[135] The appropriate remedy is to apply the doctrine of severance to the language that purports to oust the right to apply to the court to set aside the award on jurisdictional or procedural fairness grounds. As held in ***Shafron***, the impugned term is not an integral part of the provision and can be excised without fundamentally altering the parties' bargain.

[136] This result is also consistent with the severability clauses of the Engagement Letters, which provide that their terms and conditions are only applicable to the extent that they are not inconsistent with the governing law. I do not mean to suggest that clauses of this sort would be capable of saving any arbitration provision, no matter the extent of its illegality, particularly in the context of a standard form contract. But here, the severability provisions do provide an additional consideration in favour of applying the doctrine of severance.

[137] The arbitration agreement is not void for illegality.

iii. The arbitration agreement is not void due to unconscionability

[138] The LKDFN Companies also argue that the dispute resolution terms of the Engagement Letters, including but not limited to the arbitration agreement, are unconscionable, and therefore void. The LKDFN Companies say that there was an inequality of bargaining power between KPMG and the LKDFN Companies because, at the time that the Engagement Letters were signed, Barlas was not acting in the interests of the LKDFN Companies and was instead acting in his own interests.

[139] In particular, the LKDFN charge that the limitations on liability in the dispute resolution terms, which limit recovery for damages to the total fees paid to KPMG, are unconscionable for effectively permitting willful frauds and breach of fiduciary duty, effectively for free. They also argue the illegality of stripping rights of judicial review, as discussed above, enhances the unconscionability of the overall agreement.

[140] The doctrine of unconscionability rises up in scenarios where "the traditional assumptions underlying contract enforcement [i.e., that a contract is a freely negotiated bargain between autonomous, self-interested parties] lose their justificatory authority": ***Uber*** at para 59.

[141] Specific contractual terms, or a contract as a whole, are unconscionable when (1) there is inequality of bargaining power such that one party is incapable of adequately protecting its interests, and (2) the term or terms at issue constitutes an undue advantage or benefit secured by the stronger party as a result of the inequality of bargaining power (referred to as an "improvident bargain"): ***Uber*** at paras 62–65.

[142] There is no requirement that the party who obtained an undue advantage was subjectively aware of the inequality of bargaining power: ***Uber*** at para 85.

[143] As I have already found above, the Engagement Letters were not negotiated or signed with the LKDFN's interest in mind. Yet, it does not necessarily follow that an unconscionably improvident deal resulted from every contract Barlas signed. Without more, an agreement to submit disputes to arbitration is not by itself an improvident bargain: ***Wasylyk v Lyft***, 2024 ONSC 664 at paras 79–82. Indeed, as discussed throughout these reasons, the contemporary view is to respect arbitration as no lesser a dispute resolution mechanism than resort to the public courts: ***Hypertec Real Estate Inc. c. Equinix Canada Ltd***, 2023 QCCS 2098 at para 34.

[144] Similarly, limits on liability and appeal rights from an arbitration are normal contractual components. These were not specially constructed to gain unfair advantage in this case, but rather appear in a standard form contract between what are normally sophisticated, free-contracting entities.

[145] Elsewhere in their arguments, the LKDFN Companies emphasize the additional costs of conducting the arbitration in British Columbia. I agree that this is an operative concern in this case. However, one cannot judge the providence of the agreement retrospectively, standing in the multi-pronged morass that has unfolded. In particular, one cannot judge the arbitration agreement improvident based on the full-court press to escape it that has been mounted by the LKDFN. To the contrary, it must be presumed to have been signed with a preference for the efficiencies and other advantages arbitration is believed to offer.

[146] The LKDFN Companies also take issue with the limitation of liability provisions in the Engagement Letters, which they say demonstrate the improvident nature of the bargain. While I do not rule determinatively on the enforceability or interpretation of the limit of liability clauses, several factors dictate that they cannot be diagnosed as unconscionable on a superficial review of the record.

[147] To begin with, this is not a contract of adhesion between a corporate giant and economically vulnerable individuals, as was the case in ***Uber***. Although it is not a model of conscious free contracting either (as discussed below), it exists in a context where parties possess the ability to evaluate and assign risk between them.

[148] Furthermore, there is choice in the accounting and tax consultancy field, and individuals and corporations who retain KPMG can be presumed to be reasonably sophisticated and capable of rejecting this language of limitation and taking their business elsewhere if they wish.

[149] I find that there was neither a legally significant imbalance in bargaining power nor an obviously improvident bargain.

[150] I need not determine the ultimate legal enforceability of the limitation clause, and expressly do not do so. Under the separability doctrine, however, even if the rest of the contract containing an arbitration agreement is invalid or otherwise unenforceable, it does not follow that the arbitration agreement is also invalid or otherwise unenforceable: subsection 24(2); ***Uber*** at para 96.

[151] That said, it follows from my decision that the Barlas Advice Claim is outside the scope of the Engagement Letters that the limitation of liability provisions contained therein also do not apply to it.

[152] In conclusion, the LKDFN has failed to show on balance of probabilities, on a superficial review of the record, that the arbitration contract is unconscionable. Were this matter to proceed to arbitration, they would be entitled to mount a full-throated defence on this basis, on what would no doubt be a contested factual landscape. Ultimate unconscionability would then be for the arbitrator to determine.

V. The Barlas Advice Claim should not be temporarily stayed

[153] In oral argument, KPMG suggested that, if the Barlas Advice Claim is excluded from the Arbitration, it can and should nevertheless be stayed temporarily, pending the outcome of the arbitral proceedings, under ss 27 and 29(2) of the *Judicature Act*. KPMG says that doing so would avoid inefficiency and the risk of inconsistent findings and honour the primacy of agreed arbitration. The LKDFN Companies responded that a stay under the *Judicature Act* is precluded by the mandatory language of s 8(5), which dictates that non-arbitrable claims continue in Court.

[154] I conclude that while a temporary stay remains available despite the new *Act*, the Legislature's choice to adopt the clear and specific language in s 8(5) will make such an exercise of the Court's general authority under the *Judicature Act* unusual, and a temporary stay is not warranted in this case.

i. The Judicature Act encodes the Court's inherent jurisdiction to control its proceedings and ensure matters proceed in a just manner

[155] Section 29(2) of the *Judicature Act* gives the Court the power to grant a stay of proceedings "that it considers just." Section 27 makes the avoidance of a multiplicity of proceedings a specific and enumerated goal in the exercise of this remedial power.

[156] Before the current *Act* came into force, it was well established that the courts have the jurisdiction to temporarily stay proceedings pending the outcome of related arbitration: J Kenneth McEwan & Ludmila B Herbst, *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations*, looseleaf (Toronto: Thomson Reuters, 2025) at §3:61; ***Kaverit Steel*** at para 21; ***Yaworski v Gowling Lafleur Henderson LLP***, 2013 ABCA 21 at para 23 [***Yaworksi***]; ***UCANU Manufacturing Corp v Graham Construction and Engineering Inc***, 2015 ABCA 22 at para 7 [***UCANU***]; ***Novatrax International Inc v Hägele Landtechnik GmbH***, 2016 ONCA 771 at para 24 [***Novatrax***].[2]

[2] This approach is consistent with that adopted in many jurisdictions outside Canada, where the courts possess similar discretion to sequence hearings to favour prioritizing arbitral outcomes: Gary B Born, *International Commercial Arbitration*, 3rd ed (The Hauge: Wolters Kluwer International, 2020) at §8.03[C][4].

ii. The language in s 8(5) of the Act weighs against temporary stays

[157] By enacting s 8(5) in its present form, our Legislature was making a conscious choice to follow the *Uniform Arbitration Act* (2016) (the "UAA 2016").[3] This amounted to a rejection of the more highly discretionary, and often confusing, language found in the earlier *Uniform Arbitration Act* (1990) (the "UAA 1990"), which is still the law in several provincial arbitration statutes.[4] Comparison of s 8(5) of the *Act* and s 7(5) of the UAA 1990, is illuminative:

UAA 1990	**NWT *Act* / UAA 2016**
7(5) The court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters if it finds that, (a) the agreement deals with only some of the matters in respect of which the proceeding was commenced; and (b) it is reasonable to separate the matters dealt with in the agreement from the other matters. [emphasis added in both]	**8(5)** If the court finds that one or more of the circumstances described in paragraphs (2)(a) to (d) exists in respect of all or some of the matters in the court proceedings, then, in respect of those matters, (a) the court proceedings continue; (b) no person may commence arbitral proceedings in respect of the dispute; and (c) if a person has brought arbitral proceedings in respect of the dispute, the arbitral proceedings are terminated and anything done in the arbitral proceedings is without effect.

[158] The upshot of adopting the UAA 2016 language is that the *Act* now clearly mandates that parts of a dispute that are found to be non-arbitrable should continue in the courts. This language finds its roots in the Alberta Law Reform Institute recommendation that s 7(5) of Alberta's *Arbitration Act* be repealed, with the result that a court would be required to grant only a partial stay, even if the matters outside the arbitration agreement's scope were factually intertwined with other matters proceeding to arbitration: Alberta Law Reform Institute, *Arbitration Act: Stay and Appeal Issues* (September 2013) at 19-20.

[3] Alberta's *Arbitration Act* was based on recommendations by Alberta's Institute of Law Research and Reform in a 1988 report, which in turn informed the UAA 1990 (see Alberta Law Reform Institute, *Arbitration Act: Stay and Appeal Issues* (September 2013) at 1; Uniform Law Conference of Canada, *Proceedings of the Seventy-First Annual Meeting* (August 1989) at 120–121). For this reason, Alberta's *Arbitration Act* generally mirrors the UAA 1990.
[4] Including s 7(5) of Ontario's *Arbitration Act*, 1991, SO 1991, c 17, and s 7(5) of Alberta's *Arbitration Act*.

[159] In making this recommendation, the Alberta Law Reform Institute acknowledged that the stronger, clearer preference for non-arbitrable matters continuing in parallel to arbitration could result in inefficiency and a multiplicity of proceedings but reasoned that "the two-edged sword of party control means that arbitrating parties must live with the consequences of their drafting, good or bad".

