CASE COMMENTS

JUMPING SHIP: *R v CUNNINGHAM* AND THE LAWYER'S RIGHT TO WITHDRAW

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I. INTRODUCTION

It has never been in the best traditions of the criminal bar to quit a client over money. Having gone on the record as counsel for an accused, the lawyer is, as a matter of professional dignity, expected to have sorted out financial matters with the client in advance, and it is seen as unseemly for the lawyer to abandon the client over non-payment. Some Canadian codes of conduct clearly prohibit the criminal defence lawyer from withdrawing due to non-payment of fees where withdrawal would potentially prejudice the client.[1]

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1 See e.g. Law Society of Upper Canada, *Rules of Professional Conduct*, Ottawa: LSUC, 2010, rule 2.09(5) [LSUC Rules]:

> 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.

See also Law Society of British Columbia, *Annotated Professional Conduct Handbook*, Vancouver: LSBC, 2010, ch 10, rule 7 [LSBC Handbook]:

> A lawyer must not withdraw because the client has not paid the lawyer's fee when due unless there is sufficient time for the client to obtain the services of another lawyer and for that other lawyer to prepare adequately for a hearing or trial.

Other codes make it clear that such withdrawal is frowned upon.[2] The codes of conduct send a cautionary message to the lawyer: "Don't go on the record as counsel for an accused unless you're prepared to see them through to the end of the trial, whether they pay you or not." The lawyer's overriding obligations to ensure access to justice and to provide services *pro bono* to indigent clients support the absence of an unfettered right to withdraw for non-payment of fees.

That said, however, prior to the Supreme Court of Canada's recent decision in *R v Cunningham*,[3] the weight of authority suggested that it was ultimately the lawyer's decision whether or not to withdraw. As Gavin MacKenzie put it, "[b]ecause, in Canada, the legal relationship between lawyers and their clients is essentially contractual, the question whether a lawyer should withdraw is to be determined by the lawyer, not by the court before whom the lawyer is appearing."[4]

MacKenzie, even then, may have been overconfident in proclaiming the lawyer, and not the court, as the ultimate arbiter on the matter of withdrawal as the authorities on the point were divided. MacKenzie cited the 1985 British Columbia Supreme Court case *Leask v Cronin Prov J*,[5] in which McKay J held that the court has no "right in law to order counsel to continue in the defence of an accused after counsel advises that he has decided that he will no

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2 See Law Society of Alberta, *Code of Professional Conduct*, Calgary: LSA, 2009, ch 14, commentary 1(a) [LSA Code]. In Chapter 14, "Withdrawal and Dismissal", the commentary to rule 1(a) (permitting the lawyer to withdraw for non-payment of fees) reads:

> (a) Non-payment: Withdrawal may be an option when the client has failed to pay an account or a retainer in accordance with an agreement in that respect, assuming that the fee involved is fair and reasonable and the client has been provided with sufficient information regarding fees and disbursements (see Chapter 13, Fees). Although non-payment may be a justification for withdrawal, a lawyer ought to seriously consider continuing to act if the extent of the client's default is minor; if the amount of work left to be done is minimal; if non-payment is due to the client's inability to pay; or if the client would be placed in peril as a result of withdrawal.

3 2010 SCC 10, [2010] 1 SCR 331 [*Cunningham*].

4 Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline*, looseleaf (consulted on 14 March 2011), 4th ed (Toronto: Thompson Reuters, 1993) at 4-20.

5 (1985), 66 BCLR 187, 18 CCC 3d 315 (SC) [*Leask*].

longer represent the accused."[6] What MacKenzie did not mention, however, was the contrary case of *R v Creasser (DD)*,[7] in which the court found that although the lawyer-client relationship is contractual, the lawyer who has embarked on a trial owes a duty to the court not to walk out on the client for non-payment of fees. In that case, the Alberta Court of Appeal stated: "In our view, the power to order counsel to appear, and not to abandon a trial once begun, is a necessary concomitant of the power to set cases down for trial, and is a power exercisable by all trial courts in criminal cases."[8] The Court went on to say that going on the record as counsel for an accused gives rise to a duty *to the court* to represent that accused to the completion of the trial. The Court held that:

> In our view, by appearing for the accused at the arraignment, a lawyer implicitly, if not expressly, undertakes to the trial court that he will act for the accused at the trial, and see the matter to an end.... In sum, in Alberta if a counsel takes on a criminal defence without suitable fee security, the risk of harm should be on counsel, not the court. Counsel who will not accept that risk need only tell the judge on arraignment that he has a limited, not a general, retainer.[9]

The decision in *Cunningham* clarifies most of the ambiguity surrounding counsel's right to withdraw. There, the Court essentially overrules *Leask* and affirms *Creasser* with some modifications.[10] In *Cunningham* the Supreme Court found in favour of a discretion to refuse counsel's application to withdraw and held that the Court may exercise that discretion whether or not the

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6 Mackenzie, *supra* note 4 at 4-20–4-21, citing *Leask*, *supra* note 5 at 196.

7 (1996), 187 AR 279, 110 CCC (3d) 323 (CA) [*Creasser* cited to AR].

8 *Ibid* at para 22.

9 *Ibid* at paras 23, 27.

10 The Supreme Court in *Cunningham* sets out factors to be considered in exercising the discretion to refuse an application to withdraw that are broadly consistent with what was said in *Creasser*. However, one significant departure is that in *Cunningham* the court explicitly rejected consideration of whether court time scheduled for the accused could be usefully used for other court business. See *Creasser*, *supra* note 7 at para 26; *Cunningham*, *supra* note 3 at para 51.

trial has begun if the withdrawal of counsel is for financial reasons and will require an adjournment.

