In the Court of Appeal of Alberta

Citation: Piikani Nation v McMullen, 2026 ABCA 189

Date: 20260611
Docket: 2401-0198AC
Registry: Calgary

Between:

Piikani Nation, Gowling WLG (Canada) LLP, Caireen Hanert, Piikani Nation Chief and Council, Piikani Oldman Hydro Limited Partnership, Chief Reg Crow Shoe, Councillor Adam North Peigan, and Councillor Erwin Bastien

Appellants

- and -

Dale McMullen

Respondent

- and -

The Advocates' Society

Intervenor

The Court:

The Honourable Justice Jane Fagnan
The Honourable Justice April Grosse
The Honourable Justice Joshua B. Hawkes

Memorandum of Judgment

Appeal from the Order by
The Honourable Justice R.A. Graesser
Dated the 5th day of July, 2024
Filed on the 30th day of September, 2024
(2024 ABKB 414, Docket: 1001-10326, 1101-11127)

Memorandum of Judgment

The Court:

I Introduction

[1] The appellants appeal a case management justice's determination that Gowling WLG (Canada) LLP was disqualified from acting on behalf of Piikani Nation and related parties on the basis that an opposing party, Mr. McMullen, was a "near client" of Gowling.

[2] In order to determine who is a client in this context and whether duties are owed to others, the Court must undertake a contextual analysis grounded in fundamental principles and with a view to the interests a lawyer's duties are intended to protect.

[3] We conclude the justice erred in determining the circumstances of this case support a finding that Mr. McMullen was a "near client". The appeal is allowed.

II Background

[4] In 2010, Piikani Nation and related parties sued Mr. McMullen and others alleging various forms of misconduct relating directly or indirectly to the Piikani Trust (Action 1001-10326). Mr. McMullen had been a senior management employee and a director of Piikani Investment Corporation (PIC) and Piikani Energy Corporation (PEC), two of Piikani Nation's business entities. Neither PIC nor PEC is a party to that action.

[5] Mr. McMullen subsequently filed an originating application against Piikani Nation in 2011 seeking indemnification for solicitor-client legal fees in relation to his defence in Action 1001-10326 pursuant to an indemnity agreement (Action 1101-11127).

[6] Gowling had performed legal work for PIC and PEC during a time when Mr. McMullen was the main point of contact. Gowling had also represented Mr. McMullen personally in relation to an employment matter. That file was closed in 2008. The two lawyers who worked on that file are no longer with Gowling.

[7] Caireen Hanert had been long-standing counsel for Piikani Nation on Action 1001-10326 when she moved to Gowling in 2018 and transferred the Piikani Nation files in both actions from her former firm to Gowling.

[8] On May 1, 2019, Mr. McMullen filed an application for an order in both Action 1001-10326 and Action 1101-11127 disqualifying Gowling and Ms. Hanert from acting for the Piikani Nation and related parties on the basis that Gowling was in a disqualifying conflict of interest.

[9] After Ms. Hanert's move, Gowling attempted to address any concerns regarding a potential conflict of interest. Its conflicts search disclosed only the one employment matter in 2008 where Mr. McMullen was listed as a client. Nevertheless, Gowling established an ethical wall in relation to all historic PIC/PEC files and the 2008 employment file which was stored off-site. As a result, Ms. Hanert has not seen any of the Gowling records relating to matters for which Mr. McMullen says Gowling was acting for him or in which he was involved on behalf of PIC or PEC, nor is she aware of any information over which Mr. McMullen claims privilege. Further, all the Gowling lawyers Mr. McMullen claims to have dealt with are no longer with Gowling. All the lawyers from Gowling who were involved with Piikani Nation, PIC, PEC, and Mr. McMullen are long gone. If any of them were to be required to testify at trial, Ms. Hanert would involve counsel from another firm to lead their evidence or to cross-examine them.

[10] The justice noted that while Action 1001-10326 had been commenced 14 years prior, there had not yet been any questioning nor any meaningful attempt to define or narrow the issues. It was not clear whether records had been produced and there was an issue as to the availability of records for PIC and PEC dating back to the relevant years. Beyond the pleadings, Mr. McMullen had not been provided with formal or detailed particulars of the claimed damages, nor was it clear what specific transactions and decisions by Mr. McMullen were in issue.

