Court of King's Bench of Alberta

Citation: Piikani v McMullen, 2024 ABKB 414

Date: 20240705
Docket: 1001 10326, 1101 11127
Registry: Calgary

Between:

Piikani Nation, Piikani Nation Chief and Council, Piikani Oldman Hydro Limited Partnership, Chief Reg Crow Shoe, Councilor Adam North Peigan, and Councilor Erwin Bastien

Plaintiffs

- and -

Dale McMullen, Stephanie Ho Lem, Kerry Scott, Stan Knowlton, Edwin Yellow Horn, Jordie Provost, and Shelly Small Legs

Defendants

- and -

Corbin Provost, Herman Many Guns, Doane Crow Shoe, Mike Zubach, the accounting firm Meyers Norris Penny LLP, Will Willier and Mark Klassen, Gayle Strikes with a Gun, Wesley Provost, Willard Yellow Face, Angela Grier, Andrew Provost Jr., Fabian North Peigan, Clayton Small Legs, Kyle David Grier, Rebecca Weasel Traveller, Maurice Little Wolf, Eloise Provost, Casey Scott, Piikani Resource Development Ltd., Shawna Morning Bull, Sonny Richards, Mike Zubach, Kirby Smith, Fabian North Peigan

Third Party

Corrected judgment: A corrigendum was issued on July 8, 2024; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Decision
of the
Honourable Justice Robert A. Graesser

Decision on Gowlings Disqualification Application

Introduction

[1] This is the third of three applications in the action that I heard in April 2024. This is Mr. McMullen's application to disqualify Gowlings WLG ("Gowlings") from acting against him in this lawsuit.

Background

[2] This lawsuit was commenced by Piikani Nation (the "Nation") in 2010. Mr. McMullen had been appointed a director of Piikani Investment Corporation ("PIC") by the Nation following the creation of the Piikani Trust in 2002. PIC was wholly owned by the Nation. Until an investigation into PIC's affairs began in 2009, PIC borrowed money from the Piikani Trust for the purpose of making investments which were expected to benefit the Nation. Mr. McMullen, a chartered accountant, was appointed chief executive officer and managing director of PIC sometime in 2004. Mr. McMullen ceased to be a managing of PIC in late 2007 or 2008.

[3] This application can only be understood properly when put in context of what was led to this lawsuit being brought against Mr. McMullen and others in 2010.

[4] As a result of concerns by the Chief and Council over the management of PIC and the investments and loans it had made, Alger & Associates Inc. ("Alger") was appointed Investigator of PIC by me in October 2009. That began a long journey that ended with the bankruptcies of PIC and my approval of a proposal in bankruptcy 2014.

[5] One of PIC's investments made during Mr. McMullen's tenure was the incorporation of Piikani Energy Corporation ("PEC"). PEC's shares were initially wholly owned by PIC. PEC was incorporated by PIC to hold and manage the PIC's investment in the Atco hydro-electric project to be constructed following completion of the Old Man River Dam.

[6] In December 2009 I appointed Alger to be Interim Conservator for PEC. It was put into receivership by me on May 20, 2010. On November 20, 2013, Alger assigned PEC into bankruptcy.

[7] Over the period from its incorporation until the appointment of Alger & Associates in 2009, the Trust had loaned PIC and PEC well over $10,000,000.00. The hydro-electric plant had

become operational and was generating revenue, but the Nation claimed it was not getting the benefit of that revenue, amongst other concerns.

[8] Mr. McMullen was initially one of PEC's Board of Directors. In February 2009 he became the Chairman of the Board of Directors as well as its chief executive officer. He was terminated from his position as CEO by the Board in late December 2009. He continued to be a director after that time.

[9] The evidence on this and other applications in this lawsuit is to the effect that by 2006, there were major problems within the Piikani Nation. Council was divided and it appears there were warring factions on it. There was significant discord over what was happening with the Piikani Trust.

[10] Litigation ensued over Band elections. Council was divided over Piikani Trust and Piikani Investment issues. There was litigation over the removal of Mr. McMullen and other directors from PIC. They were reinstated by order of Justice Kent J. Ultimately, Mr. McMullen was involved with a faction of Council that wanted to remove some Councillors and also remove Liliana Kostic and Raymond James Ltd. ("RJL") from management of the Piikani Trust. The faction was successful in that the investment management agreement between the Nation and RJL was terminated along with Ms. Kostic's investment management agreement in late 2006.

[11] Those terminations led to PIC commencing action 0601-13061 against RJL, Ms. Kostic and others in late 2006. That action continues with the Nation as plaintiff.

[12] Justice McIntyre noted December 2008 in ***Piikani Investment Corporation v. Piikani First Nation***, 2008 ABQB 775:

> [11] The relationship between PIC and Chief and Council has not always been an easy one, resulting in several applications before this Court.
>
> [12] In November of 2005, the former Chief of the Nation, Peter Strikes With A Gun, attempted to terminate the board of directors of PIC, including Dale McMullen. These terminations, and Strikes With A Gun's concurrent instructions to the Bank of Montreal to "freeze" the accounts of PIC, were held invalid by court order dated January 6, 2005, granted by Kent, J. A new Chief and Council was elected on January 8, 2007. None of the current Council were members of the previous Council.
>
> [13] An attempt was later made to remove McMullen by the current Chief and Council. By order dated June 30, 2008, McMahon J. directed the hearing of the issue on the expiry of McMullen's term as director and enjoined the Chief and Council from diverting or using the funds of PIC outside transactions in the ordinary course of business. Yet another order dated July 24, 2008, by McDonald J., provided McMullen's term as director of PIC continue until November 30, 2008, without prejudice to the right to reargue this issue. On August 5, 2008, PIC issued a Statement of Claim against several defendants, including Chief Crow Shoe. The Claim involves an outstanding loan made by PIC to one of the corporate defendants, Oldman Irrigation Limited, a Piikani Business Entity.

[13] That decision resulted from an application in late 2008 by PIC and Mr. McMullen against then Chief and Council for the Nation relating to governance issues.

[14] By the end of December 2008 Mr. McMullen was no longer a director of PIC or its CEO. He remained as Chair and CEO of PEC until December 2009. During that interval, PIC was placed under investigation with Alger and an interim conservator was appointed for PEC.

[15] According to Mr. McMullen, Gowlings were the main solicitors for PIC and PEC commencing in 2005. For most of this time (between 2005 and 2009) Mr. McMullen was the main point of contact between PIC and PEC and Gowlings.

[16] Gowlings also became counsel for the Nation in early 2006. One of the documents in evidence on this application is a Band Council Resolution ("BCR") dated January 27, 2006 appointing Gowlings in matters relating to:

> (a) Advising Chief and Council on governance issues including formal court proceedings to take such steps as are necessary to allow the election for the position of Chief to proceed;
> (b) Providing legal advice and assistance to deal with the management and governance of those corporations in which the Piikani Nation has an interest; and
> (c) Provide (sic) assistance to the nation in connection of the Settlement Agreement dated July 2002 between the Piikani Nation and the Governments of Alberta and Canada and issues that have arisen to date and ongoing matters.

[17] This action was commenced by the Nation (and others) against Mr. McMullen (and others) in July 2010. Mr. McMullen remained as a director of PEC, although any active role was superseded by the appointment of Alger as its conservator in December 2010.

[18] The lawyer for the Plaintiffs was Michael Pflueger, then of Walsh Wilkins Creighton LLP. One of the Defendants, Kerry Scott, filed a third-party claim against Walsh Wilkins, leading them to withdraw as counsel for the Nation.

[19] The Nation then retained Robb Beeman and Caireen Hanert of Heenan Blaikie LLP to take over carriage of the action. When Heenan Blaikie dissolved in February 2011, Ms. Hanert moved to McMillan LLP and that firm became counsel of record for the Nation.

[20] In 2018, Ms. Hanert moved her practice to Gowlings. She took the Nation and this action with her.

[21] Mr. McMullen immediately objected to Gowlings acting against him in this action.

[22] The evidence on this application comes mainly from Mr. McMullen's affidavit sworn November 8, 2018 and filed May 1, 2019 (the "November 2018 affidavit"), his reply affidavit of July 21, 2022 (the "July 2022 affidavit"), and reply affidavits file on behalf of Gowlings by Ms. Hanert and Tim Ryan, a partner at Gowlings and its "designated conflicts officer".

[23] Mr. McMullen's November 2018 affidavit details what he alleges to be Gowlings' prior role as his counsel and role in the within action.

[24] Mr. McMullen says Gowlings worked on a lawsuit involving PIC and PEC, Action 0501-1736 where he instructed Gowlings on behalf of both PIC and PEC. Mr. McMullen was a co-plaintiff in that action and was represented by Gowlings along with PIC. He says the represented him in his personal capacity in a 2006 action, McMullen et al v Chief Peter Strikes with a Gun.

