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Canadian Courts May Set Aside Valid Arbitration Agreements to Remedy Oppression

In *Tsa Corporation v KPMG LLP*, the Supreme Court of the Northwest Territories confirmed that courts may set aside valid arbitration agreements as a just and proper remedy for oppression. The decision underscores that arbitration will not shield parties from court scrutiny when agreements are tainted by oppressive misconduct.

The Allegations Against KPMG

Between 2016 and 2023, the ?utsël K'é Dene First Nation (LKDFN) – a remote First Nation on Great Slave Lake – was allegedly defrauded of more than $11 million by Ron Barlas, the CEO of companies created to generate revenue for LKDFN.

The Court previously found that Mr. Barlas caused those companies to enter into oppressive agreements that benefited him and his family. LKDFN has brought claims against both Mr. Barlas and KPMG, which Barlas retained as the accountant for himself personally as well as the companies. LKDFN alleges that KPMG assisted the scheme by preparing misleading financial statements and advising on transactions that enabled the misappropriation of funds.

KPMG Seeks Private Arbitration

KPMG sought to stay the action, arguing that arbitration clauses in its engagement letters with the LKDFN companies, signed by Mr. Barlas, governed the claims.

The Court Dismisses KPMG's Motion

The Court dismissed KPMG's motion and set aside the arbitration clauses, drawing key distinctions:

- Claims arising from KPMG's work for Mr. Barlas personally fall outside the arbitration agreements and may proceed in court.
- Claims tied to KPMG's work for the LKDFN companies technically fall within the arbitration clauses – but that was not the end of the analysis.

The Court held that it has the authority, under the statutory oppression remedy, to set aside valid contracts, including arbitration agreements, where necessary to remedy oppressive

conduct.

In reaching this conclusion, the Court considered several factors:

- Mr. Barlas entered into the engagement letters as part of his oppressive scheme.
- LKDFN did not meaningfully consider the arbitration clauses.
- Enforcing arbitration would force LKDFN to litigate in parallel forums.
- Setting aside arbitration would cause KPMG only a procedural disadvantage.

Reconciliation & Indigenous Self?Determination

The broader context of reconciliation informed the Court's prejudice analysis. The Court considered federal and territorial legislation incorporating the **UN Declaration on the Rights of Indigenous Peoples** as well as **Call to Action 92**, which emphasizes Indigenous autonomy and self?determination in economic development.

Enforcing arbitration agreements that LKDFN did not knowingly approve, derived little or no benefit from, and inherited as a byproduct of an oppressive scheme was, in the Court's view, fundamentally at odds with those principles. That context reinforced the conclusion that setting aside arbitration was both necessary and just.

The Court therefore set aside the arbitration clauses.

Key Takeaways

- **Arbitration is not absolute.** Courts can set aside arbitration agreements where they are connected to oppressive conduct.
- **Context matters.** Agreements formed amid compromised governance and minimal negotiation may be vulnerable under the oppression remedy.
- **Efficiency and fairness count.** Courts will consider whether arbitration would hinder a fair and efficient resolution in oppression and insolvency contexts.
- **Indigenous rights matter.** In civil litigation involving First Nations, courts can consider and apply principles of Indigenous autonomy and self-determination incorporated into federal, provincial, and territorial law.

Lenczner Slaght's Peter Griffin, Matthew Sammon, Jessica Kras

, and Devon Kapoor act for Chief James Marlowe, the ?utsël K’é Dene First Nation, and related parties.