Court of King's Bench of Alberta

Citation: Piikani v McMullen, 2024 ABKB 575

Date:20241001
Docket: 1001 10326, 1101 11127
Registry: Calgary

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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

Decision on Consequences for Contempt
of the
Honourable Justice Robert A. Graesser

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Introduction

[1] In *Piikani Nation v McMullen*, 2024 ABKB 264, I found Dale McMullen guilty of contempt on four separate but related matters:

> [126] The Nation has proven beyond a reasonable doubt that Mr. McMullen is guilty of the following contempts of court:
>
> 1. Failing to attend for cross-examination pursuant to ACJ Rooke's April 15, 2019, Order;
> 2. Failing to turn over to JSS Barristers, solicitors for the Nation, records in his possession or control including the Navigant Report and the Machida Memo, pursuant to ACJ Rooke's June 12, 2014, Order;
> 3. Using the Navigant Report contrary to the June 2014 Order in the July 2019 Gowlings disqualification application; and
> 4. Using the Machida Memo in his November 18, 2018, affidavit in support of his Gowlings disqualification application.

[2] For the purposes of the application, I had severed the consequences of any contempt from my decision on the merits of the Nation's application. Having found Mr. McMullen guilty of contempt, I directed the parties to provide me with written submissions. Mr. McMullen requested that there be an oral hearing.

[3] Mr. Jensen's brief on behalf of the Nation was filed on June 6, 2024. Mr. McMullen filed a response brief on June 21, 2024. The Nation filed a reply on July 3, 2024.

[4] Following the Nation's reply brief, Mr. McMullen wrote me on July 26. His letter sought leave to "reargue, vary, and set aside Contempt Decision" as well as leave to file "required materials and invoke entitlement to access records and save harmless relief based on Indemnity Agreement, Fresh Evidence."

[5] Mr. McMullen's letter referenced Rule 9.12 (the "Slip Rule") and Rule 9.15 ("Varying and Discharging Judgments and Orders"). The formal order from my contempt finding was filed on August 6, 2024, such that I could only consider an application under Rule 9.13(b) if "the Court is satisfied there is good reason to do so." My decision on contempt was issued on May 7, 2024, well outside the time specified in Rule 9.15(2), such that permitting an application is entirely discretionary.

[6] The new information referenced in Mr. McMullen's letter appears to relate to findings in my decision in *Piikani v McMullen*, 2024 ABKB 414, Mr. McMullen's application to have Gowlings WLG removed from acting for the Plaintiffs in this lawsuit.

[7] He submitted that the Court in imposing sanctions must consider whether his contempt has been purged, referencing proceedings involving him in Federal Court where Gowlings is also acting for the Nation against him. He complains about Ms. Hanert "blatantly flouting this Court's decision", referencing the 2014 decisions of ACJ Rooke at the centre of this application (the "2014 Restricted Access Orders").

[8] Mr. McMullen accuses Gowlings and Ms. Hanert of acting in bad faith and dishonestly.

[9] For fresh evidence, Mr. McMullen refers to the "missing $8.5-$10 million" that he alleges was wrongly taken by former Chiefs and Council from the Piikani Trust while he was CEO of Piikani Investment Corporation and Piikani Energy Corporation.

[10] Mr. McMullen complains that Gowlings permitted or consented to Liliana Kostic relying on the Navigant Report and the Machida Memo (the use of which by Mr. McMullen resulted in my contempt findings against him).

[11] Mr. McMullen again raises the *Charter* and the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP").

[12] By letter to the parties dated July 29, 2024, I summarily dismissed Mr. McMullen's informal application. In the context of this lawsuit, along with the many other lawsuits involving Mr. McMullen, Ms. Kostic, and the Piikani Nation that I am case managing, a fiat request process is required for any applications.

[13] In my view, Mr. McMullen's request raised nothing relevant that had any prospect of success in the task remaining to me: sanctioning him for the contempts of court I have found him guilty of.

[14] I directed that the sanctions hearing proceed, and it was set for hearing on September 5, 2024.

Positions of Parties

[15] The Nation's position is that Mr. McMullen's statement of defence in this action should be dismissed and that damages against Mr. McMullen be assessed at $1, with "full costs of dealing with Mr. McMullen's contempt and seeking and obtaining this Order". They also seek an order directing that Mr. McMullen be barred from seeking leave for any further Applications or Actions until such time as he has purged his contempt and paid all costs awards to any of the parties to this action, Action 1101-11127, or to any of their counsel.

[16] The Nation argues that Mr. McMullen remains in contempt under the 2014 Restricted Access Orders, and that he has taken no steps to rectify that situation.

[17] A number of cases on sanctions for contempt of court in civil litigation were cited:

Envacon Inc v 829693 Alberta Ltd, 2018 ABCA 313;

Mella v 336239 Alberta Ltd (Dave's Diesel Repair), 2016 ABCA 226;

B(RM) v B(DT), 2019 ABQB 826;

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Sidorsky v. CFCN Communications Ltd., 1995 CanLII 9022 (AB QB);

Van De Veen v. Van De Veen, 2001 ABQB 753;

McDonald Estate, 2012 ABQB 704;

Precision Forest Industries Ltd. v. Cox, 2013 ABQB 524;

Trigg v. Lee-Knight, 2009 ABCA 224;

Bourque v Tensfeldt, 2017 ABQB 519;

Koerner v. Capital Health Authority, 2011 ABQB 191;

Security Bancorp Inc. v. Faria, 2010 ABQB 61;

Hover v. Metropolitan Life Insurance Company, 1999 ABCA 123;

Bains Engineering Corporation v. 734560 Alberta Ltd., 2004 ABQB 780;

S.W. v. K.T., 2005 ABQB 298;

Kin Franchising Ltd. v. Donco Limited, 1993 ABCA 7;

Westwood Community League v Swish One Infill General Partner Inc., 2021 ABCA 218;

Hi-Way Service Inc. v. Olson, 2000 ABCA 294;

Vaillancourt v Carter, 2016 ABQB 492;

Capital Estate Planning Corporation v. Lynch, 2011 ABCA 22;

Sharp v Royal Mutual Funds Inc., 2020 BCSC 1781;

Dreco Energy Services Ltd. v. Wenzel, 2005 ABCA 185; and

Zelazo v. Masson, 1992 CanLII 6171 (ABQB.;

[18] In his brief, Mr. McMullen submitted that he should be permitted to file an affidavit to address this phase of the contempt proceedings, that an oral hearing be conducted, and that Mr. McMullen's application to recuse me from case managing these matters should be heard first.

