Citation: *R. v. Readman*, 2006 YKTC 26 Date: 20060316
Docket: 05–00353
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Lilles

R e g i n a

v.

Richard Wesley Readman

Appearances:
Ludovic Gouaillier Counsel for Crown
Gordon Coffin Counsel for Defence

REASONS FOR JUDGMENT

[1] Mr. Readman was charged with an offence contrary to s.127(1) of the *Criminal Code*, following a telephone call on September 19, 2005 to his wife's residence. At the time, he was bound by a civil order of the Supreme Court of the Yukon made in a matrimonial proceeding. It is the Crown's position that this order prohibited any contact with the defendant's wife.

[2] Section 127 of the *Criminal Code* provides as follows:

> (1) Everyone who, without lawful excuse, disobeys a lawful order made by a court of justice or by a person or body of persons authorized by an *Act* to make or give the order, other than an order for the payment of money, is, unless a punishment or other mode of proceeding is expressly provided by law, guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

[3] Section 127 is an indictable offence, not a hybrid one, and triggers the right of the accused to elect trial by territorial court judge, judge alone or by a judge with a jury. Mr. Readman has elected trial by territorial court judge.

[4] The Supreme Court order was made ex-parte on the application of Mr. Readman's partner. As the interpretation of that order is in issue, it is set out in its entirety.

ORDER

THE APPLICATION of the Plaintiff coming on for hearing on the 12th day of April, 2005, and hearing Malcolm E.J. Campbell, Counsel for the Plaintiff, and upon no one appearing on behalf of the Defendant; and upon reviewing the material filed;

THIS COURT ORDERS THAT:

1. The Plaintiff is granted interim custody of the children of the relationship, namely, Cole Readman, born 30 November, 1996, and Ember Readman, born 27 November, 1998, (the "Children").

2. The Defendant is enjoined from removing the Children from the Yukon Territory without the written permission of the Plaintiff or further order of this Honourable Court.

3. The Defendant is required to produce financial disclosure, including a sworn Financial Statement, his Income Tax Returns for the last three years, and his recent pay stubs.

4. The Defendant is permitted to exercise access to the Children only under the following conditions:

    a. The access be supervised by a person agreed upon in advance by the Parties, or by an access supervisor appointed by the British Columbian Ministry of Children and Family Development, or equivalent agency.

    b. The Defendant be sober and abstaining from non-prescription drugs; and

    c. The Defendant be abiding by his prescription drug intake.

5. The Defendant is enjoined from harassing, molesting, annoying, or contacting, directly or indirectly the Plaintiff or the Children, or

attempting to harass, molest, annoy or contact the Plaintiff or the Children.

6. The Royal Canadian Mounted Police may take such reasonable steps as they deem necessary to enforce the terms of this Order including, without limiting the generality of the foregoing, upon appearing to a police officer having jurisdiction in the Yukon Territory, that the Defendant is in breach of any terms of the within Order, then the police officer shall be authorized to arrest the Defendant, restrain him and bring him at the earliest possible time before a Justice of the Supreme Court of the Yukon Territory to show cause why he should be not be cited for civil contempt.

7. Items 4 and 6 of the Plaintiff's Notice of Motion, filed 26 October, 2004, are adjourned *sine die*.

8. The Plaintiff is awarded the costs of her application, filed 26 October, 2004, in the amount of $300.00.

[5] The facts that gave rise to the charge before the court have been filed by counsel as an Agreed Statement of Facts. It is set out in its entirety.

AGREED STATEMENT OF FACTS

1. Richard Readman and Lisa Arnold (the "Parties") were in a common law relationship from approximately January 1996 until June 2004.

2. Two children were born of the relationship, Cole Readman, born November 30, 1996 and Ember Readman, born November 27, 1998 (the "Children").

3. Lisa Arnold moved to the Yukon approximately September 9, 2004. Shortly after arriving, she commenced an action for custody of the Children and a restraining order.

4. On April 12, 2005, an Order was granted out of the Supreme Court of the Yukon Territory, with terms, *inter alia:*

    a. Lisa Arnold was granted interim custody of the Children

    b. Richard Readman was entitled to exercise access to the Children under certain conditions;

    c. Richard Readman was enjoined from harassing, molesting, annoying, or contacting directly or indirectly, Lisa Arnold or

the Children or attempting to harass, molest, annoy or contact Lisa Arnold or the Children.

5. The Order of April 12, 2005 provided no mechanism for Richard Readman to arrange for access to the Children.

6. The aforesaid Order also contained a clause authorizing the RCMP upon it appearing to a police officer that Richard Readman was in breach of any of the terms of the Order, to arrest Richard Readman and bring him before a Justice of the Supreme Court of the Yukon Territory to show cause why he should not be cited for civil contempt.

7. Approximately August 2005, Richard Readman relocated to Whitehorse to be closer to the Children.

8. On or about September 19, 2005, Richard Readman contacted Lisa Arnold to see about arrangements to see the Children. He said, “I’m in town and want to see the kids.”

9. Lisa Arnold reminded Richard Readman of the contents of the Order of April 12, 2005 and the conversation terminated.

10. Lisa Arnold reported that contact to the RCMP in Whitehorse and a charge contrary to s.127 of the *Criminal Code* was laid against Richard Readman.

11. Since Richard Readman’s arrival in Whitehorse and subsequent to the charge being laid, he has had a number of contacts with Lisa Arnold about seeing the Children that included Lisa Arnold coming to Richard Readman’s place of employment to arrange for him to look after the Children.

[6] The actions of the accused giving rise to the s.127(1) charge before the court consisted of a telephone call to Lisa Arnold’s residence. When she answered the telephone, he said; “I’m in town and want to see the kids.” The conversation was terminated when she reminded Mr. Readman of the contents of the earlier Supreme Court order.