[160] Our Legislature's adoption of this provision thus represents a conscious rejection of the prior, more discretionary, approach to partial stays, and a clear choice to prioritize party autonomy over avoiding a multiplicity of proceedings: ***Wellman*** at para 90. The Court should be slow to countermand this legislative intent and design through its umbrella *Judicature Act* discretions, and do so only where the interests of justice clearly demand it: see e.g. ***ABOP LLC v Qtrade Canada Inc***, 2007 BCCA 290; ***Nihtat Corporation v Sullivan & Nihtat Energy Ltd.***, 2025 NWTSC 58 at para 56.

iii. Proper statutory interpretation limits the scope for temporary stays

[161] It is settled principle that a more specific statutory dictate should prevail over another general, and in this case highly discretionary, statutory provision (*generalia specialibus non derogant*): ***Ingram v Kulynych Estate***, 2024 ONCA 678 at para 55. In this case, that means that the clear, mandatory, subject-specific language in s 8(5) of the *Act* pushes s 29(2)'s broad, general, discretionary power to the margins. Resort to the *Judicature Act* to temporarily stay the non-arbitrable portion of a dispute will thus be rare, and require a compelling factual basis.

iv. Temporary stays remain available

[162] Notwithstanding the clear legislative choice manifested by the enactment of s 8(5) in the new *Act*, I am satisfied that temporary stays under the *Judicature Act* remain available where the interests of justice clearly demand. In particular, s 8(5) say that the non-arbitrable parts of a partially stayed action "continue", not "shall continue", mitigating the compulsory nature of the clause. A case "continuing" necessarily implies that it does so subject to established judicial controls over its procedural path.

[163] Before the new *Act* came into force, it was widely understood that the courts had the jurisdiction to temporarily stay suits in court pending the outcome of arbitral proceedings, both statutorily and at common law under the their inherent jurisdiction to control process: J Kenneth McEwan & Ludmila B Herbst, *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations*, looseleaf (Toronto: Thomson Reuters, 2025) at §3:61; ***Yaworski*** at para 23.

[164] It is presumed that, absent clear language to the contrary, the legislature does not intend to "change existing law or to depart from established principles, policies or practices": ***Parry Sound (District) Welfare Administration Board v OPSEU, Local 324***, 2003 SCC 42 at para 39; see also ***R v Summers***, 2014 SCC 26 at para 56; Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto: LexisNexis, 2022) at §15.05[1].

[165] Further, it is a fundamental principle of our legal system that a court has the jurisdiction to control its own process: ***Bodnar v Payroll Loans Ltd***, 2009 BCSC 1205 at para 72; ***Rocket v Royal College of Dental Surgeons of Ontario***, 1988 CanLII 4789 (ON CA). Against this backdrop, had the legislature intended to oust absolutely the Court's jurisdiction to grant even a temporary stay, it would have needed to use more explicit language than that found in subsection 8(5).

[166] Conversely, however, the courts must refrain from using the *Judicature Act* as a backdoor to reprise an older, unpredictable, and subjective approach to arbitration management. However, the abiding inherent power of the Court to avoid injustices, codified in the *Judicature Act*, must not be lightly used in a manner that frustrates the express policy directions of s 8(5) of the *Act*. As such, the chosen default state – that claims not falling under the applicable arbitration agreement continue – must be respected unless permitting the court action to go forward pending arbitration would be unfair or inefficient to such a degree that a failure of justice was likely to occur. The facts do not warrant a temporary stay of the Barlas Advice Claim.

[167] The present circumstances do not come close to warranting a stay of the Barlas Advice Claim. Arbitral vindication of KPMG's accounting services provided to the LKDFN Companies, much of which predates events of the Barlas Advice Claim, would not likely resolve that latter, more valuable claim. However, resolution of the Barlas Advice allegations in KPMG's favour would effectively moot the earlier and less valuable claims that are in-scope of the arbitration agreement. This is particularly true because the limitation of liability provisions remain presumptively valid for any arbitrable claim but would not apply to the Barlas Advice Claim, which concerns events entirely outside the scope of the Engagement Letters.

[168] Lastly, this is the first inflection point at which the unique social context of this case first gains traction. This Court should be very slow to exercise its discretion in a manner that makes the road to justice more difficult for a NWT First Nation that has suffered financial abuse, exploitation, and destruction of economic self-determination by outside forces (ie: Barlas). To the contrary, this case engages the public interest in claims of deliberate injuries to the Territory's First Nations being dealt with promptly, openly, and by the institutions of the NWT itself.

[169] By contrast, KPMG would suffer no cognizable detriment by having to answer the Barlas Advice Claim in court. As mentioned, this claim is more compact and defined than the broad Derivative Action, and different in substance and elements of proof. It would also allow KPMG to seek indemnity from other third parties in the Court action, such as the Barlas parties and RMRF. The only obvious downside to KPMG is the public nature of the proceeding.

[170] It is legitimate for parties to wish to resolve their disputes in the private confines of arbitration. However, a temporary stay of the Barlas Advice Claim would grant only a short reprieve from the public airing of these allegations. Therefore, KPMG's disinclination to have the Barlas Advice Claim heard in court ultimately translates into very little, if any, actual prejudice if it were to continue presently.

[171] Thus, applying the factors relevant to the remnant discretionary power to issue a temporary stay in favour of arbitration under the *Judicature Act*, through a test similar to that articulated in ***Yaworski***, I find the balance of relevant factors strongly favours rejecting such an order: see ***UCANU*** at para 7; as adopted by the Ontario Court of Appeal: ***Novatrax*** at paras 24 & 52.

[172] In sum, while the mandatory language found in s 8(5) does not oust the jurisdiction of the court to grant a temporary stay of court proceedings, that discretionary power must not be exercised in a manner that frustrates the direction of s 8(5) of the *Act*, and should not be employed in this case.

VI. The KPMG Oppression Application is stayed under the *Judicature Act*

[173] The LKDFN's theory behind the KPMG Oppression Application is that none of the individual members of the First Nation are parties to the Engagement Letters, KPMG was a knowing participant in Barlas' oppression, and they are thus entitled to pursue oppression remedies directly against KPMG in the courts, unencumbered by the arbitration agreement.

[174] KPMG strenuously opposes this newest offshoot of the litigation, contending that it is nothing more than a contrivance to escape the LKDFN Companies' obligation to arbitrate their claims. KPMG argues that it is not saved by the slight alteration in the style of cause from the KPMG Derivative Action and is, in fact, doomed by the unavailability of oppression remedies against strangers to the corporation. KPMG thus argues that the Oppression Application against it should be stayed in favour of arbitration under s 8 of the *Act*, or in the alternative permanently under the *Judicature Act*.

[175] For the following reasons, I do not find it necessary to engage in the complexities of the s 8 stay analysis. Rather, the KPMG Oppression Application is stayed under the *Judicature Act* for four interrelated reasons.

i. The KPMG Oppression Application is an end-run to avoid arbitration

[176] In pith and substance, the KPMG Oppression Application is a duplicative attempt to end-run the arbitration agreement. Its true nature is easily discernable from its genesis and substance. It emerged as a direct response to KPMG's assertion of its arbitration rights. The claims in it are all based on wrongs to the LKDFN Companies and all of the remedies sought are available, and more properly granted, in other, already extant branches of this litigation.

[177] It is both settled law and sound policy that "arbitrations cannot be avoided by simply having a related party commence a lawsuit claiming relief with respect to arbitrable subject matter": ***Yaworski*** at para 20. That is what has been done here. Artful and creative pleadings cannot circumvent agreements to arbitrate disputes: ***Oliver v Severance et al***, 2007 PESCAD 2 at para 103; ***Northwestpharmacy.com Inc v Yates***, 2017 BCSC 1572 at para 54.

[178] Our Court of Appeal has also endorsed this principle, holding that it is "the pith and substance" of an action, and not the names on the style of cause, which determines the applicability of an arbitration agreement: ***Miller Sales v Metso Minerals***, 2017 NWTCA 3 at para 25; see also ***Haas*** at para 21.

[179] I wish to be clear that I am not finding that the LKDFN Parties are, by operation of law, to be treated as signatories to, or bound by, the arbitration agreement. Rather, I am discerning the true nature of the KPMG Oppression Application in furtherance of deciding whether it adds anything legitimately to the litigation already before the Court or not.

[180] In terms of substance, it adds nothing, and exists solely as an attempt to avoid arbitration. That alone does not make it 'bad' or mandate a stay: ***Haas*** at para 23. It does, however, weigh in the mix of whether this Court should stay it to justly and efficiently manage this complex of litigation.

ii. KPMG cannot be a primary oppressor

[181] Oppression remedies evolved to provide recourse in situations where those who *legally* control a company exercise their lawful powers so *inequitably* towards minority or vulnerable stakeholders in that corporate entity that justice demands judicial intervention: see ***BCE Inc. v 1976 Debentureholders***, 2008 SCC 69 at paras 58-64 [***BCE***], ***Brar v Brar et al***, 2018 MBCA 87 at paras 32, 41 [***Brar***]; ***1043325***

Ontario Ltd v CSA Building Sciences Western Ltd, 2016 BCCA 258, leave ref'd 2017 CanLII 1335 (SCC) at paras 47, 53 [***10433335 Ontario Ltd***]; ***Hoffman v Hoffman***, 2025 ABKB 219 at paras 49-50; ***Ibrahim v Bellvue Manor Inc (Bellvue Manor)***, 2025 CanLII 17321 (ON SCSM) at para 48. They are corrective and meant to redress injustice and unfairness "within the internal life of a corporation": ***Shelley v Noël***, 2020 NLSC 54 at para 97 [***Shelley***]; ***Wilson v Alharayeri***, 2017 SCC 39 at paras 27 and 53 [***Wilson***].

[182] Oppression is thus constrained to correcting intra-corporate wrongs perpetrated by the subject corporation(s) and their controlling minds, against other stakeholders of the corporation. It controls affairs *within* a group of parties, centred on the subject company, that I will refer to as the "corporate circle"; being those who share a "web of interests and expectations" in and about the subject company: ***1043325 Ontario Ltd*** at para 57; ***BCE*** at para 45; ***Rea v Wildeboer*** 2015 ONCA 373 at para 19 [***Rea***]; ***Thomson v Quality Mechanical Service Inc***, 2001 CanLII 28007 (ON SC) at para 18.

[183] Given their role and nature, oppression applications rarely reach outside the corporate circle. When they have done so, the impacted third-party has always been substantively, if not legally, connected to the corporate circle, as viewed through oppression's equitable lens: eg: ***Waxman v Waxman***, 2004 CanLII 39040 (ON CA) [***Waxman***], see also ***Jaguar Financial Corporation v Alternative Earth Resources Inc***, 2016 BCCA 193 at paras 180-186.

