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EB-2014-0116

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act 1998*, Schedule B to the *Energy Competition Act*, 1998, S.O. 1998, c.15;

AND IN THE MATTER OF an Application by Toronto Hydro-System Electric Limited for an Order or Orders approving or fixing just and reasonable rates and other service charges for the distribution of electricity as of May 1, 2015.

AND IN THE MATTER OF Rule 27 of the Board's *Rules of Practice and Procedure*.

SUPPLEMENTAL BOOK OF AUTHORITIES RE MOTION AND CROSS MOTION OF THE CANADIAN ELECTRICITY ASSOCIATION (Re: School Energy Coalition's Notice of Motion dated December 19, 2014)

January 30, 2015

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J.P. v. MACMILLAN BLOEDEL LIMITED and ATTORNEY GENERAL OF BRITISH COLUMBIA; ATTORNEY GENERAL OF CANADA (Intervenor)

Lamer C.J.C., La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Heard: June 12, 1995
Judgment: December 14, 1995
Docket: Doc. 24171

Counsel: *Marilyn E. Sandford*, for appellant.
Peter W. Ewert, Q.C., for respondent Attorney General of British Columbia.
John R. Haig, Q.C., for intervenor.

Subject: Civil Practice and Procedure; Criminal

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Judges and Courts --- Contempt of court — Jurisdiction over contempt — Superior Courts

Contempt of court — Proceedings for contempt — Jurisdiction — Inferior courts — Young Offenders Act, s. 47(2) purporting to give youth court exclusive jurisdiction in respect of any ex facie contempt of court committed by young persons — Provision unconstitutional attempt to deprive superior court of its ex facie contempt power — Ex facie contempt power falling within "core jurisdiction" of superior court, and not transferable in absence of constitutional amendment.

The defendant young person was arrested for contravening an injunction prohibiting the obstruction of the plaintiff's logging operations in the Clayoquot Sound area of Vancouver Island. The defendant was charged with contempt of court. His application to be tried in youth court was dismissed and he was convicted. He appealed, arguing that on the basis of s. 47(2) of the *Young Offenders Act*, the superior court had no jurisdiction to try him. That section states that the youth court has exclusive jurisdiction in respect of "every contempt of court committed by a young person against any other court otherwise than in the face of that court." In dismissing the defendant's appeal, the appeal court found s. 47(2) to be unconstitutional, as the contempt power was within the "core" or "inherent" jurisdiction of the superior court, and could not be transferred away from that court to the youth court in the absence of constitutional amendment. The defendant appealed to the Supreme Court of Canada.

Held:

Appeal dismissed.

Per Lamer C.J.C. (La Forest, Sopinka, Gonthier and Cory JJ. concurring)

The authorities mandate a two-stage analysis in determining the validity of a grant of jurisdiction such as that here. The first stage is to consider whether the grant of jurisdiction is permissible. The second stage is to decide whether the superior court's jurisdiction can be ousted; in other words, to decide whether an exclusive grant of jurisdiction is permissible. This second stage only arises when the core jurisdiction of superior courts is affected.

In undertaking the first stage, the initial step is to properly characterize the provision in question. Here, a proper characterization had to reflect the distinct characteristics of criminal contempt of court. It was unique among crimes in that did not occur in the absence of a court. It had some aspects of a crime and some aspects of a sui generis court power. A proper characterization had to be narrow enough to reflect both these aspects. Thus the jurisdiction transferred by s. 47(2) was properly characterized as the power to punish youths for ex facie contempt of a superior court.

Having settled on a characterization of the power being transferred, the three branches of the *Residential Tenancies* test could be quickly dealt with in this case. Power to punish youths for ex facie contempt of superior courts was within the jurisdiction of superior courts at Confederation. This power obviously remained judicial in nature in its new setting. Nonetheless, the jurisdiction remained a mere ancillary to the primary functions of youth courts. Accordingly, the grant of jurisdiction in this case was permissible, and did not infringe s. 96 of the *Constitution Act, 1867*.

The second stage of the analysis involved a consideration of whether the powers to be transferred fell within the inherent powers of a superior court. The superior courts have a core or inherent jurisdiction which cannot be removed by either level of government in the absence of a constitutional amendment. This core jurisdiction comprises those powers which are essential to the administration of justice and the maintenance of the rule of law. Without this core jurisdiction, s. 96 of the *Constitution Act* could not be said either to ensure uniformity in the judicial system throughout the country or to protect the independence of the judiciary.

The power to punish for contempt ex facie is one of the defining features of superior courts. As such it was obviously within the core jurisdiction. Thus while it will in most instances be preferable for the youth court to try and punish a youth in ex facie contempt of a superior court, the superior court's jurisdiction cannot be ousted. Section 47(2) of the *Young Offenders Act* was accordingly unconstitutional to the extent that it purported to confer exclusive jurisdiction on the youth court and to deprive a superior court of general jurisdiction of its ex facie contempt power. Section 47(2) was valid to the extent that it conferred jurisdiction on the youth court. The section should be read down accordingly. As read down, it was inoperative to deprive the superior court of its jurisdiction to convict the defendant.

Per McLachlin J. (dissenting) (L'Heureux-Dubé, Iacobucci and Major JJ. concurring)

The three-branch *Residential Tenancies* test was satisfied in this case, and it was not appropriate to ask the additional question of whether the power transferred was a "core" power of a superior court. To do so represented a significant departure from the existing jurisprudence. The inherent or core power of superior courts to regulate their process did not preclude elected bodies from enacting legislation affecting that process. Parliament and the legislatures could legislate to limit the superior courts' powers, including their powers over contempt, provided that the legislation was not otherwise unconstitutional. Parliament's transfer of contempt not in the face of the court by youths from the superior courts to the youth courts was valid. Section 47(2) was not unconstitutional. It followed that the defendant should have been tried in youth court. His conviction should be set aside and the charges remitted to youth court for trial.

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Considered in dissent:

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Mississauga (City) v. Peel (Regional Municipality), [1979] 2 S.C.R. 244, 26 N.R. 200, 9 O.M.B.R. 129, 9 M.P.L.R. 81, 97 D.L.R. (3d) 439 — *considered*

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Saskatchewan (Labour Relations Board) v. John East Iron Works Ltd. (1948), [1949] A.C. 134, [1948] 2 W.W.R. 1055, [1948] 4 D.L.R. 673 (P.C.) — *considered*

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Statutes considered:

Constitution Act, 1867

preamble*considered*

s. 91(27)*considered*

s. 92(14)*referred to*

ss. 96-100*referred to*

ss. 96-101*referred to*

s. 96*considered*

s. 100*referred to*

s. 129*referred to*

Contempt of Court Act 1981 (U.K.), 1981, c. 49 — *referred to*

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s. 9 [re-en. R.S.C. 1985, c. 27 (1st Supp.), s. 6]*considered*

s. 127(1)*referred to*

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Young Offenders Act, R.S.C. 1985, c. Y-1

s. 2(1) "offence"*considered*

s. 5(1)*considered*

s. 47(2)*considered*

s. 47(3)*referred to*

Appeal from judgment of British Columbia Court of Appeal (1994), 90 B.C.L.R. (2d) 24, 113 D.L.R. (4th) 368, 89 C.C.C. (3d) 217, 21 C.R.R. (2d) 116, 43 B.C.A.C. 1, dismissing accused's appeal from his conviction for contempt of court, (1993), 12 C.E.L.R. (N.S.) 81. For related proceedings, see (1994), 47 B.C.A.C. 264.

***Lamer C.J.C. (La Forest, Sopinka, Gonthier* and *Cory JJ.* concurring):**

I. Introduction

1 This case requires us to decide whether Parliament, pursuant to its criminal law power, can confer upon youth courts the exclusive power to try youths for contempt ex facie of superior courts. To put the question another way, must superior courts retain the power to try charges of contempt, both in facie and ex facie. The problematic aspect of the impugned legislative provision is precisely the exclusivity of the grant of jurisdiction. The historical evolution of the provincial superior courts and their importance to our constitutional structure require that these superior courts retain the full range of their inherent contempt powers. While it need not have exclusive jurisdiction, curbing the power of a superior court to control its own process alters its essence, making it something less than a superior court. Such an alteration is impermissible in Canada in the absence of a constitutional amendment.

