
CANADA / JUDGMENT

Abdul v. Nisha

2005 BCSC 165

COURT

Supreme Court of British Columbia

DECIDED

7 February 2005

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2005 BCSC 165 Abdul v. Nisha

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Abdul v. Nisha,

2005 BCSC 165

Date: 20050207

Docket: M020198

Registry: Vancouver

Between:

Nazeem Abdul

Plaintiff

(Respondent)

And

Rosaline Nisha and Satnam Chand

Defendants

(Applicant)

Before: The Honourable Madam Justice Loo

Reasons for Judgment

Counsel for the Defendant Nisha

R. D. Ellis

Counsel for the Plaintiff

J. D. Vilvang, Q.C.

Date and Place of Hearing:

20 January 2005

Vancouver, B.C.

- [1] The defendant Rosaline Nisha applies for an order that: (1) Michael Ranspot be removed as counsel for the plaintiff and enjoined from acting for her regarding the subject matter of this proceeding; and (2) there be no further steps until new counsel is appointed for the plaintiff or she files a Notice of Intention to Act in Person.

Background

- [2] In May 1999, Rosaline Nisha was a passenger in a car driven by Nizam Ali when it was rear ended. Ms. Nisha was injured and her former lawyer commenced two actions on her behalf, including an action against the Insurance Corporation of British Columbia for Part 7 benefits (Ali and Nisha v. Virk and others, New Westminster Registry number S058032 and Ali and Nisha v. Insurance Corporation of British Columbia, New Westminster Registry number S066777). Later, Ms. Nisha retained Mr. Ranspot to act for her in both actions.
- [3] On August 8, 2001 Ms. Nisha was injured when the car she was driving was rear ended by Satnam Chand. Nazeem Abdul who was a passenger in Ms. Nisha's car was also injured.
- [4] On August 22, 2001 Ms. Nisha and Ms. Abdul consulted Mr. Ranspot and informed him that they wanted to retain him in connection with the August 8 accident.
- [5] On August 30 and September 7, 2001 Mr. Ranspot sent statements from Ms. Nisha and Ms. Abdul to I.C.B.C. On October 23 and 26, 2001 he forwarded Claim Applications to I.C.B.C. on their behalf.
- [6] On January 15, 2002 Mr. Ranspot acting on behalf of Ms. Nisha as plaintiff, commenced action M020197 (Vancouver Registry) against Satnam Chand (the "Nisha action"). On the same day, January 15, 2002, Mr. Ranspot acting on behalf of Ms. Abdul as plaintiff, commenced this action against Ms. Nisha and Mr. Chand as defendants.
- [7] Mr. Ranspot was both acting for Ms. Nisha as plaintiff, and suing her as a defendant in connection with the same matter.
- [8] Christopher Doll represents the defendant Mr. Chand in both actions. Ross Ellis represents Ms. Nisha in this action.
- [9] On March 1, 2002 Mr. Doll conducted an examination for discovery of Ms. Nisha in the Nisha action. Mr. Ranspot appeared as Ms. Nisha's counsel.

[10] Later in March 2002 liability was admitted in the Nisha action. Liability is not admitted in this action.

[11] On May 7, 2002 Mr. Doll wrote to Mr. Ranspot and stated in part:

I am not sure to what "potential problem" you refer, apart from the obvious fact that you are representing Ms. Nisha in one action and suing her in the other, both arising out of the same incident.

[12] On May 14, 2002 Mr. Ellis wrote to Mr. Ranspot and stated in part:

So as to avoid any possible future misunderstanding, please remember that I act on behalf of the Defendant Nisha, with respect to this collision. You do not have my permission to speak with her on any matter related to the matters put at issue in your claim by Abdul, including without limitation, the circumstances as to how the accident transpired. Please confirm that you have not undertaken any such discussions with her to date.

