SUPREME COURT OF YUKON

Citation: *Miller et al*. v. *Government of Yukon et al*., 2010 YKSC 22

Date: 20100526
S.C. No. 09-A0099
Registry: Whitehorse

Between:

GEORGE MILLER and the KASKA DENA COUNCIL

Petitioners

And

GOVERNMENT OF YUKON, MINISTER OF ENERGY, MINES AND RESOURCES, THE WATSON LAKE MINING RECORDER, RONALD STACK, GARY LEE, KILLDEER MINERALS INC., and LIARD MCMILLAN on his own behalf and on behalf of the LIARD FIRST NATION, and the LIARD FIRST NATION

Respondents

And

YUKON CHAMBER OF MINES

Intervenor

Before: Mr. Justice L.F. Gower

Appearances:

Stephen Walsh — Counsel for the Petitioners
Drew Mildon — Counsel for the Respondent Liard McMillan and Liard First Nation

REASONS FOR JUDGMENT

INTRODUCTION

[1] This an application by Chief Liard McMillan, acting on his own behalf and on behalf of the Liard First Nation, and the Liard First Nation (whom I will collectively refer to here as “LFN”), to disqualify Stephen Walsh from further acting for the petitioners in this

matter, George Miller and the Kaska Dena Council (whom I will collectively refer to here as "KDC"). LFN alleges that Mr. Walsh was previously retained on a number of matters by LFN that are related to the issues arising in the petition and is therefore in a conflict of interest.

[2] In general terms, the petition raises the question of whether the Government of Yukon has a duty to consult and accommodate KDC prior to the recording and granting of staked mineral claims within the lands that the Kaska claim as their traditional territory in the Yukon. LFN successfully applied to be joined as a respondent in this proceeding. It will argue at the hearing of the petition that the duty to consult and accommodate is owed either to it, or to the most affected Kaska First Nation, but not to KDC.

[3] For the reasons which follow, I conclude that Mr. Walsh should be disqualified because of a perceived conflict of interest with LFN.

ISSUES

[4] The issues on this application are as follows:

1. Has LFN established that it was Mr. Walsh's client on each of the occasions when it says he performed legal work for LFN?
2. a) Assuming LFN establishes that it was Mr. Walsh's client on at least one occasion in the past, has it also established that the previous retainer is sufficiently related to KDC's current retainer to give rise to the inference that Mr. Walsh received confidential information from LFN on that occasion which is relevant to the current retainer?

b) If I am able to make such an inference, has Mr. Walsh rebutted that inference by satisfying me that no relevant confidential information was provided to him by LFN?

3. Assuming a reasonably informed member of the public would be satisfied that no misuse of relevant confidential information provided by LFN to Mr. Walsh would occur, is there nevertheless a disqualifying conflict of interest arising from the duty of loyalty and the fiduciary duty owed by a lawyer to a former client? In other words, even if there is no risk of the misuse of confidential information, do these duties prevent Mr. Walsh from attacking or undermining the legal work performed for LFN while acting for KDC?

LAW

[5] The leading case in determining whether there is a disqualifying conflict of interest is *MacDonald Estate* v. *Martin*, [1990] 3 S.C.R. 1235. It sets out the following principles:

1. There are two questions to be answered:

    a) Did the lawyer receive confidential information from the former client relevant to the matter at hand?

    b) Is there a risk that it will be used to the prejudice of the former client? (para. 45)

2. In answering the first question, once it is shown by the former client that there existed a previous solicitor-client relationship which is “sufficiently related” to the retainer from which it is seeks to remove the lawyer, “the court should infer” that

confidential information *was* imparted, *unless* the lawyer satisfies the court that no information was imparted which could be “relevant” (para. 46).

3. In answering the second question, when a lawyer has relevant confidential information from the former client, the lawyer cannot act against that client and disqualification is automatic (para. 47).
4. There are two interests at stake, in the circumstances of this case, which must be balanced:
    a) The public’s confidence in the integrity of the profession and in the administration of justice; and
    b) The interest of a member of the public in retaining counsel of their choice (para. 51).

    These interests are sufficiently flexible to permit a lawyer to act against a former client, provided that a reasonable member of the public, who is informed of all the facts, would conclude that no unauthorized disclosure of confidential information has occurred or would occur (para. 51).

