

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

-v-

LEVI CAYEN

**Transcript of the Reasons for Decision of the Honourable Justice
S.H. Smallwood, sitting in Yellowknife, in the Northwest
Territories, on the 13th day of March, 2020.**

APPEARANCES:

A. Piche:	Counsel for the Crown
T. Bougie:	Counsel for A. Regel via telephone
A. Regel:	Counsel for the Accused

Charges under s. 235(1) and s. 344 of the *Criminal Code*

INDEX

PAGE

REASONS FOR DECISION

1

1 **(TELECONFERENCE COMMENCES)**

2 THE COURT: Good afternoon. Ms. Bougie, are you on
3 the line?

4 T. BOUGIE: Yes, indeed. I'm here with Mr. Regel.

5 THE COURT: Okay. And can you hear me?

6 T. BOUGIE: We can. Thank you.

7 **(REASONS FOR DECISION)**

8 THE COURT: Okay. Thank you. All right.

9 Levi Cayen is charged with first degree murder
10 contrary to section 235(1) of the *Criminal Code* and
11 robbery contrary to section 344 of the *Criminal Code*. It
12 is alleged that he robbed and murdered Alexander
13 Norwegian on December 27th, 2017. The matter was
14 set for trial in January 2020.

15 On November 18th, 2019, Mr. Cayen fired his
16 lawyer. Mr. Cayen initially indicated that he wanted to
17 retain private counsel; however, that was not
18 successful and then he sought the assistance of Legal
19 Aid. After some delay, Legal Aid assigned a new
20 lawyer to the matter: Mr. Regel. The trial date had
21 been cancelled, and a new trial date has not yet been
22 scheduled.

23 Upon being notified that Alan Regel would be
24 representing Levi Cayen, Herbert Roy Norwegian, the
25 victim's father, identified Mr. Regel as a lawyer who
26 may have represented him in a criminal case in the
27 1980s. Mr. Norwegian thought that Mr. Regel

1 represented him in 1986 for an assault charge in
2 relation to a fight with a taxi driver. Mr. Regel did
3 represent Herbert Roy Norwegian in 1986 as defence
4 counsel on a charge of mischief in relation to a city taxi.
5 He appeared as counsel on all court appearances,
6 including on October 22nd, 1986, when the matter was
7 set for trial. On that day, Mr. Norwegian changed his
8 plea from not guilty to guilty and was sentenced.

9 The Crown on this matter and a Crown witness
10 coordinator spoke with Mr. Norwegian about this issue
11 a couple of times. Mr. Norwegian was asked what he
12 thought about the issue. And ultimately, his response
13 was that he was not agreeable to have Mr. Regel
14 cross-examine him or represent a person charged with
15 killing his son. He does not waive privilege over any
16 information shared with Mr. Regel as his legal counsel
17 in 1986. Mr. Regel does not have any recollection of
18 meetings with or communications from Mr. Norwegian.
19 He does not have any recollection of details of court
20 appearances involving Mr. Norwegian.

21 The accused has received independent legal
22 advice, and he wishes to continue with Mr. Regel as his
23 counsel. He is prepared to have another lawyer cross-
24 examine Mr. Norwegian at trial and accepts that Mr.
25 Regel will not share any information about Mr.
26 Norwegian that he may have with the accused or the
27 other lawyer.

1 Mr. Norwegian will be a witness called by the
2 Crown at the trial. I will not go through what his
3 evidence will be or the significance of it, but I am
4 satisfied that his evidence is necessary to the Crown's
5 case. The Crown does not expect that his evidence is
6 overly controversial and does not expect a full-on attack
7 on his credibility by the defence. This is not a situation
8 like, for example, in some of the cases filed where the
9 conflict involves a lawyer representing co-accused,
10 where one accused is expected to testify against
11 another, and credibility is a key issue in the trial. But
12 Mr. Norwegian is a Crown witness. He is the victim's
13 father, and he is adverse interest to the defence, and
14 his evidence is important evidence.

15 In *MacDonald Estate v. Martin* [1990] 3 SCR
16 1235, the Supreme Court of Canada established the
17 test to be considered when considering a conflict of
18 interest. The test is whether the public represented by
19 a reasonably informed person and in possession of the
20 facts would be satisfied that no use of confidential
21 information would occur. In order to meet this test, two
22 questions must be answered:

- 23 (1) Did the lawyer receive confidential
24 information attributable to a solicitor-and-
25 client relationship relevant to the matter at
26 hand; and
27 (2) Is there a risk that it will be used to the

1 prejudice of the client.

