



SUPREME COURT OF CANADA

CITATION: R. v. Cunningham, 2010 SCC 10, [2010] 1 S.C.R.
331

DATE: 20100326
DOCKET: 32760

BETWEEN:

Her Majesty The Queen
Appellant

v.

Jennie Cunningham

Respondent

- and -

**Attorney General of Ontario, Law Society
of British Columbia, Law Society of Yukon,
Canadian Bar Association and Criminal
Lawyers' Association (Ontario)**

Intervenors

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and
Cromwell JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 60)

Rothstein J. (McLachlin C.J. and Binnie, LeBel,
Deschamps, Fish, Abella, Charron and Cromwell JJ.
concurring)

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Indexed as: R. v. Cunningham

2010 SCC 10

File No.: 32760.

2009: November 17; 2010: March 26.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and
Cromwell JJ.

Law of professions — Barristers and solicitors — Counsel's withdrawal application — Whether, in criminal matter, court has authority to refuse to grant defence counsel's request to withdraw because accused has not complied with financial terms of retainer — Whether oversight of lawyer's withdrawal falls exclusively to law societies.

Courts — Jurisdiction — Counsel's withdrawal application — Whether, in criminal matter, court has authority to refuse to grant defence counsel's request to withdraw because accused has not complied with financial terms of retainer.

C, a criminal defence lawyer employed by Yukon Legal Aid, represented an accused charged with sexual offences against a young child. Prior to the preliminary inquiry, Legal Aid informed the accused that failure to update his financial information would result in the suspension of his legal aid funding. The accused failed to respond to the request and Legal Aid informed him that C was no longer authorized to represent him. C brought an application to the Territorial Court of Yukon to withdraw as counsel of record solely because of the suspended funding. However, C indicated that she was willing to represent the accused if funding were reinstated. The Territorial Court refused her application. The Supreme Court of the Yukon Territory dismissed C's application for an order in the nature of *certiorari* seeking to quash the Territorial Court's order, holding that the Territorial Court did not exceed its jurisdiction. The Court of Appeal allowed C's appeal on the basis that the Territorial Court had no discretion to refuse C's application to withdraw.

Held: The appeal should be allowed.

The Territorial Court had jurisdiction to refuse to grant C's request to withdraw. A court has the authority to require counsel to continue to represent an accused when the reason for withdrawal is non-payment of fees, but the authority must be exercised sparingly and only when necessary to prevent serious harm to the administration of justice. Superior courts possess inherent jurisdiction to ensure they can function as courts of law and fulfil their mandate to administer justice. Likewise, in the case of statutory courts, the authority to control their process and oversee the conduct of counsel is necessarily implied in the grant of power to function as a court of law.

Disclosure of non-payment of fees in cases where it is unrelated to the merits and will not prejudice an accused does not attract the protection of the solicitor-client privilege, and the remote possibility that a judge will inappropriately attempt to elicit privileged information in hearing the application to withdraw does not justify leaving the decision to withdraw exclusively to counsel. As well, the oversight of a lawyer's withdrawal does not fall exclusively to the law societies. Both the courts and the law societies play different, but important, roles in regulating withdrawal: the courts prevent harm to the administration of justice and the law societies discipline lawyers whose conduct falls below professional standards. These roles are not mutually exclusive; rather, they are necessary to ensure the effective regulation of the profession and protect the process of the court. While counsel's personal or professional interests may be in tension with an individual client's interest, courts must presume that lawyers act ethically. Where the court requires counsel to continue to represent an accused, counsel must do so competently and diligently. Both the integrity of the profession and the administration of justice require nothing less. Lastly, a *Rowbotham* order

might be relevant to the court's residual discretion to refuse withdrawal, but it cannot operate as a replacement for it.

The court's exercise of discretion to decide counsel's application for withdrawal should be guided by the following principles. If counsel seeks to withdraw far enough in advance of any scheduled proceedings and an adjournment will not be necessary, the court should allow the withdrawal. If timing is an issue, the court is entitled to enquire into counsel's reasons. 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. If withdrawal is sought for an ethical reason, the court must grant withdrawal; if it is sought because of non-payment of legal fees, the court may exercise its discretion to refuse counsel's request if it determines, after weighing all the relevant factors, that allowing withdrawal would cause serious harm to the administration of justice.

Refusing an application to withdraw is a coercive and conclusive order with respect to the lawyer and, in that context, an order in the nature of *certiorari* should be given its normal scope and can be allowed where there is an error of jurisdiction or an error of law on the face of the record.

In this case, the Supreme Court of the Yukon Territory correctly concluded that the Territorial Court had the jurisdiction to refuse to grant counsel's request to withdraw. The question of whether this case satisfies the high threshold that must be met to refuse leave to withdraw is now moot and the record before this Court does not provide information on several of the relevant factors. It is, therefore, not clear whether the circumstances of this case would, after full analysis

of the relevant considerations, justify a refusal of leave to withdraw.

