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Unhappy differences arise in R. v. Cunningham

By Alice Woolley

Cases Considered:

R. v. Cunningham, 2008 YKCA 7

On November 17, 2009 the Supreme Court of Canada will hear argument in *R. v. Cunningham*, an appeal of a judgment by the Yukon Territory Court of Appeal released June 25, 2008. If the Court upholds the YKCA decision in *Cunningham* it would change the law in many other Canadian provinces, including Alberta (*R. v. D.D.C.*, (1996) 43 Alta. L.R. (3d) 1 (C.A.), generally referred to as *Ferguson*), Saskatchewan (*Mireau v. Canada et al.*, (1995) 128 Sask. R. 142 (C.A.)), Manitoba (*R. v. M.B.D.*, 2003 MBCA 116) and Ontario (*R. v. Chatwell*, (1998) 38 O.R. (3d) 32 (C.A.)).

The issue before the YKCA in *Cunningham* was as to the jurisdiction of courts to review requests by counsel to withdraw from representation in criminal cases presently or imminently before the court. The Court in *Cunningham* held, following earlier British Columbia jurisprudence, that courts should not review such decisions except with respect to the manner in which the withdrawal occurs. I would argue that while the judgment in *Cunningham* does not give sufficient weight to the inherent jurisdiction of a court to regulate the conduct of counsel appearing before it, the interests of justice would be best served by the Supreme Court upholding the YKCA's judgment.

In *Cunningham* the Yukon Territory Court of Appeal followed the 1985 decision of the British Columbia Supreme Court, *Re Leask and Cronin*, (1985) 18 C.C.C. (3d) 315, to the effect that where counsel tells a court that he or she no longer wishes to represent the accused, then "a court has no right in law to order counsel to continue in the defence" (*Cunningham*, para. 1). This is the case even if the reason for the withdrawal is not any ethical or other disagreement with the client, but simply that the client can no longer afford the services of counsel; further, it is the case even where there is the potential for prejudice to the client and to the administration of justice. The Court of Appeal offered several justifications for following the British Columbia position in preference to that of the courts in Alberta, Saskatchewan, Manitoba and Ontario. First, the primary supervisory jurisdiction for how lawyers conduct themselves lies with the law society, not the courts: "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" (*Cunningham* para. 22). Thus, if a lawyer withdraws

improperly, that lawyer can be properly sanctioned by the law society, but should not be subject to the oversight of the court. To do so is to ignore the rules promulgated by the law societies on this matter and the significance of the independence of the bar.

Second, if the court exercises this oversight over counsel's conduct, it creates the possibility that the court will become aware of information that is privileged. Even though the court can decline to inquire into a lawyer's statement that "unhappy differences" have arisen between the lawyer and her client, "it is very difficult for the lawyer to avoid being drawn into a conversation with the judge in which privilege may be trespassed upon," particularly if the judge is annoyed at the lawyer's withdrawal (*Cunningham*, para. 25). Third, if counsel is required to continue to represent the client in circumstances where the client can no longer pay for the lawyer's services, it may compromise the representation, creating an improper conflict between the lawyer and counsel.

In sum, the Court held that the better approach is to act on the "assumption that lawyers generally do not avoid their obligations or abuse their privileges as lawyers" and leave it to law societies to address any problems that arise if lawyers "do fall below the norms of the legal profession" (para. 27). To the extent a court retains authority over the conduct of counsel, it is only in circumstances where the manner of the lawyer's withdrawal is such as to justify the exercise of a court's contempt power.

In viewing the issue in this way, the YKCA expressly rejected the approach taken by the Alberta Court of Appeal in *Ferguson*, arguably the leading Canadian judgment on this point prior to *Cunningham*. In Ferguson the Alberta Court of Appeal asserted a two-fold jurisdiction over counsel seeking to be removed from the record in criminal cases. First, it asserted that in any case where a lawyer seeks to be removed, he or she must request the leave of the court. If the removal is because of ethical issues with his or her client, the lawyer can indicate to the court that "unhappy differences" have arisen; the court retains its authority over counsel's withdrawal, but "a Court is under a duty to grant the request" to withdraw in such circumstances (*Ferguson*, para. 19). Second, the Court held that where the request for removal is not for ethical reasons, but is simply for non-payment of fees, then while a court will do its best to accommodate counsel, it retains the power to enforce counsel performance where doing so is warranted by the requirements of the administration of justice. These powers arise, the Court held, because of the inherent jurisdiction of a court to "set cases down for trial;" it is "a power exercisable by all trial courts in criminal cases" (*Ferguson*, para. 22). The Alberta Court of Appeal was unimpressed by the British Columbia Supreme Court's judgment in *Leask*, saying that "If he [McKay J.] 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" (*Ferguson*, para. 18).

These cases present two types of issues, the obviously significant and the subtly significant, with - interestingly - the subtly significant being the most important.

