COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***Cunningham v. Lilles,***
2008 YKCA 7

Date: 20080625
Docket: 06-YU565

Between:

Jennie Cunningham

Plaintiff
(Appellant)

And

His Honour Judge Heino Lilles,
Clinton Lance Morgan, and
Her Majesty the Queen

Defendants
(Respondents)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Tysoe

G. Coffin	Counsel for the Appellant
P. Eccles	Counsel for the Respondents
J. Hunter, Q.C.	Counsel for Intervenor, The Law Society of Yukon
Place and Date of Hearing:	Yukon, Whitehorse May 26, 2008
Place and Date of Judgment:	Vancouver, British Columbia June 25, 2008

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Tysoe

Reasons for Judgment of the Honourable Madam Justice Newbury:

Introduction

[1] In 1985, in the well-known case of ***Re Leask and Cronin*** (1985) 66 B.C.L.R. 187, 18 C.C.C. (3d) 315, Mr. Justice McKay of the British Columbia Supreme Court laid down a rule that has been followed in criminal cases in British Columbia ever since – that a court has no right in law to order counsel to continue in the defence of an accused after counsel has advised that he or she will no longer represent the accused. This principle applies as well to counsel for the Crown or any other party in a criminal case. A very different rule has been adopted, however, in Alberta, Manitoba, Saskatchewan and Ontario. The courts in those provinces have decried the fact that in British Columbia, "it would not be contempt for a lawyer simply to walk out of court in the middle of a hearing, provided he utters a polite goodbye." (***R. v. D.D.C.*** (1996) 187 A.R. 279, 110 C.C.C. (3d) 323 (Alta. C.A.), at para. 18). Thus in those provinces, the courts assert a power to find in contempt a lawyer who fails "barring good reason, to remain when bid to stay." (*Ibid.*)

[2] The question for us on this appeal is whether ***Re Leask and Cronin*** applies, or should apply, in the Yukon Territory, where there is no appellate authority on point.

[3] At the end of the hearing of this appeal, we advised counsel that we would allow the appeal from an order of the Supreme Court of the Yukon Territory dated June 16, 2006, which dismissed an application by Ms. Cunningham, a defence lawyer practising criminal law, for an order in the nature of *certiorari* quashing an order of a Territorial Court judge. The latter order had denied Ms. Cunningham's application to be removed

as counsel of record for an accused, Mr. Morgan. Our reasons for disagreeing with the Territorial Court judge and the learned Supreme Court justice are set out below.

Factual Background

[4] The matter arose as follows. Ms. Cunningham had been retained by the Yukon Legal Services Society to act as counsel for Mr. Morgan, who had been charged with three sexual offences involving a young child. The preliminary hearing was scheduled for June 26, 2006. Prior to the hearing, the Crown had advised Ms. Cunningham that it would be applying to introduce a videotape in lieu of *viva voce* evidence of the child.

[5] On May 16, 2006, the Yukon Legal Services Society advised Mr. Morgan that because he had resumed employment and had not completed a required report to that effect to the Legal Services Society, his legal aid certificate would be revoked on May 18. On the latter date, Ms. Cunningham appeared before Judge Lilles in the Territorial Court and applied to be removed as counsel of record. Either in response to questioning or simply in support of her application, Ms. Cunningham told Judge Lilles that the only reason for her application was that the Legal Aid certificate had been revoked. Mr. Morgan himself told the Court that he wanted Ms. Cunningham to continue representing him, but she was unwilling to do so unless she was going to be paid for her services.

[6] Judge Lilles declined to grant Ms. Cunningham's application to be removed as solicitor of record, issuing very brief reasons on May 30, 2006, with more detailed reasons to follow. On June 8, he issued further reasons in which he reviewed the law, in particular ***Re Leask and Cronin*** and ***R.* v. *D.D.C.*** and two Yukon decisions of Hudson J.,

R. v. Skookum [1995] Y.J. No. 123 (S.C.) (Q.L.), and ***R. v. Bunbury*** [1995] Y.J. No. 103 (S.C.) (Q.L.). Lilles J. concluded that the Court had the jurisdiction to refuse to permit counsel to withdraw and that in the circumstances of this case, leave should be refused. These circumstances included the possible prejudice to Mr. Morgan; the fact that if counsel were permitted to withdraw, an adjournment of the preliminary hearing would be necessary and a delay in scheduling the trial would occur; and the fact that further delay would "likely irreparably harm the Crown's case as the child's memory of the relevant events will be diminished."