2 To resolve this issue we must consider both whether the grant of jurisdiction to the youth court is permissible and whether removing the corresponding jurisdiction from the superior court is equally so. The jurisprudence concerning s. 96 of the *Constitution Act, 1867* gives guidance in considering the grant of jurisdiction. The removal of jurisdiction is better analyzed

in a broader constitutional context, considering this jurisprudence along with the preamble to the *Constitution Act, 1867*, the principle of the rule of law, and the central place of the superior courts in our system of governance.

II. Constitutional Question

3 The following constitutional question was stated:

> Is it within the jurisdiction of Parliament to grant exclusive jurisdiction to youth courts, through the operation of s. 47(2) of the *Young Offenders Act*, R.S.C., 1985, c. Y-1, over contempt of court committed by a young person against a superior court otherwise than in the face of that court?

III. Factual Background

4 On July 19, 1993, the appellant was arrested and charged with contempt of court while participating in protest activities in the Clayoquot Sound area of Vancouver Island. Along with many others, a large number of whom were also arrested, the appellant stood on a logging road and refused to move thus preventing employees of MacMillan Bloedel Limited from reaching their job sites. This activity contravened an injunction of the British Columbia Supreme Court ordering that MacMillan Bloedel's operations not be obstructed. The appellant was 17 years old at the time of his arrest.

5 At trial, counsel for the appellant made an application for him to be tried in youth court. Bouck J., relying on the decision in *British Columbia (Attorney General) v. Mount Currie Indian Band* (1991), 64 C.C.C. (3d) 172 [54 B.C.L.R. (2d) 146] (B.C.S.C.), dismissed this application. The appellant was convicted on October 6, 1993, and on October 13, 1993, was sentenced to 45 days imprisonment and a $1,000 fine: (1993), 12 C.E.L.R. (N.S.) 81 and 104.

IV. Statutory Provisions

6 The impugned legislative provision in this case is:

Young Offenders Act, R.S.C. 1985, c. Y-1

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> 47 ...
>
> (2) The youth court has exclusive jurisdiction in respect of every contempt of court committed by a young person against the youth court whether or not committed in the face of the court and every contempt of court committed by a young person against any other court otherwise than in the face of that court.

Other provisions relevant to resolving the case are:

Young Offenders Act

8

> 2. (1) In this Act,
>
> "offence" means an offence created by an Act of Parliament or by any regulation, rule, order, by-law or ordinance made thereunder other than an ordinance of the Yukon Territory or the Northwest Territories.
>
> 5. (1) Notwithstanding any other Act of Parliament but subject to the *National Defence Act* and section 16, a youth court has exclusive jurisdiction in respect of any offence alleged to have been committed by a person while he was a young person and any such person shall be dealt with as provided in this Act.

Criminal Code, R.S.C. 1985, c. C-46

9

9. Notwithstanding anything in this Act or any other Act, no person shall be convicted or discharged under section 736

(*a*) of an offence at common law,

but nothing in this section affects the power, jurisdiction or authority that a court, judge, justice or provincial court judge had, immediately before April 1, 1955, to impose punishment for contempt of court.

V. The British Columbia Court of Appeal

10 The issue before this Court is but one of the many addressed in the Court of Appeal judgment. We denied leave to appeal with respect to the various other issues. The Court of Appeal was called upon to decide numerous questions pertaining to the joint contempt of court trial of 44 individuals who had defied the injunction. Thirty-one individuals appealed their convictions and another group appealed their sentences in a separate proceeding. While other trials arising from breaches of the same injunction were held later, J.P. was the only youth involved in this particular appeal. The British Columbia Court of Appeal unanimously upheld the contempt of court convictions: (1994), 90 B.C.L.R. (2d) 24, 113 D.L.R. (4th) 368, 89 C.C.C. (3d) 217, 21 C.R.R. (2d) 116, 43 B.C.A.C. 1, 69 W.A.C. 1. The sentence appeals were allowed to the extent that all fines were removed from the sentences: (1994), 47 B.C.A.C. 264.

11 McEachern C.J.B.C. penned the reasons of the court. In response to the argument that J.P. should be tried before a youth court pursuant to s. 47(2) of the *Young Offenders Act*, he struck down s. 47(2) as unconstitutional. In his reasons, McEachern C.J.B.C., like Bouck J. at trial, followed the principles set out by Macdonald J. in *Mount Currie Indian Band*, supra. McEachern C.J.B.C. considered both the nature of the contempt power and the jurisprudence which recognizes that superior courts have a "core" or "inherent" jurisdiction that is beyond the reach of Parliament and the provincial legislatures in the absence of constitutional amendment. In particular, he noted the decisions of this Court in *Re Court of Unified Criminal Jurisdiction*, (sub nom. *McEvoy v. New Brunswick (Attorney General)*) [1983] 1 S.C.R. 704, and in *Reference re Young Offenders Act (Canada)*, (sub nom. *Reference re Young Offenders Act (P.E.I.)*) [1991] 1 S.C.R. 252; the former for the proposition that the superior courts are independent of both levels of government and the latter for the principle that superior courts have a core jurisdiction which is, in McEachern C.J.B.C.'s words, "untouchable". Throughout his reasons, McEachern C.J.B.C. carefully separated criminal law jurisdiction from the contempt power of superior courts. He concluded that as the contempt power is within the core jurisdiction of the superior courts, no part of it can be transferred away from those courts to the youth courts.

VI. Analysis

12 I agree in part with McEachern C.J.B.C.'s analysis, particularly with his consideration of the inherent jurisdiction of superior courts and the nature of the contempt power. Nonetheless, in keeping with my conclusion that the essence of the problem before us is the *exclusivity* of the grant of jurisdiction to the youth court, I find that our jurisprudence on this question mandates a two-part analysis. After reviewing our s. 96 jurisprudence, therefore, I will first consider whether this grant of jurisdiction can be made and next consider whether the superior court's jurisdiction can be ousted. The first inquiry involves examining the nature of the contempt power; the second necessitates elaboration of the inherent jurisdiction of superior courts and recognition of their importance to our constitutional structure.

A. The Section 96 Jurisprudence

13 This Court's decision in *McEvoy*, supra, establishes that s. 96 of the *Constitution Act, 1867*, limits both Parliament and the provincial legislatures. Accordingly, the first analytic step is to consider the s. 96 jurisprudence to date to determine how that limitation takes effect.

14 Writing for the Court in *Reference re Residential Tenancies Act*, (sub nom. *Re Residential Tenancies Act of Ontario)* [1981] 1 S.C.R. 714, Dickson J. (as he then was) reviewed the s. 96 jurisprudence up to that time and fashioned its principles into a three-part test for determining which powers, under which circumstances, can be transferred to inferior courts or to

administrative tribunals without infringing the guarantee of judicial independence which s. 96 has come to stand for. Dickson J. asserted that the judicature sections of the *Constitution Act, 1867* limit the power of the provincial legislatures under s. 92(14) over the administration of justice in a province and provide a unifying force to the Canadian judicial system (at p. 728):

> Section 92(14) and ss. 96 to 100 represent one of the important compromises of the Fathers of Confederation. It is plain that what was sought to be achieved through this compromise, and the intended effect of s. 96, would be destroyed if a province could pass legislation creating a tribunal, appoint members thereto, and then confer on the tribunal the jurisdiction of the superior courts. What was conceived as a strong constitutional base for national unity, through a unitary judicial system, would be gravely undermined.