[11] The justice found the 2008 employment matter had no apparent connection to the actions and was irrelevant. Gowling's other involvement with Mr. McMullen was in his management capacity (he was the "key contact" between Gowling and PIC and PEC). He also found there were no solicitor client privilege issues as it had not been demonstrated that Gowling had learned anything privileged or confidential from Mr. McMullen and he had no "independent privilege":

> 117 …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.

[12] Nevertheless, the justice disqualified Gowling on the basis that Mr. McMullen had been a "near client" as he was the key contact between Gowling and PIC in relation to many of the transactions that may be part of the claim against Mr. McMullen. He further stated he was satisfied that Mr. McMullen should be treated as a Gowling "client" for the purposes of the application. As such, the justice expressed concerns about Gowling acting when Mr. McMullen was defending

partly on the basis that he was entitled to indemnification under an indemnity agreement "drafted by Gowling and on which Gowling presumably advised both Mr. McMullen and PIC".

[13] The justice reviewed some of the history of the matter, allegations in the statement of claim and Mr. McMullen's assertions as to Gowling's general involvement in advising PIC and PEC in relation to the relevant matters. He held that a lawyer may not act for a new client to undermine work they have done for a former client. He referred to the high standards of the legal profession, the integrity of the justice system, public confidence in the legal profession and the lawyer's duty of loyalty. He opined that Mr. McMullen might have to call lawyers to testify who were at Gowling at the time he was a near client.

[14] The justice found that the client's right to counsel of their choice was not a significant factor as it was Ms. Hanert who chose to join Gowling, and that lawyers' mobility was even less important.

[15] He found there was no basis to disqualify Ms. Hanert if she left Gowling, given her uncontroverted evidence that she had no access to Gowling's walled files. He stated that even if she did have access, there was nothing confidential as Mr. McMullen could not have had "confidences" from PIC or PEC.

[16] The justice also stated that Mr. McMullen's status as a "near client" likely meant he should have full access to Gowling's files for matters they were engaged in during his tenure as managing director and CEO of PIC/PEC, as the contents of their files and the advice they gave on various matters may be key to his defences to some of the allegations against him.

III Subsequent Events

[17] The same case management justice subsequently found Mr. McMullen to be in contempt of a court order for failure to attend questioning and misuse of privileged materials, including the Navigant Report which figures prominently in his reply factum in this matter: ***Piikani Nation v McMullen***, 2024 ABKB 264. He also issued an order imposing sanctions for the contempt: 2024 ABKB 575. This Court denied Mr. McMullen's application to restore the appeal of those decisions: 2025 ABCA 114.

[18] As part of the sanction for Mr. McMullen's contempt, Piikani Nation was permitted to discontinue Action 1001-10326 as against him on a without costs basis. Mr. McMullen had acknowledged that he owes more than $700,000 in costs in this action and in Federal Court actions between himself, and Piikani Nation and others and described himself as impecunious: 2024 ABKB 575 at para 100.

[19] Accordingly, after the filing of the appellants' factum on this appeal, the plaintiffs in Action 1001-10326 discontinued their claim as against Mr. McMullen.

[20] Counsel for Piikani Nation advised the Court during the hearing of this appeal that the defences it will advance in indemnity Action 1101-11127 will mirror the allegations it had pled in Action 1001-10326.

IV Grounds of Appeal

[21] This appeal raises significant issues of importance to the legal community and the public regarding the law on disqualification, particularly as it relates to key contacts for corporate clients. The issues concern the duties, responsibilities, and obligations owed by a law firm or lawyer and to whom they are owed, which are connected to the principles regarding solicitor-client privilege and conflict of interest.

[22] Mr. McMullen submits the "near client" argument is irrelevant given the discontinuance. However, he takes the position that Gowling should be disqualified from acting in relation to his originating application against Piikani Nation for indemnification, on the basis that he is a former client of Gowling in relation to the matters in dispute. His arguments as to why he is a former client include points similar to those relied on by the case management justice in finding Mr. McMullen to be a "near client".

[23] Despite developments in the proceedings since the filing of the appeal, we will address the following issues:

A Did the justice err in finding Mr. McMullen was a "near client" and in disqualifying Gowling on that basis?

B Did he err in failing to find Mr. McMullen's status as a former client should result in Gowling's disqualification?

C Did he err in stating Mr. McMullen had a right to access Gowling's files?

[24] Mr. McMullen raises numerous other issues unrelated to the grounds raised by the appellants. This matter was subject to an application for permission to appeal pursuant to Rule 14.5(1)(j): ***Piikani Nation v McMullen***, 2024 ABCA 306. While the justice hearing that application did contemplate that "subsidiary" issues might be addressed on appeal, we do not understand that decision as granting permission to argue the unrelated issues raised by Mr. McMullen. They are not properly before this Court; accordingly, we will not comment on them.

