Date: 2025 03 10
Docket: S-1-CV 2023 000 128

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

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

Applicants

-and-

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

Respondents

Application for return of Funds from Counsel

Heard at Yellowknife: March 3, 2025

Written Reasons filed: March 10, 2025

REASONS FOR DECISION

OF THE HONOURABLE JUSTICE N.E. DEVLIN

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REASONS FOR DECISION

Overview

[1] The worldwide assets of Ron Barlas ("Barlas") were restrained by a *Mareva* injunction in favour of the Applicants, granted by Grist J of this Court on April 28, 2023. Two days before, Barlas wired $90,000 ("the retainer") to Andrew Rogerson ("Rogerson"), a lawyer in Ontario, whose professional services were advertised to include "asset protection". The full amount of the retainer was bound by the *Mareva* Order, but Rogerson has refused to return it.

[2] The Applicants have been trying to get that money back since July 2023. Rogerson has evaded responding to this legitimate demand to account for trust funds restrained by a Court Order, which he admits dissipating. The record demonstrates that he has disregarded two separate Orders of this Court and removed the entirety of the retainer from trust without rendering proper accounts to the client or doing any authorized work.

[3] The full $90,000 is ordered returned to the frozen account of Northern Consulting Group Inc, from which Barlas dispatched it, and Rogerson is ordered to personally pay full solicitor and client costs for this application, in the amount of $46,995.54, also forthwith.

Attendance at this motion

[4] This motion was set for hearing at a Case Management Conference on December 9, 2024. Rogerson had notice of that proceeding, but did not attend. A vague medical note was subsequently received. He was sent a copy of the Case Management Order from that date, formally setting the hearing of this Application, by the Court and Applicants' counsel. That Order read in part:

> I have since received a copy of Mr. Rogerson's medical note. He is counsel holding property subject to court order and was responsible to have representation at the Case Management Hearing, in person or through counsel. In the absence of a formal adjournment application from him, filed no later than January 10, 2025, the matters will proceed as directed. If he is in ill health, he is encouraged to retain NWT counsel for these matters.

[5] The Court notes that Rogerson was well enough to self-represent before the Appeal Panel of the Law Society of Ontario's Discipline Tribunal one week later: ***Law Society of Ontario v Rogerson***, 2025 ONLSTA 5.

[6] Given a history of last-minute adjournments by Rogerson, he was further reminded of the hearing by Applicants' counsel and by the Court at my direction. Those reminders emphasized the need for him to appear or be represented by counsel. Notwithstanding these extensive steps to secure his attendance and participation, neither Rogerson, nor counsel instructed on his behalf appeared. The hearing proceeded as there was no information offered to account for his absence, nor any adjournment sought at any time in the previous months.

[7] Rogerson clearly knew of the date as, partway through the hearing, his office assistant emailed the parties and the Court. The message stated: “Please see that attached Doctors note, Mr. Rogerson is unwell, but has indicated if the matter can be adjourned he will be a peremptory order on him would be fair.” [sic]

[8] The attached document (which I direct to be made Exhibit J1 on this application) appears to be from a Dr. Robert H. Ting, in Scarborough, Ontario, and bears the date of the hearing. It reads:

> TO THE COURT
>
> TO WHOM IT MAY CONCERN
>
> Please excuse Mr. Rogerson from the court for the next two weeks for medical reasons.

[9] The note is unsigned, written in poor grammar, and was delivered as a Microsoft Word file. While I assume it to be genuine, this document falls far below the standards for such professional medical communications set by the Ontario Medical Association.[1] It fails to communicate the information necessary for a Court to determine whether to not only adjourn, but in fact interrupt, a multiply delayed proceeding for a lawyer to answer to serious allegations of breaching court orders.

[10] The note does not clearly state that Rogerson is a patient of Dr. Ting, or under his care (though this is implied), it does not state when he was seen and assessed by the doctor, does not provide any other information about the nature or onset of the incapacity it implies, nor any other information as to his anticipated ability to attend.

[11] The Courts repose great trust and respect in the judgment of our professional counterparts in medicine. A doctor’s note will normally prompt the halt of a legal proceeding, even to the great prejudice of the other parties. Therefore, while we understand the added burden the provision of last-minute medical notes places on busy doctors, more is expected than the bare, single sentence provided here when doctors are asked to intervene in Court proceedings in a manner that can have profound consequences to justice system participants. It would have taken only seconds longer to provide basic information to allow the Court to make an informed assessment of the legal implications of the medical situation the note ought to have properly conveyed.