[13] Mr. Ranspot in his affidavit sworn November 2, 2004, deposes:

Mr. Ellis did not state I was in a conflict and should remove himself [sic] as Counsel for Abdul. That as Abdul was a passenger in a motor vehicle on August 8, 2001 that was rear-ended by Chand and there was a formal admission (Amended Statement of Defence - Nisha action) of liability by Chand in the Nisha action; I saw no reason to discuss the particulars of the August 8, 2001 accident with Nisha and did not do so after receiving the letter from Ellis of May 14, 2002.

[14] In December 2002 all three actions commenced by Ms. Nisha were settled through mediation and dismissed by consent.

[15] In September 2003, Mr. Ranspot wrote to Mr. Ellis indicating that he wanted to examine for discovery Ms. Nisha in this action.

[16] On September 16, 2004, Mr. Ellis wrote to Mr. Ranspot insisting "as previously requested" that it was not appropriate for him to be suing Ms. Nisha because he had acted for Ms. Nisha in respect of the same accident. Mr. Ellis insisted that Mr. Ranspot cease representing Ms. Abdul and refer the matter to other counsel. Mr. Ranspot denies that Mr. Ellis had previously requested that he cease acting for Ms. Abdul.

[17] By letter of October 19, 2004 Mr. Ranspot served Mr. Ellis with an appointment to examine for discovery Ms. Abdul on November 1, 2004. On October 24, 2004 Mr. Ellis served Mr. Ranspot with the Notice of Motion in this application.

[18] On October 28, 2004 Mr. Ranspot wrote to Mr. Ellis requesting that Ms. Nisha provide her consent pursuant to Rule 7(a) of the Law Society Professional Conduct Handbook so that he could continue to act for Ms. Abdul.

[19] Ms. Nisha has not provided her consent.

[20] Mr. Ranspot states in his affidavit that he is:

not aware of any confidential information related to me by Nisha that is necessary, useful or relevant to the prosecution of Abdul's claim and if such information exists or becomes apparent to me, I undertake not to use that information.

[21] Audrey Hopkinson, a legal assistant with Mr. Ellis' office deposes that on August 16, 2004 she spoke to Ms. Nisha who informed her that Mr. Ranspot acted for her, and that she had reviewed in detail with him the circumstances of the accident in preparation for her examination for discovery in March 2002.

Issue: Should Mr. Ranspot be removed from the record as counsel for the plaintiff because of a conflict of interest arising from his previous representation of the defendant?

[22] Mr. Ellis for Ms. Nisha contends that Mr. Ranspot owes a duty not to act against his own client in relation to the same matter, and is obligated to cease acting against his own client without being compelled by a motion to do so: Rule 7 of the Law Society Professional Conduct Handbook; *Dobosz v. John Doe*, [2001] B.C.J. No. 1479, 2001 BCSC 938.

[23] Mr. Vilvang, Q.C., for Ms. Abdul, opposes this application on three grounds: (1) there is no conflict of interest "for practical purposes"; (2) there was no expectation of confidentiality; and (3) the divided loyalty between acting for the insured and the insurer raises the issue of whether the issue of consent has been put before Ms. Nisha.

Analysis

[24] Rule 7 reads:

Acting against a former client

7. Subject to Rule 7.4, a lawyer must not represent a client for the purpose of acting against the interests of a former client of the lawyer unless:
 - (a) the former client is informed that the lawyer proposes to act for a client adverse in interest to the former client and the former client consents to the new representation, or
 - (b) the new representation is substantially unrelated to the lawyer's representation of the former client, and the lawyer does not possess confidential information arising from the representation of the former client that might reasonably affect the new representation.
- [25] In *MacDonald Estate v. Martin (Martin)*, [1990] 3 S.C.R. 1235, Mr. Justice Sopinka noted that while professional codes of ethics such as Rule 7 express the views of the legal profession on the standards that should apply, the court is not bound to apply the code or rules, but may rely on its inherent jurisdiction to remove from the record, lawyers who have a conflict of interest.

[26] The test to be applied in determining whether there is a conflict of interest is whether a reasonably informed person would be satisfied that no use of confidential information would occur. This in turn raises the two questions articulated at p. 1260 of MacDonald Estate: (1) did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of the client?

