*R v Cayen*, 2020 NWTSC 10 S-1-CR-2018-000137

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

**IN THE MATTER OF:**

**HER MAJESTY THE QUEEN**

**-v-**

**LEVI CAYEN**

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**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.**

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**APPEARANCES:**

A. Piche: Counsel for the Crown

T. Bougie: Counsel for A. Regel via telephone

A. Regel: Counsel for the Accused

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

**I N D E X**

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**REASONS FOR DECISION** 1

**(TELECONFERENCE COMMENCES)**

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

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

THE COURT: Okay. And can you hear me?

T. BOUGIE: We can. Thank you.

**(REASONS FOR DECISION)**

THE COURT: Okay. Thank you. All right.

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

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

 Upon being notified that Alan Regel would be representing Levi Cayen, Herbert Roy Norwegian, the victim’s father, identified Mr. Regel as a lawyer who may have represented him in a criminal case in the 1980s. Mr. Norwegian thought that Mr. Regel represented him in 1986 for an assault charge in relation to a fight with a taxi driver. Mr. Regel did represent Herbert Roy Norwegian in 1986 as defence counsel on a charge of mischief in relation to a city taxi. He appeared as counsel on all court appearances, including on October 22nd, 1986, when the matter was set for trial. On that day, Mr. Norwegian changed his plea from not guilty to guilty and was sentenced.

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

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

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

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

1. Did the lawyer receive confidential information attributable to a solicitor-and-client relationship relevant to the matter at hand; and
2. Is there a risk that it will be used to the prejudice of the client.

 The Supreme Court also stated at pages 1260 to 1261:

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

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

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

 The focus of the inquiry, as stated in *Edkins* at paragraph 10, is always on the potential misuse of confidential information or the appearance of misuse. A lawyer can act against a former client in a new and independent matter which is wholly unrelated to the matter for which the lawyer had previously represented that client. However, any confidential information the lawyer gained as a result of the former representation must be irrelevant to the new matter.

 In *Edkins*, Justice Vertes found that it was not a case of actual conflict but one of the appearance of a conflict. The lawyer in *Edkins* had no recollection of specific details from his past conversations with the witness. The judge concluded that a reasonable member of the public who was informed of the facts would still come to the conclusion that there was a possibility of harm to the fairness of the trial or to the appearance of fairness if the lawyer was not removed. He noted that the charge rested almost entirely on the credibility of the complainant and that the complainant's credibility would have to be attacked if defence counsel expected to do a proper job. That would involve an inquiry into the complainant's criminal record. The concern would be that even if the lawyer did not consciously remember anything that he thought could be used adversely against his former client, one could never be sure as to what unconscious thoughts may emerge so as to prompt questions of the former client. He also noted that it would be unseemly for counsel to point to a criminal conviction as an indicator of lack of credibility when he was involved in advising that client which she accumulated that conviction.

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

 Therefore, I conclude that Mr. Norwegian did impart confidential information to Mr. Regel when he represented him in 1986. While it appears that Mr. Regel does not recall that information, there is still a concern. A long time has passed, admittedly, since Mr. Regel represented Mr. Norwegian, but Mr. Norwegian, on his part, immediately recalled that Mr. Regel was his lawyer and expressed concern about being cross-examined by him. Even if Mr. Regel does not consciously remember anything about Mr. Norwegian, there is still a possibility that his cross-examination of Mr. Norwegian could be influenced by his former solicitor-client relationship with Mr. Norwegian. A reasonable member of the public in possession of the facts would be left wondering if the lawyer’s questions in cross-examination were in some way influenced by the previous solicitor-client relationship.

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

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

 Mr. Cayen likely has an expectation that Mr. Regel will properly defend him and challenge evidence and witnesses. This often involves challenging the credibility of the Crown’s witnesses. There is at least an appearance of conflict of interest between Mr. Regel and Mr. Norwegian, and a reasonable member of the public would conclude that there was a risk that confidential information given by Mr. Norwegian to Mr. Regel could be used at the accused’s trial.