[7] At a hearing held in Supreme Court on June 9, 2006, Ms. Cunningham sought an order in the nature of *certiorari* quashing Judge Lilles' order. For reasons issued June 16 and indexed as 2006 YKSC 40, the Chambers judge dismissed her application.

[8] The Court began by addressing the question of "threshold discretion", reasoning that a Territorial Court judge presiding over a preliminary inquiry has jurisdiction equivalent to the inherent jurisdiction of the Supreme Court to control and regulate its process. Thus, an application by defence counsel to withdraw from the record in the course of the preliminary inquiry was, the Court stated, a matter within its jurisdiction. (Para. 9.) As I understand it, no challenge is made on appeal to this conclusion.

[9] The Chambers judge then posed the question: does ***Re Leask and Cronin*** apply in the Yukon? There were two Yukon Supreme Court decisions, both decided by Hudson J. in the same week, on point – ***R. v. Skookum*** and ***R. v. Bunbury***, *supra*. As the Chambers judge read them, these cases did not adopt ***Re Leask and Cronin*** as good law in the Yukon "in any unequivocal way", and previous applications by counsel to withdraw from the record had been treated in both Territorial and Supreme courts in the

Yukon as not simply matters of "politeness and courtesy", as suggested by McKay J. in ***Re Leask and Cronin***.

[10] Turning next to the question, "What is the law in the Yukon in this area?", the Court suggested that a useful starting point was the Alberta Court of Appeal's decision in ***R.* v. *D.D.C.*** In that case, as in the case at bar, the difficulty between counsel and his client was a financial one: the accused in a criminal trial defaulted on a retainer arrangement a few weeks before the trial was to begin and counsel told him he would no longer represent him. Counsel tried to arrange Legal Aid but this was likely to necessitate an application to adjourn the trial. The Queen's Bench judge ruled that counsel required the Court's leave to withdraw. The Court denied leave to do so, and denied counsel's request for an adjournment. The Court of Appeal affirmed this ruling in clear terms, reasoning that independent of his obligations to his or her client, a lawyer who has accepted a retainer from an accused and gone on record for him before the trial court is "obligated to the court to continue to represent him unless and until, after notice to the client, the court permits him to withdraw for cause or by reason of the accused's consent to the termination of his employment." (Para. 2.) Cause was said to include "unhappy differences" that made it impossible for the lawyer to continue, but not the non-payment of fees.

[11] At para. 18, the Court in ***D.D.C.*** continued:

> Counsel who goes on the record for an accused has a further duty. We particularly like this formulation by the North Carolina Supreme Court, which accurately summarizes that duty:
>
> > Independent of his obligations to his client, an attorney, having accepted employment by a defendant and having represented him before the court, is obligated to the court

> to continue to do so unless and until, after notice to the client, the court permits him to withdraw for cause or by reason of defendant's consent to the termination of his employment. [*State* v. *Crump*, 178 S.E. 2d 366 (Sup. Ct. N.C. 1971) at 377]
>
> We do not agree with McKay, J. in *Leask and Cronin* … when he categorized the traditional request for leave to withdraw as merely a matter of "politeness and courtesy" elevated by repetition "... into a discretionary power in the judge to grant or refuse leave to withdraw." If he is right, it would not be contempt for a lawyer simply to walk out of Court in the middle of a hearing, provided he utters a polite goodbye. We think not. It certainly can be contempt to fail, barring good reason, to come when bid by the Court to come. See *R*. v. *Aster (No. 1)* (1980), 57 C.C.C. (2d) 450 (Que. S.C.) at 451 …; *R*. v. *Fox* (1976), 70 D.L.R. (3d) 577 30 C.C.C. (2d) (Ont. C.A.) …; *Re Andreachuk* (1984), 120 A.R. 156 (Alta. C.A) … . And it follows that it can be contempt to fail, barring good reason, to remain when bid to stay.