2 The Supreme Court also stated at pages 1260
3 to 1261:

4 Once it is shown by the client that there existed
5 a previous relationship which is sufficiently
6 related to the retainer from which it is sought to
7 remove the solicitor, the court should infer that
8 confidential information was imparted unless
9 the solicitor satisfies the court that no
10 information was imparted which could be
11 relevant. This will be a difficult burden to
12 discharge....

13 A lawyer who has relevant confidential
14 information cannot act against his client or
15 former client. In such a case, the
16 disqualification is automatic.

17 This situation is similar to that of the case of
18 *Edkins* and *M.G.*, cases from this jurisdiction where the
19 lawyer representing an accused person was found to
20 have previously represented a Crown witness in the
21 case. In *M.G.*, I stated:

22 The focus of the inquiry, as stated in *Edkins* at
23 paragraph 10, is always on the potential misuse
24 of confidential information or the appearance of
25 misuse. A lawyer can act against a former
26 client in a new and independent matter which is
27 wholly unrelated to the matter for which the

1 lawyer had previously represented that client.
2 However, any confidential information the
3 lawyer gained as a result of the former
4 representation must be irrelevant to the new
5 matter.

6 In *Edkins*, Justice Vertes found that it was not a
7 case of actual conflict but one of the
8 appearance of a conflict. The lawyer in *Edkins*
9 had no recollection of specific details from his
10 past conversations with the witness. The judge
11 concluded that a reasonable member of the
12 public who was informed of the facts would still
13 come to the conclusion that there was a
14 possibility of harm to the fairness of the trial or
15 to the appearance of fairness if the lawyer was
16 not removed. He noted that the charge rested
17 almost entirely on the credibility of the
18 complainant and that the complainant's
19 credibility would have to be attacked if defence
20 counsel expected to do a proper job. That
21 would involve an inquiry into the complainant's
22 criminal record. The concern would be that
23 even if the lawyer did not consciously
24 remember anything that he thought could be
25 used adversely against his former client, one
26 could never be sure as to what unconscious
27 thoughts may emerge so as to prompt

1 questions of the former client. He also noted
2 that it would be unseemly for counsel to point to
3 a criminal conviction as an indicator of lack of
4 credibility when he was involved in advising
5 that client which she accumulated that
6 conviction.

7 While in *Edkins* the issue that was concluded to
8 be was of an appearance of conflict, in *M.G.* the finding
9 was that there was an actual conflict. In this case, it is
10 agreed that Mr. Regel does not recall any details of his
11 representation of Mr. Norwegian. It must be inferred
12 that Mr. Regel received privileged information from Mr.
13 Norwegian. He represented Mr. Norwegian at all times
14 during the process for his 1986 mischief conviction. It
15 has to be assumed that he acted competently and that
16 that would involve interviewing Mr. Norwegian and
17 gathering personal information for the sentencing
18 process. The letter sent by Mr. Regel to the Crown
19 back in 1986 gives credence to this. He had clearly
20 discussed the charge with Mr. Norwegian and had
21 obtained his version of events.

22 Therefore, I conclude that Mr. Norwegian did
23 impart confidential information to Mr. Regel when he
24 represented him in 1986. While it appears that Mr.
25 Regel does not recall that information, there is still a
26 concern. A long time has passed, admittedly, since Mr.
27 Regel represented Mr. Norwegian, but Mr. Norwegian,

1 on his part, immediately recalled that Mr. Regel was his
2 lawyer and expressed concern about being cross-
3 examined by him. Even if Mr. Regel does not
4 consciously remember anything about Mr. Norwegian,
5 there is still a possibility that his cross-examination of
6 Mr. Norwegian could be influenced by his former
7 solicitor-client relationship with Mr. Norwegian. A
8 reasonable member of the public in possession of the
9 facts would be left wondering if the lawyer's questions
10 in cross-examination were in some way influenced by
11 the previous solicitor-client relationship.

12 The confidential information that has been
13 shared between a lawyer and a former client must also
14 be relevant to the new matter. In this case, Mr.
15 Norwegian will be a Crown witness at the trial. His
16 evidence is important to the Crown's case.

17 I do not know the defence strategy and whether
18 it will involve a challenge to Mr. Norwegian's credibility.
19 It is possible. Credibility is frequently an issue in
20 criminal matters. And where the charge is murder, the
21 stakes are high.

22 Mr. Cayen likely has an expectation that Mr.
23 Regel will properly defend him and challenge evidence
24 and witnesses. This often involves challenging the
25 credibility of the Crown's witnesses. There is at least
26 an appearance of conflict of interest between Mr. Regel
27 and Mr. Norwegian, and a reasonable member of the

1 public would conclude that there was a risk that
2 confidential information given by Mr. Norwegian to Mr.
3 Regel could be used at the accused's trial.

