

# Court of King's Bench of Alberta

**Citation: Bartsch v Bennett Jones LLP, 2023 ABKB 230**

**Date:** 20230419  
**Docket:** 2101 05921  
**Registry:** Calgary

Between:

**Robert Bartsch and Sheena Bartsch**

Plaintiffs

- and -

**Bennett Jones LLP**

Defendant

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**Reasons for Decision  
of J.T. Prowse, Applications Judge**

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[1] The defendant Bennett Jones LLP applies to summarily dismiss this Action brought against it by the plaintiffs, Mr. Bartsch and Ms. Bartsch (together the “Bartsch’s”).

[2] The issue in this application is not whether the Bartsch’s allegations are meritorious, but rather whether they are made in time. Bennett Jones asserts that the Bartsch’s became sufficiently aware of the facts surrounding their allegations to warrant them commencing a claim more than two years prior to the commencement of this Action. Bennett Jones says this entitles it to immunity from liability pursuant to section 3(1) of the *Limitations Act*.

[3] For the reasons which follow I conclude that Bennett Jones is entitled to immunity from liability pursuant to the *Limitations Act* and I dismiss the Action.

[4] The story begins with the Bartsch’s unsuccessful investment in an entity named Crown Corporation. Details of the Bartsch’s investment can be found in the reported decision of Justice Hall in *CPI Crown Properties International Corp. v Bartsch*, 2016 ABQB 93, 2016 CarswellAlta 192 (the “CPI - Bartsch Action”).

[5] In 2010 a group of investors, including the Bartsch's, retained Bennett Jones to obtain financial disclosure from Crown Corporation (CPI), and to pursue recovery of their investments.

[6] A hint of the difficulty to come is contained in a retainer agreement prepared by Bennett Jones for that group of investors. Which investors actually signed the retainer agreement, and which were aware of it and bound by it, is not relevant to these reasons. What is of interest is the implicit recognition of potential future conflicts of interest arising from different investors having different interests.

[7] Bennett Jones proposed retainer agreement with the group of investors (including the Bartsch's) who retained them in 2010 contained the following wording:

As described herein, we confirm that we represent a large number of CPI Crown Group investors, and you agree that we may continue to represent them, and that we may represent additional CPI Crown Group investors, notwithstanding that there may ultimately be potential issues among the investors. For example, there may be potential conflicts arising from unauthorized co-mingling of funds among investment vehicles, or from distinctions to be drawn between equity (i.e. UDI or limited partnership) and debt (i.e. bondholders). You agree that, in the event that such issues arise and are not resolved among the investors whom we represent at such time, you will then obtain independent counsel and we may continue to act for those investors who are able to resolve any such issues among themselves.  
(emphasis added)

[8] Another example of potential conflict is that one subset of investors, which included the Bartsch's, had borrowed some of the funds they were investing from a related corporation i.e. from CPI Crown Properties International Corp. Those investors were claiming, inter alia, a return of interest paid to CPI under those loans.

[9] Another source of potential conflict arose with another issue, unique to the Bartsch's. CPI sued the Bartsch's to recover funds an affiliated corporation lent to the Bartsch's for them to invest in CPI. CPI did not sue any other investors, even though it had made similar loans to dozens of other investors who had retained Bennett Jones. Mr. Bartsch believes CPI was trying to intimidate him as a member of the steering committee for the group of investors, in order to discourage his efforts in that regard.

[10] The Bartsch's counterclaimed against various CPI entities in the "CPI – Bartsch Action", in order to recover their investment losses.

[11] Bennett Jones commenced a separate action, the "1201 Group Action", to recover funds on behalf of the group of investors who had retained Bennett Jones in 2010, including the Bartsch's.

[12] The Bartsch's were then in the unique position of paying legal fees to Bennett Jones under a separate retainer to defend themselves and counterclaim in the CPI - Bartsch Action, while the main group of investors (including the Bartsch's) were sharing legal fees to advance the 1201 Group Action.