[12] The Alberta Court of Appeal also disagreed with a case relied upon by the Court in ***Re Leask and Cronin***, ***Boult Enterprises Ltd.* v. *Bisset*** [1985] 3 W.W.R. 669 (B.C.C.A.), although the Court in ***D.D.C.*** noted that where "unhappy differences" arise in a civil case, a court would be under a duty to grant the request to withdraw. Thus, the Alberta Court of Appeal said, "the difference between us and Taggart, J.A., [in ***Boult v. Bisset***] is minuscule. But this nicety was the tiny acorn with which McKay, J., built his tree." (Para. 19.)

[13] The Chambers judge in the case at bar noted that the Manitoba Court of Appeal in ***R. v. M.B.D.***, 2003 MBCA 116, 177 Man. R. (2d) 301, the Saskatchewan Court of Appeal in ***Mireau v. Canada et al.*** (1995) 128 Sask. R. 142, [1995] 4 W.W.R. 389 (C.A.), and the Ontario Court of Appeal in ***R. v. Chatwell*** (1998) 38 O.R. (3d) 32, 122 C.C.C. (3d) 162, had all taken the view that leave of the court is required on an application to withdraw, even for non-payment of fees. The Chambers judge also referred to the British Columbia Court of Appeal's decisions in ***Luchka v. Zens*** (1989) 37 B.C.L.R. (2d) 127, 36

C.P.C. (2d) 271, and ***R. v. Huber***, 2004 BCCA 43, 192 B.C.A.C. 75, in which Southin, Rowles and Smith JJ.A. all wrote separate reasons affirming ***Re Leask and Cronin*****,** but leaving open the possibility of "some limitations" on the principle that (in the words of Southin J.A. at para. 101), "a member of the bar has a right to throw up his brief without the court's consent and a judge has no right to require him to continue."

[14] Finally in terms of case law, the Chambers judge referred to ***Spataro v. The Queen*** [1974] 1 S.C.R. 253, 26 D.L.R. (3d) 625, in which the majority of the Court upheld a trial judge's refusal to grant an adjournment requested by an accused in an apparent attempt to delay his trial, and to discharge his counsel. The majority found, however, that "there had never been an unequivocal discharge of counsel by the accused and that in effect he had reaffirmed the retainer and continued to be represented by him throughout the trial." (At 257.) The accused's appeal on the ground that he had been unable to make full answer and defence failed.

[15] The Chambers judge also referred to two texts, *Ethics and Canadian Criminal Law* (2001) by the Honourable Mr. Justice Michel Proulx and David Layton, and *Legal Ethics* (1957), by Mark M. Orkin. On a consideration of these and the case authorities, the Chambers judge concluded as follows:

> Considering all of the above authorities, in my respectful view, the obligations of defence counsel in a criminal proceeding, when the issue of withdrawal arises, do not arise solely from the existence of a private contract between a client and their counsel. Rather, such counsel has concurrent and independent obligations to the court before whom they are appearing. Those obligations arise out of the status of counsel as an officer of the court and the court's inherent supervisory jurisdiction over the conduct of such officers in legal proceedings which may affect the administration of justice. Thus, <u>any counsel seeking to withdraw from the representation of a client in the course of a criminal proceeding, or indeed before those proceedings commence,</u> if such counsel has appeared on

> the record as being generally retained to represent that client, must seek the leave of the court to withdraw. Such applications must be made with reasonable notice to the client. In those circumstances where counsel cites unhappy or irreconcilable differences which go to the core of the solicitor-client relationship and would prevent counsel from continuing to act in good conscience, then the court should allow the withdrawal in almost all but the most exceptional circumstances. Where the reason for the withdrawal is a financial one relating to the retainer, the Court will grant or deny leave based on its assessment of any resulting prejudice to the accused and to the administration of justice.
>
> Given my view of the law in the Yukon Territory respecting the withdrawal of counsel, I am not able to say that Lilles J. exceeded his jurisdiction in exercising his discretion as he did. While I may not have conducted the hearing in exactly the same manner or come to the same conclusion, that is not necessary for me to decide in determining the question of jurisdiction. As stated in *Re: Madden*, cited above, if he erred, he did so in the exercise of his jurisdiction, not in excess of it. [At paras. 40-1; emphasis added.]

