

CANADA / JUDGMENT

Daneshian v. Bystedt

2024 BCSC 491

COURT

Supreme Court of British Columbia

DECIDED

20 March 2024

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2024 BCSC 491 *Daneshian v. Bystedt*

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Daneshian v. Bystedt,

2024 BCSC 491

Date: 20240320

Docket: M200171

Registry: Vancouver

Between:

Zahra Daneshian

Plaintiff

And

Amanda Rae Bystedt and Kambiz Sayyad Abbasi

Defendants

And

Insurance Corporation of British Columbia

Third Party

Before: Associate Judge Robertson

Oral Reasons for Judgment

The Plaintiff, appearing on her own behalf:

Z. Daneshia

Counsel for Naz Kohan, counsel of record for the Plaintiff:

P. Plunkett, Articled Student

Counsel for the defendants:

D. Zerbo, Articled Student

Place and Date of Judgment:

Vancouver, B.C.

February 27, 2024

No one other appearances

Place and Date of Hearing:

Vancouver, B.C.

March 20, 2024

Place and Date of Judgment:

Vancouver, B.C.

March 20, 2024

- [1] THE COURT: When I issued these oral reasons for judgment, I reserved the right to edit them as to grammar, background and citations should a transcript be ordered. I have made such edits, without affecting the substance or final disposition.
- [2] The plaintiff's counsel ("Counsel") seeks a declaration pursuant to R. 22-6(3) that she has ceased to be the lawyer acting for the plaintiff (the "Client").

Background

- [3] The underlying claim is one for personal injuries arising from a motor vehicle accident ("MVA") that occurred on September 12, 2018. The Client was a passenger in a parked car that was struck from the rear by the defendant's vehicle. Liability has been admitted for that accident. I am advised that there was a second MVA one month later, On October 12, 2018, and, once again, the Client was a passenger. Liability for that motor vehicle accident is in dispute.
- [4] Trial is schedule to commence on April 2, 2024, for 9 days. A jury notice has been filed by the defendant; however, I am advised that jury fees have not been paid.

- [5] On February 14, 2024 the parties attended a trial management conference. Although not included in the application record, I reviewed the court file and specifically, the trial brief filed January 29, 2024 by Counsel. At that time, there was every indication that the matter was ready to proceed to trial based on the responses under the heading "Trial Readiness". In addition, the trial brief indicates "Yes" in response to the question "the filing party is represented by legal counsel and anticipates being represented by legal counsel at the trial".

Parties' Positions

- [6] The only evidence from Counsel as to the reason to withdraw is:

On February 21, 2024 there was a breakdown in solicitor-client relationship. I determined that I would withdraw as counsel due to a serious loss of trust and confidence. I emailed the plaintiff that day advising her of same and advised her to find another lawyer to represent her as soon as possible.

- [7] No other evidence is provided by Counsel.
- [8] The Clients have filed a response opposing the withdrawal. The response is replete with matters that are subject to solicitor-client privilege. Counsel therefore submitted that the response ought to be struck. In addition, there was no affidavit filed in support. As such, I gave a very short leash to the Client in making submissions.
- [9] The Client, through her husband, advised the court that they have not lost faith or confidence in Counsel, that they wish the representation to continue and that they will be unable to represent themselves and will be prejudiced if they must do so at trial. The Client believes that the only reason for the breakdown is due to a disagreement as to a settlement offer received from the defendant.

Legal Analysis

- [10] In support of the application Counsel relies solely on the rules of court, namely Rules 22-6 and 1-3 as to the object of the rules, Rule 3.7-2 of the Code of Professional Conduct and *Luchka v. Zens*, 37 BCLR (3d) 127, 1989 CanLII 2749 (BCCA):

- [11] Rule 3.7-2 reads as follows:

3.7-2 If there has been a serious loss of confidence between the lawyer and the client, the lawyer may withdraw.

- [12] The relevant provision of *Luchka* is:

- [8] That brings me back to R. 16(4). The rule is in permissive terms in that the court "may declare" that the solicitor has ceased to be the solicitor acting for the party. It is upon that basis that other judges have concluded that the chambers judge hearing an application under this subrule must exercise a discretion. In my view, however, until an issue is raised between the retiring solicitor and one of the other parties or his own client, the court is not

called upon to investigate the matter critically. There is no issue raised to be investigated. The fact that the solicitor seeking the declaration has served the client and served the other parties in the proceedings with notice of his application and sets out in the affidavit in support that he has ceased to act for the party, in my view, is sufficient. Thereafter, unless an issue is raised by either the client or another party to the litigation the court is not called upon to go further and investigate the matter. That material alone is sufficient to make the declaration. That material was before the judge in chambers on this application and, in my view, he ought to have granted the application.

