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F I L E D	FEDERAL COURT COUR FÉDÉRALE	D É P O S É	
May 17, 2023 17 mai 2023			
Charlotte Torgerson			
EDM	BETWEEN:	27	

**FEDERAL COURT**

ANDREW ROBERT GIRARD, ALEXANDER GOSSEN, HARRY GARCIA, MARCO AUGUSTO CARREIRA, THOMAS LAMOUREUX, JULIE KERFOOT, PAUL GORDON MACDONALD, DAVID MONTAGNON, CHAD REXER, SEAN BRIAN WILLIAM HOWE, JAMIE TATE LINN, DEVON BROOKS, MICHAEL BROWN, AARON RUHL, ANDREW TIGHE, THOMAS ALEXANDRE JOSEPH POIRIER, MARC DANIEL PARADIS, JOHN ARTHUR GARY GEORGE SKEOCH, RYLEE JON GUDNASON STEVENS, SHELDON BENEDICTSON, TREVOR J HALLETT, BRETT JERRY GAUDRY, DONALD WERSCHLER, MARK BAKER, DARRYL REID, LANCE KENYON, JOHN KARKARIS, ORRIE MYLES ANDERSON, CHRISTOPHER DANIEL ANDREWS, CAMERON JOSEPH EDWARDS, DEREK ESKOWICH, BRENT TIMOTHY MARTIN, PAUL DEVARENNE, BRODIE MELNYCHUK, DANIEL PURPUR, RYAN HRYNIW, ADAM HELFRICH, MARTIN JOHN GOGELA, EJAZ ALEKOZAI, JEREMY STEPHENSON, BRYAN MATTHEW MCHUGH, RYAN EDGE, NOAH STEELE, TULLY HARTL, SPENCER STEVENS, ANDREW NJUME, MATTHEW HICKS, LISA SCHMIDTKE, CHRISTOPHER LOCKE, JEFFERY DEVINE, DAWOOD K HAIDER, JARED SCOTT MAYHEW, TYRRELL HIATT, SHAWN BASKETTE, GEORGE COSTA, BRIAN DESROSIERS, KYLE WILLIAM ROSS PILON, KYLE DANIEL MICHAEL KORTKO, SHANE THOMAS STONE, JESSE RANDALL BLOOM, COLIN STAN PORTICE, RYAN CHARLES THIESSEN, TIMOTHY HAY, MATTHEW BLANC, RUSSELL THOMAS HENDERSON, STEVEN KOENIG, THOMAS MARTIN SAVORN, JAMES WELCH, CINDY STEVENSON, JON MCALLISTER, MICHAEL DAVID SERBEN, JACK EBIN THOMAS SAVORN, CHARLES MILLER, MILAN MITIC, ROBERT DESROSIERS, MATTHEW CARTER-BARR, WILLIAM CHESTER JOSLIN, COLBY COCHRANE, TRAVIS SCHALLOCK, ANDREW MULHERIN-CARON, CHRISTIAN THOMAS JONES, GEORGE ZINDROS, JEFFREY WYCHOPEN, GLEN SAINAS, RYAN DONER, KYLE WICKSTROM, SLATE PODAIMA, COLEMAN MITCHELL, ERNEST GEORGESON, DALLON DAVID EDMONDSON, AARON SWAN, SARA LOVEGROVE, SAMUEL LEGERE, CLAUDIO CARACCILO, RACINE MARIE STONE, STEVE STOPA, CLAUDIA LAPOLLA, KELLY ROBERT HIGGINS, TED AMEAR KIRYAKOS, ALAN TODD RUDDERHAM, SAMANTHA OLSEN, CHANDRA MARIE GILLIES, LANCE LESLIE WILLIAMS, LIONEL BROWN RICHARDO, JOHN THOMAS CRODEN, CHARLES ANTHONY DICKSON, MICHAEL CASTILLO, MICHAEL CERULLI, KARIM LOWEN, SHAWN SILVARI, JUSTIN DADINA, MARCEL LEONARD BEDARD, DWAYNE SOBERS, JESSE ALLISON, NICOLAS LICOIS, CLAYTON PAPP, DOUGLAS BRYAN, DEREK JAMES CHARLES WATERHOUSE, JAMIE CAMERON HALL, DAYLE JONES, KENTON HILDEBRAND, DEVANANTH VICTOR SELVAM, MATTHEW BRITTON, JESSICA ERIN ASLIN, ALIE KRAAYENBRINK, NANCY JEAN WARD, ERIC BEAULIEU, REJEAN DONALD JOSEPH SAWCHUK, DARYL CHAMBERS, RAPHAEL DESCHENES, JAMES LEE KERR, EUGENE JEFFREY MACKAY, BRETT KYLE HUNT, DERRICK WOODALL, TROY STRANDBERG, BILLY NEUMANN, RONALD MARK KELLY, SUZANNE MARIE BATTICK, NATHAN HUGH BOHMER, TYLER BYRNES, ROBERT STUVE, JASON

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Plaintiffs

-and-

THE MINISTER OF TRANSPORT, HER MAJESTY THE QUEEN IN RIGHT OF CANADA, ATTORNEY GENERAL OF CANADA, DIRECTOR GENERAL RAIL SAFETY, and CANADIAN NATIONAL RAILWAY

Defendants

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**MOTION RECORD**

**(Motion for removal of solicitor of record under Rule 125)**

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**Grey Wowk Spencer LLP**

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Cold Lake, Alberta T9M 1P3  
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Telephone: (780)594-0299

Attention: Leighton BU Grey, KC  
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TO: **Federal Court – Edmonton**  
**Via e-filing**  
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10060 Jasper Avenue  
Tower 1, Suite 530  
Edmonton, Alberta T5J 3 R8

AND TO: **Borden Ladner Gervais**  
**Via email:** gpratte@blg.com  
Bay Adelaide Centre- East Tower  
22 Adelaide Street West  
Toronto, Ontario M5H 4E3

Attention: Mr. Guy Pratte  
Counsel for Canadian National Railway

AND TO: **Department of Justice Canada/Government of Canada**  
**Via email:** daniel.vassberg@justice.gc.ca  
EPCOR Tower 300, 10423 101 Street  
Edmonton, AB  
T5H 0E7

Attention: Mr. Daniel Vassberg  
Counsel for the Crown Defendants

AND TO: **JOHN KARKARIS**  
712 Regent Avenue  
Winnipeg, MB R2C 1S4

AND TO: **SHAWN SILVARI**  
PO Box 283  
New Bothwell, MB R0A 1C0

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**FEDERAL COURT**

BETWEEN:

ANDREW ROBERT GIRARD, ALEXANDER GOSSEN, HARRY GARCIA, MARCO AUGUSTO CARREIRA, THOMAS LAMOUREUX, JULIE KERFOOT, PAUL GORDON MACDONALD, DAVID MONTAGNON, CHAD REXER, SEAN BRIAN WILLIAM HOWE, JAMIE TATE LINN, DEVON BROOKS, MICHAEL BROWN, AARON RUHL, ANDREW TIGHE, THOMAS ALEXANDRE JOSEPH POIRIER, MARC DANIEL PARADIS, JOHN ARTHUR GARY GEORGE SKEOCH, RYLEE JON GUDNASON STEVENS, SHELDON BENEDICTSON, TREVOR J HALLETT, BRETT JERRY GAUDRY, DONALD WERSCHLER, MARK BAKER, DARRYL REID, LANCE KENYON, JOHN KARKARIS, ORRIE MYLES ANDERSON, CHRISTOPHER DANIEL ANDREWS, CAMERON JOSEPH EDWARDS, DEREK ESKOWICH, BRENT TIMOTHY MARTIN, PAUL DEVARENNE, BRODIE MELNYCHUK, DANIEL PURPUR, RYAN HRYNIW, ADAM HELFRICH, MARTIN JOHN GOGELA, EJAZ ALEKOZAI, JEREMY STEPHENSON, BRYAN MATTHEW MCHUGH, RYAN EDGE, NOAH STEELE, TULLY HARTL, SPENCER STEVENS, ANDREW NJUME, MATTHEW HICKS, LISA SCHMIDTKE, CHRISTOPHER LOCKE, JEFFERY DEVINE, DAWOOD K HAIDER, JARED SCOTT MAYHEW, TYRRELL HIATT, SHAWN BASKETTE, GEORGE COSTA, BRIAN DESROSIERS, KYLE WILLIAM ROSS PILON, KYLE DANIEL MICHAEL KORTKO, SHANE THOMAS STONE, JESSE RANDALL BLOOM, COLIN STAN PORTICE, RYAN CHARLES THIESSEN, TIMOTHY HAY, MATTHEW BLANC, RUSSELL THOMAS HENDERSON, STEVEN KOENIG, THOMAS MARTIN SAVORN, JAMES WELCH, CINDY STEVENSON, JON MCALLISTER, MICHAEL DAVID SERBEN, JACK EBIN THOMAS SAVORN, CHARLES MILLER, MILAN MITIC, ROBERT DESROSIERS, MATTHEW CARTER-BARR, WILLIAM CHESTER JOSLIN, COLBY COCHRANE, TRAVIS SCHALLOCK, ANDREW MULHERIN-CARON, CHRISTIAN THOMAS JONES, GEORGE ZINDROS, JEFFREY WYCHOPEN, GLEN SAINAS, RYAN DONER, KYLE WICKSTROM, SLATE PODAIMA, COLEMAN MITCHELL, ERNEST GEORGESON, DALLON DAVID EDMONDSON, AARON SWAN, SARA LOVEGROVE, SAMUEL LEGERE, CLAUDIO CARACCIOLO, RACINE MARIE STONE, STEVE STOPA, CLAUDIA LAPOLLA, KELLY ROBERT HIGGINS, TED AMEAR KIRYAKOS, ALAN TODD RUDDERHAM, SAMANTHA OLSEN, CHANDRA MARIE GILLIES, LANCE LESLIE WILLIAMS, LIONEL BROWN RICHARDO, JOHN THOMAS CRODEN, CHARLES ANTHONY DICKSON, MICHAEL CASTILLO, MICHAEL CERULLI, KARIM LOWEN, SHAWN SILVARI, JUSTIN DADINA, MARCEL LEONARD BEDARD, DWAYNE SOBERS, JESSE ALLISON, NICOLAS LICOIS, CLAYTON PAPP, DOUGLAS BRYAN, DEREK JAMES CHARLES WATERHOUSE, JAMIE CAMERON HALL, DAYLE JONES, KENTON HILDEBRAND, DEVANANTH VICTOR SELVAM, MATTHEW BRITTON, JESSICA ERIN ASLIN, ALIE KRAAYENBRINK, NANCY JEAN WARD, ERIC BEAULIEU, REJEAN DONALD JOSEPH SAWCHUK, DARYL CHAMBERS, RAPHAEL DESCHENES, JAMES LEE KERR, EUGENE JEFFREY MACKAY, BRETT KYLE HUNT, DERRICK WOODALL, TROY STRANDBERG, BILLY NEUMANN, RONALD MARK KELLY, SUZANNE MARIE

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Plaintiffs

-and-

THE MINISTER OF TRANSPORT, HER MAJESTY THE QUEEN IN RIGHT OF CANADA, ATTORNEY GENERAL OF CANADA, DIRECTOR GENERAL RAIL SAFETY, and CANADIAN NATIONAL RAILWAY

Defendants

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**NOTICE OF MOTION**  
(Motion for removal of solicitor of record under Rule 125)

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**TAKE NOTICE** that the solicitors for the Plaintiffs, John Karkaris and Shawn Silvari, will make a motion to the court in writing under Rule 369 of the *Federal Courts Rules*, SOR/98-106.

**THE MOTION IS FOR:**

1. An Order removing Grey Wowk Spencer LLP (“GWS”) as solicitors of record for the Plaintiffs John Karkaris and Shawn Silvari; and
2. Such further and other relief as this Honourable Court may deem appropriate in the circumstances.

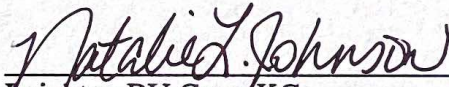
**THE GROUNDS FOR THIS MOTION ARE:**

3. GWS is the solicitor of record for the Plaintiffs in this action, Court File T-553-22 (the “**Action**”).
4. When GWS was retained by the Plaintiffs, each Plaintiff provided their email addresses, residential addresses and phone numbers to GWS prior to the commencement of the Action (the “**Contact Information**”).
5. GWS advised the Plaintiffs to ensure their Contact Information was accurate at all times.
6. GWS has obtained instructions from all but two of the Plaintiffs: John Karkaris and Shawn Silvari (the “**Remaining Plaintiffs**”).
7. GWS has made numerous attempts to receive instructions from the Remaining Plaintiffs through the Contact Information via email, telephone calls and regular mail to their last known addresses. Despite repeated attempts to obtain instructions from the Remaining Plaintiffs, the Remaining Plaintiffs have failed to respond to GWS.
8. GWS pleads and relies on:
  - a. Rules 125 and 369(1) of the *Federal Courts Rules*, SOR/98-106.
  - b. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- 9. The affidavit of Megan Gurski sworn, to be filed.
- 10. The affidavit of personal service from the process server confirming service upon John Karkaris and Shawn Silvari, to be filed.

Dated this 30<sup>th</sup> day March, 2023.

for   
 Leighton BU Grey, KC  
**Grey Wowk Spencer LLP**  
 5110 – 51 Avenue, PO Box 1028  
 Cold Lake, AB T9M 1P3  
 Email: [lgrey@gwsllp.ca](mailto:lgrey@gwsllp.ca)

**TO: Federal Court – Edmonton**  
**Via e-filing**  
 Rice Howard Place  
 10060 Jasper Avenue  
 Tower 1, Suite 530  
 Edmonton, Alberta T5J 3 R8

**AND TO: Borden Ladner Gervais**  
**Via email: gpratte@blg.com**  
 Bay Adelaide Centre- East Tower  
 22 Adelaide Street West  
 Toronto, Ontario M5H 4E3

**Attention: Mr. Guy Pratte**  
**Counsel for Canadian National Railway**



AND TO: **Department of Justice Canada/Government of Canada**  
**Via email:** daniel.vassberg@justice.gc.ca  
EPCOR Tower 300, 10423 101 Street  
Edmonton, AB  
T5H 0E7

Attention: Mr. Daniel Vassberg  
Counsel for the Crown Defendants

AND TO: **JOHN KARKARIS**  
**Via personal service**  
712 Regent Avenue  
Winnipeg, MB R2C 1S4

AND TO: **SHAWN SILVARI**  
**Via personal service**  
PO Box 283  
New Bothwell, MB R0A 1C0

**FORM 80A- Rule 80****AFFIDAVIT***Court File No. T-553-22***FEDERAL COURT**

BETWEEN:

ANDREW ROBERT GIRARD, ALEXANDER GOSSEN, HARRY GARCIA, MARCO AUGUSTO CARREIRA, THOMAS LAMOUREUX, JULIE KERFOOT, PAUL GORDON MACDONALD, DAVID MONTAGNON, CHAD REXER, SEAN BRIAN WILLIAM HOWE, JAMIE TATE LINN, DEVON BROOKS, MICHAEL BROWN, AARON RUHL, ANDREW TIGHE, THOMAS ALEXANDRE JOSEPH POIRIER, MARC DANIEL PARADIS, JOHN ARTHUR GARY GEORGE SKEOCH, RYLEE JON GUDNASON STEVENS, SHELDON BENEDICTSON, TREVOR J HALLETT, BRETT JERRY GAUDRY, DON WERSCHLER, MARK BAKER, DARRYL REID, LANCE KENYON, JOHN KARKARIS, ORRIE MYLES ANDERSON, CHRISTOPHER DANIELS ANDREWS, CAMERON JOSEPH EDWARDS, DEREK ESKOWICH, BRENT TIMOTHY MARTIN, PAUL DEVARENNE, BRODIE MELNYCHUK, DANIEL PURPUR, RYAN HRYNIW, ADAM HELFRINCH, MARTIN JOHN GOGELA, EJAZ ALEKOZAI, JEREMY STEPHENSON, BRYAN MATTHEW MCHUGH, RYAN EDGE, NOAH STEELE, TULLY HARTL, SPENCER STEVENS, ANDREW NJUME, MATTHEW HICKS, LISA SCHMIDTKE, CHRISTOPHER LOCKE, JEFFERY DEVINE, DAWOOD K HAIDER, JARED SCOTT MAYHEW, TYRRELL HIATT, SHAWN BASKETTE, GEORGE COSTA, BRIAN DESROSIERS, KYLE WILLIAM ROSS PILON, KYLE DANIEL MICHAEL KORTKO, SHANE THOMAS STONE, JESSE RANDALL BLOOM, COLIN STAN PORTICE, RYAN CHARLES THIESSEN, TIMOTHY HAY, MATTHEW BLANC, RUSSELL THOMAS HENDERSON, STEVEN KOENIG, THOMAS MARTIN SAVORN, JAMES WELCH, CINDY STEVENSON, JON MCALLISTER, MICHAEL DAVID SERBEN, JACK EBIN THOMAS SAVORN, CHARLES MILLER, MILAN MITIC, ROBERT DESROSIERS, MATTHEW CARTER-BARR, WILLIAM CHESTER JOSLIN, COLBY COCHRANE, TRAVIS SCHALLOCK, ANDREW MULHERIN-CARON, CHRISTIAN THOMAS JONES, GEORGE ZINDROS, JEFFREY WYCHOPEN, GLEN SAINAS, RYAN DONER, KYLE WICKSTROM, SLATE PODAIMA, COLEMAN MITCHELL, ERNEST GEORGESON, DALLON DAVID EDMONDSON, AARON SWAN, SARA LOVEGROVE, SAMUEL LEGERE, CLAUDIO CARACCILO, RACINE MARIE STONE, STEVE STOPA, CLAUDIA LAPOLLA, KELLY ROBERT HIGGINS, TED AMEAR KIRYAKOS, ALAN TODD RUDDERHAM, SAMANTHA OLSEN, CHANDRA MARIE GILLIES, LANCE LESLIE WILLIAMS, LIONEL BROWN RICHARDO, JOHN THOMAS CRODEN, CHARLES ANTHONY DICKSON, MICHAEL CASTILLO, MICHAEL CERULLI, KARIM LOWEN, SHAWN SILVARI, JUSTIN DADINA, MARCEL LEONARD BEDARD, DWAYNE SOBERS, JESSE ALLISON, NICOLAS LICOIS, CLAYTON PAPP, DOUGLAS BRYAN, DEREK JAMES CHARLES WATERHOUSE, JAMIE CAMERON HALL, DAYLE JONES, KENTON HILDEBRAND, DEVANANTH VICTOR SELVAM, MATTHEW BRITTON, JESSICA ERIN ASLIN, ALIE KRAAYENBRINK, NANCY JEAN WARD, ERIC BEAULIEU, REJEAN DONALD JOSEPH

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PLAINTIFFS

-and-

THE MINISTER OF TRANSPORT, HIS MAJESTY THE KING IN RIGHT OF CANADA,  
ATTORNEY GENERAL OF CANADA, DIRECTOR GENERAL RAIL SAFETY, and  
CANADIAN NATIONAL RAILWAY

DEFENDANTS

**AFFIDAVIT OF MEGAN GURSKI**  
**(Motion for removal of solicitor of record under Rule 125)**  
**Sworn on March 30, 2023**

I, MEGAN GURSKI, legal assistant, of the City of Cold Lake, in the Province of Alberta, SWEAR (or AFFIRM) THAT:

1. I am a legal assistant of Grey Wowk Spencer LLP (“GWS”). I have personal knowledge of the matters deposed herein. Where I do not have personal knowledge, I have stated the source of my information and believe it to be true.
2. GWS is the solicitor of record for the Plaintiffs for Court File T-553-22 (the “**Action**”).
3. The Defendant, Canadian National Railway, (“CN”) brought a motion to strike the Action on jurisdictional grounds (the “**Motion**”). The parties agreed to a consent Order dated February 13, 2023, which Order set out a timetable for the outstanding steps in the litigation leading up to the hearing of the Motion. The Motion is scheduled to be heard on June 13, 14, 15, and 16, 2023.
4. Each Plaintiff provided their email addresses, residential addresses and phone numbers to GWS prior to the commencement of the Action (the “**Contact Information**”). GWS advised the Plaintiffs to ensure their Contact Information was accurate at all times.
5. To facilitate the administration of the Action, the Plaintiffs were organized into a group. Generally, GWS communicated with the Plaintiff, Christian Jones, who acted on behalf of the other Plaintiffs (the “**Group Leader**”). I am advised by the Group Leader and believe that he communicated with all Plaintiffs via email to the email addresses the Plaintiffs provided to the Group Leader and to GWS.
6. On March 9, 2023, GWS delivered a letter to the defendants stating that GWS had received instructions from the majority of the Plaintiffs to discontinue the Action. GWS also advised the defendants that GWS was unable to obtain instructions from some Plaintiffs (the “**Remaining Plaintiffs**”). Currently, there are two Remaining Plaintiffs.
7. GWS has attempted to obtain instructions from the Remaining Plaintiffs using the Contact Information. I am informed by Natalie Johnson, lawyer with GWS, and believe that she has attempted to obtain instructions from the Remaining Plaintiffs as detailed below. I have also attempted to obtain instructions. Despite repeated attempts, GWS has not received a response from the Remaining Plaintiffs:
  - a. Shawn Silvari:
    - i. 2023-02-17: email from the Group Leader seeking response to legal advice of GWS by 2023-03-03;

- ii. 2023-02-27: reminder email from the Group Leader seeking response to legal advice of GWS by 2023-03-03;
- iii. 2023-03-07: telephone call from me to Shawn Silvari; I left a voicemail message;
- iv. 2023-03-07: email directly from GWS to Shawn Silvari;
- v. 2023-03-08: email directly from GWS to Shawn Silvari;
- vi. 2023-03-27: email directly from me on behalf of GWS to Shawn Silvari;
- vii. 2023-03-27: voice mail message from me on behalf of GWS to Shawn Silvari;
- viii. 2023-03-27: voice mail message from Natalie Johnson on behalf of GWS to Shawn Silvari;
- ix. 2023-03-28: voice mail message from Natalie Johnson on behalf of GWS to Shawn Silvari;
- x. 2023-03-28: email directly from me on behalf of GWS to Shawn Silvari; and
- xi. 2023-03-28: email from Natalie Johnson on behalf of GWS to Shawn Silvari.

b. John Karkaris:

- i. 2023-02-17: email from the Group Leader seeking response to legal advice of GWS by 2023-03-03;
- ii. 2023-02-27: reminder email from the Group Leader seeking response to legal advice of GWS by 2023-03-03;
- iii. 2023-03-07: telephone call from me to John Karkaris; I left a voicemail message;
- iv. 2023-03-07: email directly from GWS to John Karkaris;
- v. 2023-03-08: email directly from GWS to John Karkaris;
- vi. 2023-03-27: email directly from me on behalf of GWS to John Karkaris;
- vii. 2023-03-27: voice mail message from me on behalf of GWS to John Karkaris;
- viii. 2023-03-27: voice mail message from Natalie Johnson on behalf of GWS to John Karkaris;
- ix. 2023-03-28: voice mail message from Natalie Johnson on behalf of GWS to John Karkaris;
- x. 2023-03-28: email directly from me on behalf of GWS to John Karkaris; and
- xi. 2023-03-28: email from Natalie Johnson on behalf of GWS to Shawn Silvari.

8. I am advised by Natalie Johnson and believe that on March 28, 2023, she emailed and mailed a letter to the Remaining Plaintiffs via Express Post with tracking numbers to their last known address. Attached as Exhibit "A" to my affidavit is a copy of the Canada Post receipt and tracking information. In that letter Natalie Johnson advised the Remaining

Plaintiffs that due to their failure to respond to GWS, their failure to respond to the legal advice of GWS and their failure to provide GWS instructions, GWS was seeking a court order to be removed as solicitors of record.

- 9. On March 30, 2023, I instructed a process server to personally serve notice of this motion upon the Remaining Plaintiffs at their last known address.
- 10. I make this affidavit in support of GWS' motion pursuant to Rule 125 of the *Federal Courts Rules* seeking an order from the court to be removed as solicitor of record in respect of the Remaining Plaintiffs.

SWORN (OR AFFIRMED) BEFORE ME at )  
 the City of Cold Lake, in the Province of )  
 Alberta, on March 30, 2023. )

Sharon Bishop  
 Commissioner for Oaths in and for the  
 Province of Alberta

MEGAN GURSKI

SHARON BISHOP  
 COMMISSION EXPIRES  
 NOVEMBER 20, ...2027

Canada Post/Postes Canada  
 SHOPPERS DRUG MART #2377  
 5970 MULLEN WAY NW  
 EDMONTON, AB T6R 0S0  
 GST/TPS#105152433

2023/03/28  
 CC104014

16:00:33  
 W/G 2

GENERAL

G/S	3 @ \$16.15	\$48.45
PP XP REG SMALL/PP XP REG PETIT		
SUBTL/SOUS-TOTAL		\$48.45
GST/TPS		\$2.42
TOTAL		\$50.87
MasterCard		\$50.87

Receipt required for all eligible returns.  
 Reçu requis pour tous les retours  
 éligibles.

Tell us how we did today. Complete the  
 survey at canadapostsurvey.ca or text  
 survey to 55555 and enter to WIN one of  
 two \$250 Prepaid Visa Cards. (Standard  
 message and data rates would apply for  
 text message.)

Parlez-nous de votre expérience  
 aujourd'hui. Répondez au sondage sur le  
 site sondagepostescanada.ca ou envoyez un  
 message texte à sondage au 55555 et courez  
 la chance de GAGNER l'une des deux cartes  
 Visa prépayées de 250\$. (Les frais  
 standard pour les messages textes et les  
 données s'appliquent.)



2124-10104014-2-1243957-2

WWW.CANADAPOST.CA/WWW.POSTESCANADA.CA

This is Exhibit "A" referred to in the  
 Affidavit of

..... Megan Gurski .....

Sworn before me this 30 day

of March A.D., 2023

..... Sharon Bishop .....

A Commissioner for Oaths in and for the  
 Province of Alberta

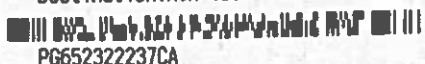
SHARON BISHOP  
 COMMISSION EXPIRES  
 NOVEMBER 20, 2024

Canada Post/Postes Canada  
 SHOPPERS DRUG MART #2377  
 5970 MULLEN WAY NW  
 EDMONTON, AB T6R 0S0  
 GST/TPS#105152433

2023/03/28 16:05:39 GENERAL  
 CC104014 W/G 2

N 1 @ \$0.00 \$0.00  
 Item Dropoff/Dépôt d'articles

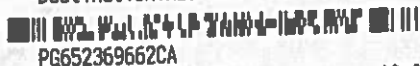
Destination:ROA 1C0



N \$0.00  
 Originating PP - Xp/PP d'origine - Xpos

N 1 @ \$0.00 \$0.00  
 Item Dropoff/Dépôt d'articles

Destination:R2C 1S4



N \$0.00  
 Originating PP - Xp/PP d'origine - Xpos

N 1 @ \$0.00 \$0.00  
 Item Dropoff/Dépôt d'articles

Destination:TOC 1C0



N \$0.00  
 Originating PP - Xp/PP d'origine - Xpos

SUBTL/SOUS-TOTAL \$0.00  
 Total Tax/Taxe Totale \$0.00  
 TOTAL \$0.00

Tell us how we did today. Complete the survey at canadapostsurvey.ca or text survey to 55555 and enter to WIN one of two \$250 Prepaid Visa Cards. (Standard message and data rates would apply for text message.)  
 Parlez-nous de votre expérience aujourd'hui. Répondez au sondage sur le site sondagepostescanada.ca ou envoyez un message texte à sondage au 55555 et courez la chance de GAGNER l'une des deux cartes Visa prépayées de 250\$. (Les frais standard pour les messages textes et les données s'appliquent.)



2124-10104014-2-1243997-1



**FEDERAL COURT**

BETWEEN:

ANDREW ROBERT GIRARD, ALEXANDER GOSSEN, HARRY GARCIA, MARCO AUGUSTO CARREIRA, THOMAS LAMOUREUX, JULIE KERFOOT, PAUL GORDON MACDONALD, DAVID MONTAGNON, CHAD REXER, SEAN BRIAN WILLIAM HOWE, JAMIE TATE LINN, DEVON BROOKS, MICHAEL BROWN, AARON RUHL, ANDREW TIGHE, THOMAS ALEXANDRE JOSEPH POIRIER, MARC DANIEL PARADIS, JOHN ARTHUR GARY GEORGE SKEOCH, RYLEE JON GUDNASON STEVENS, SHELDON BENEDICTSON, TREVOR J HALLETT, BRETT JERRY GAUDRY, DONALD WERSCHLER, MARK BAKER, DARRYL REID, LANCE KENYON, JOHN KARKARIS, ORRIE MYLES ANDERSON, CHRISTOPHER DANIEL ANDREWS, CAMERON JOSEPH EDWARDS, DEREK ESKOWICH, BRENT TIMOTHY MARTIN, PAUL DEVARENNE, BRODIE MELNYCHUK, DANIEL PURPUR, RYAN HRYNIW, ADAM HELFRICH, MARTIN JOHN GOGELA, EJAZ ALEKOZAI, JEREMY STEPHENSON, BRYAN MATTHEW MCHUGH, RYAN EDGE, NOAH STEELE, TULLY HARTL, SPENCER STEVENS, ANDREW NJUME, MATTHEW HICKS, LISA SCHMIDTKE, CHRISTOPHER LOCKE, JEFFERY DEVINE, DAWOOD K HAIDER, JARED SCOTT MAYHEW, TYRRELL HIATT, SHAWN BASKETTE, GEORGE COSTA, BRIAN DESROSIERS, KYLE WILLIAM ROSS PILON, KYLE DANIEL MICHAEL KORTKO, SHANE THOMAS STONE, JESSE RANDALL BLOOM, COLIN STAN PORTICE, RYAN CHARLES THIESSEN, TIMOTHY HAY, MATTHEW BLANC, RUSSELL THOMAS HENDERSON, STEVEN KOENIG, THOMAS MARTIN SAVORN, JAMES WELCH, CINDY STEVENSON, JON MCALLISTER, MICHAEL DAVID SERBEN, JACK EBIN THOMAS SAVORN, CHARLES MILLER, MILAN MITIC, ROBERT DESROSIERS, MATTHEW CARTER-BARR, WILLIAM CHESTER JOSLIN, COLBY COCHRANE, TRAVIS SCHALLOCK, ANDREW MULHERIN-CARON, CHRISTIAN THOMAS JONES, GEORGE ZINDROS, JEFFREY WYCHOPEN, GLEN SAINAS, RYAN DONER, KYLE WICKSTROM, SLATE PODAIMA, COLEMAN MITCHELL, ERNEST GEORGESON, DALLON DAVID EDMONDSON, AARON SWAN, SARA LOVEGROVE, SAMUEL LEGERE, CLAUDIO CARACCILO, RACINE MARIE STONE, STEVE STOPA, CLAUDIA LAPOLLA, KELLY ROBERT HIGGINS, TED AMEAR KIRYAKOS, ALAN TODD RUDDERHAM, SAMANTHA OLSEN, CHANDRA MARIE GILLIES, LANCE LESLIE WILLIAMS, LIONEL BROWN RICHARDO, JOHN THOMAS CRODEN, CHARLES ANTHONY DICKSON, MICHAEL CASTILLO, MICHAEL CERULLI, KARIM LOWEN, SHAWN SILVARI, JUSTIN DADINA, MARCEL LEONARD BEDARD, DWAYNE SOBERS, JESSE ALLISON, NICOLAS LICOIS, CLAYTON PAPP, DOUGLAS BRYAN, DEREK JAMES CHARLES WATERHOUSE, JAMIE CAMERON HALL, DAYLE JONES, KENTON HILDEBRAND, DEVANANTH VICTOR SELVAM, MATTHEW BRITTON, JESSICA ERIN ASLIN, ALIE KRAAYENBRINK, NANCY JEAN WARD, ERIC BEAULIEU, REJEAN DONALD JOSEPH SAWCHUK, DARYL CHAMBERS, RAPHAEL DESCHENES, JAMES LEE KERR, EUGENE JEFFREY MACKAY, BRETT KYLE HUNT, DERRICK WOODALL, TROY STRANDBERG, BILLY NEUMANN, RONALD MARK KELLY, SUZANNE MARIE

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Plaintiffs

-and-

THE MINISTER OF TRANSPORT, HER MAJESTY THE QUEEN IN RIGHT OF CANADA, ATTORNEY GENERAL OF CANADA, DIRECTOR GENERAL RAIL SAFETY, and CANADIAN NATIONAL RAILWAY

Defendants

---

**AFFIDAVIT OF SERVICE**

---

I, Tammy Bruneau-Beaton, of the City of Winnipeg, in the Province of Manitoba, Process Server

AFFIRM AND SAY THAT:

1. I did on Saturday, April 8<sup>th</sup>, 2023, at 22:29 personally serve JOHN KARKARIS (the "Recipient") with the following documents in this action:

- a. NOTICE OF MOTION attached as Exhibit "A"
- b. AFFIDAVIT OF MEGAN GURSKI sworn March 30, 2023 attached as Exhibit "B"
- c. WRITTEN REPRESENTATIONS attached as Exhibit "C"
- d. BOOK OF AUTHORITIES attached as Exhibit "D"
- e. ORDER attached as Exhibit "E"

by handing true copies thereof to, and leaving them with JOHN KARKARIS at the Mechanical Car Shop, CNR Symington Yard, 821 Lagimodiere Boulevard, Winnipeg, Manitoba.

2. My means of knowledge of the identity of the Recipient are as follows:

- a. That at the time of service JOHN KARKARIS was fetched for me by a co-worker.
- b. That at the time of service JOHN KARKARIS verbally confirmed his identity, and verbally agreed that he is a named Plaintiff in this matter, and that he is the appropriate party to be so served.
- c. That at the time of service JOHN KARKARIS offered no documentation to further confirm his identity, despite my request.

3. To effect service I necessarily travelled 13.8 kilometres.

Affirmed before me in the City )  
of Winnipeg, in the Province )  
of Manitoba, this 12 day )  
of April 2023. )

  
Tammy Bruneau-Beaton



Montague Aldous  
A Commissioner for Oaths  
In and for the Province of Manitoba  
My appointment expires Feb 10, 2025

This is Exhibit " A " referred to in the  
Affidavit of  
JAMMY BRUNEAU-BEAUD

20

Sworn before me this 12 day  
of APRIL A.D. 20 23



Court File No. T-553-22

**MONTAGUE ALDOUS**  
**A COMMISSIONER FOR OATHS**  
IN AND FOR THE PROVINCE OF MANITOBA  
MY COMMISSION EXPIRES FEB 10 / 25

**FEDERAL COURT**

BETWEEN:

ANDREW ROBERT GIRARD, ALEXANDER GOSSEN, HARRY GARCIA, MARCO AUGUSTO CARREIRA, THOMAS LAMOUREUX, JULIE KERFOOT, PAUL GORDON MACDONALD, DAVID MONTAGNON, CHAD REXER, SEAN BRIAN WILLIAM HOWE, JAMIE TATE LINN, DEVON BROOKS, MICHAEL BROWN, AARON RUHL, ANDREW TIGHE, THOMAS ALEXANDRE JOSEPH POIRIER, MARC DANIEL PARADIS, JOHN ARTHUR GARY GEORGE SKEOCH, RYLEE JON GUDNASON STEVENS, SHELDON BENEDICTSON, TREVOR J HALLETT, BRETT JERRY GAUDRY, DONALD WERSCHLER, MARK BAKER, DARRYL REID, LANCE KENYON, JOHN KARKARIS, ORRIE MYLES ANDERSON, CHRISTOPHER DANIEL ANDREWS, CAMERON JOSEPH EDWARDS, DEREK ESKOWICH, BRENT TIMOTHY MARTIN, PAUL DEVARENNE, BRODIE MELNYCHUK, DANIEL PURPUR, RYAN HRYNIW, ADAM HELFRICH, MARTIN JOHN GOGELA, EJAZ ALEKOZAI, JEREMY STEPHENSON, BRYAN MATTHEW MCHUGH, RYAN EDGE, NOAH STEELE, TULLY HARTL, SPENCER STEVENS, ANDREW NJUME, MATTHEW HICKS, LISA SCHMIDTKE, CHRISTOPHER LOCKE, JEFFERY DEVINE, DAWOOD K HAIDER, JARED SCOTT MAYHEW, TYRRELL HIATT, SHAWN BASKETTE, GEORGE COSTA, BRIAN DESROSIERS, KYLE WILLIAM ROSS PILON, KYLE DANIEL MICHAEL KORTKO, SHANE THOMAS STONE, JESSE RANDALL BLOOM, COLIN STAN PORTICE, RYAN CHARLES THIESSEN, TIMOTHY HAY, MATTHEW BLANC, RUSSELL THOMAS HENDERSON, STEVEN KOENIG, THOMAS MARTIN SAVORN, JAMES WELCH, CINDY STEVENSON, JON MCALLISTER, MICHAEL DAVID SERBEN, JACK EBIN THOMAS SAVORN, CHARLES MILLER, MILAN MITIC, ROBERT DESROSIERS, MATTHEW CARTER-BARR, WILLIAM CHESTER JOSLIN, COLBY COCHRANE, TRAVIS SCHALLOCK, ANDREW MULHERIN-CARON, CHRISTIAN THOMAS JONES, GEORGE ZINDROS, JEFFREY WYCHOPEN, GLEN SAINAS, RYAN DONER, KYLE WICKSTROM, SLATE PODAIMA, COLEMAN MITCHELL, ERNEST GEORGESON, DALLON DAVID EDMONDSON, AARON SWAN, SARA LOVEGROVE, SAMUEL LEGERE, CLAUDIO CARACCILO, RACINE MARIE STONE, STEVE STOPA, CLAUDIA LAPOLLA, KELLY ROBERT HIGGINS, TED AMEAR KIRYAKOS, ALAN TODD RUDDERHAM, SAMANTHA OLSEN, CHANDRA MARIE GILLIES, LANCE LESLIE WILLIAMS, LIONEL BROWN RICHARDO, JOHN THOMAS CRODEN, CHARLES ANTHONY DICKSON, MICHAEL CASTILLO, MICHAEL CERULLI, KARIM LOWEN, SHAWN SILVARI, JUSTIN DADINA, MARCEL LEONARD BEDARD, DWAYNE SOBERS, JESSE ALLISON, NICOLAS LICOIS, CLAYTON PAPP, DOUGLAS BRYAN, DEREK JAMES CHARLES WATERHOUSE, JAMIE CAMERON HALL, DAYLE JONES, KENTON HILDEBRAND, DEVANANTH VICTOR SELVAM, MATTHEW BRITTON, JESSICA ERIN ASLIN, ALIE KRAAYENBRINK, NANCY JEAN WARD, ERIC BEAULIEU, REJEAN DONALD JOSEPH SAWCHUK, DARYL CHAMBERS, RAPHAEL DESCHENES, JAMES LEE KERR, EUGENE JEFFREY MACKAY, BRETT KYLE HUNT, DERRICK WOODALL, TROY STRANDBERG, BILLY NEUMANN, RONALD MARK KELLY, SUZANNE MARIE

BATTICK, NATHAN HUGH BOHMER, TYLER BYRNES, ROBERT STUVE, JASON FLOYD FREDRICKSON, KATHY PIETERSMA, BRAD PALEY, CHANTEL TARA KOETZLE, PARTICK PAQUET, DENISE FINK, NATHAN ROBBERT VEINOT, KYLE GEORGE KING, DOMENICO RICCI, CATHLEEN ALICE PESSERL, STEPHEN EDWARD GLADISH, REMY FAST, ROBERT KOETSIER, BRETT HERBERT, COREY ADAM ARSENAULT, JAZMINE STADNYK, RAYMOND LUNN, CAMERON JAMES SMITH, MYLES GOZDA, DAVID CAMERON WENSLEY, ANDREW PAUL STEWART, MICHAEL MARUSHY, NATHAN GOY, RICHARD MICHAEL, RYAN GILBY, DEAN GRYWACHESKI, DORIN HALMAGHI, MICHAEL VALLINS, NICOLE LABOUCAN, JAMES BULLOUGH, WALTER FERLEYKO, JOCELYN VALERIA YANEZ, TRISTAN JENKIN, SEAN FIORILLO, ERIC MORKEBERG, NATHANIEL PHILIPPOT, CHAMREIYANG KAMEI, SHENDY GINGRAS, JEFFREY THOMAS BURT, JAMES FREDERICK BETTS, DALE SAWA, ALEXANDER BLOKZYL, ANDREW BLOKZYL, CLAYTON EDWARD MOFFAT, AARON TANK, JOHN ROBERT MANSEAU, SEBASTIEN TRITZ, COOPER AUSTIN BAILEY SHAW, DAVID WEBSTER, KATERINA D'AMOURS, ANDREW STEPHEN KOETZLE, ANTHONY FEDERICO, BYRON SABORIO, ADAM ALEXANDER EALEY, JOSEPH GUY CRISTIAN DUFOUR, ARGENTINA CORPENO, KEITH STOWE, TIM SCORY AND CAROLINE ROBILLARD, DARRAN BLACKMON, PAUL MENEER, KARIM BEKRI, TAMMY MITCHELL. ADAM VAN DE WALLE, EDDIE NEISER, YOANN HAMEL, VIKRAM KUKADIA, KAJEN SATHASIVAM, ADAM JOHNSON, JOHN NORDQUIST, PIERRE POIRIER, RAJANIKANTH SHANMUGAM, AUSTIN CLARK, MARK DESJARDINS, ISAIAH JOHNSON, LINDEN AWSOME, ARTHUR ANSELM, TYSON WEBER, EUGENIA KULCHYCKY, TAMMY SMITH, YANNICK LAPLANTE, CAROLIN BOYER, CHARLES ADAM, PHILIP SCHROER, ANDREW PRATT and LUC PRINCE

Plaintiffs

-and-

THE MINISTER OF TRANSPORT, HER MAJESTY THE QUEEN IN RIGHT OF CANADA,  
ATTORNEY GENERAL OF CANADA, DIRECTOR GENERAL RAIL SAFETY, and  
CANADIAN NATIONAL RAILWAY

Defendants

---

**NOTICE OF MOTION**  
**(Motion for removal of solicitor of record under Rule 125)**

---

**TAKE NOTICE** that the solicitors for the Plaintiffs, John Karkaris and Shawn Silvari, will make a motion to the court in writing under Rule 369 of the *Federal Courts Rules*, SOR/98-106.