[16] Finally, the Chambers Judge addressed the question of whether the Territorial Court judge had otherwise exceeded his jurisdiction, either because he had "essentially" ordered Legal Aid to fund the accused's defence or because he had failed to give "special consideration" to the particular circumstances of Legal Aid staff lawyers. The Chambers judge noted that the Territorial Court judge had not ordered Legal Aid to do anything and that Ms. Cunningham's status as a Legal Aid employee was irrelevant to her status as an officer of the court. The Chambers judge continued:

> … Should she feel strongly enough and confident enough about the correctness of her decision to withdraw, and fail to appear further on her client's behalf, then she risks incurring the contempt powers of the court she is before. Looking at it another way, the fact that she is under contract with Legal Aid and has been directed by Legal Aid not to continue acting for Mr. Morgan does not supersede her obligation to the court. In any event, in more practical terms, I expect it would be very unlikely that Legal Aid would take issue with Ms. Cunningham continuing to act for Mr. Morgan pursuant to an order of the court, even though such an order is contrary to the Legal Aid's direction that she cease to act. [At para. 45.]

[17] In the result, Ms. Cunningham's application for an order of *certiorari* was dismissed. We were told that ultimately, a trial of the charges against Mr. Morgan became unnecessary. However, counsel made no objection, on the ground of mootness, to this appeal proceeding, evidently recognizing the desirability of appellate guidance on the important issues raised by the case.

On Appeal

[18] As a preliminary matter, I must say that I disagree with the courts below in their interpretation of the judgments of Hudson J. in ***R. v. Skookum*** and ***R. v. Bunbury*****.** Both are very brief oral judgments, but in ***Bunbury***, the Court purported to distinguish ***Re Leask and Cronin***, apparently on the basis that ***Bunbury*** involved a Legal Aid certificate; and in ***Skookum***, the application before the Court (an application by defence counsel to withdraw) was left for the trial judge. It is true that the Court's reasoning was not completely clear, but I do not read these judgments to say that ***Re Leask and Cronin*** was wrongly decided.

[19] As a second preliminary point, I note that (as Mr. Hunter pointed out), ***Re Leask and Cronin*** and some of the cases following it did not close the door completely to the possibility of a contempt citation being made against a lawyer who withdraws from a case. McKay J. stated near the end of his reasons:

> I do not want to be understood as saying that withdrawal by counsel can never be the subject of contempt proceedings. One can readily visualize situations in which the manner of withdrawing -- either by words or conduct -- will justify a citation for contempt. As well the circumstances surrounding the withdrawal may be such as to establish a reasonable basis for concluding, for example, that the withdrawal is a ploy to delay or hinder the trial process. [At 199.]

[20] Similarly, in ***R.* v. *Huber***, *supra,* Rowles J.A. observed at para. 76 that "[w]hatever the reasons may be for counsel seeking to withdraw, the court's scope of inquiry is circumscribed by issues that lie properly within the domain of counsel and client". She also stated, however, that once the client has consented to the withdrawal or has discharged counsel, "the bench can intervene no further than attempting to urge reconciliation between counsel and client …". (*Ibid*.) For her part, Southin J.A. at para. 101 suggested that the constraint on the judicial power "may not be without some limitations", but she did not find it necessary to consider what those limitations might be. Only Smith J.A. in dissent in ***Huber*** took an "absolute" view of the issue, stating at paras. 121-2 that a party is entitled to terminate the lawyer-client contract upon repudiation by the other, that the "propriety of a lawyer's termination of the contract is a disciplinary matter for the benchers of the Law Society" and that the court has no power to order counsel to continue.

