

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gross v. Peak Products Manufacturing Inc.*,  
2025 BCSC 173

Date: 20250203  
Docket: S213994  
Registry: Vancouver

Between:

**Phil Gross**

Plaintiff/  
Defendant by way of Counterclaim

And

**Peak Products Manufacturing Inc., Peak Products International Inc., Peak Innovations Inc., Peak Products America Inc., Peak Products USA Corporation, Peak Rsg Services Inc., Peak Products Corporation, Peak Products Industries Inc., Peak Products Industrial Inc., Mountaintop Holdings Inc., 561885 BC Ltd., Synergize Innovations Inc., West Coast Summit Holdings, Peak Installations Inc, H2Go Installations Inc., OnPoint Compliance Solutions Inc., Superspike Inc., Synergize International Inc., 6191533 Canada Inc., 6251242 Canada Inc., 7260326 Canada Inc., 7259158 - Canada Incorporated, 7258356 Canada Inc., 6504558 Canada Inc., Peak Products Pty. Ltd., Synergize Incorporated, And All Corporations and Entities, Wherever Situated, Captured by the February 1992 Agreement (Individually and Collectively Referred to as the "Peak Group of Companies") And John Anthony Gross Aka John Gross**

Defendants/  
Plaintiffs by way of Counterclaim

Before: The Honourable Mr. Justice D. M. Masuhara

## **Ruling on Interim Removal of Counsel**

Counsel for the Plaintiff/Defendant by way  
of Counterclaim:

W.G. Wharton

Counsel for Defendants/Plaintiffs by way of  
Counterclaim:

C.A.B. Ferris, K.C.  
S.B. Hannigan

Place and Date of Hearing:

Vancouver, B.C.  
December 18, 2024

Place and Date of Judgment:

Vancouver, B.C.  
February 3, 2025

**Introduction**

[1] The defendants seek an order prohibiting Mr. Wharton and Rose-Mary Basham, K.C., from appearing as counsel for the plaintiff, with respect to an application by the defendants seeking to disqualify the aforementioned and removing them as counsel of record for the plaintiff in this action (the “Disqualification Application”). The date of the application is yet to be set.

[2] I have been case managing this action since January 2023.

[3] The plaintiff, Phil Gross, and the defendant, John Gross, are brothers but have not interacted for about 30 years. It is the within action that has them re-engaged.

[4] The principal defendant is John Gross, who is asserted by the plaintiff as having control over and being the beneficial owner of the defendant corporations. As I understand it, since the mid-1990s, John Gross and his companies have become very successful as a key manufacturer and supplier to Home Depot of building supply products such as roofing and gutter products.

[5] The central dispute in this action is the assertion by the plaintiff that he is entitled to an equal share in assets held by his brother or companies under his control pursuant to an agreement said to have been made in or about February 1992. As I understand it, it was an oral agreement which was then reflected into written form, the written form being drafted by a jointly retained solicitor. The document, however, was never signed and John Gross denies the existence of an agreement.

[6] The assertion of Phil Gross is that during the early 1990s, he and his brother were facing a host of civil and criminal proceedings involving the family’s business and themselves personally. He claims that given his past efforts and expenditures and the brothers’ anticipated joint future efforts to avoid financial ruin (and even worse future consequences), John Gross agreed that any new future building supply company (started by either brother) would be shared equally.

[7] The motivation for John Gross is pleaded by the plaintiff as follows:

148-A) At the time of contract formation, potential criminal charges against John Gross resulting from his role as the President of Philips Mfg. was a major factor for John Gross driving the formation of the Agreement. In consideration of the Agreement, the Plaintiff agreed to remain and assist with the financial issues, civil claims and to assist John Gross with any criminal charges that may be brought against John Gross.

[8] Phil asserts that it was agreed that:

any legal or beneficial interest in any asset or any real or personal property of any of the family businesses, successor corporation or corporation hereinafter established, shall be held in trust by the recipient as to an undivided one-half interest therein for the benefit of the other of them to the intent and purpose that any such asset or real or personal property shall be shared equally by Phil Gross, Jr. and John Gross.

[9] During the period of the legal issues, Ms. Basham was the primary lawyer at Russell & DuMoulin, managing a portion of the litigation faced by the brothers. Ms. Basham was involved in meetings and took instructions from both brothers and the family company. It appears that she represented Phil Gross, John Gross, and Philips Manufacturing Ltd. (“PML”) both collectively and individually. She was defending John Gross against serious allegations of fraud.

[10] Ms. Basham was, and is, esteemed senior litigation counsel.

[11] Ultimately, the criminal and civil proceedings against John and Phil (and others) were resolved with no findings of wrongdoing or liability on the part of any of the persons involved. This occurred in the mid to late 1990s and as I understand it, the brothers have had no contact since, except for this litigation.