The facts of the case are interesting. Lawyer Jennie Cunningham had sought leave of the Yukon Territorial Court to withdraw in circumstances where her client had failed to respond to a request from the Yukon Legal Services Society for updated financial information. Her client, who was accused of three counts of sexual assault of a six-year-old girl, had been informed that his failure to respond to the request for information would result in the suspension of his legal aid certificate. He did not respond and the certificate was suspended. Ms. Cunningham sought to withdraw. Her application was made approximately one month before the scheduled preliminary inquiry. The Territorial Court refused Ms. Cunningham's application.[11] Ultimately the Supreme Court of Canada upheld the position taken by the Territorial Court finding that the court had jurisdiction over the issue of withdrawal and could exercise its discretion to refuse counsel's application to withdraw for non-payment of fees.[12]

The Supreme Court of Canada went on to discuss the scope and proper exercise of the court's discretion to refuse counsel's application to withdraw. The Court held first that in circumstances where the withdrawal would not require an adjournment, counsel's application should be granted.[13] Second, where counsel is seeking to withdraw for ethical reasons, the court should allow the withdrawal without inquiring any further into the matter.[14] If, however, counsel is seeking to withdraw on financial grounds, *and the withdrawal will create the need for an adjournment*, the court may refuse the application to withdraw. The Court stressed that the discretion to refuse the application to withdraw should be "exercised exceedingly sparingly"[15] and only where counsel's withdrawal "would cause serious harm to the administration

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[11] *R v Morgan*, 2006 YKTC 61, 70 WCB (2d) 863.

[12] *Cunningham*, *supra* note 3 at para 59.

[13] *Ibid* at para 47.

[14] *Ibid* at para 49.

[15] *Ibid* at para 59.

of justice."[16] The upshot of the case is that the discretion to refuse counsel's application to withdraw exists on a limited basis, where a) the reason for the application is financial, and b) an adjournment will be required. Those two criteria having been met, the court is then to weigh eight (non-exhaustive) factors set out in the decision to assess the equities of the case and the harm to the administration of justice.[17]

These factors bear further examination in order to fully understand the import of the decision. In what follows I shall argue that the difficulty with these factors is that they either invariably weigh against the lawyer seeking to withdraw or they pit the lawyer against the client in a way that could violate solicitor-client confidentiality and prejudice the client.

II. THE EIGHT FACTORS

The Court cited eight factors to be considered in making the decision whether to allow counsel to withdraw. I will enumerate them here for convenience of reference in the analysis that follows:

(1) whether it is feasible for the accused to represent himself or herself;

(2) other means of obtaining representation;

(3) impact on the accused from delay in proceedings, particularly if the accused is in custody;

(4) 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;

(5) impact on the Crown and any co-accused;

(6) impact on complainants, witnesses and jurors;

(7) fairness to defence counsel, including consideration of the expected length and complexity of the proceedings;

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[16] *Ibid.*

[17] *Ibid* at para 50.

(8) the history of the proceedings, e.g. if the accused has changed lawyers repeatedly.[18]

The Court did not elaborate at all on these factors, nor did they group them in any conceptual order. I argue that five out of eight of these factors (factors one, two, three, five, and six) will invariably weigh heavily against granting the application to withdraw. The remaining three factors (factors four, seven, and eight) potentially raise questions about the equities as between the lawyer and client on the financial issues and will therefore potentially invite the lawyer to breach solicitor-client confidentiality in a manner that will be prejudicial to the accused. The Court stated that: "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."[19] I argue that the examination of at least three of the factors posited by the court give rise to a serious risk of violating solicitor-client confidentiality (if not solicitor-client privilege) in a way that is potentially damaging to the accused.

Indeed, the information before the court in *Cunningham*—that Mr Morgan, Ms Cunningham's client, had failed to provide the updated financial information necessary to secure his legal aid certificate—was potentially prejudicial to the accused and was not something that any accused person would want in a judge's mind while they were considering their assessment of the case.

A. Factors Invariably Weighing Against the Lawyer

In any case of serious criminal charges factor one—whether the accused can represent him- or herself—will always weigh against allowing counsel to withdraw. While an accused is entitled to represent him- or herself, no layperson is well equipped to navigate the complexities of criminal law and procedure. This is why the right to counsel is a fundamental component of the right to a fair trial. Most particularly, the spectre of self-representation will weigh strongly against allowing counsel's application to withdraw in cases of

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[18] *Ibid.*

[19] *Ibid.*

sexual assault.[20] The sexual assault situation raises particular difficulties with self-representation because of the nature of the confrontation between the accused and the complainant. This is especially true when the complainant is a child. While the courts have crafted the solution of appointing counsel to cross-examine the complainant, this compromise remains problematic.[21] Thus the need for representation is acute in the sex assault context.

Factor two—"other means of obtaining representation"—is naively optimistic when posited in the context of non-payment of fees. The assumption that there might be other means of obtaining representation seems to envision a world where clients who do not pay their bills or who cannot or will not secure legal aid funding may be passed on to other lawyers who will cheerfully take them on as *pro bono* clients. Here again, the practical likelihood in any criminal case that a non-paying client who does not have legal aid funding will be able to secure alternate representation is slim and the factor is therefore almost certain to weigh heavily against allowing counsel's application to withdraw.