Cases Cited

Considered: *Re Leask and Cronin* (1985), 18 C.C.C. (3d) 315; *R. v. C. (D.D.)* (1996), 110 C.C.C. (3d) 323, leave to appeal refused, [1997] 1 S.C.R. vii (*sub nom. Ferguson v. The Queen*); *R. v. Deschamps*, 2003 MBCA 116, 177 Man. R. (2d) 301; *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1; **referred to:** *Vescio v. The King*, [1949] S.C.R. 139; *Luchka v. Zens* (1989), 37 B.C.L.R. (2d) 127; *R. v. Ho*, 2003 BCCA 663, 21 B.C.L.R. (4th) 83; *R. v. Huber*, 2004 BCCA 43, 192 B.C.A.C. 75; *Bernier v. 9006-1474 Québec inc.*, [2001] J.Q. n° 2631 (QL); *Mireau v. Canada* (1995), 128 Sask. R. 142; *R. v. Brundia*, 2007 ONCA 725, 230 O.A.C. 29; *R. v. Peterman* (2004), 70 O.R. (3d) 481; *R. v. Golding*, 2007 NBQB 320, 325 N.B.R. (2d) 92; *Dooling v. Banfield* (1978), 22 Nfld. & P.E.I.R. 413; *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235; *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140; *Smith v. Jones*, [1999] 1 S.C.R. 455; *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445; *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644; *Descôteaux v. Mierzewski*, [1982] 1 S.C.R. 860; *Maranda v. Richer*, 2003 SCC 67, [2003] 3 S.C.R. 193; *R. v. Burns*, [1994] 1 S.C.R. 656; *Young v. Young*, [1993] 4 S.C.R. 3; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46; *R. v. Rushlow*, 2009 ONCA 461, 245 C.C.C. (3d) 505; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *Patterson v. The Queen*, [1970] S.C.R. 409; *Dubois v. The Queen*, [1986] 1 S.C.R. 366; *R. v. Deschamplain*, 2004 SCC 76, [2004] 3 S.C.R. 601; *R. v. Gardiner*, 2008 ONCA 397, 231 C.C.C. (3d) 394; *Ottawa Citizen Group Inc. v. R.* (2005), 75 O.R. (3d) 590.

Statutes and Regulations Cited

Code of Civil Procedure, R.S.Q., c. C-25, art. 249.

Criminal Code, R.S.C. 1985, c. C-46, ss. 537(1), 674, 784(1).

Supreme Court Act, R.S.C. 1985, c. S-26, s. 40.

Territorial Court Act, R.S.Y. 2002, c. 217, s. 77.

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APPEAL from a judgment of the Yukon Territory Court of Appeal (Newbury, Kirkpatrick and Tysoe JJ.A.), 2008 YKCA 7, 257 B.C.A.C. 1, 432 W.A.C. 1, 59 C.R. (6th) 49, [2008] Y.J. No. 37 (QL), 2008 CarswellYukon 42, setting aside a decision of Gower J., 2006 YKSC

40, 41 C.R. (6th) 66, [2006] Y.J. No. 46 (QL), 2006 CarswellYukon 51, dismissing an application to quash an order of Lilles Terr. Ct. J., 2006 YKTC 54, 2006 YKTC 61, dismissing defence counsel's application to withdraw. Appeal allowed.

Ron Reimer and Peter A. Eccles, for the appellant.

Gordon R. Coffin and Nils F. N. Clarke, for the respondent.

Susan L. Reid, for the intervener the Attorney General of Ontario.

Leonard T. Doust, Q.C., and *Michael A. Feder*, for the intervener the Law Society of British Columbia.

John J. L. Hunter, Q.C., and *Brent B. Olthuis*, for the intervener the Law Society of Yukon.

Gregory P. DelBigio, for the intervener the Canadian Bar Association.

Scott C. Hutchison and Andrea Gonsalves, for the intervener the Criminal Lawyers' Association (Ontario).

The judgment of the Court was delivered by

1. Introduction

[1] What is the role of a court when defence counsel, in a criminal matter, wishes to withdraw because of non-payment of legal fees? Does a court have the authority to require counsel to continue to represent the accused? In my opinion, a court does have this authority, though it must be exercised sparingly, and only when necessary to prevent serious harm to the administration of justice.

2. Facts

[2] Jennie Cunningham is a criminal defence lawyer employed by the Yukon Legal Services Society (“Legal Aid”). She represented Clinton Lance Morgan, who was charged with three sexual offences against a young child. Mr. Morgan’s preliminary inquiry was set for June 26, 2006. The Crown had advised that it intended to bring a motion prior to the preliminary inquiry to have the complainant’s testimony admitted by videotape in lieu of *viva voce* evidence.

[3] On May 3, 2006, Legal Aid informed Mr. Morgan that he had to update his financial information, which he had previously provided to Legal Aid, and that failure to do so would result in the suspension of his Legal Aid funding. By May 16, 2006, Mr. Morgan had failed to respond to the request and Legal Aid informed him that his counsel, Ms. Cunningham, was no longer authorized to represent him. Ms. Cunningham promptly brought an application to the Territorial

Court of Yukon to withdraw as counsel of record. The sole reason for the application was the suspension of Legal Aid funding and Mr. Morgan's inability to otherwise pay for legal services. Ms. Cunningham indicated that she was willing to continue to represent Mr. Morgan if his Legal Aid funding was reinstated.