[13] In addition to this unique expenditure of legal fees (in the CPI - Bartsch Action), Mr. Bartsch was also spending a disproportionate amount of time advancing the 1201 Group Action. At least one, and possibly more, of the group of investors came to believe that the 1201 Group

Action was only able to advance because of the time and effort being devoted to it by Mr. Bartsch.

[14] Another unique situation arose. In the 1201 Group Action, Bennett Jones named Ms. Premji as one of the defendants. She had acted as legal counsel for various Crown entities with respect to the offering memoranda through which funds had been raised from the investors. Bennett Jones did not, however, name Premji as a defendant by counterclaim in the CPI - Bartsch Action.

[15] Bennett Jones brought a summary judgment application on behalf of the Bartsch's in the CPI – Bartsch Action. It was heard on December 14, 2015, and, on February 16, 2016, Justice Hall summarily dismissed the claim of CPI against the Bartsch's. He awarded the Bartsch's judgment on their counterclaim against CPI for recovery of loan interest paid to CPI. However, Justice Hall declined to grant summary judgment to the Bartsch's with respect to the balance of their counterclaim, including fraud claims against CPI and related entities.

[16] Now the Bartsch's had a judgment against CPI, but the other group investors had, as yet, no judgment against CPI in the 1201 Group Action. Were the Bartsch's entitled to take immediate collection steps against CPI for their own benefit?

[17] All these underlying conflicts came to a head on July 25, 2017, when Bennett Jones received a settlement offer of \$250,000 in the 1201 Group Action from Premji's counsel. This necessitated a decision by the group of 1201 group investors as to whether to accept that offer, or to counter-offer and, if so, in what amount.

[18] Here is a quote from a later email by Mr. Bartsch giving his version of what happened next, on July 25, 2017:

- So when Justin [the Bennett Jones lawyer] advised me on the phone about the \$250,000 settlement from Jamila Premji as the result of that meeting, I asked Justin how does the settlement from Jamila also help the Bartsch's on our personal lawsuit/judgment?
- Within a second and in similar words, this is what Justin, our lawyer, responded to my question: 'Rob do not talk to me – that is a conflict of interest and I my have to resign as your legal counsel'.
- This is when the relationship between Bennett Jones, [the group investors' steering committee], and the Bartsch's seriously deteriorate!
- I was stunned that Justin, our lawyer, is telling me not to talk to him and he may have to resign as our legal counsel. How can Justin use our judgment for the benefit of his other client, the Plaintiff Group, and not for us who paid him \$40,000 to obtain that judgment.

[19] Matters speedily proceeded downhill between the Bartsch's and Bennett Jones after July 25, 2017. Here is a brief summary of the chronology of ensuing events:

- August 16, 2017 – the Bartsch's asked Bennett Jones about Ms. Premji's insurance coverage
- August 25, 2017 – Bennett Jones answered the Bartsch's question about Premji insurance coverage but outlined the potential conflict of interest

- August 29, 2017 – the Bartsch’s raise the prospect of attempting to now add Premji as a defendant to their counterclaim in the CPI - Bartsch Action
- August 30, 2017 – Ms. Bartsch provided a written summary of her recollection of Bennett Jones prior legal advice regarding whether Ms. Premji should be a defendant in the Bartsch’s counterclaim in the CPI – Bartsch Action.
- September 5, 2017 – at a meeting, the Bartsch’s advanced the position that they were entitled to compensation in excess of simply a pro-rata share arising from the outcome of the 1201 group action. At that meeting the Bartsch’s asserted that Bennett Jones had been negligent in their prior advice not to add Premji as a defendant to their counterclaim. Bennett Jones recommended that the Bartsch’s obtain independent legal advice.
- September 21, 2017 – the Bartsch’s new lawyer, Mr. Llewellyn, wrote to Bennett Jones outlining the Bartsch’s recollection of the advice they had received from Bennett Jones regarding adding Premji to the Bartsch’s counterclaim. Mr. Llewellyn indicated that he had received instructions to apply to add Premji as a defendant to the Bartsch’s counterclaim.
- October 5, 2017 – Mr. Llewellyn formally became new counsel for the Bartsch’s with respect to their counterclaim. Mr. Llewellyn corresponded with Bennett Jones regarding the adding of Premji and Bennett Jones’ conflict of interest.
- November 13, 2017 – Mr. Llewellyn asserted that Bennett Jones, due to the conflict of interest, should cease to act for the investor group in the 1201 Group Action.
- November 24, 2017 – Bennett Jones emailed Mr. Llewellyn and advised that Mr. Bartsch has been removed from the steering committee dealing with the 1201 Group Action, that they have heard that Mr. Bartsch was threatening to have Bennett Jones removed from the carriage of the 1201 Group Action due to conflict of interest, and that Mr. Bartsch was free to pursue whatever remedies against Premji as he saw fit.
- November 30, 2017 – Bennett Jones formally withdraws as the Bartsch’s counsel in the 1201 Group Action.