[21] At the other end of the spectrum, the Court in ***D.D.C.*****,** *supra*, acknowledged that where counsel informs the court that "unhappy differences" (i.e., differences other than those concerning payment of counsel's retainer) have arisen, the court would be under a duty to grant counsel the right to withdraw. These judicial observations lead Proulx and Layton, *supra*, to observe that the gulf between the respective positions of the Courts of Appeal of British Columbia and Alberta may not be as wide as one might suppose. In the authors' words:

> To sum up, *Leask and Cronin* and *D.(D.C.)* adopt distinct approaches to the question of the court's supervisory power over defence counsel's withdrawal from a criminal case. The former decision does not require that counsel seek leave in the ordinary course. The latter case always requires that counsel do so. But lawyers in British Columbia will typically seek leave as a matter of courtesy, and they may feel obligated to

> do so where there is some concern that withdrawal may be viewed as improper by the court. By the same token, lawyers in Alberta may be able to rely upon an automatic right to withdraw where the request for leave relates to an irrevocable and substantial breakdown in the client-lawyer relationship. The difference between the two approaches may thus be fairly modest in practice. [At 618.]

[22] This may be so, but in my view, the difference between the rule enunciated in ***Re Leask and Cronin*** and the approach taken in ***D.D.C.*** and cases following it, reflects a fundamental disagreement in principle concerning who has primary supervisory jurisdiction over the conduct of lawyers and their retainers. To put it another way, what body – the court or the governing body of the Bar – has the most legitimate interest in ascertaining and judging reasons for a lawyer's withdrawal or a client's discharge of his lawyer? It seems to me obvious, both as a matter of principle and as a matter of practicality, that while the court has an obvious interest in ensuring the integrity of the administration of justice, it is the legal profession that must generally exercise the responsibilities of oversight independent of the court. As McKay J. stated in ***Re Leask and Cronin***:

> The starting point for a consideration of this matter is a recognition that a strong and independent bar is a prerequisite to the proper administration of justice. Counsel must be prepared to assert that independence by standing firm against clearly improper demands from the bench. In my view Mr. Leask did just that and, as one would expect, the benchers of the law society stand behind him.
>
> There must also be a recognition that disciplinary jurisdiction over members of the legal profession in this province has been vested, in modern times, with the benchers of the law society with a right of appeal to the Court of Appeal. The vesting of such disciplinary jurisdiction in the benchers does not, of course, detract from the contempt powers of the various courts. At times conduct by a member may be the subject of disciplinary action by the benchers and as well contempt action by a court. But apart from conduct amounting to contempt, the disciplining of members is a function that is solely within the jurisdiction of the benchers. [At 196-7.]

[23] As in British Columbia, the legal profession in the Yukon Territory is a self-governing body. It operates under rules enacted by the executive of the Law Society. (In this regard, the legal profession of Yukon and other provinces and territories of Canada differs from the legal profession in states of the United States, where lawyers are supervised by the courts rather than by independent law societies. This may explain the position taken by the North Carolina Supreme Court in ***State* v. *Crump***, 178 S.E. (2d) 366 (Sup. Ct. N.C., 1971), a passage from which was quoted with approval by the Court in ***D.D.C.*** at para. 18.) In the Yukon, the supervision of lawyers is carried out pursuant to Part 3 of the ***Legal Profession Act*****,** R.S.Y. 2002, c. 134. The Law Society has adopted a code of professional conduct consistent with that promulgated by the Canadian Bar Association. Section 21 of the Yukon Code provides that "The lawyer owes a duty to the client not to withdraw his or her services except for good cause and upon giving appropriate notice."

[24] Chapter XII of the ***Canadian Bar Association Code*** deals more extensively with the subject of withdrawal. It distinguishes between obligatory withdrawal, optional withdrawal and withdrawal for non-payment of fees. The latter is said to be justified "unless serious prejudice to the client would result." It is inherent in the ***Code*** that the applicable law society, rather than the court, is the body that would determine whether this or any other related provision had been breached, and that it would be for the law society to determine appropriate sanctions. The enforcement of such rules is generally not a matter for the court. This is consistent with the time-honoured principle of the independence of the Bar. That principle was described by McEachern C.J.B.C. in a passage quoted at para. 125 of ***Huber***, "Lawyers are amongst the most fiercely independent members of society. They regularly stand between the citizen and the

government, and between the citizen and the court, and it would be unthinkable if they should have to answer to anyone but their clients, their conscience and their own professional body for how they conduct themselves in the representation they give to their clients."