[1] https://www.oma.org/practice-professional-support/running-your-practice/operations-and-practice-management/doctors-notes/

[12] Moreover, and more importantly, the note is far too little and far too late to satisfy Rogerson's obligations to the Court. He knew of this hearing for many months and was told repeatedly to secure representation if his ability to self-represent was tenuous. He has not responded to any of the reminder communications he has received over time from the Court and the other parties.

[13] Furthermore, the Court notes that Dr. Ting is listed with the College of Physicians and Surgeons of Ontario as a specialist in nephrology. This makes it unlikely that he saw Rogerson on an urgent basis for a newly arising condition. This is consistent with the fact that Rogerson has claimed illness as a justification for failing to respond to communications in this matter on numerous other instances. The only available inference is that Rogerson requested this note at the last minute for a situation that of long-standing, which he knew threatened his ability to self-represent before the Court.

[14] In a similar vein, if Rogerson was well-enough to see the doctor to obtain a note, the inference is that he could also have appeared online and explained himself, albeit briefly.

[15] Finally, Rogerson advertises himself as the head of a leading firm in its practice area, with numerous other lawyers represented to be part of his firm. The failure of any of them to appear to present the adjournment request, as a basic courtesy to the Court, is inexplicable.

[16] For those reasons, taken together with the other factors on the conduct of the litigation by Rogerson, discussed below, I declined to grant an adjournment.

Facts and findings

[17] Three days after he was served with Notice of the Application for the *Mareva* injunction against him, Barlas transferred $90,000 to Rogerson from one of his corporate entities, Northern Consulting Group Inc. He did so expressly for the purposes of seeking assistance with the impending application. His Counsel re-affirmed this fact before the Court today, and the inference that this was the case is irresistible in any event.

[18] I find as a fact that Rogerson took receipt of the retainer in full knowledge that the party sending it was facing the potential full restraint of their assets imminently.

He was provided with a copy of the *Mareva* Order by the latest on July 28, 2023, but I find he had notice of it throughout.

[19] Barlas' worldwide assets were frozen by this Court within 48-hours of Rogerson receiving the retainer, and remain restrained to this day. The *Mareva* Order covered the retainer and directly applied to Rogerson. In particular, paragraph 3 stated that its all-encompassing restraint applied to:

> ...any asset which he or she has the power, directly or indirectly, to dispose of or deal with as if it were his or her own. The Barlas Party is to be regarded as having such power if a third party holds or controls the assets in accordance with his or her direct or indirect instructions.

[20] This obviously captured the now in-trust retainer Rogerson held for Barlas' benefit. There is no evidence that Rogerson did any work between receipt of the retainer and *Mareva* injunction taking force a few hours later, and I find as a fact that he did not. The full $90,000 in his hands was thus both held in trust to Barlas, and frozen by Court Order.

[21] Rogerson has since expended the entirety of the retainer, or at least converted it from trust, purportedly in the payment of fees for professional services rendered to Barlas.

[22] In May, June, October, and November 2023, Rogerson made several withdrawals from this trust account, amounting to a not-coincidental total of exactly $90,000. Several of the charges were for large figures in round amounts. In May 2023, Rogerson purported to charge $15,000 for work performed on May 16, 2023; $20,000 for work performed on May 21, 2023; and $18,000 for work performed on May 31, 2023, in addition to disbursements that month in the amount of $2,523.74.

[23] These sums are very difficult to rationalize, and Rogerson has refused to explain them. He did not remember having dockets. He did not remember if he was billing Barlas hourly. He produced no documents substantiating the rates Barlas agreed to pay him. Taken literally, they suggest he did many dozens of hours of work on various single days.

[24] On the totality of the evidence, including Rogerson's refusal to provide any meaningful explanation, I find as a fact that the purported fees were contrivances to justify draining the retainer.

[25] Even more troublingly, in May 2023, Rogerson facilitated the shipment of more than $1 million worth of gold and silver bullion (since returned) from Barlas' possession in the Northwest Territories to his offices in Ontario. I find as a fact that he did so in knowing breach of the *Mareva* Order. Whether he was wilfully blind or in a state of actual knowledge is immaterial. Moreover, he paid almost $10,000 from the restrained retainer for this prohibited movement of restrained assets.

