IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Cunningham* v. *Lilles*, *et al.*,
2006 YKSC 40

Date: 20060616
Docket No.: S.C. No.: 06-A0035
Registry: Whitehorse

BETWEEN:

JENNIE CUNNINGHAM

PETITIONER

AND:

**HIS HONOUR JUDGE HEINO LILLES,
CLINTON LANCE MORGAN, and
HER MAJESTY THE QUEEN**

RESPONDENTS

Before: Mr. Justice L.F. Gower

Appearances:

Gordon R. Coffin	For the Petitioner
Noel Sinclair	For the Respondent Her Majesty the Queen

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by Ms. Cunningham, a defence lawyer practicing criminal law, for an order in the nature of certiorari quashing an order of Territorial Court Judge Lilles made on May 30, 2006: *R.* v. *Morgan*, 2006 YKTC 61. That order denied Ms. Cunningham's application to be removed as counsel of record for the accused, Mr. Morgan.

[2] Mr. Morgan has been charged with three sexual offences against a young complainant, who was six years old at the time the offences are alleged to have occurred on December 31, 2005. The Crown proceeded by indictment and Mr. Morgan elected trial by Supreme Court judge and jury. The preliminary inquiry has been set for June 26, 2006. However, an application is to be made before the preliminary inquiry to determine whether the Crown will be allowed to introduce a videotape of the complainant child's evidence in lieu of her in-person evidence.

[3] Mr. Morgan retained counsel through the legal aid plan of the Yukon Legal Services Society ("Legal Aid"). On May 3, 2006, Legal Aid wrote to Mr. Morgan demanding that he update his financial information and informing him that if he did not do so by May 15, 2006, his coverage would be suspended. On May 16, 2006, Legal Aid again wrote to Mr. Morgan, advising that his counsel was no longer authorized to provide legal services to him. His counsel at that time was Ms. Cunningham. Immediately upon learning that Mr. Morgan's legal aid coverage had been discontinued, Ms. Cunningham brought an application to the Territorial Court to be removed as counsel of record.

[4] That application was heard before Lilles J. on May 30, 2006. The sole reason for Ms. Cunningham's application to withdraw was that Mr. Morgan's legal aid certificate had been revoked. There was no suggestion of any other breakdown in the solicitor-client relationship. Mr. Morgan stated that he could not afford to hire a lawyer. Crown counsel opposed Ms. Cunningham's application. The central issue before Lilles J. was whether defence counsel is entitled to withdraw when there has been a repudiation of the solicitor-client contract by the client. In such cases, courts in British Columbia have

expressed the view that counsel are entitled to withdraw and do not require leave of the court. This view stems from the case of *Leask* v. *Cronin Prov. J.* (1985), 18 C.C.C. (3d) 315, a decision of McKay J. of the British Columbia Supreme Court. That case was recently affirmed by the British Columbia Court of Appeal in *R.* v. *Huber*, 2004 BCCA 43, at para. 121, as the law in that province regarding withdrawal of counsel during a trial.

ISSUE

[5] The issues before me are:

#1 Whether Lilles J. had discretion to refuse Ms. Cunningham's application to withdraw. If *Leask* is the law in the Yukon Territory, as Ms. Cunningham's counsel suggests, then Lilles J. had no such discretion and he exceeded his jurisdiction by doing so; or

#2 If *Leask* is not the law in the Yukon in this area, then did Lilles J. otherwise exceed his jurisdiction in making the order?

ANALYSIS

#1 Did Lilles J. have discretion to refuse the application to withdraw?

Did Lilles J. have threshold discretion?

[6] It has been said that a preliminary inquiry commences after an accused has been put to his election: *Regina* v. *McIntyre*, [1990] A.J. No. 217 (Alta. Prov. Ct.), cited in *R.* v. *Schertzer*, [2005] O.J. No. 3290 (Ont. Ct. Just.).

[7] It has also been said that when a trial judge has embarked upon a trial, a superior court will accord him or her the widest latitude in the conduct of the trial without prerogative intervention: *Re: Madden, et al. and the Queen* (1977), 35 C.C.C. (2d) 381.

In *Madden*, Henry J. of the Ontario High Court of Justice said that a trial judge has jurisdiction to decide all matters of law necessary for the conduct of the trial and the final disposition of the charge. If he commits an error of law, he does so within the exercise of his jurisdiction and not in excess of it. The proper remedy for such an error of law is by way of an appeal at the conclusion of the trial. The only circumstances in which a superior court will intervene by granting prerogative remedies sought during the conduct of a trial would be in cases of abuse of power or error so fundamental that it could constitute an excess of jurisdiction, for example a breach of natural justice.

