Court of King's Bench of Alberta

Citation: Carbone v Dawes, 2026 ABKB 215

Date: 20260323
Docket: 2301 02955
Registry: Calgary

Between:

Angela Carbone

Applicant

- and -

Dr. Jeffrey C. Dawes, Jeffrey C. Dawes Professional Corporation, Jeffrey C. Dawes Md Plastic Surgery, Surgical Centres Inc., Elisha Marie Makar, Elisha Makar (Also Known as E.Doyle), and Dr. Mohamed Nanji

Respondents/Defendants

Reasons for Decision
of the
Honourable Justice Lisa A. Silver

Introduction

[1] This is an application brought by the Applicant, Angela Carbone, seeking to disqualify Bennett Jones as counsel for Dr. Mohamed Nanji because of an alleged conflict of interest arising from their joint representation of the Co-Defendants, Dr. Jefferey Dawes, and his professional corporation. The issue is whether the circumstances demonstrate an adversity of interests sufficient to undermine counsel's duty of loyalty or the integrity of the administration of justice.

[2] The Applicant brought a claim for damages arising from surgery she received on March 4, 2021 at Surgical Centres Inc. or SCI. The physicians involved were Dr. Jeffrey Dawes and Dr.

Mohamed Nanji. Dr. Dawes was also conducting business under his own professional corporation. At the time of the surgery, Dr. Nanji was the CEO of SCI. Elisha Makar (also known as E. Doyle) was a nurse employed by SCI.

[3] At the time the claim was launched, Miller Thomson was acting for all the SCI Defendants including Dr. Nanji. After pleadings closed, Dr. Nanji switched lawyers and went from Miller Thomson to Bennett Jones, who was also representing Dr. Dawes and his professional corporation.

[4] For reasons to follow the application is dismissed.

Applicant's Position

[5] The Applicant submits that Bennett Jones must be removed because the Dawes and Nanji Defendants hold adverse interests. She asserts that the respective Statements of Defence of the two Defendants shift responsibility onto one another. Accordingly, the Defendants have directly opposed interests inconsistent with joint representation.

[6] The Applicant also argues that the separate filing of security for costs applications for each Defendant demonstrates divergence of interests. She further submits that any potential conflict must be addressed proactively to preserve the integrity of the administration of justice. Accordingly, disqualification will ensure compliance with the Law Society of Alberta's Code of Conduct on duty of loyalty and avoidance of conflicting interests.

[7] The Applicant points to the serious and ongoing prejudice caused by the change in counsel. For instance, the filing of two separate security of costs applications by Bennett Jones doubled the costs requested. Moreover, the separate pleadings impact the Applicant's ability to properly prepare for Questioning and creates unfairness.

Respondent's Position

[8] Counsel for Bennett Jones submits there is no conflict. All Defendants are aligned in interest, none has cross-claimed or asserted claims over against another, and each consents to the joint representation. Counsel argues that the pleadings relied on by the Applicant are routine in multi-party litigation and do not demonstrate adversity.

[9] Moreover, the separate security for costs application is a procedural choice that does not reflect divergent legal interests. Counsel further submits that the Applicant remains fully able to question each Defendant and that any theoretical future disagreement does not warrant disqualification.

Governing Principles

[10] A court, using their supervisory powers over litigation may disqualify counsel where a conflict of interest arises, including where joint representation places counsel in a position of divided loyalty: ***CNR v McKercher LLP***, 2013 SCC 39 at para 13. The Law Society of Alberta's Code of Conduct informs this analysis but it is the bright line rule established in the jurisprudence, which governs this determination: ***McKercher*** at paras 15 to 16.

[11] There are competing values to consider in determining conflict of interest. The decision requires the balancing of differing interests such as the integrity of the justice system, public

confidence in it, and a litigant's right to have counsel of choice: ***McKercher*** at para 22; ***McDonald Estate v Martin***, 1990 CanLII 32 (SCC), [1990] 3 SCR 1235 at 1243.

[12] Conflicts of interest are governed by the bright line rule outlined in ***R v Neil***, 2002 SCC 70 at para 29. The rule prohibits a lawyer from representing a client whose interests are "directly adverse" to the "immediate" interests of another current client unless both clients provide informed consent and the lawyer "reasonably believes" that joint representation would not adversely affect the clients: ***Neil*** at para 29.

[13] Although the rule cannot be "rebutted or attenuated," it is limited in scope: ***MTM Commercial Trust v Statesman Riverside Quays Ltd***, 2014 ABQB 16 at paras 30 and 31. The rule only applies where the "immediate" interests of the clients are "directly adverse": ***McKercher*** at para 41. Moreover, even when the bright rule applies, disqualification is not automatic because concurrent representation may still be possible with informed consent of both clients: ***McKercher*** at para 39. For instance, in ***McKercher***, the firm was in breach of its duty to avoid conflicts of interest because they failed to obtain the consent of their existing client before representing the new one: ***McKercher*** at paras 51 to 53.