[6] The question of the public interest in this area of the law was addressed in *Chiefs of Ontario* v. *Ontario*, [2003] O.J. No. 580. There, A. Campbell J., of the Ontario Superior Court of Justice, was considering a motion to disqualify a law firm from acting on the basis of conflict of interest. He acknowledged that disqualification has serious consequences that should not lightly be undertaken and that the court must balance various competing factors, which in the context of the case at bar include:

1. the *MacDonald Estate* factors, mentioned above;

2. the public interest that litigants should have confidence that their confidential legal advisors will not later attack them in related matters;

3. the public interest that First Nations litigation should be untainted by serious conflict of interest; and

4. the interest of all parties that the litigation not be delayed through the removal of counsel (at para. 111).

[7] With respect to the public interest, Campbell J. (at para. 115) quoted from Mr. Justice Callahan in a family law case as follows:

> "…Of more importance, however, is the fact that the principles involved herein are designed not only to protect the interests of the individual clients but they also protect the public confidence in the administration of justice. This is particularly so when the litigation involves a family dispute…[*Goldberg* v *Goldberg*, (1982), 141 D.L.R. 3d 133]

Campbell J. continued (at paras. 116 and 117) to state:

> For "family dispute" in that case, substitute "First Nations litigation" in this case."

> "This First Nations litigation involves the honour of the Crown. It engages the public interest in ensuring full access by First Nations litigants to independent legal advice free from conflict and free from attacks by former confidential legal advisers who enjoyed access to confidential information of their former clients on matters connected with the subject matter proceedings [as written]."

[8] In *R.* v. *Neil*, 2002 SCC 70, Binnie J. observed that, on motions to disqualify a lawyer from acting, while courts are most often preoccupied with the use and abuse of confidential information, the duty of loyalty to a current client includes the much broader principle of avoidance of conflicts of interest, in which confidential information may or may

not play a role (para. 17). He then quoted from Ground J. in *Drabinsky v. KPMG* (1998), 41 O.R. 3rd 565 (Gen. Div.):

> "I am of the view that the fiduciary relationship between the client and the professional advisor, either a lawyer or an accountant, imposes duties on the fiduciary beyond the duty not to disclose confidential information. It includes a duty of loyalty and good faith and a duty not to act against the interests of the client." (para. 18)(emphasis already added)

Later, Binnie J. referred to the general rule that 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 after receiving full disclosure (and preferably independent legal advice), and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other." (para. 29) (emphasis already added)

[9] In *Brookville Carriers Flatbed GP Inc.* v. *Blackjack Transport Ltd.*, 2008 NSCA 22, Cromwell J. picked up on this notion of the duty of loyalty to a former client, even where the misuse of confidential information is not at risk. At para. 51, he stated:

> "… [The] broader continuing duty of loyalty to former clients is based on the need to protect and to promote public confidence in the legal profession and the administration of justice. What is of concern is the spectre of a lawyer attacking or undermining in a subsequent retainer the legal work which the lawyer did for the former client or of a lawyer effectively changing sides by taking an adversarial position against a former client with respect to a matter that was central to the previous retainer. *Basinview* is an example of the former: the new retainer involved the lawyer attacking or attempting to undermine the very legal services provided to the former client. …."

Cromwell J. then went on to note that one must not lose sight of the important right of parties to retain and instruct counsel of their choice, nor should courts ignore the possible strategic use of applications to disqualify counsel (para. 52). However, he returned to

address the case of an alleged disqualifying conflict of interest where confidential information is *not* at risk:

> "… the relationship between the two retainers is considered in order to identify whether the second retainer involves the lawyer attacking the legal work done during the first retainer or amounts, in effect, to the lawyer changing sides on a matter central to the earlier retainer. The concept of relatedness for this purpose is much narrower and has an entirely different focus than the concept as applied in the *MacDonald Estate* analysis." (para. 55)

ANALYSIS

[10] To summarize, LFN has the onus of establishing that it previously retained Mr. Walsh in a matter that was sufficiently related to the matter raised in the petition. If that onus is met, then I am required to draw an inference that confidential information was imparted to Mr. Walsh during that previous retainer, unless he satisfies me that this is not the case, or that the information imparted was not relevant. Further, if I conclude that Mr. Walsh formerly acted for LFN, I must also determine whether his fiduciary duty and his duty of loyalty to LFN prevent him from acting against it in this instance.