Factors three, five, and six all relate to the consequence and inconvenience of delay. Factor number three, the "impact on the accused from delay in proceedings, particularly if the accused is in custody",[22] again almost inevitably weighs against allowing counsel's application to withdraw. By the terms of the decision the Court can only consider the possibility of disallowing the application for withdrawal where there is going to be delay in the proceedings. It is difficult to imagine the case where such delay would not impact negatively on the accused. Likewise, it is difficult to imagine a case where the need for an adjournment would not inconvenience and potentially prejudice others involved. Thus considering the position of the Crown, the witnesses, complainants, jurors and any co-accused will almost inevitably weight against allowing the application.

Given that all these factors will by their nature weigh against allowing counsel to withdraw, the question arises as to why the court left any discre-

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20 See *R v Lee* (1998), 125 CCC (3d) 363 at 365 (NWT SC); *R v Phung*, 2006 CanLII 57082 (Ont Sup Ct J).

21 See *ibid.*

22 *Cunningham*, *supra* note 3 at para 50.

tion at all to allow counsel's application for withdrawal for non-payment of fees. The possibility of the successful application rests on the potential for the remaining three factors to tip the balance in favour of the lawyer seeking to withdraw. Each of these remaining factors potentially raises the issue of the equities as between counsel and the accused.

B. FACTORS PITTING COUNSEL AGAINST THE ACCUSED

The remaining factors (four, seven, and eight) essentially engage the question: how unfair is it to make the lawyer continue to act? These factors ask the court to look at the conduct of counsel, fairness to counsel, and the history of the proceedings (which includes the history of the client's dealings with other lawyers.)

These remaining factors permit the court to inquire into the equities as between the lawyer and the client. In upholding the discretion to refuse the application to withdraw, the Court took the view that:

> 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.[23]

The Court, however, by positing factors four, seven, and eight as relevant to the exercise of the discretion, invites counsel, in their own cause, to reveal far more about the relationship with the client on the financial issue than merely the "sliver of information" that the client has not paid. It does not take much imagination to construct an explanation of how that further information about counsel's dealings with the client on the financial issue might be prejudicial to the accused though entirely relevant to the ethical position of counsel seeking to withdraw for non-payment.

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[23] *Cunningham*, *supra* note 3 at para 29.

In many, if not most, cases where the lawyer is seeking to withdraw for financial reasons, the lawyer and client will be at odds. The lawyer will be attempting to vindicate the justice of his or her position vis-à-vis the client. They will be trying to show in the circumstances of the relationship that it is only fair to allow them to withdraw.

Let us look in more detail at these three factors and consider the fourth factor first. It directs the court to "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".[24] Here the court must inquire into the lawyer's treatment of the client and the court.[25] The court must consider the lawyer's behaviour *in the relationship with* the client. Informing the court as to the lawyer's actions will often require revelation of the client's conduct in the relationship as well. Presumably the better the lawyer behaved in relation to the client, the more likely it will be that the lawyer will be permitted to withdraw. The subtle converse, of course, is that the worse the client behaved vis-à-vis the lawyer, the more justification the lawyer will have for requesting permission to withdraw.

The facts of *Cunningham* itself (on which the Court declined to comment)[26] ought to have suggested a ready way to imagine the kind of information counsel might want before the court under this factor "conduct of counsel." One can imagine the lawyer wanting to inform the court, for example, of how many times the lawyer contacted the client and informed them of the need to provide the legal aid office with financial information and how many times the client ignored counsel's admonitions. The lawyer might also want to inform the court of the difficulties he or she had in tracking the client down or getting them to respond. Details of that difficulty could be relevant to the question of the propriety of the lawyer's conduct in seeking to withdraw and could also reveal the accused as an indolent reprobate.

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[24] *Ibid* at para 50.

[25] Again the Court presumes a world in which the difficulty of a client who cannot or will not either pay or get legal aid can be solved by letting them seek other means of representation.

[26] *Cunningham*, *supra* note 3 at para 54.

The next relevant factor is number seven—"fairness to defence counsel". Here the court seems to point to the question of just how much counsel will be required to do for the accused if they are not permitted to withdraw. The court cites issues such as the "anticipated length and complexity of the proceedings". It might be hard to imagine how details relating to the length and complexity of the case could be prejudicial to the accused. However, one can easily imagine a situation where, for example, the defence rested on a number of difficult *Charter*[27] applications. Perhaps there are issues arising under section 10(b) of the *Charter* relating to the right to counsel, or perhaps there is an argument to be made under section 8 of the *Charter* about an unlawful search or seizure and a corresponding application to be made under subsection 24(2) of the *Charter* to exclude evidence. Perhaps there are further issues around the accused's legal rights under section 11 of the *Charter*. That the accused's only hope of acquittal lies in the success of difficult constitutional arguments can itself be prejudicial to the accused. To put it in the most colloquial terms, the more tricky lawyering the accused needs to get off, the more likely it is that he is guilty. Of course, all this will become evident at trial. However, at the outset the client is not benefited by the court's attention being drawn to the fact that everything in the case rests on complex constitutional argument.

Further, under the heading of "fairness to defence counsel" one can again imagine the lawyer wanting to provide further information relating to the equities as between themselves and the accused. Counsel in a position similar to that of Ms. Cunningham might want to give an account of their frustration with a client who, though eligible for legal aid, seems not to have enough respect for either the process or his lawyer to provide his updated financial information. He or she might want to argue that in fairness they should not be required to act if the client cannot bestir himself to get his financial information in to the legal aid office when he has been put on notice that his legal aid certificate will be cancelled if he does not. Counsel might want to argue that the accused having assumed no responsibility at all

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[27] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

for his representation cannot expect counsel to act on a *pro bono* basis. If the Supreme Court's decision makes fairness to counsel relevant it can hardly be the case that counsel would be acting unprofessionally by putting such evidence before the court.