[184] The narrow class of respondents to oppression actions – being those entities and individuals within the corporate circle – is defined by the language of virtually every oppression provision in Canada. In this case, oppression actions relating to Tsa are governed by s 253 of the *CNFPCA*, which constructs the remedy in the following terms:

> 253 (1) On the application of a complainant, a court may make an order if it is satisfied that, in respect of a corporation or any of its affiliates, any of the following is oppressive or unfairly prejudicial to or unfairly disregards the interests of any shareholder, creditor, director, officer or member, or causes such a result:
>
> (a) any act or omission of the corporation or any of its affiliates;
>
> (b) the conduct of the activities or affairs of the corporation or any of its affiliates; or
>
> (c) the exercise of the powers of the directors or officers of the corporation or any of its affiliates.
>
> [emphasis added]

[185] Identical language is found in s 243 of the *NWTBCA*, which governs Denesoline and T'agera. In keeping with the intended scope of the oppression remedy, the "affairs" of the subject corporation are defined as "the relationships among a corporation, its affiliates and the directors, officers, shareholders or members of those bodies corporate": *CNFPCA*, s 2(1).

[186] Critically, the subject company's contractual counterparties and true third-party service providers do not fall within the corporate circle to which oppression may be directly applied: ***Budd v Gentra***, [1996] OJ No 3515 (Ont SCJ) at para 21, aff'd 1998 CarswellOnt 3069, 1998 CanLII 5811 (ON CA).

[187] Indeed, it is well settled law in Canada that accounting professionals alleged to have been negligent, or even malevolent, in their work documenting a corporation's affairs have no duty of care towards the individual shareholders of the corporation, other than in their collectivity *as the company:* ***Hercules Management Ltd v Ernst & Young***, 1997 CanLII 345 (SCC) at paras 59-60. The "reasonable expectation" piece of the oppression analysis is thus fatally absent.

[188] Relatedly, the Supreme Court has clearly instructed that "a derivative action...is the appropriate vehicle for a claim regarding a negligent statutory audit". This further indicates that bringing a new oppression claim against KPMG is not the right way to advance the complaints made against it in this case: ***Deloitte & Touche v Livent Inc (Receiver of)***, 2017 SCC 63 at para 7.

[189] Oppression is a statutory cause of action. While its remedial powers are broadly and liberally applied, in keeping with its equitable essence, that does not provide a basis for extending its *scope and reach* beyond the plain text of its source provision: ***Brar*** at paras 33-34; ***Pasnak v Chura***, 2004 BCCA 221 at para 5. Moreover, the complimentary establishment of derivative actions, in the same section of each act where oppression remedies are found, is a clear contextual indication that the defined borders of each statutory cause should be respected. The KPMG Oppression Application transgresses those bounds.

iii. The allegations in the KPMG Oppression Application are in substance derivative claims of the LKDFN Companies

[190] Third, and relatedly, the law is clearly against recruiting oppression to do the work properly reserved for actions in contract and tort brought in the name of the aggrieved corporation: ***Stahlke v Stanfield***, 2010 BCSC 142 at para 23. Oppression's powerful equitable toolkit is not meant as a substitute or shortcut for claims in tort and contract: ***1043325 Ontario Ltd*** at para 53; ***Research Capital Corporation v Skyservice Airlines Inc***, 2008 CanLII 30703 (ON SC), at para 35, aff'd 2009 ONCA 418; ***JSM Corp (Ontario) Ltd v Brick Furniture Warehouse Ltd***,

2008 ONCA 183 [***JSM***]; ***Naneff v Con-Crete Holdings Limited et al***, 1995 CanLII 959 (ON CA), [1995] 23 O.R. (3d) 481 (C.A.) at 489; see also Michael Marin, *Third-Party Liability of Directors and Officers: Reconciling Corporate Personality and Personal Responsibility in Tort*, 2019 CanLIIDocs 4260 – Dalhousie Law Journal, at 358.

[191] In this case, the wrongs alleged against KPMG are for breaches of contract with, and tortious wrongdoings against, the LKDFN Companies, not their members. The proper vehicle for these claims is the KPMG Derivative Action.

[192] The distinct roles of, and relationship between, derivative and oppression actions were succinctly described in ***Rea***, where the applicant claimed that "the somewhat murky' line between oppression remedies and derivative actions had all but disappeared." Writing for the Court, Justice Blair redrew that line.

[193] The respondents in ***Rea*** who objected to being targeted by the oppression action brought by shareholders of the subject company, were complete strangers to the corporate circle. They were, however, alleged to have "aided and abetted the insider defendants" in the purportedly oppressive transactions at issue, by participating in an overpricing/kickback scheme with the subject company: ***Rea*** at para 9. In upholding a decision to strike the oppression action against the third parties, the Court, at paras 18-19, provided the following articulation of the proper nature and role of derivative and oppression proceedings respectively:

> The derivative action was designed to counteract the impact of *Foss v. Harbottle* by providing a "complainant" -- broadly defined to include more than minority shareholders -- with the right to apply to the court for leave to bring an action "in the name of or on behalf of a corporation … for the purpose of prosecuting, defending or discontinuing the action on behalf of the body corporate": *OBCA*, s. 246. It is an action for "corporate" relief, in the sense that the goal is to recover for wrongs done to the company itself.
>
> The oppression remedy, on the other hand, is designed to counteract the impact of *Foss v. Harbottle* by providing a "complainant" -- the same definition -- with the right to apply to the court, without obtaining leave, in order to recover for wrongs done to the individual complainant by the company or as a result of the affairs of the company being conducted in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of the complainant. The oppression remedy is a personal claim: [citations omitted, emphasis added]

[194] The Court in ***Rea*** concluded that the allegations of knowingly participating in the oppressive scheme did not overcome the absence of specific, personal wrongs to the applicants. There, as here, the losses inflicted by the scheme were equally and universally suffered by every shareholder *qua* shareholder: ***Rea*** at paras 32-36. I further adopt the apt summation of these principles found in ***Shelley*** at para 103, where Boone J stated that:

> [t]he claim for an oppression remedy protects the interests of some shareholders that diverge from the interests of the shareholders as a whole. A shareholder claiming relief from oppression must plead that their interests that were unfairly disregarded are interests that they do not hold in common with the shareholders as a whole. Otherwise, the claim is really one that is for the corporation, and not individual shareholders, to assert. [emphasis added]

[195] Viewed metaphorically, an oppression application is the 911 call for the fire department to rescue stranded shareholders from the burning corporate structure. The subsequent sorting out of the fire damage is both less urgent and requires less remedial creativity. Where third parties are alleged to bear some responsibility for the fire, those claims would properly be brought by the company, or derivatively through its stakeholders, and not as a new and further oppression claim.

[196] None of this exculpates a third-party oppression-aider, it simply means that their alleged wrongs are properly conceived of as injuries to the entire body-corporate, and therefore rightly the subject of a derivative action: ***Rea*** at para 41, 49. The Alberta Court of Appeal adopted this reasoning in ***Shefsky v California Gold Mining Inc***, 2016 ABCA 103 at para 41, as do I: see also ***Pappas et al v Acan Windows Inc et al***, 1991 CanLII 7482 (NL SC) at para 106.

[197] The LKDFN has tried to carve a bypass around these established lanes and fences. They do so by seizing on language found in a few authorities suggesting that oppression remedies may be levied against third parties who "knowingly participated" in oppressive acts, or were in "knowing receipt" of profits derived therefrom: ***The JSL Trust v Razor Logic Systems Inc***, 2020 ONSC 3603 at para 38; ***Holden v Infolink Technologies Ltd***, 2006 CarswellOnt 910 (Ont. S.C.), at para. 45; ***Jabalee v Abalmark Inc***, 1996 CarswellOnt 2391 at para 1.2, [1996] OJ NO 2609; ***Maynes v Allen-Vanguard Technologies Inc (Med-Eng Systems Inc)***, 2011 ONCA 125 at para 75; ***Waxman*** at paras 540-556**.**

[198] None of these authorities hold that true third parties, *entirely* outside the corporate circle, can be the *primary* respondent to an oppression claim. I conclude that they cannot, as a matter of law. These cases all featured a primary oppression claim against a wrongdoer *inside* the corporate circle, married to a separate but related claim in equity against the third party, or for relief against a third party which was not truly at arms-length from the primary oppressor. Applying that template to the present case, Barlas is the primary oppressor, and proper respondent, and any oppression-related relief against KPMG must exist as an adjunct to the ongoing, court-supervised remediation of Barlas' oppression, not as a freestanding oppression claim.

[199] Courts should be on alert for claims improperly cloaked in the mantle of oppression, and screen these out as early in the process as possible: ***Bruner v MGX***

Minerals Inc, 2019 BCSC 11 at para 76 and ***Mudrick Capital Management v Wright***, 2018 ABQB 194 at para 18; Kevin P McGuiness, *The Law and Practice of Canadian Business Corporations* (Markham: Butterworths, 1999) at § 9.247:

> While acts of oppression may entail a breach of contract, or the commission of some tortious or similar wrong, against the complainant, it is doubtful that the oppression remedy was intended to be a substitute for an ordinary right of action in contract - or tort for that matter.[5]

[200] I agree with and apply this line of cases, and conclude that the request for a declaration that KPMG knowingly assisted Barlas' oppression is an attempt to dress up as an oppression application what is, in substance, a tort claim by the company against a third party, for the collateral benefit of avoiding arbitration.

iv. The right oppression action has already been brought

[201] Finally, in asking to avoid the arbitration agreement, the LKDFN is really seeking a new and further remedy in the original oppression claim. The remedy to Barlas' oppression remains ongoing, under the supervision of this Court, in the form of the Receivership Order. The KPMG Oppression Application is surplusage to this, a misuse of the oppression remedy, and wholly duplicative of more properly brought proceedings, in a manner that the law frowns upon. This fundamentally flawed nature of the KPMG Oppression Application directly invites exercise of the Court's power to impose a stay under the *Judicature Act*.

v. Conclusion

[202] I have no doubt that the proper, practical way to untie the Gordian knot of proceedings presently before the Court is to stay the KPMG Oppression Application in favour of deciding whether to set-aside the arbitration agreement as an ongoing remedy for Barlas' oppression under the ambit of the Receiver's motion. The balance of the remedies sought by the LKDFN in its Oppression Application are subsumed in either the Barlas Advice Claim – which would proceed in the courts in any event – or those portions of the KPMG Derivative Action which would fall within the ambit of the arbitration agreement.