[26] The only other work Rogerson directly explained doing for Barlas was an ill-fated and ineffectual attack on Miller Thompson's fees for handling the *Mareva* application. In cross-examination, Rogerson claimed he assumed that Miller Thompson had secured variations of the *Mareva* Order to permit him to expend restrained funds. He could produce no correspondence to substantiate such a belief.

[27] I find as a fact that he was willfully blind to the lack of any exception to the *Mareva* permitting his challenge to Miller Thompson's account. Indeed, such authorizations of expenditure of restrained funds are carefully allocated and quantified to ensure they are "reasonable": ***Royal Bank of Canada v Welton***, 2009 CanLII 46165 (ON SC) at para 47.

[28] Moreover, it would be bizarre to think that counsel for Barlas on the *Mareva* – all of whom were from major firms in Alberta – would seek to have funds released to Rogerson to tax a bill in that province. The further idea that they did so without asking Rogerson how much it would cost, or advising him of their success in securing those funds, is beyond credulity.

[29] I find as a fact that Rogerson was indifferent to the existence of any *Mareva* variation permitting him to draw on the retainer, and in breach of his professional obligations as an officer of the courts when he subsequently transferred restrained funds out of trust to satisfy his tenuous invoices concerning the fee review.

[30] Even more concerningly, at the hearing of this Application, counsel for Barlas advised the Court that her client was not aware of any of the retainer being used on his instructions, and that he had received no invoices.

[31] The retainer must be returned in full. Rogerson was on notice of the impending *Mareva* Order when he received it, and the funds were bound by the Order hours later. He knew that no variation had been made to permit him to spend it at any point. The invoices he has provided do not substantiate work properly performed for

Barlas, who expressly denies authorizing any work or receiving any invoices. Moreover, Rogerson used retainer funds to pay for a gross breach of the *Mareva* Order in the form of the bullion transportation.

[32] The re retainer was restrained by this Court's *Mareva* Order and dissipated in breach of it. This is a dispositive reason for return of the funds.

[33] The application is granted.

Litigation conduct of Rogerson

[34] Rogerson has engaged in a course of obstructionist conduct in response to efforts to have him account for or return the retainer. This began with a persistent failure to answer inquiries from the Applicants' counsel, in breach of Rule 7.2-5 of the *Rules of Professional Conduct* of the Law Society of Ontario which prescribes that:

> **7.2-5** A lawyer shall answer with reasonable promptness all professional letters and communications from other legal practitioners that require an answer, and a lawyer shall be punctual in fulfilling all commitments.

[35] On the day before the first return date of this motion, in February 2024, Rogerson's assistant emailed an affidavit from Rogerson to the applicants' counsel and the Court. It stated he had been "very ill for some time" and would be unable to proceed on the motion.

[36] The Application was rescheduled to May of 2024. When his appointment for cross-examination arrived on April 11, 2024, he refused to be cross-examined by Ms. Kras, on the basis that she was the real affiant of the affidavit supporting the Application, which had been prepared by a law clerk at her firm.

[37] He went on to make a sexist remark, recorded on the transcript as stating that he was "really sorry, you're a nice person, Ms. Kras, you have a lovely smile, I can tell you're a nice, decent, genuine, person, but you cannot cross-examine me..."

[38] The Court notes with concern that Rogerson is presently suspended by the Law Society of Ontario, as discipline imposed in part on the basis of sexual harassment of a female employee, which included multiple comments about her physical appearance: ***Law Society of Ontario v Rogerson***, 2025 ONLSTA 5 at paras 10-11, 77. The findings of professional misconduct underlying that suspension

preceded his demeaning comment towards Ms. Kras, who handled the matter with professionalism and restraint: ***Law Society of Ontario v Rogerson***, 2023 ONLSTH 131.

[39] Many further correspondences were expended attempting to secure a further appointment for cross-examination. These included reminders to Rogerson about the contents of Rule 7.2-5. Forty-five minutes before the second appointment for examination, Rogerson sent an email stating he was "not free to attend today".

[40] Ultimately, an Order of Shaner J was required to secure Rogerson's attendance. At that examination, Rogerson provided little to nothing in the way of meaningful answers. The transcript is a disheartening miasma of deflections, digression, and downright obstructionism.