One can see how a lawyer might reasonably want to raise such issues on the matter of "fairness to defence counsel." Of course, even in a case like *Cunningham*, it might not have been irresponsibility or disrespect that caused the client to fail to provide the information. However, this is certainly an available interpretation given the client's actions. Indeed, I would argue that many people would find that a natural interpretation of the facts. Thus it could be tempting for a judge to conclude that counsel should not, in fairness, be required to continue to act for a client who refuses to take even the minimal amount of responsibility involved in giving financial information to legal aid. And having made that judgment call, one can see how it would be all the easier for the judge to suspect that the accused was just the sort of person who would probably assault a six-year-old child. The leap is by no means a logical one. But the fact that it could be made is precisely why the evidence would not be admissible in relation to the criminal charges. The point is, however, that the potential inferences arising out of information on the issue of fairness to counsel could be scathingly prejudicial to the accused.

The eighth factor the court cites is the "history of the proceedings".[28] Here the court suggests information about the client's dealings with other counsel as potentially relevant. The Court raises the possibility of an accused who "has changed lawyers repeatedly."[29] The Court's explanation of this factor is cryptic. However, from what is said, one can surmise that perhaps the suggestion is that a history of the accused going from lawyer to lawyer shows that the accused has not been able to maintain a stable lawyer-client relationship, and that the accused is an unmanageable client. If the history of the proceedings shows the client to be prohibitively uncooperative and troublesome, this again would presumably weigh in counsel's favour in an application to withdraw. Another example one can imagine is if the accused has been guilty of deliberate delay.

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[28] *Cunningham*, *supra* note 3 at para 50.

[29] *Ibid.*

Such information, once again, goes far beyond "the sliver of information that the accused has not paid or will not be paying fees"[30] and it is not difficult at all to see how such information about the history of the proceedings "could be used against the accused on the merits of the criminal proceeding".[31] The Court does not limit the range of what could be introduced under this eighth factor of "the history of the proceedings", and indeed it seems to authorize the most far-ranging possible examination of the case. The one example it gives relates to the conduct of the accused. In many cases the substance of that conduct if introduced by the lawyer will essentially function as evidence of bad character of the accused that could easily be prejudicial on the criminal charges.

A headline from the *Canwest News Service* points precisely to the problem: "Lawyers can't dump deadbeat clients, top court rules."[32] Of course, this is not an accurate description of the decision.[33] However, it is a perfect description of the dim view the average person would take of the conduct of an accused person like Mr Morgan in *Cunningham*. The factors relevant in the exercise of the discretion invite counsel to show the client up as a "deadbeat". Doing so both violates solicitor-client confidentiality and is potentially prejudicial to the accused.

III. EXERCISE OF DISCRETION AND THE DISTINCTION BETWEEN SOLICITOR-CLIENT PRIVILEGE AND SOLICITOR-CLIENT CONFIDENTIALITY

The Supreme Court, as we have seen, took the view that in exercising the discretion to grant or refuse counsel's application to withdraw, the court need

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30 *Ibid* at para 29.

31 *Ibid.*

32 Janice Tibbetts, "Lawyers can't dump deadbeat clients, court rules", *Canwest News Service* (26 March 2010), online: <http://www.canada.com>.

33 See e.g. Michael Bates, "Withdrawal for the non-attendance of 'Mr. Green'" *Calgary Criminal Lawyers' Weekly* (26 March 2010), online: <http://calgarycriminallawyer.blogspot.com>. Bates criticizes the media coverage of the case, stressing that the Supreme Court clearly states that the discretion to refuse counsel's application to withdraw should be used sparingly and only to prevent serious harm to the administration of justice.

only look to facts that will be unrelated to the merits of the case and not prejudicial to the accused. Such facts were seen as unlikely to attract the protection of solicitor-client privilege in the first place. Justice Rothstein, delivering the opinion of the court, said:

> 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. Rather, non-payment of legal fees in this context does not attract the protection of solicitor-client privilege in the first place.[34]

And, a few paragraphs later:

> 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.[35]

We have seen, however, that information relating to non-payment of fees may well be prejudicial to the accused and that the possibility of prejudicial information coming out in the course of the application is far from remote. Now let us discuss the further claim that solicitor-client privilege does not attach to the information surrounding non-payment of fees.

Here the distinction between the evidentiary rule of solicitor-client privilege and the ethical rule of solicitor-client confidentiality is pertinent. Solicitor-client privilege is an exclusionary rule that communications between the lawyer and client made for the purposes of obtaining legal advice are not admissible evidence.[36] The ethical rule of solicitor-client confidentiality is much broader than the evidentiary rule and holds that the lawyer must not disclose any information that comes to him or her in the course of representing the client.[37] The Canadian Bar Association *Code of Professional Conduct* reads:

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34 *Cunningham*, *supra* note 3 at para 31 [citations omitted].

35 *Ibid* at para 34.