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

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

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

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

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

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

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

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

 The case involves several co-accused charged separately, some of whom have had multiple counsel. Some of the co-accused have resolved their charges and others are proceeding to trial. This poses a challenge for Legal Aid, which was indicated in an e-mail which was filed on this application. The e-mail is from Karen Wilford, the executive director of the Legal Aid Commission, and indicates that there are “very limited options from the current criminal law panel,” and “it would be difficult to locate new counsel with comparable experience who is not in conflict and is willing to act.”

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

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

 The facts of this case are different from *M.G.*, for example, where I had no hesitation in removing counsel of choice. The issues of delay, the accused being in custody, the expected difficulty in retaining new counsel, and the passage of time from when Mr. Regel represented Mr. Norwegian suggests to me that a partial disqualification should be utilized. In doing so, I am going to impose protective measures that will hopefully have the effect of isolating Mr. Regel from the portion of the case that has a connection to Mr. Norwegian.

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

* If Mr. Regel has any information in his control or possession related to his representation of Mr. Norwegian, and I don’t expect that he does, but if he does, that information will be sealed.
* Mr. Regel will not provide any person with confidential information related to Mr. Norwegian.
* If Mr. Norwegian testifies at trial, Mr. Regel will not be present in the courtroom during his testimony.
* Mr. Regel will not be involved in any way with the cross-examination of Mr. Norwegian.
* Independent counsel will be appointed to conduct the cross-examination of Mr. Norwegian and will be retained specifically for that purpose.
* Mr. Regel can discuss the defence strategy generally with independent counsel but will not instruct the independent counsel regarding the cross-examination of Mr. Norwegian.
* Mr. Regel will not be involved in the preparation or delivery of any submissions concerning Mr. Norwegian.
* To the extent that Mr. Regel wishes to challenge Mr. Norwegian’s evidence, including in a defence opening, the calling of witnesses to contradict Mr. Norwegian’s evidence or to comment on Mr. Norwegians evidence in closing submissions, those issues will be conducted by independent counsel.
* In addition, because these terms are different to what Mr. Cayen had consulted independent legal counsel with previously, Mr. Cayen will be required to consult with independent legal counsel again to determine if he is prepared to continue to have Mr. Regel represent him on these terms and to continue with independent counsel dealing with Mr. Norwegian’s evidence.

 Okay. Ms. Piche.

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

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

A. PICHE: Thank you.

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

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

THE COURT: Okay.

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

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

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

THE COURT: Okay.

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

THE COURT: Okay. Do you have then -- I am going to order the transcript on an expedited basis. Given the issues that we have with transcripts these days, that doesn’t necessarily mean that it will come quickly, but I am hoping that it will be filed as soon as possible. So do you -- just given that caveat, Ms. Bougie, do you have a date to suggest that we could have this returned?

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

THE COURT: Okay. Ms. Piche?

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

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

A. PICHE: I’m available. In April, I don’t have any date I’m not available until the week of the 13th. So the first two weeks or the -- half of the -- the week of the 30th, the 1st, I think, 3rd, and then the following week I’m available.

THE COURT: Okay. Ms. Bougie.

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

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

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

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

 Dates --

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

THE COURT: Okay.

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

THE COURT: Okay. And, Ms. Bougie?

T. BOUGIE: The 7th, 8th, and 9th, I’m available any time, Your Honour.

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

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

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

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

THE COURT: That is --

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

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

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

THE COURT: Okay.

A. PICHE: -- outside of court.

THE COURT: Okay.

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

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

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

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

A. PICHE: That’s here in Yellowknife.

THE COURT: Okay.

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

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

A. PICHE: It is.

THE COURT: Okay.

A. PICHE: It’s before Justice Mahar.

THE COURT: Okay. That will not be, I do not -- hopefully, will not affect by things. Okay. All right. Mr. Regel, Mr. Bougie, do you have any other comments?

A. REGEL: Not for me, Your Honour.

T. BOUGIE: Nothing for me, Your Honour. Thank you.

THE COURT: Okay. There will be a Form 19 to that date, and hopefully the transcript will be available next week. Okay. We will adjourn then. Thank you.

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

**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.



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Kim Neeson

Principal