[25] He deposes that Gowlings provided "wide ranging legal, strategic and business advice to both PIC and to me in my personal capacity on matters such as my employment, salary, role as a director, as well as protection as an officer and director".

[26] Mr. McMullen says that Gowlings took directions from him regarding PIC and PEC including PIC's articles of incorporation and by-laws, as well as reviewing and putting together indemnity agreements for himself and other PIC directors. Gowlings was involved in loan agreements for PIC, including the loan agreements that are the subject of this action.

[27] He deposes that Gowlings advised PIC and himself on "business, tax, legal and corporate structure" for the Piikani Oldman Hydro Limited Partnership ("POHLP") and they drafted numerous contractual documents setting up POHLP.

[28] Mr. McMullen says Gowlings was involved in a $7.8 million loan from the Piikani Trust to PIC and PEC for the POHLP, and their fees were paid from that loan.

[29] He provides significant details of his role in Action 0601 and says that Gowlings "gave legal and strategic advice in the process of preparing and filing the Statement of Claim in that action, and that they were involved with the retention of Navigant and the preparation of the Navigant Report.

[30] Gowlings were also involved in loans from PIC to the Piikani Land Holding Corporation, which were never repaid because the funds were misappropriated by "rogue members of Chief and Council". Mr. McMullen says that this loan is one of the things claimed in this action as wrongful by him.

[31] After the loan went into default, he says that he and worked to ensure that the rogue members were included in Action 0601. Mr. McMullen ties this loan and the misappropriation to an attempted sale by the Nation of an option to acquire lands to Nordic Petroleum ASA and Norwegian Petroleum Inc. The option had been previously assigned by the Nation to PIC as security for loans made by PIC to the Nation.

[32] Gowlings assisted Mr. McMullen in having that transaction aborted.

[33] Other alleged misdeeds on the part of rogue Chief and Councillors are detailed.

[34] Mr. McMullen provides details on Gowlings's role in the investigation of Raymond James and Ms. Kostic. When a faction of Council wanted to have Ms. Kostic and RJL removed from management of the Piikani Trust's investments, they came to Mr. McMullen for assistance. He describes himself as a chartered accountant as well as being a forensic accountant, having the necessary professional qualifications and designations in that area.

[35] Mr. McMullen says he sought Gowlings' advice on the concerns raised by the faction over the management of the Trust, and he was directed by one of the Gowlings partners he regularly dealt with to retain Navigant Consulting (affiliated with Gowlings) to do a forensic audit of Ms. Kostic's and RJL's activities.

[36] Mr. McMullen says that he worked with Navigant and participated not just by way of giving instruction but also by doing some of the investigative work himself. Mr. McMullen says that Gowlings was involved with the investigation along the way. Mr. McMullen says that Navigant billed PIC for the work they did on the investigation, as did Gowlings.

[37] Mr. McMullen notes that when Chief Crowe Shoe was cross-examined by his lawyer on an affidavit Mr. Crowe Shoe filed in an application in this action, Chief Crowe Shoe said that one of the things the Nation was trying to recover from Mr. McMullen was payments PIC made to Gowlings in relation to the Navigant Report and their work on Action 0601.

[38] Attached to his affidavit as Exhibit 11 is a copy of a letter from Navigant to Gowlings dated February 2, 2007 setting out the terms of engagement between Navigant and Gowlings. It describes the work as "investigative assistance to Piikani Nation and PIC".

[39] The letter states:

> We understand that you would like to engage Navigant to assist you and Mr. Dale McMullen, CA, in his capacity of the Managing Director of PIC with respect to a legal action initiated by Piikani Nation and PIC. Piikani Nation and PIC have filed a Statement of Claim in the Court of Queen's Bench of Alberta containing allegations of a conspiracy between Liliana Kostic ("Kostic"), investment advisor with Raymond James Ltd, and former Piikani Nation Councilors, the named defendants, to defraud Piikani Nation and PIC of Settlement Funds through SWIFT transactions. In addition, Piikani Nation and PIC allege that Kostic invested settlement funds in non-qualifying and unauthorized securities, and allegedly paid kick-backs or bribes to former Piikani Nation Councilors.

[40] Attached to the November affidavit are copies of some accounts from Gowlings to PIC, supporting Mr. McMullen's claims as to the nature of the work done and advice given by Gowlings.

[41] Mr. McMullen's affidavit is lengthy and discuss a number of other matters and issues, and I do not suggest that the activities described above are the only relevant activities for the purpose of this application. Essentially, Mr. McMullen's affidavit speaks for itself on the work he says was done for him, PIC, and PEC by Gowlings during the period 2005 to 2008. He was not cross-examined on work done by Gowlings for PIC and PEC during this period.

[42] Mr. McMullen was cross-examined on the November 2018 affidavit. The cross-examination, insofar as Mr. McMullen responded to Mr. Hawkes' questions, dealt with the work Gowlings did for Mr. McMullen in his personal capacity as opposed to his capacity as managing director and CEO of PIC or PEC, and things Gowlings were not involved in during the period 2005 to 2009.

[43] The cross-examination did not deal with any solicitors work that Mr. McMullen claims Gowlings did for PIC and PEC and the POHLP during this period.

[44] Ms. Hanert's affidavit describes her role in this litigation. She says she acted for Chief Reg Crow Shoe and two councilors when Kerry Scott (also a defendant in this action) brought disqualification proceedings against them in 2008. She also acted for another councilor in 2009-2010 in a disqualification proceeding brought by Mr. Scott.

[45] Her first involvement with this lawsuit was in February 2011 when the Nation's then lawyers ceased to act because of a third-party claim brought against them by Mr. Scott. She and her partner at Heenan Blaikie LLP were then retained.

[46] She says that all of the Gowlings lawyers Mr. McMullen claims to have dealt with are no longer with Gowlings. She has never seen any of the Gowlings records relating to matters for

which Mr. McMullen says Gowlings were acting for him, and she is not aware of any information over which Mr. McMullen claims privilege.

[47] Ms. Hanert deals with Mr. McMullen's concern over her former firm's meeting with some of the defendants in Action 0601 and says that no confidential information was requested or provided.

[48] Mr. Ryan's affidavit says that Gowlings represented PIC in various matters "off and on from October of 2006 and following Mr. McMullen's departure from PIC in December 2007. Their conflicts search disclosed only one small matter in 2008 where Mr. McMullen was listed as a client.

[49] He then details the "ethical wall" that has been established limiting access to all of the closed PIC files to him and his designate. Mr. Ryan says that Ms. Hanert has not been provide access to the files.

[50] Mr. McMullen filed the July 2022 (20 page) affidavit in reply to these affidavits. He notes that Mr. Ryan made no reference to PEC and Piikani Oldman Hydro Limited Partnership (POHLP) and the work Gowlings did for those entities.

[51] He says that a letter from Gowling Partner Ron Hansford dated May 29, 2009, states "we were instructed by PIC to assist the Nation on certain matters and PIC agreed to pay those accounts".

[52] Mr. McMullen says that from November 2005 to November 2006, he received advice from Gowlings over a "covert investigation" into the conduct of PIC's shareholder trustee, PIC's then Chairman, Nation leadership, Raymond James, and Ms. Kostic.

[53] He also discusses Gowlings' involvement in the formation of POHLP and lending arrangements between PIC and PEC, including changing PEC's share structure.

[54] Mr. McMullen says that Gowlings advised him on his employment and remuneration.

[55] He says that Gowlings assisted in developing the Statement of Claim in action 0601. He also references Action 0501-17326 which he describes as an action by Brian Jackson, Peter Strikes with a Gun, and Ms. Kostic to have him removed from the PIC Board. Mr. McMullen says that he was represented by several partners at Gowlings in this.

[56] After Justice Kent ordered him reinstated, he says that he had Gowlings's assistance to have him reinstated, and then "directed PIC and McMullen to aggressively pursue Peter Strikes with a Gun, Brian Jackson and Ms. Kostic," which led to the Navigant Report.

[57] Mr. McMullen then further details Gowlings' work with this investigation.

Positions

[58] Mr. McMullen's position is that Gowlings was his and PIC's and PEC's solicitors. They advised him as CEO and managing director on a number of matters over which Mr. McMullen is now being sued in this lawsuit. He maintains that they are in an impossible conflict, which cannot be resolved by creating walls around their files.

[59] Gowlings draws a bright line between what they did for PIC and PEC and what they did for Mr. McMullen. They say that all significant work was done for the corporate entities. They

were the client, not Mr. McMullen. Gowlings submits that Mr. McMullen has no interest in any of the privileged materials and has no confidential information to protect.