[12] In early 2023, about 2 years into this action, Ms. Basham joined the plaintiff’s legal team as co-counsel with Mr. Wharton.

[13] As a result of further document production in June 2023, John Gross through counsel asked Ms. Basham to reconsider her ability to act, based on her earlier involvement in the 1990s litigation described above.

[14] John Gross asserts that Ms. Basham is now directly adverse in interest to him, a former client, particularly considering that Ms. Basham represented John Gross in a litigation matter closely related to the subject matter of the plaintiff's pleadings in this action. His concerns include that Ms. Basham possesses (and can now weaponize against him) confidential information that he relayed to her during her prior retainer.

[15] John Gross submits that even absent specific concerns about the misuse of confidential information, Ms. Basham's involvement in the action supports a *prima facie* breach of her duty of loyalty. For Ms. Basham, or anyone on her legal team, to prosecute Phil's case—which relies on a finding that John was driven to enter into the alleged agreement based on concerns about the legal issues he was facing at the time—is irreconcilable with Ms. Basham's defence of John in respect of those very legal issues in 1991 and 1992. John confided in Ms. Basham at the time, and Ms. Basham formed an assessment of John in her capacity as his former counsel. Allowing her to now act against John, with the knowledge and experience she obtained through her prior representation of him, risks visiting prejudice on John in the action and bringing the administration of justice into disrepute.

[16] As I understand it, there is also the potential of John Gross being cross-examined on the affidavit in advance of the Disqualification Application. It is also the stated intention of John Gross to have Ms. Basham cross-examined in advance of the hearing.

[17] Ms. Basham has provided an affidavit outlining her practice of discussing the implications of a joint retainer, as well as challenging assertions made by John Gross about their conversations.

[18] In response to the evidence provided by Ms. Basham, John Gross says that it is not sufficient that Ms. Basham is unable to recall receiving relevant confidential information. He points out that “the memory is sometimes triggered in unexpected ways”, and that the discovery phase may prompt recollections of such information: *Richmond Taxi Co. Holdings Ltd. v. Robbins*, 2007 BCSC 1680 at paras. 122–124,

citing *Rosin v. MacPhail*, 1997 CanLII 862 (BC CA) [*Rosin*]; and, *Hunt v. Hunt*, [1992] B.C.J. No. 1366 (B.C.S.C.). Moreover, he submits that it is of no consequence if a lawyer does not remember their interactions with a client due to the passage of time: *Rosin* at para. 20; *Suchy v. Zurich Insurance Co.*, 1997 CanLII 3541 (B.C. C.A.) at para. 14; and, *Sampley v. Sampley*, 2015 BCCA 51 at para. 12.

[19] As mentioned, John Gross has moved to have both Ms. Basham and Mr. Wharton disqualified. He argues Ms. Basham's involvement constitutes a *prima facie* breach of her duty of loyalty and that Mr. Wharton has been tainted by this breach and should also be disqualified.

[20] I also note that Mr. Nathanson, John Gross' counsel of record, has stepped away from acting pending the outcome of the Disqualification Application. He has done so because of allegations of a conflict of interest raised by Phil Gross, due to Mr. Nathanson's representation of Phillips Manufacturing Ltd. relating to an application for leave to appeal in December 1991.

[21] For the reasons that follow, the within application is approved.

### **Discussion**

[22] I recognize that the ultimate question of disqualification is yet to be heard and that we are only at the preliminary stage. I also recognize the importance of a litigant to have the counsel of their choice. I also recognize that the scope of the duty of loyalty is said to be "very limited absent confidential information being at risk, and requires a very close relationship between the two retainers": *Sandhu v. Mangat*, 2018 BCCA 454 at para. 34.

[23] On the other hand, the question of Ms. Basham and Mr. Wharton being able to act and argue the application with respect to the allegations of their conflict of interest attracts concerns regarding the integrity of the court and its processes.

[24] Mr. Wharton argues that there is no authority for the court to provide the relief sought. He submitted that the position of John Gross is without merit on the basis

that the retainer with Ms. Basham was a joint retainer and as such any confidences were between her and the two brothers jointly and thus no individual confidentiality obligations arise.

[25] I do not accept these arguments. I agree that it is a relatively unique occurrence for the interim removal of counsel, but it is not controversial that:

- a) the court has inherent jurisdiction to exercise control over lawyers where necessary to protect its process; and
- b) where counsel of record are alleged to be in a conflict, the best practice is to retain independent counsel to act in respect of the allegation.