3. Judicial History

A. *Territorial Court of Yukon, 2006 YKTC 61 (CanLII)*

[4] Lilles Terr. Ct. J. heard Ms. Cunningham's application to withdraw. He refused to grant her application to withdraw because: (a) legal aid funding could potentially be reinstated and Ms. Cunningham was willing to continue in the event that it was; (b) the charges against Mr. Morgan were very serious; (c) there was a young child complainant whose memory, emotional and psychological well-being may have been affected by further delay; (d) counsel would have to be appointed to cross-examine the child complainant; (e) there was no information on the potential for Mr. Morgan to obtain other representation; (f) there was no information on when the preliminary inquiry could be rescheduled if withdrawal was allowed; (g) while a preliminary inquiry is not as critical as a trial, it is still important to how the trial is conducted; (h) there was a hotly contested and difficult issue regarding videotape evidence that would be difficult for Mr. Morgan to deal with as a self-represented litigant; and (i) further delay would prejudice Mr. Morgan as he was labelled as a potential sexual offender as a result of the criminal charges (para. 26).

B. *Supreme Court of the Yukon Territory, 2006 YKSC 40, 41 C.R. (6th) 66*

[5] Gower J. heard Ms. Cunningham's application for an order in the nature of *certiorari* seeking to quash the order of Lilles Terr. Ct. J. Gower J. determined that the preliminary inquiry judge had jurisdiction to exercise discretion over withdrawal on the basis of s. 537(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, and s. 77 of the *Territorial Court Act*, R.S.Y. 2002, c. 217. After a thorough review of Canadian authorities on the issue of withdrawal, Gower J. concluded that the weight of authority supported the court having the power to exercise its discretion to refuse withdrawal. He held that Lilles Terr. Ct. J. did not exceed his jurisdiction and dismissed the application for *certiorari*.

C. *Court of Appeal for the Yukon Territory, 2008 YKCA 7, 257 B.C.A.C. 1*

[6] On appeal, the court found that the issue had become moot as a trial of the charges against Mr. Morgan had become unnecessary (para. 17). The appeal nevertheless proceeded in order to obtain appellate court guidance on the legal issue.

[7] The Court of Appeal allowed the appeal, finding that Lilles Terr. Ct. J. had no discretion to refuse withdrawal. It reached its conclusion on the basis of three factors. First, the law society has the primary interest in lawyer regulation and court oversight of withdrawal could create a conflict between the court's decision and any disciplinary decision by a law society. Second, the court's supervision of withdrawal potentially threatens solicitor-client privilege in cases where counsel is asked to disclose the reasons for wishing to withdraw. Third, compelled representation puts counsel in the position of a perceived or actual conflict between the client's best interest and

the lawyer's interest in ending the matter as quickly as possible. It determined the better approach to withdrawal was to rely on the assumption that lawyers generally do not avoid their professional obligations and, if they do, then the law societies will take appropriate disciplinary action. The court acknowledged, however, that a court could use its contempt power "in extreme circumstances where a lawyer's conduct in connection with a withdrawal amounted to a serious affront to the administration of justice" (para. 29). The court concluded that Lilles Terr. Ct. J. should not have ordered Ms. Cunningham to continue to represent Mr. Morgan.

4. Issue

[8] The issue in the present appeal is whether, in a criminal matter, a court has the authority to refuse to grant defence counsel's request to withdraw because the accused has not complied with the financial terms of the retainer. The reasons use the phrase "non-payment of legal fees" to refer to situations where, for example, an accused has actually defaulted on payment, where an accused has failed to provide funds on account at the agreed upon time, or where a legal aid certificate has been suspended or revoked.

5. Analysis

[9] An accused has an unfettered right to discharge his or her legal counsel at any time and for any reason. A court may not interfere with this decision and cannot force counsel upon an unwilling accused (see *Vescio v. The King*, [1949] S.C.R. 139, at p. 144; though exceptionally the court may appoint an *amicus curiae* to assist the court). Counsel, on the other hand, does not have

an unfettered right to withdraw. The fiduciary nature of the solicitor-client relationship means that counsel is constrained in his or her ability to withdraw from a case once he or she has chosen to represent an accused. These constraints are thoroughly outlined in the rules of professional conduct issued by the provincial or territorial law societies (e.g. Law Society of Yukon, *Code of Professional Conduct*, Part One, r. 21; Law Society of Alberta, *Code of Professional Conduct* (updated 2009), cc. 2, 6-7; Law Society of British Columbia, *Professional Conduct Handbook* (updated 2010), c. 10; Law Society of Upper Canada, *Rules of Professional Conduct* (updated 2009), r. 2). This appeal raises the issue of whether a court's jurisdiction to control its own process imposes a further constraint on counsel's ability to withdraw.

A. *Divergent Lines of Authority*

[10] There are two lines of provincial and territorial appellate court reasoning on this issue. The British Columbia and Yukon Courts of Appeal have determined that a court has no authority to prevent criminal defence counsel from withdrawing for non-payment of legal fees. The Alberta, Saskatchewan, Manitoba, Ontario, and Quebec Courts of Appeal have taken the opposite position — a court may refuse counsel's request to withdraw. Trial courts in New Brunswick and Newfoundland have also followed this line of authority.