[60] The work they did for Mr. McMullen in his personal capacity is not connected with any of the issues in this lawsuit so if any confidential information was learned from him, none of that would be relevant in this action.

[61] Gowlings says that they have created sufficient protections to ensure that any confidential information is protected from disclosure. Gowlings also argues that while it is possible that some former Gowlings lawyers may be required to testify at trial, they would follow the "usual" process of retaining outside counsel to examine or cross-examine any such witnesses.

[62] The parties referenced a large number of cases. Mr. McMullen cited:

R v McClure, 2001 SCC14 (CanLII), [2001] 1 SCR 445;

MacDonald Estate v Martin, 1990 CanLII 32 (SCC);

Savanna Energy v CanElson Drilling, 2010 ABQB 645 (CanLII);

Blair v Consolidated Enfield Corp, 1995 CanLII 76 (SCC);

Dobbin et al v Acrohelipro Global et al, 2004 NLSCTD 178;

Brookville Carriers v Blackjack Transport, 2008 NSCA 22;

1985 Sawridge Trust v Alberta (Public Trustee), 2017 ABQB 530;

Credit Suisse First Boston Canada Inc, 2004 ONSEC 12 (CanLII);

Chiefs of Ontario v Ontario, 2003 CanLII 32351 (ONSC);

Dacapa Crane & Rigging Ltd v Norman, 2014 ABQB 598 (CanLII);

Jans v Coulter (GH) Co, 1992 CanLII 8216 (SKCA);

Orr v Alook, 2015 ABQB 101 (CanLII);

Strother v 3464920 Canada Inc, 2007 SCC 24 (CanLII); and

La Banque Provinciale v Adjutor Levesque, 1968 CanLII 718 (NBCA).

[63] Gowlings cited:

Pritchard v Ontario Human Rights Commission, 2004 SCC 31;

Canadian National Railway Co v McKercher, 2013 SCC 39;

MacDonald Estate v Martin, [1990} 3 SCR 1235; and

Piikani Nation v McMullen, 2020 ABQB 89.

Law

[64] The modern seminal case on disqualification of lawyers is ***MacDonald Estate v Martin***, [1990] 3 SCR 39 ("***MacDonald Estate***"). It involved a lawyer who was heavily involved in a lawsuit changing firms. His new firm were the lawyers formerly on the other side of the case. The lawyer was no longer involved in the case, and his new firm had implemented protections from any potential breach of confidentiality or privilege on his part.

[65] The Supreme Court identified what they described as the "competing values" in considering the disqualification of counsel:

> In resolving this issue, the Court is concerned with at least three competing values. There is first of all the concern to maintain the high standards of the legal profession and the integrity of our system of justice. Furthermore, there is the countervailing value that a litigant should not be deprived of his or her choice of counsel without good cause. Finally, there is the desirability of permitting reasonable mobility in the legal profession. The review of the cases which follows will show that different standards have been adopted from time to time to resolve the issue. This reflects the different emphasis placed at different times and by different judges on the basic values outlined above.

[66] It declined to follow the "probability of mischief" test, holding that standard was not high enough.

[67] The majority noted:

> Typically, these cases require two questions to be answered: (1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of the client?

[68] In rejecting the sufficiency of "undertakings and conclusory statements in affidavits without more", the Court stated:

> In giving precedence to the preservation of the confidentiality of information imparted to a solicitor, the confidence of the public in the integrity of the profession and in the administration of justice will be maintained and strengthened. On the other hand, reflecting the interest of a member of the public in retaining counsel of her choice and the interest of the profession in permitting lawyers to move from one firm to another, the standards are sufficiently flexible to permit a solicitor to act against a former client provided that a reasonable member of the public who is in possession of the facts would conclude that no unauthorized disclosure of confidential information had occurred or would occur.

[69] ***MacDonald Estate*** dealt with mobility and confidentiality. Mr. McMullen relies heavily on the risks of misuse of confidential information he says Gowlings obtained from him during the 2005-2009 period. Gowlings says it obtained no confidential information from Mr. McMullen on the matters they acted on for him in his personal capacity, and there was no duty of confidentiality owed to him in his capacity as managing director and CEO of PIC and PEC.

[70] Confidentiality is not the only issue to be considered with disqualification matters, however. A lawyer's "duty of loyalty" arose in a criminal case***, R v Neil***, 2002 SCC 70. There, the law firm was representing the defendant in criminal proceedings. Another member of the firm began acting for one of Mr. Neil's alleged victims in an action unrelated to any of the prosecutions. Information given to the police by this other client led to further charges being laid against Mr. Neil. He was convicted of that new charge.

[71] At para 1, Justice Binnie described the issue before them as follows:

> What are the proper limits of a lawyer's "duty of loyalty" to a current client in a case where the lawyer did not receive any confidential information that was (or is) relevant to the matter in which he proposes to act against the current client's interest?

[72] He held at para 3:

> In my view, the law firm did owe a duty of loyalty to the appellant at the material time, and the law firm ought not to have taken up the cause of one of the appellant's alleged victims (Darren Doblanko) in proceedings before a civil court at the same time as it maintained a solicitor-client relationship with the appellant in respect of other matters simultaneously pending before the criminal court (the "*Canada Trust*" matters). The *Doblanko* mandate, though factually and legally unrelated to the *Canada Trust* matters, was adverse to the appellant's interest. The law firm, as fiduciary, could not serve two masters at the same time.

[73] ***Canadian National Railway Co v McKercher LLP***, 2013 SCC 39 also deals with loyalty. There, McKercher had been acting for CN on several matters. Without CN's consent or knowledge, McKercher accepted a retainer to act for the plaintiffs in a large class action against CN. CN objected. They then terminated their retainers with CN on the other matters.

[74] The Supreme Court repeated what it had said in ***R v Neil***, 2002 SCC 70 on loyalty:

> [19] A lawyer, and by extension a law firm, owes a duty of loyalty to clients. This duty has three salient dimensions: (1) a duty to avoid conflicting interests; (2) a duty of commitment to the client's cause; and (3) a duty of candour: *Neil*, at para 19...

[75] The result of this case was that McKercher was found to have breached its duty of loyalty to CN by accepting the conflicting retainer without CN's permission. That was a clear breach of the "bright line" rule that a lawyer cannot concurrently act for and against a client without the client's consent. That breach was not cured by McKercher subsequently ceasing to act for CN in the other matters. The Supreme Court stated at para 61:

> [61] As discussed, the courts in the exercise of their supervisory jurisdiction over the administration of justice in the courts have inherent jurisdiction to remove law firms from pending litigation. Disqualification may be required: (1) to avoid the risk of improper use of confidential information; (2) to avoid the risk of impaired representation; and/or (3) to maintain the repute of the administration of justice.

[76] They continued at para 65:

> [65] On the other hand, it must be acknowledged that in circumstances where the lawyer-client relationship has been terminated and there is no risk of misuse of confidential information, there is generally no longer a concern of ongoing prejudice to the complaining party. In light of this reality, courts faced with a motion for disqualification on this third ground should consider certain factors that may point the other way. Such factors may include: (i) behaviour disentitling the complaining party from seeking the removal of counsel, such as delay in bringing the motion for disqualification; (ii) significant prejudice to the new client's interest in retaining its counsel of choice, and that party's ability to retain

> new counsel; and (iii) the fact that the law firm accepted the conflicting retainer in good faith, reasonably believing that the concurrent representation fell beyond the scope of the bright line rule and applicable law society restrictions.

[77] The Supreme Court sent the matter back to the motions judge for reconsideration, based on their findings.

[78] Gowlings relies on ***Neil*** and ***McKercher*** in this case noting that any connection Gowlings had with Mr. McMullen ended many years before they were retained to act against him in this action.

[79] Mr. McMullen says that Gowlings owed continuing obligations to him, citing ***Blair v Consolidated Enfield Corp***, 1995 CanLII 76 (SCC).

[80] ***Blair*** discusses directors' reliance on legal advice from corporate counsel. It is not a disqualification case. Under consideration there was s 135 of the *Ontario Business Corporations Act*, RSO 1990 c B.16 ("OBCA"). That section stated:

> (4) A director is not liable under section 130 and has complied with his or her duties under subsection 134(2) if the director exercised the care, diligence, and skill that a reasonably prudent person would have exercised in comparable circumstances, including reliance in good faith on,
>
> …
>
> (d) a report of a lawyer, accountant, engineer, appraiser, or other person whose profession lends credibility to a statement made by any such person.

[81] Section 130 of the OBCA refers to the liability of directors for certain share transactions, dividend declarations, and various types of payments as well as unpaid wages in certain situations. Section 130 requires directors to "act honestly and in good faith with a view to the best interests of the corporation".