[27] With respect to the first question, Sopinka J. at p. 1260 states:

once it is shown by the client that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant. This will be a difficult burden to discharge.

The second question is whether the confidential information will be misused. A lawyer who has relevant confidential information cannot act against his client or former client. In such a case the disqualification is automatic. No assurances or undertakings not to use the information will avail.

[Emphasis added.]

[28] The facts in the case at bar are similar to those of Dobosz, supra. Heath alleged she was a passenger in a car driven by Dobosz when the car hit a lamp standard as a result of an identified driver. Heath sued Dobosz and I.C.B.C. as a nominal defendant. Dobosz sued John Doe and I.C.B.C. Thomas Spraggs was the solicitor for both the plaintiff Dobosz in one action, and for the plaintiff Heath in the other action. The defendant I.C.B.C. was successful on its application to remove Mr. Spraggs as solicitor. Joyce J. stated:

[10] In this case counsel for ICBC says Mr. Spraggs will obviously have interviewed both clients with respect to the circumstances of the accident. He has obtained confidential information regarding the accident from both of them. Having obtained confidential information from Dobosz in a solicitor-client relationship, Mr. Spraggs cannot now act against Mr. Dobosz. His disqualification is automatic. I agree.

[11] Mr. Spraggs cannot cross-examine Mr. Dobosz on discovery or at trial with respect to the circumstances of the accident when he has obtained confidential information from him regarding the accident in his capacity as his solicitor in the action in which Dobosz is a plaintiff.

[12] Nor can Mr. Spraggs act for Ms. Heath. Having named Mr. Dobosz as a defendant in her action counsel for Ms. Heath has a duty to pursue that claim against Mr. Dobosz. But Mr. Spraggs' duty to Ms. Heath conflicts directly with his duty to Mr. Dobosz to deny that he was at fault for the accident. Mr. Spraggs cannot act for either and give assurance that he can fulfil his duty to each.

- [15] Mr. Spraggs suggested he ought not to be disqualified from acting because, as I understood his submission, naming Mr. Dobosz as a defendant was more a matter of form than of substance and he did not anticipate actively pursuing the claim of negligence against Dobosz. Further, he suggested that, as all damages would come out of the same insurer's pocket the clients were not at risk.
- [16] I cannot accept that submission, First of all, it ignores the fact that counsel for Ms. Heath has an obligation to pursue a claim against the driver of the vehicle in which she was a passenger if there are grounds to do so. I cannot conclude that the action was brought against Mr. Dobosz without some justification. Secondly, the suggestion that because ICBC may ultimately pay damages there is no need to be concerned about a conflict is not tenable. It suggests that the question whether or not there is a conflict be resolved by asking, at the end of the day whether either client has been financially hurt. That, in my respectful opinion, is no basis for determining whether there is a conflict interest such that a solicitor may not act because of the risk of harm to one or both clients.
- [29] I do not agree with the contention that Dobosz is distinguishable because it involved a claim against an unidentified driver. Joyce J. was clear that the conflict arose because Mr. Spraggs had a duty to Heath to pursue a claim against Dobosz as defendant and this duty conflicted directly with his duty to Dobosz who was also his client.
- [30] Mr. Vilvang argues that there was no conflict of interest because the only "real issue" before the court will be an assessment of Ms. Abdul's damages and the apportionment of those damages between Ms. Nisha and the remaining defendant Chand and that it is not significant to Ms. Abdul which defendant pays her damages. He also argues there is "no real need" to examine Ms. Nisha because Mr. Ranspot's theory of the case is set out in the statement of claim in the Nisha action and he has Ms. Nisha's evidence from her examination from discovery.
- [31] These arguments are similar to the ones raised in Dobosz.
- [32] Liability has not been admitted and Mr. Ranspot in his affidavit emphasized the fact that he has repeatedly asked that liability be admitted. Even if it were, I know of no authority and none was cited to me for the proposition that a lawyer can both act for a client and sue the same client arising out of the same subject matter as long the only issue is damages. Even if the only issue was damages, it is possible that the defence would call Ms. Nisha to testify, whereupon Mr. Ranspot would be in the position of having to cross-examine his former client on the same matter in which he represented her.
- [33] Mr. Vilvang's argument that Mr. Ranspot is not in possession of confidential information, must also fail. It is argued that Ms. Nisha and Ms. Abdul would have had no expectation that there would be any secrets from each other because they consulted Mr. Ranspot together and therefore there is no information that is confidential.