V Standard of Review

[25] The justice's findings on the applicable legal framework are reviewed for correctness. His application of the law to the facts and findings of fact are reviewed for palpable and overriding error: ***Housen v Nikolaisen (Housen)***, 2002 SCC 33 at paras 31-36.

VI Analysis

A Did the justice err in finding Mr. McMullen was a "near client" and in disqualifying Gowling on that basis?

[26] The appellants submit the justice erred in finding Mr. McMullen was a "near client" of Gowling. Mr. McMullen did not address the "near client" issue in his factum other than to argue it was irrelevant.

1 Legal Framework

[27] Disqualifying conflicts of interest generally arise by reference to a lawyer's duties and obligations to a client, a former client or to the legal process and the administration of justice: Alice Woolley & Amy Salyzyn, *Understanding Lawyers' Ethics in Canada*, 3rd ed (Toronto: LexisNexis Canada, 2023) at 313.

[28] A major concern addressed by the duty to avoid conflicting interests is the misuse of confidential information: ***Canadian National Railway Co v McKercher LLP***, 2013 SCC 39 at para 24. This concern can arise in respect of confidential information received from both current clients and former clients. If a lawyer received confidential information attributable to a solicitor and client relationship relevant to the matter at hand, and there is a risk that it will be used to the prejudice of the client, the lawyer is generally disqualified: ***MacDonald Estate v Martin***, [1990] 2 SCR 1235 at 1260-1261. Confidential information cases often involve considerations as to whether adequate protections are in place to avoid a transfer of confidential information between members of a law firm.

[29] With respect to current clients, lawyers owe a duty of loyalty that extends beyond their obligation not to disclose confidential information. A lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client - even if the two mandates are unrelated - unless both clients consent and the lawyer reasonably believes they are able to represent each client without adversely affecting the other: ***R v Neil***, 2002 SCC 70 at para 29. In such cases, the "bright line rule" is engaged. Where confidential information is not in issue, there is only a deemed conflict of interest where this bright line rule applies: ***McKercher*** at para 38.

[30] In cases where the bright line rule does not apply, the onus falls upon the applicant to establish the existence of a conflict on a balance of probabilities: ***McKercher*** at para 38. The question is whether there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person. The focus is on whether the situation is liable to create conflicting pressures on the lawyer's judgment: ***Neil*** at para 31; ***McKercher*** at para 38.

[31] Lawyers do not owe the same duty of loyalty to former clients as they do to current clients: ***Neil*** at paras 21, 27. Subject to concerns about confidential information, lawyers are generally free to act adverse to the interests of a former client in matters unrelated to the work they did for the former client: ***Brookville Carriers Flatbed GP Inc v Blackjack Transport Ltd,*** 2008 NSCA 22 at para 17; Law Society of Alberta *Code of Conduct* Rule 3.4-6. "Related" in this context is often defined as "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*** at para 17.

[32] In exceptional circumstances, courts have disqualified a lawyer from acting at the request of a person who was never the lawyer's client. Some of those cases are based on a finding that a "near client" relationship exists with respect to a person who is related to an actual client. A "near client" has been defined as someone "related to the actual client of a lawyer, and to whom the lawyer can be said to owe some duties that may create an improper conflict of interest if the lawyer then acts against that near client": Woolley & Salyzyn at 322. Generally, the case law establishes that in order to disqualify a lawyer, the person alleging they were a "near client" must establish a reasonable expectation of confidentiality or loyalty: Woolley & Salyzyn at 324 and cases cited therein. "Near client" cases typically involve confidential information provided by the "near client" that is at risk of being used against the "near client" in another retainer accepted by the lawyer: ***Dobbin v Acrohelipro Global Services Inc***, 2005 NLCA 22 at para 53. (This Court has previously noted the unusual nature of the facts found in ***Dobbin***: ***Dreco Energy Services Ltd v Wenzel Downhole Tools Ltd***, 2006 ABCA 39 at paras 30-32.) Woolley & Salyzyn note that some of the "near client" cases are more properly characterized as cases concerned with the potential disclosure of privileged information and that the focus on whether the concerned party was a "near client" is misplaced in that context: Woolley & Salyzyn at 322, note 48.

