

**Criminal**

## Court finds lawyer gave 'ineffective assistance' to client allegedly abused by co-accused

By **Terry Davidson**

(August 15, 2022, 8:51 AM EDT) -- Criminal lawyers must be alive to the "emotional and personal" aspects of their clients' lives, says the lawyer of a woman whose trial counsel failed to consider severing her case from that of an allegedly abusive co-accused boyfriend.

The Aug. 5 Ontario Court of Appeal decision in *R. v. McDonald*, 2022 ONCA 574 involved Toronto-area residents Samantha McDonald and her boyfriend, Trevone Watson, both of whom were jointly tried and convicted on drug possession and trafficking charges.

At the centre of McDonald's appeal was her argument that her trial lawyer, Carol Anne Matthews, provided "ineffective assistance of counsel" after failing to advise her of the options of either applying for a mistrial or severing of her case from that of Watson's in light of alleged abuse McDonald had suffered at his hands before, during and after their trial.

The wrinkle in the case comes from the fact McDonald had instructed Matthews to say nothing to the trial judge about the alleged abuse.

The allegations of abuse on the part of Watson are based on notes made by Matthews on her interactions with McDonald and an affidavit filed by McDonald to the Appeal Court, as is detailed in the court's written decision.

According to the written decision, McDonald and Watson began a romantic relationship in 2007. They eventually moved in together, but things turned toxic.

McDonald moved into her father's home and Watson went to stay with his godfather in Markham, but the two continued to see each other regularly at the godfather's home.

In 2011, Watson became "physically and emotionally abusive." McDonald would later detail to the Appeal Court that she was punched in the ribs, suffered a sprained arm and had her foot broken.

In January 2012, police raided the godfather's home while McDonald, Watson and Watson's sister, Jorgia, were inside. Police alleged they saw McDonald throw three small bags of crack cocaine out a bedroom window. They also found ecstasy (MDMA), a digital scale and marijuana.

McDonald and Watson were charged, as was Watson's sister.

McDonald was 23 at the time.

McDonald, Watson and his sister attended court on March 7, 2013, for their preliminary inquiry. Watson pleaded guilty to the possession of cocaine for the purposes of trafficking. The charges against his sister were withdrawn.

The trial Crown at the time said once Watson stepped into custody, the charges against McDonald would be withdrawn, as well.

But before his sentencing, Watson changed lawyers and decided to apply to strike his guilty plea.

In November 2014, McDonald gave birth to their daughter. Following this, she and Watson began

living together again.

A new preliminary inquiry took place in January 2015. By this point, McDonald had also changed lawyers, hiring Matthews, who had represented McDonald for minor offences prior to this case.

In the months leading up to the trial, McDonald began telling Matthews about the abuse. She also detailed abusive incidents in her affidavit to the Appeal Court, including an attack from Watson in a bar — an incident McDonald claimed to have told Matthews about, but at the same time downplayed the event — and one occasion when Watson allegedly smashed McDonald's mobile phone outside the courtroom — also an event McDonald told Matthews about.

McDonald also told Matthews she had had an abortion.

Matthews began taking notes on her discussions with McDonald. Also, Matthews more than once offered to accompany McDonald to file a complaint with police, but McDonald declined.

Matthews' notes would later be relied on during McDonald's appeal.

In a strange twist, McDonald, Matthews, Watson and Watson's lawyer went out for dinner together the evening of Oct. 27, 2016, to discuss the situation. Over the meal, McDonald became intoxicated, began crying and accused Watson of trying to control her. McDonald and Watson told the two lawyers that they had been abusive with each other at times.

During the meal, Matthews asked McDonald if she was OK to continue with the trial, to which McDonald said yes. In Matthews' notes from that night, there was no mention of exploring a mistrial or a severance of McDonald's case from that of Watson's in light of the abuse.

Matthews continued taking notes, stating at one point she was concerned about McDonald's ability to provide counsel instructions.

Matthews spoke to McDonald the next day and made notes that seemed to indicate Matthews broached the subject of a mistrial to McDonald. In the written decision, the Appeal Court laid bare some of those notes.

"Her notes stated: 'I explain what is m/trial. Explain not satisfied she is ready to give me instructions clearly — some contradicting herself. If need to get med help — can ask for adjournment — depending on med/MH info app for mis-T — he can continue on his own.' She then wrote 'Explain need basis, reasons for mis-T — abuse, threats'. The appellant was then noted as saying, 'Please you cant tell J. I assaulted T and he me or abortion.'" \*

As the trial went on, Matthews had placed a call to the Law Society of Ontario's (LSO) "Practice Advisory helpline" and was told to expect a callback. Afterwards, Matthews noted McDonald seemed to be back to her "old self." To this, Matthews called the helpline again to say no callback was needed.

The Crown was told to proceed with the next witness and the trial continued.

In November 2016, McDonald and Watson were convicted of the cocaine and ecstasy charges but cleared of the marijuana charge.

McDonald alleges Watson assaulted her that December and again in January and March 2018. McDonald stated she told Matthews about two of those attacks.