[8] A Territorial Court judge presiding over a preliminary inquiry has similar jurisdiction to decide all matters of law necessary for the conduct of the inquiry, subject only to the inability to provide *Charter* remedies: *R.* v. *Mills*, [1986] 1 S.C.R. 863. Section 537(1) of the *Criminal Code* authorizes a justice presiding over a preliminary inquiry to exercise certain specific powers, including the power to "regulate the course of the inquiry in any way that appears to the justice to be consistent with [the *Criminal Code*]." Further, pursuant to s. 77 of the *Territorial Court Act*, R.S.Y. 2002, c. 217, a Territorial Court judge has the "same power and authority to preserve order in a court over which the judge is presiding as may be exercised by a judge of the Supreme Court". Thus, a Territorial Court judge presiding in a preliminary inquiry has jurisdiction equivalent to the inherent jurisdiction of the Supreme Court to control and regulate its process and to remedy any procedural unfairness that arises during the trial.

[9] I find that an application by defence counsel to withdraw from the record in the course of a preliminary inquiry is a matter within the jurisdiction of the Territorial Court judge as part of his or her duty to control that Court's process, to prevent its process

from being abused or obstructed and to ensure that every litigant receives a fair trial. I further find that Ms. Cunningham's application to Lilles J. was made in the course of, that is after the commencement of, the preliminary inquiry. Therefore, Lilles J. had threshold discretion to proceed as he did.

Does Leask apply in the Yukon?

[10] In my view, the case law from British Columbia endorsing the approach in *Leask* is not binding in the Yukon Territory. As far as I have been able to determine, *Leask* has only been considered by this Court in two decisions and never by the Yukon Court of Appeal. The two decisions in this Court are both of Hudson J. and interestingly, both were delivered as oral judgments just two days apart.

[11] The first of these decisions was *R.* v. *Skookum* [1995], Y.J. No. 123, delivered on June 12, 1995, in response to an application by defence counsel to withdraw from the record. The case report is only two paragraphs long and the reasons are extremely short. Interestingly, the headnote refers to the motion being "dismissed", notwithstanding that Hudson J. granted defence counsel's application to withdraw. That may be because there is a reference in his reasons to *R.* v. *Rowbotham* (1988), 41 C.C.C. (3d) 1, the well-known case dealing with the appointment of counsel for an accused who has been denied legal aid and is not otherwise able to retain counsel. Hudson J. was of the view that the accused in that case did not qualify for a *Rowbotham* order. However, he chose not to make that decision directly, but left it to the trial judge. The only reference to the *Leask* decision in the reasons is as follows:

> " . . . and then there is the matter of *Leask* v. *Cronin Prov. J.* (1985), 66 B.C.L.R. 187, so I will not inquire."

I take it that what Hudson J. meant by saying he would “not inquire” is that he did not intend to ask defence counsel anything further about his reasons for seeking to withdraw before subsequently granting the application. There is no indication in the reasons what information he was given in support of that application. (Interestingly, the Clerk’s Notes indicate that defence counsel actually commenced his application five days earlier. He apparently informed the Court then that he did not believe he had been retained as the accused had no contact with him or Legal Aid and that he appeared at the fixing of the trial date as a courtesy.) In any event, I am unable to accept this brief reference to the *Leask* decision, in an otherwise brief and less than informative set of reasons, as an unequivocal acceptance of *Leask* as the law in the Yukon.

[12] Two days later, on June 14, 1995, Hudson J. was dealing with the matter of *R.* v. *Bunbury*, [1995] Y.J. No. 103. That was a case remarkably similar to the one at bar. Mr. Bunbury had obtained a legal aid certificate, but it was set to expire in March 1995. However, the Yukon Legal Services Society apparently did not take the step of officially cancelling the certificate until June 2, 1995. Defence counsel then applied to withdraw from the record. Once again, the oral decision of Hudson J. is very brief, totalling only six paragraphs. It is apparent that the only reason for defence counsel’s application was the cancellation of the legal aid certificate. There is no suggestion that there was any other problem in the solicitor-client relationship which would otherwise justify withdrawal. It is also apparent that a trial date was imminent. At para. 2, Hudson J. referred to the *Leask* decision and once again to the *Rowbotham* case, as follows:

> “The Court is concerned that its process be protected. I have examined and re-examined the case of Leask v. Cronin Prov. J. (1985), 66 B.C.L.R. 187. I have also examined and re-examined the case of R. v. Rowbotham (1988), 41 C.C.C. (3d) 1. In my view, the

> features of Leask, which, in fact, is not a binding decision, it is of an equivalent jurisdiction, have added to them in this matter the fact of the Legal Aid certificate and the Legal Aid provisions. There is, therefore, a competition, if you will, between the rights as described in Leask and the rights of the accused in Rowbotham. Therefore, I have a situation here in which there is an accused who is, since there was a certificate granted based on his lack of means, in all likelihood, entitled to the relief indicated in Rowbotham."