[19] He states that he has a right to all *Charter* protected rights and further rights as set out in UNDRIP.

[20] Mr. McMullen also says that as this matter is complex and he is a self-represented party, he cannot adequately reply to this application and that counsel should be appointed for him. He maintains that he is entitled to rely on his Indemnity Agreement with the Nation and complains that his access to the Indemnity Agreement is being blocked by Ms. Hanert and Gowlings.

[21] Mr. McMullen's brief raises four issues:

1. Should he be permitted to file a further affidavit in relation to the "sanctions phase";
2. What are the appropriate sanctions for the four findings of contempt;
3. Should the contempt findings be permanently stayed; and

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4. Should the 2014 Restricted Access Orders be set aside on the basis of fraud and dishonesty.

1. Further affidavit

[22] This was dealt with above in the context of Mr. McMullen's letter to me of July 26. I saw no need or benefit from further evidence. The July 26 letter described the need for further evidence to "set aside, reargue and vary my contempt decision". The application before me is to determine sanctions. He treats my decision on Gowlings' disqualification as a basis for the rehearing. I saw no merit to that.

[23] Mr. McMullen's brief raises use by others of the Navigant Report, which is of course at the heart of my contempt findings against him. The fact that others may be in contempt of court as well as Mr. McMullen is irrelevant to this proceeding. His arguments are similar to those from convicted speeders: I shouldn't be punished because of all the other speeders who have not been caught or charged. There is no merit to those arguments. Each matter stands on its own merits.

[24] He complains about use of the Navigant report by the Nation in various proceedings in Federal Court brought against it by Ms. Kostic, as well as by the Nation in actions brought it by Mr. McMullen in Federal Court.

[25] ACJ Rooke determined in the first 2014 Restricted Access Order that the Nation owned privilege to the Navigant Report and other records. Ms. Kostic unsuccessfully appealed that decision. The Nation is free to use these records as it sees fit. Others are not, especially in the face of clear court orders restricting access and use.

[26] The fact that the Nation might have waived privilege since Mr. McMullen's prohibited use of them (which I emphasize is only Mr. McMullen's argument and not something that has ever been considered by any court as far as I know) is irrelevant to these proceedings. Waiver may have been alleged, but it has never been proven. In any event, use of the Navigant Report and other privileged documents by the Nation or by Ms. Kostic or by others does not purge Mr. McMullen's contempt.

2. Sanctions

[27] I will deal with this after considering Mr. McMullen's other issues.

3. Permanent Stay

[28] Mr. McMullen provides absolutely no reason or justification for the contempt findings to be stayed. He does not accept my findings and wishes to revisit my decision as well as the 2014 Restricted Access Orders. He does not seek as stay of my contempt findings pending any appeal to the Alberta Court of Appeal and references a permanent stay.

[29] His objections to the contempt proceedings as being inappropriate and disproportionate to his behaviours might be relevant to sanctions, but there is no reason at all to permanently stay my findings. Mr. McMullen is free to pursue an appeal in the Alberta Court of Appeal. To date, to my knowledge, there has been no application for any stays in that Court. I refuse this remedy.

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4. Setting aside the 2014 Restricted Access Orders be set aside on the basis of fraud and dishonesty.

[30] This ship sailed a long time ago. Mr. McMullen had the opportunity to appeal the September 2014 Restricted Access Order. He has had nearly 10 years since then to pursue any allegations of fraud and dishonesty. Instead, he simply throws these unsupported allegations into his arguments from time to time. I will waste no time on these frivolous and vexatious issues.

[31] I will now return to sanctions.

Mr. McMullen's specific responses

Failing to appear for cross-examination

[32] Regarding his failure to appear for cross-examination, Mr. McMullen essentially repeats the arguments he made against the application in the first place and he maintains that it was not unreasonable for him to refuse to attend to be cross-examined by someone from JSS Barristers after he had sought to have JSS Barristers removed from the matter. ACJ Rooke specifically required Mr. McMullen to attend to be questioned by JSS Barristers on behalf of the Nation, while at the same time dealing with a separate process for Mr. McMullen to pursue his disqualification claim against JSS (which was unsuccessful).

[33] This is an example of Mr. McMullen simply ignoring Court orders or directions with which he disagrees.

[34] At the oral hearing, Mr. McMullen submitted a letter from JSS to him, which he says was JSS's agreement to postpone the questioning. That letter was before me on the application and was clearly a temporary agreement to accommodate Mr. McMullen's schedule. He uses this letter out of context, and it is not "fresh evidence" of anything.

[35] He claims this issue is an abuse of process as it was in response to his application to conflict out Gowlings. He says the contempt proceedings for failing to attend are an "extreme overreach". That will be considered in the context of sanctions.

[36] He also says that his refusal to attend was the result of his lack of legal representation and unfamiliarity with legal processes as he has been told that he should have applied for a stay because of his concerns with JSS. In fact, ACJ Rooke had refused to delay cross-examination because of these concerns. Only ACJ could have revisited the issue and the likelihood of him doing so was in my view zero. Mr. McMullen's written refusal to attend for questioning while JSS was acting speaks for itself.

[37] Mr. McMullen also argues that it is mitigating that the Court of Appeal granted a stay of proceedings relating to the application in *Piikani Nation v McMullen*, 2020 ABCA 183. Mr. McMullen was already in contempt before that decision was issued.

Failing to return privileged records to the Nation

[38] As for failing to turn over the various records referenced in ACJ Rooke's 2014 Orders, Mr. McMullen referenced a letter from his former lawyer, Gabor Zinner (who acted for him on the 2014 applications) dated November 19, 2014. In the letter, Mr. Zinner "assures (JSS) that neither Mr. McMullen nor this office has any intention of disregarding a court order". Mr. Zinner referenced the September 2014 Order, which provided that Mr. McMullen could make an

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application to clarify "regarding what records need to be returned or destroyed and which records are exempt from the ambit of the Restricted Access Court Order".