[41] Rogerson claimed he could not recall preparing his own affidavit. He provided stream-of-consciousness answers to simple questions. He refused to agree to simple matters, such as the obligation of lawyers to maintain accurate records of trust funds. He refused to answer numerous proper questions. Well-founded cautions by examining counsel failed to temper this behaviour.

[42] I find as a fact that Rogerson's conduct on the examination was a wilful breach of the spirit of Shaner J's Order of May 16, 2024. While he attended s*impliciter*, complying with a direction to be cross-examined comprises more than merely showing up. It requires giving meaningful, responsive answers to questions properly posed. Rogerson failed to do that. Such conduct is unacceptable from a member of the bar, especially when answering credible allegations of breach of trust and breach of court orders.

[43] Based on this conduct, and Rogerson's muteness to subsequent requests for information responsive to refusals and undertakings, adverse inferences arise against him on any point of where he has failed to provide information. I draw those inferences.

[44] Finally, Shaner J's Order also directed Rogerson to pay costs for the adjournment of the Application. The Court was told those remain outstanding.

[45] The decision to initially proceed with the hearing in Rogerson's absence, and to then dismiss his ersatz adjournment request, were informed by this history, as are my assessment of costs.

Costs

[46] The Applicants seek full indemnity costs for the entire effort required to obtain an order to return the retainer. Their request is well founded.

[47] The *Rules of the Supreme Court of the Northwest Territories*, NWT Reg 010-96 make costs a matter of discretion and create a presumption of tariff costs following the event: *r* 643, 648. The application of this rule was aptly summarized by Charbonneau CJ in ***GNWT v 831594***, 2017 NWTSC 78 at para 4:

> The legal framework that governs costs awards in this jurisdiction is not controversial. The basic principles can be summarized as follows: costs are always in the discretion of the Court; they are intended to indemnify the successful party, encourage settlement, and punish inappropriate behavior by litigants; they generally consist of partial indemnification, calculated in accordance with the Tariff set out in Appendix A of the Rules of the Supreme Court of the Northwest Territories, R-010-96, as amended; they can, however, also be awarded on an enhanced basis, and, in rare circumstances, be awarded on a solicitor-client basis.

[48] Enhanced costs are awarded as a multiple of tariff costs, in preference to being measured by the solicitor's account, save in cases of litigation misconduct: ***Anderson v Bell Mobility Inc***., 2011 NWTSC 28 at para 44.

[49] The awarding of enhanced costs is, in turn, governed by the same principles operative in other jurisdictions, and frequently codified in their respective Rules of Court: eg. *r* 10.33(2) *Alberta Rules of Court*, Alta Reg 124/2010.; *r* 57.01of the *Rules of Civil Procedure*, RRO 1990, Reg 194. In ***Fullowka v Royal Oak Ventures Inc.***, 2005 NWTSC 60, Lutz J endorsed and applied the aggregation of factors informing when enhanced costs are appropriate found in ***Jackson v Trimac Industries Ltd.***, 1993 CanLII 7031 (AB KB), aff'd (1994), 1994 ABCA 199 (CanLII). The factors applicable to this case are bolded.

1. circumstances constituting **blameworthiness in the conduct of the litigation** by that party (*Reese*);

2. cases in which **justice can only be done by a complete indemnification** for costs (*Foulis v Robinson*);

3. where there is evidence that the plaintiff **did something to hinder, delay or confuse the litigation**, where there was **no serious issue of fact or law which required these lengthy, expensive proceedings**, where the positively misconducting party was **"contemptuous" of the aggrieved party** in forcing that aggrieved party to exhaust legal proceedings to obtain that which was obviously his (*Sonnenberg*);

4. an attempt to deceive the court and defeat justice, an **attempt to delay, deceive and defeat justice**, a requirement imposed on the plaintiff to prove facts that should have been admitted, thus prolonging the trial, **unnecessary adjournments**, concealing material documents from the plaintiffs and failing to produce material documents in a timely fashion (*Olson*);
5. where the **defendants were guilty of positive misconduct**, where others should be deterred from like conduct and the defendants should be penalized beyond the ordinary order of costs (*Dusik v Newton*);

6. defendants found to be acting fraudulently and **in breach of trust** (*Davis v Davis*);

7. the defendants' fraudulent conduct in inducing a breach of contract and in **presenting a deceptive statement of accounts** to the court at trial (*Kepic v Tecumseh Road Builder et al*.);

8. fraudulent conduct (*Sturrock*);

9. an **attempt to delay or hinder proceedings, an attempt to deceive or defeat justice**, fraud or untrue or scandalous charges (*Pharand*).