[11] The British Columbia and Yukon position stems from the British Columbia Supreme Court decision in *Re Leask and Cronin* (1985), 18 C.C.C. (3d) 315. In *Leask*, the court, on an application for an order in the nature of prohibition, found that a provincial court judge has no right in law to order counsel to continue to represent an accused. McKay J. found that this conclusion

recognized the role of a strong and independent bar and that the role of disciplining lawyers is vested in the law societies, not the court. He found that the relationship between a solicitor and client is a contractual one and that once the client breaches the contract, the solicitor is entitled to repudiate and bring the contract to an end. McKay J. was also concerned about potential infringements of solicitor-client privilege, which he thought may arise if counsel must disclose the reasons for withdrawal. Although lawyers may ask for leave, McKay J. found this was a matter of “politeness and courtesy” (p. 325), the court having no discretionary power to refuse.

[12] I would note that the issue in *Leask* did not arise from non-payment of fees, like the present appeal, but rather from a breakdown in the solicitor-client relationship. Nonetheless, subsequent British Columbia jurisprudence has relied on *Leask* as a basis for finding that the court is not empowered to refuse counsel’s request to withdraw for any reason (see also *Luchka v. Zens* (1989), 37 B.C.L.R. (2d) 127 (C.A.), at p. 129; *R. v. Ho*, 2003 BCCA 663, 21 B.C.L.R. (4th) 83, at para. 19; *R. v. Huber*, 2004 BCCA 43, 192 B.C.A.C. 75, at paras. 75-76, *per* Rowles J.A., at para. 101, *per* Southin J.A., and at paras. 121-26, *per* Smith J.A.).

[13] In contrast, the Alberta, Saskatchewan, Manitoba, Ontario and Quebec Courts of Appeal as well as their trial courts, and trial courts in New Brunswick and Newfoundland, have all accepted that a court has the authority to refuse counsel’s application for withdrawal. The Alberta Court of Appeal’s decision in *R. v. C. (D.D.)* (1996), 110 C.C.C. (3d) 323, leave to appeal refused, [1997] 1 S.C.R. vii (*sub nom. Ferguson v. The Queen*), has received the most attention. In *C. (D.D.)*, the Alberta Court of Appeal determined that in addition to counsel’s contractual obligations to the client, a lawyer is also an officer of the court. It is in this capacity that counsel owes a duty to the

court to “attend before a judge when requested” and “not to walk out on a client in the middle of a trial” (p. 327). So long as counsel has not expressed that he or she appears on a limited retainer, the court may refuse to grant a request to withdraw.

[14] The Alberta Court of Appeal appears to recognize two limitations to the court’s discretion. First, the court *must* grant a withdrawal request when there is a breakdown in the solicitor-client relationship (p. 328). Second, where counsel seeks to withdraw for non-payment of fees, the court *may* permit withdrawal after considering harm to the Crown’s case, inconvenience to witnesses, and whether the allotted court time could be filled with other business (p. 330).

[15] The Manitoba Court of Appeal has also considered the court’s power to refuse counsel’s request to withdraw for non-payment of fees: *R. v. Deschamps*, 2003 MBCA 116, 177 Man. R. (2d) 301. It agreed with the Alberta Court of Appeal that a court has the authority to refuse withdrawal. However, Steel J.A. determined that the assessment should be based on whether allowing withdrawal would cause prejudice to the accused and to the administration of justice (para. 24).

[16] The Quebec Court of Appeal has also confirmed that the court may refuse counsel’s application to withdraw once a hearing date has been set (*Bernier v. 9006-1474 Québec inc.*, [2001] J.Q. n° 2631 (QL); see also s. 249 of the Quebec *Code of Civil Procedure*, R.S.Q., c. C-25). Similarly, both the Saskatchewan and Ontario Courts of Appeal have acknowledged that court permission is required to withdraw as counsel of record (*Mireau v. Canada* (1995), 128 Sask. R. 142, at para. 4; *R. v. Brundia*, 2007 ONCA 725, 230 O.A.C. 29, at para. 44; *R. v. Peterman* (2004), 70 O.R. (3d) 481, at para. 38) as have trial courts in New Brunswick and Newfoundland (*R. v.*

Golding, 2007 NBQB 320, 325 N.B.R. (2d) 92, at paras. 18 and 20; *Dooling v. Banfield* (1978), 22 Nfld. & P.E.I.R. 413 (Nfld. Dist. Ct.), at para. 27).

[17] For the following reasons, I conclude that a court does have the authority to refuse criminal defence counsel's request to withdraw for non-payment of legal fees.

B. *Jurisdiction of the Court*

[18] Superior courts possess inherent jurisdiction to ensure they can function as courts of law and fulfil their mandate to administer justice (see I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Legal Probs.* 23, at pp. 27-28). Inherent jurisdiction includes the authority to control the process of the court, prevent abuses of process, and ensure the machinery of the court functions in an orderly and effective manner. As counsel are key actors in the administration of justice, the court has authority to exercise some control over counsel when necessary to protect its process. In *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, this Court confirmed that inherent jurisdiction includes the authority to remove counsel from a case when required to ensure a fair trial:

The courts, which have inherent jurisdiction to remove from the record solicitors who have a conflict of interest, are not bound to apply a code of ethics. Their jurisdiction stems from the fact that lawyers are officers of the court and their conduct in legal proceedings which may affect the administration of justice is subject to this supervisory jurisdiction. [p. 1245]

It would seem to follow that just as the court, in the exercise of its inherent jurisdiction, may remove counsel from the record, it also may refuse to grant counsel's application for withdrawal.