36 See MacKenzie, *supra* note 4 at 3-3. See also *Solosky v Canada*, [1980] 1 SCR 821 at 833, 105 DLR (3d) 745.

37 See MacKenzie, *supra* note 4 at 3-3.

> The lawyer has a duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, and shall not divulge any such information except as expressly or impliedly authorized by the client, required by law or otherwise required by this Code.[38]

Most provincial codes have similar provisions.[39] The duty of confidentiality, therefore, covers far more than solicitor-client privilege and extends to all information about the client and his or her affairs. This must include details about the financial relationship between the lawyer and client. Mr. Justice Rothstein may be correct in saying that information about the client's payment of fees does not attract the protection of the evidentiary rule. However, his explanation of why this is the case seems wanting. Indeed one might argue what passes between the lawyer and client regarding fees is the very core of "communications for the purpose of obtaining legal advice." Be that as it may, even if Rothstein J is correct about such information not attracting privilege, such information clearly does attract the protection of the ethical rule to keep all information confidential.[40]

Justice Rothstein does make brief mention of the ethical rule of solicitor-client confidentiality. He qualifies the statement about non-payment not attracting the protection of solicitor-client privilege: "However, nothing in these reasons, which address the application, or non-application, of solicitor-

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[38] Canadian Bar Association, *CBA Code of Professional Conduct*, Ottawa: CBA, 2009, ch IV, rule 1 [*CBA Code*].

[39] The Law Society of Yukon *Code of Professional Conduct* reads: "The lawyer has a duty to hold in strict confidence all information acquired in the course of his or her professional relationship concerning a client's business and affairs" (Yukon: Law Society of Yukon, 2010, part 1 rule 3). The Alberta provision uses almost identical wording (*LSA Code*, *supra* note 2 at ch 7, preamble), and so does the Law Society of Upper Canada (*LSUC Rules*, *supra* note 1, rule 2.03).

[40] The *LSA Code*, *supra* note 2, Chapter 7, rule 8(f) contains an exception to confidentiality which might pertain in the context of an application to withdraw. The section reads: "A lawyer may disclose confidential information when reasonably necessary for the lawyer to properly prosecute an action or defend a claim or allegation in a dispute with a client." However, the application to withdraw probably does not fall within the meaning of either prosecuting an action or defending against a claim by the client.

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."[41] This is a cryptic statement again and does not clarify how counsel is to provide the court with information relevant under factors four, seven, and eight without violating solicitor-client confidentiality. Rothstein J tells us that the duty of confidentiality still applies in other contexts but does not give us any explanation as to why it does not apply in this most important context of the courtroom. Nor does he explain how the context of the courtroom is to be prevented from spilling over into other contexts. Indeed, one can imagine that in a high-profile and sensational case the press would take a keen interest in reporting the details of the dispute between the lawyer and client as it comes out in the trial.

There is no need here for a detailed discussion of the bounds of the evidentiary rule of solicitor-client privilege. Suffice it to say that even where information relevant under factors four, seven, and eight might not be inadmissible under the evidentiary rule because it does not constitute a communication made for the purposes of obtaining legal advice (though again, isn't talk about money precisely "for the purpose of obtaining legal advice"?), it is still unethical for a lawyer to reveal information pertaining to the client's affairs. The Court's statement that a duty of solicitor-client confidentiality might still pertain regarding information about non-payment "in other contexts"[42] does nothing to address the likelihood that, I would argue, is far from "remote" that the court will elicit such confidential information regarding non-payment.

IV. ETHICS VS. MONEY

One cannot read the Court's discussion of the discretion to refuse counsel's application to withdraw for financial reasons in isolation. The Court also held that the discretion to refuse an application to withdraw should never be refused if counsel is seeking to withdraw for ethical reasons.[43] If counsel tells

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41 *Cunningham*, *supra* note 3 at para 31.

42 *Ibid.*

43 *Ibid.*

the court that the reason for the application is related to the lawyer's professional ethics, that is the end of the matter. The application should be granted. The Court's willingness to allow counsel to have the last word where the issue is an ethical one was perhaps driven by the fiasco presented in *Leask*. There, counsel, the judge, and the accused got into an almost comedic discussion over counsel's reasons for seeking to withdraw. A lengthy piece of the transcript of the conversation is contained in the British Columbia Supreme Court's decision in *Leask* but a short excerpt here will provide a sense of the difficulty the Court was trying to avoid.

> MR. LEASK: And I indicated to Your Honour, in his absence, with some regret I'm informing the court that I'm withdrawing as Mr. Robertson's counsel. I informed him of that only today, I've given him, in writing, the fact that I'm withdrawing and the reasons. In the light of the professional canons of ethics I don't intend to give Your Honour the reasons.
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> THE COURT: Don't you think you should stay on with him now, you've gone this far? Unless there's an irreconcilable difference between you and he as to how to conduct the defence.
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> MR. LEASK: I think I can say quite sincerely that if I possibly could, I would and I can't recall taking this step in the past, it's not one I commonly take, certainly but I don't think I can stay.
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> THE COURT: What's your position on this, Mr. Robertson?
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> THE ACCUSED: I prefer to move ahead on the matter. Finances, as far as I'm concerned, is the major—
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> THE COURT: Any objection to your counsel withdrawing?
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> THE ACCUSED: Of course I do, yes, but under the circumstances I understand his position but financially I'm in a situation where I just can't come up with the cash difference—
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> MR. LEASK: I want to make it completely clear that my withdrawal is not about financial matters as I have told Mr. Robertson. We do have financial differences but they have nothing, whatsoever, to do with this position. It would be quite improper of me to withdraw for that reason and I'm not withdrawing for that reason.

> THE COURT: Well, is it an irreconcilable difference between you and he as to how to conduct the defence?[44]

The court went on to try to elicit from Mr. Leask the source of the irreconcilable difference with the accused. Mr. Leask tried his best not to disclose any information to the court and, in particular, he tried to avoid saying anything that could be prejudicial to the accused. Indeed, Mr. Leask told the court that the accused had not been attempting to get him to conduct the trial in an improper manner.[45] The judge ordered Mr. Leask to continue with the trial and he refused. It was on the basis of these facts that the British Columbia Supreme Court found that the trial judge did not as a matter of law have the power to order counsel to continue to act.