[82] At para LXV of its decision, the Supreme Court stated:

> I note that the case law cited by the appellant establishes that reliance on counsel's advice (even if it leads to a deleterious result) will strongly militate against a finding of *mala fides* or fiduciary breach, such a finding being necessary to disentitle one from indemnification. For example, in *Exco* (*Exco Corp. v. Nova Scotia Savings & Loan Co.* (1987) (1987 CanLII 135 (NSSC) , at pp. 220-21, Richard J. held:
>
> > The presence of ... counsel...do[es] have the result of absolving the directors of any allegation of bad faith with respect to their actions.... Directors have a right, indeed a duty to rely on the opinion of counsel....
> >
> > Although what the directors did, as a board, may have been unlawful, no liability can attach to the directors personally for what they did, having first received advice from...counsel who held himself out as having experience and expertise in that area of law. [Emphasis added.]

[83] The Court held at para LXVII:

> LXVII. It was reasonable for Blair to believe, and the evidence shows he did believe, that reliance on the advice of Osler was the only course open to him. Thus, it is clear that Blair fulfilled his duty of care under the *Rafuse* standard. This militates against a finding that he should not be indemnified for the subsequent litigation initiated by Canadian Express. I also note that such a conclusion is consonant with jurisprudence in other contexts which has held that reliance on actuarial and legal advice obtained from competent sources would militate against a finding of misconduct...

[84] I note that the provisions in the OBCA referenced by the Supreme Court are largely echoed in sections 122.4 and 122.5 of the *Canada Business Corporations Act*, RSC 1985, c C-44 ("CBCA"), under which PIC and PEC were incorporated. Section 122(1) of the CBCA requires the directors to act honestly and in good faither with a view to the gest interests of the corporation. Section 122.4 provides:

> (4) A director is not liable under section 118 or 119, and has complied with his or her duties under subsection 122(2), if the director exercised the care, diligence, and skill that a reasonably prudent person would have exercised in comparable circumstances, including reliance in good faith on
>
> > (a) financial statements of the corporation represented to the director by an officer of the corporation or in a written report of the auditor of the corporation fairly to reflect the financial condition of the corporation; or
> >
> > (b) a report of a person whose profession lends credibility to a statement made by the professional person.

[85] Section 122.5 says:

> (5) A director has complied with his or her duties under subsection 122(1) if the director relied in good faith on
>
> > (a) financial statements of the corporation represented to the director by an officer of the corporation or in a written report of the auditor of the corporation fairly to reflect the financial condition of the corporation; or
> >
> > (b) a report of a person whose profession lends credibility to a statement made by the professional person.

[86] ***Blair*** might be argued as being distinguishable on its facts and circumstances and only refers to directors and not officers. It arose in the context of a shareholders fight where Blair, the corporation's president, acted as chair at a board of directors meeting. He was not re-elected as a director as a result of a surprise candidate supported by the opposing faction. Following advice from the corporation's lawyers, Blair declared the surprise candidate ineligible. Litigation ensued. The proceeding in the Supreme Court related to Blair's entitlement to indemnity for his legal costs.

[87] The Law Society of Alberta's *Code of Conduct* discusses Lawyers acting against former clients in Rule 3.4-6:

> Acting Against Former Clients
>
> 3.4-6 Unless the former client consents, a lawyer must not act against a former client:
> (a) in the same matter,
> (b) in any related matter, or
> (c) except as provided by Rule 3.4-7, in any other matter if the lawyer has relevant confidential information arising from the representation of the former client that may prejudice that client.

The Commentary under that Rule states:

> Commentary
>
> [1] This rule protects clients from the misuse of confidential information and prohibits a lawyer from attacking the legal work done during the retainer, or from undermining the client's position on a matter that was central to the retainer. It is not improper for a lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that client. A new matter is wholly unrelated if no confidential information from the prior retainer is relevant to the new matter and the new matter will not undermine the work done by the lawyer for the client in the prior retainer.
>
> [2] A person who has consulted a lawyer in the lawyer's professional capacity may be considered a former client for the purposes of this rule even though the lawyer did not agree to represent that person or did not render an account to that person (see commentary below regarding "Prospective Client").

[88] The impact of Law Society conduct rules was considered in ***Dobbin v Acrohelipro Global Services Inc***, 2004 NLSC 178. There, Dobbin, and others were former senior executives of the Respondent. In anticipation of a change in control of the Respondent, Dobbin sought the advice of counsel at Stewart McKelvey in Newfoundland. That firm had offices in all four maritime provinces. Stewart McKelvey's Halifax office had been doing work on various credit arrangements for the Respondent's bankers. The Respondent objected to Stewart McKelvey's representation of Dobbin, even though it had not retained Stewart McKelvey itself: they acted for its bank.

[89] Adams J referred to ***USB Sidac International Ltd v Lancaster Packaging Inc***, 1993 CanLII 5588 (ONSC) at para 23:

> [23] Blair, J., as he then was, referred to the principles enunciated in *MacDonald Estate,* supra, and the *Code of Professional Conduct*[4]. He rejected the suggestion that the statement of Sopinka, J., quoted in these reasons at paragraph [12] presupposes the existence of a solicitor and client relationship. At paragraph 13 of *UCB Sidac* Blair, J., stated:

> "I do not think the ethic expressed in the passages quoted above can be so confined. There are two reasons for this conclusion. The first is that the word 'client' must be taken, in this context, to include 'persons who were involved in or associated with [the client] in [the] matter' as pointed out in the excerpt cited from the Commentaries to the *Code of Professional Conduct* by Sopinka, J., earlier in the decision. The second is that the central question addressed in the judgment was not the two 'typical' questions noted, but the overriding question: 'Is there a disqualifying conflict of interest?' (see p. 137). In addressing this question, one should look to see whether there is 'a previous relationship' not only between the lawyer and the client but also between the lawyer and the 'person involved in or associated with' the client in connection with the original matter, 'which is sufficiently related to the retainer from which it is sought to remove the solicitor' to justify the removal sought."

[90] He concluded at paras 42-43:

> [42] Lawyers must be scrupulous to not put themselves, even inadvertently or indirectly, in a position in which they might be found to be in a conflict of interest or where there may be tempted or be perceived as being tempted to disclose confidential information entrusted to them by a client or a near client as I have defined Vector to be in the circumstances of this case. This may from time to time present harsh and unpleasant choices to lawyers when considering whether to accept a retainer. Nevertheless, the integrity of our system of justice dictates that there be no erosion in the high confidence placed in the legal profession by members of the public. The assurance of complete and unequivocal loyalty and confidentiality of the lawyer to the client is one of the cornerstones of a system of justice which has evolved to be the envy of much of the world. It is difficult cases like these which breathe life into these high-sounding and ethereal principles. When the integrity of the justice system comes into conflict with the right to counsel of choice, the former must trump the latter in every instance.
>
> [43] In my view, therefore, Vector has met the test for a disqualifying conflict of interest set out in *MacDonald Estate* and unless Vector has waived the conflict, Stewart McKelvey must be removed as solicitor of record from this action.

[91] Following ***MacDonald Estate***, there was some debate about whether that case had determined that lawyers could only be disqualified from acting against former clients if there were confidentiality issues. One of the earliest appellate level decisions on that was from the Saskatchewan Court of Appeal in ***G. H. Coulter v. Jens***, [1992] S.J. No. 321 (SKCA) in which they held:

> [9] With one explainable exception we can find no case where a law firm, having previously prepared documents while representing both parties to the transaction, was allowed to represent one of the parties in litigation arising out of those documents…

> [10] We agree that the *Martin* case has replaced the courts' preoccupation with the old tests, i.e., possibility or probability of mischief, but we do not accept counsel's contention that the *Martin* case requires a finding that there is a risk of a breach of confidentiality before a court will restrain a law firm from acting in this type of case…

[92] The Alberta Court of Appeal considered the issue of "who is a client?" in ***Gainers Inc v Pocklington***, 1995 ABCA 177. At para 22, Justice Cote stated:

> [22] After extended argument and consideration, I conclude that Mr. Pocklington's counsel raises relevant considerations, but that one cannot adopt a simple all-or-nothing rule. At one extreme, courts should look at more than just whose name was on the law firm's file cover or ledger as "client". But at the other extreme, courts should not ignore the existence of companies, and pretend that they are all unincorporated associations of their shareholders, officers, and directors. An Oregon case suggesting that in this context was cited, but I disagree. Most companies are not a mechanism for doing business by an individual; still less was Gainers Inc. Still less should courts pretend that the spokesperson for a company is the "real client" when a law firm represents the company in litigation. One must examine all the relevant facts, including the reasonable expectations of those involved.