[33] The definition of "client" in the Law Society of Alberta's *Code of Conduct* states that a client "may include a person who reasonably believes that a lawyer-client relationship exists, whether or not that is the case at law": at 1.1-1. The *Code* does not explicitly recognize the term "near client", but it does recognize that there may be circumstances in which a lawyer has legal and ethical duties to an individual similar to those from a solicitor-client relationship "even though no [solicitor-client] relationship is ever actually established": Rule 1.1-1, Commentary 1.

[34] In ***Gainers Inc v Pocklington,*** 1995 ABCA 177 (which predates ***Neil*** and ***McKercher***), this Court introduced a "composite rule" for considering whether a law firm could act for a current or former client against an objecting person who was never its client, taking into account - in addition to confidentiality concerns - whether acting for the client against the person objecting would work significant injustice for some other reason, and whether allowing the law firm to act would set a precedent causing significant harm to future relations between lawyers and lay people. ***Gainers*** is consistent with the later recognition by the Supreme Court of Canada that disqualification may be required in some circumstances to protect the integrity and repute of the administration of justice, even where client duties are not engaged: ***McKercher*** at paras 61-65.

2 Mr. McMullen's Relationship with Gowling

[35] Mr. McMullen was a management employee of PIC and PEC. He acted as a director of PIC from the end of 2003 until 2007 and as a director of PEC from 2007 until PEC's receivership in May 2010. PIC was also the subject of insolvency proceedings and was restructured. Piikani Nation commenced Action 1001-10326 in July 2010. Ms. Hanert arrived at Gowling in 2018.

[36] The case management justice found that no confidential information was in issue. Nothing presented on this appeal undermines that finding. While Mr. McMullen may have been the key contact person for Gowling at PIC and PEC for certain periods, confidential information and solicitor-client privilege belonged to PIC or PEC, not Mr. McMullen.

[37] The duty of loyalty to an existing client, including the bright line rule, is not engaged in this case as Mr. McMullen is not a current client of Gowling.

[38] The case management justice found that Mr. McMullen was a former client of Gowling in relation to the 2008 employment matter, but that this matter was entirely unrelated to the allegations in the statement of claim. Mr. McMullen's status as a former client did not prevent Gowling from acting for Piikani Nation against Mr. McMullen. Again, no error has been established in this regard, as will be discussed further below.

[39] The justice nevertheless concluded that Mr. McMullen was a "near client" of Gowling during the time he was managing director and CEO of PIC as he was the key contact between Gowling and PIC. The justice then found the two ***Gainers*** factors which are unrelated to confidential information compelled a determination that Mr. McMullen should be treated as a Gowling "client" for the purposes of the application. The justice went on to apply ***Brookville*** and concluded that Piikani's Action 1001-10326 was related to the work Gowling did for PEC during the period in which Mr. McMullen was dealing with Gowling on behalf of PEC. More specifically, he found that in Action 1001-10326, Gowling would seek to challenge the validity of some of the advice they gave "Mr. McMullen, PIC, and PEC" during the 2005-2008 period. The justice also noted that Mr. McMullen was defending the Piikani Nation action in part on the basis that he was entitled to indemnification under an indemnity agreement drafted by Gowling "and on which they presumably advised both Mr. McMullen and PIC": para 144.

[40] We conclude that in trying to reconcile some of the seemingly disparate authorities relating to conflicts of interest, the case management justice made four related legal errors that undermine his conclusion that Gowling must be disqualified from acting for Piikani Nation in this litigation. First, the justice concluded that Mr. McMullen was a "near client" simply because he was the client contact for PIC and PEC. Second, he characterized PIC or PEC, or both, as a corporation closely held by Mr. McMullen. Third, he misconstrued ***Gainers*** as a test for whether a person or entity is a client or former client. Fourth, he conflated former near clients with former clients by

applying the conflicts rules for former clients to Mr. McMullen. The case management justice also misapprehended the evidence with respect to the indemnity issue, as discussed further below.

[41] The justice concluded that Mr. McMullen was a "near client" of Gowling while he was managing director and CEO of PIC, citing only: his role as key contact between Gowling and PIC; the fact that he relayed instructions and received advice for PIC; and his approval of payment of Gowling's accounts from which he inferred Mr. McMullen decided to have PIC continue to work with Gowling.

[42] These factors alone did not make Mr. McMullen a "near client". The person who instructs external counsel on behalf of a corporation or other entity is not, without more, a client, a near client or a former client. A lawyer's or firm's duty of loyalty is to the corporation in these circumstances, not to its officer**.** There is no authority to the contrary. None of the cases cited by Mr. McMullen or the case management justice involved a client representative being deemed a "near client" where no confidential information was at risk.