- [13] Since Luckha, the SCC has commented on this issue in *R. v. Cunningham*, 2010 SCC 10 ("Cunningham"), as follows:
- [46] The court's exercise of discretion to decide counsel's application for withdrawal should be guided by the following principles.
- [47] If counsel seeks to withdraw far enough in advance of any scheduled proceedings and an adjournment will not be necessary, then the court should allow the withdrawal. In this situation, there is no need for the court to enquire into counsel's reasons for seeking to withdraw or require counsel to continue to act.
- [48] Assuming that timing is an issue, the court is entitled to enquire further. Counsel may reveal that he or she seeks to withdraw for ethical reasons, non-payment of fees, or another specific reason (e.g. workload of counsel) if solicitor-client privilege is not engaged. Counsel seeking to withdraw for ethical reasons means that an issue has arisen in the solicitor-client relationship where it is now impossible for counsel to continue in good conscience to represent the accused. Counsel may cite "ethical reasons" as the reason for withdrawal if, for example, the accused is requesting that counsel act in violation of his or her professional obligations (see, e.g., *Law Society of Upper Canada*, r. 2.09(7)(b), (d); *Law Society of Alberta*, c. 14, r. 2; *Law Society of British Columbia*, c. 10, r. 1), or if the accused refuses to accept counsel's advice on an important trial issue (see, e.g., *Law Society of Upper Canada*, r. 2.09(2); *Law Society of Alberta*, c. 14, r. 1; *Law Society of British Columbia*, c. 10, r. 2). If the real reason for withdrawal is non-payment of legal fees, then counsel cannot represent to the court that he or she seeks to withdraw for "ethical reasons". However, in either the case of ethical reasons or non-payment of fees, the court must accept counsel's answer at face value and not enquire further so as to avoid trenching on potential issues of solicitor-client privilege.
- [49] If withdrawal is sought for an ethical reason, then the court must grant withdrawal (see *C. (D.D.)*, at p. 328, and *Deschamps*, at para. 23). Where an ethical issue has arisen in the relationship, counsel may be required to withdraw in order to comply with his or her professional obligations. It would be inappropriate for a court to require counsel to continue to act when to do so would put him or her in violation of professional responsibilities.

[50] If withdrawal is sought because of non-payment of legal fees, the court may exercise its discretion to refuse counsel's request. The court's order refusing counsel's request to withdraw may be enforced by the court's contempt power (C. (D.D.), at p. 327). In exercising its discretion on the withdrawal request, the court should consider the following non-exhaustive list of factors:

- whether it is feasible for the accused to represent himself or herself;
- other means of obtaining representation;
- impact on the accused from delay in proceedings, particularly if the accused is in custody;
- conduct of counsel, e.g. if counsel gave reasonable notice to the accused to allow the accused to seek other means of representation, or if counsel sought leave of the court to withdraw at the earliest possible time;
- impact on the Crown and any co-accused;
- impact on complainants, witnesses and jurors;
- fairness to defence counsel, including consideration of the expected length and complexity of the proceedings;
- the history of the proceedings, e.g. if the accused has changed lawyers repeatedly.

As these factors are all independent of the solicitor-client relationship, there is no risk of violating solicitor-client privilege when engaging in this analysis. On the basis of these factors, the court must determine whether allowing withdrawal would cause serious harm to the administration of justice. If the answer is yes, withdrawal may be refused.

[51] Harm to the administration of justice is not simply administrative inconvenience as the interveners suggest. Harm to the administration of justice recognizes that there are other persons affected by ongoing and prolonged criminal proceedings: complainants, witnesses, jurors and society at large. Because of this, I would respectfully observe that the consideration suggested by the Alberta Court of Appeal in C. (D.D.) of whether allotted court time can be otherwise usefully filled is not a relevant consideration in this balancing of interests.