[203] Facets of this reasoning closely resemble the analysis the Court would undertake on an application to strike. However, these overlapping factors make granting a stay at this juncture more attractive, to avoid the expenditure of further time and money on a superfluous and structurally doomed claim.

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[5] Also cited with approval by the Ontario Court of Appeal in ***JSM*** at para 65; ***1059217 Ontario inc v General motors ventures LLC***, 2021 CanLII 68302 (NB KB) at para 25; and ***Landvis Canada Inc v Ocean Choice International Limited Partnership,*** 2016 CanLII 544 (NL SC) at para 126.

[204] The LKDFN litigation is already too complicated and costly. When the real question before the Court is where, not whether, claims should be pursued, the various pathways' prospects for success are seminally relevant considerations. Moreover, the issues as to whether the KPMG Oppression Application is a proper invocation of oppression principles was thoroughly argued before me.

[205] When allocated correctly to their source of rights and bases for relief, the damages claim against KPMG should be determined in the KPMG Derivative Action, and the setting-aside of the arbitration agreement should be sought in the ongoing remedial phase of the original oppression action, as the Receiver has requested. The KPMG Oppression Action is surplusage. It is stayed accordingly.

VII. The arbitration agreement is set aside as a remedy to Barlas' oppression

[206] Both the Receivership Order and the statutory oppression regimes governing this case expressly provide the authority to set aside contracts. The Receiver, who continues to administer the LKDFN Companies, asks the Court to exercise that power to render the arbitration agreement with KPMG unenforceable.

[207] The Receiver says that parallel arbitration proceedings would invite inconsistent outcomes, impose significant, duplicative costs on the LKDFN Companies, compromise the objectives of the receivership in maximizing recovery as redress for the harm caused by Barlas' oppressive conduct, and simply be unjust.

[208] KPMG vociferously resists this application. Factually, it questions the Receiver's assertion that arbitration would be financially or juridically prejudicial to the LKDFN Companies' overall recovery. Legally, it argues that this remedy is not available, and is limited to the insolvency context by the Supreme Court's recent decision in ***Peace River***. It argues that setting-aside arbitration agreements is only appropriate as an adjunct to the "single proceeding model" in insolvency, and has no place in oppression remedies.

[209] For the following reasons, I find it appropriate to grant this somewhat exceptional remedy, on the unique facts of this case. To be conceptually clear, setting aside the arbitration agreement is not a remedy for a new, further, or different act of oppression by KPMG. Rather, the Receiver has deemed it a necessary adjunct to successfully carrying out the ongoing recovery from Barlas' oppression, and it is granted on that basis.

i. Findings of fact relevant to the Receiver's request

[210] I find that Barlas moved the LKDFN Companies' accounting work to KPMG to risk-manage his oppressive acts by leveraging personal relationships to gain trust,

and cloaking his misdeeds with distance. He was not acting in the interests of the LKDFN Companies when he signed the Engagement Letters. Both final judicial findings, as well as available inferences from the record before me, support these conclusions.

[211] In the Oppression Decision, at paras 131*ff*, Shaner J. found that Barlas repeatedly sought to influence the KPMG partners as to how his related-company transactions should (or should not) appear in the LKDFN Companies' financial statements, and that these requests were often successful. Much of that same evidence was before me. Without finding that KPMG acted improperly on their end of these interactions, there is little doubt that Barlas sought to trade on his relationship with KPMG to cover his tracks.

[212] Barlas' dismissal of the LKDFN's local accountancy, in favour of a distant firm with whom he had a pre-existing relationship, reads as a play to reduce the chances of suspicions arising over his actions, and to insulate his financial dealings from the risks attendant to local knowledge. Retaining a remote firm to replace local accountants made no sense in this case, but-for the concomitant reduction in the chances that Barlas' oppressive acts would come to light.

[213] This is to take nothing from the competencies of KPMG and its worldwide network of professionals. Their reputation and scale have no doubt been built through the quality of their work. In this case, however, KPMG was engaged to provide basic accounting services and production of consolidated annual financials. This was sub-audit level review. None of KPMG's special or more advanced expertise was sought or required. As such, I find as a fact that the relationship with KPMG was an instrumentality of Barlas' proven oppressive conduct, irrespective of any wrongdoing on KPMG's side of the equation,

[214] I also accept as a fact, from the Receiver's evidence, that the LKDFN Companies remain in a tenuous financial position, are at best in a break-even scenario to date with the professional fees they have incurred, and the funding released to Barlas, and would be hard pressed to afford multiple streams of overlapping litigation. The LKDFN is a small First Nation, and does not have other or independent resources to pursue parallel cases. Chief Marlowe's evidence confirms this, and I accept it.

[215] In terms of the formation of the arbitration agreement, I find, based on the evidence as to how Barlas ran Board affairs and treated the members, that the TSA Board was likely neither informed nor consulted about these contracts.

[216] Given Barlas' obvious lack of interest in ever litigating anything to do with his administration, I find, on balance of probabilities, that Barlas never turned his

mind to the presence of the arbitration clauses, nor to their impact on the LKDFN Companies' interests.

[217] Conversely, considering that parts of the arbitration agreement are directly contrary to their governing law (as discussed in Part IV above), I find that no one on KPMG's end specifically turned their mind to the arbitration aspect of the Engagement Letters in this case either. Rather, these terms simply existed as words on a pre-printed standard form contract, and first came to be considered after this dispute arose.

[218] Moreover, KPMG went to significant lengths to avoid producing a knowledgeable witness who could offer evidence on the circumstances surrounding the execution of the Engagement Letters. As part of their strategy to avoid any substantive inquiries on the arbitration-related motions before the Court, neither of their witnesses spoke to the KPMG partners who signed the Engagement Letters. They could only confirm that these were standard forms used across the country.

[219] While in no way invalidating the terms of the contract, these facts serve to situate the arbitration agreement in question along the spectrum of contractual documents. I find that it falls closer in nature to the contract-of-adhesion considered by the Supreme Court in ***Wellman*** than the deal-specific, agreements at issue in ***Peace River***. I infer, on balance of probabilities, that the arbitration agreement in this case was not the subject of any direct advertence or intention on either side.

[220] Although a minor point, this is relevant because the abrogation of true negotiated bargains hits different. As the Supreme Court has said, "the concept of party autonomy, which is always engaged to at least some extent where arbitration agreements are involved, may speak more or less forcefully, depending on the contract": ***Wellman*** at para 53.

[221] I note that KPMG suggested that it was precluded from substantively defending the arbitration agreement before the Court when arguing that all jurisdiction lay with the arbitrator. Respectfully, this is incorrect. While I appreciate the fine line KPMG was walking, substantive proof of the technical prerequisites, and an evidentiary reply to the case made against the stay, do not constitute attornment to the Court's jurisdiction, and should not be discouraged.

[222] Finally, my knowledge of this matter, as the case management judge since August 2024, has provided me with significant insight into its many layers. As such, I find the following facts about the litigation. The liability of the professionals being pursued in the derivative actions is significantly intertwined. Their attendance at the community "feasts" Barlas organized will be heavily scrutinized and highly relevant to determinations of their respective liability, as both made representations to the members of the LKDFN Companies at these events.

[223] Their mutual inter-reliance will also be an issue. RMRF specifically pled in its Statement of Defence that any losses were caused not by it, but by other parties, including "the Plaintiff corporations' external accountants." Notably, and likely not coincidentally, RMRF subsequently left KPMG out of their (potentially initial) third party notice. KPMG then refused to answer whether it had made any arrangements with RMRF to this end, on the basis of relevance. That question was seminally relevant, and I draw an adverse inference from its refusal: ***Ontario (Attorney General) v 8477 Darlington Crescent***, 2011 ONCA 363 at paras 50-51; ***Stikeman Elliott LLP v 2083878 Alberta Ltd,*** 2019 ABCA 274 at paras 87-89.

[224] Specifically, I find that KPMG was aware of, and justifiably concerned by, the natural interrelationship between, and factual overlap in, the derivative actions against it and RMRF, both in respect of liability and apportionment of damages.

[225] The conduct of the community Board members will also be of significance to all facets of the case. A number of these individuals are elderly and forcing them to repeatedly testify about times during which they were threatened by Barlas would impose a hardship on them.

[226] Furthermore, and perhaps most importantly, I find as a fact that there exists a significant scope for inconsistent outcomes if parts of this litigation are pursued in separate forums. This may be most acute with the Barlas Advice Claim, which would proceed in this Court, irrespective of the decision to render the arbitration agreement unenforceable.

ii. The Peace River approach to overriding arbitration agreements

[227] There exists little in the way of direct judicial guidance on the avoidance of arbitration contracts as a remedy for oppression. This is unsurprising, as oppression remedies usually reach outside the corporate circle only where contractual dealings with a third-party are intimately intertwined with the oppressive conduct (see paragraphs 181-184 above): ***Deluce Holdings Inc v Air Canada*** 1992 CanLII 7654 (ON SC). Consequently, both parties relied heavily on the Supreme Court's recent consideration of a receiver's request to set aside arbitration contracts in the insolvency context as a template for what is, or is not, possible in a case like this.

[228] In ***Peace River***, the plaintiffs were placed into receivership under section 243 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ["*BIA*"]. The receiver then sought to bring a civil claim against the defendants in the bankrupt's name, similar to the KPMG Derivative Action in this case. As here, the defendants sought a stay of the court proceedings on the grounds that the dispute was the subject of an arbitration agreement.

[229] Enforcing that agreement would have required that the receiver fund and participate in multiple arbitrations, as well as parallel court proceedings involving defendants who were not parties to any arbitration agreement. This created a risk of piecemeal and potentially inconsistent decisions, significant delay, and additional cost: ***Peace River*** at paras 175-177. This matrix of facts persuaded the Supreme Court to unanimously find the arbitration agreements inoperative, though the Court split 5-4 on the fountainhead of authority to do so.

[230] For the majority, Côté J found that the arbitration agreements were "inoperative" for the purposes of s 15(2) of the BC *Arbitration Act* then in force, which provided an exception to a mandatory stay in favour of arbitration where the underlying agreement was, *inter alia*, "inoperative or incapable of being performed". This provision mirrors the statutory exception to a stay in favour of arbitration on account of the agreement being "unenforceable" found in s 8(2)(c) of our *Act*.