[14] Notably, in ***McKercher***, Chief Justice McLachlin as she then also considered circumstances when the bright line rule did not apply. In that situation, the alternative question asks whether there is a "substantial risk" the concurrent representation would "materially and adversely" affect the "lawyer's duties to another current client": ***McKercher*** at para 8.

[15] Conflict of interest can arise for many reasons. However, mere theoretical or speculative conflict is not enough: ***Hazelwood v Schlotter***, 2022 ABKB 739 at para 82. Conflicts are not viewed in a vacuum but in the context of the particular circumstances of the case. In this case, the conflict arises from joint representation of parties who are allegedly adverse in interest. A lawyer has a duty to avoid conflicts of interest because this may impact a lawyer's overarching duty of loyalty to their clients: ***MTM*** at para 27; ***McKercher*** at para 19.

[16] The Code of Conduct addresses conflict of interest, providing guidelines for lawyers. Issues with joint representation are governed by rules 3.3 and 3.4 on confidentiality, duty of loyalty, and conflict of interest. Notably, the Code of Conduct aligns with, and at times mirrors, the bright line rule.

[17] Specifically, although rule 3.4.2 of the Code of Conduct states that a lawyer must not represent opposing parties to a dispute, the commentary to this rule recognizes that joint representation of parties to a claim is possible. For instance, joint representation of Defendants is acceptable if all parties are informed of the potential for conflict and the parties provide consent to such representation.

[18] The commentary on rule 3.4 relating to joint representation is instructive. The commentary recognizes that it is sometimes "difficult" to determine if a dispute exists because even though litigation qualifies as a "dispute" from the outset, "parties who appear to have differing interests" are not "necessarily engaged in a dispute." Therefore, the commentary outlines various factors to assist a lawyer in deciding whether a dispute exists.

Analysis

[19] Having outlined the governing principles, I find for the following reasons that the bright line rule is not engaged in this case because the "immediate" interests of the Dawes Defendants and Dr. Nanji are not "directly adverse" with one another for the following reasons.

[20] First, I will comment on the issue of adversity and blame shifting found in the respective pleadings for the Dawes Defendants and Dr. Nanji. The Applicant points to various paragraphs found in each of the Dawes Defendants' Statement of Defence and the SCI Defendants' Statement of Defence created when Dr. Nanji was represented by Miller Thomson together with SCI and Elisha Makar. For instance, the SCI pleadings and the Dawes Defendants pleadings deny vicarious liability, rely on the *Tort-Feasors Act* and the *Contributory Negligence Act*, and specifically blame one another for any injuries caused. The Applicant submits that these pleadings when compared show adverse legal interests.

[21] In reviewing the pleadings and applying the bright line rule, I must look at the context of the pleadings to determine whether the "immediate" legal interests of concurrently or jointly represented clients are "directly adverse." Although the pleadings contain blame-shifting rhetoric, this does not create the type of direct adversity to immediate legal interests required to trigger the bright-line rule.

[22] Both Defendants deny liability in full, and neither Defendant's legal position presently depends on the other being found at fault. In these circumstances, the pleadings do not place counsel in a position where advancing one client's interests would necessarily prejudice the other. Viewed contextually, the pleadings are protective in nature and do not establish the type of real and continuing adversarial stance necessary to trigger the bright line rule.

[23] Second, the Applicant also emphasizes the separate security for costs applications brought on behalf of each Bennett Jones Defendants. While these parallel applications might raise superficial concerns, they do not establish a conflict of interest or create divided loyalties. The applications pursued substantively similar relief. No defendant advanced a position adverse to the other, and counsel was not required to undermine the interests of one to advance those of the other. In these circumstances, the applications are consistent with coordinated joint representation rather than proof of legal adversity.

[24] I appreciate that the Applicant points to this conduct as prejudicial including the increase in the Bill of Costs on the appeal. However, any prejudice arising from that conduct does not bear on whether a conflict of interest exists for the purposes of this application.

[25] Third, according to the Applicant, hiving off Dr. Nanji from the corporation for which he was CEO is unprecedented because it is contrary to the usual and best practice in medical malpractice cases. First, according to the Code of Conduct joint representation of a corporation and directors or officers of that corporation is also subject to conflict of interest concerns. Second, there is precedent in case authorities for separate representation of the physicians from the hospital and other medical personnel in a medical negligence case: See for example, ***Elguindy v. St. Joseph's Health Care London***, 2017 ONSC 5360. In any event, even if best practice is engaged, it does not alter the conflict analysis in this case.