After reviewing the jurisprudence, Dickson J. concluded that there was a general trend towards an increasingly broad test of constitutional validity, except in cases where the judicial function in question is isolated from the rest of the administrative structure of the legislation in question. Having thus stated his view of the purpose of the constitutional provisions and the directions in the jurisprudence, he elaborated the test which is now our standard for analysing grants of jurisdiction to tribunals not presided over by s. 96 judges.

15 The first branch of the test is an historical inquiry into "whether the power or jurisdiction conforms to the power or jurisdiction exercised by superior, district or county courts at the time of Confederation" (p. 734). He emphasizes that this phase involves a temporary isolation of the power or jurisdiction in question, which is to be considered in its context at the second and third stages of the test. Of course, if the power in question does not conform to one exercised by a superior court in 1867, the inquiry ends here. The second step asks whether the function in question is "judicial" in its institutional setting, and he contrasts "judicial" functions with policy making functions. The final branch of the test involves an assessment of the "tribunal's function as a whole in order to appraise the impugned function in its entire institutional context" (p. 735). Under this branch of the test it is permissible for administrative tribunals and inferior courts to exercise powers historically belonging to courts with s. 96 judges provided those judicial powers are "merely subsidiary or ancillary" to the general administrative functions assigned to the tribunal (at p. 736).

16 Applying this three-part test to the legislative scheme set out in the Act before the Court, Dickson J. found that the creation of the Residential Tenancy Commission infringed s. 96. The legislation could not be saved by either the second or third branches of the test. In his analysis of the third branch, Dickson J. noted that the chief role of the Commission was not to administer policy or to carry out an administrative function. While the legislation aimed to address an acknowledged social problem, he stated (at p. 750):

> ... however worthy the policy objectives, it must be recognized that we, as a Court, are not given the freedom to choose whether the problem is such that provincial, rather than federal, authority should deal with it. We must seek to give effect to the Constitution as we understand it and with due regard for the manner in which it has been judicially interpreted in the past. If the impugned power is violative of s. 96 it must be struck down.

Following *McEvoy*, supra, this conclusion is equally applicable to devolution of powers to a federally created court or tribunal. Essential historic functions of superior courts cannot be removed from those courts and granted to other adjudicative bodies to meet social policy goals if the resulting transfer contravenes our Constitution.

17 An important addition to the *Residential Tenancies* test was elaborated in *Sobeys Stores Ltd. v. Yeomans*, [1989] 1 S.C.R. 238, where Wilson J. described the characterization of the transferred power as preliminary to the first or historical branch of the test. Considering that the second and third branches of the test are designed to preserve some grants of power despite the fact that the powers were within the exclusive jurisdiction of the superior courts at Confederation, Wilson J. concluded that the test requires a strict, or narrow, approach to characterization to prevent large accretions of power (at p. 254). As many present day remedies were not available in 1867, characterization should highlight the type of dispute rather than the type of remedy sought. She also states that the same characterization must be used at each stage of the test. The complexity of the characterization question is demonstrated in the *Reference re Young-Offenders Act* case.

18 The decision in *Reference re Young Offenders Act* is important to my analysis in this case both because it continues the development of the s. 96 jurisprudence and because it addresses in a broad manner the same Act which is before the Court now. I opened my analysis in *Reference re Young Offenders Act* by stating (at p. 264):

> Section 96 of the *Constitution Act, 1867* is regarded as a means of protecting the "core" jurisdiction of the superior courts so as to provide for some uniformity throughout the country in the judicial system. The case law has developed principles to ensure that s. 96 would not be rendered meaningless through the use of the provincial competence to constitute, maintain and organize provincial courts staffed with provincially appointed judges having the same jurisdiction and powers as superior courts ...
>
> ... if the jurisdiction conferred on Youth Courts by Parliament is within the core of jurisdiction of superior courts, Parliament cannot confer such jurisdiction on courts presided over by judges not appointed in accordance with s. 96.

While there were three judgments in the case, none of my colleagues took issue with my statement of the law regarding the core jurisdiction of the superior courts. The superior courts have a core or inherent jurisdiction which is integral to their operations. The jurisdiction which forms this core cannot be removed from the superior courts by either level of government, without amending the Constitution. Without this core jurisdiction, s. 96 could not be said either to ensure uniformity in the judicial system throughout the country or to protect the independence of the judiciary. Furthermore, the power of superior courts to fully control their own process is, in our system where the superior court of general jurisdiction is central, essential to the maintenance of the rule of law itself. I discuss the contents and contours of the core jurisdiction below.

19 The second aspect of the *Reference re Young Offenders Act* decision which figures in my analysis here is the precise issue which was determined at that time. In that case, four constitutional questions were addressed:

> 1. Is the *Young Offenders Act* ... unconstitutional on the basis and to the extent that it does not specifically require that the Youth Court be presided over by a Judge appointed pursuant to s. 96 of the *Constitution Act, 1867*?
>
> 2. Is the establishment by a Province of a Youth Court as defined by s. 2 of the *Young Offenders Act* within the legislative competence of the Province pursuant to s. 92 of the *Constitution Act, 1867*?
>
> 3.
>
> (a) Is the appointment of a Youth Court Judge an appointment which must be made by the Governor in Council pursuant to s. 96 of the *Constitution Act, 1867*?
>
> (b) If the answer to (a) is no,
>
> (i) Can a Provincial Court Judge be appointed a Judge of the Youth Court by the Lieutenant Governor in Council?
>
> (ii) Can a Supreme Court Judge be appointed a Judge of the Youth Court by the Lieutenant Governor in Council?

These questions demonstrate that our review of the legislation at the time was undertaken from a broad perspective in light of the overall policy aims of the Act. In particular, the focus of the inquiry was judicial appointments and the establishment of youth courts. Our approval of the *Young Offenders Act* at that time does not preclude a separate analysis in this case of whether a particular provision of that Act meets constitutional requirements.

20 In addition, my characterization of the issue, which was accepted by my colleagues, stated (at p. 268):

> I am of the view that the jurisdiction in issue here should be characterized as jurisdiction over young persons charged with a criminal offence. *I do not mean to say that Youth Courts' jurisdiction is limited to criminal offences but I think it appropriate to limit the inquiry of this Court to the facts of this case. The Court has not had the benefit of hearing*

> *arguments on the jurisdiction of the superior and inferior courts on matters other than criminal offences, nor has the issue been examined in the factums*. [Emphasis added.]

In the *Young Offenders Act* "offence" is defined as "an offence created by an Act of Parliament or by any regulation, rule, order, by-law or ordinance made thereunder other than an ordinance of the Yukon Territory or the Northwest Territories". As a common law provision, contempt of court is not, therefore, an offence within the meaning of the Act. On this strict interpretation, the *Young Offenders Act* decision cannot be said to preclude us from considering whether the contempt of court provisions of that Act offend s. 96. Reasoning more broadly, my characterization of the issue clearly stated that some aspects of the youth courts' jurisdiction were *not* considered by the Court at that time. Contempt of court powers granted by s. 47 of the Act were one of those aspects.

21 The *Reference re Young Offenders Act* decision states explicitly that there is a core jurisdiction of superior court powers which cannot be removed by either level of government in the absence of a constitutional amendment. It also leaves open the specific question of whether individual provisions of the Act may offend s. 96 even though the overall scheme of the Act does not. While it was not required in that case, *Reference re Young Offenders Act* mandates a two-stage analysis in cases like the present. The first stage, following the jurisprudence of *Residential Tenancies* and *Sobeys Stores*, is to consider whether the *grant* of jurisdiction is permissible. The second stage, considering the emphasis on core jurisdiction in *Reference re Young Offenders Act*, is to decide whether the superior court's jurisdiction can be *ousted*. In other words, the second stage weighs whether an exclusive grant of jurisdiction is permissible.