[19] Likewise in the case of statutory courts, the authority to control the court’s process and oversee the conduct of counsel is necessarily implied in the grant of power to function as a court of law. This Court has affirmed that courts can apply a “doctrine of jurisdiction by necessary implication” when determining the powers of a statutory tribunal:

. . . the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime . . .

(*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 51)

Although Bastarache J. was referring to an administrative tribunal, the same rule of jurisdiction, by necessary implication, would apply to statutory courts.

[20] Applications regarding withdrawal or removal of counsel, whether for non-payment of fees, conflict of interest or otherwise, are the types of matters that fall within the necessarily implied authority of a court to control the conduct of legal proceedings before it.

C. *Exercise of Jurisdiction*

[21] The more contentious issue in this appeal is whether a criminal court may exercise its inherent or necessarily implied jurisdiction to control its own process by overseeing lawyer withdrawal.

[22] The reasons in favour of courts exercising this jurisdiction are numerous. An accused, who becomes unable to pay his lawyer, may be prejudiced if he is abandoned by counsel in the midst of criminal proceedings. Proceedings may need to be adjourned to allow the accused to obtain new counsel. This delay may prejudice the accused, who is stigmatized by the unresolved criminal charges and who may be in custody awaiting trial. It may also prejudice the Crown's case. Additional delay also affects complainants, witnesses and jurors involved in the matter, and society's interest in the expedient administration of justice. Where these types of interests are engaged, they may outweigh counsel's interest in withdrawing from a matter in which he or she is not being paid.

[23] On the other hand, Ms. Cunningham and the interveners taking the same position say a court must *always* decline to exercise this jurisdiction. Collectively, they support their position with the three main factors relied on by the Court of Appeal: solicitor-client privilege, the role of law societies and conflict of interest. In addition, they also direct the Court's attention to *Rowbotham* orders as a potential solution. Their position is that the proper approach is for a court to presume that lawyers act ethically and that any professional transgressions are best addressed by the law society. In exceptional cases, however, Ms. Cunningham and the Law Society of Yukon say that the contempt power would be available to a court where counsel seeks to withdraw for an improper purpose or where the manner of withdrawal warrants a citation for contempt. The Canadian Bar Association and the Criminal Lawyers' Association state that there must be clear evidence of a breach of an ethical standard or an abuse of process for a court to cite counsel for contempt.

[24] I will address each of these arguments in turn.

(1) Solicitor-Client Privilege

[25] Ms. Cunningham and the interveners argue that solicitor-client privilege could be violated in one of two ways: simply by disclosure of the mere fact that the accused has not paid his or her fees, or inadvertent disclosure of privileged information when engaging in a discussion with the court about the reasons for withdrawal.

[26] Concern regarding the protection of solicitor-client privilege is warranted. It need hardly be said that solicitor-client privilege is a fundamental tenet of our legal system. The solicitor-client relationship is integral to the administration of justice; privilege encourages the free and full disclosure by the client required to ensure effective legal representation (see *Smith v. Jones*, [1999] 1 S.C.R. 455, at para. 45, *per* Cory J. for the majority, and *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445, at paras. 31 and 33, *per* Major J.).

[27] However, revealing that an accused has not paid his or her fees does not normally touch on the *rationale* for solicitor-client privilege in the criminal context. A client must be able to rely on the confidentiality of the communications made between lawyer and client because only then can there be full and frank discussion of the facts of the case, and the giving and receiving of soundly based legal advice (see *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644 (C.A.), at p. 649; relied on in *Smith v. Jones*, at para. 45, and *McClure*, at para. 32). There has been no explanation as to why an accused would be any more inclined to withhold information from counsel, where the court has discretion over withdrawal, than where counsel can unilaterally withdraw.

[28] In arguing that disclosure of the mere fact that an accused has not paid or will not be paying his or her legal fees is protected by solicitor-client privilege, the Law Societies of British Columbia and Yukon rely on this Court's decisions in *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, and *Maranda v. Richer*, 2003 SCC 67, [2003] 3 S.C.R. 193, where this Court held that, in the context of a law office search, an accused's financial and fee information may be privileged. In *Maranda*, the Court was concerned that fee information, specifically the amount of fees and disbursements, may appear to be "neutral" when in fact disclosure of the information could be prejudicial to the accused. In particular, LeBel J. stated that fee information

might enable an intelligent investigator to reconstruct some of the client's comings and goings, and to assemble evidence concerning his presence at various locations based on the documentation relating to his meetings with his lawyer. [para. 24]

This information could then be used to charge and/or convict the client. Because of the potentially detrimental effect of disclosure on the client, fee information is considered *prima facie* privileged for the purposes of the search. If the Crown seeks disclosure, the ultimate decision of whether the fee information is *in fact* privileged is made by the court, not the police.

[29] Counsel seeking to withdraw for non-payment of legal fees is a decidedly different context from a police search of counsel's accounts and records. The most significant difference is the content of the information being disclosed. The only information revealed by counsel seeking to withdraw is the sliver of information that the accused has not paid or will not be paying fees. It has not been explained how, in this case, this sliver of information could be prejudicial to the

accused. Indeed, it is hard to see how this simple fact alone could be used against the accused on the merits of the criminal proceeding: it is unrelated to the information given by the client to the lawyer, and unrelated to the advice given by the lawyer to the client. It would not be possible to infer from the bare fact of non-payment of fees any particular activities of the accused that pertain to the criminal charges against him.