4 The court must also be concerned about a
5 lawyer's duty of loyalty. As stated in the *R. v. Billy*,
6 2009 CanLII 63957 (ON SC) at paragraph 28, the citing
7 the text *Ethics and Canadian Criminal Law*:

8 As most rules of professional conduct suggest,
9 a former client has a legitimate claim to expect
10 counsel's loyalty to persist with respect to the
11 subject matter of a retainer even after the
12 client-lawyer relationship has ended and even if
13 there is little or no possibility that confidential
14 information can be misused.

15 In *Billy*, the court found that there will be an
16 appearance of conflict of interest whether or not the
17 lawyer is likely to use confidential information.

18 The issue then becomes whether Mr. Regel
19 should be removed as counsel or whether a protective
20 measure can be implemented which would suffice.

21 In *R v. Speid*, the Ontario Court of Appeal held
22 that an accused has a right to retain counsel of choice
23 and that it is a fundamental right. The court noted at
24 paragraph five:

25 Although it is a fundamental right and one to be
26 zealously protected by the court, it is not an
27 absolute right and is subject to reasonable

1 limitations.

2 In considering whether to remove counsel of
3 choice because of a conflict, the court must balance the
4 accused's rights, public policy, the public interest in the
5 administration of justice and basic principles of
6 fundamental fairness. Counsel should not be removed
7 unless there are compelling reasons. In this case, it
8 has been proposed that another lawyer be retained to
9 conduct the cross-examination of Mr. Norwegian. The
10 accused is agreeable to proceeding in that manner. He
11 wishes to have Mr. Regel continue as his counsel.

12 The accused and Mr. Regel have only had a
13 brief solicitor-client relationship. This conflict was
14 raised almost immediately when the Crown learned of
15 the potential issue. But another complicating factor is
16 that Legal Aid had difficulty in finding Mr. Cayen a
17 lawyer.

18 The case involves several co-accused charged
19 separately, some of whom have had multiple counsel.
20 Some of the co-accused have resolved their charges
21 and others are proceeding to trial. This poses a
22 challenge for Legal Aid, which was indicated in an e-
23 mail which was filed on this application. The e-mail is
24 from Karen Wilford, the executive director of the Legal
25 Aid Commission, and indicates that there are "very
26 limited options from the current criminal law panel," and
27 "it would be difficult to locate new counsel with

1 comparable experience who is not in conflict and is
2 willing to act.”

3 Another factor to consider is that the accused is
4 in custody and the first trial date has been cancelled,
5 although responsibility for that delay is on the accused.
6 The charges are serious, and the accused is entitled to
7 the best defence possible. This will be a lengthy trial,
8 and it would take time to find a new lawyer and for that
9 lawyer to become familiar with the file. At this point, the
10 trial is unlikely to be heard this year regardless of who
11 the defence counsel is. Realistically, I would expect
12 this matter to be heard in 2021. It would be quite a feat
13 if it were to be scheduled this year, given how events
14 are unfolding and other trials that are currently
15 scheduled.

16 I am concerned about the prospect of retaining
17 another counsel to cross-examine Mr. Norwegian. As
18 the cases note, there may be a lingering concern that
19 confidential information can still be misused in other
20 ways, or that confidential information cannot be
21 adequately isolated without sacrificing an element of
22 the accused’s defence. There are also compelling
23 reasons to permit Mr. Regel to continue as counsel.

24 The facts of this case are different from *M.G.*,
25 for example, where I had no hesitation in removing
26 counsel of choice. The issues of delay, the accused
27 being in custody, the expected difficulty in retaining new

1 counsel, and the passage of time from when Mr. Regel
2 represented Mr. Norwegian suggests to me that a
3 partial disqualification should be utilized. In doing so, I
4 am going to impose protective measures that will
5 hopefully have the effect of isolating Mr. Regel from the
6 portion of the case that has a connection to Mr.
7 Norwegian.

8 Therefore, his continued representation will be
9 subject to the following conditions:

- 10 • If Mr. Regel has any information in his control or
11 possession related to his representation of Mr.
12 Norwegian, and I don't expect that he does, but if he
13 does, that information will be sealed.
- 14 • Mr. Regel will not provide any person with confidential
15 information related to Mr. Norwegian.
- 16 • If Mr. Norwegian testifies at trial, Mr. Regel will not be
17 present in the courtroom during his testimony.
- 18 • Mr. Regel will not be involved in any way with the
19 cross-examination of Mr. Norwegian.
- 20 • Independent counsel will be appointed to conduct the
21 cross-examination of Mr. Norwegian and will be
22 retained specifically for that purpose.
- 23 • Mr. Regel can discuss the defence strategy generally
24 with independent counsel but will not instruct the
25 independent counsel regarding the cross-examination
26 of Mr. Norwegian.
- 27 • Mr. Regel will not be involved in the preparation or

1 delivery of any submissions concerning Mr. Norwegian.