**THE MOTION IS FOR:**

1. An Order removing Grey Wowk Spencer LLP (“GWS”) as solicitors of record for the Plaintiffs John Karkaris and Shawn Silvari; and
2. Such further and other relief as this Honourable Court may deem appropriate in the circumstances.


**THE GROUNDS FOR THIS MOTION ARE:**

3. GWS is the solicitor of record for the Plaintiffs in this action, Court File T-553-22 (the “**Action**”).
4. When GWS was retained by the Plaintiffs, each Plaintiff provided their email addresses, residential addresses and phone numbers to GWS prior to the commencement of the Action (the “**Contact Information**”).
5. GWS advised the Plaintiffs to ensure their Contact Information was accurate at all times.
6. GWS has obtained instructions from all but two of the Plaintiffs: John Karkaris and Shawn Silvari (the “**Remaining Plaintiffs**”).
7. GWS has made numerous attempts to receive instructions from the Remaining Plaintiffs through the Contact Information via email, telephone calls and regular mail to their last known addresses. Despite repeated attempts to obtain instructions from the Remaining Plaintiffs, the Remaining Plaintiffs have failed to respond to GWS.
8. GWS pleads and relies on:
  - a. Rules 125 and 369(1) of the *Federal Courts Rules*, SOR/98-106.
  - b. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

9. The affidavit of Megan Gurski sworn, to be filed.
10. The affidavit of personal service from the process server confirming service upon John Karkaris and Shawn Silvani, to be filed.

Dated this 30<sup>th</sup> day March, 2023.

for   
Leighton BU Grey, KC  
Grey Wowk Spencer LLP  
5110 – 51 Avenue, PO Box 1028  
Cold Lake, AB T9M 1P3  
Email: [lgrey@gwsllp.ca](mailto:lgrey@gwsllp.ca)

**TO: Federal Court – Edmonton**  
**Via e-filing**  
Rice Howard Place  
10060 Jasper Avenue  
Tower 1, Suite 530  
Edmonton, Alberta T5J 3 R8

**AND TO: Borden Ladner Gervais**  
**Via email: [gpratte@blg.com](mailto:gpratte@blg.com)**  
Bay Adelaide Centre- East Tower  
22 Adelaide Street West  
Toronto, Ontario M5H 4E3

Attention: Mr. Guy Pratte  
Counsel for Canadian National Railway

AND TO: **Department of Justice Canada/Government of Canada**  
**Via email:** daniel.vassberg@justice.gc.ca  
EPCOR Tower 300, 10423 101 Street  
Edmonton, AB  
T5H 0E7

Attention: Mr. Daniel Vassberg  
Counsel for the Crown Defendants

AND TO: **JOHN KARKARIS**  
**Via personal service**  
712 Regent Avenue  
Winnipeg, MB R2C 1S4

AND TO: **SHAWN SILVARI**  
**Via personal service**  
PO Box 283  
New Bothwell, MB R0A 1C0



This is Exhibit " B " referred to in the  
Affidavit of

25

TAMMY BRUNEAU-BEARD

Sworn before me this 12 day  
of APRIL A.D. 20 23

FORM 80A- Rule 80



AFFIDAVIT

MONTAGUE ALDOUS  
A COMMISSIONER FOR OATHS  
IN AND FOR THE PROVINCE OF MANITOBA  
MY COMMISSION EXPIRES 2025/10/25

Court File No. T-553-22

FEDERAL COURT

BETWEEN:

ANDREW ROBERT GIRARD, ALEXANDER GOSSEN, HARRY GARCIA, MARCO AUGUSTO CARREIRA, THOMAS LAMOUREUX, JULIE KERFOOT, PAUL GORDON MACDONALD, DAVID MONTAGNON, CHAD REXER, SEAN BRIAN WILLIAM HOWE, JAMIE TATE LINN, DEVON BROOKS, MICHAEL BROWN, AARON RUHL, ANDREW TIGHE, THOMAS ALEXANDRE JOSEPH POIRIER, MARC DANIEL PARADIS, JOHN ARTHUR GARY GEORGE SKEOCH, RYLEE JON GUDNASON STEVENS, SHELDON BENEDICTSON, TREVOR J HALLETT, BRETT JERRY GAUDRY, DON WERSCHLER, MARK BAKER, DARRYL REID, LANCE KENYON, JOHN KARKARIS, ORRIE MYLES ANDERSON, CHRISTOPHER DANIELS ANDREWS, CAMERON JOSEPH EDWARDS, DEREK ESKOWICH, BRENT TIMOTHY MARTIN, PAUL DEVARENNE, BRODIE MELNYCHUK, DANIEL PURPUR, RYAN HRYNIW, ADAM HELFRINCH, MARTIN JOHN GOGELA, EJAZ ALEKOZAI, JEREMY STEPHENSON, BRYAN MATTHEW MCHUGH, RYAN EDGE, NOAH STEELE, TULLY HARTL, SPENCER STEVENS, ANDREW NJUME, MATTHEW HICKS, LISA SCHMIDTKE, CHRISTOPHER LOCKE, JEFFERY DEVINE, DAWOOD K HAIDER, JARED SCOTT MAYHEW, TYRRELL HIATT, SHAWN BASKETTE, GEORGE COSTA, BRIAN DESROSIERS, KYLE WILLIAM ROSS PILON, KYLE DANIEL MICHAEL KORTKO, SHANE THOMAS STONE, JESSE RANDALL BLOOM, COLIN STAN PORTICE, RYAN CHARLES THIESSEN, TIMOTHY HAY, MATTHEW BLANC, RUSSELL THOMAS HENDERSON, STEVEN KOENIG, THOMAS MARTIN SAVORN, JAMES WELCH, CINDY STEVENSON, JON MCALLISTER, MICHAEL DAVID SERBEN, JACK EBIN THOMAS SAVORN, CHARLES MILLER, MILAN MITIC, ROBERT DESROSIERS, MATTHEW CARTER-BARR, WILLIAM CHESTER JOSLIN, COLBY COCHRANE, TRAVIS SCHALLOCK, ANDREW MULHERIN-CARON, CHRISTIAN THOMAS JONES, GEORGE ZINDROS, JEFFREY WYCHOPEN, GLEN SAINAS, RYAN DONER, KYLE WICKSTROM, SLATE PODAIMA, COLEMAN MITCHELL, ERNEST GEORGESON, DALLON DAVID EDMONDSON, AARON SWAN, SARA LOVEGROVE, SAMUEL LEGERE, CLAUDIO CARACCILO, RACINE MARIE STONE, STEVE STOPA, CLAUDIA LAPOLLA, KELLY ROBERT HIGGINS, TED AMEAR KIRYAKOS, ALAN TODD RUDDERHAM, SAMANTHA OLSEN, CHANDRA MARIE GILLIES, LANCE LESLIE WILLIAMS, LIONEL BROWN RICHARDO, JOHN THOMAS CRODEN, CHARLES ANTHONY DICKSON, MICHAEL CASTILLO, MICHAEL CERULLI, KARIM LOWEN, SHAWN SILVARI, JUSTIN DADINA, MARCEL LEONARD BEDARD, DWAYNE SOBERS, JESSE ALLISON, NICOLAS LICOIS, CLAYTON PAPP, DOUGLAS BRYAN, DEREK JAMES CHARLES WATERHOUSE, JAMIE CAMERON HALL, DAYLE JONES, KENTON HILDEBRAND, DEVANANTH VICTOR SELVAM, MATTHEW BRITTON, JESSICA ERIN ASLIN, ALIE KRAAYENBRINK, NANCY JEAN WARD, ERIC BEAULIEU, REJEAN DONALD JOSEPH

SAWCHUK, DARYL CHAMBERS, RAPHAEL DESCHENES, JAMES LEE KERR, EUGENE JEFFREY MACKAY, BRETT KYLE HUNT, DERRICK WOODALL, TROY STRANDBERG, BILLY NEUMANN, RONALD MARK KELLY, SUZANNE MARIE BATTICK, NATHAN HUGH BOHMER, TYLER BYRNES, ROBERT STUVE, JASON FLOYD FREDRICKSON, KATHY PIETERSMA, BRAD PALEY, CHANTEL TARA KOETZLE, PARTICK PAQUET, DENISE FINK, NATHAN ROBERT VEINOT, KYLE GEORGE KING, DOMENIO RICCI, CATHLEEN ALICE PESSERL, STEPHEN EDWARD GLADISH, REMY FAST, ROBERT KOETSIER, BRETT HERBERT, COREY ADAM ARSENAULT, JAZMINE STADNYK, RAYMOND LUNN, CAMERON JAMES SMITH, MYLES GOZDA, ANDREW PAUL STEWART, MICHAEL MARUSHY, NATHAN GOY, RICHARD MICHAEL, RYAN GILBY, DEAN GRYWACHESKI, DORIN HALMAGHI, MICHAEL VALLINS, NICOLE LABOUCAN, JAMES BULLOUGH, WALTER FERLEYKO, JOCELYN VALERIA YANEZ, TRISTAN JENKIN, SEAN FIORILLO, ERIC MORKEBERG, NATHANIEL PHILIPPOT, JUSTIN DADINA, CHAMREIYANG KAMEI, SHENDY GINGRAS, JEFFREY THOMAS BURT, JAMES FREDERICK BETTS, DALE SAWA, ALEXANDER BLOKZYL, ANDREW BLOKZYL, CLAYTON EDWARD MOFFAT, AARON TANK, JOHN ROBERT MANSEAU, SEBASTIEN TRITZ, COOPER AUSTIN BAILEY SHAW, DAVID WEBSTER, KATERINA D'AMOURS, ANDREW STEPHEN KOETZLE, ANTHONY FEDERICO, BYRON SABORIO, ADAM ALEXANDER EALEY, JOSEPH GUY CRISTIAN DUFOUR, ARGENTINA CORPENO, KEITH STOWE, TIM SCORY, CAROLINE ROBILLARD, DARRAN BLACKMON, PAUL MENEER, KARIM BEKRI, TAMMY MITCHELL. ADAM VAN DE WALLE, EDDIE NEISER, YOANN HAMEL, VIKRAM KUKADIA, KAJEN SATHASIVAM, ADAM JOHNSON, JOHN NORDQUIST, PIERRE POIRIER, RAJANIKANTH SHANMUGAM, AUSTIN CLARK, MARK DESJARDINS, ISAIAH JOHNSON, LINDEN AWSOME, ARTHUR ANSELM, TYSON WEBER, EUGENIA KULCHYCKY, TAMMY SMITH, YANNICK LAPLANTE, CAROLIN BOYER, CHARLES ADAM, PHILIP SCHROER, ANDREW PRATT and LUC PRINCE

PLAINTIFFS

-and-

THE MINISTER OF TRANSPORT, HIS MAJESTY THE KING IN RIGHT OF CANADA, ATTORNEY GENERAL OF CANADA, DIRECTOR GENERAL RAIL SAFETY, and CANADIAN NATIONAL RAILWAY

DEFENDANTS

**AFFIDAVIT OF MEGAN GURSKI**  
**(Motion for removal of solicitor of record under Rule 125)**  
**Sworn on March 30, 2023**

I, MEGAN GURSKI, legal assistant, of the City of Cold Lake, in the Province of Alberta, SWEAR (or AFFIRM) THAT:

1. I am a legal assistant of Grey Wowk Spencer LLP (“GWS”). I have personal knowledge of the matters deposed herein. Where I do not have personal knowledge, I have stated the source of my information and believe it to be true.
2. GWS is the solicitor of record for the Plaintiffs for Court File T-553-22 (the “Action”).
3. The Defendant, Canadian National Railway, (“CN”) brought a motion to strike the Action on jurisdictional grounds (the “Motion”). The parties agreed to a consent Order dated February 13, 2023, which Order set out a timetable for the outstanding steps in the litigation leading up to the hearing of the Motion. The Motion is scheduled to be heard on June 13, 14, 15, and 16, 2023.
4. Each Plaintiff provided their email addresses, residential addresses and phone numbers to GWS prior to the commencement of the Action (the “Contact Information”). GWS advised the Plaintiffs to ensure their Contact Information was accurate at all times.
5. To facilitate the administration of the Action, the Plaintiffs were organized into a group. Generally, GWS communicated with the Plaintiff, Christian Jones, who acted on behalf of the other Plaintiffs (the “Group Leader”). I am advised by the Group Leader and believe that he communicated with all Plaintiffs via email to the email addresses the Plaintiffs provided to the Group Leader and to GWS.
6. On March 9, 2023, GWS delivered a letter to the defendants stating that GWS had received instructions from the majority of the Plaintiffs to discontinue the Action. GWS also advised the defendants that GWS was unable to obtain instructions from some Plaintiffs (the “Remaining Plaintiffs”). Currently, there are two Remaining Plaintiffs.
7. GWS has attempted to obtain instructions from the Remaining Plaintiffs using the Contact Information. I am informed by Natalie Johnson, lawyer with GWS, and believe that she has attempted to obtain instructions from the Remaining Plaintiffs as detailed below. I have also attempted to obtain instructions. Despite repeated attempts, GWS has not received a response from the Remaining Plaintiffs:
  - a. Shawn Silvari:
    - i. 2023-02-17: email from the Group Leader seeking response to legal advice of GWS by 2023-03-03;

- ii. 2023-02-27: reminder email from the Group Leader seeking response to legal advice of GWS by 2023-03-03;
- iii. 2023-03-07: telephone call from me to Shawn Silvari; I left a voicemail message;
- iv. 2023-03-07: email directly from GWS to Shawn Silvari;
- v. 2023-03-08: email directly from GWS to Shawn Silvari;
- vi. 2023-03-27: email directly from me on behalf of GWS to Shawn Silvari;
- vii. 2023-03-27: voice mail message from me on behalf of GWS to Shawn Silvari;
- viii. 2023-03-27: voice mail message from Natalie Johnson on behalf of GWS to Shawn Silvari;
- ix. 2023-03-28: voice mail message from Natalie Johnson on behalf of GWS to Shawn Silvari;
- x. 2023-03-28: email directly from me on behalf of GWS to Shawn Silvari; and
- xi. 2023-03-28: email from Natalie Johnson on behalf of GWS to Shawn Silvari.

b. John Karkaris:

- i. 2023-02-17: email from the Group Leader seeking response to legal advice of GWS by 2023-03-03;
- ii. 2023-02-27: reminder email from the Group Leader seeking response to legal advice of GWS by 2023-03-03;
- iii. 2023-03-07: telephone call from me to John Karkaris; I left a voicemail message;
- iv. 2023-03-07: email directly from GWS to John Karkaris;
- v. 2023-03-08: email directly from GWS to John Karkaris;
- vi. 2023-03-27: email directly from me on behalf of GWS to John Karkaris;
- vii. 2023-03-27: voice mail message from me on behalf of GWS to John Karkaris;
- viii. 2023-03-27: voice mail message from Natalie Johnson on behalf of GWS to John Karkaris;
- ix. 2023-03-28: voice mail message from Natalie Johnson on behalf of GWS to John Karkaris;
- x. 2023-03-28: email directly from me on behalf of GWS to John Karkaris; and
- xi. 2023-03-28: email from Natalie Johnson on behalf of GWS to Shawn Silvari.

8. I am advised by Natalie Johnson and believe that on March 28, 2023, she emailed and mailed a letter to the Remaining Plaintiffs via Express Post with tracking numbers to their last known address. Attached as Exhibit "A" to my affidavit is a copy of the Canada Post receipt and tracking information. In that letter Natalie Johnson advised the Remaining

Plaintiffs that due to their failure to respond to GWS, their failure to respond to the legal advice of GWS and their failure to provide GWS instructions, GWS was seeking a court order to be removed as solicitors of record.

- 9. On March 30, 2023, I instructed a process server to personally serve notice of this motion upon the Remaining Plaintiffs at their last known address.
- 10. I make this affidavit in support of GWS' motion pursuant to Rule 125 of the *Federal Courts Rules* seeking an order from the court to be removed as solicitor of record in respect of the Remaining Plaintiffs.

SWORN (OR AFFIRMED) BEFORE ME at )  
the City of Cold Lake, in the Province of )  
Alberta, on March 30, 2023. )

Sharon Bishop )  
Commissioner for Oaths in and for the )  
Province of Alberta )

  
\_\_\_\_\_  
MEGAN GURSKI

SHARON BISHOP  
COMMISSION EXPIRES  
NOVEMBER 20, 2024

Canada Post/Postes Canada  
 SHOPPERS DRUG MART #2377  
 5970 MULLEN WAY NW  
 EDMONTON, AB T6R 0S0  
 GST/TPS#105152433

2023/03/28 16:00:33 GENERAL  
 CC104014 W/G 2

G/S	3 @ \$16.15	\$48.45
PP XP REG SMALL/PP XP REG PETIT		
SUBTL/SOUS-TOTAL		\$48.45
GST/TPS		\$2.42
TOTAL		\$50.87
MasterCard		\$50.87

Receipt required for all eligible returns.  
 Reçu requis pour tous les retours  
 éligibles.

Tell us how we did today. Complete the  
 survey at canadapostsurvey.ca or text  
 survey to 55555 and enter to WIN one of  
 two \$250 Prepaid Visa Cards. (Standard  
 message and data rates would apply for  
 text message.)

Parlez-nous de votre expérience  
 aujourd'hui. Répondez au sondage sur le  
 site sondagepostescanada.ca ou envoyez un  
 message texte à sondage au 55555 et courez  
 la chance de GAGNER l'une des deux cartes  
 Visa prépayées de 250\$. (Les frais  
 standard pour les messages textes et les  
 données s'appliquent.)



2124-10104014-2-1243957-2

WWW.CANADAPOST.CA/WWW.POSTESCANADA.CA

This is Exhibit "A" referred to in the  
 Affidavit of

.....Megan Gursk.....

Sworn before me this 30.....day

of March..... A.D., 2023.

.....Sharon B. Baker.....

A Commissioner for Oaths in and for the  
 Province of Alberta

SHARON BISHOP

COMMISSION EXPIRES

NOVEMBER 20, 2024

Canada Post/Postes Canada  
 SHOPPERS DRUG MART #2377  
 5970 MULLEN WAY NW  
 EDMONTON, AB T6R 0S0  
 GST/TPS#105152433

2023/03/28 16:05:39 GENERAL  
 CC104014 W/G 2

N 1 @ \$0.00 \$0.00  
 Item Dropoff/Dépôt d'articles

Destination:ROA 1C0

PG652322237CA

N \$0.00  
 Originating PP - Xp/PP d'origine - Xpos

N 1 @ \$0.00 \$0.00  
 Item Dropoff/Dépôt d'articles

Destination:R2C 1S4

PG652369662CA

N \$0.00  
 Originating PP - Xp/PP d'origine - Xpos

N 1 @ \$0.00 \$0.00  
 Item Dropoff/Dépôt d'articles

Destination:TOC 1C0

PG652322245CA

N \$0.00  
 Originating PP - Xp/PP d'origine - Xpos

SUBTL/SOUS-TOTAL \$0.00  
 Total Tax/Taxe Totale \$0.00  
 TOTAL \$0.00

Tell us how we did today. Complete the survey at [canadapostsurvey.ca](http://canadapostsurvey.ca) or text survey to 55555 and enter to WIN one of two \$250 Prepaid Visa Cards. (Standard message and data rates would apply for text message.)  
 Parlez-nous de votre expérience aujourd'hui. Répondez au sondage sur le site [sondagepostescanada.ca](http://sondagepostescanada.ca) ou envoyez un message texte à sondage au 55555 et courez la chance de GAGNER l'une des deux cartes Visa prépayées de 250\$. (Les frais standard pour les messages textes et les données s'appliquent.)



2124-10104014-2-1243997-1

[WWW.CANADAPOST.CA](http://WWW.CANADAPOST.CA)/[WWW.POSTESCANADA.CA](http://WWW.POSTESCANADA.CA)

This is Exhibit " C " referred to in the  
Affidavit of

32

Danny BILUNEAU-BEARD  
Sworn before me this 12 day  
of APRIL A.D. 20 23

Court File No. T-553-22



**FEDERAL COURT**

**MONTAGUE ALDOUS**  
**A COMMISSIONER FOR OATHS**  
**IN AND FOR THE PROVINCE OF MANITOBA**  
BETWEEN: MY COMMISSION EXPIRES 23/10/25

ANDREW ROBERT GIRARD, ALEXANDER GOSSEN, HARRY GARCIA, MARCO AUGUSTO CARREIRA, THOMAS LAMOUREUX, JULIE KERFOOT, PAUL GORDON MACDONALD, DAVID MONTAGNON, CHAD REXER, SEAN BRIAN WILLIAM HOWE, JAMIE TATE LINN, DEVON BROOKS, MICHAEL BROWN, AARON RUHL, ANDREW TIGHE, THOMAS ALEXANDRE JOSEPH POIRIER, MARC DANIEL PARADIS, JOHN ARTHUR GARY GEORGE SKEOCH, RYLEE JON GUDNASON STEVENS, SHELDON BENEDICTSON, TREVOR J HALLETT, BRETT JERRY GAUDRY, DONALD WERSCHLER, MARK BAKER, DARRYL REID, LANCE KENYON, JOHN KARKARIS, ORRIE MYLES ANDERSON, CHRISTOPHER DANIEL ANDREWS, CAMERON JOSEPH EDWARDS, DEREK ESKOWICH, BRENT TIMOTHY MARTIN, PAUL DEVARENNE, BRODIE MELNYCHUK, DANIEL PURPUR, RYAN HRYNIW, ADAM HELFRICH, MARTIN JOHN GOGELA, EJAZ ALEKOZAI, JEREMY STEPHENSON, BRYAN MATTHEW MCHUGH, RYAN EDGE, NOAH STEELE, TULLY HARTL, SPENCER STEVENS, ANDREW NJUME, MATTHEW HICKS, LISA SCHMIDTKE, CHRISTOPHER LOCKE, JEFFERY DEVINE, DAWOOD K HAIDER, JARED SCOTT MAYHEW, TYRRELL HIATT, SHAWN BASKETTE, GEORGE COSTA, BRIAN DESROSIERS, KYLE WILLIAM ROSS PILON, KYLE DANIEL MICHAEL KORTKO, SHANE THOMAS STONE, JESSE RANDALL BLOOM, COLIN STAN PORTICE, RYAN CHARLES THIESSEN, TIMOTHY HAY, MATTHEW BLANC, RUSSELL THOMAS HENDERSON, STEVEN KOENIG, THOMAS MARTIN SAVORN, JAMES WELCH, CINDY STEVENSON, JON MCALLISTER, MICHAEL DAVID SERBEN, JACK EBIN THOMAS SAVORN, CHARLES MILLER, MILAN MITIC, ROBERT DESROSIERS, MATTHEW CARTER-BARR, WILLIAM CHESTER JOSLIN, COLBY COCHRANE, TRAVIS SCHALLOCK, ANDREW MULHERIN-CARON, CHRISTIAN THOMAS JONES, GEORGE ZINDROS, JEFFREY WYCHOPEN, GLEN SAINAS, RYAN DONER, KYLE WICKSTROM, SLATE PODAIMA, COLEMAN MITCHELL, ERNEST GEORGESON, DALLON DAVID EDMONDSON, AARON SWAN, SARA LOVEGROVE, SAMUEL LEGERE, CLAUDIO CARACCILO, RACINE MARIE STONE, STEVE STOPA, CLAUDIA LAPOLLA, KELLY ROBERT HIGGINS, TED AMEAR KIRYAKOS, ALAN TODD RUDDERHAM, SAMANTHA OLSEN, CHANDRA MARIE GILLIES, LANCE LESLIE WILLIAMS, LIONEL BROWN RICHARDO, JOHN THOMAS CRODEN, CHARLES ANTHONY DICKSON, MICHAEL CASTILLO, MICHAEL CERULLI, KARIM LOWEN, SHAWN SILVARI, JUSTIN DADINA, MARCEL LEONARD BEDARD, DWAYNE SOBERS, JESSE ALLISON, NICOLAS LICOIS, CLAYTON PAPP, DOUGLAS BRYAN, DEREK JAMES CHARLES WATERHOUSE, JAMIE CAMERON HALL, DAYLE JONES, KENTON HILDEBRAND, DEVANANTH VICTOR SELVAM, MATTHEW BRITTON, JESSICA ERIN ASLIN, ALIE KRAAYENBRINK, NANCY JEAN WARD, ERIC BEAULIEU, REJEAN DONALD JOSEPH SAWCHUK, DARYL CHAMBERS, RAPHAEL DESCHENES, JAMES LEE KERR, EUGENE JEFFREY MACKAY, BRETT KYLE HUNT, DERRICK WOODALL, TROY STRANDBERG, BILLY NEUMANN, RONALD MARK KELLY, SUZANNE MARIE



BATTICK, NATHAN HUGH BOHMER, TYLER BYRNES, ROBERT STUVE, JASON FLOYD FREDRICKSON, KATHY PIETERSMA, BRAD PALEY, CHANTEL TARA KOETZLE, PARTICK PAQUET, DENISE FINK, NATHAN ROBBERT VEINOT, KYLE GEORGE KING, DOMENICO RICCI, CATHLEEN ALICE PESSERL, STEPHEN EDWARD GLADISH, REMY FAST, ROBERT KOETSIER, BRETT HERBERT, COREY ADAM ARSENAULT, JAZMINE STADNYK, RAYMOND LUNN, CAMERON JAMES SMITH, MYLES GOZDA, DAVID CAMERON WENSLEY, ANDREW PAUL STEWART, MICHAEL MARUSHY, NATHAN GOY, RICHARD MICHAEL, RYAN GILBY, DEAN GRYWACHESKI, DORIN HALMAGHI, MICHAEL VALLINS, NICOLE LABOUCAN, JAMES BULLOUGH, WALTER FERLEYKO, JOCELYN VALERIA YANEZ, TRISTAN JENKIN, SEAN FIORILLO, ERIC MORKEBERG, NATHANIEL PHILIPPOT, CHAMREIYANG KAMEI, SHENDY GINGRAS, JEFFREY THOMAS BURT, JAMES FREDERICK BETTS, DALE SAWA, ALEXANDER BLOKZYL, ANDREW BLOKZYL, CLAYTON EDWARD MOFFAT, AARON TANK, JOHN ROBERT MANSEAU, SEBASTIEN TRITZ, COOPER AUSTIN BAILEY SHAW, DAVID WEBSTER, KATERINA D'AMOURS, ANDREW STEPHEN KOETZLE, ANTHONY FEDERICO, BYRON SABORIO, ADAM ALEXANDER EALEY, JOSEPH GUY CRISTIAN DUFOUR, ARGENTINA CORPENO, KEITH STOWE, TIM SCORY AND CAROLINE ROBILLARD, DARRAN BLACKMON, PAUL MENEER, KARIM BEKRI, TAMMY MITCHELL. ADAM VAN DE WALLE, EDDIE NEISER, YOANN HAMEL, VIKRAM KUKADIA, KAJEN SATHASIVAM, ADAM JOHNSON, JOHN NORDQUIST, PIERRE POIRIER, RAJANIKANTH SHANMUGAM, AUSTIN CLARK, MARK DESJARDINS, ISAIAH JOHNSON, LINDEN AWSOME, ARTHUR ANSELM, TYSON WEBER, EUGENIA KULCHYCKY, TAMMY SMITH, YANNICK LAPLANTE, CAROLIN BOYER, CHARLES ADAM, PHILIP SCHROER, ANDREW PRATT and LUC PRINCE

Plaintiffs

-and-

THE MINISTER OF TRANSPORT, HER MAJESTY THE QUEEN IN RIGHT OF CANADA, ATTORNEY GENERAL OF CANADA, DIRECTOR GENERAL RAIL SAFETY, and CANADIAN NATIONAL RAILWAY

Defendants

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**WRITTEN REPRESENTATIONS**  
(Motion for removal of solicitor of record under Rule 125)

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**SUBMISSIONS**

1. This is a motion by the solicitors of record of the Plaintiffs, Grey Wowk Spencer LLP (“GWS”), to be removed as solicitors of record for the two Plaintiffs John Karkaris (“Mr.

**Karkaris**) and Shawn Silvari (“**Mr. Silvari**”) pursuant to Rule 125 of the *Federal Courts Rules*, SOR/98-106 (“the *Rules*”).<sup>1</sup>

2. GWS is the solicitor of record for the Plaintiffs in this action, Court File T-553-22 (the “**Action**”).
3. When GWS was retained by all of the Plaintiffs, each Plaintiff provided their email addresses, residential addresses and phone numbers to GWS prior to the commencement of the Action (the “**Contact Information**”).<sup>2</sup>
4. GWS advised the Plaintiffs to ensure their Contact Information was accurate at all times.<sup>3</sup>
5. There are 230 Plaintiffs in this Action. GWS has obtained instructions to discontinue the Action from 228 of the Plaintiffs; all but two of the Plaintiffs have failed to provide instructions to GWS: Mr. Karkaris and Mr. Silvari (the “**Remaining Plaintiffs**”).<sup>4</sup>
6. GWS has made numerous attempts to receive instructions from Mr. Karkaris and Mr. Silvari through their Contact Information via email, telephone calls and regular mail to their last known addresses. Despite repeated attempts to obtain instructions from Mr. Karkaris and Mr. Silvari, Mr. Karkaris and Mr. Silvari have failed to respond to GWS.<sup>5</sup>
7. A Court has authority to remove a solicitor of record.<sup>6</sup> It is submitted that this is such a case. The court must exercise its discretion and grant the motion to remove GWS as solicitor of record for the Remaining Plaintiffs.
8. It is submitted that the failure of GWS to receive instructions from Mr. Karkaris and Mr. Silvari affects the administration of justice. In this case, GWS has represented 228 other Plaintiffs who provided their instructions to withdraw from the Action, however, Mr. Karkaris and Mr. Silvari have not responded to GWS’ numerous requests for instructions. Consequently, Mr. Karkaris and Mr. Silvari are the only remaining Plaintiffs.

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<sup>1</sup> *Federal Courts Rules*, SOR/98-106, Rule 125, Book of Authorities, Tab 1.

<sup>2</sup> Affidavit of Megan Gurski, at para 4.

<sup>3</sup> Affidavit of Megan Gurski, at para 4.

<sup>4</sup> Affidavit of Megan Gurski, at paras 6 to 8.

<sup>5</sup> Affidavit of Megan Gurski, at paras 6 to 8.

<sup>6</sup> See *Cunningham v Lilles*, 2010 SCC 10 at paras 36, 46 to 49, 59, Book of Authorities Tab 4.

9. Chapter 3.7 of the *Law Society of Alberta Code of Conduct* (the “*Code*”)<sup>7</sup> provides guidance to lawyers seeking to withdraw from representation. Rule 3.7-2 of the *Code* states that a lawyer may withdraw from representation of a client due to a serious loss of confidence between the lawyer and the client so long as reasonable notice of withdrawal is given and no serious prejudice would result to the client. Rules 3.7-7 of the *Code* provides further details on the preferred procedure of withdrawal.<sup>8</sup>
10. It is hard to imagine how the Remaining Plaintiffs could establish that they would suffer serious prejudice should the court grant the motion of GWS. As Plaintiffs in the Action, it is incumbent upon Mr. Karkaris and Mr. Silvari to remain in contact with their lawyers, receive advice from their lawyers and provide instructions to their lawyers in a timely manner. Through their conduct, it may be inferred that Mr. Karkaris and Mr. Silvari have essentially abandoned their claim.
11. On March 28, 2023, Natalie Johnson, lawyer with GWS, gave notice to the Remaining Plaintiffs that GWS would be withdrawing from representing the Remaining Plaintiffs due to their failure to provide GWS instructions and their failure to respond to the legal advice of GWS. This notice was provided in writing via email to the Remaining Plaintiffs’ last known email address and through Express Post mail to the Remaining Plaintiffs’ last known mailing address.<sup>9</sup>
12. Megan Gurski is a legal assistant with GWS. In her affidavit, Ms. Gurski swore/affirmed the following:<sup>10</sup>
  - a. GWS has attempted to obtain instructions from the Remaining Plaintiffs using the Contact Information. I am informed by Natalie Johnson, lawyer with GWS, and believe that she has attempted to obtain instructions from the Remaining Plaintiffs

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<sup>7</sup> *Law Society of Alberta Code of Conduct*, March 28, 2023, Rule 3.7 and related commentary, Book of Authorities, Tab 2.

<sup>8</sup> *Law Society of Alberta Code of Conduct*, March 28, 2023, Rule 3.7 and related commentary, Book of Authorities, Tab 2.

<sup>9</sup> Affidavit of Megan Gurski, at para 8.

<sup>10</sup> Affidavit of Megan Gurski, at paras 7 to 9.

as detailed below. I have also attempted to obtain instructions. Despite repeated attempts, GWS has not received a response from the Remaining Plaintiffs:

i. Shawn Silvari:

1. 2023-02-17: email from the Group Leader seeking response to legal advice of GWS by 2023-03-03;
2. 2023-02-27: reminder email from the Group Leader seeking response to legal advice of GWS by 2023-03-03;
3. 2023-03-07: telephone call from me to Shawn Silvari; I left a voicemail message;
4. 2023-03-07: email directly from GWS to Shawn Silvari;
5. 2023-03-08: email directly from GWS to Shawn Silvari;
6. 2023-03-27: email directly from me on behalf of GWS to Shawn Silvari;
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8. 2023-03-27: voice mail message from Natalie Johnson on behalf of GWS to Shawn Silvari;
9. 2023-03-28: voice mail message from Natalie Johnson on behalf of GWS to Shawn Silvari;
10. 2023-03-28: email directly from me on behalf of GWS to Shawn Silvari; and
11. 2023-03-28: email from Natalie Johnson on behalf of GWS to Shawn Silvari.

ii. John Karkaris:

1. 2023-02-17: email from the Group Leader seeking response to legal advice of GWS by 2023-03-03;
2. 2023-02-27: reminder email from the Group Leader seeking response to legal advice of GWS by 2023-03-03;

3. 2023-03-07: telephone call from me to John Karkaris; I left a voicemail message;
  4. 2023-03-07: email directly from GWS to John Karkaris;
  5. 2023-03-08: email directly from GWS to John Karkaris;
  6. 2023-03-27: email directly from me on behalf of GWS to John Karkaris;
  7. 2023-03-27: voice mail message from me on behalf of GWS to John Karkaris;
  8. 2023-03-27: voice mail message from Natalie Johnson on behalf of GWS to John Karkaris;
  9. 2023-03-28: voice mail message from Natalie Johnson on behalf of GWS to John Karkaris;
  10. 2023-03-28: email directly from me on behalf of GWS to John Karkaris; and
  11. 2023-03-28: email from Natalie Johnson on behalf of GWS to John Karkaris.
- b. I am advised by Natalie Johnson and believe that on March 28, 2023, she emailed and mailed a letter to the Remaining Plaintiffs via Express Post with tracking numbers to their last known address. Attached as Exhibit "A" to my affidavit is a copy of the Canada Post receipt and tracking information. In that letter Natalie Johnson advised the Remaining Plaintiffs that due to their failure to respond to GWS, their failure to respond to the legal advice of GWS and their failure to provide GWS instructions, GWS was seeking a court order to be removed as solicitors of record.
- c. On March 30, 2023, I instructed a process server to personally serve notice of this motion upon the Remaining Plaintiffs at their last known address.

13. The above noted actions satisfy the requirements of Rule 125 and the procedures in the *Code* regarding counsel's withdrawal from representation.<sup>11</sup> For these reasons, no prejudice to the Remaining Plaintiffs will manifest from the removal of GWS as solicitors of record for the Remaining Plaintiffs.
14. The Remaining Plaintiffs have been unreasonable and uncooperative as they have failed to provide adequate instructions to GWS despite repeated requests.<sup>12</sup>
15. GWS has good cause to withdraw from representing the Remaining Plaintiffs<sup>13</sup> and has provided reasonable notice of same upon the Remaining Plaintiffs.<sup>14</sup>

### **ORDER SOUGHT**

16. GWS requests an Order that:
  - a. GWS be removed as solicitors of record for the Remaining Plaintiffs;
  - b. There should be no costs for this motion; and
  - c. Such further or other relief as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. The affidavit of Megan Gurski, to be filed;
2. The affidavit of personal service of the process server confirming service of this motion upon John Karakaris, to be filed; and

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<sup>11</sup> *Federal Courts Rules*, SOR/98-106, Rule 125, Book of Authorities, Tab 1; *Law Society of Alberta Code of Conduct*, March 28, 2023, Rule 3.7, Book of Authorities, Tab 2; See also *Fitzpatrick v College of Physical Therapists of Alberta*, 2020 ABCA 88 (CanLII), Book of Authorities Tab 3.

<sup>12</sup> *Law Society of Alberta Code of Conduct*, March 28, 2023, rule 3.7-2 and related commentary, Book of Authorities, Tab 2.

<sup>13</sup> See *Fitzpatrick v College of Physical Therapists of Alberta*, 2020 ABCA 88 (CanLII), Book of Authorities, Tab 3.

<sup>14</sup> *Law Society of Alberta Code of Conduct*, March 28, 2023, rule 3.7-1 and related commentary, Book of Authorities, Tab 2.

3. The affidavit of personal service of the process server confirming service of this motion upon Shawn Silvari, to be filed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of March, 2023.