[43] For example, one of the cases cited by the justice was ***Dobbin***. In that case, a judge found that confidential information relevant to a current action had been obtained from a non-client (the defendant in the current action) in the course of work for a bank on a substantial credit facility for the non-client. The non-client was obliged to provide the information to the bank, and it was presumed the bank shared the information with the bank's counsel. The non-client sought to have the law firm removed as counsel in the current action, in which the firm was acting against the non-client. The law firm did not rely on the existence of any ethical walls to prevent exchange of information. The court concluded the confidential information was at risk and there was a limited duty of loyalty to the non-client in the circumstances: 2004 NLSCTD 178. In upholding the removal of counsel, the appeal court stated that in the circumstances, the focus must be on the mischief that the conflict of interest rule is designed to address: 2005 NLCA 22 at para 50. The appeal court found that the conflict of interest rule was engaged because the law firm had obtained confidential information of the non-client, which included information about the plaintiffs' claim in the current action and the non-client's defence strategy.

[44] The fact that a lawyer or law firm may come to know a client's key contact person well, including an understanding of how that person thinks, does not make the client contact a "client" or "near client". In ***Gainers***, the person in question was the director, officer and indirect owner of the company which was the law firm's client. He had considerable contact with the company's lawyer and argued he was a client. The court disagreed, noting that a company officer cannot expect that the company lawyer will keep information from the company. The court also made the following observations:

> 39 …sometimes a big company will use a law firm for years and thereby repeatedly expose to the firm an employee of the company and all that employee's personal strengths, weaknesses, attitudes, and way of thinking. The employee has no shares

> in the company, and uses a different law firm for his own affairs. What if the company then fired the employee for some unrelated reason? It would be unjust to force the company to drop its long-standing lawyers on the theory that they had become familiar with the ex-employee.
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> …
>
> 52 Courts should be a little cautious of supposed secrets which merely boil down to familiarity with an individual and his philosophy and thinking. If carried very far, such reasoning would link any two retainers and so prevent a law firm from ever acting on anything against someone they had ever met on a friendly basis…

This is consistent with the later conclusion of the Supreme Court of Canada in ***McKercher*** that even knowledge of a *client's* corporate philosophy or litigation philosophy does not, on its own, give rise to a risk of misuse of confidential information: ***McKercher*** at para 54.

[45] The second error relates to the case management justice's reasoning that in cases of closely held corporations, it is very difficult to separate the persons who control the corporation from the corporation, and lawyers acting for such corporations should not be able to use the corporate veil against the guiding minds of their corporate client in determining to whom the lawyers owed duties, particularly where the person in question is the person who gave instructions and received advice from the lawyers.

[46] While a person can be a "client", or a "near client", without a formal retainer, it remains the case that a corporation is a separate legal entity from its shareholders, directors, officers, and employees. In holding the firm was not disqualified in ***Gainers***, the Court stated:

> 22 …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 they are all unincorporated associations of their shareholders, officers and directors…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.

[47] In this case, PIC and PEC were closely held by Piikani Nation, not by Mr. McMullen. Any advice Gowling communicated to Mr. McMullen was given for the benefit of PEC or PIC. Confidential information and solicitor-client privilege belonged to PIC or PEC. As was held in ***Gainers***, Mr. McMullen could not expect that PIC or PEC's lawyer would keep information from PIC or PEC.

[48] The third legal error in the analysis of the case management justice was his characterization of the "composite rule" set out in ***Gainers*** as governing the determination as to "who is or was a

client or former client for conflict purposes": para 112. As set out above at para 34, the composite rule was expressly stated to apply when considering whether a law firm could act for a current or former client against an objecting person who was never its client. Disqualifying a lawyer from acting against someone who was never a client is exceptional and occurs when specific circumstances require the disqualification. The application of the composite rule does not grant "client" or "former client" status, with all accompanying duties or obligations, to the person who was never a client.