[231] To obviate the arbitration agreements, the majority relied on the authority granted to bankruptcy courts by the combined effect of ss 183(1) and 243(1) of the *BIA*: at paras 146-149. These are both very broad and general catch-all provisions, neither of which specifically imbues the Court with the power to avoid contracts.

[232] Section 183(1), though only specifying which courts have jurisdiction in bankruptcy in each province and territory, has been interpreted to give those courts residual jurisdiction to make orders in furtherance of the objectives of the *BIA* that are not expressly authorized by other provisions of the statute: ***Peace River*** at para 147; ***Kingsway General Insurance Company v Residential Warranty Company of Canada Inc (Trustee of)***, 2006 ABCA 293 at paras 19-21. In turn, s 243(1), allows the court to appoint a receiver with various broad powers, including taking "any ...action that the court considers advisable."

[233] Significantly, neither of these provisions grant a specific authority to avoid contracts. However, they have been judicially constructed to provide the power to impose what is known as the "single proceeding model". This concept holds that a centralized judicial process for the adjudication of claims by and against bankrupts promotes the "public interest in the expeditious, efficient and economical clean-up of the aftermath of a financial collapse": ***Peace River*** at para 55, citing ***Sam Lévy & Associés Inc v Azco Mining Inc***, 2001 SCC 92 at para 27 [***Sam Lévy***].

[234] The single proceeding model traditionally refers to a single forum for creditors to bring claims against the debtor, but has been expanded to encompass claims advanced by the debtor against third parties: ***Mundo Media Ltd (Re)***, 2022 ONCA 607 at para 52.

[235] Through these statutory sections, and the judicial concept of the single proceedings model, the majority assembled and applied a power to set-aside or avoid arbitration agreements where failing to do so would "compromise" the integrity of the insolvency proceeding and the orderly and efficient remediation of the corporate collapse at hand: ***Peace River*** at paras 8, 34, 55.

[236] The minority opinion, authored by Jamal J, concurred that the arbitration agreements could and should be rendered inoperative, but sourced the authority to do so from the Receivership Order itself. While concurring with the majority on the statutory foundation of the power to disclaim contracts, the minority held that the Order should be considered the primary source of the relevant authority.

[237] The Court was unanimous that arbitration agreements are not to be set aside lightly, or as a matter of course, though it is unclear if they agreed on the applicable standard. The majority held that the arbitration agreement could be set aside "where enforcing it would *compromise* the orderly and efficient resolution of insolvency proceedings". It emphasized that this analysis would require consideration of the prejudice suffered by the disappointed arbitral counterparty. The minority arguably articulated a lower threshold to exercise of this power, indicating that it would be appropriate where avoiding the arbitration agreement would "*best promot*e the orderly and efficient resolution of the receivership": ***Peace River*** at paras 55 & 193.

[238] Ultimately, this may be a distinction without a difference, as the majority's standard was derived from the trial judge's finding that staying the arbitrations "will be faster and less expensive" and "would promote the efficient and inexpensive resolution of their dispute": ***Peace River*** at para 35. That reasoning implies a standard well short of necessity, and sounds a lot like the minority's expression of the test.

[239] Either way, it is clear that the court must be satisfied that avoiding arbitration would yield a significantly better net resolution process for the underlying problem (the insolvency or oppression) or, conversely but equally, that compelling arbitration would materially compromise the clean-up process being undertaken.

[240] For the following reasons, I find that the Supreme Court's reasoning to set aside the arbitration agreements in ***Peace River*** can be analogized to the same end in this case. A number of considerations compel the conclusion that the power to disclaim an arbitration agreement, thereby rendering it "unenforceable" within the meaning of s 8(2)(iii) of the *Act*, clearly exists in this oppression proceeding, and that it ought to be exercised in this case.

iii. Commonalities between the Oppression and Insolvency regimes

[241] Oppression and insolvency have much in common. Both regimes grant broad, open-ended, creative powers to the Court to make the best of bad business situations by correcting the faltering corporate course. Despite different roles and goals, both exist as statutorily created grants of 'super equitable' jurisdiction, providing courts with means to clean up corporate failures in the fairest and most efficient manner, often irrespective of strict legal rights and recourse: ***BCE*** at paras 58 and 71; ***Mennillo v Intramodal inc.***, 2016 SCC 51 at para 173.

[242] The breadth and depth of the power conferred on the courts in insolvency is near-unique in our legal ecosystem. The *BIA* confers a "broad scope of authority" as "[a]nything less would unnecessarily complicate and undermine the economical and expeditious winding up of the bankrupt's affairs": ***Sam Lévy*** at para 38.

[243] The only rival to the scope and flexibility of insolvency remedies are oppression remedies. In ***Peoples Department Stores Inc (Trustee of) v Wise***, 2004 SCC 68 at para 48, the Supreme Court said this about the nature, role, and power of the oppression remedy:

> The Canadian legal landscape with respect to stakeholders is unique….The oppression remedy of s. 241(2)(c) of the CBCA and the similar provisions of provincial legislation regarding corporations grant the broadest rights to creditors of any common law jurisdiction…. One commentator describes the oppression remedy as "the broadest, most comprehensive and most open-ended shareholder remedy in the common law world": [citations omitted, emphasis added]

[244] The similarities run deeper. The following passage from ***Peace River***, at para 52, resonates in the present case. Substituting "oppression" for "insolvency", it acutely describes the impacts of Barlas' actions on the people of the LKDFN.

> Insolvency engages broad public interests. It "affects all of the stakeholders of the insolvent business enterprise", including creditors, employees, landlords, suppliers, shareholders, and customers.… In the case of very large companies, an insolvency may even "threaten the existence of whole communities"… Canadian legislation therefore offers stakeholders a wide range of judicial procedures to resolve problems presented by an insolvency. [citations omitted, emphasis added]

[245] The commonalities between oppression and insolvency are further illustrated by the use of Receiver-managers in both contexts, and the marked similarity of the template Orders empowering these agents commonly used in both. In sum, at a level of legal principle, insolvency and oppression are close cousins. They possess different aims and specific tests of application, but both exist to permit courts to fix corporate wrongs, often with sweeping, pragmatic powers.

iv. The CNFPCA and NTWBCA explicitly grant power to avoid contracts

[246] The oppression provisions of the *CNFPCA* and *NWTBCA* expressly authorize abrogation of the subject company's contractual obligations where this is necessary to achieve the goals of the oppression remedy. A comparison of the statutory provisions of these, and the *BIA* as relied on in ***Peace River***, is illuminative:

Relevant *BIA* provisions	**Relevant *CNFPCA* provisions**
Courts vested with jurisdiction 183(1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers: ... (h) in Yukon, the Supreme Court of Yukon, in the Northwest Territories, the Supreme Court of the Northwest Territories, and in Nunavut, the Nunavut Court of Justice. … Court may appoint receiver 243(1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so: (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person…; (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or (c) take any other action that the court considers advisable.	Powers of court 253(3) The court may make any interim or final order that it thinks fit, including an order ... (b) appointing a receiver or receiver-manager; ... (h) varying, setting aside or annulling a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract; * * * **Relevant *NWTBCA* provisions** Powers of Court 243(3) In connection with an application under this section, the Court may make any interim or final order it considers fit including, without limiting the generality of the foregoing … (b) an order appointing a receiver or receiver-manager; … (j) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract; [emphasis added]

[247] Unlike in bankruptcy, the root power to avoid contractual arbitration obligations undeniably exists in the realm of oppression. The text, context, and purpose of the governing statutes make this clear. While insolvency courts have arrogated to themselves, and their appointed Receivers, a phenomenal breadth of creative powers under a relatively austere and non-specific legislative regime,[6] the power to set aside contracts when correcting oppression is expressly provided on the face of the statutory instruments driving the oppression remedy.

a. *Peace River* is not the source of the contractual set-aside power

[248] Complainants in oppression need not look to ***Peace River*** for a power to set-aside arbitration contracts. This reality provides a full answer to KPMG's main argument, which is that the Supreme Court only found a power to set-aside arbitration agreements in insolvency because of the need to maximize debtor-recovery and the importance of the single proceeding model to achieving these ends – concerns which are absent from the oppression context. This fails to recognize that the need to conjure a source for the authority to invalidate arbitration agreements in the insolvency context only arises because of the *absence* of any specific statutory grant of this power. By contrast, the oppression context suffers no such lacunae. The power to set aside contracts is explicit on the face of the enabling statutes.

[249] There is no doubting the centrality of the single proceeding model to insolvency law: see Roderick J Wood, *Bankruptcy and Insolvency* Law, 3d ed (Toronto: University of Toronto Press, 2025) at 2-4. Deriving the authority to abrogate arbitration contracts in part from it makes sense. That, however, says nothing about the availability of the same remedy in oppression.

[250] Moreover, a multiplicity of proceedings need not be the problem for contractual set-aside to be a remedy to oppression. For instance, had Barlas created an employment agreement that contained an arbitration clause requiring disputes over his service as CEO to be arbitrated in the Netherlands, applying Dutch law, Shaner J may have swept it away as a device of oppression in the initial proceedings.

[251] Unlike in ***Peace River***, the question in this case is not whether arbitration agreements *can* be set aside, but whether this is a proper case to deploy this exceptional power as a form of oppression relief. The question is whether the power to avoid arbitration obligations should be used, not if it exists.

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[6] (See e.g. ***Montréal (City) v Deloitte Restructuring Inc***, 2021 SCC 53 at para 115; ***Re Quest Guardian Properties Ltd***, 2021 BCSC 251 at para 62; ***Groupe Bikini Village inc (Proposition de)***, 2015 QCCS 1317 at para 20).

b. Receivers' various roles do not affect availability of the remedy

[252] KPMG also emphasizes the different purposes and tenures of receivership in insolvency versus oppression as demonstrating that this application is misconceived. They argue that the Receiver here had a limited mandate to manage the corporations transitionally, has devolved the power to pursue the Derivative Actions to the LKDFN itself, and will shortly be relieved of duty. None of this matters. First, the Receiver was appointed in this case to ascertain and gain control over the LKDFN Companies' assets, much like a receiver in bankruptcy. Second, their role was to take over from the oppressor and to unwind the oppression. To this end, they have appropriately used their powers to assert and litigate trusts over Barlas' property.