*fw/* Natalie L. Johnson  
**Grey Wowk Spencer LLP**  
5110 – 51 Avenue, PO Box 1028  
Cold Lake, AB T9M 1P3  
Email: [lgrey@gwslp.ca](mailto:lgrey@gwslp.ca)  
Attention: Leighton BU Grey, KC

This is Exhibit " D " referred to in the Affidavit of

RAMMY BRUNEAU-BLAIN

Sworn before me this 12 day of APRIL A.D. 20 23

[Signature]

Court File No. T-553-22

**MONTAGUE ALDOUS**  
**A COMMISSIONER FOR OATHS**  
**IN AND FOR THE PROVINCE OF MANITOBA**  
MY COMMISSION EXPIRES 2025/10/25

**FEDERAL COURT**

BETWEEN

ANDREW ROBERT GIRARD, ALEXANDER GOSSEN, HARRY GARCIA, MARCO AUGUSTO CARREIRA, THOMAS LAMOUREUX, JULIE KERFOOT, PAUL GORDON MACDONALD, DAVID MONTAGNON, CHAD REXER, SEAN BRIAN WILLIAM HOWE, JAMIE TATE LINN, DEVON BROOKS, MICHAEL BROWN, AARON RUHL, ANDREW TIGHE, THOMAS ALEXANDRE JOSEPH POIRIER, MARC DANIEL PARADIS, JOHN ARTHUR GARY GEORGE SKEOCH, RYLEE JON GUDNASON STEVENS, SHELDON BENEDICTSON, TREVOR J HALLETT, BRETT JERRY GAUDRY, DONALD WERSCHLER, MARK BAKER, DARRYL REID, LANCE KENYON, JOHN KARKARIS, ORRIE MYLES ANDERSON, CHRISTOPHER DANIEL ANDREWS, CAMERON JOSEPH EDWARDS, DEREK ESKOWICH, BRENT TIMOTHY MARTIN, PAUL DEVARENNE, BRODIE MELNYCHUK, DANIEL PURPUR, RYAN HRYNIW, ADAM HELFRICH, MARTIN JOHN GOGELA, EJAZ ALEKOZAI, JEREMY STEPHENSON, BRYAN MATTHEW MCHUGH, RYAN EDGE, NOAH STEELE, TULLY HARTL, SPENCER STEVENS, ANDREW NJUME, MATTHEW HICKS, LISA SCHMIDTKE, CHRISTOPHER LOCKE, JEFFERY DEVINE, DAWOOD K HAIDER, JARED SCOTT MAYHEW, TYRRELL HIATT, SHAWN BASKETTE, GEORGE COSTA, BRIAN DESROSIERS, KYLE WILLIAM ROSS PILON, KYLE DANIEL MICHAEL KORTKO, SHANE THOMAS STONE, JESSE RANDALL BLOOM, COLIN STAN PORTICE, RYAN CHARLES THIESSEN, TIMOTHY HAY, MATTHEW BLANC, RUSSELL THOMAS HENDERSON, STEVEN KOENIG, THOMAS MARTIN SAVORN, JAMES WELCH, CINDY STEVENSON, JON MCALLISTER, MICHAEL DAVID SERBEN, JACK EBIN THOMAS SAVORN, CHARLES MILLER, MILAN MITIC, ROBERT DESROSIERS, MATTHEW CARTER-BARR, WILLIAM CHESTER JOSLIN, COLBY COCHRANE, TRAVIS SCHALLOCK, ANDREW MULHERIN-CARON, CHRISTIAN THOMAS JONES, GEORGE ZINDROS, JEFFREY WYCHOPEN, GLEN SAINAS, RYAN DONER, KYLE WICKSTROM, SLATE PODAIMA, COLEMAN MITCHELL, ERNEST GEORGESON, DALLON DAVID EDMONDSON, AARON SWAN, SARA LOVEGROVE, SAMUEL LEGERE, CLAUDIO CARACCILO, RACINE MARIE STONE, STEVE STOPA, CLAUDIA LAPOLLA, KELLY ROBERT HIGGINS, TED AMEAR KIRYAKOS, ALAN TODD RUDDERHAM, SAMANTHA OLSEN, CHANDRA MARIE GILLIES, LANCE LESLIE WILLIAMS, LIONEL BROWN RICHARDO, JOHN THOMAS CRODEN, CHARLES ANTHONY DICKSON, MICHAEL CASTILLO, MICHAEL CERULLI, KARIM LOWEN, SHAWN SILVARI, JUSTIN DADINA, MARCEL LEONARD BEDARD, DWAYNE SOBERS, JESSE ALLISON, NICOLAS LICOIS, CLAYTON PAPP, DOUGLAS BRYAN, DEREK JAMES CHARLES WATERHOUSE, JAMIE CAMERON HALL, DAYLE JONES, KENTON HILDEBRAND, DEVANANTH VICTOR SELVAM, MATTHEW BRITTON, JESSICA ERIN ASLIN, ALIE KRAAYENBRINK, NANCY JEAN WARD, ERIC BEAULIEU, REJEAN DONALD JOSEPH SAWCHUK, DARYL CHAMBERS, RAPHAEL DESCHENES, JAMES LEE KERR, EUGENE JEFFREY MACKAY, BRETT KYLE HUNT, DERRICK WOODALL, TROY STRANDBERG, BILLY NEUMANN, RONALD MARK KELLY, SUZANNE MARIE



BATTICK, NATHAN HUGH BOHMER, TYLER BYRNES, ROBERT STUVE, JASON FLOYD FREDRICKSON, KATHY PIETERSMA, BRAD PALEY, CHANTEL TARA KOETZLE, PARTICK PAQUET, DENISE FINK, NATHAN ROBBERT VEINOT, KYLE GEORGE KING, DOMENICO RICCI, CATHLEEN ALICE PESSERL, STEPHEN EDWARD GLADISH, REMY FAST, ROBERT KOETSIER, BRETT HERBERT, COREY ADAM ARSENAULT, JAZMINE STADNYK, RAYMOND LUNN, CAMERON JAMES SMITH, MYLES GOZDA, DAVID CAMERON WENSLEY, ANDREW PAUL STEWART, MICHAEL MARUSHY, NATHAN GOY, RICHARD MICHAEL, RYAN GILBY, DEAN GRYWACHESKI, DORIN HALMAGHI, MICHAEL VALLINS, NICOLE LABOUCAN, JAMES BULLOUGH, WALTER FERLEYKO, JOCELYN VALERIA YANEZ, TRISTAN JENKIN, SEAN FIORILLO, ERIC MORKEBERG, NATHANIEL PHILIPPOT, CHAMREIYANG KAMEI, SHENDY GINGRAS, JEFFREY THOMAS BURT, JAMES FREDERICK BETTS, DALE SAWA, ALEXANDER BLOKZYL, ANDREW BLOKZYL, CLAYTON EDWARD MOFFAT, AARON TANK, JOHN ROBERT MANSEAU, SEBASTIEN TRITZ, COOPER AUSTIN BAILEY SHAW, DAVID WEBSTER, KATERINA D'AMOURS, ANDREW STEPHEN KOETZLE, ANTHONY FEDERICO, BYRON SABORIO, ADAM ALEXANDER EALEY, JOSEPH GUY CRISTIAN DUFOUR, ARGENTINA CORPENO, KEITH STOWE, TIM SCORY AND CAROLINE ROBILLARD, DARRAN BLACKMON, PAUL MENEER, KARIM BEKRI, TAMMY MITCHELL. ADAM VAN DE WALLE, EDDIE NEISER, YOANN HAMEL, VIKRAM KUKADIA, KAJEN SATHASIVAM, ADAM JOHNSON, JOHN NORDQUIST, PIERRE POIRIER, RAJANIKANTH SHANMUGAM, AUSTIN CLARK, MARK DESJARDINS, ISAIAH JOHNSON, LINDEN AWSOME, ARTHUR ANSELM, TYSON WEBER, EUGENIA KULCHYCKY, TAMMY SMITH, YANNICK LAPLANTE, CAROLIN BOYER, CHARLES ADAM, PHILIP SCHROER, ANDREW PRATT and LUC PRINCE

Plaintiffs

-and-

THE MINISTER OF TRANSPORT, HER MAJESTY THE QUEEN IN RIGHT OF CANADA,  
ATTORNEY GENERAL OF CANADA, DIRECTOR GENERAL RAIL SAFETY, and  
CANADIAN NATIONAL RAILWAY

Defendants

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**BOOK OF AUTHORITIES**  
(Motion for removal of solicitor of record under Rule 125)

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**TABLE**

<b>TAB</b>	<b>Authority</b>
1	<i>Federal Courts Rules</i> , SOR/98-106, Rule 125
2	Law Society of Alberta Code of Conduct, March 28, 2023, Rule 3.7 and commentary
3	<i>Fitzpatrick v College of Physical Therapists of Alberta</i> , 2020 ABCA 88 (CanLII)
4	<i>Cunningham v Lilles</i> , 2010 SCC 10

### **Motion for removal of solicitor of record**

- **125 (1)** Where a solicitor of record ceases to act for a party and the party has not changed its solicitor of record in accordance with rule 124, the Court may, on a motion of the solicitor, order that the solicitor be removed from the record.
- **Marginal note:Manner of service**

**(2)** A notice of motion under subsection (1) shall be served on the party formerly represented by the solicitor

  - **(a)** by personal service; or
  - **(b)** where personal service cannot practicably be effected,
    - **(i)** by mailing the notice of motion to the party at the party's last known address, or
    - **(ii)** if no mailing address of the party is known, by depositing the notice of motion at the Registry office where the proceeding was initiated.
- **Marginal note:Order to be served**

**(3)** An order made under subsection (1) removing a solicitor of record of a party shall be served on the party in the manner set out in subsection (2) and on all other parties to the proceeding.
- **Marginal note:Proof of service**

**(4)** An order under subsection (1) does not take effect until proof of its service has been filed.

### **Marginal note:Cessation of representation**

## 3.7 Withdrawal from Representation

### Withdrawal from Representation

**3.7-1 A lawyer must not withdraw from representation of a client except for good cause and on reasonable notice to the client.**

### Commentary

[1] Although the client has the right to terminate the lawyer-client relationship at will, a lawyer does not enjoy the same freedom of action. Having undertaken the representation of a client, the lawyer should complete the task as ably as possible unless there is justifiable cause for terminating the relationship. It is inappropriate for a lawyer to withdraw on capricious or arbitrary grounds.

[2] An essential element of reasonable notice is notification to the client, unless the client cannot be located after reasonable efforts. No hard and fast rules can be laid down as to what constitutes reasonable notice before withdrawal and how quickly a lawyer may cease acting after notification will depend on all relevant circumstances. When the matter is covered by statutory provisions or the Rules of Court, these will govern. In other situations, the governing principle is that the lawyer should protect the client's interests to the best of the lawyer's ability and should not desert the client at a critical stage of a matter or at a time when withdrawal would put the client in a position of disadvantage or peril. As a general rule, the client should be given sufficient time to retain and instruct replacement counsel. Nor should withdrawal or an intention to withdraw be permitted to waste court time or prevent other counsel from reallocating time or resources scheduled for the matter in question. See Rule 3.7-6, Manner of Withdrawal.

[3] Every effort should be made to ensure that withdrawal occurs at an appropriate time in the proceedings in keeping with the lawyer's obligations. The court, opposing parties and others directly affected should also be notified of the withdrawal.

### Optional Withdrawal

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

### Commentary

[1] A lawyer may have a justifiable cause for withdrawal in circumstances indicating a loss of confidence, for example, if a lawyer is deceived by the client, the client refuses to accept and act upon the lawyer's advice on a significant point, a client is persistently unreasonable or uncooperative in a material respect, or the lawyer is facing difficulty in obtaining adequate instructions from the

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client. However, the lawyer should not use the threat of withdrawal as a device to force a hasty decision by the client on a difficult question.

### **Non-payment of Fees**

**3.7-3 If, after reasonable notice, the client fails to provide a retainer or funds on account of disbursements or fees, a lawyer may withdraw unless serious prejudice to the client would result.**

### **Commentary**

[1] When the lawyer withdraws because the client has not paid the lawyer's fee, the lawyer should ensure that there is sufficient time for the client to obtain the services of another lawyer and for that other lawyer to prepare adequately for trial. Also see the commentary to Rule 3.7-4.

## **Withdrawal from Criminal Proceedings**

- 3.7-4** If a lawyer has agreed to act in a criminal case and the interval between a withdrawal and the trial of the case is sufficient to enable the client to obtain another lawyer and to allow such other lawyer adequate time for preparation, the lawyer who has agreed to act may withdraw because the client has not paid the agreed fee or for other adequate cause provided that the lawyer:
- (a) notifies the client, in writing, that the lawyer is withdrawing because the fees have not been paid or for other adequate cause;**
  - (b) accounts to the client for any money received on account of fees and disbursements;**
  - (c) notifies Crown counsel that the lawyer is no longer acting; and**
  - (d) complies with the applicable Rules of Court.**

## **Commentary**

[1] In Alberta, when a lawyer seeks to withdraw in criminal proceedings the usual practice is to apply for leave in open court.

[2] A lawyer who has withdrawn, or intends to withdraw, because of conflict with the client should not indicate in the notice addressed to the court or Crown counsel the cause of the conflict or make reference to any matter that would violate the privilege that exists between lawyer and client. The notice should merely state that the lawyer is no longer acting and has withdrawn. If the court requests that the lawyer provide reasons for withdrawal, then the lawyer may indicate that there are “ethical reasons” or an inability to obtain proper instructions, making the least possible disclosure of privileged information. In certain circumstances, the court may refuse to allow a lawyer to withdraw for non-payment of fees.

## **Obligatory Withdrawal**

- 3.7-5** A lawyer must withdraw if:
- (a) discharged by a client;**
  - (b) a client persists in instructing the lawyer to act contrary to professional ethics; or**
  - (c) the lawyer is not competent to continue to handle a matter.**

## In the Court of Appeal of Alberta

**Citation: Fitzpatrick v College of Physical Therapists of Alberta, 2020 ABCA 88**

**Date:** 20200304  
**Docket:** 1901-0008-AC  
**Registry:** Calgary

**Between:**

**Marilyn Fitzpatrick and Westbrook Physiotherapy Ltd.**

Respondents  
(Appellants)

- and -

**The College of Physical Therapists of Alberta, Dianne Millette,  
Cathy Sveen, and Julie Moylan**

Respondents  
(Respondent)

- and -

**Code Hunter LLP**

Applicant  
(Not Parties to the Appeal)

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**Reasons for Decision of  
The Honourable Madam Justice Elizabeth Hughes**

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Application for Permission to Withdraw as Counsel

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**Reasons for Decision of  
The Honourable Madam Justice Elizabeth Hughes**

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[1] Counsel for the appellants seeks permission to withdraw as lawyer of record in this appeal for both appellants, Ms. Fitzpatrick and her corporation, Westbrook Physiotherapy Clinic Ltd. Rules 14.2 and 2.31 govern this application as the appeal, scheduled for April 9, 2020, was set down for hearing on September 9, 2019.

[2] The other rule that comes into play in this application is Rule 2.22. That rule provides that an individual may represent themselves in an action, but the case law interpreting the rule has found that “[t]he statutory and case law confirms that other types of litigants in civil cases, including corporations, must be represented by a lawyer”: *908077 Alberta Ltd v 1313608 Alberta Ltd*, 2015 ABCA 117 at para 2.

[3] The history of the appeal follows:

- When Ms. Fitzpatrick filed her Statement of Claim she was the only named plaintiff.
- The defendants applied to have the claim summarily dismissed, and Ms. Fitzpatrick applied to amend her claim including the addition of Westbrook Physiotherapy Clinic Ltd. as a plaintiff.
- The Master gave his decision on July 25, 2017. He summarily dismissed the claims against some of the defendants, leaving four defendants; in addition, he granted the amendments to the Statement of Claim: *Fitzpatrick v Physiotherapy Alberta College*, 2017 ABQB 453.
- The remaining defendants appealed to the Court of Queen’s Bench seeking dismissal of the claims against them, as well the order granting the amendments.
- On December 4, 2018 the chambers judge on appeal allowed the remaining defendants’ appeal to summarily dismiss the claims against them: *Fitzpatrick v College of Physical Therapists of Alberta*, 2018 ABQB 989.
- In December 2018 the appellants engaged present counsel.
- On January 3, 2019 the appellants filed their Notice of Appeal.
- On July 3, 2019 counsel for the appellants filed their factum.
- On August 30, 2019 the respondents filed their factum.
- On September 9, 2019 the appeal was set for hearing for April 9, 2020.



- On October 28, 2019 Ms. Fitzpatrick and Westbrook Physiotherapy Ltd were faxed a letter by their counsel advising (1) the total amount owed, (2) that due to the length of time the amount had been outstanding and the prior discussions between counsel and Ms. Fitzpatrick no further services could be rendered without full payment, (3) unless full payment was made before December 13, 2019 counsel would take steps to apply to remove himself as counsel of record, and (4) should that happen, counsel recommended Ms. Fitzpatrick find new counsel for the appeal set for April 9, 2020.
- As of January 20, 2020, the appellants had not paid their outstanding bill to counsel. Therefore, on January 20, 2020 counsel for the appellants filed an Affidavit of Service attaching a Notice of Withdrawal of Lawyer of Record.
- On January 21, 2020 the case management officer advised counsel for the appellants that because the appeal had been set for hearing, counsel had to make an application pursuant to Rule 2.31 to withdraw from the record.
- Counsel filed his application which was heard on February 13, 2020.

[4] In *R v Cunningham*, 2010 SCC 10, a case which concerned the withdrawal of counsel, the Supreme Court held that courts have inherent jurisdiction to control their own process, along with the authority to exercise control over counsel when necessary to protect that process. Other principles from *Cunningham* include the following:

- 1) Leave to withdraw should be granted where the application is made well in advance of any scheduled proceeding and adjournment is unnecessary: *Cunningham* at para 47.
- 2) If timing is an issue the court may grant permission to withdraw if counsel seeks to withdraw for ethical reasons. Ethical reasons do not include the non-payment of fees: *Cunningham* at para 48.
- 3) When counsel seek to withdraw because of the non-payment of fees, the court may exercise its discretion to refuse leave to withdraw but should only do so after considering the following non-exhaustive list of factors (*Cunningham* at para 50):
  - whether it is feasible for the individual to represent him or herself;
  - other means of obtaining counsel;
  - whether counsel gave reasonable notice to the party to allow the individual to seek other means of representation;
  - impact on the respondent; and
  - the history of the proceedings including whether the party has changed counsel repeatedly.

[5] The Supreme Court also observed that rules enacted by law societies are “essential statements of the appropriate standards of professional conduct”: *Cunningham* at para 36.

[6] The relevant sections of the Law Society of Alberta’s Code of Conduct are:

3.7-1 A lawyer must not withdraw from representation of a client except for good cause and on reasonable notice to the client.

...

3.7-3 If, after reasonable notice, the client fails to provide a retainer or funds on account of disbursements or fees, a lawyer may withdraw unless serious prejudice to the client would result.

[7] Ms. Fitzpatrick’s position on counsel’s application to withdraw is not clear. On the one hand, she writes “my request would be to retain Mr. Frenken at this time.” On the other hand, she writes “as it would appear that Mr. Frenken would not seem to be fully engaged in my file, I am concerned that his written argument may be lacking in major details and that there may be omissions which would compromise my position.”

[8] Mr. Sim, on behalf of the respondents in the main appeal, submits that any prejudice to his clients, should the application be granted, may be remedied by an order of costs.

[9] In assessing Mr. Frenken’s application, I consider the following:

- 1) Ms. Fitzpatrick and her company had reasonable notice of Mr. Frenken’s intention to withdraw should the outstanding bill not be paid.
- 2) It would be feasible for Ms. Fitzpatrick to represent herself as the appellants’ factum has been filed. I note Ms. Fitzpatrick is of the view that she does not have the ability to make oral submissions.
- 3) Rule 2.22 prohibits Ms. Fitzpatrick from acting on behalf of the corporation.
- 4) Ms. Fitzpatrick may have the financial means to obtain other counsel. Indeed, Mr. Frenken was contacted by a lawyer the day before this application on behalf of Ms. Fitzpatrick.
- 5) Any prejudice to the respondents may be remedied by a costs order.

[10] All these factors weigh in favour of granting the application.

[11] The last factor to consider is harm to the administration of justice should the appeal not proceed on April 9, 2020. This factor weighs against the granting of the application in that the time this appeal is currently scheduled for, may not be able to be used by another appeal. All courts in this Province face increasing lead times for matters to be heard. Thus, granting the application,

which will have the likely result of an adjournment and the time scheduled will likely go unfilled, will harm the administration of justice.

[12] When I balance the factors in favour of granting the application as opposed to denying the application, I find that on balance, the application should be granted. Accordingly, Mr. Frenken is granted permission to withdraw as counsel.

[13] I further order that should this matter be adjourned, new counsel for the appellants must confirm they have been retained by Ms Fitzpatrick and the corporation three months before the new appeal date, failing which, the company's appeal is deemed abandoned.

Application heard on February 13, 2020  
and further written submissions filed  
February 19, 2020

Reasons filed at Calgary, Alberta  
this 4th day of March, 2020

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Hughes J.A.

**Appearances:**

Marilyn Fitzpatrick  
In Person

B.W. Frenken  
for the Applicant

G.D. Sim  
for the Respondent

**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)** *Interveners*

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.

ON APPEAL FROM THE COURT OF APPEAL FOR THE YUKON TERRITORY

*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

**Sa Majesté la Reine** *Appelante*

c.

**Jennie Cunningham** *Intimée*

et

**Procureur général de l'Ontario, Law Society of British Columbia, Barreau du Yukon, Association du Barreau canadien et Criminal Lawyers' Association (Ontario)** *Intervenants*

RÉPERTORIÉ : R. c. CUNNINGHAM

2010 CSC 10

N<sup>o</sup> du greffe : 32760.

2009 : 17 novembre; 2010 : 26 mars.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL DU TERRITOIRE DU YUKON

*Droit des professions — Avocats et procureurs — Requête de l'avocat pour cesser d'occuper — En matière pénale, le tribunal peut-il rejeter la requête pour cesser d'occuper présentée par l'avocat de la défense parce que l'accusé n'a pas respecté les conditions financières du mandat? — Le droit de regard sur la cessation d'occuper appartient-il seulement aux barreaux?*

*Tribunaux — Compétence — Requête de l'avocat pour cesser d'occuper — En matière pénale, le tribunal peut-il rejeter la requête pour cesser d'occuper présentée par l'avocat de la défense parce que l'accusé n'a pas respecté les conditions financières du mandat?*

C, une avocate criminaliste dont la Société d'aide juridique du Yukon retenait les services, représentait un client accusé d'agressions sexuelles sur une fillette. Avant la tenue de l'enquête préliminaire, la Société d'aide juridique a informé l'accusé que s'il ne mettait pas à jour l'information relative à sa situation financière, il cesserait de bénéficier de l'aide juridique. L'accusé n'a pas donné suite à la demande, et la Société d'aide juridique l'a avisé que C n'était plus autorisée à le représenter. C a demandé à la Cour territoriale du Yukon de l'autoriser à

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

cesser d'occuper à titre d'avocate au dossier, invoquant comme seul motif la suspension de l'aide juridique. Toutefois, elle a précisé qu'elle était disposée à représenter à nouveau l'accusé si l'aide juridique était rétablie. La Cour territoriale a rejeté sa demande. La Cour suprême du territoire du Yukon a également rejeté sa demande de *certiorari* visant l'annulation de la décision de la Cour territoriale, statuant que cette dernière n'avait pas outrepassé sa compétence. La Cour d'appel a accueilli l'appel de C au motif que la Cour territoriale n'avait pas le pouvoir discrétionnaire de lui refuser l'autorisation de cesser d'occuper.

*Arrêt :* Le pourvoi est accueilli.

La Cour territoriale avait le pouvoir de refuser à C l'autorisation de cesser d'occuper. Lorsque le motif invoqué par l'avocat est le non-paiement de ses honoraires, le tribunal a le pouvoir d'exiger qu'il continue de représenter l'accusé, mais il doit exercer ce pouvoir avec circonspection et uniquement lorsqu'il le faut pour empêcher une atteinte grave à l'administration de la justice. Une cour supérieure a la compétence inhérente nécessaire à l'exercice de sa fonction judiciaire ainsi qu'à l'exécution de son mandat d'administrer la justice. De même, dans le cas d'un tribunal d'origine législative, le pouvoir de faire respecter sa procédure et le droit de regard sur la manière dont les avocats exercent leurs fonctions s'infèrent nécessairement du pouvoir de constituer une cour de justice.

Le non-paiement des honoraires qui n'est pas lié au fondement de l'affaire et dont la mise au jour ne cause pas préjudice à l'accusé ne bénéficie pas de la protection du secret professionnel, et le risque minime que le tribunal saisi de la demande tente indûment d'obtenir des renseignements protégés à l'audience ne justifie pas que la décision de cesser d'occuper relève uniquement de l'avocat. Aussi, le droit de regard en matière de cessation d'occuper n'appartient pas seulement aux barreaux. Tribunaux et ordres professionnels jouent des rôles différents mais importants dans l'encadrement de l'exercice du droit de cesser d'occuper : les premiers préviennent l'atteinte à l'administration de la justice, les seconds soumettent à des sanctions disciplinaires les avocats qui ne respectent pas les normes professionnelles. Ces rôles ne sont pas mutuellement exclusifs. Les deux sont en fait nécessaires pour bien encadrer l'exercice de la profession d'avocat et préserver la procédure de la cour. Les intérêts personnels ou professionnels de l'avocat peuvent se heurter à ceux de ses clients, mais le tribunal doit présumer que l'avocat respecte la déontologie. L'avocat auquel le tribunal enjoint de continuer de représenter l'accusé doit le faire avec compétence et diligence. L'intégrité de la profession et l'administration de la justice n'exigent rien

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;

de moins. Enfin, l'ordonnance de type *Rowbotham* peut jouer dans l'exercice du pouvoir discrétionnaire résiduel du tribunal de refuser l'autorisation de cesser d'occuper, mais elle ne peut s'y substituer.

Les principes suivants doivent présider à l'exercice du pouvoir discrétionnaire du tribunal de faire droit ou non à la requête pour cesser d'occuper. Le tribunal doit faire droit à la demande qui est présentée par l'avocat suffisamment à l'avance pour que la procédure inscrite au rôle ne doive pas être reportée. Lorsque le délai est plus serré, le tribunal est justifié de s'enquérir des motifs de l'avocat. Lorsque la déontologie ou le non-paiement des honoraires est invoqué, le tribunal doit s'en tenir à l'explication donnée et s'abstenir de pousser l'examen afin de ne pas compromettre le secret professionnel. La demande d'autorisation de cesser d'occuper présentée pour un motif d'ordre déontologique doit être accueillie. Lorsque le non-paiement des honoraires de l'avocat est à l'origine de la demande, le tribunal peut la rejeter dans l'exercice de son pouvoir discrétionnaire s'il détermine, au regard des éléments pertinents, que l'autorisation de cesser d'occuper porterait sérieusement atteinte à l'administration de la justice.

Le rejet de la requête pour cesser d'occuper est une décision contraignante et définitive vis-à-vis de l'avocat et, dans ce contexte, il convient de reconnaître au *certiorari* sa portée normale et de ne l'accorder qu'en présence d'une décision erronée sur la compétence ou d'une erreur de droit manifeste à la lecture du dossier.

En l'espèce, la Cour suprême du Yukon a conclu à bon droit que la Cour territoriale pouvait refuser à l'avocat l'autorisation de cesser d'occuper. La question de savoir si la présente affaire satisfait aux exigences strictes qui doivent être remplies pour qu'un tribunal puisse refuser l'autorisation de cesser d'occuper est désormais théorique, et le dossier de notre Cour ne renferme ni information ni analyse concernant plusieurs des éléments pertinents. On ne peut donc pas affirmer avec certitude qu'à l'issue d'une analyse complète des éléments pertinents, les circonstances de la présente espèce justifiaient le refus d'autoriser l'avocate à cesser d'occuper.

#### Jurisprudence

**Arrêts examinés :** *Re Leask and Cronin* (1985), 18 C.C.C. (3d) 315; *R. c. C. (D.D.)* (1996), 110 C.C.C. (3d) 323, autorisation de pourvoi refusée, [1997] 1 R.C.S. vii (*sub nom. Ferguson c. The Queen*); *R. c. Deschamps*, 2003 MBCA 116, 177 Man. R. (2d) 301; *R. c. Rowbotham* (1988), 41 C.C.C. (3d) 1; **arrêts mentionnés :** *Vescio c. The King*, [1949] R.C.S. 139; *Luchka c. Zens* (1989), 37 B.C.L.R. (2d) 127; *R. c. Ho*, 2003 BCCA 663, 21 B.C.L.R. (4th) 83; *R. c. 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. Mierzwinski*, [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.

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*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 Tysoc J.J.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

ROTHSTEIN J. —

### 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

POURVOI contre un arrêt de la Cour d'appel du Yukon (les juges Newbury, Kirkpatrick et Tysoc). 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, qui a annulé une décision du juge Gower. 2006 YKSC 40, 41 C.R. (6th) 66, [2006] Y.J. No. 46 (QL), 2006 CarswellYukon 51, qui avait rejeté une demande d'annulation de l'ordonnance du juge Lilles de la Cour territoriale, 2006 YKTC 54, 2006 YKTC 61, qui avait rejeté la demande pour cesser d'occuper présentée par l'avocate de la défense. Pourvoi accueilli.

*Ron Reimer et Peter A. Eccles*, pour l'appelante.

*Gordon R. Coffin et Nils F. N. Clarke*, pour l'intimé.

*Susan L. Reid*, pour l'intervenant le procureur général de l'Ontario.

*Leonard T. Doust, c.r.*, et *Michael A. Feder*, pour l'intervenante Law Society of British Columbia.

*John J. L. Hunter, c.r.*, et *Brent B. Olthuis*, pour l'intervenant le Barreau du Yukon.

*Gregory P. DelBigio*, pour l'intervenante l'Association du Barreau canadien.

*Scott C. Hutchison et Andrea Gonsalves*, pour l'intervenante Criminal Lawyers' Association (Ontario).

Version française du jugement de la Cour rendu par

LE JUGE ROTHSTEIN —

### 1. Introduction

[1] Quel est le pouvoir du tribunal lorsque, dans une affaire criminelle, l'avocat de la défense demande à cesser d'occuper pour cause de non-paiement de ses honoraires? Peut-il exiger que l'avocat continue de représenter l'accusé? Je suis d'avis qu'il a ce pouvoir, mais qu'il doit l'exercer avec circonspection

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

et uniquement lorsqu’il le faut pour empêcher une atteinte grave à l’administration de la justice.

## 2. Les faits

[2] Jennie Cunningham est une avocate criminaliste dont la Société d’aide juridique du Yukon retenait les services. Elle représentait Clinton Lance Morgan, qui faisait l’objet de trois chefs d’accusation pour l’agression sexuelle d’une fillette et dont l’enquête préliminaire devait débiter le 26 juin 2006. Le ministère public avait fait connaître son intention de demander préalablement au tribunal d’accepter que la victime témoigne sur bande vidéo plutôt que de vive voix au procès.

[3] Le 3 mai 2006, la Société d’aide juridique a informé M. Morgan qu’il devait mettre à jour l’information relative à sa situation financière, à défaut de quoi il cesserait de bénéficier de l’aide juridique. M. Morgan n’a pas donné suite à la demande et, le 16 mai 2006, la Société d’aide juridique l’a avisé que son avocate, M<sup>me</sup> Cunningham, n’était plus autorisée à le représenter. Cette dernière a demandé sans délai à la Cour territoriale du Yukon de l’autoriser à cesser d’occuper. La révocation de l’aide juridique et l’incapacité de M. Morgan d’acquiescer ses honoraires étaient les seules raisons invoquées à l’appui de sa demande. M<sup>me</sup> Cunningham a indiqué qu’elle était disposée à représenter M. Morgan à nouveau si l’aide juridique était rétablie.

## 3. Historique judiciaire

### A. *Cour territoriale du Yukon, 2006 YKTC 61 (CanLII)*

[4] La requête de M<sup>me</sup> Cunningham a été entendue par le juge Lilles, de la Cour territoriale, qui l’a rejetée pour les motifs suivants : a) l’aide juridique pouvait être rétablie et, le cas échéant, M<sup>me</sup> Cunningham était disposée à représenter à nouveau l’accusé; b) les accusations portées contre M. Morgan étaient très graves; c) la mémoire et le bien-être à la fois émotionnel et psychologique de la jeune plaignante risquaient d’être compromis par un délai supplémentaire; d) un avocat devrait être désigné

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

pour contre-interroger la fillette; e) on ignorait si M. Morgan était en mesure d'obtenir les services d'un autre avocat; f) on ignorait la date à laquelle l'enquête préliminaire pourrait être remise si l'avocate était autorisée à cesser d'occuper; g) l'enquête préliminaire n'est pas aussi cruciale que le procès, mais elle demeure déterminante pour le déroulement de celui-ci; h) la question complexe et très controversée de l'admission en preuve d'un témoignage sur bande vidéo était soulevée et il aurait été difficile à M. Morgan de participer au débat sans être représenté; i) un délai supplémentaire aurait causé un préjudice à M. Morgan du fait qu'il était soupçonné de délinquance sexuelle depuis le dépôt des accusations criminelles (par. 26).

B. *Cour suprême du territoire du Yukon, 2006 YKSC 40, 41 C.R. (6th) 66*

[5] Le juge Gower a entendu la demande de *certiorari* de M<sup>me</sup> Cunningham visant l'annulation de la décision de la Cour territoriale. Il a statué que le par. 537(1) du *Code criminel*, L.R.C. 1985, ch. C-46, et l'art. 77 de la *Loi sur la Cour territoriale*, L.R.Y. 2002, ch. 217, conféraient au juge président l'enquête préliminaire un pouvoir discrétionnaire en matière d'autorisation de cesser d'occuper. Après un examen approfondi de la jurisprudence canadienne sur le sujet, il conclut qu'elle étaye amplement l'existence du pouvoir discrétionnaire de refuser à l'avocat l'autorisation de cesser d'occuper. Selon lui, le juge Lilles, de la Cour territoriale, n'a pas outre-passé sa compétence, et il rejette la demande de *certiorari*.

C. *Cour d'appel du Yukon, 2008 YKCA 7, 257 B.C.A.C. 1*

[6] La Cour d'appel a conclu au caractère théorique de la question puisque l'instruction du procès de M. Morgan était devenue inutile (par. 17). L'appel a tout de même suivi son cours afin qu'un tribunal d'appel se prononce sur la question de droit.

[7] La Cour d'appel estime que le juge Lilles, de la Cour territoriale, n'avait pas le pouvoir discrétionnaire de refuser l'autorisation de cesser d'occuper et elle accueille l'appel. Sa décision a trois assises.

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.

Premièrement, les règles d'exercice de la profession d'avocat ressortissent au premier chef au barreau, et un droit de regard du tribunal lorsqu'il y a requête pour cesser d'occuper pourrait opposer décisions de justice et décisions disciplinaires. Deuxièmement, la surveillance judiciaire en ce domaine pourrait compromettre le secret professionnel de l'avocat lorsque ce dernier est appelé à préciser les motifs pour lesquels il souhaite cesser d'occuper. Troisièmement, l'obligation faite à un avocat de continuer de représenter un client fait naître un conflit réel ou apparent entre l'intérêt du client et l'intérêt de l'avocat à ce que l'affaire se termine au plus tôt. La Cour d'appel juge qu'en matière de cessation d'occuper, mieux vaut présumer que les avocats ne se dérobent généralement pas à leurs obligations professionnelles et que s'ils le font, les barreaux prennent les mesures disciplinaires qui s'imposent. Elle reconnaît cependant qu'un tribunal peut exercer le pouvoir dont il dispose en matière d'outrage [TRADUCTION] « dans le cas exceptionnel où le comportement de l'avocat désireux de cesser d'occuper constitue une offense grave à l'administration de la justice » (par. 29). Elle conclut que le juge Lilles n'aurait pas dû ordonner à M<sup>me</sup> Cunningham de continuer de représenter M. Morgan.

#### 4. La question en litige

[8] Notre Cour doit déterminer si, dans une affaire pénale, un tribunal peut refuser d'autoriser un avocat de la défense à cesser d'occuper pour cause de non-respect par l'accusé des conditions financières du mandat. Dans les présents motifs, « non-paiement des honoraires de l'avocat » (et ses variantes) s'entend de la situation où, par exemple, l'accusé omet d'effectuer un paiement, il ne verse pas les fonds à la date convenue ou son droit à l'aide juridique est suspendu ou révoqué.

#### 5. L'analyse

[9] L'accusé a le droit absolu de révoquer à son gré le mandat accordé à son avocat. Le tribunal ne peut intervenir dans ce choix et lui imposer un avocat dont il ne veut pas (voir *Vescio c. The King*, [1949] R.C.S. 139, p. 144; toutefois, à titre exceptionnel, un

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

*amicus curiae* peut être nommé pour assister le tribunal). Par contre, l'avocat n'a pas le droit absolu de cesser de représenter son client. La nature fiduciaire du lien créé avec son client limite sa faculté de cesser d'occuper une fois qu'il a accepté le mandat. Les règles de déontologie des barreaux provinciaux ou territoriaux (p. ex. la règle 21 de la partie un du *Code of Professional Conduct* du Barreau du Yukon, les chapitres 2, 6 et 7 du *Code of Professional Conduct* (mise à jour 2009) du Barreau de l'Alberta, le chapitre 10 du *Professional Conduct Handbook* (mise à jour 2010) du Barreau de la Colombie-Britannique et la règle 2 du *Code de déontologie* (mise à jour 2009) du Barreau du Haut-Canada) énoncent en détail les limites applicables. Le pourvoi soulève la question de savoir si le pouvoir du tribunal de faire respecter sa procédure impose une limite supplémentaire à la faculté de l'avocat de cesser d'occuper.

#### A. *Divergences de la jurisprudence*

[10] Il existe en la matière deux courants jurisprudentiels au sein des cours d'appel provinciales et territoriales. Selon les cours d'appel de la Colombie-Britannique et du Yukon, un tribunal n'a pas le pouvoir de refuser à un avocat de la défense l'autorisation de cesser d'occuper pour cause de non-paiement de ses honoraires. Les cours d'appel de l'Alberta, de la Saskatchewan, du Manitoba, de l'Ontario et du Québec estiment au contraire qu'un tribunal peut rejeter une demande d'autorisation de cesser d'occuper. Des tribunaux de première instance du Nouveau-Brunswick et de Terre-Neuve adhèrent également à cette école de pensée.

[11] La position des cours d'appel de la Colombie-Britannique et du Yukon s'origine de la décision *Re Leask and Cronin* (1985), 18 C.C.C. (3d) 315, de la Cour suprême de la Colombie-Britannique. Dans cette affaire, la cour fait droit à une demande d'ordonnance de prohibition, concluant qu'un juge de la cour provinciale ne peut pas légalement ordonner à un avocat de continuer de représenter un accusé. Pour le juge McKay, il s'agit ainsi de faire ressortir le rôle d'un barreau à la fois vigoureux et indépendant et de reconnaître que les questions disciplinaires relèvent du barreau et non du tribunal.

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.

À son avis, la relation entre l’avocat et son client est de nature contractuelle, et lorsque le client ne respecte pas ses obligations, l’avocat peut dénoncer le contrat et y mettre fin. Il dit craindre également que si l’avocat est tenu de révéler les raisons pour lesquelles il veut cesser d’occuper, le secret professionnel puisse être compromis. L’avocat demande certes l’autorisation de cesser d’occuper, mais cela tient [TRADUCTION] « de la politesse et de la courtoisie » (p. 325), car le tribunal n’a pas le pouvoir discrétionnaire de la lui refuser.

[12] Il faut préciser que, dans l’affaire *Leask*, la demande ne faisait pas suite au non-paiement des honoraires de l’avocat comme en l’espèce, mais de la détérioration de la relation avocat-client. Quoi qu’il en soit, les tribunaux de la Colombie-Britannique ont par la suite statué, sur le fondement de cette décision, que le tribunal n’avait pas le pouvoir de rejeter une requête pour cesser d’occuper quel que soit le motif invoqué (voir aussi *Luchka c. Zens* (1989), 37 B.C.L.R. (2d) 127 (C.A.), p. 129; *R. c. Ho*, 2003 BCCA 663, 21 B.C.L.R. (4th) 83, par. 19; *R. c. Huber*, 2004 BCCA 43, 192 B.C.A.C. 75, par. 75-76, la juge Rowles, par. 101, la juge Southin, et par. 121-126, le juge Smith).

[13] À l’opposé, les cours d’appel et les tribunaux de première instance de l’Alberta, de la Saskatchewan, du Manitoba, de l’Ontario et du Québec, ainsi que des tribunaux de première instance du Nouveau-Brunswick et de Terre-Neuve, considèrent que l’autorisation de cesser d’occuper peut être refusée à l’avocat. L’arrêt *R. c. C. (D.D.)* (1996), 110 C.C.C. (3d) 323, autorisation de pourvoi refusée, [1997] 1 R.C.S. vii (*sub nom. Ferguson c. The Queen*), est la décision qui retient le plus l’attention. La Cour d’appel de l’Alberta y statue qu’en plus d’avoir des obligations contractuelles envers son client, l’avocat est un auxiliaire de justice et qu’à ce titre, il a envers le tribunal l’obligation de [TRADUCTION] « se présenter devant lui lorsqu’il en est requis » et de « ne pas laisser un client en plan au milieu d’un procès » (p. 327). À moins que l’avocat ne précise au départ la nature limitée de son mandat, le tribunal peut lui refuser l’autorisation de cesser d’occuper.

[14] La Cour d’appel de l’Alberta paraît reconnaître l’existence de deux exceptions à cet égard.

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

Premièrement, le tribunal *doit* autoriser l'avocat à cesser d'occuper lorsqu'un désaccord l'oppose à son client (p. 328). Deuxièmement, le tribunal *peut* faire droit à la demande présentée pour cause de non-paiement de ses honoraires après avoir examiné le préjudice qui en résulte pour la preuve du ministère public, les inconvénients causés aux témoins et la possibilité que le tribunal consacre son temps à une autre affaire (p. 330).

[15] La Cour d'appel du Manitoba s'est elle aussi penchée sur le pouvoir du tribunal de rejeter la requête que présente un avocat pour cesser d'occuper à cause du non-paiement de ses honoraires : *R. c. Deschamps*, 2003 MBCA 116, 177 Man. R. (2d) 301. Elle convient avec la Cour d'appel de l'Alberta que le tribunal peut rejeter pareille demande. Toutefois, la juge Steel indique qu'il doit d'abord déterminer que le retrait infligerait un préjudice à l'accusé et à l'administration de la justice (par. 24).

[16] La Cour d'appel du Québec a elle aussi statué qu'une fois fixée la date de l'audience, le tribunal peut rejeter la requête pour cesser d'occuper (*Bernier c. 9006-1474 Québec inc.*, [2001] J.Q. n° 2631 (QL); voir également l'art. 249 du *Code de procédure civile* du Québec, L.R.Q., ch. C-25). Les cours d'appel de la Saskatchewan et de l'Ontario reconnaissent elles aussi l'obligation de l'avocat d'obtenir du tribunal l'autorisation de cesser d'occuper (*Mireau c. Canada* (1995), 128 Sask. R. 142, par. 4; *R. c. Brundia*, 2007 ONCA 725, 230 O.A.C. 29, par. 44; *R. c. Peterman* (2004), 70 O.R. (3d) 481, par. 38). Des tribunaux de première instance du Nouveau-Brunswick et de Terre-Neuve concluent eux aussi à l'existence de cette obligation (*R. c. Golding*, 2007 NBBR 320, 325 R.N.-B. (2<sup>e</sup>) 92, par. 18 et 20; *Dooling c. Banfield* (1978), 22 Nfld. & P.E.I.R. 413 (C. dist. T.-N.), par. 27).

[17] Pour les motifs exposés ci-après, j'estime qu'un tribunal peut refuser l'autorisation de cesser d'occuper demandée par l'avocat de la défense pour cause de non-paiement de ses honoraires.