[49] Finally, and relatedly, although he found Mr. McMullen had been a "near client", the case management justice applied the disqualification test from ***Brookville***, which is a case about former clients, not former "near clients". This conflated a near client with a client. In ***Brookville***, Brookville and two employees were sued on the basis the two employees forced a contractor to pay bribes and Brookville knew about this. The law firm represented all three. Shortly after that action was dismissed, the law firm represented Brookville in its lawsuit against the two employees and others, alleging conspiracy, fraud and other dishonest acts during a time period overlapping with the allegations in the first action. The court found the law firm was acting against a former client in a related matter. Despite no confidential information being at risk, the court spoke of a broader continuing duty of loyalty to former clients based on the need to protect and to promote public confidence in the legal profession and the administration of justice

[50] The justice stated the basic problem as being the one raised by ***Brookville***: "a lawyer may not act for a new client to undermine work they have done for a former client". However, Mr. McMullen was not a former client in relation to the advice given to PIC and PEC. Those entities were not parties to the action. Neither Mr. McMullen's position of authority, nor the fact that he was the main contact, made him a former client.

3 Indemnification agreements

[51] As noted above, the justice also expressed concerns regarding indemnification issues and Gowling's involvement in an indemnity agreement. The justice held:

> 144 It is thus hard to see that Gowling 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 Gowling and on which they *presumably advised both Mr. McMullen* and PIC. [emphasis added]

The appellants submit that this finding constitutes a palpable and overriding error of fact.

[52] There are two potential indemnity agreements referenced in the materials: an indemnity agreement between Piikani Nation and Mr. McMullen and an indemnity agreement between PIC and Mr. McMullen.

[53] The appellants note Mr. McMullen conceded at paragraph 37 of his Reply Brief, filed on September 8, 2022 in the Court below, that the 2004 indemnity agreement between Mr. McMullen and Piikani Nation was drafted by his "prior personal legal counsel", Blake Cassels & Graydon LLP. Further, in oral argument before the justice, Mr. McMullen stated that the indemnity agreement was drafted by Blakes.

[54] The justice observed that the indemnity agreement between Mr. McMullen and Piikani Nation dated back to April 2004 when Blake Cassels were acting for the Nation and predated Gowling's involvement. Thus, he accepted that Gowling was not involved in drafting the 2004 indemnity agreement between Mr. McMullen and Piikani Nation.

[55] He further noted that Mr. McMullen claimed to be entitled to indemnification by PIC as a result of an indemnification agreement *drafted* by Gowling and that he had obtained *legal advice* from Gowling on that agreement: para 141.

[56] The justice found it was unclear as to whether there was an indemnity agreement directly between Mr. McMullen and PIC and noted that Mr. McMullen did not say in either of his affidavits exactly what Gowling's involvement was with his indemnification. He found that indemnification issues and the scope of any indemnification were undoubtedly significant issues in the litigation, regardless of whether the indemnification was given by Piikani Nation or PIC or both: at para 134.

[57] In his affidavit sworn May 7, 2018, Mr. McMullen referred to two indemnity agreements: one with Piikani Nation and the other with PIC. He deposed both were signed on April 28, 2004. The justice found Gowling's involvement started in 2005.

[58] Mr. McMullen's originating application in Action 1101-11127 refers to only one indemnity agreement and does not identify it by parties or date. The document was not provided to this Court. However, there has been no suggestion the indemnity agreement in question is not one of the agreements drafted in 2004.

[59] The finding that Gowling drafted an indemnity agreement at issue in this litigation is not supported by the evidence.

4 Duty of loyalty

[60] The justice made numerous references to discussions of the duty of loyalty in case law, stating near the end of his reasons that public confidence in the legal profession is very important and is enhanced by the lawyer's duty of loyalty. To the extent the justice considered Gowling to owe an ongoing duty of loyalty to Mr. McMullen, he did not explain the basis for such a duty in the circumstances. Again, he had found there was no confidential information at risk. He found that to the extent Mr. McMullen had been a former client in his personal capacity, the past retainer had no relationship to the Piikani Nation litigation. Rather, in his view, Mr. McMullen was a near client.

[61] As set out above, there is no dispute that lawyers and law firms owe a duty of loyalty to their clients or former clients. However, they generally do not owe a duty of loyalty to non-clients, nor does a "near client" benefit from the same duty of loyalty as a client or former client. The appellants fairly question how an ongoing duty of loyalty to Mr. McMullen - even as a former near client - could co-exist with Gowling's duty of loyalty to its actual former clients PIC and PEC.

5 Allegations against Mr. McMullen

[62] The justice considered whether the lawsuit against Mr. McMullen related to work done when Mr. McMullen was the person giving instructions to Gowling and receiving advice from them. The statement of claim contains allegations to the effect that Mr. McMullen and the other defendants conspired to commit breaches of their legal and equitable duties in relation to activities involving PIC, PEC and the Piikani Trust.