[13] In the result, Hudson J. dismissed defence counsel's application to withdraw and directed that the matter would proceed to trial. In particular, he said, at paras. 3 and 4:

> "The possible circumstance, therefore, is that there would be a stay pending the provision of funded counsel. But the circumstances here enable the Court, in my view, with some risk, to avoid that and get on with the business of the Court. The matter proceeded in the Supreme Court by the fixing of a date in one instance and the fixing of a new date, and, indeed, proceeded to the point where the trial date was imminent. <u>There has to come a time when the matter</u> is in the Supreme Court and <u>is subject to the inherent jurisdiction of the Court to control its own process</u>. Then, in my view, in this case, that time has arrived.
>
> In the result, the application of Mr. Coffin, subject to what I say hereafter, is denied. The matter will proceed . . . <u>The fact of Mr. Bunbury's failure to attend for some updating of his statement of his lack of means falls as against the need for the Court to control its own process</u>." (emphasis added)

[14] In the final paragraph of *Bunbury*, Hudson J. said "Leask is distinguished." Counsel for Ms. Cunningham argued that this was significant because Hudson J. had implicitly accepted *Leask* as good law in the *Skookum* decision two days earlier, and when he was called upon to reconsider *Leask* in *Bunbury*, he specifically declined to reject it, but rather distinguished it. With respect, I disagree. Firstly, I have already found that Hudson J. did not expressly accept *Leask* as a correct statement of the law in *Skookum*. Secondly, when he was again confronted with the *Leask* decision two days later, he simply declined to follow it. Of course, if he had accepted *Leask*, then he would

have had no choice but to allow defence counsel's application to withdraw. However, he specifically denied that application. Whether he did so because he distinguished *Leask* or because he felt that *Leask* was not good law is rather beside the point. What is important is that *Leask* was not adopted by Hudson J. in any unequivocal way in either decision.

[15] It was also a premise of Lilles J. that *Leask* is not currently the law in the Yukon and that both the Territorial and Supreme Courts have, in general, adopted an approach which requires counsel to seek the leave of the Court if they wish to withdraw from the record. I agree with that premise. Such applications have not simply been a matter of "politeness and courtesy", as stated by McKay J. in *Leask*, and the decisions of the Yukon courts on such applications have not simply been a "rubber-stamping" of an outcome predetermined by defence counsel.

What is the law in the Yukon in this area?

[16] If the *Leask* line of authority is not the law in the Yukon, then what is? A useful starting point would be the decision of *R.* v. *C.(D.D.)*, [1996] A.J. No. 829. That was a unanimous judgment of the Alberta Court of Appeal denying an application by defence counsel to withdraw from a criminal matter on the eve of trial. Counsel had appeared at the arraignment to say that he acted for the accused and to request a trial of two weeks' duration. Less than a month before the trial was to begin, the accused defaulted on a retainer arrangement and defence counsel decided he was no longer going to represent the accused. He did, however, attempt to arrange legal aid coverage for the client, but the confirmation of that coverage necessitated an application to adjourn the trial. The

lower court judge denied the adjournment request and declared that counsel needed his leave to withdraw, which was denied. The only issue between defence counsel and his client was a monetary one. The Court of Appeal held, at para. 2, that, notwithstanding that a client has defaulted in their financial arrangements with respect to the retainer, and has thereby repudiated the solicitor-client contract, the lawyer still has an "independent" obligation to the Court to continue to act for that client, unless the Court permits the lawyer to withdraw:

> "The primary challenge by the appellant is that no trial judge can force an unwilling lawyer to defend a client in a criminal case if the client has defaulted in his financial arrangements. In our view, and independent of his obligations to his client, a lawyer who has accepted a general retainer from an accused and who has then gone on record for him before the trial court, is obligated to the court to continue to represent him unless and until, after notice to the client, the court permits him to withdraw for cause or by reason of the accused's consent to the termination of his employment. Cause includes unhappy differences that make it impossible for the lawyer to defend, but does not include non-payment of fees." (emphasis added)