#### B. *Pouvoir du tribunal*

[18] Une cour supérieure a la compétence inhérente nécessaire à l'exercice de sa fonction

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)

judiciaire ainsi qu’à l’exécution de son mandat d’administrer la justice (voir I. H. Jacob, « The Inherent Jurisdiction of the Court » (1970), 23 *Curr. Legal Probs.* 23, p. 27-28), ce qui comprend le pouvoir de décider du déroulement de l’instance, de prévenir l’abus de procédure et de veiller au bon fonctionnement des rouages de la cour. Comme l’avocat joue un rôle central dans l’administration de la justice, la cour a un certain pouvoir sur lui lorsqu’il s’agit de faire respecter sa procédure. Dans l’arrêt *Succession MacDonald c. Martin*, [1990] 3 R.C.S. 1235, notre Cour confirme que la compétence inhérente englobe le pouvoir de déclarer un avocat inhabile à occuper afin d’assurer un procès équitable à l’accusé :

Les tribunaux, qui ont le pouvoir inhérent de priver un avocat du droit d’occuper pour une partie en cas de conflit d’intérêts, ne sont pas tenus d’appliquer un code de déontologie. Leur compétence repose sur le fait que les avocats sont des auxiliaires de la justice et que le comportement de ceux-ci à l’occasion de procédures judiciaires, dans la mesure où il peut influencer sur l’administration de la justice, est soumis à leur pouvoir de surveillance. [p. 1245]

Il s’ensuivrait donc que si, dans l’exercice de sa compétence inhérente, le tribunal peut priver un avocat du droit d’occuper, il peut inversement refuser de l’autoriser à cesser d’occuper.

[19] De même, dans le cas d’un tribunal d’origine législative, le pouvoir de faire respecter sa procédure et le droit de regard sur la manière dont les avocats exercent leurs fonctions s’infèrent nécessairement du pouvoir de constituer une cour de justice. Notre Cour a confirmé que les pouvoirs d’un tribunal d’origine législative peuvent être déterminés grâce à une « doctrine de la compétence par déduction nécessaire » :

... sont compris dans les pouvoirs conférés par la loi habilitante non seulement ceux qui y sont expressément énoncés, mais aussi, par déduction, tous ceux qui sont de fait nécessaires à la réalisation de l’objectif du régime législatif . . . .

(*ATCO Gas and Pipelines Ltd. c. Alberta (Energy and Utilities Board)*, 2006 CSC 4, [2006] 1 R.C.S. 140, par. 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

Même si, dans cet arrêt, le juge Bastarache renvoie à un tribunal administratif, la même règle de la compétence par déduction nécessaire vaut pour un tribunal d'origine législative.

[20] La demande d'autorisation de cesser d'occuper ou celle visant à priver l'avocat du droit d'occuper, qu'elle soit présentée en raison, par exemple, du non-paiement des honoraires ou d'un conflit d'intérêts, ressortissent au pouvoir dont dispose par déduction nécessaire le tribunal pour décider du déroulement de l'instance.

### C. *L'exercice de la compétence*

[21] En l'espèce, la question la plus litigieuse est celle de savoir si, dans l'exercice de la compétence qui lui est inhérente — ou qu'il a par déduction nécessaire — pour décider du déroulement de l'instance, un tribunal siégeant en matière criminelle a un droit de regard sur le sort à réserver à la demande présentée par un avocat pour cesser d'occuper.

[22] Les raisons militent en faveur d'un tel droit de regard ne manquent pas. L'accusé qui n'a plus les moyens de payer son avocat peut subir un préjudice si ce dernier le laisse tomber au milieu de la procédure pénale. Un ajournement pourra être nécessaire pour lui permettre de se trouver un nouvel avocat. Un tel délai peut être préjudiciable à l'accusé, qui est stigmatisé par les accusations criminelles pesant toujours contre lui et qui peut être détenu jusqu'à son procès. Un nouveau délai peut également nuire à la preuve du ministère public. En effet, tout report a une incidence sur les plaignants, les témoins et les jurés, de même que sur l'administration diligente de la justice dans l'intérêt de la société. Lorsque de tels intérêts sont en jeu, ils peuvent l'emporter sur le droit de l'avocat de cesser d'occuper dans une affaire lorsque ses honoraires ne lui sont pas versés.

[23] M<sup>me</sup> Cunningham et les intervenants qui défendent la même thèse soutiennent pour leur part qu'un tribunal doit *toujours* s'abstenir d'exercer un tel droit de regard. Ils invoquent collectivement les trois éléments principaux sur lesquels la Cour d'appel fonde sa décision : le secret professionnel de l'avocat, le rôle du barreau et le conflit

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

d'intérêts. Ils voient en outre dans l'ordonnance de type *Rowbotham* une voie de solution possible. Selon eux, le tribunal doit présumer qu'un avocat respecte la déontologie, et tout écart professionnel ressortit à juste titre au barreau auquel l'avocat appartient. M<sup>me</sup> Cunningham et le Barreau du Yukon soutiennent toutefois que le tribunal peut, à titre exceptionnel, exercer sa compétence en matière d'outrage lorsque l'avocat demande à cesser d'occuper pour un motif illégitime ou qu'il se retire d'une manière qui justifie son assignation pour outrage au tribunal. Selon l'Association du Barreau canadien et l'association des criminalistes (Criminal Lawyers' Association), la faute déontologique ou l'abus de procédure doit être établi clairement pour que le tribunal assigne un avocat pour outrage au tribunal.

[24] J'examine successivement ces prétentions.

(1) Le secret professionnel de l'avocat

[25] M<sup>me</sup> Cunningham et les intervenants font valoir que le secret professionnel de l'avocat pourrait être violé de deux façons : la simple divulgation du seul fait que l'accusé n'a pas acquitté ses honoraires ou la révélation involontaire de renseignements privilégiés lors de l'examen par le tribunal des motifs de la cessation d'occuper.

[26] Le souci de protéger le secret professionnel de l'avocat est légitime. Point n'est besoin d'insister sur son importance fondamentale dans notre système juridique. La relation entre l'avocat et son client fait partie intégrante de l'administration de la justice. Le secret incite à la communication libre et entière des éléments nécessaires à la bonne représentation du client devant la justice (voir *Smith c. Jones*, [1999] 1 R.C.S. 455, par. 45, le juge Cory au nom des juges majoritaires, et *R. c. McClure*, 2001 CSC 14, [2001] 1 R.C.S. 445, par. 31 et 33, le juge Major).

[27] Cependant, dans le contexte pénal, la mise au jour du non-paiement des honoraires de l'avocat par l'accusé ne fait généralement pas intervenir la raison d'être du secret professionnel de l'avocat. Un client doit pouvoir être assuré de la confidentialité

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

de ce qu'il confie à son avocat, car ce n'est qu'à cette condition que les faits de l'affaire peuvent être discutés librement et franchement et que de bons conseils juridiques peuvent être donnés et obtenus (voir *Anderson c. Bank of British Columbia* (1876), 2 Ch. D. 644 (C.A.), p. 649; cité dans les arrêts *Smith c. Jones*, par. 45, et *McClure*, par. 32). Aucun élément n'a été avancé pour expliquer qu'un accusé serait moins enclin à communiquer des renseignements à son avocat si le tribunal jouissait d'un pouvoir discrétionnaire en matière de cessation d'occuper que si l'avocat pouvait se retirer unilatéralement de l'affaire.

[28] La prétention des barreaux de la Colombie-Britannique et du Yukon selon laquelle le secret professionnel s'applique au simple fait que l'accusé n'a pas acquitté ou n'acquittera pas les honoraires de son avocat s'appuie sur les arrêts *Descôteaux c. Mierzwinski*, [1982] 1 R.C.S. 860, et *Maranda c. Richer*, 2003 CSC 67, [2003] 3 R.C.S. 193. Dans ces deux affaires de perquisition au bureau de l'avocat, notre Cour statue que les renseignements sur la situation financière d'un accusé et sur les honoraires versés à son avocat peuvent être protégés. Dans l'arrêt *Maranda*, notre Cour souligne que des renseignements sur les honoraires — plus précisément leur montant et celui des débours — peuvent paraître « neutres », mais que leur communication peut porter préjudice à l'accusé. Le juge LeBel signale notamment que de tels renseignements

permettraient peut-être à un enquêteur intelligent de reconstituer certaines des allées et venues du client et de constituer des éléments sur sa présence en des lieux divers à partir de la documentation relative aux rencontres avec son avocat. [par. 24]

Ces renseignements pourraient ensuite servir à porter une accusation contre le client ou à le faire déclarer coupable. Dans le contexte d'une perquisition, les renseignements sur les honoraires sont protégés *prima facie*, car leur communication pourrait être préjudiciable au client. Lorsque le ministère public demande leur communication, il appartient au tribunal, et non à la police, de déterminer s'ils sont *effectivement* protégés.

[29] La demande présentée par un avocat pour cesser d'occuper en raison du non-paiement de ses

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,

honoraires s'inscrit dans un contexte nettement différent de celui de la perquisition policière visant les dossiers et les comptes d'un avocat. La plus grande différence tient à la teneur des renseignements mis au jour. L'avocat qui demande à cesser d'occuper ne révèle qu'une bribe d'information, à savoir que l'accusé n'a pas acquitté ses honoraires ou qu'il ne les acquittera pas. En quoi la communication de ce minime élément d'information pourrait-elle en l'espèce être préjudiciable à l'accusé? Nulle explication n'est avancée. On voit d'ailleurs difficilement comment ce simple fait pourrait être utilisé contre l'accusé pour établir le fondement de la poursuite pénale : il n'a de lien ni avec les renseignements donnés à l'avocat ni avec les conseils obtenus de ce dernier. On ne pourrait inférer du seul non-paiement des honoraires que l'accusé s'est livré à quelque activité particulière liée aux accusations portées contre lui.

[30] Tel est assurément le cas lorsque le non-paiement des honoraires n'a pas de lien avec le fondement de l'affaire et que sa mise au jour n'est pas préjudiciable à l'accusé. Toutefois, dans d'autres contextes juridiques, le paiement ou le non-paiement des honoraires peut être pertinent pour ce qui concerne le fondement de l'affaire lorsque, par exemple, en droit de la famille, une pension alimentaire est demandée et que le client allègue l'impécuniosité. Révéler le non-paiement des honoraires de l'avocat peut aussi infliger un préjudice au client lorsque, par exemple, le défendeur décide alors de présenter une demande de cautionnement pour dépens. Dans le cas où le paiement des honoraires ou leur non-paiement est pertinent pour ce qui est du fondement de l'affaire ou que sa mise au jour peut être préjudiciable au client, le secret professionnel de l'avocat peut s'y appliquer.

[31] Le non-paiement des honoraires qui n'est pas lié au fondement de l'affaire et dont la mise au jour ne cause pas préjudice à l'accusé ne constitue pas une exception à l'application du secret professionnel, contrairement à la démonstration de l'innocence ou à la sécurité publique (voir généralement les arrêts *McClure* et *Smith c. Jones*). Dans ce contexte, le non-paiement des honoraires de l'avocat ne bénéficie en fait jamais de la protection du secret

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

professionnel. Cependant, les présents motifs, qui portent sur l'application ou l'inapplication du secret professionnel de l'avocat à certains éléments communiqués au tribunal, ne sauraient être interprétés de façon à modifier l'obligation déontologique de l'avocat de tenir secret le paiement de ses honoraires ou leur non-paiement dans d'autres contextes.

[32] M<sup>me</sup> Cunningham et les intervenants font par ailleurs valoir qu'en exposant les motifs de sa demande d'autorisation de cesser d'occuper et en répondant aux questions du tribunal, l'avocat pourrait révéler par mégarde des renseignements confidentiels. Il s'agirait d'un risque si inacceptable que le tribunal devrait s'abstenir d'exercer tout pouvoir discrétionnaire de rejeter la demande. Ils invoquent à l'appui l'affaire *Leask*, où l'avocat demandait l'autorisation de cesser d'occuper en raison d'un désaccord insurmontable avec l'accusé. Le juge de la cour provinciale avait voulu obtenir des précisions pour déterminer si les divergences étaient conciliables (p. 318-319). Dans cette affaire, l'accusé avait lui aussi participé à l'échange. À leur avis, l'exercice est périlleux, car l'accusé pourrait renoncer sans le savoir au secret professionnel et révéler des renseignements par ailleurs protégés.

[33] Je conviens que, dans l'affaire *Leask*, le juge n'aurait pas dû engager pareil échange. Il a maintes fois demandé à l'avocat de justifier en détail sa volonté de cesser d'occuper, même après que ce dernier eut invoqué les règles de déontologie. Il a carrément demandé à l'accusé s'il s'opposait à ce que l'avocat révèle les raisons précises à l'origine de sa demande. Dans cette affaire, les faits en cause étaient sans conteste inacceptables.

[34] Or, l'avocat est présumé connaître ses obligations professionnelles et les respecter. Le juge est présumé connaître le droit (*R. c. Burns*, [1994] 1 R.C.S. 656, p. 664, la juge McLachlin (maintenant Juge en chef)). L'intégrité de l'administration de la justice repose sur ces présomptions. Les tribunaux sont fréquemment appelés à trancher des questions délicates. Par exemple, bien que la décision initiale de ne pas produire un document susceptible d'être privilégié appartienne à l'avocat, un juge peut avoir à décider si le document est effectivement

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]

privilegié. Le risque minime qu'un renseignement protégé puisse alors être révélé par mégarde ne justifie pas que la décision finale appartienne uniquement à l'avocat en cas de contestation. Il en va de même, selon moi, de la cessation d'occuper pour non-paiement d'honoraires dans une affaire criminelle. Le risque minime que le tribunal saisi de la demande tente indûment d'obtenir des renseignements protégés à l'audience ne justifie pas que la décision de cesser d'occuper relève uniquement de l'avocat.

## (2) Droit de regard réservé au barreau

[35] Je ne saurais non plus faire droit à l'argument de M<sup>me</sup> Cunningham et des intervenants voulant que seul le barreau ait un droit de regard en la matière. Le barreau joue un rôle disciplinaire essentiel lorsqu'un avocat commet une faute professionnelle, mais lorsque ce dernier demande à cesser d'occuper, le droit de regard du tribunal n'a pas un objectif disciplinaire. Le pouvoir judiciaire se veut *préventif*. Il vise à protéger l'administration de la justice et à assurer un procès équitable. Le rôle disciplinaire du barreau a un caractère *réactif*. Les deux sont nécessaires pour bien encadrer l'exercice de la profession d'avocat et protéger la procédure de la cour.

[36] Les règles adoptées par les différents barreaux constituent des énoncés fondamentaux des normes professionnelles applicables et elles renseignent abondamment sur les conditions auxquelles l'avocat peut demander l'autorisation de cesser d'occuper. Par exemple, les règles du Barreau de l'Alberta disposent ce qui suit relativement à la cessation d'occuper pour cause de non-paiement des honoraires :

[TRADUCTION] Moyennant un préavis raisonnable au client, l'avocat peut cesser d'occuper lorsque les circonstances le justifient. Les circonstances pouvant justifier l'avocat de se retirer, mais non l'y contraindre, comprennent les suivantes :

- a) le client omet de donner suite à la demande de verser une somme dans un délai raisonnable pour le paiement des honoraires ou des débours conformément à l'entente conclue avec l'avocat; [ch. 14, règle 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]

Une règle du Barreau du Haut-Canada vise directement le retrait pour non-paiement des honoraires dans une affaire criminelle :

L'avocate ou l'avocat qui a consenti à représenter un client ou une cliente ne peut se retirer d'une affaire criminelle en raison du non-paiement des honoraires lorsque la date prévue du procès n'est pas assez éloignée pour permettre à son client ou à sa cliente de changer de titulaire de permis et à cette nouvelle personne de bien se préparer pour le procès et que le report de la date du procès nuirait aux intérêts du client ou de la cliente. [règle 2.09(5)]

[37] L'Association du Barreau canadien établit elle aussi des règles de déontologie professionnelle, notamment en ce qui concerne la cessation d'occuper :

Le devoir de l'avocat envers son client lui interdit de cesser d'occuper sauf pour un bon motif et après l'avoir convenablement avisé, eu égard aux circonstances.

(*Code de déontologie professionnelle* (2009), ch. XII)

Au nombre des commentaires afférents à cette règle figure le suivant :

Le fait qu'un client, après un préavis raisonnable, refuse de verser à l'avocat une provision pour frais ou honoraires donne à l'avocat un motif valable de cesser d'occuper, à condition toutefois que le client ne subisse pas, de ce fait, un préjudice grave. [commentaire 6]

[38] Les normes établies par les codes de déontologie des barreaux ou de l'Association du Barreau canadien ne lient pas les tribunaux, mais elles « doivent être considérées comme un important énoncé de principes » (*Succession MacDonald*, p. 1246). Elles complètent le pouvoir discrétionnaire du tribunal de refuser l'autorisation de cesser d'occuper qui aurait de graves répercussions sur l'administration de la justice. À titre d'exemple, le code de l'Association du Barreau canadien reconnaît que tribunaux et barreaux ont des rôles certes complémentaires, mais distincts :

Chaque fois que la présente règle autorise ou oblige l'avocat à cesser d'occuper pour un client, il doit le faire conformément aux règlements du tribunal devant lequel il plaide et aux règles de procédure qui s'imposent. [commentaire 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

Tribunaux et ordres professionnels jouent des rôles différents mais importants dans l'encadrement de l'exercice du droit de cesser d'occuper : les premiers préviennent l'atteinte à l'administration de la justice, les seconds soumettent à des sanctions disciplinaires les avocats qui ne respectent pas les normes professionnelles. Ces rôles ne sont pas mutuellement exclusifs.

[39] M<sup>me</sup> Cunningham et les intervenants soutiennent qu'un droit de regard du tribunal en la matière compromet l'indépendance professionnelle des avocats, qui, je le rappelle, sont parties prenantes à l'administration de la justice. Je ne saurais convenir qu'une mesure exceptionnelle prise à l'endroit d'un avocat et jugée nécessaire pour préserver l'intégrité de l'administration de la justice compromet l'indépendance de la profession. Dans l'arrêt *Young c. Young*, [1993] 4 R.C.S. 3, aux p. 135-136, la juge McLachlin reconnaît qu'un avocat peut être condamné personnellement aux dépens dans le rare cas où il agit de mauvaise foi en encourageant l'abus de la procédure de la cour et en retardant le déroulement de celle-ci. Nul ne laisse entendre que pareille mesure exceptionnelle a compromis l'indépendance de la profession. De plus, en Alberta, où la cessation d'occuper fait l'objet d'un droit de regard du tribunal depuis à tout le moins l'arrêt *C. (D.D.)* rendu en 1996, ce contrôle ne semble pas avoir eu d'incidence sur l'indépendance des avocats de la province. Enfin, toutes les règles de déontologie reconnaissent que les membres d'un barreau indépendant ont des obligations qui transcendent celles qu'ils ont envers leurs clients. Les avocats doivent respecter leurs obligations professionnelles vis-à-vis de l'administration de la justice et du public, et leur indépendance n'en souffre pas pour autant (voir, p. ex., Barreau du Yukon, parties 2 et 3, Barreau du Haut-Canada, règles 4 et 6; Barreau de l'Alberta, ch. 1; Barreau de la Colombie-Britannique, ch. 1).

### (3) Le conflit d'intérêts

[40] Je ne suis pas convaincu non plus par la prétention du barreau de la Colombie-Britannique selon laquelle obliger un avocat à continuer de représenter un client peut opposer les intérêts de l'un et de l'autre. Suivant ce raisonnement, l'avocat contraint



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.

de travailler sans rémunération peut être tenté de conseiller son client de manière à accélérer la procédure et réduire ainsi son manque à gagner, alors que, en matière pénale, ce n'est pas dans l'intérêt du client. Cela contredit pourtant l'affirmation du barreau — à laquelle je souscris — que les tribunaux doivent présumer que les avocats respectent la déontologie. Les intérêts personnels ou professionnels de l'avocat peuvent souvent se heurter à ceux de ses clients — par exemple, lorsqu'il se voit confier un nouveau dossier intéressant qui requiert une attention immédiate ou que le déroulement d'une instance est compromis par ses projets de vacances. L'avocat doit être diligent et minutieux et agir au mieux des intérêts de son client. S'il accepte d'agir *pro bono*, il doit faire preuve du même professionnalisme que s'il exécutait un mandat contre rémunération. L'avocat auquel le tribunal enjoint de continuer de représenter l'accusé doit le faire avec compétence et diligence. L'intégrité de la profession et l'administration de la justice n'exigent rien de moins.

#### (4) L'ordonnance de type *Rowbotham*

[41] Les intervenants Barreau du Yukon, Criminal Lawyers' Association et procureur général de l'Ontario attirent l'attention de notre Cour sur l'arrêt *R. c. Rowbotham* (1988), 41 C.C.C. (3d) 1, où la Cour d'appel de l'Ontario statue que lorsqu'un accusé impécunieux, mais non admissible à l'aide juridique, doit bénéficier des services d'un avocat pour que son procès soit équitable, le tribunal peut suspendre l'instance jusqu'à ce que l'État paie pour l'obtention de ces services (p. 69).

[42] Notre Cour ne s'est pas prononcée sur le bien-fondé d'une telle ordonnance (*Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. G. (J.)*, [1999] 3 R.C.S. 46, par. 90), et comme la question n'est pas soulevée dans le présent pourvoi, les remarques qui suivent sont incidentes. À supposer toutefois qu'une telle ordonnance puisse être rendue, elle jouerait dans la décision du tribunal d'autoriser ou non l'avocat à cesser d'occuper.

[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.

[43] Cela dit, l'ordonnance de type *Rowbotham* ne saurait cependant se substituer entièrement au pouvoir du tribunal de rejeter la demande de l'avocat. Comme le dit la Cour d'appel de l'Ontario dans l'arrêt du même nom (à la p. 69), ainsi que dans l'arrêt *R. c. Rushlow*, 2009 ONCA 461, 245 C.C.C. (3d) 505, aux par. 17-21 et 24, l'ordonnance vise à assurer à l'accusé un procès équitable; elle ne tient pas compte des intérêts de quelque autre partie ou personne touchée par l'instance. Par conséquent, lorsque le délai dans le déroulement de l'instance ou l'incidence sur un tiers est une considération déterminante aux fins d'accorder ou non l'autorisation de cesser d'occuper pour cause de non-paiement d'honoraires, l'ordonnance de type *Rowbotham* ne résout pas le problème et peut même l'aggraver. Pour l'obtenir, l'accusé doit présenter une autre requête distincte et satisfaire à des critères stricts. L'ordonnance de type *Rowbotham* peut jouer dans l'exercice du pouvoir discrétionnaire résiduel du tribunal de refuser l'autorisation de cesser d'occuper, mais elle ne peut s'y substituer.

#### (5) Mesure de dernier recours

[44] L'argumentation de M<sup>me</sup> Cunningham n'écarte donc pas entièrement le pouvoir du tribunal de refuser à un avocat l'autorisation de cesser d'occuper dans un dossier.

[45] Cela dit, un tribunal ne saurait décider à la légère de contraindre un avocat à représenter un client gratuitement. L'avocat criminaliste est le mieux placé pour déterminer le risque financier que comporte l'acceptation d'un mandat, mais il ne devrait être tenu de supporter seul cette charge financière que dans les circonstances les plus graves. L'accessibilité de la justice ne devrait pas généralement reposer sur les seules épaules des avocats de la défense ni, en particulier, sur celles des avocats de l'aide juridique. L'autorisation de cesser d'occuper ne devrait être refusée à l'avocat qu'en dernier recours et seulement si cela s'impose pour prévenir une atteinte grave à l'administration de la 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

#### D. *Le rejet de la demande*

[46] Les principes suivants devraient présider à l'exercice du pouvoir discrétionnaire du tribunal de faire droit ou non à la demande présentée par un avocat pour cesser d'occuper.

[47] Le tribunal devrait faire droit à la demande qui est présentée suffisamment à l'avance pour que la procédure inscrite au rôle ne doive pas être reportée. Il n'y a pas lieu alors d'examiner le fondement de la demande ni d'exiger que l'avocat continue de représenter son client.

[48] Lorsque le délai est plus serré, le tribunal est justifié de pousser l'examen. Tant qu'il ne manque pas au secret professionnel, l'avocat peut révéler qu'il veut cesser d'occuper pour des motifs d'ordre déontologique, pour cause de non-paiement de ses honoraires ou pour une autre raison (sa charge de travail, p. ex.). S'il invoque le respect de la déontologie, c'est que sa relation avec son client a évolué de telle sorte qu'il ne peut en conscience continuer de le représenter. L'avocat peut invoquer des « motifs d'ordre déontologique » lorsque, par exemple, l'accusé lui demande de manquer à ses obligations professionnelles (voir, p. ex., *Barreau du Haut-Canada*, règles 2.09(7)b) et d); *Barreau de l'Alberta*, ch. 14, règle 2; *Barreau de la Colombie-Britannique*, ch. 10, règle 1) ou qu'il ne suit pas ses conseils sur un point important lié au procès (voir, p. ex., *Barreau du Haut-Canada*, règle 2.09(2); *Barreau de l'Alberta*, ch. 14, règle 1; *Barreau de la Colombie-Britannique*, ch. 10, règle 2). Lorsque la véritable raison à l'origine de la demande est le non-paiement des honoraires, l'avocat ne peut invoquer la déontologie. Toutefois, que l'un ou l'autre soit invoqué, le tribunal doit s'en tenir à l'explication donnée et s'abstenir de pousser l'examen afin de ne pas compromettre le secret professionnel.

[49] La demande d'autorisation de cesser d'occuper présentée pour un motif d'ordre déontologique doit être accueillie (voir les arrêts *C. (D.D.)*, p. 328, et *Deschamps*, par. 23). Lorsqu'un problème d'ordre

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

éthique se pose dans sa relation avec le client, l'avocat peut être *tenu* de se retirer du dossier pour se conformer à ses obligations professionnelles. Le tribunal ne saurait exiger qu'il continue d'occuper au mépris de celles-ci.

[50] Lorsque le non-paiement de ses honoraires est à l'origine de la demande de l'avocat, le tribunal peut, dans l'exercice de son pouvoir discrétionnaire, la rejeter. Il peut également recourir à son pouvoir en matière d'outrage au tribunal pour faire respecter sa décision de ne pas autoriser l'avocat à cesser d'occuper (*C. (D.D.)*, p. 327). Voici une liste non exhaustive des éléments dont il peut tenir compte dans l'exercice de son pouvoir discrétionnaire de faire droit ou non à la demande :

- la possibilité que l'accusé se défende lui-même;
- l'existence d'autres avenues pour que l'accusé soit représenté;
- les conséquences pour l'accusé d'un délai dans le déroulement de la procédure, spécialement lorsque l'accusé est en détention;
- la conduite de l'avocat (p. ex., s'il a informé l'accusé suffisamment à l'avance pour qu'il puisse trouver un autre représentant ou s'il a demandé dès que possible au tribunal l'autorisation de cesser d'occuper);
- l'incidence sur le ministère public et sur un coaccusé;
- l'incidence sur les plaignants, les témoins et les jurés;
- l'équité envers l'avocat de la défense, compte tenu notamment de la durée prévue de l'instance et de sa complexité;
- l'historique du dossier, y compris le changement d'avocat à répétition.

Ces éléments étant tous étrangers à la relation avocat-client, leur examen ne saurait violer le secret professionnel. Le tribunal doit déterminer, au regard de ces éléments, si l'autorisation de cesser

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

d'occuper porterait sérieusement atteinte à l'administration de la justice. Dans l'affirmative, il peut la refuser.

[51] Contrairement à ce que prétendent les intervenants, l'atteinte à l'administration de la justice ne s'entend pas seulement des inconvénients d'ordre administratif. Elle s'entend également du fait que l'instance pénale en cours et celle qui se prolonge touchent d'autres personnes : les plaignants, les témoins, les jurés et les citoyens en général. C'est pourquoi j'estime en toute déférence que la considération tenant à la possibilité — dont fait mention la Cour d'appel de l'Alberta dans l'arrêt *C. (D.D.)* — que le tribunal consacre son temps à une autre affaire n'est pas pertinente dans la mise en balance des intérêts en jeu.

[52] L'arrêt *Deschamps* de la Cour d'appel du Manitoba offre un bon exemple d'exercice opportun du pouvoir discrétionnaire du tribunal. L'avocat de la défense représentait un délinquant dans une instance engagée pour que ce dernier soit déclaré délinquant dangereux. Après cinq jours d'audience, il a demandé l'ajournement le temps que le délinquant soit évalué et traité. L'instance a été suspendue pendant environ huit mois et, dans l'intervalle, des problèmes sont survenus relativement aux honoraires versés par l'aide juridique. Vu la grande complexité de la procédure engagée pour faire déclarer une personne délinquant dangereux, il avait été entendu au départ que l'avocat toucherait des honoraires supérieurs à ceux que prévoyait le tarif. Des « difficultés financières » ont remis en question le respect de cet engagement par les services d'aide juridique. L'avocat de la défense a demandé l'autorisation de cesser d'occuper en raison de cette inexécution alléguée du contrat.

[53] La juge des requêtes a conclu qu'il n'y avait pas d'inexécution contractuelle, mais que s'il y en avait eu, elle aurait quand même rejeté la demande. Sa décision a été confirmée en appel. La juge Steel a convenu avec elle que les éléments suivants justifiaient le refus de l'autorisation de cesser d'occuper : l'instance était complexe et son enjeu considérable, le délinquant ne pouvait se défendre seul, l'audition

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

avait commencé, le délinquant ne pouvait obtenir les services d'un autre avocat dans un délai prévisible et, malgré le caractère difficile du délinquant, une relation de confiance s'était établie entre l'avocat et lui. La Cour d'appel a également convenu avec la juge des requêtes que le retrait de l'avocat aurait encore retardé le déroulement de l'instance et causé un grave préjudice au délinquant. Elle a fait observer qu'après la requête initiale, les services d'aide juridique avaient garanti que les honoraires seraient versés, mais au tarif ordinaire. La demande d'autorisation de cesser d'occuper a été rejetée.

[54] La question de savoir si la présente affaire satisfait aux exigences strictes qui doivent être remplies pour qu'un tribunal puisse refuser l'autorisation de cesser d'occuper est désormais théorique. Ni les parties ni le juge n'ont pu bénéficier des présents motifs, et le dossier de notre Cour ne renferme ni information ni analyse concernant plusieurs des éléments pertinents. On ne peut donc pas affirmer avec certitude qu'à l'issue d'une analyse complète des éléments pertinents, les circonstances de la présente espèce justifieraient le refus d'autoriser l'avocate à cesser d'occuper. J'insiste seulement sur le caractère strict des conditions auxquelles l'autorisation peut être refusée et sur la nécessité que le dossier offre l'assise voulue pour que le tribunal exerce son pouvoir en ce sens.

#### E. *Le contrôle des décisions refusant l'autorisation de cesser d'occuper*

[55] Le présent pourvoi tire son origine du rejet d'une demande de *certiorari* par la Cour suprême du territoire du Yukon. M<sup>me</sup> Cunningham avait sollicité un *certiorari* parce qu'aucune disposition du *Code criminel* ne lui permettait d'interjeter un appel interlocutoire (voir l'art. 674 du *Code criminel*). Elle a porté la décision de la cour supérieure en appel devant la Cour d'appel (par. 784(1) du *Code criminel*), puis le ministère public s'est à son tour adressé à la Cour suprême du Canada (art. 40 de la *Loi sur la Cour suprême*, L.R.C. 1985, ch. S-26).

[56] On peut se demander ce qui serait advenu si le pourvoi avait eu pour origine la décision d'une

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

cour supérieure. Les cours d'appel de l'Alberta et du Manitoba se sont toutes deux déclarées sans compétence à l'égard d'un appel visant la décision d'une cour supérieure relative à une requête pour cesser d'occuper (arrêts *C. (D.D.)*, p. 330, et *Deschamps*, par. 42). Notre Cour n'a pas à se prononcer sur la procédure à suivre pour en appeler d'une telle décision, mais quelques repères pourraient néanmoins être utiles. La présente espèce s'apparente à première vue à l'affaire *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835, où une entreprise de communication contestait une interdiction de publication visant une instance pénale. Comme l'entreprise n'était pas partie à cette instance, notre Cour a estimé que son recours différait de l'appel interlocutoire interjeté par une partie. Elle a conclu que le moyen d'appel le moins inopportun pour contester la décision de la cour supérieure consistait à s'adresser directement à la Cour suprême du Canada en application de l'art. 40 de la *Loi sur la Cour suprême* (p. 862). En l'espèce, l'avocate criminaliste est elle aussi un tiers en ce qui concerne l'instance principale de nature pénale, de sorte que la situation paraît analogue.

#### F. *Certiorari*

[57] Une demande de *certiorari* ne peut être accueillie que lorsque la juridiction inférieure a rendu une décision erronée sur sa compétence ou commis une erreur de droit manifeste eu égard au dossier (G. Létourneau, *The Prerogative Writs in Canadian Criminal Law and Procedure* (1976), p. 143). Le juge Gower a estimé qu'il ne pouvait intervenir dans l'exercice du pouvoir discrétionnaire que si le juge Lilles, de la Cour territoriale, avait outrepassé sa compétence. Toutefois, en matière d'enquête préliminaire, l'exigence de l'excès de compétence s'applique au renvoi de l'accusé à son procès ou à la décision de le libérer (*Patterson c. La Reine*, [1970] R.C.S. 409, p. 413; *Dubois c. La Reine*, [1986] 1 R.C.S. 366, p. 380; *R. c. Deschamplain*, 2004 CSC 76, [2004] 3 R.C.S. 601, par. 17). Ce critère de révision strict procède du fait qu'à l'issue d'une enquête préliminaire, le tribunal ne se prononce pas définitivement sur la culpabilité ou l'innocence de l'accusé, de sorte que de larges moyens de contrôle sont moins nécessaires (*Dubois*, p. 373-374). La

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.

demande présentée par un avocat pour cesser d'occuper ne s'apparente ni au renvoi à procès ni à la libération à l'issue de l'enquête préliminaire. Elle se rapproche davantage de la situation considérée dans l'affaire *Dagenais*, où la demande était présentée par un tiers. Le juge de première instance peut statuer sans délai et définitivement sur la demande d'autorisation de cesser d'occuper. Comme l'indique la juge Steel dans l'arrêt *Deschamps*, le rejet d'une telle demande est une décision contraignante et définitive vis-à-vis de l'avocat (par. 38). Dans ce contexte, il convient donc de reconnaître au *certiorari* sa portée normale et de ne l'accorder qu'en présence d'une décision erronée sur la compétence ou d'une erreur de droit manifeste à la lecture du dossier (*Dagenais*, p. 864-865).

[58] Comme le pouvoir du tribunal de surveiller le comportement des avocats ressortit à sa compétence inhérente ou à sa compétence par déduction nécessaire, il est difficile de concevoir que le refus d'autoriser un avocat à cesser d'occuper puisse équivaloir à une décision erronée sur sa compétence. Cependant, l'avocat peut faire valoir que le juge de la cour provinciale ou territoriale a commis une erreur de droit au vu du dossier. Pareille erreur s'entend notamment du refus de permettre à l'avocat de cesser d'occuper pour un motif d'ordre déontologique ou de l'omission de tenir compte d'un élément pertinent dans l'exercice du pouvoir discrétionnaire d'autoriser ou non la cessation d'occuper pour cause de non-paiement des honoraires (voir *R. c. Gardiner*, 2008 ONCA 397, 231 C.C.C. (3d) 394, par. 26, et *Ottawa Citizen Group Inc. c. R.* (2005), 75 O.R. (3d) 590 (C.A.), par. 49).

## 6. Conclusion

[59] En résumé, un tribunal est investi du pouvoir de décider du déroulement de l'instance et d'encadrer le travail des avocats en leur qualité d'auxiliaires de justice. La Cour suprême du Yukon a conclu à bon droit que la Cour territoriale pouvait refuser à l'avocat l'autorisation de cesser d'occuper. Ce pouvoir doit toutefois être exercé avec circonspection. Il ne convient pas de refuser le retrait qui n'occasionne pas d'ajournement ni celui qui est justifié par le respect de la déontologie. Le tribunal malencontreusement



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.*

saisi d'une demande d'autorisation de cesser d'occuper pour cause de non-paiement d'honoraires doit sopeser les éléments pertinents et déterminer si y faire droit porterait gravement atteinte à l'administration de la justice.

#### 7. Dispositif

[60] Je suis d'avis d'accueillir le pourvoi et de refuser d'adjuger des dépens.

*Pourvoi accueilli.*

*Procureur de l'appelante : Service des poursuites pénales du Canada, Vancouver.*

*Procureur de l'intimée : Clinique d'aide juridique communautaire, Whitehorse.*

*Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.*

*Procureurs de l'intervenante Law Society of British Columbia : McCarthy Tétrault, Vancouver.*

*Procureurs de l'intervenant le Barreau du Yukon : Hunter Litigation Chambers Law Corporation, Vancouver.*

*Procureur de l'intervenante l'Association du Barreau canadien : Gregory P. DelBigio, Vancouver.*

*Procureurs de l'intervenante Criminal Lawyers' Association (Ontario) : Stockwoods, Toronto.*

This is Exhibit " E " referred to in the  
Affidavit of  
JAMMY BRUNEAU-BERTO

82

Sworn before me this 12 day  
of APRIL A.D. 20 23



Court File No. T-553-22

**MONTAGUE ALDOUS**  
**A COMMISSIONER FOR OATHS**  
**IN AND FOR THE PROVINCE OF MANITOBA**  
MY COMMISSION EXPIRES FEB 10/25

**FEDERAL COURT**

BETWEEN:

ANDREW ROBERT GIRARD, ALEXANDER GOSSEN, HARRY GARCIA, MARCO AUGUSTO CARREIRA, THOMAS LAMOUREUX, JULIE KERFOOT, PAUL GORDON MACDONALD, DAVID MONTAGNON, CHAD REXER, SEAN BRIAN WILLIAM HOWE, JAMIE TATE LINN, DEVON BROOKS, MICHAEL BROWN, AARON RUHL, ANDREW TIGHE, THOMAS ALEXANDRE JOSEPH POIRIER, MARC DANIEL PARADIS, JOHN ARTHUR GARY GEORGE SKEOCH, RYLEE JON GUDNASON STEVENS, SHELDON BENEDICTSON, TREVOR J HALLETT, BRETT JERRY GAUDRY, DONALD WERSCHLER, MARK BAKER, DARRYL REID, LANCE KENYON, JOHN KARKARIS, ORRIE MYLES ANDERSON, CHRISTOPHER DANIEL ANDREWS, CAMERON JOSEPH EDWARDS, DEREK ESKOWICH, BRENT TIMOTHY MARTIN, PAUL DEVARENNE, BRODIE MELNYCHUK, DANIEL PURPUR, RYAN HRYNIW, ADAM HELFRICH, MARTIN JOHN GOGELA, EJAZ ALEKOZAI, JEREMY STEPHENSON, BRYAN MATTHEW MCHUGH, RYAN EDGE, NOAH STEELE, TULLY HARTL, SPENCER STEVENS, ANDREW NJUME, MATTHEW HICKS, LISA SCHMIDTKE, CHRISTOPHER LOCKE, JEFFERY DEVINE, DAWOOD K HAIDER, JARED SCOTT MAYHEW, TYRRELL HIATT, SHAWN BASKETTE, GEORGE COSTA, BRIAN DESROSIERS, KYLE WILLIAM ROSS PILON, KYLE DANIEL MICHAEL KORTKO, SHANE THOMAS STONE, JESSE RANDALL BLOOM, COLIN STAN PORTICE, RYAN CHARLES THIESSEN, TIMOTHY HAY, MATTHEW BLANC, RUSSELL THOMAS HENDERSON, STEVEN KOENIG, THOMAS MARTIN SAVORN, JAMES WELCH, CINDY STEVENSON, JON MCALLISTER, MICHAEL DAVID SERBEN, JACK EBIN THOMAS SAVORN, CHARLES MILLER, MILAN MITIC, ROBERT DESROSIERS, MATTHEW CARTER-BARR, WILLIAM CHESTER JOSLIN, COLBY COCHRANE, TRAVIS SCHALLOCK, ANDREW MULHERIN-CARON, CHRISTIAN THOMAS JONES, GEORGE ZINDROS, JEFFREY WYCHOPEN, GLEN SAINAS, RYAN DONER, KYLE WICKSTROM, SLATE PODAIMA, COLEMAN MITCHELL, ERNEST GEORGESON, DALLON DAVID EDMONDSON, AARON SWAN, SARA LOVEGROVE, SAMUEL LEGERE, CLAUDIO CARACCILO, RACINE MARIE STONE, STEVE STOPA, CLAUDIA LAPOLLA, KELLY ROBERT HIGGINS, TED AMEAR KIRYAKOS, ALAN TODD RUDDERHAM, SAMANTHA OLSEN, CHANDRA MARIE GILLIES, LANCE LESLIE WILLIAMS, LIONEL BROWN RICHARDO, JOHN THOMAS CRODEN, CHARLES ANTHONY DICKSON, MICHAEL CASTILLO, MICHAEL CERULLI, KARIM LOWEN, SHAWN SILVARI, JUSTIN DADINA, MARCEL LEONARD BEDARD, DWAYNE SOBERS, JESSE ALLISON, NICOLAS LICOIS, CLAYTON PAPP, DOUGLAS BRYAN, DEREK JAMES CHARLES WATERHOUSE, JAMIE CAMERON HALL, DAYLE JONES, KENTON HILDEBRAND, DEVANANTH VICTOR SELVAM, MATTHEW BRITTON, JESSICA ERIN ASLIN, ALIE KRAAYENBRINK, NANCY JEAN WARD, ERIC BEAULIEU, REJEAN DONALD JOSEPH SAWCHUK, DARYL CHAMBERS, RAPHAEL DESCHENES, JAMES LEE KERR, EUGENE JEFFREY MACKAY, BRETT KYLE HUNT, DERRICK WOODALL, TROY STRANDBERG, BILLY NEUMANN, RONALD MARK KELLY, SUZANNE MARIE

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Plaintiffs

-and-

THE MINISTER OF TRANSPORT, HER MAJESTY THE QUEEN IN RIGHT OF CANADA, ATTORNEY GENERAL OF CANADA, DIRECTOR GENERAL RAIL SAFETY, and CANADIAN NATIONAL RAILWAY

Defendants

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## ORDER

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UPON HEARING THIS MOTION in writing made by Grey Wowk Spencer LLP, the solicitors for the Plaintiffs, for an Order removing them as solicitors of record with respect to two Plaintiffs: John Karkaris and Shawn Silvani;

UPON READING the notice of motion and the affidavit of Megan Gurski;

AND UPON READING the written submissions of Grey Wowk Spencer LLP;

AND UPON NOTING that Grey Wowk Spencer LLP has made numerous attempts to receive instructions from John Karkaris and Shawn Silvari;

AND UPON NOTING that John Karkaris and Shawn Silvari have failed to respond to Grey Wowk Spencer LLP and provide their instructions;

AND UPON NOTING that Grey Wowk Spencer LLP has provided reasonable notice to John Karkaris and Shawn Silvari of Grey Wowk Spencer LLP's intention to withdraw as solicitors of record;

**THIS COURT ORDERS that:**

1. The law firm, Grey Wowk Spencer LLP, is hereby removed as solicitors of record for the Plaintiffs John Karkaris and Shawn Silvari.