The circumstances in *Leask* appear to be influential in the Court's reasoning in *Cunningham*. The spectre of this sort of conversation appears to have been foremost in the Court's mind in holding that if counsel maintains that the reasons for withdrawal are ethical the court should allow counsel's application. Rothstein J says that, of course, counsel cannot misrepresent the reason for the request to withdraw as being an ethical one if it is really financial.[46] However, he goes on to say that the lawyer's explanation for the reason for applying to withdraw must be taken at "face value" and not inquired into by the judge.[47] This has to mean that the lawyer's word trumps the client's and that any *Leask*-like dispute between the lawyer and client over the lawyer's true motives will not be entertained by the court.

Nevertheless, the *Cunningham* ruling (that the lawyer's word about his or her reasons for seeking to withdraw is not to be questioned) cannot prevent the accused client from challenging the lawyer's motives and arguing in court that the lawyer is really concerned about money, not ethics. The creation of two categories of application to withdraw that will be treated differently by the court—the application on ethical grounds being beyond refusal and one on financial grounds being amenable to being refused—still gives

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44 *Leask*, *supra* note 5 at 190.

45 *Ibid* at 191.

46 *Cunningham*, *supra* note 3 at para 48.

47 *Ibid.*

rise to the possibility of an unseemly dispute between counsel and the client which could cast the accused in an unfavourable light. The client might want to waive solicitor-client confidentiality and privilege to put the facts of the situation before the court as the client sees them. Where both financial and ethical issues were present one can easily imagine a client who would feel very strongly about putting his or her side of the case to the court. Indeed, one can imagine an accused who claims that the lawyer is attempting extortion. Perhaps the accused might even want to try to prove, for example, that he had paid his lawyer $20 thousand according to an agreement but that the lawyer had demanded another $20 thousand on the eve of the trial. It is hard to imagine how taking the lawyer's word at face value could justify silencing the client on such issues.

Alice Woolley has argued that this splitting of the reasons for withdrawal on the lines of ethics versus money is potentially unfair to the accused because if counsel claims ethical reasons for seeking to withdraw the court is immediately tempted to draw an adverse inference in relation to the accused. Woolley writes:

> While the Court in Cunningham reduces the harm to privilege by preventing the court from inquiring into the nature of the ethical reasons that have arisen, as soon as a lawyer advises the court that ethical reasons require withdrawal, the lawyer has also placed a bright red "caution" flag over his client's head. The court knows that the client has in some way behaved improperly—or, at best, is perceived by her lawyer to have behaved improperly.[48]

Woolley goes on to discuss the likelihood that the court faced with counsel's request to withdraw for ethical reasons will infer that the client is persisting with an intention to commit perjury or otherwise mislead the court.[49]

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[48] Alice Woolley, "Reflecting on the Supreme Court's Reassertion of Judicial Control Over Lawyer Withdrawal and Its (Non) Impact on the 'Perjury Trilemma'", *ABlawg* (1 April 2010), online: <http://ablawg.ca>.

[49] Woolley goes on to concur with the position taken by Monroe H Freedman in his famous article, "Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions" (1966) 64 Mich L Rev 1469, that counsel should not withdraw even where counsel believes that his or her client is going to commit perjury. Woolley cites the recent Alberta case of *R v White*, 2010 ABCA 66, 474 AR 310 as an example of a case where the accused was unfairly prejudiced by counsel withdrawing in circumstances where the court

This pairing of ethical reasons for withdrawal with client misconduct, however, is problematic. There are at least some cases where the lawyer may have ethical reasons for withdrawal that do not implicate the client in any wrongdoing.

Most codes of ethics in Canada are clear, at least in principle, on the ethical reasons that justify and perhaps even require criminal defence counsel to withdraw. The primary ethical reasons justifying (and in fact usually requiring) withdrawal are that the client cannot be dissuaded either from misleading the court or from trying otherwise to get the lawyer to act unethically, that the lawyer is not able to represent the client competently, or that the lawyer is in a conflict of interest.[50] Sometimes such circumstances justifying or even requiring the lawyer to withdraw are the fault of the client, as when the client persists in an intention to commit perjury. Other times, however, as when an issue arises with respect to the lawyer's competence, objectivity, or conflict of interest, the client is entirely innocent of any wrongdoing and is altogether the victim of the lawyer's withdrawal. Nevertheless, a lawyer in any such circumstances is ethically justified in withdrawing and may even be required by their code of conduct to withdraw.

It would, therefore, be improper for the court to make any adverse inference against the accused from counsel's statement that the reasons for applying to withdraw are ethical. In both a request to withdraw for non-payment and a request to withdraw for ethical reasons, the client may be either innocent of any misconduct or guilty of misconduct which if known would cast him or her in an unfavourable light. The assumption that, on the one hand, inquiry into non-payment of fees is not likely to be prejudicial to the accused and can therefore be entered into and, on the other hand, inquiry into the ethical reasons for counsel's request to withdraw are potentially prejudicial

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might conclude that the reason for withdrawal was counsel's conclusion that the client was about to commit perjury. It will be clear from what follows that I do not agree with the position taken by Woolley and Freedman and argue that counsel must retain ethical control over the conduct of the case and must either rein in the client's intentions to mislead the court or withdraw.