[39] Mr. Zinner noted that he had sent ACJ Rooke an unfiled application and affidavit on October 16, 2014 to seek such clarification. He says in the letter he had not yet heard back from ACJ Rooke.

[40] He states that in view of "all the orders taken together" are being complied with.

[41] Mr. McMullen's point is that based on Mr. Zinner's letter, there were "absolutely no attempts by McMullen to intentionally breach or otherwise disobey or fail to comply with the 2014 Orders".

[42] His argument appears to be that Mr. Zinner's unfiled application prepared on October 16, 2014 and sent to ACJ Rooke that day operated as a form of stay of the Restricted Access Orders, as he was seeking to vary them in some fashion. Mr. McMullen says that Mr. Zinner never heard back from ACJ Rooke about setting a date for hearing the application or even if it would be heard. That was late 2014. Nothing was apparently done by ACJ Rooke on this issue.

[43] Mr. Zinner has not acted for Mr. McMullen for a number of years now. There is no information as to any follow up by Mr. Zinner or Mr. McMullen on this application request in the last nearly 10 years.

[44] It is trite law that orders speak from pronouncement. Stays only occur when specifically granted. An appeal or an application to vary does not constitute a stay.

[45] This argument has absolutely no bearing on Mr. McMullen's contempt. Mr. Zinner's representation to counsel for the Nation was that neither he nor Mr. McMullen had any intention of disregarding a court order, and that the 25 boxes of documents received from Mr. McMullen's former solicitors remained safely stored in his office, "unseen by anyone".

[46] Mr. McMullen's belief that there was no contempt at that stage does not help him. He would not be in this difficulty if the documents, including the Navigant Report, had simply stayed in the boxes in Mr. Zinner's office, unseen by anyone and unused.

[47] Mr. Zinner's letter and the request to ACJ Rooke that he set down an application might mitigate the mere retention in Mr. Zinner's office of the records. Those steps by Mr. Zinner cannot possibly be interpreted as entitling either Mr. Zinner or Mr. McMullen to make any use whatsoever of the Restricted Access documents without first getting permission to do so.

[48] It is clear that the privileged records were used without permission.

[49] As for retaining the privileged records themselves, it would clearly have been obvious to anyone, lay person or not, that the bringing of a contempt application would have put an end to any reasonable belief that it was alright to retain the documents sealed an unused. Mr. McMullen did nothing in the face of the contempt application to comply with the 2014 Restricted Access Orders or to purge his contempt in that regard.

[50] It is difficult to separate what is in the evidence before me and what was simply submitted in argument. During the application, Mr. McMullen repeated something he has said earlier: that Ms. Kostic obtained the Navigant report from Mr. Zinner's office while she was working either for Mr. Zinner or working on her own litigation against the Nation out of Mr. Zinner's office.

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[51] If that is true, that would demonstrate that Mr. Zinner's representation that the documents were safely stored was inaccurate and his failure to return the records as ordered has caused incredible harm to the Nation. That is, however, for another day.

[52] In any event, I accept that Mr. Zinner's position as expressed in his letter of November 19, 2014 might mitigate to some extent Mr. McMullen's failure to immediately return the records as ordered. It does not excuse Mr. McMullen's contempt as Mr. Zinner was clearly wrong in his position. Mr. Zinner should have sought a stay rather than purport to create one himself.

[53] It is a factor on consequences that the Nation appears to have taken no steps to enforce the return provisions until it became apparent that Mr. McMullen was using the Navigant Report and other privileged records in contravention of ACJ Rooke's orders.

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Using the Restricted Documents for the Gowlings Disqualification Application

[54] Mr. McMullen says that my finding that he relied on the Navigant Report in the Gowlings disqualification application is a "major error". Before commenting on this argument, I note that this is the sort of "error" that would not fall within the scope of the Slip Rule. There is a formal order from the contempt finding such that his remedy (if any) on major errors should be at the Court of Appeal.

[55] For this, Mr. McMullen appears to rely on the fact that he sought leave to file the materials for that application, and that any references to the Navigant Report were "authorized and approved by ACJ Rooke in compliance with the September 14, 2014 Order". He makes the same argument regarding the Machida Memo.

[56] The evidence of ACJ Rooke's authorization and approval of his use of these records is, according to Mr. McMullen, the Order of April 15, 2019 by ACJ which granted leave "to file the Application and Affidavit of Dale McMullen sworn November 8, 2018." The Affidavit was directed to be sealed in accordance with the 2014 Restricted Access Orders.

[57] The Notice of Application filed in accordance with the April 15 Order describes the remedies sought by Mr. McMullen, including:

> 1. Permitting McMullen to rely on the evidence contained in his affidavit to be filed concurrently in accordance with the terms and conditions of (the 2014 Restricted Access Orders)".

[58] The April 15 Order does not give Mr. McMullen any permission to use the Navigant Report or other privileged documents in any way. It permits him to make an application and to file an affidavit in support of that application, which affidavit was required to be sealed.

[59] Mr. McMullen had sworn the affidavit and provided it to ACJ Rooke and counsel for the Nation in November 2018. Before doing anything at all with the Navigant Report and other privileged documents, or even making an application to do so, Mr. McMullen was required by the 2014 Restricted Access Orders to seek the Nation's permission. He has never done so and has consistently bypassed that requirement.

[60] The fact that the 2018 Affidavit does not appear to have been widely circulated is something that is relevant to consequences, but not to being in contempt in the first place.

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Using the Machida Memo

[61] Mr. McMullen's argument on the use of the Machida Memo is the same as the argument relating to the Navigant Report. It is without merit. Mr. McMullen suggests that it is mitigating that I allowed him to refer to the Machida Memo in argument. He was found guilty of contempt for what he did regarding the Navigant Report and the Machida Memo in November 2018 and May 2019, not in court in 2024. No mitigation is warranted in that regard.