[30] To be sure, this is the case where non-payment of fees is not linked to the merits of the matter and disclosure of non-payment will not cause prejudice to the accused. However, in other legal contexts, payment or non-payment of fees may be relevant to the merits of the case, for example, in a family law dispute where support payments are at issue and a client is alleging inability to pay. Or disclosure of non-payment of fees may cause prejudice to the client, for example, where the opposing party may be prompted to bring a motion for security for costs after finding out that the other party is unable to pay its legal fees. Where payment or non-payment of fees is relevant to the merits of the case, or disclosure of such information may cause prejudice to the client, solicitor-client privilege may attach.

[31] Disclosure of non-payment of fees in cases where it is unrelated to the merits and will not cause prejudice to the accused is not an exception to privilege, such as the innocence at stake or public safety exceptions (see generally *McClure* and *Smith v. Jones*). Rather, non-payment of legal fees in this context does not attract the protection of solicitor-client privilege in the first place. However, nothing in these reasons, which address the application, or non-application, of solicitor-client privilege in disclosures to a court, should be taken as affecting counsel's ethical duty of confidentiality with respect to payment or non-payment of fees in other contexts.

[32] In the alternative, Ms. Cunningham and the interveners argue that counsel may inadvertently disclose privileged information when explaining the reasons for withdrawing and answering questions from the judge. They argue that this risk is so unacceptable that it requires the court to decline to exercise any discretion to refuse counsel's request to withdraw. They point to *Leask* where counsel sought withdrawal due to irreconcilable differences between counsel and the accused. The provincial court judge wanted specific details to determine if the differences could be resolved (*Leask*, at pp. 318-19). The accused in *Leask* was drawn into the conversation with the judge as well. They argue that this is dangerous because the accused may unknowingly waive his or her right to privilege and disclose information that is otherwise protected.

[33] I agree that the exchange initiated by the provincial court judge in *Leask* was inappropriate. The judge repeatedly pressed counsel for detailed reasons for withdrawal, and continued to press even when counsel attempted to rely on the professional rules of conduct. The judge bluntly asked the accused if he objected to counsel disclosing the specific reason for withdrawal. I think it is fair to say that what occurred in *Leask* was unacceptable.

[34] However, lawyers are presumed to know and respect their professional obligations. Judges are presumed to know the law (*R. v. Burns*, [1994] 1 S.C.R. 656, at p. 664, *per* McLachlin J. (as she then was)). The integrity of the administration of justice rests on these assumptions. Delicate matters frequently come before courts. For example, although the initial decision not to produce a potentially privileged document is that of counsel, a judge may have to decide whether the document is in fact privileged. The remote possibility of inadvertent disclosure in the course of

that proceeding does not mean that the ultimate decision must be left solely to counsel in disputed cases. I am of the view that the same is true with respect to withdrawal for non-payment of legal fees in criminal matters. The remote possibility that a judge will inappropriately attempt to elicit privileged information in hearing the application does not justify leaving the decision to withdraw exclusively to counsel.

(2) Exclusive Law Society Oversight

[35] I am also unable to accept the argument of Ms. Cunningham and the interveners that oversight of lawyer withdrawal falls exclusively to the law societies. The law societies play an essential role in disciplining lawyers for unprofessional conduct; however, the purpose of the court overseeing withdrawal is not disciplinary. The court's authority is *preventative* — to protect the administration of justice and ensure trial fairness. The disciplinary role of the law society is *reactive*. Both roles are necessary to ensure effective regulation of the profession and protect the process of the court.

[36] The rules enacted by the law societies are essential statements of the appropriate standards of professional conduct. They offer extensive guidance on when counsel may seek to withdraw from a case. For example, the Law Society of Alberta rules state the following with respect to withdrawal for non-payment of fees:

A lawyer may withdraw upon reasonable notice to the client when justified by the circumstances. Circumstances that may justify, but not require, withdrawal include the following:

- (a) the client fails after reasonable notice to provide funds on account of fees or disbursements in accordance with the agreement made with the lawyer; [c. 14, r. 1]

The Law Society of Upper Canada rules speak directly to withdrawal for non-payment of fees in the criminal context:

Where a lawyer has agreed to act in a criminal case and where the date set for trial is not far enough removed to enable the client to obtain another licensee or to enable another licensee to prepare adequately for trial and an adjournment of the trial date cannot be obtained without adversely affecting the client's interests, the lawyer who agreed to act may not withdraw because of non-payment of fees. [r. 2.09(5)]

[37] The Canadian Bar Association also offers guidance on professional conduct. Its rule on withdrawal states:

The lawyer owes a duty to the client not to withdraw services except for good cause and upon notice appropriate in the circumstances.