[34] Mr. Vilvang relies on Tjader v. Tjader, 2002 BCCA 593 where it was held at paragraph 14 that "there could be no confidential information imparted since the parties met together with the lawyer". In my view, the facts in Tjader are distinguishable as reflected in the preceding portions of the same paragraph:

As I analyze this case, the parties had a fairly general discussion on a pro bono basis with a lawyer in a town in this Province about matters relating to their pending separation and how their children could be protected in case of the death of the husband. These events took place about ten years ago and the lawyer in question professes, (not surprisingly), that he has no present recollection of the consultation or its contents. Is it appropriate on these facts that the law firm of which that lawyer is a member ought to be restrained from acting for one of the parties? The learned chambers judge thought not and I agree with her view of the matter.

[35] Ms. Abdul and Ms. Nisha may have both consulted Mr. Ranspot on August 22, 2001, but that that fact does not overcome the conflict of interest that was created when Mr. Ranspot sued Ms. Nisha while acting for her.

[36] R. v. Neil [2002] 3 S.C.R. 631 deals with the limits of a lawyer's duty of loyalty to a current client, but the following passage at ¶12 and 17 is important:

the defining principle -- the duty of loyalty -- is with us still. It endures because it is essential to the integrity of the administration of justice and it is of high public importance that public confidence in that integrity be maintained . Unless a litigant is assured of the undivided loyalty of the lawyer, neither the public nor the litigant will have confidence that the legal system, which may appear to them to be a hostile and hideously complicated environment, is a reliable and trustworthy means of resolving their disputes and controversies . As O'Connor J.A. (now A.C.J.O.) observed in R. v. McCallen (1999), 43 O.R. (3d) 56 (C.A.), at p. 67:

the relationship of counsel and client requires clients, typically untrained in the law and lacking the skills of advocates, to entrust the management and conduct of their cases to the counsel who act on their behalf. There should be no room for doubt about counsel's loyalty and dedication to the client's case.

While the Court is most often preoccupied with uses and abuses of confidential information in cases where it is sought to disqualify a lawyer from further acting in a matter, as in MacDonald Estate, supra, the duty of loyalty to current clients includes a much broader principle of avoidance of conflicts of interest, in which confidential information may or may not play a role

[37] Mr. Ranspot was acting for Ms. Nisha. He cannot and should not act against her in connection with the same matter.

[38] Mr. Ranspot deposes that he "saw no reason to discuss the particulars of the accident with Nisha and did not do so after receiving the letter from Mr. Ellis of May 14, 2002" (my emphasis). There is surely no doubt that he discussed the accident with her before receiving the letter.

- [39] As Mr. Ranspot is acting against Ms. Nisha in connection with the same accident for which he acted for her, the court should infer that confidential information was imparted. Mr. Ranspot has not discharged the heavy burden of showing that no confidential information passed, nor do I think he can. Being in receipt of confidential information, Mr. Ranspot cannot act against Ms. Nisha. The disqualification is automatic.
- [40] It is argued that as Mr. Ellis acts for both the insured and the insurer, and there is no affidavit from Ms. Nisha, the court should infer that Ms. Nisha has never been asked to provide her consent. In view of my findings above, I do not propose to deal with this argument.

Conclusion

- [41] The defendant is entitled to the orders sought and costs of this application.

"L.A. Loo, J."

The Honourable Madam Justice L.A. Loo

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Prepared on 29 October 2026 · Esheria