[11] LFN alleges that Mr. Walsh previously acted for it directly, or in matters affecting LFN's interests, in the following specific matters:

1. The "Simpson Lake Accord", in 1992;
2. A tax case in the Federal Court, originally filed September 29, 1999;
3. The "Kaska-Yukon Forestry Agreement in Principle", in 2003;
4. The Regulations for the Conduct of Elections for the Chief and Council of LFN, in 2004 (the "2004 Election Regulations");
5. An action in this Court in 2005, with the Ross River Dena Council as Plaintiff (#05-A0043);

6. Providing legal updates at the quarterly meetings of the Kaska Tribal Council ("KTC") on litigation between Kaska First Nations and third parties;
7. An action in the Supreme Court of British Columbia to compel Canada to add lands to LFN's reserve at Lower Post, British Columbia, pursuant to a previous agreement with Canada (#S-061239);
8. Correspondence related to oil and gas developments in Kaska traditional territory for the KTC, in late 2005;
9. Providing advice to LFN on March 31, 2006 on various Kaska agreements with other governments, the treaty and land claims negotiations processes and the overall Kaska legal context.
10. Providing the Kaska leadership with alternative versions of a law suit related to funds held in trust for the Kaska, in June 2007; and
11. Providing a work plan for Kaska meetings with Canada's representative, Gavin Fitch, in 2007.

[12] I will start by dealing with the alleged previous retainers relating to the 1992 Simpson Lake Accord and the 2004 Election Regulations, as I find they are dispositive of LFN's application to disqualify. However, in the event I am incorrect in that regard, I will also address each of the other alleged retainers.

A. Simpson Lake Accord and *2004 Election Regulations.*

[13] It is not disputed that Mr. Walsh was retained by LFN in the summer of 1992 (then the "Liard River Indian Band" and elsewhere "the Band"), primarily to assist in the drafting of various documents and agreements that were developed by LFN and the Kaska Unity Society with a view to instituting an elected form of government for LFN. At that time, Mr.

Walsh was also retained by KDC and had been since September 1987. One of the petitioners, George Miller, is a founding member of KDC and is its current chair. In 1986 Mr. Miller became the first Deputy Chief of the Liard Indian Reserve #3 (now known as the Daylu Dena Council) and held that position until early 2002. In that capacity, I presume he also would have been a member of the Board of Directors of KDC, as the Board included a position for the Deputy Chief of the Daylu Dena Council. [1] Mr. Miller was also a member of LFN's bargaining team throughout the negotiations leading up to Simpson Lake Accord, and in that capacity acted on behalf of LFN. [2]

[14] Mr. Miller was instrumental in the decision of the LFN to retain Mr. Walsh to assist it in the Simpson Lake Accord negotiations. Specifically, he recommended Mr. Walsh to the Band on the grounds that he had worked with KDC in a variety of capacities since 1987 and "had, during that period, acquired considerable knowledge about the history, structure, membership and internal workings of the Band." [3] Mr. Miller deposed that the executive members of KDC to whom Mr. Walsh reported, "were all, without exception, members of the [Liard River Indian] Band". [4] Mr. Miller further deposed in his affidavit #4, at paras. 33 through 36 that:

> "To the best of my knowledge Steve did not acquire any confidential information regarding the Band during the time he was retained to assist in the discussions and negotiations leading to the Simpson Lake Accord. As I alluded to above, he came to that file already possessed of quite extensive and detailed information regarding the history, structure, membership and internal workings of the Band, information which he obtained during many years of working with the KDC prior to being retained to assist in the discussions and

[1] Dave Porter's affidavit #1, para. 14.
[2] George Miller's affidavit #4, paras. 1 and 18.
[3] George Miller's affidavit #4, para. 9.
[4] George Miller's affidavit #4, para. 34.