B. Is the Grant of Jurisdiction Permissible?

(1) Characterization

22 The first step in analysing whether a grant of jurisdiction infringes s. 96 is to properly characterize the provision in question. The provision here is not adequately described by the characterization I set out in *Reference re Young Offenders Act*. There the jurisdiction at stake was "jurisdiction over young persons charged with a criminal offence" (p. 268). In addition to being overly broad for this case, this characterization is inappropriate given the nature of criminal contempt of court. Unlike my colleague, I find that the history of contempt of court, academic commentary, and indeed the provisions of the *Young Offenders Act* and the *Criminal Code*, all reinforce the view that criminal contempt of court is unique among crimes. It may even be inappropriate to call it a crime. A careful consideration of the nature of criminal contempt of court is essential to properly characterizing the power being transferred by s. 47(2) of the *Young Offenders Act*.

23 The authoritative history of contempt of court was written by Sir John Fox in 1927 (*The History of Contempt of Court: The Form of Trial and the Mode of Punishment* (reprinted 1972)). In his introductory remarks, he states that contempt of court has been a recognized phrase in English law from the twelfth century to the present time, and continues (at p. 1):

> The punishment of contempt is the basis of all legal procedure and implies two distinct functions to be exercised by the Court: (*a*) enforcement of the process and orders of the Court, disobedience to which may be described as 'civil contempt', and (*b*) punishment of other acts which hinder the administration of justice, such as disturbing the proceedings of the Court while it is sitting (contempt in court) or libelling a Judge or publishing comments on a pending case (contempt out of court), which are both distinguished as 'criminal contempt'.

The distinction he draws between civil and criminal contempt does not precisely correspond with the distinction drawn in contemporary Canadian law, but this is of little import given the difficulties in establishing that distinction. He does note, also, that some contempts are both civil and criminal. Fox's work demonstrates that the punishment of contempt predated the development of criminal law.

24 Discussing the law of contempt in England, which has been partially codified by the *Contempt of Court Act 1981* (U.K.), 1981, c. 49, C.J. Miller states:

> Although criminal contempt of court is a criminal offence punishable in the superior courts by an unlimited fine or a fixed period of imprisonment of up to two years it has many characteristics which distinguish it from ordinary crimes. Indeed these characteristics are so marked that criminal contempt may be said to be an offence *sui generis*.

25 (*Contempt of Court* (1989), at p. 5.) Among the unique characteristics of contempt which Miller notes are the summary process by which some contempts are tried, the manner of initiating proceedings, how evidence is given, and sentencing. Borrie and Lowe also address the relationship between criminal contempt and other crimes:

> In so far as contempt constitutes a crime it is best to regard it as a crime that is sui generis since there are a number of peculiarities as sociated with the offence of which perhaps the outstanding example is the summary process by which such crimes are prosecuted.

26 (*Borrie and Lowe's Law of Contempt* (2nd ed., 1983), at p. 3.)

27 Commenting in the Canadian context on the parallels between certain *Criminal Code* provisions which create offences dealing with the administration of justice, Adrian Popovici writes:

> [TRANSLATION]
>
> The parallel and complementary role of contempt of court in our system is explained by the characterization of *power* which we have given it. Contempt of court can only be understood by considering that it is part power and part offence. In fact, one could imagine a system in which contempt of court was eliminated completely and replaced by a number of criminal offenses or penal sanctions. The elimination of contempt of court would be the elimination of the summary procedure, which can be explained historically only by the power aspect of contempt of court. [Emphasis in original.]

28 (*L'outrage au tribunal* (1977), at p. 130.) While it is indeed possible to conceive of a system where all of the contempt powers are transformed into codified offences, such a system would be antithetical to ours, where the superior court of general jurisdiction plays the central role.

29 Both the *Criminal Code* and the *Young Offenders Act* treat contempt of court distinctly from criminal offences. When common law offences were abolished in 1955, the power to punish contempt of court was specifically preserved for the courts. This provision in the Code remains to this day in s. 9. Section 47 of the *Young Offenders Act*, dealing with various contempt of court provisions, is included in the Act separately from the main body of the statute dealing with criminal offences. Despite a general grant of exclusive jurisdiction to the youth courts in s. 5, a separate exclusive grant of jurisdiction is made in s. 47(2). As I noted above, the definition of "offence" in the Act excludes contempt of court.

30 On the basis of the history of contempt of court, academic commentary, and the overall scheme of the *Criminal Code* and the *Young Offenders Act*, I am persuaded that criminal contempt of court has distinct characteristics from other crimes. By history and procedure, as well as its links with the inherent jurisdiction of superior courts which I discuss below, criminal contempt of court can be distinguished from other criminal offences. While other crimes occur in society and the law merely defines or criminalizes them, contempt of court does not occur in the absence of a court. Having considered the nature of criminal contempt of court, I will now proceed to characterize the power tran sferred by s. 47(2) of the *Young Offenders Act* and apply the test outlined in *Residential Tenancies*.

31 A proper characterization for s. 96 purposes must be narrow and consider the nature of the dispute. While I noted in *Reference re Young Offenders Act* that the nature of the dispute provides little assistance in criminal law, this is not the case here as contempt of court is distinctive. The dispute is one between the individual and the court itself. Ex facie criminal contempt of superior courts committed by youths has some aspects of a crime and some aspects of a sui generis court power. A proper characterization must be narrow enough to reflect both these aspects. I would therefore characterize the jurisdiction transferred by s. 47(2) as the power to punish youths for ex facie contempt of a superior court.

(2) The Residential Tenancies Test

32 Having settled on a characterization of the power being transferred, the three branches of the *Residential Tenancies* test are quickly dealt with in this case. Power to punish youths for ex facie contempt of superior courts was within the jurisdiction of superior courts at Confederation. Under the second branch of the test, this power obviously remains judicial in nature even in its new institutional setting. Nonetheless, when considering the institutional function of the youth courts, a transfer of this power is permissible. As we elaborated in *Reference re Young Offenders Act*, the policy objectives of the youth court system are clear and laudable. Our society wishes to establish different treatment for youths accused of criminal offences than for adults. Youth courts have an expertise in providing procedural protections appropriate for youths and in deciding punishments for convicted young offenders. The power to punish youths for ex facie contempt of superior courts is indeed a mere ancillary to these primary functions. Accordingly, granting jurisdiction to punish youth for ex facie contempt of superior courts does not infringe s. 96. What remains to be considered, however, is whether this jurisdiction can be granted to the exclusion of superior courts.

C. Can the Superior Courts' Jurisdiction be Removed?

33 In the case of transfers of jurisdiction *which are within the inherent powers* of a superior court, the *Residential Tenancies* test does not provide a framework for analysing the most important aspect of constitutional infringement. The true problem in this case is the exclusivity of the grant. The impugned section of the *Young Offenders Act* clearly states that *exclusive* jurisdiction over ex facie contempt of court is transferred to the youth court. The plain meaning of this section is that the corresponding part of the superior court's jurisdiction is removed. Otherwise, the word "exclusive" would have no meaning in this sentence. Indeed, it is not used in s. 47(3) which deals with in facie contempt. As my colleague McLachlin J. notes, in most instances where a s. 96 analysis is employed, the grant of jurisdiction is exclusive. The requirement to consider whether the corresponding removal of jurisdiction is valid only arises when the core jurisdiction of superior courts is affected. In many instances, therefore, the *Residential Tenancies* test provides a complete answer to the constitutional query.

34 To determine whether either Parliament or a provincial legislature may remove part of the superior court's jurisdiction, we must consider the contours and contents of the "core" or "inherent" jurisdiction of superior courts. On the facts of this appeal, the British Columbia Supreme Court being the superior court involved, we need only consider whether this jurisdiction can be removed from superior courts of general jurisdiction, that is, the provincial superior courts. Whether jurisdiction to punish youth for ex facie contempt of statutorily constituted superior courts can be removed from those courts is a question for another day since neither the parties nor the courts below addressed the issue of whether a distinction might exist between these two kinds of superior courts.

