

Lawyer who is necessary witness at trial removed from the record (Bahrami v. Jagtoo)

Litigation & Dispute Resolution | Removal from the record | Witness

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Canadian law recognizes the fundamental importance of a litigant's right to counsel of their choice and the principle that a litigant should not be deprived of their choice of counsel, absent good cause. A court will, however, interfere with this right and remove a litigant's counsel of choice where it is necessary in the interests of justice.

The decision of the Superior Court in *Bahrami v. Jagtoo*, 2026 ONSC 3110, provides a recent example of such circumstances.

In this matter, the plaintiff sued his former lawyer (the defendant) for his alleged negligence in handling an underlying breach of contract action. Among other things, the plaintiff asserted that the defendant mishandled and failed to settle an urgent interlocutory injunction motion in accordance with his instructions. The injunction motion ultimately proceeded and was decided against the plaintiff, who was then ordered to pay \$40,000 in costs. He subsequently terminated the retainer and commenced an action against the defendant alleging, in part, that the defendant's negligence effectively "forced" him to settle the underlying breach of contract claim.

In the solicitor's negligence action, the plaintiff was represented by a lawyer who was later found to have acted for and provided legal advice to the plaintiff in the underlying action while the defendant was still retained. On this basis, the defendant brought a motion seeking the removal of the plaintiff's lawyer from the record.

The defendant submitted that the plaintiff's lawyer would be a necessary witness at trial given his involvement in the underlying action, the possibility that his advice to the plaintiff overlapped with that of the defendant, and his role in assisting with the settlement of the underlying action, for which the plaintiff now sought to hold the defendant responsible.

The defendant argued that the plaintiff's lawyer could not continue to act for the plaintiff while appearing as a witness at trial.

The motion judge agreed.

The *Rules of Professional Conduct*, to which all lawyers in Ontario are bound, prohibit a lawyer who appears as an advocate from testifying or submitting their own evidence. Where a lawyer is a necessary witness, the *Rules* require that the conduct of the case be transferred to another lawyer.

This requirement reflects the inherent conflict that arises when a lawyer assumes the dual role of advocate and witness, placing their duties to the client in tension with their obligations to the court. This conflict cannot be waived, as the conflict is between the lawyer and the justice system. Accordingly, courts retain inherent jurisdiction to order the removal of counsel where necessary.

The test for the removal of a lawyer who may be a witness is whether a fair-minded reasonably informed member of the public would conclude that the proper administration of justice requires the removal of the lawyer. In making this determination, the court may apply the following factors, set out in *Essa (Township) v. Guergis*; *Membery v. Hill*, 1993 CanLII 8756:

- i. the stage of the proceedings;

- ii. the likelihood that the witness will be called;
- iii. the good faith (or otherwise) of the party making the application;
- iv. the significance of the evidence to be led;
- v. the impact of removing counsel on the party's right to be represented by counsel of choice;
- vi. whether trial is by judge or jury;
- vii. the likelihood of a real conflict arising or that the evidence will be "tainted";
- viii. who will call the witness if, for example, there is a probability counsel will be in a position to cross-examine a favourable witness, a trial judge may rule to prevent that unfair advantage arising; and
- ix. the connection or relationship between counsel, the prospective witness and the parties involved in the litigation.

In this matter, the motion judge found most of the factors favoured the removal of the plaintiff's lawyer.

In particular, the court accepted the defendant's position that the plaintiff's lawyer had material evidence which would be relevant to the determination of the negligence claim against him.

The essence of the plaintiff's claim was that the defendant was negligent both with respect to his advice to the plaintiff and in his alleged failure to follow instructions from the plaintiff regarding the injunction motion. Yet, the plaintiff admitted that he received advice from his current lawyer during the same time period.

Additionally, the plaintiff alleged that he was "forced" to settle the underlying claim as a result of the defendant's negligence and sought corresponding damages from the defendant. However, the evidence was that the plaintiff's lawyer recommended the settlement to the plaintiff and negotiated the settlement on the plaintiff's behalf.

The court found that there was a real basis to conclude that the plaintiff's lawyer possessed material evidence on core matters in dispute and of significant importance to the action. The lawyer would not be able to reconcile his role as an advocate with his role as a witness, and it was likely that these dual roles would give rise to a conflict of interest or that his evidence would be "tainted". The court held that this alone was sufficient to justify the lawyer's removal.

Additionally, given that the defendant would be calling the plaintiff's lawyer as a witness at trial, this would mean he would be subject to cross-examination by the plaintiff. The lawyer could not cross-examine himself and it would be inappropriate for someone else from his office to conduct cross-examination.

Finally, the court noted that the defendant brought the motion for removal as soon as reasonably possible, after discovering the full extent of the lawyer's involvement during examinations for discovery. The plaintiff did not otherwise lead any evidence that he would suffer prejudice if the lawyer was removed as his counsel of record.

The court ultimately held that a review of the factors "overwhelmingly" favoured an order for removal of the plaintiff's lawyer. A fair-minded reasonably informed person would conclude such an order would be necessary for the proper administration of justice.

This result follows an established line of cases in which the court has removed a plaintiff's lawyer of record in solicitor's negligence actions due to that lawyer's involvement in the underlying matter. In *Bahrami*, the court specifically noted the decision of *8657181 Canada Inc. v. Mehdi Au LLP*, 2021 ONSC 1295, where it stated that lawyers who assume carriage of litigation from another lawyer are routinely disqualified from acting in a solicitor's negligence action against the first lawyer. This approach, the court held, was "just common sense". A PDF version is available for download [here](#).

Representation by Gardiner Roberts LLP

The successful defendant was represented by Christopher Junior and Michael Lauricella of Gardiner Roberts' Dispute Resolution group. Mr. Junior is a partner, and Mr. Lauricella is an associate.

They were assisted in the preparation of their written material by Isabel Yoo, also an associate lawyer at the firm.

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