2 • To the extent that Mr. Regel wishes to challenge Mr.
3 Norwegian's evidence, including in a defence opening,
4 the calling of witnesses to contradict Mr. Norwegian's
5 evidence or to comment on Mr. Norwegian's evidence
6 in closing submissions, those issues will be conducted
7 by independent counsel.

8 • In addition, because these terms are different to what
9 Mr. Cayen had consulted independent legal counsel
10 with previously, Mr. Cayen will be required to consult
11 with independent legal counsel again to determine if he
12 is prepared to continue to have Mr. Regel represent
13 him on these terms and to continue with independent
14 counsel dealing with Mr. Norwegian's evidence.

15 Okay. Ms. Piche.

16 A. PICHE: Yes. Thank you, Your Honour. Just in
17 terms of the terms that Your Honour has just imposed,
18 I'm just wondering in terms of efficiency for this process
19 to happen is it possible to get that in writing so that it
20 can be communicated to independent counsel who will
21 be providing Mr. Cayen with additional advice on this?

22 THE COURT: Yes. My intention was to order a
23 transcript so that it would be provided to all the parties
24 and so that if there is any issue with what I have said
25 today, that counsel and the independent legal counsel
26 will have the transcript to read and go over with Mr.
27 Cayen. And I think it would be easier in that fashion so

1 that that it is -- there is a written record.

2 A. PICHE: Thank you.

3 THE COURT: Okay. Ms. Bougie, do you have any
4 comments? Hello, Ms. Bougie?

5 T. BOUGIE: Sorry, we had it on mute. I apologize,
6 Your Honour.

7 THE COURT: Okay.

8 T. BOUGIE: I understood you to be saying that a
9 transcript would be circulated?

10 THE COURT: Yes, I am going to order a transcript and
11 have it distributed to the parties so that everyone is
12 clear on my decision, and that when Mr. Cayen
13 consults with independent legal counsel on this, that
14 the transcript is there for them to go over so that they
15 are clear about what the terms are.

16 T. BOUGIE: Okay. The one remaining issue, Your
17 Honour, that we had dealt with when we were
18 appearing before you with respect to this matter is the
19 potential issue of submissions on costs.

20 THE COURT: Okay.

21 T. BOUGIE: And I would like the opportunity to see the
22 transcript and also to speak to counsel at Legal Aid on
23 their position in that regard before we make any
24 submissions in that respect.

25 THE COURT: Okay. Do you have then -- I am going to
26 order the transcript on an expedited basis. Given the
27 issues that we have with transcripts these days, that

1 doesn't necessarily mean that it will come quickly, but I
2 am hoping that it will be filed as soon as possible. So
3 do you -- just given that caveat, Ms. Bougie, do you
4 have a date to suggest that we could have this
5 returned?

6 T. BOUGIE: Could we adjourn *sine die* given that we
7 don't know when the transcripts will be available and
8 when Legal Aid will have an opportunity to review
9 them? And then I'm certainly happy to coordinate with
10 the courts and my friend if we need any further
11 appearances in that respect.

12 THE COURT: Okay. Ms. Piche?

13 A. PICHE: I'm always reluctant to support adjourning
14 *sine die* in the context -- at the stage we're at, when
15 we're looking to move things forward and to eventually
16 set a trial date, so my suggestion would be that we
17 have an appearance. And if my friends want to appear
18 by phone, it might be more appropriate just to check in
19 and not necessarily just rely on this process being
20 initiated by someone at some point. So my suggestion
21 would be to have a return date.

22 THE COURT: Okay. And I am going to set a return
23 date, Ms. Bougie. I agree that it needs to be -- we need
24 to have dates set so that we can continue this matter
25 moving. So is there a particular date that you think
26 would work? Probably early April, maybe?

27 A. PICHE: I'm available. In April, I don't have any date

1 I'm not available until the week of the 13th. So the first
2 two weeks or the -- half of the -- the week of the 30th,
3 the 1st, I think, 3rd, and then the following week I'm
4 available.

5 THE COURT: Okay. Ms. Bougie.

6 T. BOUGIE: Are we looking -- I'm sorry, Your Honour,
7 are we looking at the week of April 6th? Am I
8 understanding correctly?