[50] Solicitor and client costs are exceptional and awarded usually only as a punitive measure, to mark the Court's disapproval of reprehensible, scandalous or outrageous conduct on the part of one of the parties: ***Woodley v Yellowknife Education District No. 1***, 2000 NWTSC 7 at para 6; ***Mackenzie-Luxon v Mackenzie-Luxon***, 2014 NWTSC 28 at paras. 18-19: ***Northwest Territories (Commissioner) v 923115 NWT Limited***, 2019 NWTSC 13 at para 35.

[51] In ***Town of Norman Wells v Mallon***, 2020 NWTSC 2, Shaner J (as she then was) held that the concept of "reprehensible" conduct is contextual, but would

include “conduct that is deliberately designed to delay, derail or otherwise undermine the litigation process”.

[52] Applying these principles to the present case, I have no difficulty finding the following. Refusing to be cross-examined by a female member of the bar, for an invented and meritless reason, and then dismissing her with a sexist remark, is reprehensible. Making a mockery of the obligation to submit to cross-examination is reprehensible. Refusing to properly account for the dissipation of trust funds, much less ones restrained by Court Order, is reprehensible. Ignoring the Court and opposing counsel for months and then interrupting a hearing with a message calculated to precipitate further delay is reprehensible. Using restrained trust funds, in breach of a Court order, to pay for a much larger breach of that Court order is reprehensible.

[53] In simple terms, I find that the level of misconduct necessary to justify the award of full indemnity costs is established in this case.

[54] The Applicants have provided a Bill of Costs outlining their total expenses in pursuing the return of the retainer. The costs and disbursements total $46,995.54. Having a full understanding of the work involved in getting the Court to order Rogerson to do what he was duty-bound to do all along, I find this amount wholly reasonable and do not require any further particularization. I exercise my discretion under *r* 643(1)(a) and fix the award of costs in this amount.

The Cross-Motion

[55] Rogerson filed a cross-motion seeking dismissal of the application, approval of his use of the retainer, and the release of a further $80,000 from the funds seized under the *Mareva* Order as an ongoing retainer. That cross-motion is dismissed for the reasons given above, and also for want of prosecution. Costs for it are subsumed in the main award.

Conclusion

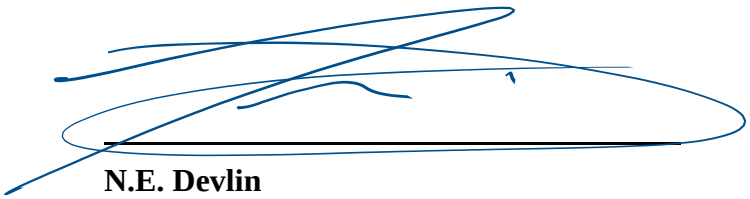
[56] The application is allowed, and Rogerson is ordered to return the full retainer, being $90,000, forthwith, to the account of Northern Consulting Group Inc., from which it came. The *Mareva* Order is varied to allow this deposit.

[57] Rogerson shall pay costs of $46,995.54 to the Applicants forthwith.

[58] Mindful of the small chance that Rogerson was in fact incapacitated at the last minute, as opposed to having ignored this motion and formulated a plan to derail it, the Order shall provide for the following:

- If, within 15 days of receiving a copy of the Order, and in no event later than April 30, 2025, Rogerson pays into Court $90,000, he may apply for leave to re-open the matter. Leave will only be granted upon a full, factually supported demonstration that his non-attendance was the result of unforeseen or sudden circumstances, and satisfaction of the Court that a *bona fide* intention to appear existed and he had made appropriate arrangements to do so.

[59] The Clerk of the Court is directed to forward a copy of these reasons to the attention of the Law Society of Ontario.



N.E. Devlin
J.S.C.

Dated at Yellowknife, NT, this
10th day of March, 2025

Counsel for the Applicants:	Matthew P. Sammon Jessica Kras Larry D. Innes
Counsel for the Barlas Respondents:	G. James Thorlakson Sara E. Hart KC
Counsel for the Receiver:	Toby Kruger

No Appearance for Andrew Rogerson

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