[20] At his point in the chronology, it is clear that Bennett Jones’ conflict of interest was recognized by everyone, including Bennett Jones. The choices facing Bennett Jones due to the conflict were:

- 1) Continue to act for the Bartsch’s and cease to act for the group investors
- 2) Continue to act for the group investors and cease to act for the Bartsch’s
- 3) Cease to act for everyone

[21] Bennett Jones chose #2. The Bartsch’s disagreed with Bennett Jones continuing to act for the group.

[22] This ongoing debate, about whether Bennett Jones should also cease to act for the group of investors, is irrelevant to the loss suffered by the Bartsch's as a result of Bennett Jones ceasing to act for them.

[23] The clearest example is legal fees. When Bennett Jones ceased to act for the Bartsch's, this led to the Bartsch's having to spend considerable legal fees to bring a new lawyer up to speed.

[24] If Bennett Jones had also ceased to act for the investor group, that group would need to spend considerable fees to bring a new lawyer up to speed, but this would not lessen the Bartsch's burden of spending legal fees on the Bartsch's new lawyer.

[25] Bennett Jones has a strong argument, given the above facts leading up to November 30, 2017, as outlined above, that the two year clock [under section 3(1) of the Limitations Act] had begun to run. But this Action was not commenced until May 10, 2021, over 3 ½ years later.

[26] The awareness of the Bartsch's regarding their potential claim against Bennett Jones is highlighted in May of 2018, when Mr. Bartsch sent an email to members of the steering committee for the group of 1201 investors (the committee is referred to in the contemporaneous documents as "CQSC"), complaining about the Bartsch's treatment by Bennett Jones. In that document Mr. Bartsch made the following assertions (the following – other than matters I have added in square parenthesis- are direct quotes):

- Bennett Jones has violated the Code of Professional Conduct that has caused harm to us.
- Bennett Jones now had two separate clients, the Plaintiff Group and the Bartsch's. Bennett Jones never identified that retaining two clients that are both suing may of the same defendants could be considered a conflict of interest.
- At the outset we did not sue [Ms. Premji] ... who we thought was part of the wrong doing. We advised Bennett Jones we wanted to add [Premji] and were concerned about the time limitation to do so... We have this time limitation concern about not having added [Premji] CPI lawyer, as a defendant in our counterclaim [in the CPI – Borsch Action] in January 2011.
- In 2015 I, not Justin Lambert [of Bennett Jones], had the vision that when we win against CPI [in the CPI – Bartsch Action] this will help our claim and the ability to collect from [Premji]. I expressed this vision to Justin. It is important to note that Justin still has never advised us it is a conflict of interest for him to have two clients who will be wanting to collect from [Premji].
- April 2016 – within weeks after we obtained personal judgment against CPI [in the CPI – Bartsch Action], on my recommendation, Justin drafted a letter to [Premji's] lawyer for the purpose of getting a settlement with [Premji] and her insurance fund. The leverage that Justin used to entice a settlement was our personal judgment [underlining is in the original document]...