[52] The Manitoba Court of Appeal's decision in *Deschamps* offers a useful example of the appropriate exercise of the court's discretion. Defence counsel was representing the offender in a dangerous offender proceeding. Five days into the proceeding counsel requested an adjournment to allow the offender to be assessed for and receive treatment. The matter was remanded for approximately eight months. During this time difficulties arose with legal aid funding. Because the dangerous offender proceedings were of high complexity, counsel was initially promised a higher fee than provided by the regular tariff. "Financial difficulties" called into question Legal Aid's ability to follow through with the commitment to a higher fee. Defence counsel sought to withdraw due to Legal Aid's alleged

breach of contract.

- [53] The motions judge determined that there was no breach of contract. However, she found that even if there had been a breach, she would have refused counsel's request to withdraw. In the Court of Appeal, Steel J.A. upheld this decision. She agreed with the motions judge that the factors relevant to denying withdrawal were: the proceeding was serious and complex, the offender could not represent himself, the proceeding had already begun, there was no immediate prospect of obtaining another lawyer, and the offender was a difficult client who had finally developed a relationship of trust and confidence with this particular counsel. The Court of Appeal agreed with the motions judge that further delay would have resulted from allowing withdrawal and would have caused serious prejudice to the offender. The Court of Appeal noted that after the initial motion, Legal Aid ensured that fees would still be paid, just not at the higher rate. Counsel's application to withdraw was refused.
- [14] Counsel did not reference this case in their materials. I brought it to Counsel's attention prior to his response so that he could specifically address the factors for the court's consideration on applications such as this in his response submissions.
- [15] Here, notably, there is no suggestion as to any ethical reason for the withdrawal, which would require the court to grant the request, without any further inquiry into the reasons for the breakdown. Rather, the reason being relied upon is a general one which engages the court's discretion, weighing the relevant factors to determine whether the withdrawal will cause serious harm to the administration of justice.
- [16] In this respect, I accept that it is a high burden that must be met by the Client to satisfy the court that a request for a withdrawal by counsel should be denied given that, ultimately, representation is a matter based on the agreement between the parties. Nonetheless, as noted in *Cunningham*, except where it is an ethical reason, the court retains jurisdiction to do so.
- [17] While *Cunningham* involves a criminal matter, its findings are equally applicable to civil matters such as this, albeit with the consideration as to the prejudice to the Client being lessened given the inherent differences between the two areas of law, and impact on the Client.
- [18] In this respect, Justice Burnyeat noted in *Sandhu v. Household Realty Corp*, 2013 BCSC 192 that there is no reason why *Cunningham* ought not be applied more broadly. Specifically, at para. 17 the court noted as follows:
- [17] While the *Cunningham* decision involved criminal proceedings, there is nothing in that decision which allows me to conclude that the principles set out should be limited to criminal proceedings. The very broad guidelines that are set out are simply stated this way: if counsel seeks to withdraw far enough in advance of any scheduled proceeding so that an adjournment will not be necessary, then the court should order the withdrawal and there is no need for the court to inquire into counsel's reasons for seeking to withdraw.

[emphasis added]

[19] Given the imminent trial, I am satisfied that it is appropriate to inquire as to the reasons beyond that set out in the affidavit in support of this application.

[20] Counsel opted to have his articled student attend at this application who, unfortunately, did not note the necessary background to answer my general inquiry as to the basis for the breakdown in the relationship. It seemed, based on the submission of the client, albeit without sworn evidence, that the breakdown may have arisen solely in respect of a dispute as to whether a recent settlement offer should or should not be accepted. He was not able to confirm whether or not there was more to the breakdown than that included in Counsel's affidavit.

[21] Counsel has not established that the reason for the withdrawal is of a type that, as noted, it would be mandatory for the direction to be made.

[22] As such, I will turn to the factors for consideration as set out in Cunningham, reframed to reflect the differences between a criminal and civil matter such as this.

a) Is it feasible for the Client to represent herself?

This is a 9-day trial. the plaintiff is not English speaking. It is not feasible.

b) Are there other means of obtaining representation?

Trial is scheduled to commence six business days from today. There is no feasible means for the client to obtain new representation for the trial as currently scheduled.

c) What is the impact on the Client?

The impact is a delay in the trial date, as an adjournment is likely, in respect of injuries sustained nearly six years ago, or to be forced to proceed with a trial in a language which is not her language, unrepresented.

d) Is there conduct of counsel that is relevant, i.e. was notice given to the client at the earliest possible time?

Counsel argues that the loss of trust occurred February 21, 2024. It is not entirely clear why it has taken a month to have this application heard, or why short leave was not sought. However, it appears to be a recent loss of trust. I am satisfied that there was not any delay on Counsel's part that would factor into this decision.

e) What is the impact on others?