The obviously significant issues are, first, with respect to ensuring the fair treatment of clients who – usually because they become unexpectedly and/or suddenly disentitled to legal aid –

cannot afford to pay counsel on the eve of trial and, second, with ensuring the orderly management of the court's own trial processes. The YKCA correctly notes the potential conflict that exists where a lawyer is suddenly asked to act for free. It also could have noted the likelihood that, where a court takes this approach, lawyers simply become cautious about accepting general retainers absent prior fee security. It is also the case, though, that counsel with limited enthusiasm for proceeding in a case may still be better than either no counsel at all or a delay which may be significant. Further, while the court may well be advised to only order counsel to proceed as a last resort, ensuring the protection of a client's interests in a criminal case, and the functioning of the court's processes, does seem something properly left to the court. The Supreme Court does not need to endorse the particular exercise of authority by either of the trial court judges in *Cunningham* or *Ferguson* (both of whom ordered counsel to continue), but to deny judges such authority regardless of the circumstances seems inconsistent with the inherent jurisdiction of the court to control its own processes.

The subtle but ultimately more significant issues raised by *Cunningham* are with respect to the manner in which courts should exercise jurisdiction over counsel withdrawal and the relative jurisdiction of courts and law societies to govern lawyer conduct.

In its judgment in *Cunningham*, the YKCA makes an important point about the risk that, in cases where a lawyer withdraws for "unhappy differences," the lawyer will be pressured to disclose privileged information. The Court could also have noted the more generic problem that arises with the "unhappy differences" rule. In one of the most famous articles in the legal ethics literature, "Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions" ((1964) 64 Mich. L. Rev. 1469) Monroe Freedman articulated "the perjury trilemma" – the inevitable ethical problem that arises for a lawyer whose client has committed perjury or stated the intention of doing so. Freedman argues that a lawyer has three conflicting ethical duties in that instance: 1) not to mislead the court; 2) not to disclose privileged and/or confidential information; and 3) to ensure that the accused in a criminal case receives effective assistance of counsel. Freedman argues that most of the responses dictated by courts or regulators to the trilemma require the lawyer to violate the second or third of these duties, and that the preferable outcome is in fact that the lawyer violate the first; it is better, he argues, to mislead the court than to violate confidentiality or deny a criminal accused the effective assistance of counsel (see more recently: Monroe H. Freedman and Abbe Smith, *Understanding Lawyers' Ethics* 3d ed. (LexisNexis, 2004) pp. 159-195). I endorse Professors Freedman and Smith's position on this issue. But whether one does so or not, it is nonetheless important to ensure that if the court requires that lawyers prefer the duty not to mislead the court, that the other duties are violated as minimally as possible.

And as soon as the lawyer says that "unhappy differences" have arisen with a client, even if the lawyer does not go on to indicate the nature of the differences, there is an immediate indication to the court that something has happened that constitutes ethical misconduct by the client, and depending on the circumstances it may be obvious that what has happened is that the client is perjuring himself (or intends to do so). This is a troubling outcome. While it may indeed be undesirable to have clients left without counsel when they cannot pay, or to have the process of

the court disrupted, it is also undesirable to require that counsel red flag ethical issues, thereby violating indirectly the confidence placed in them by their clients.

On the other hand, the faith of the YKCA in law societies to discipline lawyers who have withdrawn improperly seems naïve at best. There is very little reason to believe that law societies have the resources or inclination to stretch their regulatory reach that far. The effective regulation of the legal profession in Canada requires judicial involvement. In those areas where judges are involved – the delineation of privilege and conflicts of interest – the regulation of lawyers is more rigorous and thorough than in areas where the court has not exercised its jurisdiction in any meaningful way. This is not to say how the court should exercise the jurisdiction that it has, but it is certainly to urge the court not to place much, if any, faith in the regulatory oversight provided by the provincial law societies.

The issues raised by *Cunningham* are difficult to resolve. Clients who are suddenly without legal aid on the eve of trial are especially vulnerable, and permitting withdrawal of counsel in such circumstances seems troubling. Further, delay in judicial processes is a material issue, and the court is not unreasonably concerned with preventing such delays from occurring unnecessarily. Finally, the court should have broad jurisdiction to regulate the conduct of counsel appearing before it, and any faith in law societies to do the job without assistance is almost certainly misplaced. On the other hand, the problems with requiring counsel to declare the reasons for withdrawal, even in general terms, are serious, and go to the heart of the lawyer's ethical duties, particularly in criminal cases. In the end, I would argue that the problems raised by judicial engagement with the reasons for counsel's withdrawal are more significant than the problems raised by counsel withdrawing for reasons the court finds improper or distasteful. While the jurisdiction of the court over this issue cannot properly be denied, the court should decline to exercise that jurisdiction to interfere with counsel withdrawal. If the approach to the problem of client misconduct in criminal cases, and especially perjury, is modified by the court, then a different answer may follow. But until that occurs, the interests of clients in confidentiality and ensuring the effective assistance of counsel are better protected by lawyers being permitted to withdraw without any explanation, leaving the court the potential to give the client the benefit of the doubt rather than having to suppress the obvious inference that the lawyer believes his or her client is a liar.