> negotiations leading to the Simpson Lake Accord.
>
> …
>
> Assuming that it is possible that some of the information regarding the Band that Steve already possessed when he was retained to assist in the discussions and negotiations leading to the Simpson Lake Accord was confidential, the fact remains that he did not acquire that information while retained by the Band: he acquired it while working with the KDC throughout a more than ten-year period prior to the Simpson Lake Accord.
>
> Information about our Band that Steve became privy to in the course of his work with the KDC would be information that is known by me and those other Band members in the KDC's leadership with whom Mr. Walsh worked for more than a decade prior to his involvement in the Simpson Lake Accord."

[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.

[16] LFN's position at the hearing will be that KDC is not an authorized representative of bodies holding Kaska aboriginal rights and title, and further that KDC is not an appropriate party to bring an action based on a duty grounded in aboriginal rights and title, because it is not an entity that could hold those rights itself. Rather, LFN will argue that it

is the appropriate party to be consulted respecting Kaska aboriginal rights and title in the geographical area at issue. In their petition, KDC specifically seeks a declaration that the Government of Yukon ("GY") had a duty to consult and accommodate KDC prior to recording and granting a particular mineral claim known as "Wildcat 92", and that GY's failure to do so constitutes a breach of that duty. KDC has singled out this mineral claim in order to pursue a "test case" on the issue. LFN agrees that GY had a duty to consult and accommodate and that it breached its duty in this instance, but says that the duty is owed to it and not KDC. LFN also agrees to an order requiring GY to consult and accommodate "the aboriginal rights and interests of the Kaska Dena, prior to recording any further mineral claims in the Kaska traditional territory in the Yukon", providing that the consultation is specified to be with the "most affected Kaska First Nation(s)", rather than with KDC.

[17] In support of its position LFN intends to rely upon the Simpson Lake Accord (and its attached regulations) and the 2004 Election Regulations. In particular, LFN has indicated that it will rely on two sections, among others, of the Simpson Lake Accord, namely:

a) s. 10, which states, "the Liard First Nation Government shall decide issues relating to Land Claims, policy matters and by-laws.";

b) s. 9, which states, "the [Custom Elected] Deputy Chief and two Councillors of Liard Indian Reserve No. 3 shall administer the funds and programs for the Liard Indian Reserve No. 3."

[18] LFN is concerned that KDC may wish to rely upon other provisions found in the Simpson Lake Accord and the 2004 Election Regulations in support of KDC's position that

it can represent aboriginal rights, title and interests of *some* LFN members, in opposition to the position taken by LFN on the petition. In particular LFN has referred to:

[1] s. 4 of the Simpson Lake Accord, which states:

> "To be eligible to vote or be elected, a person must be 18 years of age and a member of the Liard River Indian Band and eligible beneficiary of the comprehensive claims of the Liard First Nation or the Kaska Dena Council."; and

[2] sub-section 2(p) of the 2004 Election Regulations, which I quoted above at para 15.

LFN submits that the interpretation of these and other provisions in the two documents will be central to the determination of which entity is entitled to be consulted and accommodated in this context.

[19] Accordingly, since Mr. Walsh acted for LFN on the Simpson Lake Accord and on the 2004 Election Regulations, LFN submits it has established that its previous solicitor-client relationship with Mr. Walsh is "sufficiently related" to these proceedings to give rise to the inference that confidential information was imparted to him. I agree. Accordingly, *MacDonald Estate* directs that I must disqualify Mr. Walsh, unless he rebuts that presumption by satisfying me that no such information passed. *MacDonald Estate* states that this will be a difficult burden to discharge.

[20] Nevertheless, with respect to the Simpson Lake Accord, I am satisfied that Mr. Walsh successfully rebutted the presumption by adducing evidence that any relevant confidential information about LFN he *may* have possessed was not obtained by him while retained by LFN, but rather was obtained earlier while retained by KDC.

[21] However, with respect to the 2004 Election Regulations, on my review of the record, Mr. Walsh has not provided any evidence to rebut the presumption. LFN's

evidence about this retainer is in Jim Wolftail's affidavit #1, at paras. 11 and 12, and is based on his review of a statement of account Mr. Walsh submitted to LFN for that work. Mr. Walsh has not disputed this retainer. Therefore, I am directed by *MacDonald Estate* to infer that relevant confidential information was imparted to him by LFN, and to conclude that disqualification is automatic.