35 The seminal article on the core or inherent jurisdiction of superior courts is I.H. Jacob's "The Inherent Jurisdiction of the Court" (1970), 23 Current Legal Problems 23. Jacob's work is a starting point for many discussions of the subject, figures prominently in analyses of contempt of court, and was cited with approval by Dickson C.J.C. in *Re B.C.G.E.U.*, (sub nom. *B.C.G.E.U. v. British Columbia (Attorney General))* [1988] 2 S.C.R. 214 [[1988] 6 W.W.R. 577, 31 B.C.L.R. (2d) 273]. While the particular focus of Jacob's work is the High Court of Justice in England, he notes that "The English doctrine of the inherent jurisdiction of the court is reflected in most, if not all, other common law jurisdictions, though not so extensively in the United States" (p. 23, fn. 1). Moreover, the English judicial system is the historic basis of our system and is explicitly imported into the Canadian context by the preamble of the *Constitution Act, 1867*. The superior courts of general jurisdiction are as much the cornerstone of our judicial system as they are of the system which is Jacob's specific referent.

36 Discussing the history of inherent jurisdiction, Jacob says (at p. 25):

> ... the superior courts of common law have exercised the power which has come to be called "inherent jurisdiction" from the earliest times, and ... the exercise of power developed along two paths, namely, by way of punishment for contempt of court and of its process, and by way of regulating the practice of the court and preventing the abuse of its process.

Regarding the basis of inherent jurisdiction, Jacob states (at p. 27):

> ... the jurisdiction to exercise these powers was derived, not from any statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called "inherent." This description

> has been criticised as being "metaphysical" [cite omitted], but I think nevertheless that it is apt to describe the quality of this jurisdiction. For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. *Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law.* [Emphasis added.]

While inherent jurisdiction may be difficult to define, it is of paramount importance to the existence of a superior court. The full range of powers which comprise the inherent jurisdiction of a superior court are, together, its "essential character" or "immanent attribute". To remove any part of this core emasculates the court, making it something other than a superior court.

37 Jacob also states that an inferior court of record has the inherent jurisdiction to punish summarily for in facie contempt, but jurisdiction to punish for ex facie contempt must be conferred explicitly by statute. This point is important in framing the issue before the Court in this case, for the problem with s. 47(2) of the *Young Offenders Act* is not the grant of jurisdiction to the youth court, but the removal of jurisdiction from the superior court.

38 Addressing the Canadian superior courts in particular, in the context of a discussion of constitutional judicial review, T.A. Cromwell states:

> At the center of the Canadian conception of constitutional judicial review is the notion of the general jurisdiction superior courts of the provinces, which are the direct descendants of the English superior courts. The importance of these tribunals has been emphasized and reinforced in a variety of contexts. For example, the superior courts are said to possess "inherent jurisdiction" and to have original jurisdiction in any matter unless jurisdiction is clearly taken away by statute.

39 ("Aspects of Constitutional Judicial Review in Canada" (1995), 46 S.C. L. Rev. 1027, at pp. 1030-31.)

40 Although the inherent jurisdiction of superior courts is difficult to define, there is no doubt that the power to control its process and enforce its orders, through, in part, punishing for contempt, is within that jurisdiction. In an article which concludes that the inherent jurisdiction of superior courts is growing, at least in Australia, Keith Mason states that the "ubiquitous nature" of inherent jurisdiction "precludes any exhaustive enumeration of the powers which are thus exercised by the courts" ("The Inherent Jurisdiction of the Court" (1983), 57 A.L.J. 449, at p. 449). Following this qualification, Mason attempts to classify the functions of inherent jurisdiction which are clearly knowable by grouping them under four headings (i) ensuring convenience and fairness in legal proceedings; (ii) preventing steps being taken that would render judicial proceedings inefficacious; (iii) preventing abuse of process; and (iv) acting in aid of superior courts and in aid or control of inferior courts and tribunals. He includes the power to punish for contempt both in facie and ex facie under the first heading (at p. 452). That is, Mason recognizes that the power of a court to punish *all* forms of contempt is integral to its process.

41 The supervisory role which superior courts exercise over inferior courts, Mason's fourth category, is of note here because s. 47(2) of the *Young Offenders Act* also limits the ability of the superior court to exercise its supervisory function in relation to the youth court by proscribing the superior court from punishing contempts of the youth court and of other inferior courts. Borrie and Lowe, state that "superior courts of record have an inherent superintendent jurisdiction to punish contempts committed in connection with proceedings before inferior courts" (p. 316).

42 This Court's jurisprudence has also contributed to outlining the contours of the inherent jurisdiction of superior courts. In *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220, the Court considered whether the provincial legislature could grant the power to make final decisions on questions of jurisdiction to an appeal tribunal under Quebec's *Professional Code*. Writing for the Court, Laskin C.J.C. stated (at pp. 236-37):

> It is true that this is the first time that this Court has declared unequivocally that a provincially-constituted statutory tribunal cannot constitutionally be immunized from review of decisions on questions of jurisdiction. In my opinion, this limitation, arising by virtue of s. 96, stands on the same footing as the well-accepted limitation on the power of provincial statutory tribunals to make unreviewable determinations of constitutionality. There may be differences of opinion as to what are

> questions of jurisdiction but, in my lexicon, they rise above and are different from errors of law, whether involving statutory construction or evidentiary matters or other matters ... Given that s. 96 is in the *British North America Act* and that it would make a mockery of it to treat it in non-functional formal terms as a mere appointing power, *I can think of nothing that is more the hallmark of a superior court than the vesting of power in a provincial statutory tribunal to determine the limits of its jurisdiction without appeal or other review*. [Emphasis added.]

This decision establishes, therefore, that powers which are "hallmarks of superior courts" cannot be removed from those courts.

43 In *Law Society (British Columbia) v. Canada (Attorney General)*, [1982] 2 S.C.R. 307 [[1982] 5 W.W.R. 289, 37 B.C.L.R. 145], the Court considered whether the *Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.), ousted the jurisdiction of provincial superior courts to consider the constitutional validity of federal statutes. Estey J., writing for the Court, described the superior courts as follows (at pp. 326-27):

> The provincial superior courts have always occupied a position of prime importance in the constitutional pattern of this country. They are the descendants of the Royal Courts of Justice as courts of general jurisdiction. They cross the dividing line, as it were, in the federal-provincial scheme of division of jurisdiction ...

Finding that Parliament lacked the authority to remove the power of superior courts to rule on the validity of federal statutes, he stated (at p. 328) that:

> To do so would strip the basic constitutional concepts of judicature of this country, namely the superior courts of the provinces, of a judicial power fundamental to a federal system as described in the *Constitution Act*.

This decision emphasizes the centrality of the superior courts to our constitutional and judicial system. In order for the superior courts to fulfil that central role, they must have the powers which are part of their essence as superior courts.

44 Commenting on the constitutional jurisprudence regarding courts, Cromwell, concludes (at p. 1032):

> Thus, through generous interpretation of the constitutional provisions governing appointment and independence of provincial superior court judges and a restrictive reading of the constitutional limits of jurisdiction on the Federal Court, the primacy of the provincial superior courts in constitutional judicial review has been maintained. The basic proposition is that the Canadian conception of constitutional judicial review is deeply committed to the supervisory role of the provincial superior courts, that is, the general jurisdiction trial courts in each province.

In the constitutional arrangements passed on to us by the British and recognized by the preamble to the *Constitution Act, 1867*, the provincial superior courts are the foundation of the rule of law itself. Governance by rule of law requires a judicial system that can ensure its orders are enforced and its process respected. In Canada, the provincial superior court is the only court of general jurisdiction and as such is the centre of the judicial system. None of our statutory courts has the same core jurisdiction as the superior court and therefore none is as crucial to the rule of law. To remove the power to punish contempt ex facie by youths would maim the institution which is at the heart of our judicial system. Destroying part of the core jurisdiction would be tantamount to abolishing the superior courts of general jurisdiction, which is impermissible without constitutional amendment.