[17] While the Court of Appeal recognized that the fee arrangement between counsel and a client in Canada is an enforceable private contract, it again emphasized that there is a further duty arising when counsel practices law before a court. At para. 13, the Court said

> "But the lawyer who would practise his profession of counsel before a Court owes duties to that Court quite apart from any duty he owes his client or his profession or, indeed, the public. That these duties are sometimes expressed as an ethical responsibility does not detract from the reality that the duties are owed to the Court, and the Court can demand performance of them. The expression "officer of the Court" is a common if flowery way to emphasize that special relationship. . . ." (emphasis added)

[18] At para. 18 of *C.(D.D.)*, the Alberta Court of Appeal cited the decision of *State* v. *Crump* 178 S.E.2d 366 at 377, where the North Carolina Supreme Court also held that an attorney, having accepted employment by a defendant and having represented him before the Court, is obligated to the Court, “independent of his obligations to his client”, to continue to do so unless and until the Court permits him to withdraw. The Court of Appeal then continued:

> “We do not agree with McKay, J. in Leask v. Cronin Prov. J., [1985] 3 W.W.R. 152 (B.C.S.C.) when he categorized the traditional request for leave to withdraw as merely a matter of "politeness and courtesy" elevated by repetition ... into a discretionary power in the judge to grant or refuse leave to withdraw." If he 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. We think not. It certainly can be contempt to fail, barring good reason, to come when bid by the Court to come. See R. v. Aster (No. 1) (1980), 57 C.C.C. (2d) 450 at 451 (Que. S.C.) (not cited by counsel); R. v. Fox (1976) 70 D.L.R. (3d) 577 (not cited by counsel); Re Andreachuk (1984), 120 A.R. 156 (not cited by counsel). And it follows that it can be contempt to fail, barring good reason, to remain when bid to stay.”

[19] The Court of Appeal in *C.(D.D.)* also noted that the sole authority relied upon by McKay J. in *Leask* was a decision of the British Columbia Court of Appeal in *Boult Enterprises Ltd.* v. *Bisset*, [1985] 3 W.W.R. 669 at 671. That was a case where “unhappy differences” arose between client and counsel. I take it from what was said later in *C.(D.D.).*, that such unhappy differences would include an event which would make it impossible for defence counsel to proceed in good conscience. Apparently, in *Boult Enterprises*, Taggart J.A. said that it was sufficient for counsel to appear to say that he must withdraw and that he needed no permission to do so. The Alberta Court of Appeal responded as follows:

> “With respect, we are of a contrary view, although in such a circumstance, we are bound to add that a Court is under a duty to

> grant the request. In the result, the difference between us and Taggart, J.A., is minuscule. But this nicety was the tiny acorn with which McKay, J. built his tree."

[20] *C.(D.D.)* also found that *Leask* "is against the weight of authority", citing *R.* v. *Le* (1994), 162 A.R. 4 (C.A.), at 5-6; *R.* v. *ATC Consulting Ltd.* (1982), 48 A.R. 238 (Q.B.); *R.* v. *Mosychuk* (1978), 21 A.R. 339 (Dist. Ct.); *Mireau* v. *Saskatchewan*, [1995] 4 W.W.R. 389; *Dooling* v. *Banfield & Nearly* (1978), 22 Nfld. & P.E.I.R. 413; *R.* v. *Bunbury*, [1995] Y.J. No. 103 (S.C.); *Weldon Plastics Ltd.* v. *Communication Press Ltd.* (1987), 19 C.P.C. (2d) 36 (Ont. Dist. Ct.); *Duca Community Credit Union* v. *Tay, et al.* (1995), 26 O.R. (3d) 172 (Gen. Div.).

[21] The Alberta Court of Appeal in *C.(D.D.)* also viewed defence counsel's obligation to the Court in these circumstances as arising from an implicit undertaking which arises when counsel appears for an accused at an arraignment. At paras. 23 and 24, the Court stated that unless counsel specifically indicates that he or she is appearing on a limited retainer, by appearing at an arraignment, counsel is implicitly undertaking that they will act for the accused at the trial and see the matter to an end. In other words, a court is entitled to infer from going on the record in a criminal case that the lawyer has a general retainer, unless the lawyer says otherwise.