[62] Mr. McMullen's brief concludes with him repeating his submission that I should be recused and that application should proceed before the sanctions hearing.

[63] He seeks orders setting aside the contempt finding or permanently staying them.

[64] In support of his arguments, Mr. McMullen cited a number of authorities:

Stokes v Heck, 2023 ABKB 58;

Olson v Olson, 2022 ABQB 356;

Piikani Nation v McMullen, 2020 ABCA 183;

Dreco Energy Services Ltd. v. Wenzel, 2004 ABQB 517;

Humphreys v. Trebilcock, 2017 ABCA 116;

Ernst & Young Inc. v. Central Guaranty Trust Company, 2006 ABCA 337;

Hover v. Metropolitan Life Insurance Company, 1999 ABCA 123; and

Carey v. Laiken, 2015 SCC 17 (CanLII), [2015] 2 SCR 79.

Nation's Reply

[65] The Nation's reply states:

> In the Response Brief, Mr. McMullen not only fails to address the nature of the sanctions sought by the Nation but instead, reiterates the same arguments, reiterates his allegation that the Court is to blame, reiterates his collateral attacks on the 2014 Orders, deliberately ignores the leave process established by Justice Rooke in 2014, denies any breaches of the Orders, and essentially reargues the Contempt decision.

[66] In my view, that is a fair summary.

[67] The Nation cited two cases in its reply brief:

Chaitas v. Greasley, 2019 ONSC 1158; and

Carey v. Laiken, 2015 SCC 17 (CanLII), [2015] 2 SCR 79.

Discussion

[68] Having found Mr. McMullen guilty of contempt, my sole task on this application is to determine the appropriate sanction. As stated in Rule 10.53, the Court has a very broad array of penalties. The remedy sought by the Nation, striking Mr. McMullen's statement of defence, is one of the potential sanctions.

[69] I was provided with a large number of cases by both parties. I do not intend to review them in any detail. I am already familiar with most of them, having dealt with civil contempt fairly recently in *Ford v Jivraj*, 2023 ABKB 92 and 2023 ABKB 331.

[70] The leading case is *Carey v Laiken*, 2015 SCC 17. It deals extensively with the mental element in civil contempt.

[71] *Envacon Inc v 829693 Alberta Ltd*, 2018 ABCA 313 is instructive and is of course binding authority from the Alberta Court of Appeal. They stated at para 65:

> [65] A penalty for contempt performs a number of functions. First, it upholds the authority of the court by punishing the contemnor and deterring others. Its rationale is grounded in the public interest that court orders should be obeyed. Second, in some instances the penalty provides an incentive for belated compliance, because the contemnor may seek a reduction or discharge of the penalty if he subsequently purges his contempt by complying with the order: see *JSC BTA Bank v Solodchenko*, [2012] 1WLR 350 at para 45.

[72] Leading cases on sanctions in Alberta include *McDonald Estate*, 2012 ABQB 704 and *Precision Forest Industries Ltd v Cox*, 2013 ABQB 524.

[73] Mr. McMullen's cases are of little assistance to him. In *Stokes v Heck*, 2023 ABKB 58, the judge concluded on the facts of that case that his primary purpose in sanctioning Mr. Heck was to get him to comply with the order he had breached. Here, it is too late for that. But for turning over the records to the Nation, the damage is done. Both elements of sanctions for contempt are at play here: ensuring that Mr. McMullen complies with orders in the future, and to demonstrate to the public that people who disobey court orders should not simply be given a slap on the wrist.

[74] *Law Society of Alberta v Beaver*, 2021 ABCA 163 discusses the appropriate process for imposing sanctions for contempt: considering the severity of the contempt, and then balancing aggravating and mitigating factors to arrive at a reasonable sanction.

[75] I see no relevance to Mr. McMullen's complaints that his *Charter* and *UNDRIP* rights have been violated. No specific allegations have been made.

[76] Mr. McMullen references *Dreco Energy Systems v Wenzel*, 2004 ABQB 517 in characterizing the Nation's argued-for remedy of striking his pleadings as "excessive and hardball". I recognize that any sanctions must be proportionate to the offensive conduct and its impact on the other party.

[77] *Humphreys v Trebilcock*, 2017 ABCA 116 is a dismissal for delay case and has no relevance here. Mr. McMullen's characterization of this application as a "stunt" is simply offensive and demonstrates his refusal to accept any responsibility for his actions and the absence of any sincere remorse.

[78] Mr. McMullen's reference to *International Capital Corp v Schafer*, 2010 SKCA 48 exhorting the Court to be "sensitive to the impact of claims that put in question the professional, business or personal reputation of the defendant" is taken out of context as that was a delay claim. Here, it is Mr. McMullen himself who has put his reputation in question by breaching court orders.

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[79] Mr. McMullen's arguments do not diminish the fact that Mr. McMullen deliberately defied the 2014 Restricted Access Orders and that he deliberately refused to attend for cross-examination when ordered to do so.

[80] Mr. McMullen has done nothing to purge his contempt. He accepts no responsibility for his actions, and blames everyone from his former counsel, the Nation, the Nation's lawyers, ACJ Rooke, to myself.

[81] At the hearing, he offered an apology of sorts, saying that he did not intend to breach any court orders.

[82] Remedies for contempt are to achieve two purposes. Firstly, to ensure respect for the Courts and compliance with the Courts' orders and directions. Secondly, to punish the offender. A sanction may satisfy both purposes.

[83] A key consideration is the severity of the contempt. Failing to attend for questioning or cross-examination is unfortunately a fairly common occurrence when questioning is set up by giving a formal notice and serving conduct money. The consequences are usually an order to attend at a specified time, and to pay thrown away costs and the costs of the application. Failing to attend a court-ordered questioning or cross-examination is less common and is clearly an affront to the Court. It wastes court time, as time will have been taken in obtaining the order it the first place, and then dealing with the breach.

[84] Here, Mr. McMullen purged his contempt by attending at a much later date. That does not excuse the contempt but circumstances like that generally warrant cost consequences.