[22] If I am wrong in concluding that the 2004 Election Regulations retainer is sufficient reason to disqualify Mr. Walsh from acting for KDC on the petition, I will go on to address the remaining question: 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? Mr. Walsh submits that, in pursuing the relief sought in the petition, he would not be attacking or undermining the value of the legal work he previously provided to LFN relating to the Simpson Lake Accord or the 2004 Election Regulations, nor would he be "changing sides" in a matter that was central to those previous retainers. He stresses that KDC agrees with LFN that the Simpson Lake Accord and the 2004 Election Regulations are "constitutional" documents relating to the internal governance of LFN. Indeed, as I understood his submissions, Mr. Walsh also seemed to concede that the Government of Yukon has a duty to consult and accommodate LFN in respect of certain matters relating to the aboriginal rights, title and interests of LFN members, but not in this particular context and on this particular tract of the claimed Kaska traditional territory. For the sake of argument, I accept that if no relevant confidential information was imparted to him by LFN on either of those retainers, the concept of relatedness between Mr. Walsh's retainers by LFN on these matters and his current retainer for KDC on the petition is "much narrower" than in

the *MacDonald Estate* analysis.[5] I am also cognizant of the competing interest of KDC to retain and instruct counsel of its choice, and the other factors I mentioned (at para. 6 above) from *Chiefs of Ontario*. However, even with those considerations in mind, Mr. Walsh cannot escape the fact that there is a clear conflict in the positions of KDC and LFN with respect to the representation of the rights, title and interests of LFN members.

[23] Mr. Walsh's own submissions highlight the nature of the conflict and, in my view, place the differing interpretations of the relevant provisions of the Simpson Lake Accord and the 2004 Election Regulations squarely at issue. Counsel for LFN stated in his outline:

> "KDC says it represents some members of LFN for purposes of dealing with their Kaska aboriginal rights and title and LFN says that the LFN Government exclusively represents the rights, title and interests of LFN, its members and communities." (my emphasis)

In reply, Mr. Walsh submitted that LFN's position is "mischaracterized and not supported by the evidence referred to." The "evidence referred to" by LFN is Dave Porter's affidavit #1, at para. 15, and Chief McMillan's affidavit #1, at para. 11. Mr. Porter deposed that KDC "does represent some members of [LFN] … who choose to be represented by [KDC] for the purposes of pursuing a settlement of our recognized land claims…" Chief McMillan's evidence is that the Simpson Lake Accord and the 2004 Election Regulations authorize LFN to make decisions on the Kaska aboriginal rights and title of LFN.

[24] Similarly, the evidence of Lois Moorcroft suggests that when the issue of the representative capacities of KDC and LFN is eventually argued at the hearing of the petition, there will very likely be a debate about what the relevant provisions of the Simpson Lake Accord and the 2004 Election Regulations were intended to mean. At para. 3 of her affidavit #1, she deposed as follows:

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[5] *Brookville Carriers*, cited above, at para. 55.

> "During the course of my work for LFN on the custom election regulations, I attended an LFN special general assembly on July 15, 2004. I have retained a copy of the draft minutes of that assembly which contain the following notation:
>
> > Steve Walsh reported that the provision that voters must be eligible to be a beneficiary of the comprehensive land claims of the Liard First Nation or the Kaska Dena Council in the Simpson Lake Agreement was designed to ensure voters in LFN elections are of Kaska ancestry." (my emphasis).

[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 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.

[26] Consequently, the motion is allowed. Mr. Walsh is removed as counsel for the petitioners in this proceeding.

[27] Given my conclusion regarding the solicitor-client relationship which Mr. Walsh had with LFN with respect to the 1992 Simpson Lake Accord and the 2004 Election Regulations, there is, strictly speaking, no need for me to express any opinion on the other specific matters in which he allegedly previously acted for LFN directly, or in matters

affecting LFN's interests. However, in the event I am wrong about my conclusions above, I will briefly set out my views about the other remaining legal work at issue.

B. The tax case in Federal Court.

[28] This action was commenced by LFN in Federal Court on September 29, 1999, and arises in part from the order made on July 15, 1870, pursuant to the *Rupert's Land and North-Western Territory Order* (the "*1870 Order*"). LFN's counsel points out that para. 3B of the statement of claim in that case alleges that LFN and its ancestors "At all material times…have used and occupied lands in the Yukon Territory which were, prior to 1870, part of the North-western Territory referred to in section 146 of the *Constitution Act, 1867."*

[29] LFN's counsel submits that the question of a First Nation's use and occupation of lands, at the time of the assertion of sovereignty, is directly related to the question of whether the Crown owes a duty to consult and accommodate to that First Nation. That submission strikes me as being both logical and correct.