[253] The Receivership Order in this case also expressly permits setting aside contracts, in language identical to that in the parallel order in ***Peace River***. A comparison of the two Orders, both of which contain language common to standard form receiver-manager orders issued across Canada, is again illuminative.

The Peace River Order	***The LKDFN Order***
[The receiver is authorized to] ... 3(c) "cease to perform any contracts of the Debtor" ... 3(f).. "to exercise all remedies of the Debtor in collecting [what is owed to it]." ... 3(j) "to initiate, prosecute and continue the prosecution of any and all proceedings [regarding the property of the Debtor]." [emphasis added]	...the Receiver is hereby empowered and authorized to... 3(e) to manage, operate, and carry on the business of the LKDFN Companies, including the powers to enter into any agreements, incur any obligations....or cease to perform any contracts of the LKDFN Companies. 3(k) to initiate, prosecute, and continue the prosecution of any and all proceedings now pending or hereafter instituted with to the LKDFN Companies.... [emphasis added]

[254] The grant of authority in the two Orders is identical. In ***Peace River***, at para 193, Jamal J. held that this broadly worded Order "authorized the Receiver to disclaim the Arbitration Agreements", subject to Court approval, after hearing from the impacted parties: para 197. In my respectful view the same holds true in this case. There is no logical or legal impediment to the Receiver now asking – as the Court in ***Peace River*** instructed – for the Court's imprimatur to exercise that power, as compelling reasons to do so have arisen.

[255] Whether directly by statute or through the Receivership Order, the Court in this case has the authority to render the arbitration agreement unenforceable if, to use the words of the Supreme Court by analogy, not doing so would compromise the fair and orderly correction of the oppressive conditions.

v. Neither caselaw nor principle stand in the way of this remedy

[256] In the absence of directly applicable caselaw,[7] some commentators have doubted whether the oppression remedy can be used to set aside a contract with a third party, absent a finding of wrongdoing by that third party: see e.g., Paul Martel, *Business Corporations in Canada - Legal and Practical Aspects*, looseleaf (Toronto: Thomson Reuters, 2025) at §31:16.

[257] Respectfully, I disagree. To begin with, the mention of compensation to the counterparty in both enabling statutes makes it clear that the cancellation of legitimate contracts with true and potentially innocent third parties is on the table. If set-aside were limited to cases where the arbitration counterparty was implicated in the oppression, the notion of compensation would make little sense.

[258] Equally, other enumerated oppression remedies have the potential to affect the interests of third parties. For example, an order for a corporation to buy back its own shares may reduce the funds available to the corporation to satisfy the claims of creditors: see e.g., ***Safarik v Ocean Fisheries Ltd*** 1996 CanLII 10202 (BC CA) at para 15. Although such an order could not be made if it would cause the corporation to become insolvent, it could still be made in circumstances in which it would increase the likelihood of a future insolvency: *NWTBCA*, s 243(7).

[259] It would be incongruous to foreclose the use of the power to set aside or vary contracts in situations involving innocent third parties, even though the other powers under the oppression remedy have the potential of third-party prejudice.

[260] Finally, the author of *Business Corporations Canada* accurately notes that the powers granted to the court under the oppression remedy have been described as "very flexible", "inquisitorial and salvationist" and "even mind boggling". Notwithstanding this, he bases his doubts about the anti-contractual reach of oppression remedies on the *obiter* comments of the Court in ***JSM*** at paras 58-66. There, at para 60, the court held that:

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[7] In ***Woolcock***, the Ontario Court of Appeal interpreted ***Deluce Holdings*** as standing for the proposition that the court can stay the arbitral proceedings when the invocation of the arbitration agreement was itself oppressive conduct: at para 32. Subsequently, however, in ***Toronto Standard Condominium Corporation No 1628 v Toronto Standard Condominium Corporation No 1636***, 2021 ONCA 360, the Court interpreted the holding more narrowly, emphasizing the narrow scope of the arbitration provision at issue: at para 31.

> [t]he oppression remedy is not, however, a means by which commercial agreements negotiated at arms length by sophisticated parties can be rewritten to accord with a court's after-the-fact assessment of what is "just and equitable" in the circumstances. It is not the function of the court to rewrite contracts or to relieve a party to a contract of the consequences of an improvident agreement. See *Jedfro Investments (U.S.A.) Ltd. v. Jacyk*, 2007 SCC 55 (CanLII), [2007] S.C.J. No. 55 at para. 34.

[261] ***JSM*** involved an unsuccessful attempt to use oppression as a surrogate for a contractual debt-claim between independent counterparties. Judicial rejection of that ploy was principled, but has no bearing on this case. The Receiver here is not seeking set-aside because the arbitration agreement is an improvident bargain, but because it was conceived in the course of oppressive conduct, as a second-order instrument of the oppression, and now obstructs the fair and equitable recovery from that oppression. Those are valid reasons to employ this power.

vi. Rational limits on, and criteria for applying, the power to set-aside arbitration agreements

[262] With great power comes the risk of great overreach. The textually unbounded authority to remedy oppression must have principled limits. For this reason, the Supreme Court has encircled the open-ended statutory language driving oppression remedies with certain foundational principles. These include that any remedy: must be fair to all parties affected; should go no further than necessary to rectify the oppression; must be tailored to vindicate the reasonable expectations of stakeholders in their capacity *as* corporate stakeholders and not in their familial or other personal capacities; and may not be available to the extent that other, more appropriate remedies are available at law: ***Wilson*** at paras 47–57.

[263] The second of these principles has been more colourfully expressed as requiring that, when a court resorts to its powers under the oppression remedy, "the surgery should be done with a scalpel, and not a battle axe": ***820099 Ontario Inc v Harold E Ballard Ltd*** (1991), 3 BLR (2d) 113 at para 140 (Ont Gen Div). In this regard, I find helpful the Alberta Court of Appeal's guidance in ***JBRO Holdings Inc v Dynasty Power Inc***, 2022 ABCA 140 at para 61, where it held that:

> ...where oppressive conduct is made out, the court must intervene in as minimal a way as possible in the circumstances to address the imbalance or the conduct which is the subject of complaint. The ultimate test requires an assessment of the best interests of the corporation, its shareholders, directors and officers. It involves a balancing of competing interests: ***Toor,*** para 32; ***Caron v Canadian Energy Inc***, 2017 ABQB 767, para 51; ***Melin v Melin***, 2018 ABQB 1056, para 69.

[264] Therefore, while I conclude that the abrogation of arbitration agreements is an available remedy under the *CNFPCA* and *NWTBCA*, it will be a rare case where this power is exercised. This is not least because the law strongly favours enforcing arbitration agreements: ***Wellman*** at paras 48-56; ***Peace River*** at paras 49-50.

vii. The outlines of a test for the set-aside of arbitration agreements under oppression remedies

[265] Rather than attempting to articulate an omnibus test for when the power to set aside arbitration agreements may be deployed, I think it better that the practical limits evolve incrementally through the consideration of specific factual scenarios. That said, factors militating in favour of exercising this power will include that:

- the arbitration agreement has some nexus to the oppression;
- the broader deal in which the arbitration agreement is found yielded minimal or generic benefit, to the subject company;
- there was minimal conscious consideration or negotiation of the arbitration agreement;
- the company's governance in and around the entering of the broader agreement was compromised; and
- the arbitration in question can be shown to materially interfere with efficient and fair resolution of the oppression.

[266] I am satisfied that all these conditions, as well as certain unique facets of social context, are present in this case and compel the conclusion that setting aside the arbitration agreement is both a functionally superior, and indeed necessary, step to achieve proper correction of the oppression suffered by the members of the LKDFN.

viii. The balance of factors in this case favours setting aside the arbitration agreement

[267] Each of the above-mentioned factors is present in this case, along with the special social context attendant to the exploitation of a vulnerable indigenous group.

a. <u>The arbitration agreement is connected to the oppression</u>

[268] This is the rare instance in which the contractual relationship from whence the arbitration agreement sprang is itself an adjunct of the oppression. This matters because the oppression remedy must not be popularized as a backdoor to avoid arbitration: see ***Toronto Standard Condominium Corporation No 1628 v Toronto Standard Condominium Corporation No 1636***, 2021 ONCA 360 at para 25.

[269] In the same vein, it must also not be used to create a *de facto* return to the more discretionary choice between judicial and arbitral proceedings embodied in earlier *Arbitration Acts*: ***Difederico v Amazon.com, Inc***, 2023 FCA 165 at para 69. This case invites neither of these mischiefs. The oppression here is very real. The oppressor got the LKDFN Companies into the arbitration agreement as a side-effect of trying to cover his tracks and avoid detection. It is thus tainted by his wrongdoing, irrespective of whether KPMG is found to be negligently or knowingly complicit.

[270] This is not a scenario in which the enforcement of the arbitration agreement is said to be independently oppressive, as was the case in ***Deluce Holdings***. However, there is a clear nexus between the oppression and the obligation to arbitrate now in issue. If there had been no oppression there would be no arbitration agreement. Moreover, this artefact of the oppression will make recovery from it more complex and expensive. That matters to the overall assessment of what is just and within the impacted parties' reasonable expectations.

b. <u>No unique or special benefit to the LKDFN Companies</u>

[271] This is not a case where the stakeholders seeking to avoid the contract took a fulsome and meaningful benefit, such that the set-aside would itself be unfair or inequitable. While the LKDFN Companies received ordinary accounting services under the auspices of the Engagement Letters, there was nothing unique about those services that would have warranted signing away their rights to local legal recourse. As found above, retaining accountants over 2,000 kilometres away (as the bird flies) was not sensible for the LKDFN Companies.

c. <u>The arbitration agreement featured little conscious contracting</u>

[272] Despite the outward trappings of corporate sophistication, the Engagement Letters are more in the character of standard form contracts of adhesion. No obvious consideration or negotiation was directed towards their terms, they were clearly not specifically lawyered by either side, including KPMG's, as evidenced by the terms being facially in conflict with the basic arbitration law of the chosen forum.