[93] He concluded his analysis at para 40 by creating what he named the "Composite Rule":

> [40] Therefore, it seems to me that the only reasonable solution is to take a more flexible tailored approach. I would not adopt a rigid rule like the former "rule #2" discussed in Part C above, but since repealed in Alberta. Instead, I prefer the following approach. Where a law firm proposes to act for someone who is or was its client, against an objecting person who never was its client, the court should weigh all the facts. It should do so to see whether
>
> (a) the law firm gave the person objecting a reasonable expectation of confidentiality at the hands of the law firm; for example, whether he had any reasonable ground to think that he was discussing confidentially with his lawyer his private interests as shareholder and not as officer of the company;
>
> (b) if so, whether disclosure to its client would be contrary to that expectation;
>
> (c) how strong is the likelihood of harm resulting;
>
> (d) how great that harm is likely to be;
>
> (e) whether acting for that client against the person objecting would work significant injustice for some other reason; and
>
> (f) whether allowing the law firm thus to act would set a precedent working significant harm to future relations between lawyers and lay people.

[94] In a brief decision from the bench in ***Bow Valley Energy Inc. v. San Diego Gas & Electric Co***, (1996) ABCA 44, the Alberta Court of Appeal upheld an order removing counsel, stating at para 12:

> In our view, to allow a law firm to act for both parties and then elect to act for one party against another in a closely related matter (here the same matter) is to create

> at least an appearance of unfairness and impropriety which is unacceptable. Accordingly, the appeal is dismissed.

[95] ***In Brookville Carriers Flatbed GP Inc v Blackjack Transport Ltd***, 2008 NSCA 22, the Nova Scotia Court of Appeal considered lawyers' duties beyond confidentiality. Their decision is very helpful as it canvasses the treatment of this issue in other Canadian Courts of Appeal, including the Alberta Court of Appeal in ***Gainers v Pocklington***. It appears to be the leading authority for disqualification cases where there are no confidentiality issues.

[96] Writing for the Court, Cromwell JA (as he then was) concluded at para 17:

> [17] In my view, putting aside issues of informed consent, lawyers have a duty not to act against a former client in a related matter whether or not confidential information is at risk. A matter is "related" for this purpose if the new retainer involves the lawyer taking an adversarial position against the former client with respect to the legal work which the lawyer performed for the former client or a matter central to the earlier retainer. Here, although the causes of action pleaded in the two lawsuits were different, the judge found that they were related because in the Brookville action, the law firm was attacking the honesty of the Jenkins in their employment with Brookville during an overlapping time period in which the firm had previously defended their honesty in the course of the same employment. While this is perhaps at the outer limits of what could be considered "related" retainers, the judge correctly understood the legal principles and he did not make any clear or determinative error in applying them to the facts.

[97] He continued:

> [51] Under the principle relevant here, that concerning acting against a former client in a related matter, the focus is different. As the cases and commentators show, the scope of this duty is very limited absent confidential information being at risk. This broader continuing duty of loyalty to former clients is based on the need to protect and to promote public confidence in the legal profession and the administration of justice. What is of concern is the spectre of a lawyer attacking or undermining in a subsequent retainer the legal work which the lawyer did for the former client or of a lawyer effectively changing sides by taking an adversarial position against a former client with respect to a matter that was central to the previous retainer. **Basinview** is an example of the former: the new retainer involved the lawyer attacking or attempting to undermine the very legal services provided to the former client. **Harris** and **Chiefs of Ontario** are examples of the latter: the new retainer involved attacks on the honesty and integrity of the former client in relation to exactly the same sort of matters as the lawyer acted to defend in the previous retainer. In either type of case, the relationship between the two retainers must be very close so that the lawyer in the new retainer is attacking or undermining the value of the legal work provided to the former client or effectively changing sides in a matter that was central to the previous retainer.

[98] The Court concluded:

> [55] … the approach to the question of whether two matters are related is entirely different in a **MacDonald Estate** situation than it is in the case of an alleged disqualifying conflict of interest where confidential information is not at risk. The purpose of assessing the relationship between the two retainers in **MacDonald Estate** is to determine whether an inference should be drawn that confidential information obtained in the course of the first retainer is relevant to the second. When, as here, confidential information is not at risk, the relationship between the two retainers is considered in order to identify whether the second retainer involves the lawyer attacking the legal work done during the first retainer or amounts, in effect, to the lawyer changing sides on a matter central to the earlier retainer. The concept of relatedness for this purpose is much narrower and has an entirely different focus than the concept as applied in the **MacDonald Estate** analysis.

[99] Cromwell JA stated that care should be taken to ensure that the principles in the decision were not applied too broadly.

[100] ***Brookville*** has been approved and used by a number of courts of appeal across Canada:

> ***Consulate Ventures Inc v Amico Contracting & Engineering (1992) Inc***, 2010 ONCA 780;
>
> ***Dr N Vankoughnett Dental Prof Corp v Gallagher,*** 2012 SKCA 110
>
> ***Sandhu v Mangat***, 2018 BCCA 454;
>
> ***Winnipeg (City of) v The Neighbourhood Bookstore and Café Ltd,*** 2019 MBCA 3; and
>
> ***Bourgeois v. R,*** 2022 NBCA 62.

[101] Significantly, the principles in Brookville have been incorporated into Rule 4.4 of the Law Society of Alberta's *Code of Conduct*, which states:

> A lawyer must not act against a former client (a) in the same matter, or (b) in any related matter.

[102] Law Society Codes of Conduct are not dispositive of disqualification proceedings, as they relate to the self-governance of the profession. They are, however, given considerable weight in determining ethical situations that come to the Court for a judicial remedy.

[103] ***Brookville*** and some of the cases referred to in it (including ***Gainers v Pocklington)*** were considered by Justice Hillier in ***Dacapa Crane & Rigging Ltd v Norman***, 2014 ABQB 598.

[104] In that case, McLennan Ross had been long-time solicitors for plaintiff James Myshak Management Ltd. In particular, they acted for Myshak when it bought the shares of Dacapa Crane from the Normans. Following the share purchase, McLennan Ross accepted a retainer from Dacapa Crane to recover a receivable which was in Dacapa's name but in which Normans retained a beneficial interest. The Normans had by then ceased to be directors of Dacapa.

[105] Hillier J noted that instructions on the receivable came from Mr. Norman and not directly from Dacapa. One of the firm's lawyers had met with the Normans on a number of occasions.

[106] At paras 42-44, Justice Hillier referred to the decision of Hawco J in ***Jeffers v Calico Compression Systems***, 2002, ABQB 71:

> [42] In ***Jeffers v Calico Compression Systems***, 2002 ABQB 72, 314 AR 294, Hawco J. observed that the test to determine whether a solicitor-client relationship exists is whether a reasonable person in the position of a party with knowledge of all the facts would reasonably form the belief that the lawyer was acting for a particular party.
>
> [43] This is consistent with the definition of "client" in the *Law Society of Alberta Code of Conduct* which extends to a person who reasonably believes that a solicitor-client relationship exists, whether or not that is the case at law.
>
> [44] Hawco J. listed, at para 8 of ***Jeffers***, some of the indicia set out in the case law that would be indicative of a solicitor/client relationship:
>
> - a contract or retainer;
> - a file opened by the lawyer;
> - meetings between the lawyer and the party;
> - correspondence between the lawyer and the party;
> - a bill rendered by the lawyer to the party;
> - a bill paid by the party;
> - instructions given by the party to the lawyer;
> - the lawyer acting on the instructions given;
> - statements made by the lawyer that the lawyer is acting for the party;
> - a reasonable expectation by the party about the lawyer's role;
> - legal advice given; and
> - legal documents created for the party.

[107] Justice Hillier concluded at paras 16-17:

> [16] This case is not one where one member of a large firm may or may not have received confidential information and may or may not have passed it on or set up procedures to prevent the information from being passed on. This case does not concern implied or imputed knowledge. In this case we have Mr. Dawe acting for both parties with respect to the very issues in dispute.
>
> [17] For Mr. Dawe to continue acting against Mr. Jeffers would not only create an appearance of unfairness and impropriety, it would be unfair and improper.

[108] Recently, Justice Devlin succinctly summarized the ratio in ***Brookville*** in ***Harder v Sartorio***, 2020 ABQB 404 at para 22:

> It is trite that a lawyer may not act for a new client to undermine work they have done for a former client.