[85] Failing to obey court orders regarding privileged documents is uncommon. Privilege is one of the fundamental hallmarks of the solicitor client relationship. Clients are entitled to be assured that what they tell their lawyer remains confidential and neither the client nor the lawyer can be compelled to disclose those communications except in extremely limited circumstances. Lawyers go to great lengths to protect and preserve privilege, and the importance of this has been recognized in legions of cases in all courts. Solicitor and client privilege is what applies to the Machida Memo and other communications between the Nation and its solicitors.

[86] The Navigant Report is covered by litigation privilege, which is a branch of solicitor and client privilege. Lawyers are entitled to retain experts and obtain records and information from many sources without having to disclose to the other side that they have done this, and without disclosing what they have obtained. The use, if any, of materials covered by litigation privilege is in the sole control of the client.

[87] Here, the Nation has gone to great lengths to protect its solicitor and client privilege and its litigation privilege. They are not required to demonstrate any particular harm or damage they may suffer by the misuse by others of their privileged materials. Any use at all is a serious matter. Specific harm or the risk of specific harm may aggravate any penalties but use by itself is something that must be strongly condemned.

[88] I enquired of Mr. Jensen as to any actual harm to the Nation as a result of Mr. McMullen's contempt of the 2014 Restricted Access Orders, but he did not offer any information.

[89] Unauthorized use of privileged materials warrants both general deterrence and specific deterrence.

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[90] The Courts in Alberta have punished litigants who have deliberately misused the other party's privileged materials. See for example *Firemaster Oilfield Services Ltd. v. Safety Boss (Canada) (1993) Ltd.*, 2000 ABQB 932

[91] That case did not involve any breaches of court orders.

[92] Here, not only was privileged material misused, it was misused in violation of clear court orders. Mr. McMullen says he didn't intend to breach any court orders, although he continues to attack the validity of the 2014 Restricted Access Orders. He relies on Mr. Zinner's explanation in 2014 for refusing to immediately return the documents to the Nation's lawyer still promised that the documents would not be used. What he fails to admit is that the documents were used, and they were used by him.

[93] Mr. McMullen refers to ACJ Rooke's April 2019 Order allowing him to use a sealed affidavit in support of the Gowlings disqualification application, but the reality is that he should not have had access to the records in the first place and should not have made reference to the contents of the records without first having obtained express permission to do so.

[94] He has consistently ignored the clear requirements of the 2014 Restricted Access Orders as to how to obtain permission to use the records.

Conclusion on sanctions

[95] The extreme sanction for civil contempt is imprisonment. That has been applied only in especially egregious situations such as in *Mella v 336239Alberta Ltd (Dave's Diesel Repair)*, 2016 ABCA 226 (3 months imprisonment). The Nation does not seek imprisonment here, and it would not be an appropriate remedy at this stage, even if they had. Further contemptuous behaviour might engage more drastic measures.

[96] Striking pleadings is likely the next level down from imprisonment. This remedy may have the consequence of dismissing a plaintiff's case, or having judgment entered against a defendant.

[97] Here, since this is a damage claim, striking Mr. McMullen's defence would have the effect of allowing the Nation to proceed to trial on its damage claim. Mr. McMullen would be unable to raise defences to the claim but would have the ability to argue against the nature and level of damages to be awarded against him.

[98] The Nation does not want to go to trial. It does not want to have a damage assessment. Instead, it seeks an order that Mr. McMullen's defence be struck, and that the Nation be awarded only nominal damages of $1. It does not seek costs of the action, but only enhanced costs for these contempt proceedings.

[99] The Nation is undoubtedly taking this approach as a practical remedy. It would be very time consuming and very costly for the Nation to proceed further with an assessment of damages. They might recover large damages; they might not. In any event, they might not collect any of the damages that might be awarded against Mr. McMullen if they were successful on an assessment.

[100] During argument, Mr. McMullen acknowledged that he owes more than $700,000 in costs that have been awarded against him in this action and in Federal Court actions between him and the Nation and others. He described himself as impecunious.

[101] The fact that Mr. McMullen owes so much in unpaid costs makes using costs or any kind of monetary consequence as a penalty pointless. What use would there be in imposing a fine, if it is unlikely to every get paid?

[102] From a specific deterrence perspective, there is little point in simply imposing financial consequences as that essentially does not punish the contemptuous conduct and it would it do nothing to prevent further contempts.

[103] From a general deterrence perspective, what does imposing a meaningless consequence do to ensure that others will obey court orders? Very little if not nothing, I fear.

[104] I am loath to strike pleadings except in the most extreme situations. I am also very reluctant to do so where the claim alleges egregious conduct. Here, a professional accountant has been accused of negligence and breach of trust. There have been no fact findings in this matter, despite the underlying transactions dating back more than 15 years. I do not see that it is appropriate at this stage of the litigation to have a judgment, even a nominal one, rendered against Mr. McMullen in the absence of the Nation having to demonstrate that his conduct as a director of Piikani Investment Corporation and Piikani Energy Corporation was blameworthy. That does not mean that Mr. McMullen is entitled to a trial on the merits in all circumstances. Further misconduct on his part may make more draconian remedies appropriate.

[105] I inquired of Mr. McMullen if he could picture life without this lawsuit hanging over him, and he said that he couldn't, until he had recovered his damages.

[106] That was curious, as Mr. McMullen has no action against the Nation at least in this Court, and he did not counterclaim against the Nation in this action. He is plaintiff in proceedings in Federal Court with which I have limited knowledge but for the fact that he has to date had little success there as plaintiff.

[107] In lieu of striking Mr. McMullen's statement of defence and awarding $1 against him (which would put an end to the litigation but for his potential indemnity claims), I direct that the primary sanction against Mr. McMullen be that he shall not be entitled to any costs of any nature in this action up to the date of this decision. Essentially, the slate is wiped clean for the Nation if it were to discontinue the action. If it chooses to proceed, then Mr. McMullen may pursue costs for steps after the date of this decision.

[108] If the Nation continues on and succeeds, its ability to pursue costs against Mr. McMullen going back to the beginning of the litigation is unimpaired. For Mr. McMullen, however, if the Nation proceeds and loses or for some reason Mr. McMullen becomes entitled to costs, he is not entitled to seek costs in this action for anything done before the date of this decision.