45 The core jurisdiction of the provincial superior courts comprises those powers which are essential to the administration of justice and the maintenance of the rule of law. It is unnecessary in this case to enumerate the precise powers which compose inherent jurisdiction, as the power to punish for contempt ex facie is obviously within that jurisdiction. The power to punish for all forms of contempt is one of the defining features of superior courts. The in facie contempt power is not more vital to the court's authority than the ex facie contempt power. The superior court must not be put in a position of relying on either the provincial attorney general or an inferior court acting at its own instance to enforce its orders. Furthermore, ex facie contempt is not limited to the enforcement of orders. It can include activities such as threatening witnesses or refusing to attend a proceeding (see *R. v. Vermette*, [1987] 1 S.C.R. 577 [[1987] 4 W.W.R. 595]). In addition, the distinction between in facie and ex facie contempt is not always easily drawn (see *B.C.G.E.U.*, supra), increasing the difficulty of saying one is more essential to the court's process than the other.

46 Borrie and Lowe, state that "the power that courts of record enjoy to punish contempts is part of their *inherent* jurisdiction" (p. 314 (emphasis in original)). After referring to Jacob's work, which I have discussed earlier, they continue:

> Such a power [to punish for contempt] is not derived from statute nor truly from the common law but instead flows from the very concept of a court of law.

Miller, also links the contempt power directly to the core jurisdiction of superior courts (at p. 18):

> From its ancient origins contempt of court has developed over the years as a creation of the superior courts, building on their inherent powers.

And later (at pp. 49-50):

> In the case of contempt this inherent jurisdiction was linked historically to the notion of an affront to the King's justice with the equivalence between the sovereign and the courts in matters of contempt being relatively straightforward.

47 Canadian contempt of court case law also attests to the intertwining of superior court core jurisdiction and the contempt power. Writing for the Court in *Vermette*, supra, a case involving ex facie contempt, McIntyre J. said (at p. 581):

> The power to deal with contempt as part of the inherent and essential jurisdiction of the courts has existed, it is said, as long as the courts themselves ... This power was necessary, and remains so, to enable the orderly conduct of the court's business and to prevent interference with the court's proceedings.

In *U.N.A. v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901 [[1992] 3 W.W.R.481], Sopinka J., dissenting on another point, stated (at p. 944):

> The common law has always jealously restricted the power to punish for criminal contempt. This is particularly true for contempt *ex facie* which was reserved to courts of superior jurisdiction.

Writing about contempt for the majority in *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394, Gonthier J. asserted (at p. 405):

> *Barring constitutional considerations*, if a statute, read in context and given its ordinary meaning, clearly confers upon an inferior tribunal a jurisdiction that is enjoyed by the superior court at common law, *while not depriving the superior court of its jurisdiction*, it should be given effect. [Emphasis added.]

Later in the judgment he states (at p. 414):

> Even if the Tribunal exercises powers that at common law belong to a superior court, it is still subject to full review by the Federal Court of Appeal. The Tribunal has none of the characteristics that would inspire fear for the integrity of the powers of superior courts.

These cases attest to the role of the contempt power as an essential attribute of superior courts.

48 In light of its importance to the very existence of a superior court, no aspect of the contempt power may be removed from a superior court without infringing all those sections of our Constitution which refer to our existing judicial system as inherited from the British, including ss. 96-101, s. 129, and the principle of the rule of law recognized both in the preamble and in all our conventions of governance. I agree with Macdonald J. who made the following statement in dealing with the identical issue:

> In this case, the question should be whether parliament can remove from this court its inherent jurisdiction to maintain its authority by contempt proceedings. I would have no difficulty with a concurrent jurisdiction in the youth court in that regard in so far as young persons are concerned. The philosophy which underlies the Act is entitled to support, and has certainly received it from the Supreme Court of Canada. Just as adult offenders could be charged in the provincial courts

under the *Criminal Code* for failure to comply with a court order, so young persons should be subject to being charged under the Act and dealt with in youth court.

It is quite another thing to deny this court the right to maintain its own authority.

49 (*Mount Currie Indian Band*, supra, at pp. 177-78.)

50 While it will in most instances be preferable for the youth court to try and punish a youth in ex facie contempt of a superior court, the provincial superior court's jurisdiction cannot be ousted. It will always be for the superior court to elect whether to hold contempt proceedings against a youth in order to exert control over its process, or to defer to the youth court. In addition, in cases where the youth court does proceed against a youth for contempt ex facie of a superior court, the provincial superior court retains its supervisory power to ensure that the lower court's disposition of the matter is correct. The full panoply of contempt powers is so vital to the superior court that even removing the jurisdiction in question here and transferring it to another court with judges appointed pursuant to s. 96 would offend our Constitution.

VII. Disposition

51 I would dismiss the appeal on the grounds that s. 47(2) is unconstitutional to the extent that it purports to confer exclusive jurisdiction on the youth court and to deprive a superior court of general jurisdiction of its ex facie contempt power. Section 47(2) is valid to the extent that it confers jurisdiction on the youth court. The section should be read down accordingly. As read down, the section is inoperative to deprive the superior court of its jurisdiction to convict the appellant of contempt in this case.

52 In light of this conclusion, I would answer the constitutional question as follows:

Is it within the jurisdiction of Parliament to grant exclusive jurisdiction to youth courts through the operation of s. 47(2) of the *Young Offenders Act*, R.S.C., 1985, c. Y-1, over contempt of court committed by a young person against a superior court otherwise than in the face of that court?

Answer: No, not *exclusive* jurisdiction.

***McLachlin J.* (dissenting) (*L'Heureux-Dubé, Iacobucci* and *Major JJ.* concurring):**

53 J.P., aged 16, defied a court order which prohibited protest activities interfering with logging in Clayoquot Sound in British Columbia. He was tried in the British Columbia Supreme Court, convicted, and sentenced to 45 days in prison and fined $1,000: (1993), 12 C.E.L.R. (N.S.) 81. He appealed that conviction on the ground that the Supreme Court of British Columbia had no jurisdiction to try him, since s. 47(2) of the *Young Offenders Act*, R.S.C. 1985, c. Y-1, grants exclusive jurisdiction over ex facie contempt of court to the provincial youth courts.

54 The issue before us is a narrow one. Can Parliament confer upon youth courts the power to try youths for the offence of contempt outside the face of the court? Or do the superior courts created by s. 96 of the *Constitution Act, 1867* have exclusive power to try all charges of contempt, whether in or not in the face of the court?

The Enactments

55 Section 91(27) of the *Constitution Act, 1867*, gives Parliament exclusive power over criminal law and procedure:

91 ... it is hereby declared that ... the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, —

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

56 Pursuant to its power over criminal law and procedure, Parliament enacted s. 47 of the *Young Offenders Act*, which gives the youth courts exclusive jurisdiction to try contempt of court not in the face of the court committed by a young person, regardless of the court against which the contempt was committed:

> 47 ...
>
> (2) The youth court has exclusive jurisdiction in respect of every contempt of court committed by a young person against the youth court whether or not committed in the face of the court *and every contempt of court committed by a young person against any other court otherwise than in the face of that court.* [Emphasis added.]

57 The Court of Appeal ruled that the italicized portion of s. 47(2) is invalid because it transfers from the superior courts to the youth courts powers which can be transferred only by constitutional amendment, given the constitutionally protected status of s. 96 superior courts: (1994), 90 B.C.L.R. (2d) 24, 113 D.L.R. (4th) 368, 89 C.C.C. (3d) 217, 21 C.R.R. (2d) 116, 43 B.C.A.C. 1, 69 W.A.C. 1.

58 Section 96 of the *Constitution Act, 1867* creates and confers constitutional status on the superior courts:

> 96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each province except those of the Courts of Probate in Nova Scotia and New Brunswick.