[22] The Manitoba Court of Appeal, in *R.* v. *M.B.D.*, 2003 MBCA 116, at para. 21, said through the judgment of Steel J.A., that it did not agree with McKay J. in *Leask*. While the Court also acknowledged the Alberta Court of Appeal in *C.(D.D.)*, it did not go so far as to say that non-payment of fees by a client would never justify withdrawal. At para. 22, Steel J.A. said that if counsel appears on the record and fails to specify that they are on a limited retainer, the court is entitled to assume that they act on a general

retainer and the court's permission, as well as reasonable notice, is required upon an application to withdraw. The Court of Appeal continued, at paras. 23 and 24:

> "Permission will almost always be granted in situations where there has been a serious loss of confidence between the lawyer and the client. Such situations are sometimes referred to as a case where the lawyer has "cause to withdraw" or by reason of "unhappy differences" or "irreconcilable differences" between the lawyer and the client. See R. v. C.(D.D.), at p. 324, and the cases referred to there. It would be very hard to imagine a case where a judge would order a lawyer to continue representation of a client in the face of these kinds of concerns.
>
> The same is not true of a situation involving the arrangements for the payment of fees. Such a situation would not fall within our understanding of withdrawal for cause or unhappy differences . . .
>
> Where the request to withdraw is based on an issue of non-payment, the court will grant or deny leave based on its assessment of any resulting prejudice to the accused and to the administration of justice."

[23] The Saskatchewan Court of Appeal, in *Mireau* v. *Saskatchewan (Minister of Justice)*, [1995] S.J. No. 47, adopted the reasoning of Côté J.A. in *R.* v. *Le*, cited above, which was quoted in *Mireau*, at para. 4, as follows:

> ". . . when counsel goes on the record for the appellant on a criminal appeal and gets bail for his client, he thereby incurs some very serious obligations to keep the matter moving. Those obligations cannot be delegated, and <u>if he wants to get out of them, he should apply</u> to be relieved of them, or to have them extended, or <u>to have himself taken off the record as counsel</u>. . . ." (emphasis added)

Although *Le* was referring to an appeal, there is no reason to distinguish that reasoning from a trial or any other criminal proceeding, including a preliminary inquiry.

[24] The Ontario Court of Appeal, in *R.* v. *Chatwell* (1998), 122 C.C.C. (3d) 162, leave to appeal to the Supreme Court of Canada refused October 5, 1998, commented at para. 14:

> ". . . it seems to us that counsel who remain unpaid - - whether by Legal Aid or otherwise - - should either proceed to discharge his professional responsibilities and proceed to trial or, if he is sufficiently concerned about non-payment, should seek to remove himself from the record. . . . " (emphasis added)

That was a case where a trial had been adjourned at the request of defence counsel because Legal Aid had not paid counsel's interim account. Although the central issue was whether there had been unreasonable delay in proceeding to trial, the case nevertheless shows that the Ontario Court of Appeal is also of the view that leave of the court is required on applications to withdraw, even for non-payment of fees.

[25] The British Columbia Court of Appeal endorsed *Leask* in *Luchka* v. *Zens*, [1989] B.C.J. No. 942. That was an oral decision by Hinkson J.A., speaking for a three-judge panel, in a civil case involving an application by a solicitor under Rule 16(4) of the *Rules of Court* for a declaration that the solicitor had ceased to act for a party. Hinkson J.A. referred to *Leask*, accepted its reasoning and held that it applies equally to a solicitor in a civil case. Interestingly, at page 3 of the Quicklaw report, in referring back to Rule 16(4), he said as follows:

> "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.
>
> . . .

> . . . 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. . . .” (emphasis added)

[26] I say that this passage is interesting, because in the application before Lilles J., the Crown, as a party to the litigation, objected to Ms. Cunningham’s withdrawal and the client, Mr. Morgan, specifically stated that he wanted and needed counsel to represent him. In the transcript of the proceedings of May 30, 2006 (at page 30), Mr. Morgan replied affirmatively when asked by Lilles J. whether he wanted Ms. Cunningham to stay on the record. Therefore, according to the reasoning in *Luchka*, Lilles J. *did* have the discretion to go further and investigate the matter.

[27] *Leask* was more recently considered by the British Columbia Court of Appeal in *R.* v. *Huber*, cited above. In that case, Rowles J.A., at para. 76, cited *Leask* along with the *Luchka* decision and said:

> “Whatever the reasons may be for counsel seeking to withdraw, the court's scope of inquiry is circumscribed by issues that lie properly within the domain of counsel and client.”