Dated this \_\_\_\_\_, 2023

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**FEDERAL COURT**

BETWEEN:

ANDREW ROBERT GIRARD, ALEXANDER GOSSEN, HARRY GARCIA, MARCO AUGUSTO CARREIRA, THOMAS LAMOUREUX, JULIE KERFOOT, PAUL GORDON MACDONALD, DAVID MONTAGNON, CHAD REXER, SEAN BRIAN WILLIAM HOWE, JAMIE TATE LINN, DEVON BROOKS, MICHAEL BROWN, AARON RUHL, ANDREW TIGHE, THOMAS ALEXANDRE JOSEPH POIRIER, MARC DANIEL PARADIS, JOHN ARTHUR GARY GEORGE SKEOCH, RYLEE JON GUDNASON STEVENS, SHELDON BENEDICTSON, TREVOR J HALLETT, BRETT JERRY GAUDRY, DONALD WERSCHLER, MARK BAKER, DARRYL REID, LANCE KENYON, JOHN KARKARIS, ORRIE MYLES ANDERSON, CHRISTOPHER DANIEL ANDREWS, CAMERON JOSEPH EDWARDS, DEREK ESKOWICH, BRENT TIMOTHY MARTIN, PAUL DEVARENNE, BRODIE MELNYCHUK, DANIEL PURPUR, RYAN HRYNIW, ADAM HELFRICH, MARTIN JOHN GOGELA, EJAZ ALEKOZAI, JEREMY STEPHENSON, BRYAN MATTHEW MCHUGH, RYAN EDGE, NOAH STEELE, TULLY HARTL, SPENCER STEVENS, ANDREW NJUME, MATTHEW HICKS, LISA SCHMIDTKE, CHRISTOPHER LOCKE, JEFFERY DEVINE, DAWOOD K HAIDER, JARED SCOTT MAYHEW, TYRRELL HIATT, SHAWN BASKETTE, GEORGE COSTA, BRIAN DESROSIERS, KYLE WILLIAM ROSS PILON, KYLE DANIEL MICHAEL KORTKO, SHANE THOMAS STONE, JESSE RANDALL BLOOM, COLIN STAN PORTICE, RYAN CHARLES THIESSEN, TIMOTHY HAY, MATTHEW BLANC, RUSSELL THOMAS HENDERSON, STEVEN KOENIG, THOMAS MARTIN SAVORN, JAMES WELCH, CINDY STEVENSON, JON MCALLISTER, MICHAEL DAVID SERBEN, JACK EBIN THOMAS SAVORN, CHARLES MILLER, MILAN MITIC, ROBERT DESROSIERS, MATTHEW CARTER-BARR, WILLIAM CHESTER JOSLIN, COLBY COCHRANE, TRAVIS SCHALLOCK, ANDREW MULHERIN-CARON, CHRISTIAN THOMAS JONES, GEORGE ZINDROS, JEFFREY WYCHOPEN, GLEN SAINAS, RYAN DONER, KYLE WICKSTROM, SLATE PODAIMA, COLEMAN MITCHELL, ERNEST GEORGESON, DALLON DAVID EDMONDSON, AARON SWAN, SARA LOVEGROVE, SAMUEL LEGERE, CLAUDIO CARACCILO, RACINE MARIE STONE, STEVE STOPA, CLAUDIA LAPOLLA, KELLY ROBERT HIGGINS, TED AMEAR KIRYAKOS, ALAN TODD RUDDERHAM, SAMANTHA OLSEN, CHANDRA MARIE GILLIES, LANCE LESLIE WILLIAMS, LIONEL BROWN RICHARDO, JOHN THOMAS CRODEN, CHARLES ANTHONY DICKSON, MICHAEL CASTILLO, MICHAEL CERULLI, KARIM LOWEN, SHAWN SILVARI, JUSTIN DADINA, MARCEL LEONARD BEDARD, DWAYNE SOBERS, JESSE ALLISON, NICOLAS LICOIS, CLAYTON PAPP, DOUGLAS BRYAN, DEREK JAMES CHARLES WATERHOUSE, JAMIE CAMERON HALL, DAYLE JONES, KENTON HILDEBRAND, DEVANANTH VICTOR SELVAM, MATTHEW BRITTON, JESSICA ERIN ASLIN, ALIE KRAAYENBRINK, NANCY JEAN WARD, ERIC BEAULIEU, REJEAN DONALD JOSEPH SAWCHUK, DARYL CHAMBERS, RAPHAEL DESCHENES, JAMES LEE KERR, EUGENE JEFFREY MACKAY, BRETT KYLE HUNT, DERRICK WOODALL, TROY STRANDBERG, BILLY NEUMANN, RONALD MARK KELLY, SUZANNE MARIE

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Plaintiffs

-and-

THE MINISTER OF TRANSPORT, HER MAJESTY THE QUEEN IN RIGHT OF CANADA, ATTORNEY GENERAL OF CANADA, DIRECTOR GENERAL RAIL SAFETY, and CANADIAN NATIONAL RAILWAY

Defendants

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**AFFIDAVIT OF SERVICE**

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I, Montague Aldous, of the City of Winnipeg, in the Province of Manitoba, Process Server

AFFIRM AND SAY THAT:

1. I did on Saturday, April 1<sup>st</sup>, 2023, at 15:07 personally serve SHAWN SILVARI (the "Recipient") with the following documents in this action:

- a. NOTICE OF MOTION attached as Exhibit "A"
- b. AFFIDAVIT OF MEGAN GURSKI sworn March 30, 2023 attached as Exhibit "B"
- c. WRITTEN REPRESENTATIONS attached as Exhibit "C"
- d. BOOK OF AUTHORITIES attached as Exhibit "D"
- e. ORDER attached as Exhibit "E"


by handing true copies thereof to, and leaving them with SHAWN SILVARI at 11 Sheila Drive, New Bothwell, Manitoba, R0A 1C0.

2. My means of knowledge of the identity of the Recipient are as follows:

- a. That at the time of service SHAWN SILVARI verbally confirmed his identity, and verbally agreed that he is a named Plaintiff in this matter, and that he is the appropriate party to be so served.
- b. That at the time of service SHAWN SILVARI offered no documentation to further confirm his identity, despite my request.

3. To effect service I necessarily travelled 95.4 kilometres.

Affirmed before me in the City )  
of Winnipeg, in the Province )  
of Manitoba, this 05 day )  
of April 2023. )

  
Virginia Aldous )  
A Commissioner for Oaths )  
In and for the Province of Manitoba )  
My appointment expires Nov 10, 2024 )

  
Montague Aldous

MONTAGUE ALDOUS

**VERGINIA ALDOUS**  
A COMMISSIONER FOR OATHS  
IN AND FOR THE PROVINCE OF MANITOBA  
MY COMMISSION EXPIRES Nov 10 / 21

Sworn before me this 05 day  
of APRIL A.D. 20 23

Court File No. T-553-22

*Virginia Aldous*

**FEDERAL COURT**

BETWEEN:

ANDREW ROBERT GIRARD, ALEXANDER GOSSEN, HARRY GARCIA, MARCO AUGUSTO CARREIRA, THOMAS LAMOUREUX, JULIE KERFOOT, PAUL GORDON MACDONALD, DAVID MONTAGNON, CHAD REXER, SEAN BRIAN WILLIAM HOWE, JAMIE TATE LINN, DEVON BROOKS, MICHAEL BROWN, AARON RUHL, ANDREW TIGHE, THOMAS ALEXANDRE JOSEPH POIRIER, MARC DANIEL PARADIS, JOHN ARTHUR GARY GEORGE SKEOCH, RYLEE JON GUDNASON STEVENS, SHELDON BENEDICTSON, TREVOR J HALLETT, BRETT JERRY GAUDRY, DONALD WERSCHLER, MARK BAKER, DARRYL REID, LANCE KENYON, JOHN KARKARIS, ORRIE MYLES ANDERSON, CHRISTOPHER DANIEL ANDREWS, CAMERON JOSEPH EDWARDS, DEREK ESKOWICH, BRENT TIMOTHY MARTIN, PAUL DEVARENNE, BRODIE MELNYCHUK, DANIEL PURPUR, RYAN HRYNIW, ADAM HELFRICH, MARTIN JOHN GOGELA, EJAZ ALEKOZAI, JEREMY STEPHENSON, BRYAN MATTHEW MCHUGH, RYAN EDGE, NOAH STEELE, TULLY HARTL, SPENCER STEVENS, ANDREW NJUME, MATTHEW HICKS, LISA SCHMIDTKE, CHRISTOPHER LOCKE, JEFFERY DEVINE, DAWOOD K HAIDER, JARED SCOTT MAYHEW, TYRRELL HIATT, SHAWN BASKETTE, GEORGE COSTA, BRIAN DESROSIERS, KYLE WILLIAM ROSS PILON, KYLE DANIEL MICHAEL KORTKO, SHANE THOMAS STONE, JESSE RANDALL BLOOM, COLIN STAN PORTICE, RYAN CHARLES THIESSEN, TIMOTHY HAY, MATTHEW BLANC, RUSSELL THOMAS HENDERSON, STEVEN KOENIG, THOMAS MARTIN SAVORN, JAMES WELCH, CINDY STEVENSON, JON MCALLISTER, MICHAEL DAVID SERBEN, JACK EBIN THOMAS SAVORN, CHARLES MILLER, MILAN MITIC, ROBERT DESROSIERS, MATTHEW CARTER-BARR, WILLIAM CHESTER JOSLIN, COLBY COCHRANE, TRAVIS SCHALLOCK, ANDREW MULHERIN-CARON, CHRISTIAN THOMAS JONES, GEORGE ZINDROS, JEFFREY WYCHOPEN, GLEN SAINAS, RYAN DONER, KYLE WICKSTROM, SLATE PODAIMA, COLEMAN MITCHELL, ERNEST GEORGESON, DALLON DAVID EDMONDSON, AARON SWAN, SARA LOVEGROVE, SAMUEL LEGERE, CLAUDIO CARACCILO, RACINE MARIE STONE, STEVE STOPA, CLAUDIA LAPOLLA, KELLY ROBERT HIGGINS, TED AMEAR KIRYAKOS, ALAN TODD RUDDERHAM, SAMANTHA OLSEN, CHANDRA MARIE GILLIES, LANCE LESLIE WILLIAMS, LIONEL BROWN RICHARDO, JOHN THOMAS CRODEN, CHARLES ANTHONY DICKSON, MICHAEL CASTILLO, MICHAEL CERULLI, KARIM LOWEN, SHAWN SILVARI, JUSTIN DADINA, MARCEL LEONARD BEDARD, DWAYNE SOBERS, JESSE ALLISON, NICOLAS LICOIS, CLAYTON PAPP, DOUGLAS BRYAN, DEREK JAMES CHARLES WATERHOUSE, JAMIE CAMERON HALL, DAYLE JONES, KENTON HILDEBRAND, DEVANANTH VICTOR SELVAM, MATTHEW BRITTON, JESSICA ERIN ASLIN, ALIE KRAAYENBRINK, NANCY JEAN WARD, ERIC BEAULIEU, REJEAN DONALD JOSEPH SAWCHUK, DARYL CHAMBERS, RAPHAEL DESCHENES, JAMES LEE KERR, EUGENE JEFFREY MACKAY, BRETT KYLE HUNT, DERRICK WOODALL, TROY STRANDBERG, BILLY NEUMANN, RONALD MARK KELLY, SUZANNE MARIE



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Plaintiffs

-and-

THE MINISTER OF TRANSPORT, HER MAJESTY THE QUEEN IN RIGHT OF CANADA, ATTORNEY GENERAL OF CANADA, DIRECTOR GENERAL RAIL SAFETY, and CANADIAN NATIONAL RAILWAY

Defendants

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**WRITTEN REPRESENTATIONS**  
(Motion for removal of solicitor of record under Rule 125)

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**SUBMISSIONS**

1. This is a motion by the solicitors of record of the Plaintiffs, Grey Wowk Spencer LLP (“GWS”), to be removed as solicitors of record for the two Plaintiffs John Karkaris (“Mr.

**Karkaris**) and Shawn Silvari (**Mr. Silvari**) pursuant to Rule 125 of the *Federal Courts Rules*, SOR/98-106 (“the **Rules**”).<sup>1</sup>

2. GWS is the solicitor of record for the Plaintiffs in this action, Court File T-553-22 (the **“Action”**).
3. When GWS was retained by all of the Plaintiffs, each Plaintiff provided their email addresses, residential addresses and phone numbers to GWS prior to the commencement of the Action (the **“Contact Information”**).<sup>2</sup>
4. GWS advised the Plaintiffs to ensure their Contact Information was accurate at all times.<sup>3</sup>
5. There are 230 Plaintiffs in this Action. GWS has obtained instructions to discontinue the Action from 228 of the Plaintiffs; all but two of the Plaintiffs have failed to provide instructions to GWS: Mr. Karkaris and Mr. Silvari (the **“Remaining Plaintiffs”**).<sup>4</sup>
6. GWS has made numerous attempts to receive instructions from Mr. Karkaris and Mr. Silvari through their Contact Information via email, telephone calls and regular mail to their last known addresses. Despite repeated attempts to obtain instructions from Mr. Karkaris and Mr. Silvari, Mr. Karkaris and Mr. Silvari have failed to respond to GWS.<sup>5</sup>
7. A Court has authority to remove a solicitor of record.<sup>6</sup> It is submitted that this is such a case. The court must exercise its discretion and grant the motion to remove GWS as solicitor of record for the Remaining Plaintiffs.
8. It is submitted that the failure of GWS to receive instructions from Mr. Karkaris and Mr. Silvari affects the administration of justice. In this case, GWS has represented 228 other Plaintiffs who provided their instructions to withdraw from the Action, however, Mr. Karkaris and Mr. Silvari have not responded to GWS’ numerous requests for instructions. Consequently, Mr. Karkaris and Mr. Silvari are the only remaining Plaintiffs.

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<sup>1</sup> *Federal Courts Rules*, SOR/98-106, Rule 125, Book of Authorities, Tab 1.

<sup>2</sup> Affidavit of Megan Gurski, at para 4.

<sup>3</sup> Affidavit of Megan Gurski, at para 4.

<sup>4</sup> Affidavit of Megan Gurski, at paras 6 to 8.

<sup>5</sup> Affidavit of Megan Gurski, at paras 6 to 8.

<sup>6</sup> See *Cunningham v Lilles*, 2010 SCC 10 at paras 36, 46 to 49, 59, Book of Authorities Tab 4.

9. Chapter 3.7 of the *Law Society of Alberta Code of Conduct* (the “*Code*”)<sup>7</sup> provides guidance to lawyers seeking to withdraw from representation. Rule 3.7-2 of the *Code* states that a lawyer may withdraw from representation of a client due to a serious loss of confidence between the lawyer and the client so long as reasonable notice of withdrawal is given and no serious prejudice would result to the client. Rules 3.7-7 of the *Code* provides further details on the preferred procedure of withdrawal.<sup>8</sup>
10. It is hard to imagine how the Remaining Plaintiffs could establish that they would suffer serious prejudice should the court grant the motion of GWS. As Plaintiffs in the Action, it is incumbent upon Mr. Karkaris and Mr. Silvari to remain in contact with their lawyers, receive advice from their lawyers and provide instructions to their lawyers in a timely manner. Through their conduct, it may be inferred that Mr. Karkaris and Mr. Silvari have essentially abandoned their claim.
11. On March 28, 2023, Natalie Johnson, lawyer with GWS, gave notice to the Remaining Plaintiffs that GWS would be withdrawing from representing the Remaining Plaintiffs due to their failure to provide GWS instructions and their failure to respond to the legal advice of GWS. This notice was provided in writing via email to the Remaining Plaintiffs’ last known email address and through Express Post mail to the Remaining Plaintiffs’ last known mailing address.<sup>9</sup>
12. Megan Gurski is a legal assistant with GWS. In her affidavit, Ms. Gurski swore/affirmed the following:<sup>10</sup>
  - a. GWS has attempted to obtain instructions from the Remaining Plaintiffs using the Contact Information. I am informed by Natalie Johnson, lawyer with GWS, and believe that she has attempted to obtain instructions from the Remaining Plaintiffs

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<sup>7</sup> *Law Society of Alberta Code of Conduct*, March 28, 2023, Rule 3.7 and related commentary, Book of Authorities, Tab 2.

<sup>8</sup> *Law Society of Alberta Code of Conduct*, March 28, 2023, Rule 3.7 and related commentary, Book of Authorities, Tab 2.

<sup>9</sup> Affidavit of Megan Gurski, at para 8.

<sup>10</sup> Affidavit of Megan Gurski, at paras 7 to 9.

as detailed below. I have also attempted to obtain instructions. Despite repeated attempts, GWS has not received a response from the Remaining Plaintiffs:

i. Shawn Silvari:

1. 2023-02-17: email from the Group Leader seeking response to legal advice of GWS by 2023-03-03;
2. 2023-02-27: reminder email from the Group Leader seeking response to legal advice of GWS by 2023-03-03;
3. 2023-03-07: telephone call from me to Shawn Silvari; I left a voicemail message;
4. 2023-03-07: email directly from GWS to Shawn Silvari;
5. 2023-03-08: email directly from GWS to Shawn Silvari;
6. 2023-03-27: email directly from me on behalf of GWS to Shawn Silvari;
7. 2023-03-27: voice mail message from me on behalf of GWS to Shawn Silvari;
8. 2023-03-27: voice mail message from Natalie Johnson on behalf of GWS to Shawn Silvari;
9. 2023-03-28: voice mail message from Natalie Johnson on behalf of GWS to Shawn Silvari;
10. 2023-03-28: email directly from me on behalf of GWS to Shawn Silvari; and
11. 2023-03-28: email from Natalie Johnson on behalf of GWS to Shawn Silvari.

ii. John Karkaris:

1. 2023-02-17: email from the Group Leader seeking response to legal advice of GWS by 2023-03-03;
2. 2023-02-27: reminder email from the Group Leader seeking response to legal advice of GWS by 2023-03-03;

6

3. 2023-03-07: telephone call from me to John Karkaris; I left a voicemail message;
  4. 2023-03-07: email directly from GWS to John Karkaris;
  5. 2023-03-08: email directly from GWS to John Karkaris;
  6. 2023-03-27: email directly from me on behalf of GWS to John Karkaris;
  7. 2023-03-27: voice mail message from me on behalf of GWS to John Karkaris;
  8. 2023-03-27: voice mail message from Natalie Johnson on behalf of GWS to John Karkaris;
  9. 2023-03-28: voice mail message from Natalie Johnson on behalf of GWS to John Karkaris;
  10. 2023-03-28: email directly from me on behalf of GWS to John Karkaris; and
  11. 2023-03-28: email from Natalie Johnson on behalf of GWS to John Karkaris.
- b. I am advised by Natalie Johnson and believe that on March 28, 2023, she emailed and mailed a letter to the Remaining Plaintiffs via Express Post with tracking numbers to their last known address. Attached as Exhibit "A" to my affidavit is a copy of the Canada Post receipt and tracking information. In that letter Natalie Johnson advised the Remaining Plaintiffs that due to their failure to respond to GWS, their failure to respond to the legal advice of GWS and their failure to provide GWS instructions, GWS was seeking a court order to be removed as solicitors of record.
- c. On March 30, 2023, I instructed a process server to personally serve notice of this motion upon the Remaining Plaintiffs at their last known address.

13. The above noted actions satisfy the requirements of Rule 125 and the procedures in the *Code* regarding counsel's withdrawal from representation.<sup>11</sup> For these reasons, no prejudice to the Remaining Plaintiffs will manifest from the removal of GWS as solicitors of record for the Remaining Plaintiffs.
14. The Remaining Plaintiffs have been unreasonable and uncooperative as they have failed to provide adequate instructions to GWS despite repeated requests.<sup>12</sup>
15. GWS has good cause to withdraw from representing the Remaining Plaintiffs<sup>13</sup> and has provided reasonable notice of same upon the Remaining Plaintiffs.<sup>14</sup>

### **ORDER SOUGHT**

16. GWS requests an Order that:
  - a. GWS be removed as solicitors of record for the Remaining Plaintiffs;
  - b. There should be no costs for this motion; and
  - c. Such further or other relief as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. The affidavit of Megan Gurski, to be filed;
2. The affidavit of personal service of the process server confirming service of this motion upon John Karakaris, to be filed; and

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<sup>11</sup> *Federal Courts Rules*, SOR/98-106, Rule 125, Book of Authorities, Tab 1; *Law Society of Alberta Code of Conduct*, March 28, 2023, Rule 3.7, Book of Authorities, Tab 2; See also *Fitzpatrick v College of Physical Therapists of Alberta*, 2020 ABCA 88 (CanLII), Book of Authorities Tab 3.

<sup>12</sup> *Law Society of Alberta Code of Conduct*, March 28, 2023, rule 3.7-2 and related commentary, Book of Authorities, Tab 2.

<sup>13</sup> See *Fitzpatrick v College of Physical Therapists of Alberta*, 2020 ABCA 88 (CanLII), Book of Authorities, Tab 3.

<sup>14</sup> *Law Society of Alberta Code of Conduct*, March 28, 2023, rule 3.7-1 and related commentary, Book of Authorities, Tab 2.

3. The affidavit of personal service of the process server confirming service of this motion upon Shawn Silvari, to be filed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of March, 2023.

*for/* Natalie Johnson  
Grey Wowk Spencer LLP  
5110 – 51 Avenue, PO Box 1028  
Cold Lake, AB T9M 1P3  
Email: [lgrey@gwsllp.ca](mailto:lgrey@gwsllp.ca)  
Attention: Leighton BU Grey, KC

This is Exhibit " B " referred to in the Affidavit of

MONTAGUE ALDOUS  
Sworn before me this 05 day  
of APRIL A.D. 20 23

VERGINIA ALDOUS  
A COMMISSIONER FOR OATHS  
IN AND FOR THE PROVINCE OF MANITOBA  
MY COMMISSION EXPIRES NOV 10/24

96

*Verginia Aldous*

FORM 80A- Rule 80

AFFIDAVIT

Court File No. T-553-22

FEDERAL COURT

BETWEEN:

ANDREW ROBERT GIRARD, ALEXANDER GOSSEN, HARRY GARCIA, MARCO AUGUSTO CARREIRA, THOMAS LAMOUREUX, JULIE KERFOOT, PAUL GORDON MACDONALD, DAVID MONTAGNON, CHAD REXER, SEAN BRIAN WILLIAM HOWE, JAMIE TATE LINN, DEVON BROOKS, MICHAEL BROWN, AARON RUHL, ANDREW TIGHE, THOMAS ALEXANDRE JOSEPH POIRIER, MARC DANIEL PARADIS, JOHN ARTHUR GARY GEORGE SKEOCH, RYLEE JON GUDNASON STEVENS, SHELDON BENEDICTSON, TREVOR J HALLETT, BRETT JERRY GAUDRY, DON WERSCHLER, MARK BAKER, DARRYL REID, LANCE KENYON, JOHN KARKARIS, ORRIE MYLES ANDERSON, CHRISTOPHER DANIELS ANDREWS, CAMERON JOSEPH EDWARDS, DEREK ESKOWICH, BRENT TIMOTHY MARTIN, PAUL DEVARENNE, BRODIE MELNYCHUK, DANIEL PURPUR, RYAN HRYNIW, ADAM HELFRINCH, MARTIN JOHN GOGELA, EJAZ ALEKOZAI, JEREMY STEPHENSON, BRYAN MATTHEW MCHUGH, RYAN EDGE, NOAH STEELE, TULLY HARTL, SPENCER STEVENS, ANDREW NJUME, MATTHEW HICKS, LISA SCHMIDTKE, CHRISTOPHER LOCKE, JEFFERY DEVINE, DAWOOD K HAIDER, JARED SCOTT MAYHEW, TYRRELL HIATT, SHAWN BASKETTE, GEORGE COSTA, BRIAN DESROSIERS, KYLE WILLIAM ROSS PILON, KYLE DANIEL MICHAEL KORTKO, SHANE THOMAS STONE, JESSE RANDALL BLOOM, COLIN STAN PORTICE, RYAN CHARLES THIESSEN, TIMOTHY HAY, MATTHEW BLANC, RUSSELL THOMAS HENDERSON, STEVEN KOENIG, THOMAS MARTIN SAVORN, JAMES WELCH, CINDY STEVENSON, JON MCALLISTER, MICHAEL DAVID SERBEN, JACK EBIN THOMAS SAVORN, CHARLES MILLER, MILAN MITIC, ROBERT DESROSIERS, MATTHEW CARTER-BARR, WILLIAM CHESTER JOSLIN, COLBY COCHRANE, TRAVIS SCHALLOCK, ANDREW MULHERIN-CARON, CHRISTIAN THOMAS JONES, GEORGE ZINDROS, JEFFREY WYCHOPEN, GLEN SAINAS, RYAN DONER, KYLE WICKSTROM, SLATE PODAIMA, COLEMAN MITCHELL, ERNEST GEORGESON, DALLON DAVID EDMONDSON, AARON SWAN, SARA LOVEGROVE, SAMUEL LEGERE, CLAUDIO CARACCILO, RACINE MARIE STONE, STEVE STOPA, CLAUDIA LAPOLLA, KELLY ROBERT HIGGINS, TED AMEAR KIRYAKOS, ALAN TODD RUDDERHAM, SAMANTHA OLSEN, CHANDRA MARIE GILLIES, LANCE LESLIE WILLIAMS, LIONEL BROWN RICHARDO, JOHN THOMAS CRODEN, CHARLES ANTHONY DICKSON, MICHAEL CASTILLO, MICHAEL CERULLI, KARIM LOWEN, SHAWN SILVARI, JUSTIN DADINA, MARCEL LEONARD BEDARD, DWAYNE SOBERS, JESSE ALLISON, NICOLAS I.ICOIS, CLAYTON PAPP, DOUGLAS BRYAN, DEREK JAMES CHARLES WATERHOUSE, JAMIE CAMERON HALL, DAYLE JONES, KENTON HILDEBRAND, DEVANANTH VICTOR SELVAM, MATTHEW BRITTON, JESSICA ERIN ASLIN, ALIE KRAAYENBRINK, NANCY JEAN WARD, ERIC BEAULIEU, REJEAN DONALD JOSEPH



SAWCHUK, DARYL CHAMBERS, RAPHAEL DESCHENES, JAMES LEE KERR, EUGENE JEFFREY MACKAY, BRETT KYLE HUNT, DERRICK WOODALL, TROY STRANDBERG, BILLY NEUMANN, RONALD MARK KELLY, SUZANNE MARIE BATTICK, NATHAN HUGH BOHMER, TYLER BYRNES, ROBERT STUVE, JASON FLOYD FREDRICKSON, KATHY PIETERSMA, BRAD PALEY, CHANTEL TARA KOETZLE, PARTICK PAQUET, DENISE FINK, NATHAN ROBERT VEINOT, KYLE GEORGE KING, DOMENIO RICCI, CATHLEEN ALICE PESSERL, STEPHEN EDWARD GLADISH, REMY FAST, ROBERT KOETSIER, BRETT HERBERT, COREY ADAM ARSENAULT, JAZMINE STADNYK, RAYMOND LUNN, CAMERON JAMES SMITH, MYLES GOZDA, ANDREW PAUL STEWART, MICHAEL MARUSHY, NATHAN GOY, RICHARD MICHAEL, RYAN GILBY, DEAN GRYWACHESKI, DORIN HALMAGHI, MICHAEL VALLINS, NICOLE LABOUCAN, JAMES BULLOUGH, WALTER FERLEYKO, JOCSELYN VALERIA YANEZ, TRISTAN JENKIN, SEAN FIORILLO, ERIC MORKEBERG, NATHANIEL PHILIPPOT, JUSTIN DADINA, CHAMREIYANG KAMEI, SHENDY GINGRAS, JEFFREY THOMAS BURT, JAMES FREDERICK BETTS, DALE SAWA, ALEXANDER BLOKZYL, ANDREW BLOKZYL, CLAYTON EDWARD MOFFAT, AARON TANK, JOHN ROBERT MANSEAU, SEBASTIEN TRITZ, COOPER AUSTIN BAILEY SHAW, DAVID WEBSTER, KATERINA D'AMOURS, ANDREW STEPHEN KOETZLE, ANTHONY FEDERICO, BYRON SABORIO, ADAM ALEXANDER EALEY, JOSEPH GUY CRISTIAN DUFOUR, ARGENTINA CORPENO, KEITH STOWE, TIM SCORY, CAROLINE ROBILLARD, DARRAN BLACKMON, PAUL MENEER, KARIM BEKRI, TAMMY MITCHELL. ADAM VAN DE WALLE, EDDIE NEISER, YOANN HAMEL, VIKRAM KUKADIA, KAJEN SATHASIVAM, ADAM JOHNSON, JOHN NORDQUIST, PIERRE POIRIER, RAJANIKANTH SHANMUGAM, AUSTIN CLARK, MARK DESJARDINS, ISAIAH JOHNSON, LINDEN AWSOME, ARTHUR ANSELM, TYSON WEBER, EUGENIA KULCHYCKY, TAMMY SMITH, YANNICK LAPLANTE, CAROLIN BOYER, CHARLES ADAM, PHILIP SCHROER, ANDREW PRATT and LUC PRINCE

PLAINTIFFS

-and-

THE MINISTER OF TRANSPORT, HIS MAJESTY THE KING IN RIGHT OF CANADA,  
ATTORNEY GENERAL OF CANADA, DIRECTOR GENERAL RAIL SAFETY, and  
CANADIAN NATIONAL RAILWAY

DEFENDANTS

**AFFIDAVIT OF MEGAN GURSKI**  
**(Motion for removal of solicitor of record under Rule 125)**  
**Sworn on March 30, 2023**

I, MEGAN GURSKI, legal assistant, of the City of Cold Lake, in the Province of Alberta, SWEAR (or AFFIRM) THAT:

1. I am a legal assistant of Grey Wowk Spencer LLP (“GWS”). I have personal knowledge of the matters deposed herein. Where I do not have personal knowledge, I have stated the source of my information and believe it to be true.
2. GWS is the solicitor of record for the Plaintiffs for Court File T-553-22 (the “Action”).
3. The Defendant, Canadian National Railway, (“CN”) brought a motion to strike the Action on jurisdictional grounds (the “Motion”). The parties agreed to a consent Order dated February 13, 2023, which Order set out a timetable for the outstanding steps in the litigation leading up to the hearing of the Motion. The Motion is scheduled to be heard on June 13, 14, 15, and 16, 2023.
4. Each Plaintiff provided their email addresses, residential addresses and phone numbers to GWS prior to the commencement of the Action (the “Contact Information”). GWS advised the Plaintiffs to ensure their Contact Information was accurate at all times.
5. To facilitate the administration of the Action, the Plaintiffs were organized into a group. Generally, GWS communicated with the Plaintiff, Christian Jones, who acted on behalf of the other Plaintiffs (the “Group Leader”). I am advised by the Group Leader and believe that he communicated with all Plaintiffs via email to the email addresses the Plaintiffs provided to the Group Leader and to GWS.
6. On March 9, 2023, GWS delivered a letter to the defendants stating that GWS had received instructions from the majority of the Plaintiffs to discontinue the Action. GWS also advised the defendants that GWS was unable to obtain instructions from some Plaintiffs (the “Remaining Plaintiffs”). Currently, there are two Remaining Plaintiffs.
7. GWS has attempted to obtain instructions from the Remaining Plaintiffs using the Contact Information. I am informed by Natalie Johnson, lawyer with GWS, and believe that she has attempted to obtain instructions from the Remaining Plaintiffs as detailed below. I have also attempted to obtain instructions. Despite repeated attempts, GWS has not received a response from the Remaining Plaintiffs:
  - a. Shawn Silvari:
    - i. 2023-02-17: email from the Group Leader seeking response to legal advice of GWS by 2023-03-03;

- ii. 2023-02-27: reminder email from the Group Leader seeking response to legal advice of GWS by 2023-03-03;
- iii. 2023-03-07: telephone call from me to Shawn Silvari; I left a voicemail message;
- iv. 2023-03-07: email directly from GWS to Shawn Silvari;
- v. 2023-03-08: email directly from GWS to Shawn Silvari;
- vi. 2023-03-27: email directly from me on behalf of GWS to Shawn Silvari;
- vii. 2023-03-27: voice mail message from me on behalf of GWS to Shawn Silvari;
- viii. 2023-03-27: voice mail message from Natalie Johnson on behalf of GWS to Shawn Silvari;
- ix. 2023-03-28: voice mail message from Natalie Johnson on behalf of GWS to Shawn Silvari;
- x. 2023-03-28: email directly from me on behalf of GWS to Shawn Silvari; and
- xi. 2023-03-28: email from Natalie Johnson on behalf of GWS to Shawn Silvari.

b. John Karkaris:

- i. 2023-02-17: email from the Group Leader seeking response to legal advice of GWS by 2023-03-03;
- ii. 2023-02-27: reminder email from the Group Leader seeking response to legal advice of GWS by 2023-03-03;
- iii. 2023-03-07: telephone call from me to John Karkaris; I left a voicemail message;
- iv. 2023-03-07: email directly from GWS to John Karkaris;
- v. 2023-03-08: email directly from GWS to John Karkaris;
- vi. 2023-03-27: email directly from me on behalf of GWS to John Karkaris;
- vii. 2023-03-27: voice mail message from me on behalf of GWS to John Karkaris;
- viii. 2023-03-27: voice mail message from Natalie Johnson on behalf of GWS to John Karkaris;
- ix. 2023-03-28: voice mail message from Natalie Johnson on behalf of GWS to John Karkaris;
- x. 2023-03-28: email directly from me on behalf of GWS to John Karkaris; and
- xi. 2023-03-28: email from Natalie Johnson on behalf of GWS to Shawn Silvari.

8. I am advised by Natalie Johnson and believe that on March 28, 2023, she emailed and mailed a letter to the Remaining Plaintiffs via Express Post with tracking numbers to their last known address. Attached as Exhibit "A" to my affidavit is a copy of the Canada Post receipt and tracking information. In that letter Natalie Johnson advised the Remaining

Plaintiffs that due to their failure to respond to GWS, their failure to respond to the legal advice of GWS and their failure to provide GWS instructions, GWS was seeking a court order to be removed as solicitors of record.

- 9. On March 30, 2023, I instructed a process server to personally serve notice of this motion upon the Remaining Plaintiffs at their last known address.
- 10. I make this affidavit in support of GWS' motion pursuant to Rule 125 of the *Federal Courts Rules* seeking an order from the court to be removed as solicitor of record in respect of the Remaining Plaintiffs.

SWORN (OR AFFIRMED) BEFORE ME at )  
the City of Cold Lake, in the Province of )  
Alberta, on March 30, 2023. )

Sharon Bishop )  
Commissioner for Oaths in and for the )  
Province of Alberta )

Megan Gurski  
MEGAN GURSKI

SHARON BISHOP  
COMMISSION EXPIRES  
NOVEMBER 20, 2024

Canada Post/Postes Canada  
 SHOPPERS DRUG MART #2377  
 5970 MULLEN WAY NW  
 EDMONTON, AB T6R 0S0  
 GST/TPS#105152433

2023/03/28  
 CC104014

16:00:33  
 W/G 2

GENERAL

G/S	3 @ \$16.15	\$48.45
PP XP REG SMALL/PP XP REG PETIT		
SUBTL/SOUS-TOTAL		\$48.45
GST/TPS		\$2.42
TOTAL		\$50.87
MasterCard		\$50.87

Receipt required for all eligible returns.  
 Reçu requis pour tous les retours  
 éligibles.

Tell us how we did today. Complete the  
 survey at canadapostsurvey.ca or text  
 survey to 55555 and enter to WIN one of  
 two \$250 Prepaid Visa Cards. (Standard  
 message and data rates would apply for  
 text message.)

Parlez-nous de votre expérience  
 aujourd'hui. Répondez au sondage sur le  
 site sondagepostescanada.ca ou envoyez un  
 message texte à sondage au 55555 et courez  
 la chance de GAGNER l'une des deux cartes  
 Visa prépayées de 250\$. (Les frais  
 standard pour les messages textes et les  
 données s'appliquent.)



2124-10104014-2-1243957-2

WWW.CANADAPOST.CA/WWW.POSTESCANADA.CA

This is Exhibit "A" referred to in the  
 Affidavit of

.....Megan Gurst.....

Sworn before me this 30.....day

of March..... A.D., 2023.

.....Sharon Bishop.....

A Commissioner for Oaths in and for the  
 Province of Alberta

SHARON BISHOP

COMMISSION EXPIRES

NOVEMBER 20, 2024

Canada Post/Postes Canada  
 SHOPPERS DRUG MART #2377  
 5970 MULLEN WAY NW  
 EDMONTON, AB T6R 0S0  
 GST/TPS#105152433

2023/03/28 16:05:39 GENERAL  
 CC104014 W/G 2

N 1 @ \$0.00 \$0.00  
 Item Dropoff/Dépôt d'articles

Destination:ROA 1C0

PG652322237CA

N \$0.00  
 Originating PP - Xp/PP d'origine - Xpos

N 1 @ \$0.00 \$0.00  
 Item Dropoff/Dépôt d'articles

Destination:R2C 1S4

PG652369662CA

N \$0.00  
 Originating PP - Xp/PP d'origine - Xpos

N 1 @ \$0.00 \$0.00  
 Item Dropoff/Dépôt d'articles

Destination:TOC 1C0

PG652322245CA

N \$0.00  
 Originating PP - Xp/PP d'origine - Xpos

SUBTL/SOUS-TOTAL \$0.00  
 Total Tax/Taxe Totale \$0.00  
 TOTAL \$0.00

Tell us how we did today. Complete the survey at canadapostsurvey.ca or text survey to 55555 and enter to WIN one of two \$250 Prepaid Visa Cards. (Standard message and data rates would apply for text message.)  
 Parlez-nous de votre expérience aujourd'hui. Répondez au sondage sur le site sondagepostescanada.ca ou envoyez un message texte à sondage au 55555 et courez la chance de GAGNER l'une des deux cartes Visa prépayées de 250\$. (Les frais standard pour les messages textes et les données s'appliquent.)