[273] I have found by inference that neither signatory was likely even conscious of the arbitration terms. Barlas certainly paid no attention to them, as any sort of factual trial process was the last thing he would have wanted. The interference with free contracting entailed in setting these agreements aside is consequently lesser in this case.

d. The LKDFN Companies' governance was decimated by the oppression

[274] This Court has already found that Barlas executed a scheme to gut the LKDFN Companies' oversight mechanisms and centralize near total power in himself. He went so far as to wage campaigns of threats, creating "an atmosphere of fear, discouraging Tsa members and DCL Board members from asking legitimate questions" about the corporations' affairs": Oppression Decision at para 204. There is no basis to believe KPMG knew of this condition, and it was entitled to rely on the indoor management rule to accept Barlas' authority to sign the Engagement Letters. However, once the questions of equity were asked and answered in the oppression process, those contracts lost much of their quality as freely and informedly joined bargains that both sides believed were in their interests at the time.

e. Partial arbitration will make remedying the oppression more difficult

[275] I agree with the Receiver, and specifically find as a fact, that having multiple streams of private and public litigation will significantly impair the remedial process underway in this case. The cost will be unduly, if not prohibitively prejudicial to the LKDFN. Forcing parallel proceedings may well push this beleaguered First Nation over the brink.

[276] Duplication of proceedings will also create inevitable delay, which will prejudice the LKDFN in their quest for financial recovery.

[277] There is also a significant risk of conflicting outcomes. Much of what may go to arbitration will be re-argued, with additional parties, before the courts no matter what. The duplication and risk of conflicting outcomes is manifest, particularly with the Barlas Advice Claim.

[278] The same is true for any apportionment of liability. If RMRF were to successfully rely on KPMGs professional representations as a basis for their belief in the financial legitimacy of Barlas' actions (which they have pled), much of what would be arbitrated would have to be re-litigated in the damages phase of the Court proceedings.

[279] As in ***Peace River***, arbitrating some of the claims for compensation separately would create a royal mess. I have no difficulty concluding that not rendering the arbitration agreement unenforceable would compromise the Court's attempts to fully and functionally remedy Barlas' oppression.

f. The unique context of this case

[280] This case is likely unique amongst instances in which a Receiver has sought to avoid arbitration obligations. On the surface, the facts reflect both the archetypal scenario in which sophisticated, free-contracting, commercial entities have agreed to arbitration, and that agreement should be enforced. Yet, when that veneer is pulled aside, as Shaner J did in the Oppression Decision, the facts of this case reveal a scenario of exploitation, unfairness, and the obliteration of autonomy, in which the arbitration agreement takes on a rather different appearance.

[281] On the one hand, this case presents as a contractual relationship between a professionally managed million-dollar commercial enterprise and the high-end advisors it retained. On the other, it is a situation in which standard bearers of colonial capitalist power – big law and big accountancy – walked into a remote indigenous community, appeared to vouch (innocently or otherwise) for the fraudster who was robbing this small band of people blind and, when called to account for their actions, rely on a contract the First Nation never knew existed, signed by their oppressor as part of his scheme to defraud them, forcing them to spend much more of their limited resources to litigate for compensation in secret, in a foreign jurisdiction, far from their home.

[282] Without finding that KPMG (or Reynolds Mirth) have done anything wrong – something that is fiercely contested and far from proven – this Court can find that both of these conceptions of the case are true. This unique social context infuses the case with competing social policy interests.

[283] It is essential to encourage and facilitate First Nations participation in mainstream commercial activity to enhance their economic prosperity and the future prospects of Canada's indigenous people. The Court is very cognizant that any legal result precipitating a "chill" on business dealings with First Nations would be retrograde and should be avoided.

[284] By the same token, the project of reconciliation with Canada's First Nations is implicated by the events in this case. Call to Action 92 of the Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (2015), speaks directly to corporate engagements with Canada's indigenous people:

> 92. We call upon the corporate sector in Canada to adopt the United Nations Declaration on the Rights of Indigenous Peoples as a reconciliation framework and to apply its principles, norms, and standards to corporate policy and core operational activities involving Indigenous peoples and their lands and resources. This would include, but not be limited to, the following:

> Committing to meaningful consultation, building respectful relationships, and obtaining the free, prior, and informed consent of Indigenous peoples before proceeding with economic development projects.

[285] The *United Nations Declaration on the Rights of Indigenous Peoples Implementation Act*, SNWT 2023, c 36 also informs this case. The *Act's* preamble speaks of the injustices suffered by the Territories' First Nations as a result of the "colonization and dispossession of their land, territories and resources and disruptions of Indigenous forms of governance and legal systems".

[286] Section 6(2) goes on to demand of the Courts that "[t]he laws of the Northwest Territories must be interpreted and applied in a manner consistent with the Declaration." This includes the *Arbitration Act*, *Business Corporations Act*, and the *Judicature Act* (as already mentioned in relation to the temporary stay issue, above).

[287] At the federal level, the *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 is also relevant. Similar to the NWT statute, the preamble makes reference to the "colonization and dispossession of [Indigenous] lands, territories and resources" and "the inherent rights of Indigenous peoples ... which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories, philosophies and legal systems, <u>especially their rights to their lands, territories and resources</u>." [emphasis added]

[288] Although the body of the federal statute does not include a provision analogous to subsection 6(2) of the NWT statute, the preamble provides that "the Declaration is affirmed as a source for the interpretation of Canadian law." This includes the oppression provisions of the *CNFPCA*.

[289] I agree with Madame Justice Blackhawk's conclusion in ***Kebaowek First Nation v Canadian Nuclear Laboratories***, 2025 FC 319 at para 74, that UNDRIP provides an important "interpretive lens" for Canadian Courts, which

> ...emphasizes the rights of Indigenous peoples to maintain and strengthen their own institutions, cultures, and traditions, and promotes the pursuit of social and economic development aligned with their collective aspirations. The UNDRIP also advocates for the right of Indigenous people to full and effective participation in matters that concern them within states.

[290] In its recently released decision in ***Gitxaala v British Columbia (Chief Gold Commissioner)***, 2025 BCCA 430 at para 129, the majority described the import of British Columbia's incorporation of UNDRIP into provincial law as follows:

> ... wherever relevant, *UNDRIP* should be applied as a weighty source for the interpretation of Canadian law in accordance with the presumption of conformity, with due regard for the extent to which a relevant article expresses a binding international rule or general principle, minimum standard, or aspiration.

[291] While the Court in ***Gitxaala*** settled on an interventionist, and contentious, application of UNDRIP, to which the dissent offered compelling limiting considerations, the case unquestionably demonstrates that the incorporation of these principles into Canadian law is being treated as substantive, impactful, and far more than window dressing.

[292] Of direct relevance to this case is Art 3 of UNDRIP, which declares that:

> Article 3
>
> Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

[293] While in no way operating as an exemption from general contractual obligations, the need for primacy of autonomy and self-determination in the commercial dealings and economic development of indigenous people, for which Call to Action 92 and UNDRIP Article 3 stand, have resonance in this case. Enforcement of an arbitration agreement that the LKDFN did not know about, derived little or no benefit from, and was foisted on them as an appurtenance of their oppressor's misdeeds, stands in obvious tension to these values.

[294] As already conclusively found, the oppression in this case resulted in the LKDFN's natural resources and autonomy over their economic development being taken from them. Correcting that wrong is the goal of the oppression remedy. Any condition which runs counter to the smooth facilitation of that aim both undermines the oppression remedy, and also the statutory mandate to apply our laws in ways that advances Indigenous economic self determination.

[295] Simply put, the statutory incorporation of UNDRIP, together with the TRC's calls for action, supercharge the importance of remedying the oppression in this case. Practically, this means that benefits to the remedial process will weigh more heavily in the balance performed against the values of party autonomy and freedom of contract described in ***Peace River*** at para 155(a).

[296] Similarly, there is much merit in a small First Nation, which has been grievously wronged, seeking public justice and accountability for those it accuses of aiding in its exploitation. While there is nothing 'lesser' about arbitration as a dispute resolution mechanism *per se*, allowing First Nations to seek public redress through the courts is foundational to the "truth" component of Canada's reconciliation project. This point goes a considerable distance to countervailing KPMG's loss of privacy in the dispute resolution process.

[297] Concerns over any commercial "chill" precipitated by setting the arbitration agreement aside in the highly unusual circumstances of this case should be minimal.

Moreover, it does not seem too much to ask that Canada's business community accept the risk of having to render account for their conduct in open court when acting as fiduciaries for First Nations. Rather than worrying about the enforceability of standard-form arbitration agreements, large corporate actors should:

> …ask themselves how their relationships and any agreements they enter into with Indigenous Peoples are enabling the solutions to the broader challenges of rebuilding Indigenous communities, governance, and nations as necessary in order to live together: Jody Wilson Raybould, *True Reconciliation: How to Be a Force for Change* (Toronto: McClelland & Stewart, 2024) at p. 302.

[298] For all of these reasons, the unique facts of this case make avoidance of the arbitration agreement, as part of the ongoing remedy for Barlas' oppression, consistent with what is just, fair, and consistent with the reasonable expectations of the LKDFN stakeholders.

ix. The law of B.C. does not govern this oppression remedy

[299] Finally, KPMG says that, even if the court were inclined to set aside the arbitration agreement under the oppression remedy, it lacks the jurisdiction to do so because the arbitration agreement is governed by the laws of British Columbia. To this end, KPMG characterizes the relief that the Receiver is seeking as a stay or injunction in relation to the arbitral proceedings. KPMG says that a court in the NWT does not have the jurisdiction to grant such relief and that doing so is precluded by s 4(a) of BC's *Arbitration Act*, which provides that, "[i]n matters governed by this Act, a court must not intervene unless so provided in this Act."

[300] This provision has no application here. The Receiver is asking for a declaration that the arbitration agreement is unenforceable, not a stay of, or injunction against, the arbitral proceedings themselves. This parallels the Supreme Court's conception of the relief granted in ***Peace River***: paras 6, 126, 197 & 198. The effect of this judgment is to declare the arbitration agreement unenforceable, within the meaning of s 8(2)(c) of the *Act*. Section 8(5)(c) of the *Act* then takes effect, deeming any arbitral proceedings undertaken inconsistently with it ineffectual:

> .. if a person has brought arbitral proceedings in respect of the dispute, the arbitral proceedings are terminated and anything done in the arbitral proceedings is without effect.

[301] The effect of this section is broadened by s 3(4) of the *Act*, which confirms that section 8 applies to an arbitration regardless of whether it is seated in the NWT. On this point, it must be remembered that a choice of law provision governing the law applicable to a contract does not, by itself, bar the application of another

province's laws: ***R v Thomas Equipment Ltd***, [1979] 2 SCR 529 at 545–546, 1979 CanLII 226 (SCC).