[28] Southin J.A., concurring, at para. 101, said:

> “. . . in this jurisdiction, a member of the bar has a right to throw up his brief without the court's consent and a judge has no right to require him to continue. This constraint on judicial power may not be without some limitations but in this case I need not consider what those limitations may be. Leask v. Cronin . . . is about that right of members of the bar.” (emphasis added)

[29] Although Smith J.A. dissented in the result, he agreed with the majority that *Leask*, as approved by *Luchka*, represented the law in British Columbia governing withdrawal of counsel from a trial. However, Smith J.A. also noted, at para. 124:

> "That is not to say that the court has no power to act at all in the face of a withdrawal of counsel.
>
> . . .
>
> The power to act in such circumstances arises out of the court's inherent jurisdiction to supervise its own officers in matters which may affect the administration of justice: MacDonald Estate v. Martin, [1990] 3 S.C.R. 1235 at 1245; Rosin v. MacPhail (1997), 32 B.C.L.R. (3d) 279 [paragraph] 16 (B.C.C.A.)." (emphasis added)

[30] In *MacDonald Estate*, just cited above, the judgment of the majority of the Supreme Court of Canada was delivered by Sopinka J. Although the issue in that case was whether counsel was in a conflict of interest, Sopinka J. said this about jurisdiction of the courts, at para. 18:

> "A code of professional conduct is designed to serve as a guide to lawyers and typically it is enforced in disciplinary proceedings. See, for example, Law Society of Manitoba v. Giesbrecht (1983), 24 Man. R. (2d) 228 (C.A.). 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. . . ." (emphasis added)

This passage was quoted and adopted by Esson J.A., who delivered the reasons of the British Columbia Court of Appeal in *Rosen* v. *MacPhail*, also just cited above in Smith J.A.'s reasons, at page 16.

[31] Indeed, the Supreme Court of Canada, in *R.* v. *Spataro*, [1974] S.C.R. 253, refused to allow counsel to withdraw even when he indicated that his client wished to discharge him and was not prepared to accept counsel's advice on a matter. Judson J.,

speaking for the majority, after considering a portion of the transcript of the application before the trial judge held, at page 3 of the Quicklaw report:

> "It is apparent from this exchange that the first request made by the accused was for a postponement. Then he mentioned change of counsel. Then there was a clear statement by counsel that his client had informed him that he wished to discharge him, the client not being prepared to accept his advice on a matter. This is all that we know about the reason for the request. The request was not one either by counsel or the accused that the accused wished to conduct his own defence. It was in essence a further request for a postponement which had been involved in the motion for a change of venue."

And later, at page 4 of the Quicklaw report:

> "My opinion is that the request was for a change of counsel and a postponement of trial until new counsel could be retained. With all that had happened, the accused was not entitled to this."

In the result, Judson J.A. upheld the trial judge's refusal to allow counsel to withdraw, as being in the accused's own interest.

[32] Thus, *Spataro* supports the proposition that a judge presiding over a criminal proceeding has supervisory jurisdiction over whether counsel may withdraw, even where a client has purported to discharge that counsel.

[33] Whether counsel must obtain leave of the court before withdrawing from criminal matters is "one of the most debated issues in Canada", according to the Hon. Justice Michel Proulx and David Layton in their text, *Ethics and Canadian Criminal Law* (Toronto: Irwin Law Inc., 2001), at page 615. They go on to say that there are valid reasons why, once counsel has committed to the retainer on the record, courts should maintain a degree of supervisory jurisdiction over withdrawal:

> "First, the withdrawal of counsel can lead to significant administrative problems. The trial may need to be postponed, other matters rescheduled, witnesses called off, preparations forestalled, and so on. Society has an interest in expeditious justice and in maintaining an efficient criminal justice process. Providing the court with some supervisory power over counsel's decision to withdraw can help to ensure that these interests are protected. Second, withdrawal frequently puts the lawyer's interests in sharp juxtaposition to the client's. Within reason, the client has a right to legal representation by counsel of choice. It makes sense for the court to make inquiries to ensure that the client is being treated fairly by counsel and does not face undue prejudice if withdrawal is effected."

[34] Earlier, at page 611, the authors addressed this issue of potential prejudice as follows:

> "Withdrawal can have a devastating impact on the client, including a negative impact on the ability to make full answer and defence, so counsel must take all reasonable measures to avoid prejudice to the client."

[35] McKay J. himself acknowledged in *Leask* that withdrawal by counsel can nevertheless fall within the supervisory contempt jurisdiction of the court. At page 326, he said:

> "One can readily visualize situations in which the manner of withdrawing - - either by words or conduct - - will justify a citation for contempt. As well, the circumstances surrounding the withdrawal may be such as to establish a reasonable basis for concluding, for example, that the withdrawal is a ploy to delay or hinder the trial process."