Analysis

59

1. The Test for Determining When Power May be Transferred from Superior Courts

(a) The Problem

60 One of the fundamental pillars upon which the Canadian Constitution rests is a unified national judiciary. This pillar in turn rests on a compromise made by the Fathers of Confederation in 1867. The Provinces were given responsibility for the administration of justice under s. 92(14) of the *Constitution Act, 1867* but under s. 96 the Governor General was given the power to appoint judges to the superior, district and county courts in each province. Section 100 obliges the Parliament of Canada to fix and pay the salaries of these judges. These sections, taken together, impose a regime of compulsory cooperation which has served for over a century to maintain a strong unified judicial presence throughout the country. The provinces establish and administer the s. 96 courts, the successors of the provincial superior courts in each territory at the time of Confederation. These courts in turn are united by the fact that they exercise similar jurisdiction, by the fact that their judges are federally appointed and paid, and by the fact that appeals lie from all to the Supreme Court of Canada, which exercises a unifying influence. The result is a network of related Canadian courts ensuring judicial independence, interprovincial uniformity, and minimum standards of decision making throughout the country. This in turn provides "a strong constitutional base for national unity": *Reference re Residential Tenancies Act, (*sub nom. *Re Residential Tenancies Act of Ontario)* [1981] 1 S.C.R. 714 at 728, per Dickson J.

61 In this way the Canadian Constitution confers a special and inalienable status on what have come to be called the "section 96 courts". The unified national judicial system thus created cannot be destroyed or weakened. At the same time, however, the Constitution does not prevent either Parliament or the legislatures from passing laws regulating the powers and operations of the s. 96 courts; a strict separation of judicial and legislative powers is not a feature of the Canadian Constitution:

> There is no general "separation of powers" in the Constitution Act, 1867. The Act does not separate the legislative, executive and judicial functions and insist that each branch of government exercise only "its own" function.
>
> (P.W. Hogg, *Constitutional Law of Canada* (3rd ed., 1992), at p. 184.)

Moreover, ss. 96 to 100 do not prevent Parliament or the legislatures from creating other courts and tribunals, provided they do not threaten the constitutional position of the s. 96 courts.

62 In the years since Confederation, Parliament and the legislatures have created many specialized tribunals to supplement the work of the s. 96 courts. New problems have given rise to new schemes of regulation. New schemes of regulation in turn have created new problems of adjudication. And new problems of adjudication have given rise to new administrative tribunals. A number of reasons for the preference of Parliament and the legislatures for administrative tribunals with decision-making powers have been identified: the desire for a specialist body; the desire for innovation; the desire for a comprehensive investigative, adjudicative and policy-formation approach; and the problem of volume: see Hogg, at p. 190. If they are to discharge their tasks, administrative tribunals must inevitably be clothed with powers which, before their time, were exercised exclusively by the s. 96 courts.

63 This brings us to the heart of the problem posed on this appeal: when may Parliament or the provincial legislatures confer powers exercised by s. 96 courts on inferior tribunals created for special purposes? Clearly, Parliament and the legislatures cannot be allowed to set up shadow courts exercising all or some of the powers of s. 96 courts. As Dickson J. stated in *Residential Tenancies*, supra, at p. 728:

> ... the intended effect of s. 96, would be destroyed if a province could pass legislation creating a tribunal, appoint members thereto, and then confer on the tribunal the jurisdiction of the superior courts. What was conceived as a strong constitutional base for national unity, through a unitary judicial system, would be gravely undermined.

On the other hand, short of impairing s. 96 courts, nothing in the Constitution suggests that Parliament should not be able to clothe inferior tribunals with s. 96 powers ancillary or necessary to their functioning. Moreover, many of the complex problems created by modern society require regulation by specialized administrative agencies. Effective regulation, in turn, may require a system of internal enforcement by specialized tribunals wielding some of the powers traditionally exercised by s. 96 courts.

64 Initially, the courts refused to accept that Parliament or the legislatures could ever transfer s. 96 powers to inferior tribunals. Over the years, however, they have come to recognize that such a draconian response is neither required to preserve the constitutional role of s. 96 courts, nor desirable in a society whose problems increasingly require specialized regulation. What is required is a test for transfer of s. 96 powers which balances the need to maintain a strong constitutional position of s. 96 courts with the need to provide sufficient scope for the creation of effective administrative tribunals.

(b) Development of the Current Test

65 In 1938, the Judicial Committee of the Privy Council held that the Ontario legislature could not confer judicial powers on the Ontario Municipal Board: *Toronto (City) v. York (Township)*, [1938] A.C. 415 [[1938] 1 W.W.R. 452]. Lord Atkin described s. 96 as one of the "three principal pillars in the temple of justice" (p. 426). His reasons proceed on the assumption that any attempt to confer a s. 96 function on an administrative tribunal is ultra vires.

66 This injunction against any transfer of s. 96 powers was quickly recognized as unworkable. In *Reference re Adoption Act (Ontario)*, [1938] S.C.R. 398, this Court, per Duff C.J.C., held at p. 418 that the jurisdiction of inferior courts was not "fixed forever as it stood at the date of Confederation". Powers enjoyed by s. 96 courts at the time of Confederation could be removed from them and transferred to courts of inferior jurisdiction, provided the power removed "conform[s] to a type of jurisdiction generally exercisable by courts of summary jurisdiction" (p. 421). Reasoning that powers over adoption matters were similar to powers exercised by summary courts in England under the Poor Laws, Duff C.J.C. concluded that the transfer of power over such matters to magistrates was constitutional.

67 Duff C.J.C.'s formulation in the *Reference re Adoption Act* in turn proved too restrictive. It effectively froze the jurisdiction to transfer s. 96 powers at those of the summary courts of England. In *Saskatchewan (Labour Relations Board) v. John East Iron Works Ltd.* (1948), [1949] A.C. 134 [[1948] 2 W.W.R. 1055] (P.C.), Lord Simonds suggested that it was not necessary

to establish an analogy with summary court jurisdiction; it sufficed to show that the power was not one traditionally falling to s. 96 courts.

68 The *John East* test also was ultimately found to unduly fetter the legislative prerogative. In *Tomko v. Nova Scotia (Labour Relations Board)* (1975), [1977] 1 S.C.R. 112, the validity of a cease and desist order issued by the Nova Scotia Labour Relations Board was challenged on the ground that the power to issue such an order was analogous to the jurisdiction of the s. 96 courts to issue mandatory injunctions, and hence, on the test in *John East*, ultra vires. The Supreme Court resiled from the *John East* test. Clearly the mandatory orders at issue fell within the jurisdiction of s. 96 courts. But that was not the end of the matter. The transferred power must be considered in the context of the tribunal's larger task: "it is not the detached jurisdiction or power alone that is to be considered but rather its setting in the institutional arrangements in which it appears and is exercisable under the provincial legislation" (p. 120).

69 *Tomko* marks the debut of the modern test affirmed by this Court in *Residential Tenancies*. It was applied in *Mississauga (City) v. Peel (Regional Municipality)*, [1979] 2 S.C.R. 244, to uphold powers granted to the Ontario Municipal Board to resolve certain property disputes, a matter within the historical purview of the s. 96 courts. The Court asked itself what role this power played in the general role of the Municipal Board, and concluded that viewed in their " 'institutional setting, the "judicial powers" to determine rights and liabilities ... had been validly granted to the Municipal Board' " (*Residential Tenancies*, supra, at p. 732).

70 The issue came before this Court once more in 1980 in *Residential Tenancies*. Dickson J., speaking for the Court, concluded at p. 733 that "the teaching of *John East, Tomko*, and *Mississauga* is that one must look to the 'institutional setting' in order to determine whether a particular power or jurisdiction can validly be conferred on a provincial body". He went on to state the following test [pp. 733-34]:

> An administrative tribunal may be clothed with power formerly exercised by s. 96 courts, so long as that power is merely an adjunct of, or ancillary to, a broader administrative or regulatory structure. If, however, the impugned power forms a dominant aspect of the function of the tribunal, such that the tribunal itself must be considered to be acting 'like a court', then the conferral of the power is *ultra vires*.