2124-10104014-2-1243997-1

WWW.CANADAPOST.CA/WWW.POSTESCANADA.CA

This is Exhibit C referred to in the Affidavit of

MONTAGNE ALDOUS  
Sworn before me this 05 day  
of APRIL A.D. 2023

VERGINIA ALDOUS  
A COMMISSIONER FOR OATHS  
IN AND FOR THE PROVINCE OF MANITOBA  
MY COMMISSION EXPIRES NOV 10/24

103

Court File No. T-553-22

*Virginia Aldous*

**FEDERAL COURT**

BETWEEN:

ANDREW ROBERT GIRARD, ALEXANDER GOSSEN, HARRY GARCIA, MARCO AUGUSTO CARREIRA, THOMAS LAMOUREUX, JULIE KERFOOT, PAUL GORDON MACDONALD, DAVID MONTAGNON, CHAD REXER, SEAN BRIAN WILLIAM HOWE, JAMIE TATE LINN, DEVON BROOKS, MICHAEL BROWN, AARON RUHL, ANDREW TIGHE, THOMAS ALEXANDRE JOSEPH POIRIER, MARC DANIEL PARADIS, JOHN ARTHUR GARY GEORGE SKEOCH, RYLEE JON GUDNASON STEVENS, SHELDON BENEDICTSON, TREVOR J HALLETT, BRETT JERRY GAUDRY, DONALD WERSCHLER, MARK BAKER, DARRYL REID, LANCE KENYON, JOHN KARKARIS, ORRIE MYLES ANDERSON, CHRISTOPHER DANIEL ANDREWS, CAMERON JOSEPH EDWARDS, DEREK ESKOWICH, BRENT TIMOTHY MARTIN, PAUL DEVARENNE, BRODIE MELNYCHUK, DANIEL PURPUR, RYAN HRYNIW, ADAM HELFRICH, MARTIN JOHN GOGELA, EJAZ ALEKOZAI, JEREMY STEPHENSON, BRYAN MATTHEW MCHUGH, RYAN EDGE, NOAH STEELE, TULLY HARTL, SPENCER STEVENS, ANDREW NJUME, MATTHEW HICKS, LISA SCHMIDTKE, CHRISTOPHER LOCKE, JEFFERY DEVINE, DAWOOD K HAIDER, JARED SCOTT MAYHEW, TYRRELL HIATT, SHAWN BASKETTE, GEORGE COSTA, BRIAN DESROSIERS, KYLE WILLIAM ROSS PILON, KYLE DANIEL MICHAEL KORTKO, SHANE THOMAS STONE, JESSE RANDALL BLOOM, COLIN STAN PORTICE, RYAN CHARLES THIESSEN, TIMOTHY HAY, MATTHEW BLANC, RUSSELL THOMAS HENDERSON, STEVEN KOENIG, THOMAS MARTIN SAVORN, JAMES WELCH, CINDY STEVENSON, JON MCALLISTER, MICHAEL DAVID SERBEN, JACK EBIN THOMAS SAVORN, CHARLES MILLER, MILAN MITIC, ROBERT DESROSIERS, MATTHEW CARTER-BARR, WILLIAM CHESTER JOSLIN, COLBY COCHRANE, TRAVIS SCHALLOCK, ANDREW MULHERIN-CARON, CHRISTIAN THOMAS JONES, GEORGE ZINDROS, JEFFREY WYCHOPEN, GLEN SAINAS, RYAN DONER, KYLE WICKSTROM, SLATE PODAIMA, COLEMAN MITCHELL, ERNEST GEORGESON, DALLON DAVID EDMONDSON, AARON SWAN, SARA LOVEGROVE, SAMUEL LEGERE, CLAUDIO CARACCILO, RACINE MARIE STONE, STEVE STOPA, CLAUDIA LAPOLLA, KELLY ROBERT HIGGINS, TED AMEAR KIRYAKOS, ALAN TODD RUDDERHAM, SAMANTHA OLSEN, CHANDRA MARIE GILLIES, LANCE LESLIE WILLIAMS, LIONEL BROWN RICHARDO, JOHN THOMAS CRODEN, CHARLES ANTHONY DICKSON, MICHAEL CASTILLO, MICHAEL CERULLI, KARIM LOWEN, SHAWN SILVARI, JUSTIN DADINA, MARCEL LEONARD BEDARD, DWAYNE SOBERS, JESSE ALLISON, NICOLAS LICOIS, CLAYTON PAPP, DOUGLAS BRYAN, DEREK JAMES CHARLES WATERHOUSE, JAMIE CAMERON HALL, DAYLE JONES, KENTON HILDEBRAND, DEVANANTH VICTOR SELVAM, MATTHEW BRITTON, JESSICA ERIN ASLIN, ALIE KRAAYENBRINK, NANCY JEAN WARD, ERIC BEAULIEU, REJEAN DONALD JOSEPH SAWCHUK, DARYL CHAMBERS, RAPHAEL DESCHENES, JAMES LEE KERR, EUGENE JEFFREY MACKAY, BRETT KYLE HUNT, DERRICK WOODALL, TROY STRANDBERG, BILLY NEUMANN, RONALD MARK KELLY, SUZANNE MARIE

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Plaintiffs

-and-

THE MINISTER OF TRANSPORT, HER MAJESTY THE QUEEN IN RIGHT OF CANADA,  
ATTORNEY GENERAL OF CANADA, DIRECTOR GENERAL RAIL SAFETY, and  
CANADIAN NATIONAL RAILWAY

Defendants

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**WRITTEN REPRESENTATIONS**  
**(Motion for removal of solicitor of record under Rule 125)**

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**SUBMISSIONS**

1. This is a motion by the solicitors of record of the Plaintiffs, Grey Wowk Spencer LLP (“GWS”), to be removed as solicitors of record for the two Plaintiffs John Karkaris (“Mr.



**Karkaris**) and Shawn Silvari (“**Mr. Silvari**”) pursuant to Rule 125 of the *Federal Courts Rules*, SOR/98-106 (“the *Rules*”).<sup>1</sup>

2. GWS is the solicitor of record for the Plaintiffs in this action, Court File T-553-22 (the “**Action**”).
3. When GWS was retained by all of the Plaintiffs, each Plaintiff provided their email addresses, residential addresses and phone numbers to GWS prior to the commencement of the Action (the “**Contact Information**”).<sup>2</sup>
4. GWS advised the Plaintiffs to ensure their Contact Information was accurate at all times.<sup>3</sup>
5. There are 230 Plaintiffs in this Action. GWS has obtained instructions to discontinue the Action from 228 of the Plaintiffs; all but two of the Plaintiffs have failed to provide instructions to GWS: Mr. Karkaris and Mr. Silvari (the “**Remaining Plaintiffs**”).<sup>4</sup>
6. GWS has made numerous attempts to receive instructions from Mr. Karkaris and Mr. Silvari through their Contact Information via email, telephone calls and regular mail to their last known addresses. Despite repeated attempts to obtain instructions from Mr. Karkaris and Mr. Silvari, Mr. Karkaris and Mr. Silvari have failed to respond to GWS.<sup>5</sup>
7. A Court has authority to remove a solicitor of record.<sup>6</sup> It is submitted that this is such a case. The court must exercise its discretion and grant the motion to remove GWS as solicitor of record for the Remaining Plaintiffs.
8. It is submitted that the failure of GWS to receive instructions from Mr. Karkaris and Mr. Silvari affects the administration of justice. In this case, GWS has represented 228 other Plaintiffs who provided their instructions to withdraw from the Action, however, Mr. Karkaris and Mr. Silvari have not responded to GWS’ numerous requests for instructions. Consequently, Mr. Karkaris and Mr. Silvari are the only remaining Plaintiffs.

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<sup>1</sup> *Federal Courts Rules*, SOR/98-106, Rule 125, Book of Authorities, Tab 1.

<sup>2</sup> Affidavit of Megan Gurski, at para 4.

<sup>3</sup> Affidavit of Megan Gurski, at para 4.

<sup>4</sup> Affidavit of Megan Gurski, at paras 6 to 8.

<sup>5</sup> Affidavit of Megan Gurski, at paras 6 to 8.

<sup>6</sup> See *Cunningham v Lilles*, 2010 SCC 10 at paras 36, 46 to 49, 59, Book of Authorities Tab 4.

9. Chapter 3.7 of the *Law Society of Alberta Code of Conduct* (the “*Code*”)<sup>7</sup> provides guidance to lawyers seeking to withdraw from representation. Rule 3.7-2 of the *Code* states that a lawyer may withdraw from representation of a client due to a serious loss of confidence between the lawyer and the client so long as reasonable notice of withdrawal is given and no serious prejudice would result to the client. Rules 3.7-7 of the *Code* provides further details on the preferred procedure of withdrawal.<sup>8</sup>
10. It is hard to imagine how the Remaining Plaintiffs could establish that they would suffer serious prejudice should the court grant the motion of GWS. As Plaintiffs in the Action, it is incumbent upon Mr. Karkaris and Mr. Silvari to remain in contact with their lawyers, receive advice from their lawyers and provide instructions to their lawyers in a timely manner. Through their conduct, it may be inferred that Mr. Karkaris and Mr. Silvari have essentially abandoned their claim.
11. On March 28, 2023, Natalie Johnson, lawyer with GWS, gave notice to the Remaining Plaintiffs that GWS would be withdrawing from representing the Remaining Plaintiffs due to their failure to provide GWS instructions and their failure to respond to the legal advice of GWS. This notice was provided in writing via email to the Remaining Plaintiffs’ last known email address and through Express Post mail to the Remaining Plaintiffs’ last known mailing address.<sup>9</sup>
12. Megan Gurski is a legal assistant with GWS. In her affidavit, Ms. Gurski swore/affirmed the following:<sup>10</sup>
- a. GWS has attempted to obtain instructions from the Remaining Plaintiffs using the Contact Information. I am informed by Natalie Johnson, lawyer with GWS, and believe that she has attempted to obtain instructions from the Remaining Plaintiffs

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<sup>7</sup> *Law Society of Alberta Code of Conduct*, March 28, 2023, Rule 3.7 and related commentary, Book of Authorities, Tab 2.

<sup>8</sup> *Law Society of Alberta Code of Conduct*, March 28, 2023, Rule 3.7 and related commentary, Book of Authorities, Tab 2.

<sup>9</sup> Affidavit of Megan Gurski, at para 8.

<sup>10</sup> Affidavit of Megan Gurski, at paras 7 to 9.

as detailed below. I have also attempted to obtain instructions. Despite repeated attempts, GWS has not received a response from the Remaining Plaintiffs:

i. Shawn Silvari:

1. 2023-02-17: email from the Group Leader seeking response to legal advice of GWS by 2023-03-03;
2. 2023-02-27: reminder email from the Group Leader seeking response to legal advice of GWS by 2023-03-03;
3. 2023-03-07: telephone call from me to Shawn Silvari; I left a voicemail message;
4. 2023-03-07: email directly from GWS to Shawn Silvari;
5. 2023-03-08: email directly from GWS to Shawn Silvari;
6. 2023-03-27: email directly from me on behalf of GWS to Shawn Silvari;
7. 2023-03-27: voice mail message from me on behalf of GWS to Shawn Silvari;
8. 2023-03-27: voice mail message from Natalie Johnson on behalf of GWS to Shawn Silvari;
9. 2023-03-28: voice mail message from Natalie Johnson on behalf of GWS to Shawn Silvari;
10. 2023-03-28: email directly from me on behalf of GWS to Shawn Silvari; and
11. 2023-03-28: email from Natalie Johnson on behalf of GWS to Shawn Silvari.

ii. John Karkaris:

1. 2023-02-17: email from the Group Leader seeking response to legal advice of GWS by 2023-03-03;
2. 2023-02-27: reminder email from the Group Leader seeking response to legal advice of GWS by 2023-03-03;

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3. 2023-03-07: telephone call from me to John Karkaris; I left a voicemail message;
  4. 2023-03-07: email directly from GWS to John Karkaris;
  5. 2023-03-08: email directly from GWS to John Karkaris;
  6. 2023-03-27: email directly from me on behalf of GWS to John Karkaris;
  7. 2023-03-27: voice mail message from me on behalf of GWS to John Karkaris;
  8. 2023-03-27: voice mail message from Natalie Johnson on behalf of GWS to John Karkaris;
  9. 2023-03-28: voice mail message from Natalie Johnson on behalf of GWS to John Karkaris;
  10. 2023-03-28: email directly from me on behalf of GWS to John Karkaris; and
  11. 2023-03-28: email from Natalie Johnson on behalf of GWS to John Karkaris.
- b. I am advised by Natalie Johnson and believe that on March 28, 2023, she emailed and mailed a letter to the Remaining Plaintiffs via Express Post with tracking numbers to their last known address. Attached as Exhibit "A" to my affidavit is a copy of the Canada Post receipt and tracking information. In that letter Natalie Johnson advised the Remaining Plaintiffs that due to their failure to respond to GWS, their failure to respond to the legal advice of GWS and their failure to provide GWS instructions, GWS was seeking a court order to be removed as solicitors of record.
- c. On March 30, 2023, I instructed a process server to personally serve notice of this motion upon the Remaining Plaintiffs at their last known address.

13. The above noted actions satisfy the requirements of Rule 125 and the procedures in the *Code* regarding counsel's withdrawal from representation.<sup>11</sup> For these reasons, no prejudice to the Remaining Plaintiffs will manifest from the removal of GWS as solicitors of record for the Remaining Plaintiffs.
14. The Remaining Plaintiffs have been unreasonable and uncooperative as they have failed to provide adequate instructions to GWS despite repeated requests.<sup>12</sup>
15. GWS has good cause to withdraw from representing the Remaining Plaintiffs<sup>13</sup> and has provided reasonable notice of same upon the Remaining Plaintiffs.<sup>14</sup>

#### **ORDER SOUGHT**

16. GWS requests an Order that:
  - a. GWS be removed as solicitors of record for the Remaining Plaintiffs;
  - b. There should be no costs for this motion; and
  - c. Such further or other relief as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. The affidavit of Megan Gurski, to be filed;
2. The affidavit of personal service of the process server confirming service of this motion upon John Karakaris, to be filed; and

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<sup>11</sup> *Federal Courts Rules*, SOR/98-106, Rule 125, Book of Authorities, Tab 1; *Law Society of Alberta Code of Conduct*, March 28, 2023, Rule 3.7, Book of Authorities, Tab 2; See also *Fitzpatrick v College of Physical Therapists of Alberta*, 2020 ABCA 88 (CanLII), Book of Authorities Tab 3.

<sup>12</sup> *Law Society of Alberta Code of Conduct*, March 28, 2023, rule 3.7-2 and related commentary, Book of Authorities, Tab 2.

<sup>13</sup> See *Fitzpatrick v College of Physical Therapists of Alberta*, 2020 ABCA 88 (CanLII), Book of Authorities, Tab 3.

<sup>14</sup> *Law Society of Alberta Code of Conduct*, March 28, 2023, rule 3.7-1 and related commentary, Book of Authorities, Tab 2.

3. The affidavit of personal service of the process server confirming service of this motion upon Shawn Silvani, to be filed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of March, 2023.

*fw/* Natalie Johnson  
Grey Wowk Spencer LLP  
5110 – 51 Avenue, PO Box 1028  
Cold Lake, AB T9M 1P3  
Email: [lgrey@gwsllp.ca](mailto:lgrey@gwsllp.ca)  
Attention: Leighton BU Grey, KC

This is Exhibit "D" referred to in the Affidavit of

MONTAGUE ALDOUS  
Sworn before me this 05 day  
of APRIL A.D. 20 23

VERGINIA ALDOUS  
A COMMISSIONER FOR OATHS  
IN AND FOR THE PROVINCE OF MANITOBA  
MY COMMISSION EXPIRES NOV 10 / 24

111

Court File No. T-553-22

*Virginia Aldous*

**FEDERAL COURT**

BETWEEN:

ANDREW ROBERT GIRARD, ALEXANDER GOSSEN, HARRY GARCIA, MARCO AUGUSTO CARREIRA, THOMAS LAMOUREUX, JULIE KERFOOT, PAUL GORDON MACDONALD, DAVID MONTAGNON, CHAD REXER, SEAN BRIAN WILLIAM HOWE, JAMIE TATE LINN, DEVON BROOKS, MICHAEL BROWN, AARON RUHL, ANDREW TIGHE, THOMAS ALEXANDRE JOSEPH POIRIER, MARC DANIEL PARADIS, JOHN ARTHUR GARY GEORGE SKEOCH, RYLEE JON GUDNASON STEVENS, SHELDON BENEDICTSON, TREVOR J HALLETT, BRETT JERRY GAUDRY, DONALD WERSCHLER, MARK BAKER, DARRYL REID, LANCE KENYON, JOHN KARKARIS, ORRIE MYLES ANDERSON, CHRISTOPHER DANIEL ANDREWS, CAMERON JOSEPH EDWARDS, DEREK ESKOWICH, BRENT TIMOTHY MARTIN, PAUL DEVARENNE, BRODIE MELNYCHUK, DANIEL PURPUR, RYAN HRYNIW, ADAM HELFRICH, MARTIN JOHN GOGELA, EJAZ ALEKOZAI, JEREMY STEPHENSON, BRYAN MATTHEW MCHUGH, RYAN EDGE, NOAH STEELE, TULLY HARTL, SPENCER STEVENS, ANDREW NJUME, MATTHEW HICKS, LISA SCHMIDTKE, CHRISTOPHER LOCKE, JEFFERY DEVINE, DAWOOD K HAIDER, JARED SCOTT MAYHEW, TYRRELL HIATT, SHAWN BASKETTE, GEORGE COSTA, BRIAN DESROSIERS, KYLE WILLIAM ROSS PILON, KYLE DANIEL MICHAEL KORTKO, SHANE THOMAS STONE, JESSE RANDALL BLOOM, COLIN STAN PORTICE, RYAN CHARLES THIessen, TIMOTHY HAY, MATTHEW BLANC, RUSSELL THOMAS HENDERSON, STEVEN KOENIG, THOMAS MARTIN SAVORN, JAMES WELCH, CINDY STEVENSON, JON MCALLISTER, MICHAEL DAVID SERBEN, JACK EBIN THOMAS SAVORN, CHARLES MILLER, MILAN MITIC, ROBERT DESROSIERS, MATTHEW CARTER-BARR, WILLIAM CHESTER JOSLIN, COLBY COCHRANE, TRAVIS SCHALLOCK, ANDREW MULHERIN-CARON, CHRISTIAN THOMAS JONES, GEORGE ZINDROS, JEFFREY WYCHOPEN, GLEN SAINAS, RYAN DONER, KYLE WICKSTROM, SLATE PODAIMA, COLEMAN MITCHELL, ERNEST GEORGESON, DALLON DAVID EDMONDSON, AARON SWAN, SARA LOVEGROVE, SAMUEL LEGERE, CLAUDIO CARACCILO, RACINE MARIE STONE, STEVE STOPA, CLAUDIA LAPOLLA, KELLY ROBERT HIGGINS, TED AMEAR KIRYAKOS, ALAN TODD RUDDERHAM, SAMANTHA OLSEN, CHANDRA MARIE GILLIES, LANCE LESLIE WILLIAMS, LIONEL BROWN RICHARDO, JOHN THOMAS CRODEN, CHARLES ANTHONY DICKSON, MICHAEL CASTILLO, MICHAEL CERULLI, KARIM LOWEN, SHAWN SILVARI, JUSTIN DADINA, MARCEL LEONARD BEDARD, DWAYNE SOBERS, JESSE ALLISON, NICOLAS LICOIS, CLAYTON PAPP, DOUGLAS BRYAN, DEREK JAMES CHARLES WATERHOUSE, JAMIE CAMERON HALL, DAYLE JONES, KENTON HILDEBRAND, DEVANANTH VICTOR SELVAM, MATTHEW BRITTON, JESSICA ERIN ASLIN, ALIE KRAAYENBRINK, NANCY JEAN WARD, ERIC BEAULIEU, REJEAN DONALD JOSEPH SAWCHUK, DARYL CHAMBERS, RAPHAEL DESCHENES, JAMES LEE KERR, EUGENE JEFFREY MACKAY, BRETT KYLE HUNT, DERRICK WOODALL, TROY STRANDBERG, BILLY NEUMANN, RONALD MARK KELLY, SUZANNE MARIE

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Plaintiffs

-and-

THE MINISTER OF TRANSPORT, HER MAJESTY THE QUEEN IN RIGHT OF CANADA,  
ATTORNEY GENERAL OF CANADA, DIRECTOR GENERAL RAIL SAFETY, and  
CANADIAN NATIONAL RAILWAY

Defendants

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**BOOK OF AUTHORITIES**  
(Motion for removal of solicitor of record under Rule 125)

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**TABLE**

<b>TAB</b>	<b>Authority</b>
1	<i>Federal Courts Rules</i> , SOR/98-106, Rule 125
2	Law Society of Alberta Code of Conduct, March 28, 2023, Rule 3.7 and commentary
3	<i>Fitzpatrick v College of Physical Therapists of Alberta</i> , 2020 ABCA 88 (CanLII)
4	<i>Cunningham v Lilles</i> , 2010 SCC 10

### **Motion for removal of solicitor of record**

- **125 (1)** Where a solicitor of record ceases to act for a party and the party has not changed its solicitor of record in accordance with rule 124, the Court may, on a motion of the solicitor, order that the solicitor be removed from the record.
- **Marginal note:Manner of service**

**(2)** A notice of motion under subsection (1) shall be served on the party formerly represented by the solicitor

  - **(a)** by personal service; or
  - **(b)** where personal service cannot practicably be effected,
    - **(i)** by mailing the notice of motion to the party at the party's last known address, or
    - **(ii)** if no mailing address of the party is known, by depositing the notice of motion at the Registry office where the proceeding was initiated.
- **Marginal note:Order to be served**

**(3)** An order made under subsection (1) removing a solicitor of record of a party shall be served on the party in the manner set out in subsection (2) and on all other parties to the proceeding.
- **Marginal note:Proof of service**

**(4)** An order under subsection (1) does not take effect until proof of its service has been filed.

### **Marginal note:Cessation of representation**

## 3.7 Withdrawal from Representation

### Withdrawal from Representation

**3.7-1 A lawyer must not withdraw from representation of a client except for good cause and on reasonable notice to the client.**

### Commentary

[1] Although the client has the right to terminate the lawyer-client relationship at will, a lawyer does not enjoy the same freedom of action. Having undertaken the representation of a client, the lawyer should complete the task as ably as possible unless there is justifiable cause for terminating the relationship. It is inappropriate for a lawyer to withdraw on capricious or arbitrary grounds.

[2] An essential element of reasonable notice is notification to the client, unless the client cannot be located after reasonable efforts. No hard and fast rules can be laid down as to what constitutes reasonable notice before withdrawal and how quickly a lawyer may cease acting after notification will depend on all relevant circumstances. When the matter is covered by statutory provisions or the Rules of Court, these will govern. In other situations, the governing principle is that the lawyer should protect the client's interests to the best of the lawyer's ability and should not desert the client at a critical stage of a matter or at a time when withdrawal would put the client in a position of disadvantage or peril. As a general rule, the client should be given sufficient time to retain and instruct replacement counsel. Nor should withdrawal or an intention to withdraw be permitted to waste court time or prevent other counsel from reallocating time or resources scheduled for the matter in question. See Rule 3.7-6, Manner of Withdrawal.

[3] Every effort should be made to ensure that withdrawal occurs at an appropriate time in the proceedings in keeping with the lawyer's obligations. The court, opposing parties and others directly affected should also be notified of the withdrawal.

### Optional Withdrawal

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

### Commentary

[1] A lawyer may have a justifiable cause for withdrawal in circumstances indicating a loss of confidence, for example, if a lawyer is deceived by the client, the client refuses to accept and act upon the lawyer's advice on a significant point, a client is persistently unreasonable or uncooperative in a material respect, or the lawyer is facing difficulty in obtaining adequate instructions from the

client. However, the lawyer should not use the threat of withdrawal as a device to force a hasty decision by the client on a difficult question.

### **Non-payment of Fees**

**3.7-3 If, after reasonable notice, the client fails to provide a retainer or funds on account of disbursements or fees, a lawyer may withdraw unless serious prejudice to the client would result.**

### **Commentary**

[1] When the lawyer withdraws because the client has not paid the lawyer's fee, the lawyer should ensure that there is sufficient time for the client to obtain the services of another lawyer and for that other lawyer to prepare adequately for trial. Also see the commentary to Rule 3.7-4.

## **Withdrawal from Criminal Proceedings**

**3.7-4** If a lawyer has agreed to act in a criminal case and the interval between a withdrawal and the trial of the case is sufficient to enable the client to obtain another lawyer and to allow such other lawyer adequate time for preparation, the lawyer who has agreed to act may withdraw because the client has not paid the agreed fee or for other adequate cause provided that the lawyer:

- (a)** notifies the client, in writing, that the lawyer is withdrawing because the fees have not been paid or for other adequate cause;
- (b)** accounts to the client for any money received on account of fees and disbursements;
- (c)** notifies Crown counsel that the lawyer is no longer acting; and
- (d)** complies with the applicable Rules of Court.

## **Commentary**

[1] In Alberta, when a lawyer seeks to withdraw in criminal proceedings the usual practice is to apply for leave in open court.

[2] A lawyer who has withdrawn, or intends to withdraw, because of conflict with the client should not indicate in the notice addressed to the court or Crown counsel the cause of the conflict or make reference to any matter that would violate the privilege that exists between lawyer and client. The notice should merely state that the lawyer is no longer acting and has withdrawn. If the court requests that the lawyer provide reasons for withdrawal, then the lawyer may indicate that there are "ethical reasons" or an inability to obtain proper instructions, making the least possible disclosure of privileged information. In certain circumstances, the court may refuse to allow a lawyer to withdraw for non-payment of fees.

## **Obligatory Withdrawal**

**3.7-5** A lawyer must withdraw if:

- (a)** discharged by a client;
- (b)** a client persists in instructing the lawyer to act contrary to professional ethics; or
- (c)** the lawyer is not competent to continue to handle a matter.

**In the Court of Appeal of Alberta**

**Citation: Fitzpatrick v College of Physical Therapists of Alberta, 2020 ABCA 88**

**Date: 20200304  
Docket: 1901-0008-AC  
Registry: Calgary**

**Between:**

**Marilyn Fitzpatrick and Westbrook Physiotherapy Ltd.**

**Respondents  
(Appellants)**

- and -

**The College of Physical Therapists of Alberta, Dianne Millette,  
Cathy Sveen, and Julie Moylan**

**Respondents  
(Respondent)**

- and -

**Code Hunter LLP**

**Applicant  
(Not Parties to the Appeal)**

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**Reasons for Decision of  
The Honourable Madam Justice Elizabeth Hughes**

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Application for Permission to Withdraw as Counsel.

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**Reasons for Decision of  
The Honourable Madam Justice Elizabeth Hughes**

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[1] Counsel for the appellants seeks permission to withdraw as lawyer of record in this appeal for both appellants, Ms. Fitzpatrick and her corporation, Westbrook Physiotherapy Clinic Ltd. Rules 14.2 and 2.31 govern this application as the appeal, scheduled for April 9, 2020, was set down for hearing on September 9, 2019.

[2] The other rule that comes into play in this application is Rule 2.22. That rule provides that an individual may represent themselves in an action, but the case law interpreting the rule has found that “[t]he statutory and case law confirms that other types of litigants in civil cases, including corporations, must be represented by a lawyer”: *908077 Alberta Ltd v 1313608 Alberta Ltd*, 2015 ABCA 117 at para 2.

[3] The history of the appeal follows:

- When Ms. Fitzpatrick filed her Statement of Claim she was the only named plaintiff.
- The defendants applied to have the claim summarily dismissed, and Ms. Fitzpatrick applied to amend her claim including the addition of Westbrook Physiotherapy Clinic Ltd. as a plaintiff.
- The Master gave his decision on July 25, 2017. He summarily dismissed the claims against some of the defendants, leaving four defendants; in addition, he granted the amendments to the Statement of Claim: *Fitzpatrick v Physiotherapy Alberta College*, 2017 ABQB 453.
- The remaining defendants appealed to the Court of Queen’s Bench seeking dismissal of the claims against them, as well the order granting the amendments.
- On December 4, 2018 the chambers judge on appeal allowed the remaining defendants’ appeal to summarily dismiss the claims against them: *Fitzpatrick v College of Physical Therapists of Alberta*, 2018 ABQB 989.
- In December 2018 the appellants engaged present counsel.
- On January 3, 2019 the appellants filed their Notice of Appeal.
- On July 3, 2019 counsel for the appellants filed their factum.
- On August 30, 2019 the respondents filed their factum.
- On September 9, 2019 the appeal was set for hearing for April 9, 2020.

- On October 28, 2019 Ms. Fitzpatrick and Westbrook Physiotherapy Ltd were faxed a letter by their counsel advising (1) the total amount owed, (2) that due to the length of time the amount had been outstanding and the prior discussions between counsel and Ms. Fitzpatrick no further services could be rendered without full payment, (3) unless full payment was made before December 13, 2019 counsel would take steps to apply to remove himself as counsel of record, and (4) should that happen, counsel recommended Ms. Fitzpatrick find new counsel for the appeal set for April 9, 2020.
- As of January 20, 2020, the appellants had not paid their outstanding bill to counsel. Therefore, on January 20, 2020 counsel for the appellants filed an Affidavit of Service attaching a Notice of Withdrawal of Lawyer of Record.
- On January 21, 2020 the case management officer advised counsel for the appellants that because the appeal had been set for hearing, counsel had to make an application pursuant to Rule 2.31 to withdraw from the record.
- Counsel filed his application which was heard on February 13, 2020.

[4] In *R v Cunningham*, 2010 SCC 10, a case which concerned the withdrawal of counsel, the Supreme Court held that courts have inherent jurisdiction to control their own process, along with the authority to exercise control over counsel when necessary to protect that process. Other principles from *Cunningham* include the following:

- 1) Leave to withdraw should be granted where the application is made well in advance of any scheduled proceeding and adjournment is unnecessary: *Cunningham* at para 47.
- 2) If timing is an issue the court may grant permission to withdraw if counsel seeks to withdraw for ethical reasons. Ethical reasons do not include the non-payment of fees: *Cunningham* at para 48.
- 3) When counsel seek to withdraw because of the non-payment of fees, the court may exercise its discretion to refuse leave to withdraw but should only do so after considering the following non-exhaustive list of factors (*Cunningham* at para 50):
  - whether it is feasible for the individual to represent him or herself;
  - other means of obtaining counsel;
  - whether counsel gave reasonable notice to the party to allow the individual to seek other means of representation;
  - impact on the respondent; and
  - the history of the proceedings including whether the party has changed counsel repeatedly.



[5] The Supreme Court also observed that rules enacted by law societies are “essential statements of the appropriate standards of professional conduct”: *Cunningham* at para 36.

[6] The relevant sections of the Law Society of Alberta’s Code of Conduct are:

3.7-1 A lawyer must not withdraw from representation of a client except for good cause and on reasonable notice to the client.

...

3.7-3 If, after reasonable notice, the client fails to provide a retainer or funds on account of disbursements or fees, a lawyer may withdraw unless serious prejudice to the client would result.

[7] Ms. Fitzpatrick’s position on counsel’s application to withdraw is not clear. On the one hand, she writes “my request would be to retain Mr. Frenken at this time.” On the other hand, she writes “as it would appear that Mr. Frenken would not seem to be fully engaged in my file, I am concerned that his written argument may be lacking in major details and that there may be omissions which would compromise my position.”

[8] Mr. Sim, on behalf of the respondents in the main appeal, submits that any prejudice to his clients, should the application be granted, may be remedied by an order of costs.

[9] In assessing Mr. Frenken’s application, I consider the following:

- 1) Ms. Fitzpatrick and her company had reasonable notice of Mr. Frenken’s intention to withdraw should the outstanding bill not be paid.
- 2) It would be feasible for Ms. Fitzpatrick to represent herself as the appellants’ factum has been filed. I note Ms. Fitzpatrick is of the view that she does not have the ability to make oral submissions.
- 3) Rule 2.22 prohibits Ms. Fitzpatrick from acting on behalf of the corporation.
- 4) Ms. Fitzpatrick may have the financial means to obtain other counsel. Indeed, Mr. Frenken was contacted by a lawyer the day before this application on behalf of Ms. Fitzpatrick.
- 5) Any prejudice to the respondents may be remedied by a costs order.

[10] All these factors weigh in favour of granting the application.

[11] The last factor to consider is harm to the administration of justice should the appeal not proceed on April 9, 2020. This factor weighs against the granting of the application in that the time this appeal is currently scheduled for, may not be able to be used by another appeal. All courts in this Province face increasing lead times for matters to be heard. Thus, granting the application,

which will have the likely result of an adjournment and the time scheduled will likely go unfilled, will harm the administration of justice.

[12] When I balance the factors in favour of granting the application as opposed to denying the application, I find that on balance, the application should be granted. Accordingly, Mr. Frenken is granted permission to withdraw as counsel.

[13] I further order that should this matter be adjourned, new counsel for the appellants must confirm they have been retained by Ms Fitzpatrick and the corporation three months before the new appeal date, failing which, the company's appeal is deemed abandoned.

Application heard on February 13, 2020  
and further written submissions filed  
February 19, 2020

Reasons filed at Calgary, Alberta  
this 4th day of March, 2020

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Hughes J.A.

**Appearances:**

Marilyn Fitzpatrick  
In Person

B.W. Frenken  
for the Applicant

G.D. Sim  
for the Respondent

**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)** *Interveners*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.

ON APPEAL FROM THE COURT OF APPEAL FOR THE YUKON TERRITORY

*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

**Sa Majesté la Reine** *Appelante*

c.

**Jennie Cunningham** *Intimée*

et

**Procureur général de l'Ontario, Law Society of British Columbia, Barreau du Yukon, Association du Barreau canadien et Criminal Lawyers' Association (Ontario)** *Intervenants*RÉPERTORIÉ : **R. c. CUNNINGHAM****2010 CSC 10**N<sup>o</sup> du greffe : 32760.

2009 : 17 novembre; 2010 : 26 mars.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL DU TERRITOIRE DU YUKON

*Droit des professions — Avocats et procureurs — Requête de l'avocat pour cesser d'occuper — En matière pénale, le tribunal peut-il rejeter la requête pour cesser d'occuper présentée par l'avocat de la défense parce que l'accusé n'a pas respecté les conditions financières du mandat? — Le droit de regard sur la cessation d'occuper appartient-il seulement aux barreaux?*

*Tribunaux — Compétence — Requête de l'avocat pour cesser d'occuper — En matière pénale, le tribunal peut-il rejeter la requête pour cesser d'occuper présentée par l'avocat de la défense parce que l'accusé n'a pas respecté les conditions financières du mandat?*

C, une avocate criminaliste dont la Société d'aide juridique du Yukon retenait les services, représentait un client accusé d'agressions sexuelles sur une fillette. Avant la tenue de l'enquête préliminaire, la Société d'aide juridique a informé l'accusé que s'il ne mettait pas à jour l'information relative à sa situation financière, il cesserait de bénéficier de l'aide juridique. L'accusé n'a pas donné suite à la demande, et la Société d'aide juridique l'a avisé que C n'était plus autorisée à le représenter. C a demandé à la Cour territoriale du Yukon de l'autoriser à

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

cesser d'occuper à titre d'avocate au dossier, invoquant comme seul motif la suspension de l'aide juridique. Toutefois, elle a précisé qu'elle était disposée à représenter à nouveau l'accusé si l'aide juridique était rétablie. La Cour territoriale a rejeté sa demande. La Cour suprême du territoire du Yukon a également rejeté sa demande de *certiorari* visant l'annulation de la décision de la Cour territoriale, statuant que cette dernière n'avait pas dépassé sa compétence. La Cour d'appel a accueilli l'appel de C au motif que la Cour territoriale n'avait pas le pouvoir discrétionnaire de lui refuser l'autorisation de cesser d'occuper.

*Arrêt :* Le pourvoi est accueilli.

La Cour territoriale avait le pouvoir de refuser à C l'autorisation de cesser d'occuper. Lorsque le motif invoqué par l'avocat est le non-paiement de ses honoraires, le tribunal a le pouvoir d'exiger qu'il continue de représenter l'accusé, mais il doit exercer ce pouvoir avec circonspection et uniquement lorsqu'il le faut pour empêcher une atteinte grave à l'administration de la justice. Une cour supérieure a la compétence inhérente nécessaire à l'exercice de sa fonction judiciaire ainsi qu'à l'exécution de son mandat d'administrer la justice. De même, dans le cas d'un tribunal d'origine législative, le pouvoir de faire respecter sa procédure et le droit de regard sur la manière dont les avocats exercent leurs fonctions s'infèrent nécessairement du pouvoir de constituer une cour de justice.

Le non-paiement des honoraires qui n'est pas lié au fondement de l'affaire et dont la mise au jour ne cause pas préjudice à l'accusé ne bénéficie pas de la protection du secret professionnel, et le risque minime que le tribunal saisi de la demande tente indûment d'obtenir des renseignements protégés à l'audience ne justifie pas que la décision de cesser d'occuper relève uniquement de l'avocat. Aussi, le droit de regard en matière de cessation d'occuper n'appartient pas seulement aux barreaux. Tribunaux et ordres professionnels jouent des rôles différents mais importants dans l'encadrement de l'exercice du droit de cesser d'occuper : les premiers préviennent l'atteinte à l'administration de la justice, les seconds soumettent à des sanctions disciplinaires les avocats qui ne respectent pas les normes professionnelles. Ces rôles ne sont pas mutuellement exclusifs. Les deux sont en fait nécessaires pour bien encadrer l'exercice de la profession d'avocat et préserver la procédure de la cour. Les intérêts personnels ou professionnels de l'avocat peuvent se heurter à ceux de ses clients, mais le tribunal doit présumer que l'avocat respecte la déontologie. L'avocat auquel le tribunal enjoint de continuer de représenter l'accusé doit le faire avec compétence et diligence. L'intégrité de la profession et l'administration de la justice n'exigent rien

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;

de moins. Enfin, l'ordonnance de type *Rowbotham* peut jouer dans l'exercice du pouvoir discrétionnaire résiduel du tribunal de refuser l'autorisation de cesser d'occuper, mais elle ne peut s'y substituer.

Les principes suivants doivent présider à l'exercice du pouvoir discrétionnaire du tribunal de faire droit ou non à la requête pour cesser d'occuper. Le tribunal doit faire droit à la demande qui est présentée par l'avocat suffisamment à l'avance pour que la procédure inscrite au rôle ne doive pas être reportée. Lorsque le délai est plus serré, le tribunal est justifié de s'enquérir des motifs de l'avocat. Lorsque la déontologie ou le non-paiement des honoraires est invoqué, le tribunal doit s'en tenir à l'explication donnée et s'abstenir de pousser l'examen afin de ne pas compromettre le secret professionnel. La demande d'autorisation de cesser d'occuper présentée pour un motif d'ordre déontologique doit être accueillie. Lorsque le non-paiement des honoraires de l'avocat est à l'origine de la demande, le tribunal peut la rejeter dans l'exercice de son pouvoir discrétionnaire s'il détermine, au regard des éléments pertinents, que l'autorisation de cesser d'occuper porterait sérieusement atteinte à l'administration de la justice.

Le rejet de la requête pour cesser d'occuper est une décision contraignante et définitive vis-à-vis de l'avocat et, dans ce contexte, il convient de reconnaître au *certiorari* sa portée normale et de ne l'accorder qu'en présence d'une décision erronée sur la compétence ou d'une erreur de droit manifeste à la lecture du dossier.

En l'espèce, la Cour suprême du Yukon a conclu à bon droit que la Cour territoriale pouvait refuser à l'avocat l'autorisation de cesser d'occuper. La question de savoir si la présente affaire satisfait aux exigences strictes qui doivent être remplies pour qu'un tribunal puisse refuser l'autorisation de cesser d'occuper est désormais théorique, et le dossier de notre Cour ne renferme ni information ni analyse concernant plusieurs des éléments pertinents. On ne peut donc pas affirmer avec certitude qu'à l'issue d'une analyse complète des éléments pertinents, les circonstances de la présente espèce justifiaient le refus d'autoriser l'avocate à cesser d'occuper.

#### Jurisprudence

**Arrêts examinés :** *Re Leask and Cronin* (1985), 18 C.C.C. (3d) 315; *R. c. C. (D.D.)* (1996), 110 C.C.C. (3d) 323, autorisation de pourvoi refusée. [1997] 1 R.C.S. vii (*sub nom. Ferguson c. The Queen*); *R. c. Deschamps*, 2003 MBCA 116, 177 Man. R. (2d) 301; *R. c. Rowbotham* (1988), 41 C.C.C. (3d) 1; **arrêts mentionnés :** *Vescio c. The King*, [1949] R.C.S. 139; *Luchka c. Zens* (1989), 37 B.C.L.R. (2d) 127; *R. c. Ho*, 2003 BCCA 663, 21 B.C.L.R. (4th) 83; *R. c. 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. Mierzwinski*, [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.

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*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 J.J.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

ROTHSTEIN J. —

### 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

POURVOI contre un arrêt de la Cour d'appel du Yukon (les juges Newbury, Kirkpatrick et Tysoe), 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, qui a annulé une décision du juge Gower, 2006 YKSC 40, 41 C.R. (6th) 66, [2006] Y.J. No. 46 (QL), 2006 CarswellYukon 51, qui avait rejeté une demande d'annulation de l'ordonnance du juge Lilles de la Cour territoriale, 2006 YKTC 54, 2006 YKTC 61, qui avait rejeté la demande pour cesser d'occuper présentée par l'avocate de la défense. Pourvoi accueilli.

*Ron Reimer et Peter A. Eccles*, pour l'appelante.

*Gordon R. Coffin et Nils F. N. Clarke*, pour l'intimée.

*Susan L. Reid*, pour l'intervenant le procureur général de l'Ontario.

*Leonard T. Doust, c.r.*, et *Michael A. Feder*, pour l'intervenante Law Society of British Columbia.

*John J. L. Hunter, c.r.*, et *Brent B. Olthuis*, pour l'intervenant le Barreau du Yukon.

*Gregory P. DelBigio*, pour l'intervenante l'Association du Barreau canadien.

*Scott C. Hutchison et Andrea Gonsalves*, pour l'intervenante Criminal Lawyers' Association (Ontario).

Version française du jugement de la Cour rendu par

LE JUGE ROTHSTEIN —

### 1. Introduction

[1] Quel est le pouvoir du tribunal lorsque, dans une affaire criminelle, l'avocat de la défense demande à cesser d'occuper pour cause de non-paiement de ses honoraires? Peut-il exiger que l'avocat continue de représenter l'accusé? Je suis d'avis qu'il a ce pouvoir, mais qu'il doit l'exercer avec circonspection



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

et uniquement lorsqu’il le faut pour empêcher une atteinte grave à l’administration de la justice.