[109] If the Nation elects to proceed with the action, the next step is to schedule Mr. McMullen's striking for delay application, as that was deferred by ACJ Rooke until the contempt and Gowlings disqualification proceedings are concluded.

Purging Contempt

[110] Judges imposing sanctions for contempt are encouraged to discuss the consequences on the sanctions in the event the contemptor purges their contempt. Here, I do not see that purging the contempt should have any consequences. That is not to say that Mr. McMullen should not purge his contempt. He has purged his contempt for failing to attend for cross-examination. He

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cannot purge his contempt for using the Navigant Report and the Machida Memo. He remains in contempt for not delivering the relevant documents to JSS in compliance with the 2014 Restricted Access Orders. He will be in contempt of court until he complies. There should be no reward to him for doing something that should have been done a decade ago.

[111] I do not need to make any further orders in that regard, The 2014 Restricted Access Orders remain in full force and effect. It would be redundant to order that Mr. McMullen comply with them as there is absolutely no doubt that the orders were directed partly at him in the first place.

[112] The most serious aspect of this matter is Mr. McMullen's use of the Navigant Report and the Machida Memo in flagrant violation of the Restricted Access Orders. He never attempted to comply with those orders in the manner required by them.

[113] Mr. McMullen can only expect that any further breaches of the Orders will result in more draconian measures against him.

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Costs

[114] This application by the Nation for contempt against Mr. McMullen is intertwined with Mr. McMullen's application to have Gowlings disqualified from acting against him in this lawsuit. The Nation was successful in having Mr. McMullen found guilty of contempt. Mr. McMullen was successful in having Gowlings removed from the lawsuit.

[115] In the ordinary course, each side would be entitled to costs of their successful application. Contempt findings are regularly accompanied by enhanced cost awards, including solicitor and client costs. Disqualification proceedings usually result in costs in favour of the successful party, but it would be unusual for there to be enhanced costs and rarer yet for there to be solicitor and client costs in applications like that.

[116] Another factor is that Mr. McMullen as a self-represented party is unlikely to recover costs to the same scale as would represented parties. Costs in favour of a self-represented party is highly discretionary.

[117] Both applications were difficult applications. They were hotly contested. They required detailed briefs and reply briefs. The contempt proceedings required two sets of briefs and two court appearances.

[118] In my view, fairness is achieved by setting off Mr. McMullen's costs for disqualifying Gowlings against the Nation's costs for the contempt proceedings (but not the sanctions portion of the proceedings). For the sanction's proceedings, I award the Nation $20,000.00 in costs, which is undoubtedly far less than their solicitor and client costs. That amount represents a rough estimate of Schedule C costs for a half day appeal, which is appropriate because of the application's complexity. Ordinary Schedule C costs for a half day contested application with briefs would be in the range of $3000.00.

[119] I am well aware of the *McAllister v Calgary*, 2021 ABCA 25 line of cases, but in this case using Schedule C accomplishes finality rather than turning the assessment of costs into another battlefield. I also take into account that there is no evidence before me that the Nation took any steps to object to Mr. Zinner's position expressed in his November 2014 letter to ACJ Rooke, or to press for compliance with the document return aspects of the 2014 Restricted

Access Orders, that Mr. McMullen purged his contempt of failing to attend for cross-examination, that the Nation has pointed to no specific harm to it as a result of use of their privileged documents, and that the level of costs awarded against an impecunious person should not be crushing but for the most egregious of circumstances.

[120] I am certainly not trivializing or minimizing Mr. McMullen's various contempts, but he is a "first offender". He should become aware of the "jump" principle applied to sentencings in criminal matters as he considers further steps in any court action that may run afoul of court orders or the *Rules of Court*.

[121] I also note for the record that ACJ Rooke previously ordered that Mr. McMullen is not able to make any applications until he has satisfied outstanding cost awards against him in this action. I need make no further orders in this regard.

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Indemnity Agreement

[122] Mr. McMullen was given indemnity by the Nation for claims arising out him being a director of Piikani Investment Corporation and other Band entities such as Piikani Energy Corporation. His indemnification claims are the subject of his action 1101-11127. Claims for indemnity under that Agreement have already been litigated in this Court. ACJ Rooke deferred indemnification issues until after the trial of this action. That decision has not been set aside or varied.

[123] The Nation agreed to indemnify Mr. McMullen under an Agreement dated as of the 28th of April, 2004. The operative provision of the Agreement is contained in paragraph 1(a):

> To the extent indemnification of the Indemnified Party by the Corporation is permitted by applicable law (including the *Canada Business Corporations Act*), the Band agrees to indemnify and save harmless the Indemnified Party, and his heirs and legal representatives, to the same extent, from and against any and all damages, liabilities, costs, charges or expenses suffered or incurred by the Indemnified Party, and his heirs or legal representatives as a result or by reason of the Indemnified Party having acted in their capacity as a director and/or officer of the Corporation or any of the subsidiaries of the Corporation (each a "Subsidiary") or any of the affiliates of the Corporation (each an "Affiliate" at any time including before the effective date hereof, provided that such damages, liabilities, costs, charges or expenses were not suffered or incurred as a direct result of the fraud, dishonesty or wilful default of the Indemnified Party.

[124] Paragraph 1(b) provides:

> Without limiting the generality of clause 1(a), and to the extent indemnification of the Indemnified Party by the Corporation is permitted by applicable law (including the Canada Business Corporations Act), the Band agrees, to the same extent:
>
> i. To indemnify and save the Indemnified Party harmless from and against all investigation costs, costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by the Indemnified Party in respect of a civil, criminal or administrative action

> or proceedings which the Indemnified Party is made a party by reason of having been a director and/or officer of the Corporation or any Subsidiary or Affiliate if:
>
> A. The Indemnified Party acted honestly and in good faith with a view to the best interests of the Corporation or any Subsidiary or Affiliate as the case may be...

[125] The “Corporation” here is Piikani Investment Corporation.