[26] Fourth, the Applicant points to the serious prejudice Bennett Jones's action has caused to her, both real and ongoing, because the pleadings were not amended after Dr. Nanji's change in counsel, making it difficult for the Applicant to prepare for Questioning. Specifically, the

Applicant is concerned with her ability to question Dr. Nanji on his role as medical director of SCI because SCI counsel no longer represents him. She therefore submits that planning her approach for Questioning is now unfair and confusing.

[27] As submitted by counsel the pleadings do not affect the applicant's right to cross examine all Defendants on matters relevant and material to the case including matters arising in the pleadings. The change in counsel does not restrict the scope of the Questioning nor does it impact the fairness of the Questioning process. I find that the Applicant's concerns regarding Questioning do not amount to legal prejudice because she remains entitled to examine each Defendant.

[28] Finally, the Applicant argues, relying on ***R c Syed***, 2012 QCCS 7188, that Bennett Jones must be disqualified before any conflict arises to safeguard the administration of justice. I find that ***Syed*** is distinguishable and the governing principle was not so broadly framed.. In ***Syed,*** the court was concerned with the potential misuse of confidential information where the criminal defence lawyer previously represented the victim: ***Syed*** at para 37. The adversity was direct and because the potential misuse of confidential information was real, disqualification was required.

[29] The case before me is much different because it arises in the civil context with informed consent for joint representation where all Defendants interests are aligned. Moreover, the situation before me differs from ***McKercher*** where the law firm was retained by a new client who wanted to sue an existing one.

[30] In conclusion, the bright line rule is limited to cases of "immediate," not hypothetical, adversity. A merely speculative potential divergence in the position of the Defendants legal positions is not enough. On the record before me, any adversity remains contingent on future developments in the evidence or litigation strategy. Neither Defendants have advanced a factual or legal position that presently pits one against the other in a way that would compel counsel to prefer one client's interests over the other. At this stage, their litigation interests remain aligned. Accordingly, there is no immediate conflict capable of engaging the bright line rule.

[31] I therefore find that the blame shifting in the Defendants' pleadings, viewed in context, does not amount to adverse legal interests. In the past three years since the pleadings were filed, the Defendants have not taken procedural steps against one another, nor have they advanced inconsistent positions that would place counsel in a position of divided loyalty.

[32] In any event, even if the bright line rule were engaged, as contemplated in ***Neil*** and ***McKercher*** joint or concurrent representation is permitted where each client provides informed consent and counsel reasonably believes that their duties of loyalty, confidentiality, and commitment to each client will not be adversely affected. Bennett Jones, on the record, confirmed that these requirements were met.

[33] I asked counsel for Bennett Jones whether the requirements of the Law Society of Alberta's Code of Conduct respecting joint representation, which include the obligations relating to disclosure, informed consent, and assessment of potential conflicts, had been met. Counsel provided an unequivocal affirmative response. In the absence of any evidence to the contrary and given that all Defendants have indicated their satisfaction with joint representation and have not raised concern about confidentiality or loyalty, I am entitled to accept that counsel obtained the necessary informed consent. I am also satisfied that counsel holds a reasonable and supportable belief that joint representation can continue without impairing their duties of loyalty and

confidentiality. Nothing in the present record suggests that such a belief is objectively unreasonable at this stage of the litigation.

[34] Still, because of the fluid nature of litigation and law society obligations, counsel must be vigilant to continually reassess the file for conflict of interest. This obligation is consistent with the court's continuing supervisory role over the integrity of the process.

Conclusion

[35] Considering the totality of the circumstances, including the nature of the pleadings, the procedural carriage of the litigation, the consistent alignment of the Defendants' positions during the course of litigation, the absence of antagonistic litigation strategies, the informed consent provided, and counsel's reasonable belief that joint representation remains viable, I am satisfied that no immediate or viable conflict of interest exists. I further find that these circumstances do not give rise to a reasonable apprehension that the integrity of the administration of justice would be compromised by continued joint representation.

[36] The concerns raised by the Applicant, while understandable, remain speculative at this juncture and fall short of displacing the general principle that parties may jointly retain counsel when their interests are aligned. The extraordinary remedy of disqualification is therefore not warranted.

[37] The application is dismissed.

Costs

[38] Costs are in the cause and will be determined as part of the global costs awarded in this case.

Heard on the 04th day of March, 2026.

Dated at the City of Calgary, Alberta this 23rd day of March, 2026

Lisa A. Silver
J.C.K.B.A.

Appearances:

Angela Carbone,
Self Represented Litigant

Christine Viney and Ellen Forsyth
For the Respondent/Defendant Dr. Mohamed Nanji