## 2. Les faits

[2] Jennie Cunningham est une avocate criminaliste dont la Société d’aide juridique du Yukon retenait les services. Elle représentait Clinton Lance Morgan, qui faisait l’objet de trois chefs d’accusation pour l’agression sexuelle d’une fillette et dont l’enquête préliminaire devait débiter le 26 juin 2006. Le ministère public avait fait connaître son intention de demander préalablement au tribunal d’accepter que la victime témoigne sur bande vidéo plutôt que de vive voix au procès.

[3] Le 3 mai 2006, la Société d’aide juridique a informé M. Morgan qu’il devait mettre à jour l’information relative à sa situation financière, à défaut de quoi il cesserait de bénéficier de l’aide juridique. M. Morgan n’a pas donné suite à la demande et, le 16 mai 2006, la Société d’aide juridique l’a avisé que son avocate, M<sup>me</sup> Cunningham, n’était plus autorisée à le représenter. Cette dernière a demandé sans délai à la Cour territoriale du Yukon de l’autoriser à cesser d’occuper. La révocation de l’aide juridique et l’incapacité de M. Morgan d’acquitter ses honoraires étaient les seules raisons invoquées à l’appui de sa demande. M<sup>me</sup> Cunningham a indiqué qu’elle était disposée à représenter M. Morgan à nouveau si l’aide juridique était rétablie.

## 3. Historique judiciaire

### A. *Cour territoriale du Yukon, 2006 YKTC 61 (CanLII)*

[4] La requête de M<sup>me</sup> Cunningham a été entendue par le juge Lilles, de la Cour territoriale, qui l’a rejetée pour les motifs suivants : a) l’aide juridique pouvait être rétablie et, le cas échéant, M<sup>me</sup> Cunningham était disposée à représenter à nouveau l’accusé; b) les accusations portées contre M. Morgan étaient très graves; c) la mémoire et le bien-être à la fois émotionnel et psychologique de la jeune plaignante risquaient d’être compromis par un délai supplémentaire; d) un avocat devrait être désigné

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

pour contre-interroger la fillette; e) on ignorait si M. Morgan était en mesure d'obtenir les services d'un autre avocat; f) on ignorait la date à laquelle l'enquête préliminaire pourrait être remise si l'avocate était autorisée à cesser d'occuper; g) l'enquête préliminaire n'est pas aussi cruciale que le procès, mais elle demeure déterminante pour le déroulement de celui-ci; h) la question complexe et très controversée de l'admission en preuve d'un témoignage sur bande vidéo était soulevée et il aurait été difficile à M. Morgan de participer au débat sans être représenté; i) un délai supplémentaire aurait causé un préjudice à M. Morgan du fait qu'il était soupçonné de délinquance sexuelle depuis le dépôt des accusations criminelles (par. 26).

B. *Cour suprême du territoire du Yukon, 2006 YKSC 40, 41 C.R. (6th) 66*

[5] Le juge Gower a entendu la demande de *certiorari* de M<sup>me</sup> Cunningham visant l'annulation de la décision de la Cour territoriale. Il a statué que le par. 537(1) du *Code criminel*, L.R.C. 1985, ch. C-46, et l'art. 77 de la *Loi sur la Cour territoriale*, L.R.Y. 2002, ch. 217, conféraient au juge président l'enquête préliminaire un pouvoir discrétionnaire en matière d'autorisation de cesser d'occuper. Après un examen approfondi de la jurisprudence canadienne sur le sujet, il conclut qu'elle étaye amplement l'existence du pouvoir discrétionnaire de refuser à l'avocat l'autorisation de cesser d'occuper. Selon lui, le juge Lilles, de la Cour territoriale, n'a pas outrepassé sa compétence, et il rejette la demande de *certiorari*.

C. *Cour d'appel du Yukon, 2008 YKCA 7, 257 B.C.A.C. 1*

[6] La Cour d'appel a conclu au caractère théorique de la question puisque l'instruction du procès de M. Morgan était devenue inutile (par. 17). L'appel a tout de même suivi son cours afin qu'un tribunal d'appel se prononce sur la question de droit.

[7] La Cour d'appel estime que le juge Lilles, de la Cour territoriale, n'avait pas le pouvoir discrétionnaire de refuser l'autorisation de cesser d'occuper et elle accueille l'appel. Sa décision a trois assises.

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.

Premièrement, les règles d'exercice de la profession d'avocat ressortissent au premier chef au barreau, et un droit de regard du tribunal lorsqu'il y a requête pour cesser d'occuper pourrait opposer décisions de justice et décisions disciplinaires. Deuxièmement, la surveillance judiciaire en ce domaine pourrait compromettre le secret professionnel de l'avocat lorsque ce dernier est appelé à préciser les motifs pour lesquels il souhaite cesser d'occuper. Troisièmement, l'obligation faite à un avocat de continuer de représenter un client fait naître un conflit réel ou apparent entre l'intérêt du client et l'intérêt de l'avocat à ce que l'affaire se termine au plus tôt. La Cour d'appel juge qu'en matière de cessation d'occuper, mieux vaut présumer que les avocats ne se dérobent généralement pas à leurs obligations professionnelles et que s'ils le font, les barreaux prennent les mesures disciplinaires qui s'imposent. Elle reconnaît cependant qu'un tribunal peut exercer le pouvoir dont il dispose en matière d'outrage [TRADUCTION] « dans le cas exceptionnel où le comportement de l'avocat désireux de cesser d'occuper constitue une offense grave à l'administration de la justice » (par. 29). Elle conclut que le juge Lilles n'aurait pas dû ordonner à M<sup>me</sup> Cunningham de continuer de représenter M. Morgan.

#### 4. La question en litige

[8] Notre Cour doit déterminer si, dans une affaire pénale, un tribunal peut refuser d'autoriser un avocat de la défense à cesser d'occuper pour cause de non-respect par l'accusé des conditions financières du mandat. Dans les présents motifs, « non-paiement des honoraires de l'avocat » (et ses variantes) s'entend de la situation où, par exemple, l'accusé omet d'effectuer un paiement, il ne verse pas les fonds à la date convenue ou son droit à l'aide juridique est suspendu ou révoqué.

#### 5. L'analyse

[9] L'accusé a le droit absolu de révoquer à son gré le mandat accordé à son avocat. Le tribunal ne peut intervenir dans ce choix et lui imposer un avocat dont il ne veut pas (voir *Vescio c. The King*, [1949] R.C.S. 139, p. 144; toutefois, à titre exceptionnel, un

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

*amicus curiae* peut être nommé pour assister le tribunal). Par contre, l'avocat n'a pas le droit absolu de cesser de représenter son client. La nature fiduciaire du lien créé avec son client limite sa faculté de cesser d'occuper une fois qu'il a accepté le mandat. Les règles de déontologie des barreaux provinciaux ou territoriaux (p. ex. la règle 21 de la partie un du *Code of Professional Conduct* du Barreau du Yukon, les chapitres 2, 6 et 7 du *Code of Professional Conduct* (mise à jour 2009) du Barreau de l'Alberta, le chapitre 10 du *Professional Conduct Handbook* (mise à jour 2010) du Barreau de la Colombie-Britannique et la règle 2 du *Code de déontologie* (mise à jour 2009) du Barreau du Haut-Canada) énoncent en détail les limites applicables. Le pourvoi soulève la question de savoir si le pouvoir du tribunal de faire respecter sa procédure impose une limite supplémentaire à la faculté de l'avocat de cesser d'occuper.

#### A. *Divergences de la jurisprudence*

[10] Il existe en la matière deux courants jurisprudentiels au sein des cours d'appel provinciales et territoriales. Selon les cours d'appel de la Colombie-Britannique et du Yukon, un tribunal n'a pas le pouvoir de refuser à un avocat de la défense l'autorisation de cesser d'occuper pour cause de non-paiement de ses honoraires. Les cours d'appel de l'Alberta, de la Saskatchewan, du Manitoba, de l'Ontario et du Québec estiment au contraire qu'un tribunal peut rejeter une demande d'autorisation de cesser d'occuper. Des tribunaux de première instance du Nouveau-Brunswick et de Terre-Neuve adhèrent également à cette école de pensée.

[11] La position des cours d'appel de la Colombie-Britannique et du Yukon s'origine de la décision *Re Leask and Cronin* (1985), 18 C.C.C. (3d) 315, de la Cour suprême de la Colombie-Britannique. Dans cette affaire, la cour fait droit à une demande d'ordonnance de prohibition, concluant qu'un juge de la cour provinciale ne peut pas légalement ordonner à un avocat de continuer de représenter un accusé. Pour le juge McKay, il s'agit ainsi de faire ressortir le rôle d'un barreau à la fois vigoureux et indépendant et de reconnaître que les questions disciplinaires relèvent du barreau et non du tribunal.

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.

À son avis, la relation entre l’avocat et son client est de nature contractuelle, et lorsque le client ne respecte pas ses obligations, l’avocat peut dénoncer le contrat et y mettre fin. Il dit craindre également que si l’avocat est tenu de révéler les raisons pour lesquelles il veut cesser d’occuper, le secret professionnel puisse être compromis. L’avocat demande certes l’autorisation de cesser d’occuper, mais cela tient [TRADUCTION] « de la politesse et de la courtoisie » (p. 325), car le tribunal n’a pas le pouvoir discrétionnaire de la lui refuser.

[12] Il faut préciser que, dans l’affaire *Leask*, la demande ne faisait pas suite au non-paiement des honoraires de l’avocat comme en l’espèce, mais de la détérioration de la relation avocat-client. Quoi qu’il en soit, les tribunaux de la Colombie-Britannique ont par la suite statué, sur le fondement de cette décision, que le tribunal n’avait pas le pouvoir de rejeter une requête pour cesser d’occuper quel que soit le motif invoqué (voir aussi *Luchka c. Zens* (1989), 37 B.C.L.R. (2d) 127 (C.A.), p. 129; *R. c. Ho*, 2003 BCCA 663, 21 B.C.L.R. (4th) 83, par. 19; *R. c. Huber*, 2004 BCCA 43, 192 B.C.A.C. 75, par. 75-76, la juge Rowles, par. 101, la juge Southin, et par. 121-126, le juge Smith).

[13] À l’opposé, les cours d’appel et les tribunaux de première instance de l’Alberta, de la Saskatchewan, du Manitoba, de l’Ontario et du Québec, ainsi que des tribunaux de première instance du Nouveau-Brunswick et de Terre-Neuve, considèrent que l’autorisation de cesser d’occuper peut être refusée à l’avocat. L’arrêt *R. c. C. (D.D.)* (1996), 110 C.C.C. (3d) 323, autorisation de pourvoi refusée, [1997] 1 R.C.S. vii (*sub nom. Ferguson c. The Queen*), est la décision qui retient le plus l’attention. La Cour d’appel de l’Alberta y statue qu’en plus d’avoir des obligations contractuelles envers son client, l’avocat est un auxiliaire de justice et qu’à ce titre, il a envers le tribunal l’obligation de [TRADUCTION] « se présenter devant lui lorsqu’il en est requis » et de « ne pas laisser un client en plan au milieu d’un procès » (p. 327). À moins que l’avocat ne précise au départ la nature limitée de son mandat, le tribunal peut lui refuser l’autorisation de cesser d’occuper.

[14] La Cour d’appel de l’Alberta paraît reconnaître l’existence de deux exceptions à cet égard.

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

Premièrement, le tribunal *doit* autoriser l'avocat à cesser d'occuper lorsqu'un désaccord l'oppose à son client (p. 328). Deuxièmement, le tribunal *peut* faire droit à la demande présentée pour cause de non-paiement de ses honoraires après avoir examiné le préjudice qui en résulte pour la preuve du ministère public, les inconvénients causés aux témoins et la possibilité que le tribunal consacre son temps à une autre affaire (p. 330).

[15] La Cour d'appel du Manitoba s'est elle aussi penchée sur le pouvoir du tribunal de rejeter la requête que présente un avocat pour cesser d'occuper à cause du non-paiement de ses honoraires : *R. c. Deschamps*, 2003 MBCA 116, 177 Man. R. (2d) 301. Elle convient avec la Cour d'appel de l'Alberta que le tribunal peut rejeter pareille demande. Toutefois, la juge Steel indique qu'il doit d'abord déterminer que le retrait infligerait un préjudice à l'accusé et à l'administration de la justice (par. 24).

[16] La Cour d'appel du Québec a elle aussi statué qu'une fois fixée la date de l'audience, le tribunal peut rejeter la requête pour cesser d'occuper (*Bernier c. 9006-1474 Québec inc.*, [2001] J.Q. n° 2631 (QL); voir également l'art. 249 du *Code de procédure civile* du Québec, L.R.Q., ch. C-25). Les cours d'appel de la Saskatchewan et de l'Ontario reconnaissent elles aussi l'obligation de l'avocat d'obtenir du tribunal l'autorisation de cesser d'occuper (*Mireau c. Canada* (1995), 128 Sask. R. 142, par. 4; *R. c. Brundia*, 2007 ONCA 725, 230 O.A.C. 29, par. 44; *R. c. Peterman* (2004), 70 O.R. (3d) 481, par. 38). Des tribunaux de première instance du Nouveau-Brunswick et de Terre-Neuve concluent eux aussi à l'existence de cette obligation (*R. c. Golding*, 2007 NBBR 320, 325 R.N.-B. (2<sup>e</sup>) 92, par. 18 et 20; *Dooling c. Banfield* (1978), 22 Nfld. & P.E.I.R. 413 (C. dist. T.-N.), par. 27).

[17] Pour les motifs exposés ci-après, j'estime qu'un tribunal peut refuser l'autorisation de cesser d'occuper demandée par l'avocat de la défense pour cause de non-paiement de ses honoraires.

#### B. *Pouvoir du tribunal*

[18] Une cour supérieure a la compétence inhérente nécessaire à l'exercice de sa fonction

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)

judiciaire ainsi qu’à l’exécution de son mandat d’administrer la justice (voir I. H. Jacob, « The Inherent Jurisdiction of the Court » (1970), 23 *Curr. Legal Probs.* 23, p. 27-28), ce qui comprend le pouvoir de décider du déroulement de l’instance, de prévenir l’abus de procédure et de veiller au bon fonctionnement des rouages de la cour. Comme l’avocat joue un rôle central dans l’administration de la justice, la cour a un certain pouvoir sur lui lorsqu’il s’agit de faire respecter sa procédure. Dans l’arrêt *Succession MacDonald c. Martin*, [1990] 3 R.C.S. 1235, notre Cour confirme que la compétence inhérente englobe le pouvoir de déclarer un avocat inhabile à occuper afin d’assurer un procès équitable à l’accusé :

Les tribunaux, qui ont le pouvoir inhérent de priver un avocat du droit d’occuper pour une partie en cas de conflit d’intérêts, ne sont pas tenus d’appliquer un code de déontologie. Leur compétence repose sur le fait que les avocats sont des auxiliaires de la justice et que le comportement de ceux-ci à l’occasion de procédures judiciaires, dans la mesure où il peut influencer sur l’administration de la justice, est soumis à leur pouvoir de surveillance. [p. 1245]

Il s’ensuivrait donc que si, dans l’exercice de sa compétence inhérente, le tribunal peut priver un avocat du droit d’occuper, il peut inversement refuser de l’autoriser à cesser d’occuper.

[19] De même, dans le cas d’un tribunal d’origine législative, le pouvoir de faire respecter sa procédure et le droit de regard sur la manière dont les avocats exercent leurs fonctions s’infèrent nécessairement du pouvoir de constituer une cour de justice. Notre Cour a confirmé que les pouvoirs d’un tribunal d’origine législative peuvent être déterminés grâce à une « doctrine de la compétence par déduction nécessaire » :

... sont compris dans les pouvoirs conférés par la loi habilitante non seulement ceux qui y sont expressément énoncés, mais aussi, par déduction, tous ceux qui sont de fait nécessaires à la réalisation de l’objectif du régime législatif . . . .

(*ATCO Gas and Pipelines Ltd. c. Alberta (Energy and Utilities Board)*, 2006 CSC 4, [2006] 1 R.C.S. 140, par. 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

Même si, dans cet arrêt, le juge Bastarache renvoie à un tribunal administratif, la même règle de la compétence par déduction nécessaire vaut pour un tribunal d'origine législative.

[20] La demande d'autorisation de cesser d'occuper ou celle visant à priver l'avocat du droit d'occuper, qu'elle soit présentée en raison, par exemple, du non-paiement des honoraires ou d'un conflit d'intérêts, ressortissent au pouvoir dont dispose par déduction nécessaire le tribunal pour décider du déroulement de l'instance.

### C. *L'exercice de la compétence*

[21] En l'espèce, la question la plus litigieuse est celle de savoir si, dans l'exercice de la compétence qui lui est inhérente — ou qu'il a par déduction nécessaire — pour décider du déroulement de l'instance, un tribunal siégeant en matière criminelle a un droit de regard sur le sort à réserver à la demande présentée par un avocat pour cesser d'occuper.

[22] Les raisons militent en faveur d'un tel droit de regard ne manquent pas. L'accusé qui n'a plus les moyens de payer son avocat peut subir un préjudice si ce dernier le laisse tomber au milieu de la procédure pénale. Un ajournement pourra être nécessaire pour lui permettre de se trouver un nouvel avocat. Un tel délai peut être préjudiciable à l'accusé, qui est stigmatisé par les accusations criminelles pesant toujours contre lui et qui peut être détenu jusqu'à son procès. Un nouveau délai peut également nuire à la preuve du ministère public. En effet, tout report a une incidence sur les plaignants, les témoins et les jurés, de même que sur l'administration diligente de la justice dans l'intérêt de la société. Lorsque de tels intérêts sont en jeu, ils peuvent l'emporter sur le droit de l'avocat de cesser d'occuper dans une affaire lorsque ses honoraires ne lui sont pas versés.

[23] M<sup>me</sup> Cunningham et les intervenants qui défendent la même thèse soutiennent pour leur part qu'un tribunal doit *toujours* s'abstenir d'exercer un tel droit de regard. Ils invoquent collectivement les trois éléments principaux sur lesquels la Cour d'appel fonde sa décision : le secret professionnel de l'avocat, le rôle du barreau et le conflit



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

d'intérêts. Ils voient en outre dans l'ordonnance de type *Rowbotham* une voie de solution possible. Selon eux, le tribunal doit présumer qu'un avocat respecte la déontologie, et tout écart professionnel ressortit à juste titre au barreau auquel l'avocat appartient. M<sup>me</sup> Cunningham et le Barreau du Yukon soutiennent toutefois que le tribunal peut, à titre exceptionnel, exercer sa compétence en matière d'outrage lorsque l'avocat demande à cesser d'occuper pour un motif illégitime ou qu'il se retire d'une manière qui justifie son assignation pour outrage au tribunal. Selon l'Association du Barreau canadien et l'association des criminalistes (Criminal Lawyers' Association), la faute déontologique ou l'abus de procédure doit être établi clairement pour que le tribunal assigne un avocat pour outrage au tribunal.

[24] J'examine successivement ces prétentions.

(1) Le secret professionnel de l'avocat

[25] M<sup>me</sup> Cunningham et les intervenants font valoir que le secret professionnel de l'avocat pourrait être violé de deux façons : la simple divulgation du seul fait que l'accusé n'a pas acquitté ses honoraires ou la révélation involontaire de renseignements privilégiés lors de l'examen par le tribunal des motifs de la cessation d'occuper.

[26] Le souci de protéger le secret professionnel de l'avocat est légitime. Point n'est besoin d'insister sur son importance fondamentale dans notre système juridique. La relation entre l'avocat et son client fait partie intégrante de l'administration de la justice. Le secret incite à la communication libre et entière des éléments nécessaires à la bonne représentation du client devant la justice (voir *Smith c. Jones*, [1999] 1 R.C.S. 455, par. 45, le juge Cory au nom des juges majoritaires, et *R. c. McClure*, 2001 CSC 14, [2001] 1 R.C.S. 445, par. 31 et 33, le juge Major).

[27] Cependant, dans le contexte pénal, la mise au jour du non-paiement des honoraires de l'avocat par l'accusé ne fait généralement pas intervenir la raison d'être du secret professionnel de l'avocat. Un client doit pouvoir être assuré de la confidentialité

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

de ce qu'il confie à son avocat, car ce n'est qu'à cette condition que les faits de l'affaire peuvent être discutés librement et franchement et que de bons conseils juridiques peuvent être donnés et obtenus (voir *Anderson c. Bank of British Columbia* (1876), 2 Ch. D. 644 (C.A.), p. 649; cité dans les arrêts *Smith c. Jones*, par. 45, et *McClure*, par. 32). Aucun élément n'a été avancé pour expliquer qu'un accusé serait moins enclin à communiquer des renseignements à son avocat si le tribunal jouissait d'un pouvoir discrétionnaire en matière de cessation d'occuper que si l'avocat pouvait se retirer unilatéralement de l'affaire.

[28] La prétention des barreaux de la Colombie-Britannique et du Yukon selon laquelle le secret professionnel s'applique au simple fait que l'accusé n'a pas acquitté ou n'acquittera pas les honoraires de son avocat s'appuie sur les arrêts *Descôteaux v. Mierzwinski*, [1982] 1 R.C.S. 860, et *Maranda c. Richer*, 2003 CSC 67, [2003] 3 R.C.S. 193. Dans ces deux affaires de perquisition au bureau de l'avocat, notre Cour statue que les renseignements sur la situation financière d'un accusé et sur les honoraires versés à son avocat peuvent être protégés. Dans l'arrêt *Maranda*, notre Cour souligne que des renseignements sur les honoraires — plus précisément leur montant et celui des débours — peuvent paraître « neutres », mais que leur communication peut porter préjudice à l'accusé. Le juge LeBel signale notamment que de tels renseignements

permettraient peut-être à un enquêteur intelligent de reconstituer certaines des allées et venues du client et de constituer des éléments sur sa présence en des lieux divers à partir de la documentation relative aux rencontres avec son avocat. [par. 24]

Ces renseignements pourraient ensuite servir à porter une accusation contre le client ou à le faire déclarer coupable. Dans le contexte d'une perquisition, les renseignements sur les honoraires sont protégés *prima facie*, car leur communication pourrait être préjudiciable au client. Lorsque le ministère public demande leur communication, il appartient au tribunal, et non à la police, de déterminer s'ils sont *effectivement* protégés.

[29] La demande présentée par un avocat pour cesser d'occuper en raison du non-paiement de ses

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,

honoraires s'inscrit dans un contexte nettement différent de celui de la perquisition policière visant les dossiers et les comptes d'un avocat. La plus grande différence tient à la teneur des renseignements mis au jour. L'avocat qui demande à cesser d'occuper ne révèle qu'une bribe d'information, à savoir que l'accusé n'a pas acquitté ses honoraires ou qu'il ne les acquittera pas. En quoi la communication de ce minime élément d'information pourrait-elle en l'es-pèce être préjudiciable à l'accusé? Nulle explication n'est avancée. On voit d'ailleurs difficilement comment ce simple fait pourrait être utilisé contre l'accusé pour établir le fondement de la poursuite pénale : il n'a de lien ni avec les renseignements donnés à l'avocat ni avec les conseils obtenus de ce dernier. On ne pourrait inférer du seul non-paiement des honoraires que l'accusé s'est livré à quelque activité particulière liée aux accusations portées contre lui.

[30] Tel est assurément le cas lorsque le non-paiement des honoraires n'a pas de lien avec le fondement de l'affaire et que sa mise au jour n'est pas préjudiciable à l'accusé. Toutefois, dans d'autres contextes juridiques, le paiement ou le non-paiement des honoraires peut être pertinent pour ce qui concerne le fondement de l'affaire lorsque, par exemple, en droit de la famille, une pension alimentaire est demandée et que le client allègue l'impécuniosité. Révéler le non-paiement des honoraires de l'avocat peut aussi infliger un préjudice au client lorsque, par exemple, le défendeur décide alors de présenter une demande de cautionnement pour dépens. Dans le cas où le paiement des honoraires ou leur non-paiement est pertinent pour ce qui est du fondement de l'affaire ou que sa mise au jour peut être préjudiciable au client, le secret professionnel de l'avocat peut s'y appliquer.

[31] Le non-paiement des honoraires qui n'est pas lié au fondement de l'affaire et dont la mise au jour ne cause pas préjudice à l'accusé ne constitue pas une exception à l'application du secret professionnel, contrairement à la démonstration de l'innocence ou à la sécurité publique (voir généralement les arrêts *McClure* et *Smith c. Jones*). Dans ce contexte, le non-paiement des honoraires de l'avocat ne bénéficie en fait jamais de la protection du secret

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

professionnel. Cependant, les présents motifs, qui portent sur l'application ou l'inapplication du secret professionnel de l'avocat à certains éléments communiqués au tribunal, ne sauraient être interprétés de façon à modifier l'obligation déontologique de l'avocat de tenir secret le paiement de ses honoraires ou leur non-paiement dans d'autres contextes.

[32] M<sup>me</sup> Cunningham et les intervenants font par ailleurs valoir qu'en exposant les motifs de sa demande d'autorisation de cesser d'occuper et en répondant aux questions du tribunal, l'avocat pourrait révéler par mégarde des renseignements confidentiels. Il s'agirait d'un risque si inacceptable que le tribunal devrait s'abstenir d'exercer tout pouvoir discrétionnaire de rejeter la demande. Ils invoquent à l'appui l'affaire *Leask*, où l'avocat demandait l'autorisation de cesser d'occuper en raison d'un désaccord insurmontable avec l'accusé. Le juge de la cour provinciale avait voulu obtenir des précisions pour déterminer si les divergences étaient conciliables (p. 318-319). Dans cette affaire, l'accusé avait lui aussi participé à l'échange. À leur avis, l'exercice est périlleux, car l'accusé pourrait renoncer sans le savoir au secret professionnel et révéler des renseignements par ailleurs protégés.

[33] Je conviens que, dans l'affaire *Leask*, le juge n'aurait pas dû engager pareil échange. Il a maintes fois demandé à l'avocat de justifier en détail sa volonté de cesser d'occuper, même après que ce dernier eut invoqué les règles de déontologie. Il a carrément demandé à l'accusé s'il s'opposait à ce que l'avocat révèle les raisons précises à l'origine de sa demande. Dans cette affaire, les faits en cause étaient sans conteste inacceptables.

[34] Or, l'avocat est présumé connaître ses obligations professionnelles et les respecter. Le juge est présumé connaître le droit (*R. c. Burns*, [1994] 1 R.C.S. 656, p. 664, la juge McLachlin (maintenant Juge en chef)). L'intégrité de l'administration de la justice repose sur ces présomptions. Les tribunaux sont fréquemment appelés à trancher des questions délicates. Par exemple, bien que la décision initiale de ne pas produire un document susceptible d'être privilégié appartienne à l'avocat, un juge peut avoir à décider si le document est effectivement

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]

privilegié. Le risque minime qu'un renseignement protégé puisse alors être révélé par mégarde ne justifie pas que la décision finale appartienne uniquement à l'avocat en cas de contestation. Il en va de même, selon moi, de la cessation d'occuper pour non-paiement d'honoraires dans une affaire criminelle. Le risque minime que le tribunal saisi de la demande tente indûment d'obtenir des renseignements protégés à l'audience ne justifie pas que la décision de cesser d'occuper relève uniquement de l'avocat.

(2) Droit de regard réservé au barreau

[35] Je ne saurais non plus faire droit à l'argument de M<sup>me</sup> Cunningham et des intervenants voulant que seul le barreau ait un droit de regard en la matière. Le barreau joue un rôle disciplinaire essentiel lorsqu'un avocat commet une faute professionnelle, mais lorsque ce dernier demande à cesser d'occuper, le droit de regard du tribunal n'a pas un objectif disciplinaire. Le pouvoir judiciaire se veut *préventif*. Il vise à protéger l'administration de la justice et à assurer un procès équitable. Le rôle disciplinaire du barreau a un caractère *réactif*. Les deux sont nécessaires pour bien encadrer l'exercice de la profession d'avocat et protéger la procédure de la cour.

[36] Les règles adoptées par les différents barreaux constituent des énoncés fondamentaux des normes professionnelles applicables et elles renseignent abondamment sur les conditions auxquelles l'avocat peut demander l'autorisation de cesser d'occuper. Par exemple, les règles du Barreau de l'Alberta disposent ce qui suit relativement à la cessation d'occuper pour cause de non-paiement des honoraires :

[TRADUCTION] Moyennant un préavis raisonnable au client, l'avocat peut cesser d'occuper lorsque les circonstances le justifient. Les circonstances pouvant justifier l'avocat de se retirer, mais non l'y contraindre, comprennent les suivantes :

- a) le client omet de donner suite à la demande de verser une somme dans un délai raisonnable pour le paiement des honoraires ou des débours conformément à l'entente conclue avec l'avocat; [ch. 14, règle 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]

Une règle du Barreau du Haut-Canada vise directement le retrait pour non-paiement des honoraires dans une affaire criminelle :

L'avocate ou l'avocat qui a consenti à représenter un client ou une cliente ne peut se retirer d'une affaire criminelle en raison du non-paiement des honoraires lorsque la date prévue du procès n'est pas assez éloignée pour permettre à son client ou à sa cliente de changer de titulaire de permis et à cette nouvelle personne de bien se préparer pour le procès et que le report de la date du procès nuirait aux intérêts du client ou de la cliente. [règle 2.09(5)]

[37] L'Association du Barreau canadien établit elle aussi des règles de déontologie professionnelle, notamment en ce qui concerne la cessation d'occuper :

Le devoir de l'avocat envers son client lui interdit de cesser d'occuper sauf pour un bon motif et après l'avoir convenablement avisé, eu égard aux circonstances.

(*Code de déontologie professionnelle* (2009), ch. XII)

Au nombre des commentaires afférents à cette règle figure le suivant :

Le fait qu'un client, après un préavis raisonnable, refuse de verser à l'avocat une provision pour frais ou honoraires donne à l'avocat un motif valable de cesser d'occuper, à condition toutefois que le client ne subisse pas, de ce fait, un préjudice grave. [commentaire 6]

[38] Les normes établies par les codes de déontologie des barreaux ou de l'Association du Barreau canadien ne lient pas les tribunaux, mais elles « doivent être considérées comme un important énoncé de principes » (*Succession MacDonald*, p. 1246). Elles complètent le pouvoir discrétionnaire du tribunal de refuser l'autorisation de cesser d'occuper qui aurait de graves répercussions sur l'administration de la justice. À titre d'exemple, le code de l'Association du Barreau canadien reconnaît que tribunaux et barreaux ont des rôles certes complémentaires, mais distincts :

Chaque fois que la présente règle autorise ou oblige l'avocat à cesser d'occuper pour un client, il doit le faire conformément aux règlements du tribunal devant lequel il plaide et aux règles de procédure qui s'imposent. [commentaire 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

Tribunaux et ordres professionnels jouent des rôles différents mais importants dans l'encadrement de l'exercice du droit de cesser d'occuper : les premiers préviennent l'atteinte à l'administration de la justice, les seconds soumettent à des sanctions disciplinaires les avocats qui ne respectent pas les normes professionnelles. Ces rôles ne sont pas mutuellement exclusifs.

[39] M<sup>me</sup> Cunningham et les intervenants soutiennent qu'un droit de regard du tribunal en la matière compromet l'indépendance professionnelle des avocats, qui, je le rappelle, sont parties prenantes à l'administration de la justice. Je ne saurais convenir qu'une mesure exceptionnelle prise à l'endroit d'un avocat et jugée nécessaire pour préserver l'intégrité de l'administration de la justice compromet l'indépendance de la profession. Dans l'arrêt *Young c. Young*, [1993] 4 R.C.S. 3, aux p. 135-136, la juge McLachlin reconnaît qu'un avocat peut être condamné personnellement aux dépens dans le rare cas où il agit de mauvaise foi en encourageant l'abus de la procédure de la cour et en retardant le déroulement de celle-ci. Nul ne laisse entendre que pareille mesure exceptionnelle a compromis l'indépendance de la profession. De plus, en Alberta, où la cessation d'occuper fait l'objet d'un droit de regard du tribunal depuis à tout le moins l'arrêt *C. (D.D.)* rendu en 1996, ce contrôle ne semble pas avoir eu d'incidence sur l'indépendance des avocats de la province. Enfin, toutes les règles de déontologie reconnaissent que les membres d'un barreau indépendant ont des obligations qui transcendent celles qu'ils ont envers leurs clients. Les avocats doivent respecter leurs obligations professionnelles vis-à-vis de l'administration de la justice et du public, et leur indépendance n'en souffre pas pour autant (voir, p. ex., Barreau du Yukon, parties 2 et 3, Barreau du Haut-Canada, règles 4 et 6; Barreau de l'Alberta, ch. 1; Barreau de la Colombie-Britannique, ch. 1).

### (3) Le conflit d'intérêts

[40] Je ne suis pas convaincu non plus par la prétention du barreau de la Colombie-Britannique selon laquelle obliger un avocat à continuer de représenter un client peut opposer les intérêts de l'un et de l'autre. Suivant ce raisonnement, l'avocat contraint

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.

de travailler sans rémunération peut être tenté de conseiller son client de manière à accélérer la procédure et réduire ainsi son manque à gagner, alors que, en matière pénale, ce n'est pas dans l'intérêt du client. Cela contredit pourtant l'affirmation du barreau — à laquelle je souscris — que les tribunaux doivent présumer que les avocats respectent la déontologie. Les intérêts personnels ou professionnels de l'avocat peuvent souvent se heurter à ceux de ses clients — par exemple, lorsqu'il se voit confier un nouveau dossier intéressant qui requiert une attention immédiate ou que le déroulement d'une instance est compromis par ses projets de vacances. L'avocat doit être diligent et minutieux et agir au mieux des intérêts de son client. S'il accepte d'agir *pro bono*, il doit faire preuve du même professionnalisme que s'il exécutait un mandat contre rémunération. L'avocat auquel le tribunal enjoint de continuer de représenter l'accusé doit le faire avec compétence et diligence. L'intégrité de la profession et l'administration de la justice n'exigent rien de moins.

#### (4) L'ordonnance de type Rowbotham

[41] Les intervenants Barreau du Yukon, Criminal Lawyers' Association et procureur général de l'Ontario attirent l'attention de notre Cour sur l'arrêt *R. c. Rowbotham* (1988), 41 C.C.C. (3d) 1, où la Cour d'appel de l'Ontario statue que lorsqu'un accusé impécunieux, mais non admissible à l'aide juridique, doit bénéficier des services d'un avocat pour que son procès soit équitable, le tribunal peut suspendre l'instance jusqu'à ce que l'État paie pour l'obtention de ces services (p. 69).

[42] Notre Cour ne s'est pas prononcée sur le bien-fondé d'une telle ordonnance (*Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. G. (J.)*, [1999] 3 R.C.S. 46, par. 90), et comme la question n'est pas soulevée dans le présent pourvoi, les remarques qui suivent sont incidentes. À supposer toutefois qu'une telle ordonnance puisse être rendue, elle jouerait dans la décision du tribunal d'autoriser ou non l'avocat à cesser d'occuper.



[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.

[43] Cela dit, l'ordonnance de type *Rowbotham* ne saurait cependant se substituer entièrement au pouvoir du tribunal de rejeter la demande de l'avocat. Comme le dit la Cour d'appel de l'Ontario dans l'arrêt du même nom (à la p. 69), ainsi que dans l'arrêt *R. c. Rushlow*, 2009 ONCA 461, 245 C.C.C. (3d) 505, aux par. 17-21 et 24, l'ordonnance vise à assurer à l'accusé un procès équitable; elle ne tient pas compte des intérêts de quelque autre partie ou personne touchée par l'instance. Par conséquent, lorsque le délai dans le déroulement de l'instance ou l'incidence sur un tiers est une considération déterminante aux fins d'accorder ou non l'autorisation de cesser d'occuper pour cause de non-paiement d'honoraires, l'ordonnance de type *Rowbotham* ne résout pas le problème et peut même l'aggraver. Pour l'obtenir, l'accusé doit présenter une autre requête distincte et satisfaire à des critères stricts. L'ordonnance de type *Rowbotham* peut jouer dans l'exercice du pouvoir discrétionnaire résiduel du tribunal de refuser l'autorisation de cesser d'occuper, mais elle ne peut s'y substituer.

##### (5) Mesure de dernier recours

[44] L'argumentation de M<sup>me</sup> Cunningham n'écarte donc pas entièrement le pouvoir du tribunal de refuser à un avocat l'autorisation de cesser d'occuper dans un dossier.

[45] Cela dit, un tribunal ne saurait décider à la légère de contraindre un avocat à représenter un client gratuitement. L'avocat criminaliste est le mieux placé pour déterminer le risque financier que comporte l'acceptation d'un mandat, mais il ne devrait être tenu de supporter seul cette charge financière que dans les circonstances les plus graves. L'accessibilité de la justice ne devrait pas généralement reposer sur les seules épaules des avocats de la défense ni, en particulier, sur celles des avocats de l'aide juridique. L'autorisation de cesser d'occuper ne devrait être refusée à l'avocat qu'en dernier recours et seulement si cela s'impose pour prévenir une atteinte grave à l'administration de la 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

D. *Le rejet de la demande*

[46] Les principes suivants devraient présider à l'exercice du pouvoir discrétionnaire du tribunal de faire droit ou non à la demande présentée par un avocat pour cesser d'occuper.

[47] Le tribunal devrait faire droit à la demande qui est présentée suffisamment à l'avance pour que la procédure inscrite au rôle ne doive pas être reportée. Il n'y a pas lieu alors d'examiner le fondement de la demande ni d'exiger que l'avocat continue de représenter son client.

[48] Lorsque le délai est plus serré, le tribunal est justifié de pousser l'examen. Tant qu'il ne manque pas au secret professionnel, l'avocat peut révéler qu'il veut cesser d'occuper pour des motifs d'ordre déontologique, pour cause de non-paiement de ses honoraires ou pour une autre raison (sa charge de travail, p. ex.). S'il invoque le respect de la déontologie, c'est que sa relation avec son client a évolué de telle sorte qu'il ne peut en conscience continuer de le représenter. L'avocat peut invoquer des « motifs d'ordre déontologique » lorsque, par exemple, l'accusé lui demande de manquer à ses obligations professionnelles (voir, p. ex., *Barreau du Haut-Canada*, règles 2.09(7)b) et d); *Barreau de l'Alberta*, ch. 14, règle 2; *Barreau de la Colombie-Britannique*, ch. 10, règle 1) ou qu'il ne suit pas ses conseils sur un point important lié au procès (voir, p. ex., *Barreau du Haut-Canada*, règle 2.09(2); *Barreau de l'Alberta*, ch. 14, règle 1; *Barreau de la Colombie-Britannique*, ch. 10, règle 2). Lorsque la véritable raison à l'origine de la demande est le non-paiement des honoraires, l'avocat ne peut invoquer la déontologie. Toutefois, que l'un ou l'autre soit invoqué, le tribunal doit s'en tenir à l'explication donnée et s'abstenir de pousser l'examen afin de ne pas compromettre le secret professionnel.

[49] La demande d'autorisation de cesser d'occuper présentée pour un motif d'ordre déontologique doit être accueillie (voir les arrêts *C. (D.D.)*, p. 328, et *Deschamps*, par. 23). Lorsqu'un problème d'ordre

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

éthique se pose dans sa relation avec le client, l'avocat peut être *tenu* de se retirer du dossier pour se conformer à ses obligations professionnelles. Le tribunal ne saurait exiger qu'il continue d'occuper au mépris de celles-ci.

[50] Lorsque le non-paiement de ses honoraires est à l'origine de la demande de l'avocat, le tribunal peut, dans l'exercice de son pouvoir discrétionnaire, la rejeter. Il peut également recourir à son pouvoir en matière d'outrage au tribunal pour faire respecter sa décision de ne pas autoriser l'avocat à cesser d'occuper (*C. (D.D.)*, p. 327). Voici une liste non exhaustive des éléments dont il peut tenir compte dans l'exercice de son pouvoir discrétionnaire de faire droit ou non à la demande :

- la possibilité que l'accusé se défende lui-même;
- l'existence d'autres avenues pour que l'accusé soit représenté;
- les conséquences pour l'accusé d'un délai dans le déroulement de la procédure, spécialement lorsque l'accusé est en détention;
- la conduite de l'avocat (p. ex., s'il a informé l'accusé suffisamment à l'avance pour qu'il puisse trouver un autre représentant ou s'il a demandé dès que possible au tribunal l'autorisation de cesser d'occuper);
- l'incidence sur le ministère public et sur un coaccusé;
- l'incidence sur les plaignants, les témoins et les jurés;
- l'équité envers l'avocat de la défense, compte tenu notamment de la durée prévue de l'instance et de sa complexité;
- l'historique du dossier, y compris le changement d'avocat à répétition.

Ces éléments étant tous étrangers à la relation avocat-client, leur examen ne saurait violer le secret professionnel. Le tribunal doit déterminer, au regard de ces éléments, si l'autorisation de cesser

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

d'occuper porterait sérieusement atteinte à l'administration de la justice. Dans l'affirmative, il peut la refuser.

[51] Contrairement à ce que prétendent les intervenants, l'atteinte à l'administration de la justice ne s'entend pas seulement des inconvénients d'ordre administratif. Elle s'entend également du fait que l'instance pénale en cours et celle qui se prolonge touchent d'autres personnes : les plaignants, les témoins, les jurés et les citoyens en général. C'est pourquoi j'estime en toute déférence que la considération tenant à la possibilité — dont fait mention la Cour d'appel de l'Alberta dans l'arrêt *C. (D.D.)* — que le tribunal consacre son temps à une autre affaire n'est pas pertinente dans la mise en balance des intérêts en jeu.

