COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: *Miller v. McMillan,*
2011 YKCA 2

Between:

Date: 20110208
Docket: YU0654

George Miller and the Kaska Dena Council

Appellants
(Petitioners)

And

**Liard McMillan on his own behalf and on behalf of
the Liard First Nation, and the Liard First Nation**

Respondents
(Respondents)

Before: The Honourable Madam Justice Ryan
The Honourable Mr. Justice Chiasson
The Honourable Madam Justice D. Smith

On appeal from: Supreme Court of the Yukon Territory, May 26, 2010
(*Miller v. McMillan*, 2010 YKSC 22, Whitehorse Registry No. 09-A0099)

Oral Reasons for Judgment

Counsel for the Appellants: G.A. Nelson

Counsel for the Respondents: J.D. Mildon

Place and Date of Hearing: Vancouver, British Columbia
February 8, 2011

Place and Date of Judgment: Vancouver, British Columbia
February 8, 2011

[1]   **RYAN J.A.:**   George Miller and the Kaska Dena Council ("KDC") appeal from the order of Mr. Justice Gower pronounced the 26 May 2010, and entered 9 July 2010, in which he disqualified, a lawyer, Mr. Walsh, from acting as counsel on their behalf in an application against the respondents Liard McMillan and the Liard First Nation ("LFN").

[2]   The primary issue in this case was framed by Mr. Justice Gower in para. 22 of his reasons for judgment, YKSC 2010 22 in this way:

> [22]   ... do the duty of loyalty and the fiduciary duty Mr. Walsh owes to LFN as a former client prevent him from acting against LFN in this instance? ...

[3]   Prior to stating the issue, Mr. Justice Gower made this finding of fact at para. 15:

> [15]   In 2004, LFN updated and ratified a version of its election regulations (the "2004 Election Regulations"). On my view of the record, Mr. Walsh has not disputed that he was retained by LFN in relation to those Regulations. Nor does he dispute that the Regulations are one of the "constitutional" documents of LFN. Included among the provisions of the 2004 Election Regulations, at sub-section 2(p) is the following definition:
>
> > ""Kaska Dena Council" means a society, incorporated in British Columbia for the purpose of, among other things, representing the interests of all Kaska Dena people with respect to the negotiation and settlement of the Kaska Dena comprehensive land claim;"
>
> For reasons which follow, it seems likely that this provision will be a focal point of argument between KDC and LFN at the eventual hearing of the petition.

[4]   In our view, the finding found in the last sentence of paragraph 15 is clearly supported by the evidence.

[5]   Based on this finding, Justice Gower then analyzed the issue of divided loyalties in paras. 22 to 24 of his reasons for judgment. He concluded by saying this:

> [25]   Since KDC's position on its capacity to represent LFN members seems to differ substantially from LFN's position, the conclusion that Mr. Walsh is in a conflict of interest on the point seems inescapable. While I appreciate that it is unlikely either KDC or LFN anticipated that there might be a debate on these provisions when they were originally ratified by LFN in 1992 or 2004, it nevertheless seems likely that Mr. Walsh will be taking a position which could effectively amount to an attack or an attempt to

undermine the result of the legal work which he did for LFN. Thus, even if I am wrong in concluding that relevant confidential information [an earlier conclusion] was imparted to him by LFN during the retainer on the 2004 Election Regulations, I would conclude that he should be disqualified because of his ongoing duty of loyalty and fiduciary duty to LFN arising from that file.

[6]   In spite of the able efforts of Mr. Nelson to persuade us to the contrary, we are all of the view that Mr. Justice Gower committed no error in law, or in fact, which would permit this Court to interfere with the order and, as a result, the appeal must be dismissed.

[7]   **CHIASSON J.A.:** I agree.

[8]   **D. SMITH J.A.:** I agree.

[9]   **RYAN J.A.:** The appeal is dismissed.

C. a. Ryan J.A.
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The Honourable Madam Justice Ryan