[36] Proulx and Layton make the point, at page 618 of their text, that this affirmation of the contempt power in *Leask* "surely equates with a modest power in the court to require leave to withdraw. After all, how would the refusal to grant leave as envisioned in *C.(D.D.)* be enforced, other than by contempt proceedings?" Further, Proulx and Layton

suggest that the difference between the approach in *Leask* and that in *C.(D.D.)* may not be that significant after all. As I have noted, the Alberta Court of Appeal, in the latter case, essentially said that where the application to withdraw is based on "unhappy differences", the court may be under a "duty" to grant the request. Thus, Proulx and Layton suggest that:

> ". . . Placing restrictions on the court's ability to refuse leave demonstrates that the gulf between the reasoning in *C.(D.D.)* and *Leask* v. *Cronin* is not as gaping as one might suppose at first glance.
>
> . . .
>
> *Leask* v. *Cronin* and *C.(D.D.)* adopt distinct approaches to the question of the court's supervisory power over defence counsel's withdrawal from a criminal case. The former decision does not require that counsel seek leave in the ordinary course. The latter case always requires that counsel do so. But lawyers in British Columbia will typically seek leave as a matter of courtesy, and they may feel obligated to do so where there is some concern that withdrawal may be viewed as improper by the court. By the same token, lawyers in Alberta may be able to rely upon an automatic right to withdraw where the request for leave relates to an irrevocable and substantial breakdown in the client-lawyer relationship. The difference between the two approaches may thus be fairly modest in practice."

[37] In his text, *Legal Ethics* (Cartwright & Sons Ltd., Toronto: 1957), Mark M. Orkin stated, at page 90, that once a lawyer has accepted a retainer to conduct or defend a case

> ". . . he is not at liberty to withdraw except under certain conditions.
>
> <u>As a general rule, a lawyer retained to conduct a lawsuit is under the obligation to carry it to its termination, and may only terminate his retainer on reasonable notice to the client and for good reason.</u>
>
> There will be circumstances, however, where it is a lawyer's duty to repudiate his retainer and withdraw from the conduct of the case. As Lord Wright said in *Myers* v. *Elman*: '<u>A solicitor is an officer of</u>

> the Court and owes a duty to the Court; he is a helper in the administration of justice. He owes a duty to his client, but if he is asked or required by his client to do something which is inconsistent with his duty to the Court, it is for him to point out that he cannot do it, and if necessary, cease to act.' " (emphasis added)

[38] Lord Wright went on to say, in the House of Lords decision in *Myers* v. *Elman*, [1940] A.C. 282, at pp. 318 and 319, that there were "numerous" cases holding that there is a continuing supervisory jurisdiction of the court over counsel appearing before it:

> ". . . The underlying principle is that the Court has a right and a duty to supervise the conduct of its solicitors, and visit with penalties any conduct of a solicitor which is of such a nature as to tend to defeat justice and the very cause in which he is engaged professionally. . . . " (emphasis added)

[39] More recently, in *Dunkley* v. *The Queen*, [1995] 1 All E.R. 279, the Judicial Committee of the Privy Council said this, at para. 9:

> ". . . where counsel appearing for a defendant on a capital charge seeks leave to withdraw during the course of the trial the trial judge should do all he can to persuade him to remain. . . . The trial judge should only permit withdrawal if he is satisfied that the defendant will not suffer significant prejudice thereby. . . . " (emphasis added)

Conclusion on Issue #1

[40] Considering all of the above authorities, in my respectful view, the obligations of defence counsel in a criminal proceeding, when the issue of withdrawal arises, do not arise solely from the existence of a private contract between a client and their counsel. Rather, such counsel has concurrent and independent obligations to the court before whom they are appearing. Those obligations arise out of the status of counsel as an officer of the court and the court's inherent supervisory jurisdiction over the conduct of

such officers in legal proceedings which may affect the administration of justice. Thus, any counsel seeking to withdraw from the representation of a client in the course of a criminal proceeding, or indeed before those proceedings commence, if such counsel has appeared on the record as being generally retained to represent that client, must seek the leave of the court to withdraw. Such applications must be made with reasonable notice to the client. In those circumstances where counsel cites unhappy or irreconcilable differences which go to the core of the solicitor-client relationship and would prevent counsel from continuing to act in good conscience, then the court should allow the withdrawal in almost all but the most exceptional circumstances. Where the reason for the withdrawal is a financial one relating to the retainer, the Court will grant or deny leave based on its assessment of any resulting prejudice to the accused and to the administration of justice.