[52] L'arrêt *Deschamps* de la Cour d'appel du Manitoba offre un bon exemple d'exercice opportun du pouvoir discrétionnaire du tribunal. L'avocat de la défense représentait un délinquant dans une instance engagée pour que ce dernier soit déclaré délinquant dangereux. Après cinq jours d'audience, il a demandé l'ajournement le temps que le délinquant soit évalué et traité. L'instance a été suspendue pendant environ huit mois et, dans l'intervalle, des problèmes sont survenus relativement aux honoraires versés par l'aide juridique. Vu la grande complexité de la procédure engagée pour faire déclarer une personne délinquant dangereux, il avait été entendu au départ que l'avocat toucherait des honoraires supérieurs à ceux que prévoyait le tarif. Des « difficultés financières » ont remis en question le respect de cet engagement par les services d'aide juridique. L'avocat de la défense a demandé l'autorisation de cesser d'occuper en raison de cette inexécution alléguée du contrat.

[53] La juge des requêtes a conclu qu'il n'y avait pas d'inexécution contractuelle, mais que s'il y en avait eu, elle aurait quand même rejeté la demande. Sa décision a été confirmée en appel. La juge Steel a convenu avec elle que les éléments suivants justifiaient le refus de l'autorisation de cesser d'occuper : l'instance était complexe et son enjeu considérable, le délinquant ne pouvait se défendre seul, l'audition

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

avait commencé, le délinquant ne pouvait obtenir les services d'un autre avocat dans un délai prévisible et, malgré le caractère difficile du délinquant, une relation de confiance s'était établie entre l'avocat et lui. La Cour d'appel a également convenu avec la juge des requêtes que le retrait de l'avocat aurait encore retardé le déroulement de l'instance et causé un grave préjudice au délinquant. Elle a fait observer qu'après la requête initiale, les services d'aide juridique avaient garanti que les honoraires seraient versés, mais au tarif ordinaire. La demande d'autorisation de cesser d'occuper a été rejetée.

[54] La question de savoir si la présente affaire satisfait aux exigences strictes qui doivent être remplies pour qu'un tribunal puisse refuser l'autorisation de cesser d'occuper est désormais théorique. Ni les parties ni le juge n'ont pu bénéficier des présents motifs, et le dossier de notre Cour ne renferme ni information ni analyse concernant plusieurs des éléments pertinents. On ne peut donc pas affirmer avec certitude qu'à l'issue d'une analyse complète des éléments pertinents, les circonstances de la présente espèce justifieraient le refus d'autoriser l'avocate à cesser d'occuper. J'insiste seulement sur le caractère strict des conditions auxquelles l'autorisation peut être refusée et sur la nécessité que le dossier offre l'assise voulue pour que le tribunal exerce son pouvoir en ce sens.

*E. Le contrôle des décisions refusant l'autorisation de cesser d'occuper*

[55] Le présent pourvoi tire son origine du rejet d'une demande de *certiorari* par la Cour suprême du territoire du Yukon. M<sup>me</sup> Cunningham avait sollicité un *certiorari* parce qu'aucune disposition du *Code criminel* ne lui permettait d'interjeter un appel interlocutoire (voir l'art. 674 du *Code criminel*). Elle a porté la décision de la cour supérieure en appel devant la Cour d'appel (par. 784(1) du *Code criminel*), puis le ministère public s'est à son tour adressé à la Cour suprême du Canada (art. 40 de la *Loi sur la Cour suprême*, L.R.C. 1985, ch. S-26).

[56] On peut se demander ce qui serait advenu si le pourvoi avait eu pour origine la décision d'une

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

cour supérieure. Les cours d'appel de l'Alberta et du Manitoba se sont toutes deux déclarées sans compétence à l'égard d'un appel visant la décision d'une cour supérieure relative à une requête pour cesser d'occuper (arrêts *C. (D.D.)*, p. 330, et *Deschamps*, par. 42). Notre Cour n'a pas à se prononcer sur la procédure à suivre pour en appeler d'une telle décision, mais quelques repères pourraient néanmoins être utiles. La présente espèce s'apparente à première vue à l'affaire *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835, où une entreprise de communication contestait une interdiction de publication visant une instance pénale. Comme l'entreprise n'était pas partie à cette instance, notre Cour a estimé que son recours différerait de l'appel interlocutoire interjeté par une partie. Elle a conclu que le moyen d'appel le moins inopportun pour contester la décision de la cour supérieure consistait à s'adresser directement à la Cour suprême du Canada en application de l'art. 40 de la *Loi sur la Cour suprême* (p. 862). En l'espèce, l'avocate criminaliste est elle aussi un tiers en ce qui concerne l'instance principale de nature pénale, de sorte que la situation paraît analogue.

#### F. *Certiorari*

[57] Une demande de *certiorari* ne peut être accueillie que lorsque la juridiction inférieure a rendu une décision erronée sur sa compétence ou commis une erreur de droit manifeste eu égard au dossier (G. Létourneau, *The Prerogative Writs in Canadian Criminal Law and Procedure* (1976), p. 143). Le juge Gower a estimé qu'il ne pouvait intervenir dans l'exercice du pouvoir discrétionnaire que si le juge Lilles, de la Cour territoriale, avait outrepassé sa compétence. Toutefois, en matière d'enquête préliminaire, l'exigence de l'excès de compétence s'applique au renvoi de l'accusé à son procès ou à la décision de le libérer (*Patterson c. La Reine*, [1970] R.C.S. 409, p. 413; *Dubois c. La Reine*, [1986] 1 R.C.S. 366, p. 380; *R. c. Deschamplain*, 2004 CSC 76, [2004] 3 R.C.S. 601, par. 17). Ce critère de révision strict procède du fait qu'à l'issue d'une enquête préliminaire, le tribunal ne se prononce pas définitivement sur la culpabilité ou l'innocence de l'accusé, de sorte que de larges moyens de contrôle sont moins nécessaires (*Dubois*, p. 373-374). La

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.

demande présentée par un avocat pour cesser d'occuper ne s'apparente ni au renvoi à procès ni à la libération à l'issue de l'enquête préliminaire. Elle se rapproche davantage de la situation considérée dans l'affaire *Dagenais*, où la demande était présentée par un tiers. Le juge de première instance peut statuer sans délai et définitivement sur la demande d'autorisation de cesser d'occuper. Comme l'indique la juge Steel dans l'arrêt *Deschamps*, le rejet d'une telle demande est une décision contraignante et définitive vis-à-vis de l'avocat (par. 38). Dans ce contexte, il convient donc de reconnaître au *certiorari* sa portée normale et de ne l'accorder qu'en présence d'une décision erronée sur la compétence ou d'une erreur de droit manifeste à la lecture du dossier (*Dagenais*, p. 864-865).

[58] Comme le pouvoir du tribunal de surveiller le comportement des avocats ressortit à sa compétence inhérente ou à sa compétence par déduction nécessaire, il est difficile de concevoir que le refus d'autoriser un avocat à cesser d'occuper puisse équivaloir à une décision erronée sur sa compétence. Cependant, l'avocat peut faire valoir que le juge de la cour provinciale ou territoriale a commis une erreur de droit au vu du dossier. Pareille erreur s'entend notamment du refus de permettre à l'avocat de cesser d'occuper pour un motif d'ordre déontologique ou de l'omission de tenir compte d'un élément pertinent dans l'exercice du pouvoir discrétionnaire d'autoriser ou non la cessation d'occuper pour cause de non-paiement des honoraires (voir *R. c. Gardiner*, 2008 ONCA 397, 231 C.C.C. (3d) 394, par. 26, et *Ottawa Citizen Group Inc. c. R.* (2005), 75 O.R. (3d) 590 (C.A.), par. 49).

## 6. Conclusion

[59] En résumé, un tribunal est investi du pouvoir de décider du déroulement de l'instance et d'encadrer le travail des avocats en leur qualité d'auxiliaires de justice. La Cour suprême du Yukon a conclu à bon droit que la Cour territoriale pouvait refuser à l'avocat l'autorisation de cesser d'occuper. Ce pouvoir doit toutefois être exercé avec circonspection. Il ne convient pas de refuser le retrait qui n'occasionne pas d'ajournement ni celui qui est justifié par le respect de la déontologie. Le tribunal malencontreusement

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.*

saisi d'une demande d'autorisation de cesser d'occuper pour cause de non-paiement d'honoraires doit soupeser les éléments pertinents et déterminer si y faire droit porterait gravement atteinte à l'administration de la justice.

#### 7. Dispositif

[60] Je suis d'avis d'accueillir le pourvoi et de refuser d'adjuger des dépens.

*Pourvoi accueilli.*

*Procureur de l'appelante : Service des poursuites pénales du Canada, Vancouver.*

*Procureur de l'intimée : Clinique d'aide juridique communautaire, Whitehorse.*

*Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.*

*Procureurs de l'intervenante Law Society of British Columbia : McCarthy Tétrault, Vancouver.*

*Procureurs de l'intervenant le Barreau du Yukon : Hunter Litigation Chambers Law Corporation, Vancouver.*

*Procureur de l'intervenante l'Association du Barreau canadien : Gregory P. DelBigio, Vancouver.*

*Procureurs de l'intervenante Criminal Lawyers' Association (Ontario) : Stockwoods, Toronto.*



This is Exhibit E referred to in the  
Affidavit of

MONTAGNE ALDOUS  
Sworn before me this 05 day  
of APRIL A.D. 20 23

**VERGINIA ALDOUS**  
A COMMISSIONER FOR OATHS  
IN AND FOR THE PROVINCE OF MANITOBA  
MY COMMISSION EXPIRES NOV 10/24

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Court File No. T-553-22

*Virginia Aldous*

**FEDERAL COURT**

BETWEEN:

ANDREW ROBERT GIRARD, ALEXANDER GOSSEN, HARRY GARCIA, MARCO AUGUSTO CARREIRA, THOMAS LAMOUREUX, JULIE KERFOOT, PAUL GORDON MACDONALD, DAVID MONTAGNON, CHAD REXER, SEAN BRIAN WILLIAM HOWE, JAMIE TATE LINN, DEVON BROOKS, MICHAEL BROWN, AARON RUHL, ANDREW TIGHE, THOMAS ALEXANDRE JOSEPH POIRIER, MARC DANIEL PARADIS, JOHN ARTHUR GARY GEORGE SKEOCH, RYLEE JON GUDNASON STEVENS, SHELDON BENEDICTSON, TREVOR J HALLETT, BRETT JERRY GAUDRY, DONALD WERSCHLER, MARK BAKER, DARRYL REID, LANCE KENYON, JOHN KARKARIS, ORRIE MYLES ANDERSON, CHRISTOPHER DANIEL ANDREWS, CAMERON JOSEPH EDWARDS, DEREK ESKOWICH, BRENT TIMOTHY MARTIN, PAUL DEVARENNE, BRODIE MELNYCHUK, DANIEL PURPUR, RYAN HRYNIW, ADAM HELFRICH, MARTIN JOHN GOGELA, EJAZ ALEKOZAI, JEREMY STEPHENSON, BRYAN MATTHEW MCHUGH, RYAN EDGE, NOAH STEELE, TULLY HARTL, SPENCER STEVENS, ANDREW NJUME, MATTHEW HICKS, LISA SCHMIDTKE, CHRISTOPHER LOCKE, JEFFERY DEVINE, DAWOOD K HAIDER, JARED SCOTT MAYHEW, TYRRELL HIATT, SHAWN BASKETTE, GEORGE COSTA, BRIAN DESROSIERS, KYLE WILLIAM ROSS PILON, KYLE DANIEL MICHAEL KORTKO, SHANE THOMAS STONE, JESSE RANDALL BLOOM, COLIN STAN PORTICE, RYAN CHARLES THIESSEN, TIMOTHY HAY, MATTHEW BLANC, RUSSELL THOMAS HENDERSON, STEVEN KOENIG, THOMAS MARTIN SAVORN, JAMES WELCH, CINDY STEVENSON, JON MCALLISTER, MICHAEL DAVID SERBEN, JACK EBIN THOMAS SAVORN, CHARLES MILLER, MILAN MITIC, ROBERT DESROSIERS, MATTHEW CARTER-BARR, WILLIAM CHESTER JOSLIN, COLBY COCHRANE, TRAVIS SCHALLOCK, ANDREW MULHERIN-CARON, CHRISTIAN THOMAS JONES, GEORGE ZINDROS, JEFFREY WYCHOPEN, GLEN SAINAS, RYAN DONER, KYLE WICKSTROM, SLATE PODAIMA, COLEMAN MITCHELL, ERNEST GEORGESON, DALLON DAVID EDMONDSON, AARON SWAN, SARA LOVEGROVE, SAMUEL LEGERE, CLAUDIO CARACCILO, RACINE MARIE STONE, STEVE STOPA, CLAUDIA LAPOLLA, KELLY ROBERT HIGGINS, TED AMEAR KIRYAKOS, ALAN TODD RUDDERHAM, SAMANTHA OLSEN, CHANDRA MARIE GILLIES, LANCE LESLIE WILLIAMS, LIONEL BROWN RICHARDO, JOHN THOMAS CRODEN, CHARLES ANTHONY DICKSON, MICHAEL CASTILLO, MICHAEL CERULLI, KARIM LOWEN, SHAWN SILVARI, JUSTIN DADINA, MARCEL LEONARD BEDARD, DWAYNE SOBERS, JESSE ALLISON, NICOLAS LICOIS, CLAYTON PAPP, DOUGLAS BRYAN, DEREK JAMES CHARLES WATERHOUSE, JAMIE CAMERON HALL, DAYLE JONES, KENTON HILDEBRAND, DEVANANTH VICTOR SELVAM, MATTHEW BRITTON, JESSICA ERIN ASLIN, ALIE KRAAYENBRINK, NANCY JEAN WARD, ERIC BEAULIEU, REJEAN DONALD JOSEPH SAWCHUK, DARYL CHAMBERS, RAPHAEL DESCHENES, JAMES LEE KERR, EUGENE JEFFREY MACKAY, BRETT KYLE HUNT, DERRICK WOODALL, TROY STRANDBERG, BILLY NEUMANN, RONALD MARK KELLY, SUZANNE MARIE

BATTICK, NATHAN HUGH BOHMER, TYLER BYRNES, ROBERT STUVE, JASON FLOYD FREDRICKSON, KATHY PIETERSMA, BRAD PALEY, CHANTEL TARA KOETZLE, PARTICK PAQUET, DENISE FINK, NATHAN ROBERT VEINOT, KYLE GEORGE KING, DOMENICO RICCI, CATHLEEN ALICE PESSERL, STEPHEN EDWARD GLADISH, REMY FAST, ROBERT KOETSIER, BRETT HERBERT, COREY ADAM ARSENAULT, JAZMINE STADNYK, RAYMOND LUNN, CAMERON JAMES SMITH, MYLES GOZDA, DAVID CAMERON WENSLEY, ANDREW PAUL STEWART, MICHAEL MARUSHY, NATHAN GOY, RICHARD MICHAEL, RYAN GILBY, DEAN GRYWACHESKI, DORIN HALMAGHI, MICHAEL VALLINS, NICOLE LABOUCAN, JAMES BULLOUGH, WALTER FERLEYKO, JOCELYN VALERIA YANEZ, TRISTAN JENKIN, SEAN FIORILLO, ERIC MORKEBERG, NATHANIEL PHILIPPOT, CHAMREIYANG KAMEI, SHENDY GINGRAS, JEFFREY THOMAS BURT, JAMES FREDERICK BETTS, DALE SAWA, ALEXANDER BLOKZYL, ANDREW BLOKZYL, CLAYTON EDWARD MOFFAT, AARON TANK, JOHN ROBERT MANSEAU, SEBASTIEN TRITZ, COOPER AUSTIN BAILEY SHAW, DAVID WEBSTER, KATERINA D'AMOURS, ANDREW STEPHEN KOETZLE, ANTHONY FEDERICO, BYRON SABORIO, ADAM ALEXANDER EALEY, JOSEPH GUY CRISTIAN DUFOUR, ARGENTINA CORPENO, KEITH STOWE, TIM SCORY AND CAROLINE ROBILLARD, DARRAN BLACKMON, PAUL MENEER, KARIM BEKRI, TAMMY MITCHELL. ADAM VAN DE WALLE, EDDIE NEISER, YOANN HAMEL, VIKRAM KUKADIA, KAJEN SATHASIVAM, ADAM JOHNSON, JOHN NORDQUIST, PIERRE POIRIER, RAJANIKANTH SHANMUGAM, AUSTIN CLARK, MARK DESJARDINS, ISAIAH JOHNSON, LINDEN AWSOME, ARTHUR ANSELM, TYSON WEBER, EUGENIA KULCHYCKY, TAMMY SMITH, YANNICK LAPLANTE, CAROLIN BOYER, CHARLES ADAM, PHILIP SCHROER, ANDREW PRATT and LUC PRINCE

Plaintiffs

-and-

THE MINISTER OF TRANSPORT, HER MAJESTY THE QUEEN IN RIGHT OF CANADA,  
ATTORNEY GENERAL OF CANADA, DIRECTOR GENERAL RAIL SAFETY, and  
CANADIAN NATIONAL RAILWAY

Defendants

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**ORDER**

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UPON HEARING THIS MOTION in writing made by Grey Wowk Spencer LLP, the solicitors for the Plaintiffs, for an Order removing them as solicitors of record with respect to two Plaintiffs: John Karkaris and Shawn Silvani;

UPON READING the notice of motion and the affidavit of Megan Gurski;

AND UPON READING the written submissions of Grey Wowk Spencer LLP;

AND UPON NOTING that Grey Wowk Spencer LLP has made numerous attempts to receive instructions from John Karkaris and Shawn Silvari;

AND UPON NOTING that John Karkaris and Shawn Silvari have failed to respond to Grey Wowk Spencer LLP and provide their instructions;

AND UPON NOTING that Grey Wowk Spencer LLP has provided reasonable notice to John Karkaris and Shawn Silvari of Grey Wowk Spencer LLP's intention to withdraw as solicitors of record;

**THIS COURT ORDERS that:**

1. The law firm, Grey Wowk Spencer LLP, is hereby removed as solicitors of record for the Plaintiffs John Karkaris and Shawn Silvari.

Dated this \_\_\_\_\_, 2023

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**FEDERAL COURT**

BETWEEN:

ANDREW ROBERT GIRARD, ALEXANDER GOSSEN, HARRY GARCIA, MARCO AUGUSTO CARREIRA, THOMAS LAMOUREUX, JULIE KERFOOT, PAUL GORDON MACDONALD, DAVID MONTAGNON, CHAD REXER, SEAN BRIAN WILLIAM HOWE, JAMIE TATE LINN, DEVON BROOKS, MICHAEL BROWN, AARON RUHL, ANDREW TIGHE, THOMAS ALEXANDRE JOSEPH POIRIER, MARC DANIEL PARADIS, JOHN ARTHUR GARY GEORGE SKEOCH, RYLEE JON GUDNASON STEVENS, SHELDON BENEDICTSON, TREVOR J HALLETT, BRETT JERRY GAUDRY, DONALD WERSCHLER, MARK BAKER, DARRYL REID, LANCE KENYON, JOHN KARKARIS, ORRIE MYLES ANDERSON, CHRISTOPHER DANIEL ANDREWS, CAMERON JOSEPH EDWARDS, DEREK ESKOWICH, BRENT TIMOTHY MARTIN, PAUL DEVARENNE, BRODIE MELNYCHUK, DANIEL PURPUR, RYAN HRYNIW, ADAM HELFRICH, MARTIN JOHN GOGELA, EJAZ ALEKOZAI, JEREMY STEPHENSON, BRYAN MATTHEW MCHUGH, RYAN EDGE, NOAH STEELE, TULLY HARTL, SPENCER STEVENS, ANDREW NJUME, MATTHEW HICKS, LISA SCHMIDTKE, CHRISTOPHER LOCKE, JEFFERY DEVINE, DAWOOD K HAIDER, JARED SCOTT MAYHEW, TYRRELL HIATT, SHAWN BASKETTE, GEORGE COSTA, BRIAN DESROSIERS, KYLE WILLIAM ROSS PILON, KYLE DANIEL MICHAEL KORTKO, SHANE THOMAS STONE, JESSE RANDALL BLOOM, COLIN STAN PORTICE, RYAN CHARLES THIESSEN, TIMOTHY HAY, MATTHEW BLANC, RUSSELL THOMAS HENDERSON, STEVEN KOENIG, THOMAS MARTIN SAVORN, JAMES WELCH, CINDY STEVENSON, JON MCALLISTER, MICHAEL DAVID SERBEN, JACK EBIN THOMAS SAVORN, CHARLES MILLER, MILAN MITIC, ROBERT DESROSIERS, MATTHEW CARTER-BARR, WILLIAM CHESTER JOSLIN, COLBY COCHRANE, TRAVIS SCHALLOCK, ANDREW MULHERIN-CARON, CHRISTIAN THOMAS JONES, GEORGE ZINDROS, JEFFREY WYCHOPEN, GLEN SAINAS, RYAN DONER, KYLE WICKSTROM, SLATE PODAIMA, COLEMAN MITCHELL, ERNEST GEORGESON, DALLON DAVID EDMONDSON, AARON SWAN, SARA LOVEGROVE, SAMUEL LEGERE, CLAUDIO CARACCIOLO, RACINE MARIE STONE, STEVE STOPA, CLAUDIA LAPOLLA, KELLY ROBERT HIGGINS, TED AMEAR KIRYAKOS, ALAN TODD RUDDERHAM, SAMANTHA OLSEN, CHANDRA MARIE GILLIES, LANCE LESLIE WILLIAMS, LIONEL BROWN RICHARDO, JOHN THOMAS CRODEN, CHARLES ANTHONY DICKSON, MICHAEL CASTILLO, MICHAEL CERULLI, KARIM LOWEN, SHAWN SILVARI, JUSTIN DADINA, MARCEL LEONARD BEDARD, DWAYNE SOBERS, JESSE ALLISON, NICOLAS LICOIS, CLAYTON PAPP, DOUGLAS BRYAN, DEREK JAMES CHARLES WATERHOUSE, JAMIE CAMERON HALL, DAYLE JONES, KENTON HILDEBRAND, DEVANANTH VICTOR SELVAM, MATTHEW BRITTON, JESSICA ERIN ASLIN, ALIE KRAAYENBRINK, NANCY JEAN WARD, ERIC BEAULIEU, REJEAN DONALD JOSEPH SAWCHUK, DARYL CHAMBERS, RAPHAEL DESCHENES, JAMES LEE KERR, EUGENE JEFFREY MACKAY, BRETT KYLE HUNT, DERRICK WOODALL, TROY STRANDBERG, BILLY NEUMANN, RONALD MARK KELLY, SUZANNE MARIE

BATTICK, NATHAN HUGH BOHMER, TYLER BYRNES, ROBERT STUVE, JASON FLOYD FREDRICKSON, KATHY PIETERSMA, BRAD PALEY, CHANTEL TARA KOETZLE, PARTICK PAQUET, DENISE FINK, NATHAN ROBERT VEINOT, KYLE GEORGE KING, DOMENICO RICCI, CATHLEEN ALICE PESSERL, STEPHEN EDWARD GLADISH, REMY FAST, ROBERT KOETSIER, BRETT HERBERT, COREY ADAM ARSENAULT, JAZMINE STADNYK, RAYMOND LUNN, CAMERON JAMES SMITH, MYLES GOZDA, DAVID CAMERON WENSLEY, ANDREW PAUL STEWART, MICHAEL MARUSHY, NATHAN GOY, RICHARD MICHAEL, RYAN GILBY, DEAN GRYWACHESKI, DORIN HALMAGHI, MICHAEL VALLINS, NICOLE LABOUCAN, JAMES BULLOUGH, WALTER FERLEYKO, JOCELYN VALERIA YANEZ, TRISTAN JENKIN, SEAN FIORILLO, ERIC MORKEBERG, NATHANIEL PHILIPPOT, CHAMREIYANG KAMEI, SHENDY GINGRAS, JEFFREY THOMAS BURT, JAMES FREDERICK BETTS, DALE SAWA, ALEXANDER BLOKZYL, ANDREW BLOKZYL, CLAYTON EDWARD MOFFAT, AARON TANK, JOHN ROBERT MANSEAU, SEBASTIEN TRITZ, COOPER AUSTIN BAILEY SHAW, DAVID WEBSTER, KATERINA D'AMOURS, ANDREW STEPHEN KOETZLE, ANTHONY FEDERICO, BYRON SABORIO, ADAM ALEXANDER EALEY, JOSEPH GUY CRISTIAN DUFOUR, ARGENTINA CORPENO, KEITH STOWE, TIM SCORY AND CAROLINE ROBILLARD, DARRAN BLACKMON, PAUL MENEER, KARIM BEKRI, TAMMY MITCHELL. ADAM VAN DE WALLE, EDDIE NEISER, YOANN HAMEL, VIKRAM KUKADIA, KAJEN SATHASIVAM, ADAM JOHNSON, JOHN NORDQUIST, PIERRE POIRIER, RAJANIKANTH SHANMUGAM, AUSTIN CLARK, MARK DESJARDINS, ISAIAH JOHNSON, LINDEN AWSOME, ARTHUR ANSELM, TYSON WEBER, EUGENIA KULCHYCKY, TAMMY SMITH, YANNICK LAPLANTE, CAROLIN BOYER, CHARLES ADAM, PHILIP SCHROER, ANDREW PRATT and LUC PRINCE

Plaintiffs

-and-

THE MINISTER OF TRANSPORT, HER MAJESTY THE QUEEN IN RIGHT OF CANADA, ATTORNEY GENERAL OF CANADA, DIRECTOR GENERAL RAIL SAFETY, and CANADIAN NATIONAL RAILWAY

Defendants

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**WRITTEN REPRESENTATIONS**  
(Motion for removal of solicitor of record under Rule 125)

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**SUBMISSIONS**

1. This is a motion by the solicitors of record of the Plaintiffs, Grey Wowk Spencer LLP (“**GWS**”), to be removed as solicitors of record for the two Plaintiffs John Karkaris (“**Mr.**

**Karkaris**”) and Shawn Silvari (“**Mr. Silvari**”) pursuant to Rule 125 of the *Federal Courts Rules*, SOR/98-106 (“the *Rules*”).<sup>1</sup>

2. GWS is the solicitor of record for the Plaintiffs in this action, Court File T-553-22 (the “**Action**”).
3. When GWS was retained by all of the Plaintiffs, each Plaintiff provided their email addresses, residential addresses and phone numbers to GWS prior to the commencement of the Action (the “**Contact Information**”).<sup>2</sup>
4. GWS advised the Plaintiffs to ensure their Contact Information was accurate at all times.<sup>3</sup>
5. There are 230 Plaintiffs in this Action. GWS has obtained instructions to discontinue the Action from 228 of the Plaintiffs; all but two of the Plaintiffs have failed to provide instructions to GWS: Mr. Karkaris and Mr. Silvari (the “**Remaining Plaintiffs**”).<sup>4</sup>
6. GWS has made numerous attempts to receive instructions from Mr. Karkaris and Mr. Silvari through their Contact Information via email, telephone calls and regular mail to their last known addresses. Despite repeated attempts to obtain instructions from Mr. Karkaris and Mr. Silvari, Mr. Karkaris and Mr. Silvari have failed to respond to GWS.<sup>5</sup>
7. A Court has authority to remove a solicitor of record.<sup>6</sup> It is submitted that this is such a case. The court must exercise its discretion and grant the motion to remove GWS as solicitor of record for the Remaining Plaintiffs.
8. It is submitted that the failure of GWS to receive instructions from Mr. Karkaris and Mr. Silvari affects the administration of justice. In this case, GWS has represented 228 other Plaintiffs who provided their instructions to withdraw from the Action, however, Mr. Karkaris and Mr. Silvari have not responded to GWS’ numerous requests for instructions. Consequently, Mr. Karkaris and Mr. Silvari are the only remaining Plaintiffs.

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<sup>1</sup> *Federal Courts Rules*, SOR/98-106, Rule 125, Book of Authorities, Tab 1.

<sup>2</sup> Affidavit of Megan Gurski, at para 4.

<sup>3</sup> Affidavit of Megan Gurski, at para 4.

<sup>4</sup> Affidavit of Megan Gurski, at paras 6 to 8.

<sup>5</sup> Affidavit of Megan Gurski, at paras 6 to 8.

<sup>6</sup> See [Cunningham v Lilles](#), 2010 SCC 10 at paras 36, 46 to 49, 59, Book of Authorities Tab 4.

9. Chapter 3.7 of the *Law Society of Alberta Code of Conduct* (the “**Code**”)<sup>7</sup> provides guidance to lawyers seeking to withdraw from representation. Rule 3.7-2 of the *Code* states that a lawyer may withdraw from representation of a client due to a serious loss of confidence between the lawyer and the client so long as reasonable notice of withdrawal is given and no serious prejudice would result to the client. Rules 3.7-7 of the *Code* provides further details on the preferred procedure of withdrawal.<sup>8</sup>
10. It is hard to imagine how the Remaining Plaintiffs could establish that they would suffer serious prejudice should the court grant the motion of GWS. As Plaintiffs in the Action, it is incumbent upon Mr. Karkaris and Mr. Silvari to remain in contact with their lawyers, receive advice from their lawyers and provide instructions to their lawyers in a timely manner. Through their conduct, it may be inferred that Mr. Karkaris and Mr. Silvari have essentially abandoned their claim.
11. On March 28, 2023, Natalie Johnson, lawyer with GWS, gave notice to the Remaining Plaintiffs that GWS would be withdrawing from representing the Remaining Plaintiffs due to their failure to provide GWS instructions and their failure to respond to the legal advice of GWS. This notice was provided in writing via email to the Remaining Plaintiffs’ last known email address and through Express Post mail to the Remaining Plaintiffs’ last known mailing address.<sup>9</sup>
12. Megan Gurski is a legal assistant with GWS. In her affidavit, Ms. Gurski swore/affirmed the following:<sup>10</sup>
  - a. GWS has attempted to obtain instructions from the Remaining Plaintiffs using the Contact Information. I am informed by Natalie Johnson, lawyer with GWS, and believe that she has attempted to obtain instructions from the Remaining Plaintiffs

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<sup>7</sup> *Law Society of Alberta Code of Conduct*, March 28, 2023, Rule 3.7 and related commentary, Book of Authorities, Tab 2.

<sup>8</sup> *Law Society of Alberta Code of Conduct*, March 28, 2023, Rule 3.7 and related commentary, Book of Authorities, Tab 2.

<sup>9</sup> Affidavit of Megan Gurski, at para 8.

<sup>10</sup> Affidavit of Megan Gurski, at paras 7 to 9.

as detailed below. I have also attempted to obtain instructions. Despite repeated attempts, GWS has not received a response from the Remaining Plaintiffs:

i. Shawn Silvari:

1. 2023-02-17: email from the Group Leader seeking response to legal advice of GWS by 2023-03-03;
2. 2023-02-27: reminder email from the Group Leader seeking response to legal advice of GWS by 2023-03-03;
3. 2023-03-07: telephone call from me to Shawn Silvari; I left a voicemail message;
4. 2023-03-07: email directly from GWS to Shawn Silvari;
5. 2023-03-08: email directly from GWS to Shawn Silvari;
6. 2023-03-27: email directly from me on behalf of GWS to Shawn Silvari;
7. 2023-03-27: voice mail message from me on behalf of GWS to Shawn Silvari;
8. 2023-03-27: voice mail message from Natalie Johnson on behalf of GWS to Shawn Silvari;
9. 2023-03-28: voice mail message from Natalie Johnson on behalf of GWS to Shawn Silvari;
10. 2023-03-28: email directly from me on behalf of GWS to Shawn Silvari; and
11. 2023-03-28: email from Natalie Johnson on behalf of GWS to Shawn Silvari.

ii. John Karkaris:

1. 2023-02-17: email from the Group Leader seeking response to legal advice of GWS by 2023-03-03;
2. 2023-02-27: reminder email from the Group Leader seeking response to legal advice of GWS by 2023-03-03;



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3. 2023-03-07: telephone call from me to John Karkaris; I left a voicemail message;
  4. 2023-03-07: email directly from GWS to John Karkaris;
  5. 2023-03-08: email directly from GWS to John Karkaris;
  6. 2023-03-27: email directly from me on behalf of GWS to John Karkaris;
  7. 2023-03-27: voice mail message from me on behalf of GWS to John Karkaris;
  8. 2023-03-27: voice mail message from Natalie Johnson on behalf of GWS to John Karkaris;
  9. 2023-03-28: voice mail message from Natalie Johnson on behalf of GWS to John Karkaris;
  10. 2023-03-28: email directly from me on behalf of GWS to John Karkaris; and
  11. 2023-03-28: email from Natalie Johnson on behalf of GWS to John Karkaris.
- b. I am advised by Natalie Johnson and believe that on March 28, 2023, she emailed and mailed a letter to the Remaining Plaintiffs via Express Post with tracking numbers to their last known address. Attached as Exhibit “A” to my affidavit is a copy of the Canada Post receipt and tracking information. In that letter Natalie Johnson advised the Remaining Plaintiffs that due to their failure to respond to GWS, their failure to respond to the legal advice of GWS and their failure to provide GWS instructions, GWS was seeking a court order to be removed as solicitors of record.
- c. On March 30, 2023, I instructed a process server to personally serve notice of this motion upon the Remaining Plaintiffs at their last known address.

13. The above noted actions satisfy the requirements of Rule 125 and the procedures in the *Code* regarding counsel's withdrawal from representation.<sup>11</sup> For these reasons, no prejudice to the Remaining Plaintiffs will manifest from the removal of GWS as solicitors of record for the Remaining Plaintiffs.
14. The Remaining Plaintiffs have been unreasonable and uncooperative as they have failed to provide adequate instructions to GWS despite repeated requests.<sup>12</sup>
15. GWS has good cause to withdraw from representing the Remaining Plaintiffs<sup>13</sup> and has provided reasonable notice of same upon the Remaining Plaintiffs.<sup>14</sup>

### **ORDER SOUGHT**

16. GWS requests an Order that:
  - a. GWS be removed as solicitors of record for the Remaining Plaintiffs;
  - b. There should be no costs for this motion; and
  - c. Such further or other relief as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. The affidavit of Megan Gurski, to be filed;
2. The affidavit of personal service of the process server confirming service of this motion upon John Karakaris, to be filed; and

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<sup>11</sup> *Federal Courts Rules*, SOR/98-106, Rule 125, Book of Authorities, Tab 1; *Law Society of Alberta Code of Conduct*, March 28, 2023, Rule 3.7, Book of Authorities, Tab 2; See also [Fitzpatrick v College of Physical Therapists of Alberta](#), 2020 ABCA 88 (CanLII), Book of Authorities Tab 3.

<sup>12</sup> *Law Society of Alberta Code of Conduct*, March 28, 2023, rule 3.7-2 and related commentary, Book of Authorities, Tab 2.

<sup>13</sup> See [Fitzpatrick v College of Physical Therapists of Alberta](#), 2020 ABCA 88 (CanLII), Book of Authorities, Tab 3.

<sup>14</sup> *Law Society of Alberta Code of Conduct*, March 28, 2023, rule 3.7-1 and related commentary, Book of Authorities, Tab 2.

3. The affidavit of personal service of the process server confirming service of this motion upon Shawn Silvari, to be filed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of March, 2023.

*fw/* Natalie L. Johnson  
Grey Wowk Spencer LLP  
5110 – 51 Avenue, PO Box 1028  
Cold Lake, AB T9M 1P3  
Email: [lgrey@gwsllp.ca](mailto:lgrey@gwsllp.ca)  
Attention: Leighton BU Grey, KC

**FEDERAL COURT**

BETWEEN:

ANDREW ROBERT GIRARD, ALEXANDER GOSSEN, HARRY GARCIA, MARCO AUGUSTO CARREIRA, THOMAS LAMOUREUX, JULIE KERFOOT, PAUL GORDON MACDONALD, DAVID MONTAGNON, CHAD REXER, SEAN BRIAN WILLIAM HOWE, JAMIE TATE LINN, DEVON BROOKS, MICHAEL BROWN, AARON RUHL, ANDREW TIGHE, THOMAS ALEXANDRE JOSEPH POIRIER, MARC DANIEL PARADIS, JOHN ARTHUR GARY GEORGE SKEOCH, RYLEE JON GUDNASON STEVENS, SHELDON BENEDICTSON, TREVOR J HALLETT, BRETT JERRY GAUDRY, DONALD WERSCHLER, MARK BAKER, DARRYL REID, LANCE KENYON, JOHN KARKARIS, ORRIE MYLES ANDERSON, CHRISTOPHER DANIEL ANDREWS, CAMERON JOSEPH EDWARDS, DEREK ESKOWICH, BRENT TIMOTHY MARTIN, PAUL DEVARENNE, BRODIE MELNYCHUK, DANIEL PURPUR, RYAN HRYNIW, ADAM HELFRICH, MARTIN JOHN GOGELA, EJAZ ALEKOZAI, JEREMY STEPHENSON, BRYAN MATTHEW MCHUGH, RYAN EDGE, NOAH STEELE, TULLY HARTL, SPENCER STEVENS, ANDREW NJUME, MATTHEW HICKS, LISA SCHMIDTKE, CHRISTOPHER LOCKE, JEFFERY DEVINE, DAWOOD K HAIDER, JARED SCOTT MAYHEW, TYRRELL HIATT, SHAWN BASKETTE, GEORGE COSTA, BRIAN DESROSIERS, KYLE WILLIAM ROSS PILON, KYLE DANIEL MICHAEL KORTKO, SHANE THOMAS STONE, JESSE RANDALL BLOOM, COLIN STAN PORTICE, RYAN CHARLES THIESSEN, TIMOTHY HAY, MATTHEW BLANC, RUSSELL THOMAS HENDERSON, STEVEN KOENIG, THOMAS MARTIN SAVORN, JAMES WELCH, CINDY STEVENSON, JON MCALLISTER, MICHAEL DAVID SERBEN, JACK EBIN THOMAS SAVORN, CHARLES MILLER, MILAN MITIC, ROBERT DESROSIERS, MATTHEW CARTER-BARR, WILLIAM CHESTER JOSLIN, COLBY COCHRANE, TRAVIS SCHALLOCK, ANDREW MULHERIN-CARON, CHRISTIAN THOMAS JONES, GEORGE ZINDROS, JEFFREY WYCHOPEN, GLEN SAINAS, RYAN DONER, KYLE WICKSTROM, SLATE PODAIMA, COLEMAN MITCHELL, ERNEST GEORGESON, DALLON DAVID EDMONDSON, AARON SWAN, SARA LOVEGROVE, SAMUEL LEGERE, CLAUDIO CARACCIOLO, RACINE MARIE STONE, STEVE STOPA, CLAUDIA LAPOLLA, KELLY ROBERT HIGGINS, TED AMEAR KIRYAKOS, ALAN TODD RUDDERHAM, SAMANTHA OLSEN, CHANDRA MARIE GILLIES, LANCE LESLIE WILLIAMS, LIONEL BROWN RICHARDO, JOHN THOMAS CRODEN, CHARLES ANTHONY DICKSON, MICHAEL CASTILLO, MICHAEL CERULLI, KARIM LOWEN, SHAWN SILVARI, JUSTIN DADINA, MARCEL LEONARD BEDARD, DWAYNE SOBERS, JESSE ALLISON, NICOLAS LICOIS, CLAYTON PAPP, DOUGLAS BRYAN, DEREK JAMES CHARLES WATERHOUSE, JAMIE CAMERON HALL, DAYLE JONES, KENTON HILDEBRAND, DEVANANTH VICTOR SELVAM, MATTHEW BRITTON, JESSICA ERIN ASLIN, ALIE KRAAYENBRINK, NANCY JEAN WARD, ERIC BEAULIEU, REJEAN DONALD JOSEPH SAWCHUK, DARYL CHAMBERS, RAPHAEL DESCHENES, JAMES LEE KERR, EUGENE JEFFREY MACKAY, BRETT KYLE HUNT, DERRICK WOODALL, TROY STRANDBERG, BILLY NEUMANN, RONALD MARK KELLY, SUZANNE MARIE

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Plaintiffs

-and-

THE MINISTER OF TRANSPORT, HER MAJESTY THE QUEEN IN RIGHT OF CANADA, ATTORNEY GENERAL OF CANADA, DIRECTOR GENERAL RAIL SAFETY, and CANADIAN NATIONAL RAILWAY

Defendants

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## ORDER

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UPON HEARING THIS MOTION in writing made by Grey Wowk Spencer LLP, the solicitors for the Plaintiffs, for an Order removing them as solicitors of record with respect to two Plaintiffs: John Karkaris and Shawn Silvani;

UPON READING the notice of motion and the affidavit of Megan Gurski;

AND UPON READING the written submissions of Grey Wowk Spencer LLP;

AND UPON NOTING that Grey Wowk Spencer LLP has made numerous attempts to receive instructions from John Karkaris and Shawn Silvari;

AND UPON NOTING that John Karkaris and Shawn Silvari have failed to respond to Grey Wowk Spencer LLP and provide their instructions;

AND UPON NOTING that Grey Wowk Spencer LLP has provided reasonable notice to John Karkaris and Shawn Silvari of Grey Wowk Spencer LLP's intention to withdraw as solicitors of record;

**THIS COURT ORDERS that:**

1. The law firm, Grey Wowk Spencer LLP, is hereby removed as solicitors of record for the Plaintiffs John Karkaris and Shawn Silvari.

Dated this \_\_\_\_\_, 2023

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