[302] This Court may not have the jurisdiction to directly enjoin or stay arbitral proceedings if they were to forge ahead in British Columbia in the face of this ruling. However, such proceedings would (i) have no effect on any party in the NWT and (ii) be subject to a stay by the British Columbia courts premised on this Court's declaration of unenforceability.

[303] This conclusion is consistent with the majority's reasoning in ***Peace River*** at para 129, which found that there was no conflict between the finding of inoperability in accordance with the *BIA* and the B.C. arbitration statute then in force, such that there was no need to undertake a paramountcy analysis.

x. Compensation may take the form of enhanced costs

[304] Both relevant oppression provisions contemplate compensating a third party who loses contractual rights pursuant to an oppression-based set-aside. In this case, there is no liquidated value to the unperformed contract. Similarly, the competence-competence principle cuts both ways. Arbitration is not presumed to be superior, just contractually preferred. A party who is deprived of the benefit of an arbitration agreement cannot be presumed to suffer prejudice simply by virtue of having to join court proceedings. These factors preclude any upfront compensation.

[305] However, if KPMG is successful in the court proceedings against it, compensation might take the form of enhanced costs. Subject to the trial judge's overriding discretion, if it can be shown that the in-court proceedings inflicted greater costs than arbitration would have, this would be a legitimate basis for compensation to the extent of the demonstrated difference.

VIII. The Receiver is not entitled to blanket production of KPMG's "working papers"

[306] In the final element of this application, the Receiver seeks an order that KPMG produce all "working papers" created during its engagements with the LKDFN Companies. KPMG opposes this as an improper pre-discovery fishing expedition into its private, internal files.

[307] For the following reasons, the Receiver's application is dismissed, but KPMG is directed to produce any records sought by the successor accountants, BDO, confirmed to be required in its work rebuilding the LKDFN Companies' books and responding to tax inquiries and liabilities.

i. Operative portions of the Receivership Order

[308] In making its request, the Receiver relies on clauses 5 through 7 of the Receivership Order, which contains the broad language commonly found in such Orders. The operative provisions read as follows:

> 1. **AND IT IS FURTHER ORDERED** that the LKDFN Companies...and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "Persons" and each being a "Person") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request.
>
> 6. **AND IT IS FURTHER ORDERED** that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the LKDFN Companies, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "Records") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.
>
> 7. **AND IT IS FURTHER ORDERED** that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase, or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names, and account numbers that may be required to gain access to the information.
>
> [emphasis added]

[309] The Receiver argues that KPMG's working papers are either "property" of the LKDFN Companies, so as to fall within the scope of clause 5, or "records" within the scope of the broader language in clauses 6 and 7. These provisions generally require that the Receiver be provided access to "Records," defined to include "any ... corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the LKDFN Companies."

[310] The Receiver says that the working papers are essential to carrying out its investigative mandate, and specifically for the LKDFN Companies' new accountants to produce audited financial statements.

[311] However, the Receiver admits that it may share the working papers with counsel for the LKDFN Companies for the purposes of the litigation against KPMG.

[312] KPMG says that the Receiver is not entitled to the working papers, and that the request is being made for an improper purpose, namely, to gain pre-discovery access to materials for use in litigation against it. It says that several of the protections that would otherwise be available to it under discovery processes — including the right to challenge the jurisdiction of the Court, the relevance and proportionality rule, and the implied undertaking rule — will be denied if it is required to produce its working papers pursuant to the Receivership Order.

[313] Finally, KPMG emphasizes that because the Receivership Order was obtained *ex parte*, it should be construed narrowly to avoid undue infringement on the rights of third parties.

ii. Working papers are not "property" of the companies in receivership

[314] In this context, "working papers" are internal documents prepared by accountants or auditors in the course of an audit or accounting engagement, excluding any final deliverables or external communications. They record procedures performed, evidence gathered, trial calculations made, questions and queries, and conclusions reached, forming the basis for professional opinions in reports or financial statements. These documents can be physical or digital and include notes, charts, spreadsheets, analyses, memos, schedules, and transcriptions.

[315] Working papers have been held to be the property of the accounting professionals who created them as part of their work process: ***Houle et al v Sostarich et al***, 2016 ONSC 6558 at para 19; ***Callinan Mines Limited v Hudson Bay Mining and Smelting Co Ltd et al***, 2010 MBQB 228 at para 55; ***Marmak Holdings Inc v Miletta Maplecrete Holdings Ltd***, 2023 ONSC 225 at para 25; ***Chantrey Martin Co v Martin***, [1953] 2 All ER 691 (CA).

[316] I agree. This is both logical and consistent with the position taken by regulatory bodies in the field: ***Chartered Professional Accountants of Ontario v Cayne***, 2025 ONCPA 13 at para 59. While a client may have an interest in their accountants' working papers, and they may be producible in various forms of litigation, they fundamentally belong to the person who created them, in this case KPMG and its partners.

[317] I am satisfied that the working papers reposed in KPMG's internal files are not "property" of the client LKDFN Companies, and not producible on demand pursuant to the Receivership Order's governance of "property"

iii. Working papers are "records" but blanket access is inappropriate

[318] The definition of "records" in the Receivership Order is very broad and would *prima facie* extend to KPMG's working papers. However, I agree with KPMG's position that the facial breadth of the associated production power must be read down to reasonable limits in accordance with established jurisprudence and basic fairness.

[319] The appointment of a receiver is "an extraordinary and intrusive remedy and one that should be granted only after a careful balancing of the effect of such an order on all of the parties and others who may be affected by the order": ***Akagi v Synergy Group (2000) Inc***, 2015 ONCA 368 at para 67 [***Akagi***]. Accordingly, the investigative powers of a receiver must be "carefully tailored" and go no further than necessary to achieve the objectives of the receivership: ***Akagi*** at para 90.

[320] Caselaw establishes that the powers of a receiver should not be used as a substitute for discovery in insolvencies: ***Long, Re***, 1978 CarswellOnt 209 at paras 5–6 (ONSC); ***Taylor Ventures Ltd, Re***, 1999 CanLII 5475 (BC SC) at para 33 [***Taylor Ventures***].

[321] A similar rule emerges in the context of the court's power to order an investigation of a corporation: see *NWTBCA*, s 232; *CNFPCA* s 242. The purpose of an investigation is generally to provide the party seeking it with the information necessary to assess whether they should bring a claim for additional remedies and not to allow that party to gather information for the purposes of litigation after a viable claim has already been identified: ***Brown v Maxim Restoration Ltd*** 1998 CanLII 14811 (ON SC)at para 15; ***Phoenix Resources Inc v 617039 Saskatchewan Ltd*** (1998), 1998 CanLII 13792 (SK QB)at paras 16–20; ***Archmetal Industries Corp v Jag Flocomponents (North America) Inc***, 2004 ABQB 662 at para 18; ***Holden v Infolink Technologies Ltd*** (2005), 2005 CanLII 37000 (ON SC)at paras 26 & 29; ***Bassett-Smith v Protech Consultants (1989) Ltd***, 2005 BCSC 1101 at paras 27 & 34; ***Western Canadian Oil Management Services Inc v Arlyn Enterprises Ltd***, 2008 ABQB 521 at paras 85 & 90–98, & 114–117.

[322] In my view, these same principles are applicable in determining the scope of the powers of a receiver appointed under the oppression remedy. Although the powers given to the Receiver here are broad, they must be exercised in a manner that is consistent with the purposes for which they were granted.

[323] A bright line can be drawn in this case between permitted and overreaching exercises of the records production power. On the foul side of the line, demands for blanket access are improper. These are colourable as pre-discovery investigation, in search of further evidence against KPMG. Given that the Receiver has already identified that the LKDFN Companies have a potential claim against KPMG (and against Barlas and RMRF) and given that there is no risk of further dissipation of assets, the Receiver's investigative powers in relation to KPMG are now arguably spent. Documentary discovery, as governed by the ultimate forum of litigation, is the next step: ***Taylor Ventures*** at para 33.

[324] I also agree with KPMG that, to the extent that the Chartered Professional Accountants if British Columbia *Code of Professional Conduct* provides a means of accessing the working papers, the Receiver must demonstrate why using this procedure would not be appropriate. Just as the powers of the Receiver should not be used to sidestep the discovery rules, they equally ought not be used to sidestep rules put in place by a professional regulator to govern the exchange of information between current and former accountants.

[325] On the other side of the line, in fair territory, fall any requests for records which the LKDFN Companies' new accountants confirm are needed to fulfill their mandate of reconstructing the companies' books. These requests must be honoured. Evidence demonstrates that BDO is having difficulty providing audit-level assurance, and responding to CRA inquiries, with its present level of documentary access. Solving that problem is an appropriate use of receivership powers.

[326] Accordingly, I dismiss the Receiver's broad and general application for an order that KPMG produce its working papers at large. The Receiver may however bring a further application should it have a request that is consistent with the parameters set out in these reasons that has not been voluntarily fulfilled.

Conclusion

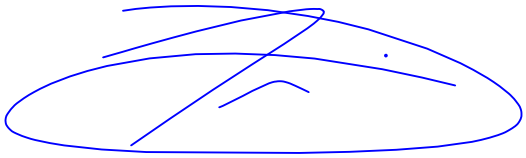
[327] The arbitration agreement is set aside at the Receiver's request. The application to stay the KPMG Derivative Action in favour of arbitration is accordingly dismissed. That action may proceed in this Court, in conjunction with the action against RMFR and the damages trial. The most convenient and efficient

manner for these matters to move forward will be determined through further case management conferences.

[328] The KPMG Oppression Action is stayed under the *Judicature Act*. The Receiver's application for production of KPMG's working papers at-large is dismissed, subject to the guidance provided for appropriate information sharing between the accounting professionals.

[329] The Court expresses its gratitude for the courteous and creative advocacy of all parties on these complex matters.

[330] The costs of these applications are reserved.



N.E. Devlin
J.S.C.

Dated at Yellowknife, NT, this
14th day of January, 2026

Counsel for the Applicants:	Andrea R. Laing, Daniel Szirmak, Sara Bolourchian
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Counsel for the Receiver:	Toby Kruger

Docket: S-1-CV 2024-000241
S-1-CV 2024-000419
S-1-CV 2023-000128

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

TSA CORPORATION, TA'EGERA COMPANY, AND DENESOLINE CORPORATION LTD.

Plaintiffs/Respondents

-and-

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

Applicant/Respondent

-and-

KPMG LLP

Defendant/Applicant

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE N.E. DEVLIN