[126] Mr. McMullen has never accepted ACJ Rooke’s decision deferring consideration of his indemnity claims. He continues to raise his entitlement to indemnity in this Court and in Federal Court proceedings. Along the way, he has been ordered to pay many hundreds of thousands of dollars to opposing parties as a result of his unsuccessful applications and appeals. In argument, Mr. McMullen referred to the cost awards against him as being in excess of $700,000.00 and the fact that he is impecunious.

[127] It is rare for a party to be able to re-litigate an issue. That is so for good reason: certainty and finality. What would be the point of getting a court decision against someone if the loser can simply keep going back to court to get the decision changed? There are appeal procedures, but once those are exhausted a decision is final. Here, appeal processes from the earlier decisions have long since been exhausted.

[128] Assuming without deciding the point that I could in some fashion revisit these orders, there is no basis here for me to vary or set them aside and open the doors for Mr. McMullen to begin pursuing indemnification claims. This action has not been concluded such that any indemnification rights have likely not been triggered.

[129] It is undecided as to whether the indemnification agreement includes a duty to defend. That issue has been extensively litigated in the Piikani v Kostic matter, resulting in a similar order: indemnification to be dealt with following trial.

[130] In looking at the Indemnification Agreement here, it is by no means clear that there is a duty to defend in Mr. McMullen’s favour.

[131] Whether the Indemnity Agreement covers any costs or losses suffered by Mr. McMullen in this or any other lawsuit has not been determined.

[132] The Nation seeks remedies on this application for contempt and its consequences that would preclude Mr. McMullen from pursuing indemnification for anything in this action under the terms of the Indemnity Agreement.

[133] That, in my view, goes too far and would be disproportionate to the nature of Mr. McMullen’s acts of contempt. There is no doubt that he has been a very difficult litigant. He has, over the last 14 years, exhibited a pattern of not accepting court decisions, appealing all rulings considered unfavourable to him, seeking to involve many other people and entities in this litigation, and seeking to sue or disqualify all of the lawyers who have acted against him in this litigation, and even some who have acted for him.

[134] Being a difficult litigant, however, does not disentitle the litigant from a reasonable opportunity to meet the case against him. Mr. McMullen has been case managed on terms similar to those used with vexatious litigators, and that will continue.

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[135] There has never been any adjudication of the merits of the Nation's claims against him. There are serious issues to be tried in the Nation's action against Mr. McMullen, and whether his Indemnity Agreement is an answer to some or all of their claims. It is discouraging to all parties and to the Court that questioning has not yet occurred in this action, which is now in its 15th year.

[136] At this point, the Nation will have to decide whether it wishes to pursue its claims in this action further. It has the option of discontinuing the action with no liability to Mr. McMullen for costs in this action to date. That does not foreclose Mr. McMullen from pursuing his claim under the Indemnity Agreement as to its scope and applicability.

[137] If the Nation discontinues the action, there will need to be a case management conference to determine what steps, if any, may be taken by Mr. McMullen under the Indemnity Agreement.

[138] If the Nation does not discontinue that action, the next step will be to have a case management conference to schedule Mr. McMullan's striking for delay application, which was deferred by ACJ Rooke to the conclusion of this application and the Gowlings disqualification application.

[139] Mr. McMullen appears to be raising indemnification issues in Federal Court and in the Alberta Court of Appeal. To the extent that there is any confusion or misunderstanding as to what is happening in this court concerning indemnification, the answer is nothing other than what has been discussed above. This Court will not consider indemnification until this action is concluded.

[140] ACJ Rooke's decision that indemnification issues are deferred to the conclusion of this lawsuit remains in full force and effect and there is no live proceeding in this Court to open the issue up in any way whatsoever. Mr. McMullen complaining about ACJ Rooke's order does not constitute an application to open up the issue, and no fiat has ever been granted to deal with the matter.

[141] I make no comment on whether the Alberta Court of Appeal has any "original jurisdiction" to decide indemnification issues in this matter.

[142] I have very limited information about proceedings in Federal Court involving Mr. McMullen. I understand he is the plaintiff in some actions, and he has been sued by Ms. Kostic in others. My understanding is that Ms. Kostic's claims against Mr. McMullen have been dismissed, but I am not clear as to what stage appeals are at. In the event there is a final determination of Ms. Kostic's claims against Mr. McMullen in his favour, he might have a claim for indemnification under his indemnification agreement for any costs incurred.

[143] To the extent that there is any such claim, and if it needs to be pursued in the Court, a fiat application would be necessary pursuant to the terms of this case management process.

[144] I also make no comment on whether the Federal Court has jurisdiction to interpret and enforce a contractual arrangement between an Indian Band and a non-band member.

[145] In this application, Mr. McMullen claims that access to the Indemnity Agreement is "presently being blocked and denied by Hanert/Gowlings who continue to be permitted to operate in blatant and fatal conflicts of interest in violation of McMullen's rights under the *UNDRIP* Act and the *Charter*." The reality is that access to the Indemnity Agreement is blocked by order of ACJ Rooke.

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[146] Mr. McMullen gives no specifics as to what *UNDRIP* rights and *Charter* rights are being violated and without details, his claims are simply empty rhetoric.

The "missing $8.5-$10 million"

[147] Mr. McMullen has long claimed that various Chiefs and Councils and others have conspired to deplete the Piikani Trust. That was raised in the insolvency and bankruptcy proceedings involving Piikani Investment Corporation and Piikani Energy Corporation. I case managed those proceedings through to the approval of Piikani Investment Corporation's proposal in bankruptcy. I still case manage the matter to the extent that the Receiver and Trustee has not been able to obtain a discharge because of proceedings brought against him by Mr. McMullen.

[148] Mr. McMullen presented these allegations to the Investigator, who subsequently became the Receiver and then Trustee in Bankruptcy, Bruce Alger. Mr. Alger investigated these allegations as best he could within his mandate. He did not include the "missing $8.5-$10 million" as an asset of Piikani Investment Corporation, other than to the extent that Piikani Investment Corporation had specifically loaned money to the Nation. Mr. Alger had no mandate to investigate what Chief and Council, or the Nation did with the funds loaned to them by Piikani Investment Corporation. Significant funds had been borrowed by Piikani Investment Corporation from the Piikani Trust. Some of those monies were in turn loaned by Piikani Investment Corporation to Piikani Energy Corporation, and also to the Nation itself.