[30] In opposition, Mr. Walsh has tendered to the affidavit of his legal assistant who deposed that she is informed by Mr. Walsh "that the issues in the case are unrelated to the issue arising in this petition as to whether the recording of a mineral claim triggers a duty to consult." LFN's counsel objects to the admissibility of that evidence because it is a legal conclusion. I agree. Furthermore, it amounts to little more than Mr. Walsh submitting or deposing *directly* that the tax case is unrelated to the one at bar. As stated in *MacDonald Estate*:

> "A fortiori undertakings and conclusory statements in affidavits without more are not acceptable. These can be expected in every case of this kind that comes before the court. It is no more than the lawyer saying 'trust me'…" (para. 50)

[31] As Mr. Walsh has provided no further evidence to the contrary, I am satisfied that LFN has shown that its previous relationship with Mr. Walsh on the tax case is sufficiently related to the matters arising in the petition to give rise to the inference that relevant confidential information was imparted to him. A lawyer who has relevant confidential information from his former client, cannot act against that former client. In such a case, disqualification is automatic.

C. The "Kaska-Yukon Forestry Agreement in Principle" in 2003.

[32] In his affidavit #4, Mr. Miller deposed that, contrary to the evidence of Mr. Wolftail on behalf of LFN, Mr. Walsh did *not* obtain any confidential information from LFN elders about Kaska traditional use and traditional knowledge about land use, customs, laws and governance practices, in the course of that retainer. This file involved an agreement between the "Kaska", as represented by LFN, Ross River Dena Council and KDC, and the Government of Yukon, respecting the management, development and beneficial enjoyment of forest resources in the Kaska traditional territory within the Yukon. Mr. Walsh admits that he was retained by LFN in relation to this agreement. However, George Miller's evidence is that Mr. Walsh's involvement was brief and limited. Based on information supplied by Mr. Walsh, Mr. Miller believes that Mr. Walsh only participated in two bargaining sessions. The Kaska representatives at those two sessions were limited to Mr. Walsh, a professional forester from British Columbia, and a consultant from Whitehorse. There was no evidence that the latter two individuals were Kaska. Mr. Walsh further informed Mr. Miller that, subsequent to those two bargaining sessions, he engaged in a few telephone conversations with lawyers from the Government of Yukon regarding

drafting issues, following which the agreement in principle was completed and signed. [6] According to Mr. Walsh, that was the extent of his limited retainer.

[33] Mr. Walsh further objected to LFN's evidence, because it is based on information and belief and because Mr. Wolftail has failed to identify the source of his information and belief, contrary to Rule 49(12) of the *Rules of Court*. That Rule is identical to its predecessor, Rule 51(10) of the *British Columbia Supreme Court Rules.* In *Ross River Dena Council* v. *The Attorney General of Canada*, 2008 YKSC 45, at para. 9, I observed that the sub-rule permits hearsay evidence, providing the source is given and identified. In *Ulrich* v. *Ulrich*, 2004 BCSC 95, Bouck J., also considered Rule 51(10), and stated:

> "Thus, Rule 51(10) allows a deponent to repeat any evidence the deponent would be permitted to give at a trial, if the deponent were called as a witness. A deponent would not be permitted to give hearsay evidence at trial because of its inherent unreliability. The Rules create an exception. They allow a deponent to swear or affirm in an affidavit the contents of an out-of-court statement made by a speaker to the deponent (the information) provided the deponent gives the speaker's name (the source). Failure of a deponent to name the source of the out-of-court statement may make the affidavit "worthless"…
>
> …
>
> Rule 51(10) applies to both oral out-of-court statements and written out-of-court documents … "(paras. 22 and 25)

[34] LFN's evidence challenging Mr. Walsh's position is limited to the statements made by Mr. Wolftail in his first affidavit, at para. 7, that Mr. Walsh had access to confidential information in the course of the forestry agreement retainer. However, Mr. Wolftail has failed to identify the source of his belief, other than to state that he reviewed some unspecified and unidentified documents provided to him from Chief Liard McMillan. Accordingly, I conclude that Mr. Wolftail's evidence in that regard is inadmissible. As there

[6] George Miller's affidavit #4, paras. 40-45.

is no further evidence from LFN as to Mr. Walsh's involvement in this file, I find that LFN has failed to establish that this previous solicitor-client relationship is sufficiently related to the case at bar to give rise to the rebuttable presumption that relevant confidential information was imparted to Mr. Walsh in the course of that previous retainer.