50 See MacKenzie, *supra* note 4 at 4.10. See also *CBA Code*, *supra* note 38, ch XII; *LSBC Handbook*, *supra* note 1, ch 10; *LSA Code*, *supra* note 2, ch 14; *LSUC rules*, *supra* note 1, rule 2.09(7).

and therefore cannot be entered into denotes a false dichotomy. The background to a lawyer's request to withdraw for either financial or ethical reasons can be either prejudicial or completely neutral with respect to the accused. Bifurcating the question and pointing the court in one direction with respect to financial reasons for withdrawal and another with respect to ethical reasons for withdrawal seems to miss the mark in terms of both protecting lawyer integrity and solicitor-client confidentiality.

V. WHAT SHOULD THE LAW BE?

Two things are clear with respect to the ethics of lawyer withdrawal in a criminal case. First, the canons of ethics hold that a lawyer having gone on the record as counsel for an accused should not withdraw for non-payment of fees.[51] Second, a lawyer should withdraw and even must withdraw where the client is persisting in instructions which are contrary to the lawyer's code of conduct, where the lawyer is in a conflict of interest and or where the lawyer is not competent to represent the client. Given these canons of ethics and the risks we have seen inherent in the court probing the reasons for withdrawal, it would seem to be preferable to leave the decision about whether to withdraw to the discretion of counsel and, as was argued by Ms. Cunningham and the Law Society interveners in the case, to leave the question of disciplining the lawyer to the Law Societies if counsel withdraws for an improper purpose.

The consequence of the decision has two aspects. If we look at it from the point of view of MacKenzie's statement that counsel has ultimate control over whether or not he or she withdraws, then the Court's decision in *Cunningham* overturns that and creates a margin of discretion for the court to refuse a lawyer's request to withdraw for non-payment of fees. From the ethical perspective the decision seems sometimes to sanction what ethics has prohibited—withdrawal for non-payment of fees even though you are on the record.

So, by creating discretion to either refuse or allow counsel's application for withdrawal the Court has opened up the possibility that counsel who has

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[51] See *LSUC Rules*, *supra* note 1; *LSBC Handbook*, *supra* note 1; *LSA Code*, *supra* note 2.

gone on the record will be given the court's permission to violate the ethical rule that the lawyer cannot withdraw for non-payment. This is a small gain to be had at the cost of opening up an inquiry into the counsel's reasons for withdrawal. Under *Cunningham* the court now is entitled to know whether the lawyer's reasons for seeking to withdraw are ethical or financial, and if they are financial, the court is entitled to hear information relevant to assessing the eight factors set out in the decision.

The court justifies the encroachment into the solicitor-client relationship in the name of protecting the administration of justice from the harm that might be incurred by counsel improperly seeking to withdraw for financial reasons. The idea seems to be that the matter is of such importance that the court needs to retain supervisory jurisdiction over counsel improperly seeking to withdraw.

The structure of the decision, however, already reposes complete trust in counsel. Any unscrupulous lawyer who wants to withdraw can, on the reasoning of *Cunningham*, get away with it simply by claiming ethical reasons. Moreover, given that lack of competence is a valid, even mandatory, reason for withdrawal, counsel who is not being paid in a criminal matter might often be able to weave together some credible ethical reason relating to competence for seeking to withdraw. Time is money and it is also competence. Financial issues and competence issues are frequently enmeshed. The lawyer who is not entitled to withdraw for non-payment is essentially doing mandatory *pro bono* work. He or she will have to find other ways to meet his or her own financial obligations. That takes time and what is left over may not be sufficient to do a competent job for the non-paying client.

The point is that at the end of the day there is no way to avoid trusting the lawyer on the question of withdrawal. Given that this is the case, it would seem that retaining supervisory jurisdiction has more costs than benefits. What would be preferable would be clear ethical rules like those found in the Law Society of Upper Canada's Code of Conduct prohibiting a lawyer from withdrawing for non-payment of fees. This, of course, appears to amount to an ethical requirement of mandatory *pro bono*. While it does not seem entirely fair that the criminal bar bear the full burden of such a requirement, one can readily see how the criminal context gives rise to a real necessity to keep counsel on the case in the interests of the administration of justice.

Clearly there is an argument to be made that the state should bear the burden of the cost of counsel where an accused person cannot pay. Ms. Cunningham and the intervener law societies argued that in cases where the accused needs representation but cannot pay or obtain legal aid funding, the remedy of the "*Rowbotham* order" should be used. Under a *Rowbotham* order, "the court may enter a conditional stay of proceedings until the government provides funded legal counsel".[52] The Court in *Cunningham* held that as a *Rowbotham* order would necessarily delay the proceedings, it is not an appropriate alternative to ordering counsel to continue to act:

> [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 nonpayment of fees, a *Rowbotham* order does nothing to address this concern and may even exacerbate it.[53]

This misses the point that a *Rowbotham* order is a kind of lever against the government. If they want to prosecute they have to come up with money for representation of the accused. It is somewhat beside the point to say that the *Rowbotham* order involves delay and therefore doesn't meet the same objectives as a refusal of counsel's request to withdraw. The sense behind *Rowbotham* is essentially that counsel do not have to work for free and the government should have to pay for representation if it is essential to a fair trial.

Further, it may often be the case that the real conflict in a case of nonpayment is not between counsel and the client but between counsel and legal aid authorities refusing payment.[54] Nevertheless, we can see here that under the present ethical rules, a lawyer who has taken the step of going on the record for an accused can be saddled with representation of that accused.

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[52] *Cunningham*, *supra* note 3 at para 41. See also *R v Rowbotham* (1988), 41 CCC (3d) 1, 25 OAC 321 (CA).