[109] In summary of all of this, the applicable "rules" for the purpose of this case are:

1. Lawyers (absent consent) will be automatically disqualified from acting against a former client if the lawyer has any relevant confidential information (***MacDonald Estate***);
2. A "mega-firm"), meaning a law firm that has offices in multiple locations, will be disqualified unless they can take measures that will eliminate the risk of "contamination" by the lawyer with the confidential information (***MacDonald Estate***);
3. The "bright line" rule discussed in ***Neil*** has limited scope and applies to lawyers or law firms acting against an existing client in any matter, whether related or not, without the existing client's prior consent (there are limited exceptions where a client should not reasonably expect the lawyer to not act against it in unrelated matters (***McKercher***);
4. In cases where the bright line rule does not apply, the question becomes whether there would be a substantial risk that the lawyer's continued representation would materially and adversely affect the client (***McKercher***); and
5. Lawyers have a duty not to act against a former client in a related matter. A matter is "related" for this purpose if the new retainer involves the lawyer taking an adversarial position against the former client with respect to the legal work which the lawyer performed for the former client or a matter central to the earlier retainer (***Brookville Carriers***).

[110] I do not purport to set out any kind of exhaustive list of relevant factors and considerations for lawyer disqualifications. For example, I leave for another day circumstances where the "contaminated" lawyer works in the same office as the lawyer acting against the former client has taken measures to guard against cross-contamination, and what those measures might be. It is obvious that exceptions to the bright line rule remain open as the test relates to the former client's "reasonable expectations."

[111] A subsidiary issue is the need to determine "who is considered to be a client?" The law in Alberta seems quite well defined, following ***Gainers Inc v Pocklington***. However, a number of Queen's Bench decisions such as ***Savanna Energy Services Corp v CanElson Drilling Inc, Dacapa Crane & Rigging Ltd v Norman*** and ***Jeffers v Calico Compression Systems*** have held that duties may exist without confidential information being exchanged or prejudiced. They make it clear that "clients" are not just people or entities that sign a retainer agreement or pay the legal bills. They may be broader than that. These are all cases with which I agree and consider them to be consistent with the principles in ***Gainers v Pocklington***.

[112] From these cases, I conclude:

1. There is no "bright line" to determine who is or was a client or former client for conflict purposes;
2. Unclear cases should be governed in the first instance by the "Composite Rule" outlined by Cote JA at para 40 in ***Gainers v Pocklington***, which

> firstly considers confidentiality concerns, and if no confidentiality issues are involved, whether:
>
> - whether acting for that client against the person objecting would work significant injustice for some other reason; and
> - whether allowing the law firm thus to act would set a precedent working significant harm to future relations between lawyers and lay people,

ANALYSIS

[113] The cases discussed above provide basic principles for solicitor disqualifications. Provincial Codes of Conduct for lawyers are interpreted using these cases, but they are not limited by them. The two relatively recent cases, ***MacDonald Estate*** and ***McKercher,*** do not provide exhaustive guidelines. They arose out of very specific fact circumstances. They do not purport to overturn previous Supreme Court authority.

[114] ***MacDonald Estate*** is really limited to cases where there is a risk of misuse of confidential information and potential harm to the impacted client. It modified any absolute rule by recognizing the creation of ethical walls to protect any sensitive information.

[115] ***McKercher*** emphasized the "bright line" rule that a law firm cannot concurrently act against an existing client without that client's prior approval where the "immediate interests of clients are directly adverse in the matters on which the lawyer is acting" (at para 41). It also held (at para 41) that if a situation falls outside the scope of the bright line rule, the applicable test is whether there is "a substantial risk that the lawyer's representation of the client would be materially and adversely affected."

[116] ***Gainers*** and ***Brookville*** provide guidance as to who is to be considered to be a "client" for lawyer disqualification purposes.

Confidentiality

[117] My conclusion from the evidence before me and my legal analysis above that it has not been established by Mr. McMullen that there are any solicitor client privilege issues at play in this lawsuit. It has not been demonstrated on any level of proof that Gowlings learned anything privileged or confidential from Mr. McMullen in the matters on which they represented his personal interests only. In all of the other situations, PIC and PEC were the "official" clients. Mr. McMullen was not receiving personal advice, and he was not paying any of the bills himself.

[118] The employment claim has no apparent connection with this lawsuit. It is not relevant. While Mr. McMullen may have conveyed confidential information to Gowlings and received advice from Gowlings, he gave and received any such information and advice in his capacity as managing director of PIC and CEO of PIC and PEC. It was essentially not his advice, even though he was privy to it. Even if he could be considered to have an ownership interest in the privilege (which he did not), that would have been shared ownership with PIC and PEC. He was a fiduciary to both entities and could have no independent privilege. Anything shared by or with him could be used by PIC and PEC.

[119] That, however, does not end the matter.

Was Mr. McMullen a Gowlings client, or should he be considered to be a "near client"?

[120] I can understand how Mr. McMullen would be offended and even angered at finding the law firm he hired on behalf of PIC and PEC now acting against him. He was the key contact between Gowlings and PIC and PEC and instructed them. He was the director and officer of PIC and PEC who received Gowlings' advice. Presumably, it was Mr. McMullen's call as to what work they did for PIC and PEC, and whether they would remain as counsel for PIC and PEC. That is a matter for a corporation's directors, and Mr. McMullen was the managing director.

[121] I was extremely surprised to find during the course of the applications that were argued with me in mid April of this year that there has not yet been any questioning in this action. This lawsuit is in its 14th year and has been in courts at various levels on countless occasions. There has been a myriad of applications and appeals from applications. However, it seems that there has been no meaningful attempt to define or narrow the issues, such that the pleadings remain the key factor in determining what the lawsuit is all about, and what may be relevant and material for record production and questioning.

[122] Gowlings argued the application on two bases: that Mr. McMullen was never a Gowlings client and is owed no duties by them; and in any event, there is no confidential information at play here.

[123] Having chosen that path, they have provided me with no evidence or information as to the work they did for PIC and PEC with Mr. McMullen being the instructing director and officer of those entities and what advice was given to Mr. McMullen on the various transactions they represented those entities on.

[124] I am satisfied from my review of the law as discussed above that this matter is not as simple as suggested by Gowlings. They have chosen not to deal with cases such as ***Gainers v Pocklington*** and ***Brookville Carriers.***

[125] All I have by way of evidence on those matters is what Mr. McMullen has sworn in his affidavits. As well, all I really have to determine what the issues in the lawsuit are is the pleadings. I am not aware that Mr. McMullen has been provided with formal or detailed particulars of the Nation's damages and I do not believe it is clear what specific transactions and decisions by Mr. McMullen the Nation takes issue with, apart what can be gleaned from the pleadings.

[126] On the evidence in this application, I have no hesitation concluding that Mr. McMullen was, during the time he was managing director and CEO of PIC, a "near client" of Gowlings. The uncontested evidence is that Mr. McMullen was the key contact between Gowlings and PIC on a host of matters. They were PIC's "main" lawyers, and Mr. McMullen was the person at PIC who gave instructions and received advice for PIC. Mr. McMullen approved payment of Gowlings' accounts and inferentially was the person who decided to have PIC continue to work with Gowlings.

[127] In terms of the "Composite Test" in ***Gainers v Pocklington*** I am satisfied that tests (e) and (f) compel a determination that Mr. McMullen should be treated as a Gowlings "client" for the purposes of this application:

> (e) whether acting for that client against the person objecting would work significant injustice for some other reason; and

(f) whether allowing the law firm thus to act would set a precedent working significant harm to future relations between lawyers and lay people.

[128] In cases of closely held corporations, I think it is very difficult to separate the person or persons who control the corporation from the corporation. I see no principled reason why lawyers acting for such corporations should be entitled to use the corporate veil against the guiding minds of their corporate client in determining to whom the lawyers' owed duties. That is particularly so where the person in question is the person who gave instructions and received advice from the lawyers.

[129] The attachments to Mr. McMullen's July 2022 affidavit are examples of Gowlings' involvement with Mr. McMullen in many of the transactions that may be part of the claim against Mr. McMullen.

[130] Mr. McMullen's evidence was clear that Gowlings was involved with him in the establishment of the Piikani Hydro Limited Partnership with ATCO. Exhibit 5 includes a letter from PIC (signed by Mr. McMullen) to CIBC Trust outlining some of the details of the POHLP. It was copied to Gowlings. Also, part of Exhibit 5 is a letter from Gowlings to PEC dated May 10, 2007 advising that the Nation should be prohibited from taking part in control of the limited partnership. This transaction and the structure of it seem to be an issue in the claim against Mr. McMullen.

[131] Gowlings advised Mr. McMullen in a letter to PIC dated December 27, 2007 (Exhibit 5 to the July 2022 affidavit) as to the consequence of a Band Council Resolution in 2008 that his term as a director not be renewed. A letter like that blurs the lines of solicitor and client, as the letter is addressed to Mr. McMullen, their client PIC's CEO and managing director is advice as to the consequences of Chief and Council (PIC's shareholder and also a Gowlings client) resolving that Mr. McMullen's directorship would not be renewed.