D. Action filed in Supreme Court of Yukon, in 2005, with Ross River Dena Council as plaintiff (#05-A0043).

[35] LFN submits that this action was commenced by the Ross River Dena Council as plaintiff on behalf of the Kaska Nation, which *includes* LFN. However, Mr. Walsh responds with the submission that his client in that action is the Ross River Dena Council and *not* the LFN. I agree. Consequently, if any confidential information was obtained by him in the preparation or prosecution of that law suit, it would be the confidential information of the Ross River Dena Council, not LFN. Further, Mr. Walsh has provided evidence that the statement of claim in that action:

> "…is to a large extent a copy of the Kaska Dena Council's statement of claim in an action commenced in the Federal Court in 1986 in respect of another area of the Kaska traditional territory in the Yukon." [7]

[36] Accordingly, LFN has failed to establish that it is Mr. Walsh's client in that Yukon action.

E. Providing legal updates at the quarterly meetings of the Kaska Tribal Council ("KTC") on litigation between Kaska First Nations and third parties.

[37] Mr. Walsh concedes that he was retained by KTC to provide these quarterly legal updates. However, he maintains that it was KTC who was his client on those occasions and not LFN. He further submits that LFN could not be considered to be his client on those occasions simply by virtue of its membership within the KTC, which is a corporate entity in

[7] Maureen Birckel's affidavit #3, para. 7.

its own right. KTC was incorporated under the *Canada Corporations Act* in about 1991. Its directors are representatives from the chiefs and councils of the four Kaska First Nations: LFN (which includes the Daylu Dena Council), the Ross River Dena Council, the Kwadacha First Nation, and the Dease River First Nation. Mr. Miller deposed, on Mr. Walsh's behalf, that representatives of KDC have participated in KTC's quarterly leadership meetings, and in its annual assemblies, and are aware of updates Mr. Walsh has provided at those meetings, which he says frequently relate to KDC legal initiatives. Furthermore, as representatives of KDC participate in the leadership meetings of the KTC, they are privy to all of the information and reports disclosed at those meetings by Mr. Walsh.[8]

[38] Mr. Walsh also pointed to the definition of "client" in the *Canadian Bar Association Code of Professional Conduct*, 2009, which states:

> "The term client does not extend to persons involved in, associated with, or related to a client such as:
>
> (i) parent companies, subsidiaries or other entities associated or affiliated with a client, or directors, shareholders [or] employees of a client,
>
> (ii) members of unincorporated clients such as trade associations, partnerships, joint ventures and clubs, …" (my emphasis)

[39] I agree with Mr. Walsh that LFN was not his client on those occasions and would add that, in any event, there is no evidence from LFN that there was any relationship between the discussions at those meetings and KDC's present retainer. Accordingly, no issue of conflict arises on this evidence.

F. An action in the Supreme Court of British Columbia to compel Canada to add lands to LFN's reserve at Lower Post, pursuant to a previous agreement with Canada. (#S-061239)

[8] George Miller's affidavit #4, paras. 38 and 46.

[40] Based on the *MacDonald Estate* test, I find that LFN has failed to establish that Mr. Walsh's work on that file was sufficiently related to the matters arising in the petition to give rise to an inference that he must have received relevant confidential information from LFN in the course of that previous retainer. In any event, I am satisfied that Mr. Walsh has rebutted any presumption which *might* arise by establishing that he did not receive any relevant confidential information from LFN during the course of that previous retainer.