[149] The ability of Piikani Energy Corporation and the Nation to repay these funds to Piikani Investment Corporation was very much in issue. The test for insolvency is whether a person or entity is able to satisfy their debts in the ordinary courts of business. There were no financial statements for Piikani Investment Corporation for relevant periods and it appeared at the time that virtually all of the potential assets of Piikani Investment Corporation and Piikani Energy Corporation were tied up in litigation.

[150] I have no recollection as to whether Mr. Alger took any active steps to recover any funds from the Nation. If he did, they were unsuccessful. Mr. McMullen's point before me was essentially that Piikani Investment Corporation was not insolvent. I disagreed with those submissions. Insolvency proceedings continued. Eventually, Piikani Investment Corporation was assigned into bankruptcy. When a proposal in bankruptcy was ultimately approved by me, the "missing $8.5-$10 million" did not, to my recollection, factor into the assets available for distribution to Piikani Investment Corporation.

[151] All of this occurred some 10 years ago. There is no live proceeding which I am case managing where the "missing $8.5-$10 million" is in issue, unless it forms part of the Nation's claims against Mr. McMullen having regard to the circumstances of those loans. It may be relevant to Mr. McMullen's defences to the claims. But since questioning has not commenced, it is not clear (at least to me) what the Nation's specific complaints are and what Mr. McMullen's specific defences are.

[152] To be clear, there is no proceeding in the Alberta Court of King's Bench where anyone might be found liable to repay the Piikani Trust anything.

[153] It appears to me that this issue has taken on a life of its own, without any basis for that, at least in the Courts of Alberta.

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My recusal

[154] Immediately on my appointment as case management justice, Mr. McMullen objected and demanded that I recuse myself. This is apparently because I decided issues in the insolvency and bankruptcy proceedings involving Piikani Investment Corporation and Piikani Energy Corporation against him. Clearly, I disagreed with his counsel's submissions on the solvency of Piikani Energy Corporation. See *Re Piikani Energy Corporation*, 2012 ABQB 187. In bankruptcy proceedings, I found that when Mr. McMullen and another Piikani Energy Corporation director and employee transferred funds to themselves to satisfy the terms of their employment contracts, that constituted a fraudulent preference under the provisions of the *Bankruptcy Act*. There was no trial; all of this was done on the basis of affidavits and submissions. My decision on that was overturned by the Alberta Court of Appeal on the basis that I had mistakenly found that Mr. McMullen and the other director were not arms length to the Corporation. The Court of Appeal did not review my finding that Piikani Energy Corporation was insolvent at the time. See *Re Piikani Energy Corporation*, 2013 ABCA 293.

[155] I also dealt with submissions on behalf of Mr. McMullen in *Piikani Nation v Piikani Investment Corporation*, 2012 ABQB 719, in which I discussed my previous insolvency findings and indicated that Mr. McMullen did not have any status to oppose the Piikani Investment Corporation bankruptcy proposal.

[156] I assume these are the reasons behind Mr. McMullen's objection to me being case management justice.

[157] Ordinarily, a judge is not disqualified from hearing a matter involving a litigant because they have ruled against that litigant in the past. Recusal may be appropriate where the judge has made adverse credibility findings against a litigant in a previous case and credibility is a key issue in the subsequent proceedings. That is not the case here. Previous interactions are less significant in case management, where there may be many applications and many decisions. The parties cannot expect to have a new case management justice every time there is a decision. Case management justices do not decide lawsuits on the merits; their task is to manage a lawsuit to a trial before a different justice.

[158] I refused to recuse myself following Mr. McMullen's demand. No compelling reasons were offered by Mr. McMullen. I invited him to take the matter up with then acting Associate Chief Justice Jeffrey. I heard nothing more about the subject until Mr. McMullen filed his written submissions in this and the other two related applications in the summer of 2023. He took no steps to pursue my recusal.

[159] Just before these applications were heard in April 2024, Mr. McMullen wrote Associate Chief Justice Nixon with a number of requests, including that I be recused. I was copied with that letter and responded, telling Mr. McMullen that I would not recuse myself and if he was concerned, he should apply to the Associate Chief Justice for that remedy.

[160] To date, no steps have been taken by Mr. McMullen on this subject. He has written on several occasions speaking of his application for my recusal being "nearly ready". Ironically, Mr. McMullen will soon have his way because of my impending retirement later this year.

Conclusion

[161] As a consequence of Mr. McMullen's 4 contempts of court, he is sanctioned as follows:

1. He will pay costs to the Nation for the sanctions portion of this application in the amount of $20,000.00 forthwith and in any event of the cause.
2. Mr. McMullen shall not be entitled to any costs of defending this action against him up to and including the date of this decision insofar as costs are payable and recoverable under the provisions of the Rules of Court.
3. The Nation's costs for the contempt finding portion of this application and Mr. McMullen's costs for the Gowlings Disqualification Application shall be offset against each other, such that neither party is entitled to any costs of those proceedings against the losing party.
4. The Nation may be liable for costs to Mr. McMullen under the provisions of the Rules of Court for any steps in this action after the date of this decision.
5. In the event the Nation proceeds with this Action, the parties are to arrange a case management conference to schedule Mr. McMullen's dismissal for delay application.
6. In the event the Nation discontinues this Action, the parties are to arrange a case management conference to schedule any intended proceedings under Mr. McMullen's Indemnity Agreement.
7. The existing case management protocols will continue until varied or terminated by the Court.

[162] To be clear, in the event the Nation continues on with this action, nothing in this decision will lessen Mr. McMullen's potential liability for costs under the Rules of Court, other than costs relating to the Gowlings Disqualification Application and these Contempt proceedings. Those costs are finally resolved by this decision.

Heard on September 5, 2024.

Dated at the City of Calgary, Alberta this 30th day of September, 2024.

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

Appearances:

Carsten Jensen KC, Jensen Shawa Solomon Duguid Hawkes LLP
for the Plaintiff

Dale McMullen, Self-Represented Litigant
for the Defendant

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