[132] I recognize that Mr. McMullen was not the only director and could not be considered to have made all corporate decisions, but here, we have Mr. McMullen's uncontroverted evidence as to what he did. There is no evidence that anyone else from PIC dealt with Gowlings.

[133] His evidence as to his involvement with the investigation into the performance of Raymond James and Liliana Kostic in their management of the Piikani Trust's investments is also uncontroverted. He says that when the Nation directed CIBC Trust, by a Band Council Resolution, to investigate Raymond James, he was directed by Gowlings (who were by then also acting for the Nation and also apparently acting for CIBC Trust)

[134] Mr. McMullen says that Gowlings was involved his compensation and the terms and conditions of his indemnity. In that, Gowlings may have been giving advice to both Mr. McMullen and to PIC. I note the indemnity agreement between Mr. McMullen and the Nation dates back to April 2004, when Blake Cassels & Graydon LLP were acting for the Nation. It predates Gowlings' involvement. I am unclear as to whether there was an indemnity agreement directly between Mr. McMullen and PIC, and Mr. McMullen did not say in either affidavit exactly what Gowlings' involvement was with his indemnification. He was not cross-examined on this, and all I have is his sworn testimony that Gowlings had involvement. Indemnification issues and the scope of any indemnification is undoubtedly a significant issue in this litigation, regardless of whether it was given by the Nation or PIC or both.

[135] I could continue with further examples from Mr. McMullen's affidavits and the exhibits, but I think the above illustrations are sufficient for me to draw reasonable conclusions.

[136] The key from ***Brookville*** is to see if the lawsuit being brought against the former client, Mr. McMullen, is related to work done when Mr. McMullen was the person giving instructions to and receiving advice from Gowlings. As held in that case:

> A matter is "related" for this purpose if the new retainer involves the lawyer taking an adversarial position against the former client with respect to the legal work which the lawyer performed for the former client or a matter central to the earlier retainer. (at para 17)

[137] The best way of determining that is to compare Mr. McMullen's evidence as to what Gowlings did for PEC during that period, and what the Nation claims he did wrong in this action.

[138] To do this, I will reproduce the relevant allegations in the Statement of Claim with annotations as to what Mr. McMullen says Gowlings was involved in:

> 32.The Defendants acted in combination with each other and with such other persons as are currently within the sole knowledge of the Defendants to commit breaches of their legal and equitable duties which include, but are not limited to, the following:
>
> (a) Removing directors of PEC contrary to the provisions of the Alberta Business Corporations Act and the Trust Agreement;
>
> Mr. McMullen says that Gowlings was fully involved in the reorganization of PEC and the ATCO transaction; it would be expected that the lawyers advising PEC would make sure the work they did complied with relevant and well-known statutory requirements.
>
> (b) Appointing directors of PEC contrary to the provisions of the Trust Agreement;
>
> As above; Mr. McMullen's says that Gowlings was fully involved in the ATCO Transaction. The lawsuit challenges the validity of these activities.
>
> (c) Manipulating the affairs of PIC and PEC to their own benefit, and to the detriment of PIC, PEC, and the Plaintiffs
>
> To the extent that any of this involves the reorganization of PEC for the purposes of the ATCO transaction, Gowlings was involved, and it would be expected that they would be familiar with foundational documents relating to the transaction. The lawsuit clearly challenges the validity of these transactions.
>
> (d) Changing the share structure of PEC to remove from PIC and Council a controlling interest in PEC, while granting a controlling interest to the Defendant, EDWIN YELLOW HORN, without adequate consideration or valid business purpose;

The reorganization to remove PIC and Council followed Gowlings' advice in that regard. That advice is now challenged.

(e) Restructuring the financial relationship between PIC and PEC to denude PIC of financial resources;

This followed Gowlings' advice as to how to set up the POHLP.

(f) Spending monies drawn by PIC and PEC from the Piikani Trust for purposes other than in accordance with the specific purposes for which said monies were advanced;

To the extent that this relates to payment by PIC of Gowlings' accounts relating to the investigation of Raymond James and Ms. Kostic and the Navigant Report, Mr. McMullen details the significant (possibly behind the scenes) involvement by Gowlings in the investigation and report, including the hiring of Navigant. The lawsuit clearly challenges any payments not for the benefit of the Nation. This is a challenging area, as Gowlings appears to have had a relationship with the Nation, CIBC Trust and PIC through all of this. Payment instructions and the validity of those instructions (and Gowlings' acceptance of the instructions that PIC pay the bills) is obviously in question. An obvious question is, what authority PIC had to contemplate, let alone commence, litigaiton on behalf of its shareholder? One might expect counsel involved in this sort of proceeding would give advice on the propriety of doing so and the risks of doing so.

(g) Paying to themselves and others excessive and exorbitant remuneration not commensurate with the services provided as directors, officers, employees and contractors of PIC and PEC;

Mr. McMullen claims that Gowlings were involved in remuneration issues between him and PIC, including indemnification issues. To the extent Gowlings gave advice, the lawsuit challenges that.

(h) Committing the tort of maintenance by officiously intermeddling, and causing PIC and PEC to officiously intermeddle, in proceedings against the Plaintiffs and others, to which the Defendants, PIC and/or PEC were not parties, by maintaining, supporting, or assisting parties to the lawsuits opposite to the Plaintiffs, with money and otherwise, to prosecute or defend the proceedings, as the case may be;

This presumably relates mainly to the Raymond James/Kostic investigation and the Navigant report and the commencement of Action 0601 against Raymond James, Ms. Kostic, and various Nation Councillors. Gowlings was according to Mr. McMullen heavily involved in all of this. Mr., McMullen says that they were involved until the possibility of having to include CIBC Trust as a

defendant emerged, when Gowlings arranged to have the matter transferred to another law firm. Why all of this was done by PIC is undoubtedly at the heart of this lawsuit, and Gowlings was heavily involved and may have to be the ones providing the explanation.

It is not clear to me what Gowlings' role if any was relating to various Chief and councillor disqualification proceedings, but if they billed PIC or PEC for anything in relation to these matters that would indicate an involvement that is now challenged in the lawsuit. One would expect a law firm to take some steps to make sure the work they did or billed a client for was properly part of the client's mandate or powers.

(i) Making the above payments or entering the above financial transactions at a time when the Defendants knew, or ought to have known, that PIC and PEC were insolvent or on the eve of insolvency, with intent to defeat, hinder, delay, or prejudice the companies' creditors;

(j) Causing PEC to improperly take and disburse monies belonging to Oldman Hydro in breach of the Piikani Oldman Hydro Limited Partnership Agreement;

(k) Causing PIC and PEC to default on loans to the Piikani Trust;

(l) Failing to provide financial and corporate information as required by the Alberta Business Corporations Act, the Canada Business Corporations Act, and the Trust Agreement;

(m) Failing to carry out the duties and obligations set out in the Trust Agreement;

(n) Falling to prepare financial statements of PIC, PEC, and Oldman Hydro;

(o) Failing to report to Council as required; and

(p) Deliberately concealing their actions in order to evade accountability.

23. The Defendants, DALE MCMULLEN, STEPHANIE HO LEM, SHELLEY SMALL LEGS and STAN KNOWLTON, using their powers as directors of PIC, acted in concert with each other and with the Defendants, KERRY SCOTT, and EDWIN YELLOW HORN, to plan and approve the above acts on behalf of PIC and execute documents on behalf of PIC in furtherance of the above acts.

Gowlings was involved in advising on and carrying out transactions involving PIC and PEC so challenges to these activities may be squarely within advice given by them to PIC and PEC through Mr. McMullen.

24. The Defendant, DALE MCMULLEN, STEPHANIE HO LEM, STAN KNOWLTON, KERRY SCOTT, and EDWIN YELLOW HORN, using their powers as directors of PEC, acted in concert with each other and with the Defendant, SHLLEY SMALL LEGS, to plan

the above acts on behalf of PEC and execute documents on behalf of PEC in furtherance of the above acts.

As discussed immediately above.

25. The Defendants, STAN KNOWLTON, KERRY SCOTT and JORDIE PROVOST assisted the conspiracy by acting as the plaintiffs, petitioners or applicants in the proceedings illegally maintained by PIC and PEC.