[41] Mr. Wolftail deposed that Mr. Walsh acted as legal counsel for LFN in this action. That was not disputed by Mr. Walsh. However, Mr. Miller deposed that the action was in relation to the failure of the Government of Canada to honour the terms of an agreement it concluded with the Kaska Dena Council in 1985 to add 48.5 hectares to the reserve at Lower Post, British Columbia to compensate for an encroachment on the reserve resulting from the construction of the Alaska Highway. The documentation provided in support of that evidence is from a federal government website which indicates that the agreement was between the Federal Department of Public Works and KTC. In any event, Mr. Miller went on to depose that Mr. Walsh informed him that his historical and legal research to prepare the plaintiff's case in that regard was based "exclusively on materials obtained from the KDC's files" and that he:

> "… reported to and received <u>all</u> of his instructions from the deputy chief of the Daylu Dena Council, Walter Carlick, who was then (and continues to be) a director and former chair of the KDC." [9] (my emphasis)

Mr. Miller's evidence was undisputed by LFN.

G. Correspondence related to oil and gas developments in Kaska traditional territory for the KTC, in late 2005.

[9] George Miller's affidavit #4, paras. 47 and 48.

[42] I accepted above Mr. Walsh's argument above that KTC is a separate corporate entity, distinct from LFN. While his legal work for KTC or this correspondence may have had an impact on LFN's interests, that does not make LFN his client in relation to that work. In any event, there is no evidence from LFN further detailing the nature of the work. Therefore, it has failed to establish that there is a sufficient relationship between that work and the matters arising in the petition to give rise to the rebuttable inference in the *MacDonald Estate* analysis.

H. Providing advice to LFN on March 31, 2006 on various Kaska agreements with other governments, the treaty and land claims negotiations processes and the overall Kaska legal context.

[43] LFN's only evidence about this legal work is in Jim Wolftail's affidavit #1, at para. 15, which paragraph I rule inadmissible. Mr. Wolftail does not depose that he has direct knowledge of this legal work; nor does he identify the source of his belief, if indeed the statement is based on information and belief. Therefore, pursuant to Rule 49(12) of the *Rules of Court*, the information should be disregarded. In any event Mr. Walsh's legal assistant deposed that she reviewed his records for March 31, 2006, and they do not contain any reference to dealings of any kind with LFN on that date.[10]

I. Providing the Kaska leadership with alternative versions of a lawsuit related to funds held in trust for the Kaska, in June 2007.

[44] Mr. Walsh does not dispute that he performed this legal work, but denies that it was on behalf of LFN. Mr. Miller, based on information from both Mr. Walsh and Dave Porter, who was chair of the Kaska Dena Council from 2002 to October 2008, deposed that LFN's evidence on this point relates to "two draft lawsuits prepared on behalf of the KDC in accordance with instructions provided to Steve [Walsh] from Dave Porter who was at the

[10] Maureen Birckel's affidavit #3, para. 6.

time the chair of the KDC." [11] The first pages of each of the draft writs of summons are attached to Mr. Miller's affidavit. One shows "Kaska Dena Council and Walter Carlick, on their own behalf on behalf of, and as representatives for, the Kaska" as plaintiffs. The other shows "Kaska Dena Council, Ross River Dena Council, and Liard First Nation, on their own behalf and on behalf of, and as the representatives for, the Kaska" as plaintiffs. Mr. Miller finally deposed that KDC has yet to make a decision as to whether to proceed with either of those actions.

[45] Thus, it would once again appear that LFN was not Mr. Walsh's client in relation to that retainer. In any event, LFN has failed to establish that there is any relationship between the nature of that retainer and the matters arising in the petition to give rise to the rebuttable inference in the *MacDonald Estate* analysis.

J. Providing a work plan for Kaska meetings with Canada's representative, Gavin Fitch, in 2007.

[46] Mr. Walsh has not specifically responded to this allegation. However, it is LFN's own evidence that it terminated its solicitor-client relationship with Mr. Walsh on *all matters* on June 19, 2006. [12] Further, there is no evidence from LFN that Mr. Walsh was acting for it on that occasion. Therefore, the allegation is of no consequence to LFN's application.

COSTS

[47] Mr. Walsh expressly requested an opportunity to separately address the issue of costs. If the parties are unable to agree on costs, I will remain seized in order that they can arrange a subsequent hearing date to speak to the issue.

Gower J.

[11] George Miller's affidavit #4, para. 49.
[12] Jim Wolftail's affidavit #1, para. 19.