During this time, several people, including neighbours, had called police with concerns about McDonald and Watson.

On March 3, 2017, before McDonald and Watson were to be sentenced, Matthews asked McDonald about a cut under her eye, to which McDonald said it was the result of an attack by Watson.

According to the appeal decision, Matthews "told [McDonald] to put glasses on to cover up the

injury.”



Leo Adler, Leo Adler Law

McDonald hired veteran Toronto lawyer Leo Adler and appealed her convictions, arguing that Matthews had provided her ineffective assistance.

As part of her affidavit to the Appeal Court, McDonald claimed Watson had been pressuring her to continue with the trial.

The court also discovered that Matthews would not be able to testify at the appeal or provide an affidavit of her own.

As part of McDonald’s affidavit, a paralegal with the Public Prosecution Service of Canada stated that Matthews was “retired and unable to provide an affidavit in response to the appellant’s allegations due to health issues, which include a head injury.”

Instead, Adler, the lawyers and the court were forced to rely on the notes Matthews had taken on her interactions with McDonald — notes which Adler and the appeal Crown worked to decipher.

The appeal Crown argued that McDonald’s trial was fair and that the pursuit of a mistrial or severance was not possible because McDonald had instructed Matthews to not reveal to the trial judge anything about the alleged abuse from Watson. The Crown also contended that McDonald’s allegations of abuse were fabricated — a notion the Appeal Court rejected outright.

But Appeal Court Justice Sarah Pepsall, with Justices Michael Tulloch and Grant Huscroft in agreement, found Matthews provided ineffective assistance for, among other things, not exploring with McDonald the option of severing her case from Watson’s.

“On the issue of ineffective assistance of counsel, I accept that [McDonald’s] trial counsel was confronted with a challenging situation: a client who was emotionally fraught and being abused by her co-accused to counsel’s knowledge but who impeded counsel’s ability to disclose the abuse to the trial judge,” wrote Justice Pepsall.

Matthews should have told McDonald about the severance option, she went on to find, noting “there is no evidence that Ms. Matthews ever discussed severance with the appellant.”

“As to the performance component, undoubtedly, in the circumstances of this case, Ms. Matthews ought to have advised [McDonald] of her options on severance. She was aware of the historical and continuing abuse of the appellant by her co-accused and, based on her notes, clearly had concerns about the state of the appellant — eventually to the point where she wisely contacted the Law Society’s Practice Management Helpline, but unfortunately abandoned her inquiry. Accepting that there is a strong presumption that a trial counsel’s conduct falls within a vast expanse of reasonable

professional assistance, I am nonetheless persuaded that, in these specific circumstances, Ms. Matthews' failure to explore severance with the appellant was unreasonable."

The Appeal Court also found the Matthews "failed to properly advise the appellant on whether to testify and this caused the appellant prejudice."

Justice Pepall felt no need to address the issue of mistrial, noting that McDonald did not argue that Matthews ought to have renewed her inquiry about a mistrial after learning about the cut under McDonald's eye before her sentencing. She also noted that because McDonald instructed Matthews to not bring up the abuse and her abortion to the trial judge, there would have been no basis to ask for a mistrial.

In the end, McDonald was given a new trial.

According to the LSO's registry, Matthews remains suspended for administrative reasons. Administrative suspensions occur for infractions such as failing to pay fees or file forms on time.

When asked for comment, an LSO spokesperson said Matthews "has not been in a practising status since 2019."

But not much else was said, as "[i]nformation concerning specific complaints made to the Law Society of Ontario and investigations by the Law Society of Ontario are confidential, until or unless they result in public regulatory action."

Attempts to reach Matthews by phone, e-mail and a contact individual were unsuccessful.

Adler, McDonald's appeal counsel, said "lawyers are not just there for the legal aspect of their client's defence."

"Because intertwined with the legal is the emotional and personal and all the other things," Adler told *The Lawyer's Daily*. "There is a saying in criminal law, and probably in family law too, [that] you are also a social worker. ... The social work aspect extends to [a client's] well-being, especially when their well-being — legal, physical and emotional — is threatened by a co-accused."

Adler, principal at Leo Adler Law, said McDonald's trial was deemed unfair.

"If the co-accused abuser is causing the client not to be able to concentrate on the case and be able to give instructions, you need to ... step in and somehow deal with it. In this case, the way to deal with it ... is to tell her: You have to stay away, and we're going to bring a severance."

Adler has some history with Matthews: she was once his law student, then she briefly worked with him after being called to the Ontario bar in 1989.

"I know her, and, unfortunately, she's had issues which don't allow her to practise, or which caused her to believe that she shouldn't be practising."

*\*Editor's note: Presiding Justice Sarah Pepall says at end of the decision that she "assumed that T denotes 'trial', mis-T and M/T denote 'mistrial', J. denotes 'judge' and Cont denotes 'continue'."*

*If you have any information, story ideas or news tips for The Lawyer's Daily, please contact Terry Davidson at t.davidson@lexisnexis.ca or at 905-415-5899.*