

Law firm not disqualified from acting against former executive of corporate client (Piikani Nation v McMullen)

Duty of Loyalty | Litigation & Dispute Resolution

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Due to their duty of loyalty, lawyers may not act in matters which are adverse to current clients. The duty of loyalty generally extends to matters which are adverse to former clients if there is the potential for the lawyer to misuse confidential or privileged information obtained from the client during the prior retainer. Disputes may occasionally arise over whether there is sufficient overlap between the two retainers to prevent the lawyer from acting. In some cases, particularly those involving corporate clients, there may be a dispute over who precisely the client was.

These issues were illustrated in *Piikani Nation v McMullen*, 2026 ABCA 189 (CanLII), a decision of the Court of Appeal of Alberta concerning an Order disqualifying the firm Gowling WLG (Canada) LLP from acting in ongoing proceedings.

The disqualification dispute arose during long-running litigation between Piikani Nation and a former senior executive and director of two Piikani-related corporations, Piikani Investment Corporation (PIC) and Piikani Energy Corporation (PEC). In 2010, Piikani Nation commenced an action against the former executive alleging misconduct related to the management of the Piikani Trust. The executive later brought a separate indemnity application seeking coverage of his legal costs.

Gowling had previously acted for PIC and PEC during the period when the former executive was their principal contact and the firm had briefly represented the executive personally in an unrelated employment matter in 2008. Years later, a lawyer acting for Piikani Nation moved to Gowling and transferred the files relating to the litigation.

The former executive then applied to disqualify Gowling, arguing that the firm was in a conflict of interest because of its prior involvement with him and the corporations.

The case management judge found that there was no risk of misuse of confidential information by Gowling. However, the judge reasoned that the executive was a “near client” and should be treated similarly to a client for conflict purposes: 2024 ABKB 414 (CanLII). In the case management judge’s view, as a “near client” of Gowling, the former executive should have full access to the firm’s files for matters they were engaged on during his tenure, 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. Accordingly, the case management judge disqualified the firm from continuing to act.

The firm appealed the disqualification order to Court of Appeal of Alberta.

In its decision, the appellate court reviewed the governing principles relating to the misuse of confidential information addressed by the Supreme Court of Canada in *Canadian National Railway Co v McKercher LLP*, 2013 SCC 39, at paragraph 24, and *R. v. Neil*, 2002 SCC 70, at paragraph 29, among other decisions. In many cases, disqualification of a lawyer arises from duties owed to current or former clients, especially concerning the protection of confidential information or the duty of

loyalty. Where confidential information is at risk of misuse, disqualification is often mandatory.

The Court of Appeal noted that lawyers do not owe the same duty of loyalty to former clients as they do to current clients: *Neil*, at paragraphs 21 & 27. Lawyers are generally free to act against former clients in unrelated matters provided no confidential information is at risk.

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” (Chapter 1: 1.1-1).

The Court of Appeal noted that the *Code of Conduct* does not define the term “near client”. However, the *Code* recognizes that there may be circumstances in which a lawyer has legal and ethical duties to an individual similar to those in a solicitor-client relationship even though no solicitor-client relationship is ever actually established (Chapter 1.1-1, Commentary 1). Accordingly, the concept of a “near client” refers to rare and fact-specific cases where a non-client may nonetheless have a relationship with a lawyer that gives rise to some duties. A typical situation would be where the person provided confidential information to the lawyer with a reasonable expectation it would remain protected.

In the Court of Appeal’s view, however, there were several reasons why the former executive was not a “near client”.

First, simply acting as a corporate representative or key contact with counsel does not make an individual a client or “near client”. In that regard, lawyers acting for a corporation owe duties to the corporate entity, not to its officers or employees.

Second, the case management judge blurred the distinction between a corporation and its representatives. The Court of Appeal reaffirmed that corporations are separate legal entities, and individuals acting on their behalf cannot assume that counsel also represents them personally. Here, Gowling’s client was not the former executive.

Third, the case management judge misapplied precedent by treating the “near client” concept as a general test for determining who qualifies as a client. The Court of Appeal affirmed that this is an exceptional doctrine used only where necessary to address specific risks, such as misuse of confidential information or harm to the administration of justice.

Finally, the case management judge conflated “near clients” with former clients and incorrectly applied the stricter legal tests applicable to former clients.

The Court of Appeal concluded that the former executive was not a “near client” since no confidential information belonging to him was at issue and his interactions with Gowling occurred in his corporate capacity.

The Court of Appeal also rejected the argument that the former executive’s prior relationship as a client with Gowling required disqualification. The only personal matter in which Gowling represented the executive was a minor employment case that was entirely unrelated to the issues in the litigation. There was no connection between that representation and the current proceedings, and no evidence that confidential information from that file was relevant.

The Court of Appeal also overturned the case management judge’s determination that the former executive was entitled to access Gowling’s files. Solicitor-client privilege belonged to the corporate client (here PIC or PEC), not to the former executive personally. As a former officer, he had no authority to waive or access the corporations’ privilege.

Overall, the Court of Appeal emphasized that disqualification is a serious remedy and should not be granted on a speculative or incomplete record. At the time of the application, the litigation had not progressed sufficiently to clearly define the issues, and there was insufficient evidence that Gowling’s conduct created a real conflict.

Of comfort to large law firms, the Court of Appeal stressed that an overly broad approach to conflicts and disqualification could negatively affect access to legal services, particularly for large organizations that rely on national law firms.

Accordingly, the Court allowed the appeal and set aside the order disqualifying Gowling. A PDF version is available for download [here](#).

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