[139] The damages sought by the Nation include:

32. Injury to the Plaintiffs did in fact result from the above conduct, which injury includes, but is not limited to:

(a) Loss of monies wrongfully taken from Oldman Hydro;

(b) Loss of monies improperly paid as salaries, fees, bonuses, severance packages or otherwise to the Defendants;

(c) Loss of monies owing by PEC to PIC, and by PIC to the Piikani Trust, and expended for purposes other than in accordance with the specific purposes for which said monies were advanced, or paid to the Defendants or others in preference over PIC and the Piikani Trust when the Defendants knew, or ought to have known, that PIC and PEC were insolvent or on the eve of insolvency;

(d) Loss of share value;

(e) The cost of defending litigation maintained by the Defendants, PIC, and PEC.

(f) The cost of funding the Piikani Nation Removal Appeals Board to hear litigation maintained by the Defendants, PIC, and PEC;

(g) The cost of investigating the activities of the Defendants, including the cost of remunerating the Investigator of PIC, and the Conservator of PEC; and

(h) The cost of insolvency proceedings involving PIC and PEC, including the future cost of remunerating any Liquidator, Receiver or Receiver and

Manager of PIC and any Receiver or Receiver and Manager of PEC.

[140] It can easily be seen how these damages relate to the allegations in the Statement of Claim and which ones relate to matters in which Gowlings were involved or gave advice to Mr. McMullen.

[141] Mr. McMullen claims to be entitled to indemnification by PIC as a result of an indemnification agreement drafted by Gowlings. Mr. McMullen says he obtained legal advice from Gowlings on that agreement. He has an indemnification agreement from the Nation relating to claims made against him while acting as a director of PIC.

[142] While Mr. McMullen is not being sued by PIC or PEC, and the claim against him by the Nation (PIC's sole shareholder) is not expressly a derivative action, it is unclear at this stage of the proceedings as to the legal foundation for a shareholder's claims for breach of fiduciary duty, negligence, and other wrongs outside of a derivative action.

[143] In any event, if the shareholder has a direct claim against directors and officers outside of derivative proceedings, it would be surprising if the shareholder might have a better claim against the directors and officers than would the corporation itself. And in any event, the Nation appears to have given him indemnification against some claims.

[144] It is thus hard to see that Gowlings can properly be acting against Mr. McMullen in an action being defended partly on the basis that Mr. McMullen is entitled to indemnification under an indemnity agreement drafted by Gowlings and on which they presumably advised both Mr. McMullen and PIC.

[145] Of course I make these comments without hearing Gowlings' side of this. They made no attempt to get into these allegations. The Navigant Report is controversial in itself and has taken on a life of its own in Action 0601. None of the allegations in that action against Raymond James and Liliana Kostic (some of which have been repeated in this application through Mr. McMullen's affidavits) have been proven and that lawsuit is being vigorously defended. Ms. Kostic has her own claim against the Nation for wrongful termination of her consulting agreement with them. None of my comments in this case have any bearing on those actions.

[146] Based on Mr. McMullen's information, I am satisfied that Gowlings, through Ms. Hanert and her representation of the Nation in this action, is seeking to challenge the validity of some of the advice they gave Mr. McMullen, PIC, and PEC during the critical period 2005-2008. I cannot see how they can properly do that.

[147] Mr. McMullen's duties to PIC and PEC are partly governed by the provisions of the *Canada Business Corporations Act*. As discussed above, the CBCA requires that directors act in the best interests of the corporation. A possible defence to any action against a director that they failed to act with care, diligence and skill is that they had received legal advice.

[148] It seems to me that key issues in this lawsuit may turn on what advice Mr. McMullen received and from whom. He claims to have received advice from Gowlings on most of the issues raised against him.

[149] An analogy would be a new board of directors coming in to a corporation that has long been a law firm's client. The old directors are gone, and the key employees are all terminated. The new board of directors then instructs the lawyers to sue the former directors, officers, and key employees for many of the acts they did using the law firm to carry out the transactions and for advice on them.

[150] The lawyers involved in the transactions and advice would undoubtedly have to be witnesses at trial if any of the former directors sought to rely on advice given.

[151] Gowlings says that the answer to that is that all of the lawyers from Gowlings who were involved with the Nation, PIC, PEC, and Mr. McMullen are long gone. If any of them needs to testify at trial, Ms. Hanert would involve counsel from another firm to lead their evidence or cross-examine them.

[152] I do not see how that solves the problem. I do not know how that gets around the basic problem raised by ***Brookville*** and so succinctly stated by Justice Devlin:

> A lawyer may not act for a new client to undermine work they have done for a former client.

[153] I do not think that a law firm entirely sheds its past and its past conflicts when it sheds lawyers who were part of its past, or those lawyers leave. The firm remains and work done by its lawyers, present or past, are part of its history. Regardless of where the lawyers who performed the work are, the appearance is still there: the law firm is turning on its former client.

[154] This goes right back to the competing values describe in ***MacDonald Estate***, the first of which is to maintain the high standards of the legal profession and the integrity of our system of justice.

[155] Public confidence in the legal profession is very important for our system of justice. That is enhanced by the lawyers' duty of loyalty, as discussed in ***Neil*** and ***Brookville***.

[156] The second of the values in ***MacDonald Estate*** is the client's right to counsel of their choice. That is a very important right, especially in criminal cases where the client's liberty is at stake. Civil litigation too can have existential consequences to the participants. However here, Gowlings was Ms. Hanert's choice, not the Nation's. After Walsh Wilkins could no longer act, the Nation was referred to Mr. Beeman and Ms. Hanert at Heenan Blaikie. After it broke apart, the Nation maintained its relationship with Ms. Hanert and followed her to McMillan, and in 2018 to Gowlings. She is their choice of counsel. That said, I do not see that this is a factor that plays strongly here,

[157] It is to some extent related to the third value: lawyers' mobility. I see this as the least important of the three. It is probably the most important to lawyers, but the least important to their clients. Lawyers cannot require that their clients follow them when they change firms. When client's follow, it shows that the connection between the client and the lawyer is stronger than the connection with the firm.

[158] It seems to me that the first value, preserving high standards of the legal profession, overwhelms the other two.

[159] My conclusion is reinforced by several other factors. Mr. McMullen raised this immediately following Ms. Hanert's move to Gowlings. This is not a situation where Mr. McMullen could be accused of lying in the weeds.

[160] Second, the grounds raised by Mr. McMullen and supported by the evidence he has provided, are legitimate concerns and the application does not have any appearance of being strategic. Mr. McMullen has in my view legitimate concerns and raised them in a timely way.

[161] Third, any prejudice to the Nation in having to instruct new counsel is minimize by the status of the litigation. This is not a situation where the matter is on the eve of trial or during the trial itself. If things were further along, it might be possible to consider whether involving independent counsel to deal with Gowlings-related issues could be a solution. Of course, by that time the issues would be narrowed and the details as to exactly what the Nation is targeting would be known.

[162] But questioning has not even started. It is not clear what stage record production is at and there is as I understand it, an issue as to the availability of records for PIC and PEC dating back to the relevant years.

Conclusion

[163] I agree with Mr. McMullen that Ms. Hanert's move to Gowlings has placed that firm in a conflict which can only be appropriately dealt with at this stage of the lawsuit by disqualifying the firm from acting against Mr. McMullen.

[164] While Mr. McMullen seeks to have Ms. Hanert disqualified along with the firm, I do not see any basis for her personal disqualification from the file. Her uncontroverted evidence was that she had no access to Gowlings' files as they had created appropriate walls around them. Even if she did have access, there is nothing confidential there, as Mr. McMullen could not have had "confidences" from PIC or PEC.

[165] Accordingly, in the event that Ms. Hanert left Gowlings, I see no reason why the Nation could not continue have her act as their counsel if they so choose.

[166] I make no comment as to whether Gowlings is conflicted in any of the ongoing proceedings in Federal Court involving Mr. McMullen and the Nation. I do not know if any of those proceedings are sufficiently related to the work done by Gowlings for PIC and PEC to have them disqualified. That will have to be determined in Federal Court.

[167] My conclusion that Mr. McMullen was a "near client" of Gowlings during his representation of them likely means that Mr. McMullen should have full access to Gowlings' files for matters they were engaged on during his tenure as managing director and CEO, as the contents of their files and the advice they gave on various matters may be key to his defences on some of the allegations against him.

Heard on the 15-17th days of April, 2024.
Dated at the City of Calgary, Alberta this 5th day of July, 2024.

Robert A. Graesser
J.C.K.B.A.

Appearances:

Dale McMullen, Self-Represented Litigant
for the Applicants
Carsten Jensen KC, Jensen Shawa Solomon Duguid Hawkes LLP
for the Respondent Gowling WLB

Corrigendum of the Reasons for Decision
of
The Honourable Justice Robert A. Graesser

A Corrigendum was issued to correct the spelling of counsel's name and the spelling of the Law firm.