(*Code of Professional Conduct* (2009), c. XII)

The commentary to the rule states:

Failure on the part of the client after reasonable notice to provide funds on account of disbursements or fees will justify withdrawal by the lawyer unless serious prejudice to the client would result. [commentary 6]

[38] While the court is not bound to apply law society or Canadian Bar Association codes of professional conduct, these codes “should be considered an important statement of public policy”

(*MacDonald Estate*, at p. 1246). These standards complement the court’s discretion to refuse withdrawal where the effects on the administration of justice will be severe. For example, the Canadian Bar Association rules recognize the distinct, yet complementary, nature of the functions served by the court and law societies:

Where withdrawal is required or permitted by this Rule the lawyer must comply with all applicable rules of court as well as local rules and practice. [commentary 3]

Both the courts and the law societies play different, but important, roles in regulating withdrawal: the courts prevent harm to the administration of justice and the law societies discipline lawyers whose conduct falls below professional standards. They are not mutually exclusive.

[39] Ms. Cunningham and the interveners submit that court supervision over withdrawal threatens the independence of the bar. As I note above, lawyers are intimately involved in the administration of justice. I do not agree that an exceptional constraint on counsel, necessary to protect the integrity of the administration of justice, threatens counsel’s independence. For instance, McLachlin J. in *Young v. Young*, [1993] 4 S.C.R. 3, at pp. 135-36, acknowledged that a court can award costs against counsel personally in rare cases where counsel acts in bad faith by encouraging abuse and delay of the court’s process. There is no suggestion that this rare constraint has threatened the independence of the bar. Furthermore, court oversight of lawyer withdrawal has been the practice in Alberta at least since the decision in *C. (D.D.)* in 1996. There is no suggestion that this practice affects the independence of the Alberta bar. Finally, all law society rules recognize that an independent bar has obligations beyond those owed to clients. Lawyers must comply with their professional obligations to the administration of justice and the public; these obligations do not

undermine counsel's independence (see, for example: Law Society of Yukon, Parts Two and Three; Law Society of Upper Canada, rr. 4 and 6; Law Society of Alberta, c. 1; Law Society of British Columbia, c. 1).

(3) Conflict of Interest

[40] I am also unpersuaded by the Law Society of British Columbia's point that forcing unwilling counsel to continue may create a conflict between the client's and lawyer's interests. It is argued that where counsel is compelled to work for free, he or she may be tempted to give legal advice which will expedite the process in order to cut counsel's financial losses even though wrapping up a criminal matter as quickly as possible may not be in the best interests of the accused. This argument, however, is inconsistent with the Law Society's position — with which I agree — that the court should presume that lawyers act ethically. There are many situations where counsel's personal or professional interests may be in tension with an individual client's interest, for example where counsel acquires an interesting new file that requires immediate attention, or has vacation plans that conflict with the timing of court proceedings affecting the client. Counsel is obligated to be diligent, thorough and to act in the client's best interest. Similarly, if counsel agrees to be retained *pro bono*, he or she must act just as professionally as if acting for the client on a paid retainer of the same nature. Where the court requires counsel to continue to represent an accused, counsel must do so competently and diligently. Both the integrity of the profession and the administration of justice require nothing less.

(4) Rowbotham Orders

[41] The interveners, the Law Society of Yukon, the Criminal Lawyers' Association and the Attorney General of Ontario, directed the Court's attention to *Rowbotham* orders. In *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1, the Ontario Court of Appeal found that where an indigent accused, who does not qualify for legal aid, requires legal representation to ensure a fair trial, the court may enter a conditional stay of proceedings until the government provides funded legal counsel (p. 69).

[42] This Court has not commented on the correctness of *Rowbotham* orders (*New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 90), and given that this was not at issue in the present appeal, the following comments are made in *obiter dicta*. I will note, however, that if such an order were available it would be relevant to the court's decision on whether to decline to grant counsel's request to withdraw.

[43] That said, a *Rowbotham* order could not be a complete substitute to the court's authority to refuse counsel's request to withdraw. As stated by the Ontario Court of Appeal in *Rowbotham*, at p. 69, and later in *R. v. Rushlow*, 2009 ONCA 461, 245 C.C.C. (3d) 505, at paras. 17-21 and 24, a *Rowbotham* order is intended to ensure that an accused receives a fair trial; it does not account for the interests of any other party or person affected by the proceeding. Thus, if delay in the proceedings or the effect on others is the determinative factor in an application for withdrawal for non-payment of fees, a *Rowbotham* order does nothing to address this concern and may even exacerbate it. A *Rowbotham* order requires a separate motion where an accused must satisfy rigorous criteria in order to succeed. A *Rowbotham* order might be relevant to the court's residual discretion to refuse withdrawal, but it cannot operate as a replacement to it.

(5) Remedy of Last Resort

[44] Ms. Cunningham's arguments do not, therefore, support a wholesale denial of the court's jurisdiction to refuse counsel's request to withdraw.

[45] That being said, ordering counsel to work for free is not a decision that should be made lightly. Though criminal defence counsel may be in the best position to assess the financial risk in taking on a client, only in the most serious circumstances should counsel alone be required to bear this financial burden. In general, access to justice should not fall solely on the shoulders of the criminal defence bar and, in particular, legal aid lawyers. Refusing to allow counsel to withdraw should truly be a remedy of last resort and should only be relied upon where it is necessary to prevent serious harm to the administration of justice.

D. *Refusing Withdrawal*

[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.