While counsel for the defendant appeared today, they are of the view that they have limited standing on this application and appeared as the result would impact the trial. In this respect, they will be impacted if the plaintiff either proceeds to trial unrepresented, or if the trial is adjourned to enable them further time to obtain representation.

- f) Is the history of the proceedings of note, for example, has the Client changed lawyers repeatedly?

There is no evidence that this is the case.

- g) Is it fair to Counsel, including consideration of the expected length and complexity of the proceedings to compel them to remain on record?

As noted, this matter appears ready to proceed as indicated in the trial brief filed by counsel. The Client has indicated that they entered into a contingency fee agreement with Counsel, and expected, until being advised to the contrary on February 21, 2024, that counsel would represent them at trial. The retainer agreement is not before the court. As such, I do not have the terms by which the counsel and client agreed that the relationship could be terminated before me. Regardless, it is trite that a lawyer enters into a contingency fee agreement with knowledge of the risk that their client's award may ultimately be such that they recover less than the time expended, but with the chance of a reward if the converse is true. Notwithstanding that the result can, for lack of a better word, result in a windfall to a counsel in that latter situation, the profession, and specifically the Law Societies who govern it, approve of billing on such a basis as it is ultimately a benefit to the public in that parties who may not otherwise have access to counsel can obtain necessary representation because counsel are willing to accept the risk, given the possibility of a reward. Thus, whenever counsel enters into such an arrangement, they are accepting the risk that their efforts may not be fully paid, just as clients accept that they may have to pay more than what would have been an hourly rate, depending upon the results. In fact, this is specifically commented upon in the commentary to Rule 3-6-2 in the Code of Professional Conduct which, notably, counsel did not direct the court to. Specifically, Rule 3.6-2 provides:

3.6-2 Subject to rule 3.6-1, a lawyer may enter into a written agreement in accordance with governing legislation that provides that the lawyer's fee is contingent, in whole or in part, on the outcome of the matter for which the lawyer's services are to be provided.

In a discipline advisory issued August 13, 2020, the law society notes:

If you are withdrawing as counsel of record in a matter, section 3.7 of the Code of Professional Conduct for British Columbia deals with the withdrawal process in detail, including numerous reminders to lawyers of their ongoing obligations to clients. Generally speaking, you must not withdraw except for good cause and on reasonable notice to your clients.

It is important to remember that special circumstances apply for a retainer that is pursuant to a contingency fee agreement.

Rule 3.6-2, commentary [2] provides:

- [2] Although a lawyer is generally permitted to terminate the professional relationship with a client and withdraw services if there is justifiable cause as set out in rule 3.7-1, special circumstances apply when the retainer is pursuant to a contingency agreement. In such circumstances, the lawyer has impliedly undertaken the risk of not being paid in the event

the suit is unsuccessful. Accordingly, a lawyer cannot withdraw from representation for reasons other than those set out in Rule 3.7-7 (Obligatory withdrawal) unless the written contingency contract specifically states that the lawyer has a right to do so and sets out the circumstances under which this may occur.

This means that where a contingency fee agreement is in place, you cannot withdraw from representation of a client unless you are discharged by the client; the client persists in instructing you to act contrary to professional ethics; or you are not competent to continue to handle a matter (see rule 3.7-7). The only exception to this restriction on withdrawal is if the written contingency contract specifically states that you have a right to do so and sets out the circumstances under which withdrawal may occur.

If you are acting under a contingency fee agreement, review your contract and include express termination clauses if you are concerned about potential limitations on your ability to withdraw.

[emphasis added]

- [23] Having regard to these factors, specifically given the lack of any evidence of an ethical reason, or conflict having arisen, being put forward by counsel which would bring the matter within R. 3.7-7 and the imminent trial date, despite that it is a high burden to meet to refuse a withdrawal in the circumstances of this case I am prepared to deny the application.
- [24] It would be contrary to the administration of justice to cause a non-English speaking plaintiff to attend a 9-day trial, self represented, that is scheduled to commence six business days from today without better evidence as to the breakdown of the relationship.
- [25] If, as it seems, the breakdown is primarily due to the refusal of the plaintiff to accept a settlement offer that counsel deems advisable, then given my comments as to the nature of contingency fee agreement, compelling the ongoing representation does not represent a significant unfairness to counsel.
- [26] As such, the application is denied.

"Associate Judge Robertson"

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