[63] The justice noted that there had been no questioning or other meaningful steps in Action 1001-10326 to define or narrow the issues and that it was unclear whether records had been produced. He had the pleadings before him, but no formal or detailed particulars of Piikani Nation's damages, nor any clarity as to what the specific transactions and decisions by Mr. McMullen were that Piikani Nation took issue with, apart from what could be gleaned from the pleadings. He also referred to affidavits sworn by Mr. McMullen.

[64] In reviewing the allegations against Mr. McMullen in the statement of claim and the affidavit evidence, the justice noted Mr. McMullen claimed to have received advice from Gowling on most of the issues raised against him. Based on this information and a review of the allegations, he found numerous allegations and claimed damages related to matters in which Gowling was involved or with respect to which it gave advice to Mr. McMullen (for PIC or PEC). He concluded that Gowling, through Ms. Hanert and her representation of Piikani Nation, was seeking to challenge the validity of some of the advice it gave Mr. McMullen, PIC, and PEC during the critical period of 2005 to 2008.

[65] As set out above, the case management justice erred by applying the "related matter" test for disqualification from ***Brookville*** to this case, where he had found Mr. McMullen to be a former near client, not a former client. He also erred by treating the ***Gainers*** factors as determining whether Mr. McMullen was a client. The related nature of the two matters could be relevant in determining whether disqualification was necessary vis à vis a near client or another non-client, for example to maintain the repute of the administration of justice or to protect confidential information, including in a situation covered by ***Gainers***. However, the justice's analysis in this case was tainted by the legal errors identified above. Further, the justice took into account the erroneous finding regarding the indemnity agreement, as discussed above.

[66] There is very little information available as to the specific circumstances at issue in the litigation, whether Gowling had any role and if so, to what extent. The appellants note the onus

was on Mr. McMullen on this application. They also note that Mr. McMullen's pleadings do not assert that he relied on legal advice with respect to any matters pleaded by Piikani Nation. Counsel should not be disqualified on a speculative basis: ***Harder v Sartorio***, 2020 ABQB 404 at para 32, citing ***Urquhart v Allen Estate***, [1999] OJ No 4816 at para 19 (SCJ). There are sound reasons to decline to make a determination as to whether a law firm should be disqualified before the issues have been narrowed: ***Nova Oculus Canada Manufacturing ULC v Sather***, 2024 ABKB 517.

[67] We note the justice opined near the end of the reasons that if the litigation were further along, it might be possible to consider whether involving independent counsel to deal with Gowling-related issues could be a solution, as by that time the issues would be narrowed and the details as to exactly what Piikani Nation was targeting would be known: para 161. This undermines his conclusion that disqualification was necessary based on what was known about the litigation at that point in time.

[68] Rather than giving pause, the lack of clarity regarding the contours of the litigation was weighed in favour of Mr. McMullen.

[69] In the circumstances, and considering that Mr. McMullen was a former client contact, not a former client, we are not satisfied that the existing record supports disqualifying Gowling on the basis that Gowling is now undermining the advice it previously gave to PIC or PEC through Mr. McMullen. We do not comment on whether, in appropriate circumstances, a law firm could be disqualified from acting against a former client contact in order to preserve the repute of the administration of justice due to a relationship between the new retainer and advice previously acted on by the client contact on behalf of the client.

6 Conclusion

[70] Disqualification of a lawyer has significant consequences for the lawyer, the law firm, and the client. The courts must be mindful that an overly broad approach to disqualification will have an impact on delivery of legal services to the public, particularly by larger law firms.

[71] The justice in this case did not err in finding no confidential information was at risk. However, he did err in finding Gowling drafted the indemnity agreement and this appears to have played a material role in his analysis.

[72] The fact that Mr. McMullen, in his role as an employee and director of PIC and PEC was the main contact for Gowling did not make him a near client, nor did it give rise to a duty of loyalty. The litigation had not progressed to a point where it could be said that Gowling was "seeking to challenge the validity of some of the advice they gave Mr. McMullen, PIC, and PEC", particularly given that Mr. McMullen's statement of defence contained no specific plea of reliance on legal advice.

[73] The justice did not err in determining that Ms. Hanert herself was not disqualified. In all the circumstances, notably the justice's recognition that independent counsel could be a viable solution to deal with any Gowling-related issues, disqualification of Gowling was not warranted on the existing record.