[54] The question of whether this case meets the high threshold that must be met to refuse leave to withdraw is now moot. The parties and the judge did not have the benefit of these reasons, and the record before this Court does not provide information or analysis on several of the relevant factors. It is, therefore, not clear whether the circumstances of this case would, after full analysis of the relevant factors, justify a refusal of leave to withdraw. I simply emphasize that the threshold for refusing leave to withdraw is a high one and requires a proper basis in the record for its exercise.

E. *Procedure to Review a Decision Refusing Withdrawal*

[55] This appeal originated in the Supreme Court of the Yukon Territory as an unsuccessful

application for an order in the nature of *certiorari*. Ms. Cunningham had to apply for *certiorari* because there is no provision in the *Criminal Code* providing for interlocutory appeals (see s. 674 of the *Criminal Code*). Once the superior court heard the application, Ms. Cunningham appealed to the Court of Appeal (s. 784(1) of the *Criminal Code*) and the Crown in turn to the Supreme Court of Canada (s. 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26).

[56] There is some question as to how the matter would have proceeded had it originated in a superior court. Both the Alberta and Manitoba Courts of Appeal have found that they do not have jurisdiction over appeals of withdrawal applications from superior courts (*C. (D.D.)*, at p. 330, *Deschamps*, at para. 42). While this Court need not decide the correct procedure for appealing a withdrawal application originating in a superior court, some guidance might be useful. These circumstances seem to be analogous to those in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835. *Dagenais* involved a media challenge of a publication ban in a criminal matter. As the media was a third party to the criminal proceedings, the Court determined that this was different than an interlocutory appeal by a party to the action. It concluded that the least undesirable route of appeal was directly from the superior court to the Supreme Court of Canada through s. 40 of the *Supreme Court Act* (p. 862). Similarly, defence counsel is a third party to the main criminal action, so it appears this would be analogous to *Dagenais*.

F. *Certiorari*

[57] Orders in the nature of *certiorari* may only be granted where the inferior court has made a jurisdictional error or an error of law on the face of the record (G. Létourneau, *The Prerogative*

Writs in Canadian Criminal Law and Procedure (1976), at p. 143). Gower J. thought he had to find an excess of jurisdiction to interfere with Lilles Terr. Ct. J.'s exercise of discretion. However, excess of jurisdiction is the standard for a preliminary inquiry judge's decision to either commit an accused to trial or issue a discharge (*Patterson v. The Queen*, [1970] S.C.R. 409, at p. 413; *Dubois v. The Queen*, [1986] 1 S.C.R. 366, at p. 380; *R. v. Deschamplain*, 2004 SCC 76, [2004] 3 S.C.R. 601, at para. 17). This high threshold for review is premised on the fact that a preliminary inquiry does not result in a final determination of guilt or innocence; therefore, there is less need for broad supervisory remedies (*Dubois*, at pp. 373-74). However, a lawyer seeking withdrawal is not analogous to a committal or discharge at a preliminary inquiry; it is more closely analogous to *Dagenais*, a third-party application. The judge at first instance has the authority to make an immediate and final determination on counsel's application to withdraw. As noted by Steel J.A. in *Deschamps*, refusing an application to withdraw is a coercive and conclusive order with respect to the lawyer (para. 38). Therefore, in this context an order in the nature of *certiorari* should be given its normal scope and can be allowed where there is an error of jurisdiction or an error of law on the face of the record (*Dagenais*, at pp. 864-65).

[58] Because the authority to supervise the conduct of counsel falls within the inherent or necessarily implied jurisdiction of the court, it is difficult to see how a decision to refuse withdrawal could amount to a jurisdictional error. However, it would be open for counsel to argue that the provincial or territorial court judge committed an error of law on the face of the record. Such errors would include, for example, refusing withdrawal when counsel seeks to withdraw for ethical reasons, or failing to consider a relevant factor when exercising discretion over withdrawal for non-payment of fees (see *R. v. Gardiner*, 2008 ONCA 397, 231 C.C.C. (3d) 394, at para. 26, and *Ottawa*

Citizen Group Inc. v. R. (2005), 75 O.R. (3d) 590 (C.A.), at para. 49).

6. Conclusion

[59] In sum, a court has the authority to control its own process and to supervise counsel who are officers of the court. The Supreme Court of the Yukon Territory correctly concluded that the Territorial Court had the jurisdiction to refuse to grant counsel's request to withdraw. This jurisdiction, however, should be exercised exceedingly sparingly. It is not appropriate for the court to refuse withdrawal where an adjournment will not be necessary, nor where counsel seeks withdrawal for ethical reasons. Where counsel seeks untimely withdrawal for non-payment of fees, the court must weigh the relevant factors and determine whether withdrawal would cause serious harm to the administration of justice.

7. Disposition

[60] I would allow the appeal. I would decline to grant an order as to costs.

Appeal allowed.

Solicitor for the appellant: Public Prosecution Service of Canada, Vancouver.

Solicitor for the respondent: Community Law Clinic, Whitehorse.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitors for the intervener the Law Society of British Columbia: McCarthy Tétrault, Vancouver.

Solicitors for the intervener the Law Society of Yukon: Hunter Litigation Chambers Law Corporation, Vancouver.

Solicitor for the intervener the Canadian Bar Association: Gregory P. DelBigio, Vancouver.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Stockwoods, Toronto.