[25] Obviously, if ***D.D.C.*** were adopted, the potential for an unseemly conflict would exist if the court took one view of a lawyer's conduct in withdrawing, and the Law Society took another. There are also two important practical reasons why in my opinion a lawyer should not be asked or expected to explain the reason for his or her withdrawal in a criminal case. First, as stated at s.3 of Part I of the ***Code of Professional Conduct*** adopted by the Law Society, a lawyer is under a duty to hold "in strict confidence all information acquired in the course of his or her professional relationship concerning a client's business and affairs." It might be argued that a lawyer's disclosure that "unhappy differences" have arisen between him or her and the client, or that the lawyer is withdrawing because of non-payment of fees, does not involve the disclosure of privileged information, but it is very difficult for the lawyer to avoid being drawn in into a conversation with the judge in which privilege may be trespassed upon. A judge who is annoyed at the withdrawal of a lawyer may well be moved to ask for more information than the lawyer should disclose – as occurred in ***Re Leask and Cronin*** itself. It would be understandably difficult for a court, concerned about protecting the integrity of its process, to resist questioning the lawyer when the vague phrase "unhappy differences" is offered up.

[26] Second, if the court retained the power to require a lawyer, upon pain of contempt, to continue to represent a client notwithstanding the non-payment of fees, the lawyer

would be put in a position of perceived if not actual conflict. In the normal course, the lawyer would want the trial to be completed as soon as possible, and might be tempted, or be seen to be tempted, not to make decisions in the client's best interests, but with a view to returning to his or her paying clients as quickly as possible. The client might very well want to rid himself of the lawyer as well. To have the court force the two to carry on together until the completion of the trial places everyone in a position that is at best awkward.

[27] Surely the better course is to avoid these problems, relying on the assumption that lawyers generally do not avoid their obligations or abuse their privileges as lawyers (see ***Grabber Ind. Products Central Ltd.* v. *Stewart & Co***., 2000 BCCA 206, 73 B.C.L.R. (3d) 356 at para. 26), and that if they do fall below the norms of the legal profession, the profession will take the appropriate disciplinary action. In British Columbia, protocols exist for the referral of a complaint or report by a judge to the Law Society where questionable conduct on a lawyer's part may have occurred. This provides a judge with a means, other than the contempt power, of ensuring that an apparent breach of the ***Rules*** or ***Code of Professional Conduct*** will be brought to the attention of the proper body. Even where such protocols do not exist, it remains open for a judge to make a complaint where in his or her opinion, that step is necessary.

[28] In the result, I conclude that the learned Supreme Court Justice erred in ruling that ***Re Leask and Cronin*** could not be followed in favour of the position enunciated in ***D.D.C.*** I also agree with Mr. Coffin, counsel for the appellant, that the difficulty in this case would likely have been resolved by an adjournment of the preliminary inquiry. If Mr. Morgan was unable to obtain counsel, he could have applied in short order under s. 12 of

the ***Charter*** for a stay unless counsel was appointed, in which event information about his finances could properly be put before the Court.

[29] Last, I should not be taken as closing the door completely on a citation for contempt in extreme circumstances where a lawyer's conduct in connection with a withdrawal amounted to a serious affront to the administration of justice. This possibility was also left open by the Court in ***Re Leask and Cronin***. In my opinion, it does not, however, entitle a court to insist that a counsel represent an accused when the retainer has been broken.

[30] With thanks to counsel for their able submissions, the appeal was allowed. An order should go in the nature of *certiorari* quashing the lower court's order.

"The Honourable Madam Justice Newbury"

I Agree:

"The Honourable Madam Justice Kirkpatrick"

I Agree:

"The Honourable Mr. Justice Tysoe"