[26] Mr. Ferris in support of the application handed up the following cases and professional guidance statement: *Poole v. PTC Automotive Ltd.*, 2011 ONSC 3748; *Suchy v. Zurich Insurance Co.*, 1997 CanLII 3541 (BCCA); *Lotech Medical Systems Ltd. v. Kinetic Concept Inc.*, 2008 FC 1195; *Inron Contracting Ltd. v. Whitebread*, 2001 CanLII 28014 (ON SC); and Canadian Bar Association Conflicts of Interest Toolkit, “Action Plan for Managing a Conflicts Situation”.

[27] The cases comment negatively on allegedly conflicted counsel representing themselves on motions regarding their own potential conflict.

[28] Mr. Ferris put forth a framework for the circumstances of this case, analogizing to the three-part injunction test in the often-cited case of *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 348–349. The test requires John Gross to establish the following:

- a) that there is a serious question to be tried;
- b) that he will suffer irreparable harm should the relief sought not be granted; and
- c) that the balance of convenience favours granting the relief sought.

[29] In application to the matter at hand, the defendants argue that there is sufficient evidence to establish a serious question as to whether Ms. Basham and Mr. Wharton are conflicted. These alleged conflicts are premised on alleged breaches by Ms. Basham of the duty of loyalty and of confidentiality, which the defendants further say taints Mr. Wharton to the point of disqualification, being as he is Ms. Basham's co-counsel.

[30] For the second part, the defendants claim that the irreparable harm here includes significant prejudice to John Gross, and more generally, the imperiling of the administration of justice.

[31] On the third part, the defendants point to the best practice of having litigants retain independent counsel in these circumstances. Furthermore, they say that Phil Gross has not asserted any prejudice arising from having Ms. Basham removed as his counsel. He does, however, claim prejudice should Mr. Wharton be removed, which the defendants dispute.

[32] It is a helpful way of looking at the present issue though not the only way. The difference is that the court is dealing with control of its own process through directions, not an injunction. The key focus is on the integrity of the court and public confidence. This involves careful consideration of the unique circumstances of the case. I am also of the view that the principle of a litigant being represented by counsel of their choice is a strong militating factor against removal.

[33] In this case, without deciding, there is sufficient evidence indicating a relationship between Ms. Basham's dealing with matters in her earlier retainer and the present action; and that confidential information involving John Gross is at risk. The nature of the legal risks faced by John Gross were numerous and significant during the period of Ms. Basham's earlier retainer. The evidence is supportive of the assertion that she had sufficient time to observe and through discussions with John Gross, either alone or with others, to form opinions regarding his character and state-of-mind and the impact of the litigation he faced, aided and supplemented as

well by her involvement with other counsel involved in representing PML and the brothers.

[34] There are documents and legal bills indicative of this. I note an internal memo written by Ms. Basham to her partner, Mr. Berardino, in which among other things, she relates her assessment of her clients including John Gross. The memo reveals a dim view of her clients, generally, as well as of John Gross, specifically. It not uncommon for counsel to not like a client nor find them distasteful without compromising their professional duties. Here, however, counsel has been retained for a matter adverse in interest to her former client. This negative view of John Gross increases the weight of the concern at this point regarding the involvement of Ms. Basham and Mr. Wharton.

[35] Added to this are the observations made in the applicant's submission that Phil Gross, Ms. Basham, and Mr. Wharton (who has given no evidence) are all silent on the circumstances of Ms. Basham's recent appointment as Mr. Wharton's co-counsel in the action; no one has provided evidence as to why Ms. Basham (out of the "dozens" of lawyers Phil has worked with) was selected to join Phil's legal team; there has there been no evidence as to any precautionary measures employed to guard against the potential disclosure of confidential information, given Ms. Basham's previous representation of John; and that Ms. Basham does not deny sharing confidences with Mr. Wharton since her appointment as co-counsel.

[36] There are two further concerns that I see: the ethical obligations of Mr. Wharton will be in issue in the Disqualification Hearing making Mr. Wharton's ability to speak to his own conduct a complication; and Mr. Wharton will likely have to address his own interactions with Ms. Basham on the extent to which she does or does not possess information from her prior retainer, which she will have presumably shared with co-counsel; thereby placing Mr. Wharton in an untenable position as counsel and witness. In this regard, I am advised that the applicant does intend to cross-examine Ms. Basham on her involvement and affidavit for the Disqualification Hearing.

[37] In balancing the interests, I find that public confidence in the integrity of the court's process and those of John Gross outweigh the prejudice to Phil Gross.

[38] As a result both Ms. Basham and Mr. Wharton are to be precluded from appearing as counsel at the Disqualification Application, as well as from involvement in any steps associated with such application, including, but not limited to, any cross-examination of John Gross.

“Masuhara J.”