[7] Mr. Readman’s position is as follows:

a. Interpreting the Supreme Court order in its entirety, Mr. Readman’s telephone call did not amount to disobeying a court order.

b. If Mr. Readman was in breach of the Supreme Court order, he should have been dealt with by way of civil contempt, as contemplated by paragraph 6 of that order, and not by a *Criminal Code* prosecution.

c. Alternatively, if Mr. Readman's actions constituted an offence contrary to s.127, the action complained of is trivial and should be dealt with by applying the *de minimus* principle.

Interpreting the Supreme Court Order

[8] Paragraph [5] of the Supreme Court order reads as follows:

> The defendant is enjoined from harassing, annoying, or contacting, directly or indirectly the plaintiff or the Children, or attempting to harass, molest, annoy or contact the plaintiff or the Children.

[9] It is apparent from the Agreed Statement of Facts that Mr. Readman, by his telephone call, did not harass or annoy, or attempt to harass or annoy, Ms. Arnold or the Children. He did contact Ms. Arnold in an attempt to contact his children. On its face, this appears to be a violation of the order.

[10] The defendant submits that the words "or contact the plaintiff or the Children" should be interpreted *ejusdem generis* with the preceding words, "harass or annoy". Upon reading the order as a whole, giving the meaning ascribed to it by the Crown, would result in a contradiction between terms.

[11] Unless the *ejusdem generis* rule is applied, paragraph four of the Supreme Court order would directly contradict paragraph five. The defendant is permitted to exercise access to his Children, on the one hand, but forbidden to contact or attempt to contact them directly or indirectly, on the other hand. This impossibility or absurdity can only be avoided by applying the *ejusdem generis* principle, which is based on common sense and equity. The words "or contacting, directly or indirectly the plaintiff or the Children" or "attempting to… contact the plaintiff or the Children" must be restricted to these contacts or attempted contacts that harass or annoy or reasonably could be viewed as attempts to harass or annoy Lisa Arnold or the Children. The circumstances of the

defendant's telephone call on September 19, 2005 to the home of Lisa Arnold did not constitute such a contact. For that reason, I find Mr. Readman not guilty of the charge before the court.

[12] As counsel spent a considerable amount of time making submissions concerning the applicability of s.127(1) of the *Criminal Code* to the alleged breach of the civil order, I will offer the following *obiter* observations.

[13] The decision of the Supreme Court of Canada in *R.* v. *Clement (1981),* 61 C.C.C. (2d) 449, held that s.127(1) (then s.116(1)) was available to the Crown to punish an accused for disobeying an order made by a Queen's Bench judge in a matrimonial dispute. The case was decided by interpreting and applying the exception "unless a punishment or other proceeding is expressly provided by law". It held that the Queen's Bench rules as they then existed did not provide a penalty or punishment nor did they provide for a mode of proceeding. Those rules did little more than preserve the inherent contempt powers of the court. Such an inherent power is not an "express" penalty or proceeding provided by the law. To exclude the application of s.127(1), the procedure and penalty must be found in "statute law". Statute law includes federal and provincial statutes, as well as *Rules of Court* that are promulgated by Order-In-Council.

[14] Several reported decisions have followed and applied the decision in *R.* v. *Clement* (supra):

R. v. *Rent*, [1989] N.S.J. No. 177 (N.S.S.C.)

R. v. *Fairchuk*, [2003] M.J. No. 119 (Man. C.A.)

[15] On the other hand, other courts have examined their *Rules of Court* and have found that they provide "a mode of proceeding" and "express penalty", with the result that prosecution pursuant to s.127 of the *Code* is precluded:

R. v. *Creamer*, [2001] A.J. No. 1281 (Alta. Prov. Ct)

R. v. *MacLean,* [2002] N.S.J. No. 543 (N.S.S.C.)

R. v. *Whelan*, [2002] N.J. No. 312 (Nfld. C.A.)

R. v. *Thompson*, [1995] B.C.J. No. 2819 (B.C. Prov. Ct.)

[16] The *Thompson* case (supra) interpreted the British Columbia *Rules of Court* which are similar to the Yukon Supreme Court Rules. Judge Stansfield concluded that the *Rules of Court* form a comprehensive provision dealing with contempt of court such as is contemplated by the exception in s.127(1) of the *Code.*

[17] Section 38 of the Yukon Judicature, Chapter 128, Yukon Statutes, adopts the Rules of the Supreme Court of British Columbia. Section 56 of those *Rules of Court* provide for punishment by way of committal, the imposition of a fine or both. In addition, a detailed procedure for the apprehension and release of the defendant is provided for. As in the *Thompson* case (supra), I am satisfied that the Yukon *Rules of Court* meet the requirement of the exception set out in s.127(1) of the *Code*. As a result, the proper procedure in this case should have been to proceed pursuant to the *Rules of Court.*

[18] Furthermore, the order made in respect of Mr. Readman makes specific reference, in paragraph six, to civil contempt proceedings as a remedy for the enforcement of the order. It is evident that the judge making the order intended any breaches to be dealt with applying the civil contempt rules.

[19] Utilizing the *Rules of Court*, rather than s.127(1) of the *Criminal Code*, makes more sense from a public policy perspective. Parliament could not have intended that a minor breach of a civil matrimonial order would trigger the public expense associated with a jury trial, an alternative available to the accused upon election.

[20] Further, as a practical matter, it is more efficient to bring a “breach” back before the judge who made the original order. That judge has available to him all the relevant information from the original court file, information that is not readily available to a judge sitting in criminal court.

Lilles T.C.J.