- As I mentioned earlier, in 2015 it was my vision, not Bennett Jones, that if we win our personal lawsuit against CPI that it will help our claim against [Premji] and her insurance fund. Justin now takes my vision and uses it only for the Plaintiff Group and not the Bartsch's.
- Again, it is very clear we were continually reminding Justin we want to collect from [Premji] and her insurance funds for OUR PERSONAL LAWSUIT. [capitals and underlining are in the original document].
- On July 25, 2017 Justin Lambert, unknowing to me or the CQSC, called me to advise he just met with [Premji's] lawyer, Stacy. In the meeting she offered a \$250,000 settlement to the Plaintiff Group. [underlining and bolding in the original document].
- Justin knew that it would be problematic and a conflict of interest for him to negotiate settlement for both his clients, the Plaintiff Group and the Bartsch's.
- In other words, if we lose the [CPI – Bartsch] lawsuit, we are responsible to pay \$500,000 all by ourselves [this is the amount of the CPI claim against the Bartsch's]. If we win, Justin would use our judgment to get a settlement from [Premji] and any settlement would go to the Plaintiff Group and not towards our personal judgment.
- This is the heart of the conflict of interest issue and the damages that Bennett Jones has done to us.

[27] There is no material difference between the assertions contained in this email of May 2018 and the statement of claim filed three years later, in May of 2021. By May of 2018 at the latest the Bartsch's knew that they had suffered financial damage (as a minimum, the incursion of additional legal fees, and possibly a loss of potential recovery from Premji) as a result of the conduct of Bennett Jones, and that commencing proceedings against Bennett Jones was warranted.

[28] Since they did not commence this action until three years later, Bennett Jones is entitled to immunity pursuant to section 3(1) of the *Limitations Act*.

### **The Denton's opinion**

[29] Notwithstanding the fact that the limitations 'clock' had begun to run in May of 2018 at the latest, the Bartsch's argue the relevance of a legal opinion which the Steering Committee (CQSC) for the group of investors had requested and received from the law firm Denton's on or about October 1, 2018.

[30] The gist of the opinion was that Bennett Jones was not prevented by conflict rules from continuing to represent the 1201 group of investors.

[31] Specifically, the Bartsch's say that it was only later, in 2019, that they learned the Denton's opinion was based on information given to Denton's from Mr. Lambert to the effect that Bennett Jones had not continued to provide the 1201 investor's group with advice on pursuing recovery from Premji or her insurers. The Bartsch's says this information was false and

amounts to fraudulent concealment within the meaning of section 4 of the *Limitations Act*, which states:

4(1) The operation of the limitation period provided by section 3(1)(b) or (1.1)(b) is suspended during any period of time that the defendant fraudulently conceals the fact that the injury for which a remedial order is sought has occurred.

(2) Under this section, the claimant has the burden of proving that the operation of the limitation period provided by section 3(1)(b) or (1.1)(b) was suspended.

[32] With respect, the Denton's opinion is irrelevant. Bennett Jones had ceased to act for the Bartsch's by November of 2017. If the Denton's opinion had been to the opposite, and Bennett Jones had thereupon also ceased to act for the 1201 group of investors, this does not detract from the fact that the Bartsch's knew, in May of 2018, that they had already suffered damages as a result of Bennett Jones ceasing to act for them in November of 2017.

[33] If the Bartsch's, illogically, did not pursue an action against Bennett Jones in later 2018 and early 2019 due to the Denton's opinion (which opinion did not deal with Bennett Jones' conflict of interest in acting for the Bartsch's) this did not stop the limitation period from continuing to run with respect to the Bartsch's claim against Bennett Jones. While that limitation clock arguably started running as soon as July 25, 2017, it clearly had begun by May of 2018 when Mr. Bartsch sent his email to the investor group. This action was commenced on May 10, 2021, which was more than two years after either date.

[34] For the reasons set out above, I conclude that Bennett Jones is immune from liability to the Bartsch's pursuant to section 3(1) of the *Limitations Act*, and accordingly I dismiss the Action.

[35] If the parties cannot agree on a costs outcome they may schedule a hearing to consider costs.

Heard on the 10<sup>th</sup> day of February, 2023.

**Dated** at the City of Calgary, Alberta this 19th day of April, 2023.

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**J.T. Prowse**  
**A.J.C.K.B.A.**

**Appearances:**

Robert Bartsch and Sheena Bartsch  
self represented Plaintiffs

Jas Sadhra  
Emery Jamieson LLP  
for the Defendant