[74] After this appeal was filed, Action 1001-10326 was partially discontinued as against Mr. McMullen. The indemnification Action 1101-11127 remains. There was certainly no more clarity regarding the particulars of the defence to the indemnity action than there was on the main action. Our conclusion on the "near client" issue is not affected by the partial discontinuance.

B Did the justice err in failing to find Mr. McMullen was a former client in a related matter?

[75] Mr. McMullen submits the justice erred in failing to find he was a former client on matters related to Action 1001-10326.

[76] The justice found Mr. McMullen was a former client in relation to a small claims Action No. P0790103779 filed by a former employee of PIC against PIC and Mr. McMullen. One account was rendered in the amount of $760 and the file was closed in 2008 and moved off-site before Ms. Hanert arrived in 2018. The two lawyers involved are no longer with Gowling. The justice found this matter was unrelated and that any information Mr. McMullen exchanged or advice he received from Gowling was in his capacity as managing director of PIC and CEO of PIC and PEC. Mr. McMullen says this action is related to the facts and allegations under Action 1001-10326; however, the plaintiff's name does not appear in the pleadings relating to Action 1001-10326 or Action 1101-11127.

[77] In the 2005 Queen's Bench Action 0501-17326, the former Chief of Piikani Nation, Peter Strikes With A Gun, attempted to terminate the board of directors of PIC, including Mr. McMullen. Gowling acted for PIC, PEC and numerous other parties including Mr. McMullen. Gowling arranged for a discontinuance of the related appeal No. 0601-0020AC and signed the Notice of Discontinuance on April 7, 2006. The accounts were paid by PIC and PEC.

[78] Mr. McMullen had also referred to QB Action 0801-07171 in which an application was filed to attempt to stop PIC's shareholders from replacing the PIC Board at a time when Mr. McMullen was on the Board. During cross-examination on Mr. McMullen's supporting Affidavits, it became clear that Wilson Laycraft was counsel of record, acting for PIC and Mr. McMullen in that matter.

[79] Having reviewed the evidence, the justice found it had not been established "on any level of proof" that Gowling learned anything privileged or confidential from Mr. McMullen in the former employee matter on which they represented Mr. McMullen's personal interests only. He

found that in all 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.

[80] Mr. McMullen has not established that the justice made a reviewable error in his finding that no confidential information was in issue in the small claims employment matter and that the file is not related to the Piikani Nation litigation. In other words, to the extent Mr. McMullen was a former client of Gowling in his personal capacity, that status would not lead to disqualification.

[81] Mr. McMullen asserted that he intends to call "Gowling" as a witness on various aspects of the Piikani Nation litigation that he says are related to the small claims employment matter and Action 0501-17326. However, the justice's findings that the matters are not related are entitled to deference. Mr. McMullen has not established the justice erred in failing to find he was a former client in a related matter with respect to the files on which Gowling represented him personally.

[82] Furthermore, for reasons outlined in relation to the "near client" issue, Mr. McMullen's role as key contact for PIC and PEC in relation to other matters did not make him Gowling's client.

C Did the justice err in stating Mr. McMullen had a right to access Gowling's files?

[83] Having concluded that Mr. McMullen was a "near client" of Gowling, the justice stated this likely meant that Mr. McMullen should have full access to Gowling's files for matters on which Gowling was engaged during Mr. McMullen's 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.

[84] The justice cited no evidence or law, nor did he engage in any analysis in support of this statement.

[85] Solicitor-client privilege belongs to the client, in this case PIC or PEC. There was no evidence of a relevant retainer with Mr. McMullen.

[86] Mr. McMullen cannot retroactively waive solicitor-client privilege on behalf of a corporation for which he no longer works: ***Nielsen v Nielsen***, 2017 BCSC 269 at paras 44, 46-47; ***Gardner v Viridis Energy Inc***, 2014 BCSC 204 at paras 38-39, 46-47; ***Ultra Information Systems Canada Inc v Pushor Mitchell LLP***, 2008 BCSC 974. Only current management or directors acting on behalf of the corporation's best interest can waive the privilege: ***Gardner*** at paras 46-47.

[87] The justice erred in concluding that Mr. McMullen should have full access to Gowling's files in the circumstances based on his status as a "near client".

VII Disposition

[88] The appeal is allowed.

[89] Rule 9.4(2)(c) is invoked. The Court will prepare the resulting order.

Appeal heard on February 13, 2026

Memorandum filed at Calgary, Alberta
this 11th day of June, 2026

Fagnan J.A.

Grosse J.A.

Hawkes J.A.

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