9 THE COURT: I think we are looking at the beginning of
10 April. I think Ms. Piche has indicated, other than the
11 week of the 13th, she is available at the beginning of
12 April.

13 T. BOUGIE: I am not in the province from the 1st to the
14 6th of April, Your Honour, but I'm available after that
15 time.

16 THE COURT: Okay. We could speak to it either on the
17 7th, 8th, or 9th, I think. Let me have a look. Okay. So
18 we could deal with this either of those days. I do have
19 other matters set that are maybe going ahead, I don't
20 know, but we could certainly speak to these either
21 earlier or later in the afternoon. Do any of those
22 Dates --

23 A. PICHE: Any of those days work for me --

24 THE COURT: Okay.

25 A. PICHE: -- at any time, Your Honour.

26 THE COURT: Okay. And, Ms. Bougie?

27 T. BOUGIE: The 7th, 8th, and 9th, I'm available any time,

1 Your Honour.

2 THE COURT: Okay. How about then we put this to the
3 9th at 2 p.m.

4 T. BOUGIE: And if we might have permission from the
5 Court to appear by phone on that occasion, Your
6 Honour, please?

7 THE COURT: Yes, that is fine. You can appear by
8 telephone.

9 A. REGEL: And as well, Your Honour, if it's okay if I
10 don't appear and Ms. Bougie appears on my behalf
11 because I will be tied up, I expect, in an examination for
12 discovery that day.

13 THE COURT: That is --

14 A. REGEL: I don't think it would be critical that I be
15 there, though.

16 THE COURT: All right. That is fine, as well. Okay. Is
17 there anything else to be addressed at this point?

18 A. PICHE: No, my only concern there is, depending on
19 what happens on the 9th and -- Mr. Regel will need to
20 be involved in the next steps, so it might be -- I'm -- I'll
21 have a discussion with him. I apologize. I'll deal with
22 this --

23 THE COURT: Okay.

24 A. PICHE: -- outside of court.

25 THE COURT: Okay.

26 A. PICHE: But I think we're going to have to move this
27 fairly quickly.

1 THE COURT: Well, yes, I think we are going to have to
2 have a pre-trial conference, go back to that process,
3 because all of the admissions that had been made
4 under previous counsel, I mean, those need to be
5 either addressed or confirmed, or if there are changes,
6 that is going to affect the trial estimate. It is going to --
7 there are a lot of issues, I think, that need to be re-
8 visited now and that is probably best done under the
9 pre-trial conference provisions.

10 A. PICHE: Yes, and I just wanted -- so that everyone is
11 aware, Mr. Thomas' (phonetic) trial starts on April 27 for
12 five weeks. Obviously, that will limit significantly the
13 Crown's availability during that period of time because
14 we'll be proceeding with the trial, so I just want
15 everyone to be aware of that.

16 THE COURT: Okay. And that is -- and where is that?

17 A. PICHE: That's here in Yellowknife.

18 THE COURT: Okay.

19 A. PICHE: I mean, we could still have a pre-trial
20 conference. But in terms of the Crown doing significant
21 work towards, like, admissions and narrowing issues
22 and whatnot, it will be challenging for us to be doing
23 that while we're also in the middle of the trial for Mr.
24 Thomas, so I just wanted to bring that to the court's
25 attention.

26 THE COURT: Okay. And that, is that a judge-alone trial
27 or...

1 A. PICHE: It is.
2 THE COURT: Okay.
3 A. PICHE: It's before Justice Mahar.
4 THE COURT: Okay. That will not be, I do not --
5 hopefully, will not affect by things. Okay. All right. Mr.
6 Regel, Mr. Bougie, do you have any other comments?
7 A. REGEL: Not for me, Your Honour.
8 T. BOUGIE: Nothing for me, Your Honour. Thank you.
9 THE COURT: Okay. There will be a Form 19 to that
10 date, and hopefully the transcript will be available next
11 week. Okay. We will adjourn then. Thank you.

12
13 **(PROCEEDINGS ADJOURNED TO APRIL 9, 2020, AT 2:00**
14 **P.M.)**

15
16
17
18
19
20
21
22
23
24
25
26
27

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

CERTIFICATE OF TRANSCRIPT

Neesons, the undersigned, hereby certify that the foregoing pages are a complete and accurate transcript of the proceedings transcribed from the audio recording to the best of our skill and ability. Judicial amendments have been applied to this transcript.

Dated at the City of Toronto, in the Province of Ontario, this 24th day of March, 2020.



Kim Neeson
Principal