[53] *Cunningham*, *supra* note 3 at para 43.

[54] See *R v Deschamps*, 2003 MBCA 116, 179 CCC (3d) 174.

Where a lawyer really is in a position where non-payment of fees results in a serious issue of competence—where the lawyer simply cannot continue to represent the accused competently while also meeting their own financial obligations, as might occur in a very complicated and drawn out case—the lawyer does have an ethical reason to withdraw which cannot be questioned by the court even under the terms of *Cunningham.*

I would argue, therefore, that the harm the Court seeks to avert by retaining supervisory jurisdiction is negligible in comparison to the risks to solicitor-client confidentiality that are run by requiring information from counsel about whether the reasons for withdrawal are ethical or financial and further requiring information on the factors the court is to consider in exercising their discretion. The law in this matter would have been better developed though a different combination of the insights in *Leask* and *Creasser.* From *Leask*, the Court might have adopted the rule that counsel, not the court, should have the final say on the matter of withdrawal. From *Creasser*, they should have adopted the rule that, as an officer of the court, having gone on the record for an accused, counsel owes a duty to the court to see the matter through to the end of the trial. Such duty must be honoured by any lawyer seeking to withdraw.

VI. DEFENCE COUNSEL AS DISCIPLINARIAN

At outset of the decision in *Cunningham* the Court acknowledges the essential asymmetry of the solicitor-client relationship.[55] The client is free to discharge the lawyer at any time for any reason but the lawyer must stick with the client unless it is ethically permissible to withdraw. The ethical asymmetry of the relationship goes beyond this, however. The lawyer is held to high standards of professionalism, competence, and confidentiality in relation to the client. As a fiduciary, the lawyer owes the client the utmost of good faith, care, and responsibility. The duty of confidentiality, especially when linked to the right against self-incrimination, rests firmly on the lawyer and (except in exceptional circumstances) cannot be breached unless the client waives their right to the lawyer's silence. In short, the lawyer must behave well in

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[55] *Cunningham, supra* note 3 at para 9. See also MacKenzie, *supra* note 4 at 4-19.

relation to the client and do their best to protect and advance the client's best interests. The lawyer must also comply with their duties as an officer of the court.

The client by contrast is bound by no ethical code. Clients faced with criminal charges may well seek to advance their own interest through dishonest means. Where a client's view of their own self-interest is at odds with the lawyer's ethical obligations and where that view carries over into the conduct of their case the lawyer is put in the difficult position of having to honour their fiduciary and confidentiality obligations to the client and at the same time uphold their duties as an officer of the court. Very often this calls for a sober dialogue between the lawyer and client and a firm stance on the part of the lawyer who must educate the client as to constraints that professional integrity place on the lawyer's ability zealously to represent the client.

Criminal defence lawyers have an important, if unacknowledged, role in disciplining the unmanageable client and bringing the client's conduct into line with the demands of proper respect for the court and the legal process. Defence counsel often find themselves in the position of having to do a certain amount of what, for lack of a better word, can be called policing of their clients. They exert their personal authority over the client to make sure the client to shows up in court at the right time, they instruct the client about how to behave in court, they impress upon the client the importance of not giving false testimony, and they do what they can to prevent the client from committing perjury or otherwise misleading the tribunal or obstructing justice. This disciplining of the client, however, generally takes place very much in private, very much under the dome of lawyer-client confidentiality. The lawyer must not reveal information about such conflicts with the client or efforts to bring the client into line as such details are likely to be prejudicial to the client charged with a criminal offence.

Of course, as a practical matter, the lawyer must also discipline the client in relation to payment of fees. Unless he or she *is* willing to do the case on a *pro bono* basis, the lawyer who goes on the record for a client accused of an offence must ensure that the client (or someone on his or her behalf) has paid adequate funds into the lawyer's trust account or that the client is properly covered by legal aid. The matter of fees should be agreed upon and settled before the lawyer agrees to go on the record as counsel. The lawyer may have to exert influence over the indigent client to get them to jump the bu-

reaucratic hurdles required to obtain legal aid funding. Here again, the lawyer must put pressure on the client to manoeuvre them into fulfilling enough of their responsibilities to the lawyer to allow the lawyer to represent them adequately. Again, the lawyer's dealings with the client on the matter of fees should be done in private and any conflict between the lawyer and client over money should not be brought to the court's attention by the lawyer as, once again, such details are likely to cast the client in an unfavourable light. In the best traditions of the bar, however, the risk of non-payment falls on the lawyer once he or she has gone on the record as counsel for an accused.

The criminal lawyer then is stuck with the task of disciplining the client in the matters of ethics and fees. On the one hand, the lawyer manages the client for the benefit of the court and the administration of justice, on the other hand the lawyer manages the client for his or her own interest in making a living. In both cases the lawyer must stand his or her ground in relation to the potentially unscrupulous client. The bad reputation of the criminal bar exists in large measure because the public perceives criminal defence lawyers as the dupes and abetters of wrongdoers. Criminal defence practice can be an honourable calling. But it is only so where the lawyer is in firm control of the conduct of the case and directs the process in accordance with the demands of honour and integrity. The Courts have no choice but to trust counsel to fulfil their obligations as officers of the court with honesty. The court is necessarily dependant on the integrity of counsel. Given that this is the case, it would seem to be preferable to leave the difficult choice about whether to withdraw within the professional autonomy of the lawyer and to leave to the law societies, who can review the matter in a context completely separate from the criminal trial, the task of disciplining those who fail to live up to proper ethical standards.