[41] Given my view of the law in the Yukon Territory respecting the withdrawal of counsel, I am not able to say that Lilles J. exceeded his jurisdiction in exercising his discretion as he did. While I may not have conducted the hearing in exactly the same manner or come to the same conclusion, that is not necessary for me to decide in determining the question of jurisdiction. As stated in *Re: Madden*, cited above, if he erred, he did so in the exercise of his jurisdiction, not in excess of it.

#2 Did Lilles J. otherwise exceed his jurisdiction?

[42] Counsel for Ms. Cunningham argued two further points, which I will attempt to address briefly.

[43] The first is that Lilles J. erred by essentially ordering Legal Aid to fund the accused without determining if he had the financial ability to retain counsel privately. The

short answer to this submission is that Lilles J. did not order Legal Aid to do anything. The issue before him was whether to allow Ms. Cunningham to withdraw and by refusing that application, he effectively ordered her to remain as Mr. Morgan's counsel. While it was clearly evident that Ms. Cunningham was a Legal Aid employee, that fact was not influential in his reasons for judgment. The fact that Mr. Morgan had failed to update his Legal Aid application was "simply a matter of fees", as Lilles J. put it, at para. 26. In that regard, Ms. Cunningham was in no different a position than that of counsel who claims that their client has repudiated the solicitor-client contract by not paying their fees. Further, having determined that the *Leask* line of authority is not the law in the Yukon, Lilles J. continued to exercise his discretion as to whether to allow the withdrawal of Ms. Cunningham in those circumstances. As I have said, he did not exceed his jurisdiction in doing so.

[44] The second additional point by Ms. Cunningham's counsel is that I should give special consideration to the particular circumstances of Legal Aid staff lawyers because, in addition to there being a contract between the lawyer and the client, there is also a contract between the lawyer and their employer. Therefore, when Legal Aid informed Ms. Cunningham that Mr. Morgan was no longer eligible for legal aid, she had an obligation to stop working for Mr. Morgan. Thus, Ms. Cunningham's counsel concludes that it is beyond the jurisdiction of this Court to cause Ms. Cunningham to act in breach of the contract with her employer.

[45] What this argument fails to acknowledge is that when Ms. Cunningham appears before the court on a litigation matter, representing a party, she does so as an officer of the court, regardless of whether she is retained privately, whether she appears on a

legal aid certificate in a “judicare” context, or as a Legal Aid staff lawyer. In other words, it is virtually of no consequence to the court what the basis of her retainer is. Her obligations to the court with respect to the issue of withdrawal arise from her status as an officer of the court and not from her retainer (assuming, of course, that she is appearing pursuant to a general retainer and not a limited one). Therefore, if she is refused leave to withdraw, she is effectively being compelled to continue representing the accused as an officer of the court and not as an employee of Legal Aid. The fact that she is an employee is irrelevant. Should she feel strongly enough and confident enough about the correctness of her decision to withdraw, and fail to appear further on her client’s behalf, then she risks incurring the contempt powers of the court she is before. Looking at it another way, the fact that she is under contract with Legal Aid and has been directed by Legal Aid not to continue acting for Mr. Morgan does not supersede her obligation to the court. In any event, in more practical terms, I expect it would be very unlikely that Legal Aid would take issue with Ms. Cunningham continuing to act for Mr. Morgan pursuant to an order of the court, even though such an order is contrary to the Legal Aid’s direction that she cease to act.

[46] Finally, I would add here that there was no suggestion that Lilles J. committed a breach of natural justice, an abuse of power or any other fundamental error which might constitute an excess of jurisdiction.

[47] Therefore, Lilles J. did not otherwise exceed his jurisdiction in making the order.

CONCLUSION

[48] That portion of Ms. Cunningham’s application which seeks an order of certiorari quashing the order of Lilles J. made May 30, 2006 is dismissed.

[49] That portion of the application which seeks an order that Ms. Cunningham be removed as counsel of record for Mr. Morgan is not properly before me as part of Ms. Cunningham's application for certiorari pursuant to s. 774 of the *Criminal Code*. The scope of review available on certiorari is very limited. If there has been an excess of jurisdiction by the Territorial Court judge, then I may only quash his order and remit the matter back to him for a re-hearing. As he did not exceed his jurisdiction, I am not empowered to make any further order.

_____

GOWER J.