On this approach, a "scheme is only invalid when the adjudicative function is a sole or central function of the tribunal ... so that the tribunal can be said to be operating 'like a s. 96 court' " (p. 736).

71 Dickson J. suggested a three-step approach to determining whether a transfer of power from a s. 96 court to an inferior court was valid. The first step, echoing *John East*, asked whether the power historically fell within the jurisdiction of the s. 96 courts. The second step asked whether the power was judicial or administrative. These two steps may be seen as serving to determine if there is in fact a transfer of s. 96 power. If the answer on the first two steps is yes, the inquiry moves to its final stage. This requires consideration of the institutional and legislative framework in which the judicial power is employed in order to determine whether its exercise is either (i) "subsidiary or ancillary" to what is predominantly an administrative function, or (ii) "necessarily incidental" to the achievement of a broader policy goal of the legislature. If it is, the transfer of s. 96 powers will be valid. If, on the other hand, "the impugned power forms a dominant aspect of the function of the tribunal, such that the tribunal itself must be considered to be acting 'like a court', then the conferral of power is *ultra vires*" (*Residential Tenancies*, supra, at pp. 733-34). In short, transfer of limited ancillary functions is permitted. Shadow courts are not.

72 The first branch of the *Residential Tenancies* test has been amplified by this Court in *Quebec (Attorney General) v. Grondin*, [1983] 2 S.C.R. 364, *Sobeys Stores Ltd. v. Yeomans*, [1989] 1 S.C.R. 238, and *Reference re Young Offenders Act (Canada)*, (sub nom. *Reference re Young Offenders Act (P.E.I.)*) [1991] 1 S.C.R. 252. In *Grondin*, this Court held that the question was whether the matter was within the *exclusive* power of the s. 96 courts at the time of Confederation; if inferior courts could exercise it then, modern tribunals could surely do so now. In *Sobeys*, Wilson J. suggested that the issue was not the particular *remedies* exercised by the superior courts at the time of Confederation, but whether the *dispute* was one which would have fallen within their exclusive jurisdiction. The dispute should be narrowly defined, so as not to preclude legitimate transfers at the outset. In *Reference re Young Offenders Act*, Lamer C.J.C. added a further qualification. He suggested that the legislative purpose of the grant of power, and the nature of the scheme of which it forms a part, should be considered in characterizing the

power for purposes of the first stage of the test. On this approach, he concluded that the powers granted to youth courts and the administrative scheme set up under the *Young Offenders Act* could be viewed as creating a "novel jurisdiction" not within the power of the superior courts at the time of confederation. Viewed thus, the answer to the question of whether the power was one exercised by the superior courts in 1867 was no, and the transfer of power was held valid.

73 The parties to this appeal agree that the first and second stages of the *Residential Tenancies* test are met. Hence I comment on them no further, except to note their function in relation to the test as a whole. The first and second stages of the test may be viewed as devoted to determining whether there is an impingement on the powers of s. 96 courts. If the powers were not historically within the exclusive purview of the s. 96 courts, their conferral on the inferior tribunal can pose no problem. Similarly, if the power is not judicial, no problem arises. But if the first two stages are passed and a derogation from s. 96 powers is established, that is not the end of the matter. Some derogations are permitted. To determine whether the identified transfer of s. 96 power is permitted, the power must be viewed in its institutional setting to determine whether it is ancillary or necessary to the policy objectives of the scheme in which it is exercised. If so, "the power in its institutional setting has changed its character sufficiently to negate the broad conformity with superior, district or county court jurisdiction" (Hogg, at p. 191). To use the words of this Court in *Re Court of Unified Criminal Jurisdiction*, (sub nom. *McEvoy v. New Brunswick (Attorney General)*) [1983] 1 S.C.R. 704 at 717, the "judicial aspect ... change[s] colour when considered in the factual setting in which the court will operate". The derogation from s. 96 powers established by the first and second inquiries of the test is rendered valid by its administrative function.

74 If the third stage of the inquiry under the *Residential Tenancies* test is satisfied, there can be no fear that the constitutional status of the s. 96 courts will be threatened. A tribunal exercising a judicial power ancillary or necessary to a broader administrative scheme is still performing an administrative function. In exercising that power, it will not be, to use the language of Dickson J. in *Residential Tenancies*, "acting 'like a court' ".

75 The *Residential Tenancies* test may thus be seen as a functional test. It does not attempt to define precluded areas of transfer by how the power itself is characterized, for example, by calling it a criminal power, or contract power, or the exercise of an inherent jurisdiction. Rather, it identifies precluded transfers by how the power *functions* in the setting Parliament or the legislature has proposed. Does the tribunal use the power as a mere aid to the achievement of an larger administrative goal, or does it use the power to make itself a shadow court?

76 This functional approach to determining whether a transfer of s. 96 power is valid or not possesses merits which a categorical approach lacks. The fundamental problem which arises when one attempts to identify protected areas of s. 96 jurisdiction by the type of power conferred is that any test threatens to be at once under and over inclusive. For example, if one suggests that important areas of common law, like criminal law, contract law or the coherent powers of the courts cannot be transferred from s. 96 courts, one is faced with the difficulty that aspects of criminal and contract law and inherent powers of the courts figure prominently in the administrative machinery of this country, without apparent harm to s. 96 courts. On the other hand, if one reduces the core of non-transferable powers, suggesting that only the inherent powers of s. 96 courts to control their process are sacrosanct, one faces the problem that vast areas of contract, tort and criminal jurisdiction could be transferred to shadow courts with impunity, thus destroying the compromise of the Fathers of Confederation and the intended effect of s. 96. By contrast, the *Residential Tenancies* test, by focusing on the function of the power in the administrative context rather than the nature of the power conferred, provides sufficient flexibility to equip administrative tribunals with the powers they need to do their work, while preserving the constitutional position of the s. 96 courts.

77 Viewed in retrospect, the *Residential Tenancies* test may be seen to have evolved over the years in response to the needs of Canadian society. Without suggesting that further refinements may not, as time passes, prove desirable, the test meets the basic requirements of the Constitution and of society in a way in which proposed alternatives, such as a rule precluding any transfer from a nebulous, indeterminate shopping list of "core" powers, does not.

78 These considerations lead me to conclude that the *Residential Tenancies* test, developed over the past 50 years in response to the changing social conditions of this country, should not be lightly discarded. It is against this background that I approach

the case for an alternative approach found in the reasons of the Court of Appeal of British Columbia and the Chief Justice of this Court.

(c) The Proposed Changes to the Residential Tenancies Test

79 The *Residential Tenancies* test is based on the premise that any judicial power can be transferred from a s. 96 court to an inferior tribunal, provided that the power is ancillary to the tribunal's larger mandate. Shadow courts, devoted exclusively or primarily to rendering judgments which s. 96 courts have traditionally rendered, are forbidden. Only if the tribunal's major focus is a larger one and the powers can be said to lose their judicial character in the administrative context, is the tribunal permitted to incidentally exercise judicial powers traditionally exercised by s. 96 courts.

(i) The Proposed "Core" Test

80 The Court of Appeal below and the Chief Justice in this Court propose a modification of this test. Acknowledging that the *Residential Tenancies* test is satisfied in this case, the Chief Justice argues that an additional question must be asked: is the power transferred a "core" power of s. 96 courts? The boundaries and constituent elements of this core are unspecified but seem to extend at least to the inherent powers of s. 96 courts. This is a new test which in my respectful opinion needlessly derogates from the functional approach of the *Residential Tenancies* test. As I understand the proposed test, it would no longer be sufficient that the transfer of judicial power historically exercised by s. 96 courts be ancillary to the larger function of inferior tribunal; it would also be necessary to show that the particular power transferred is not one of the "core" powers of s. 96 courts. This "core" is not defined by reference to the functions of the tribunal, but by the nature of the s. 96 power transferred. What is proposed is a class of "core" powers which, by their very nature, are essential to s. 96 courts and cannot be transferred to other courts regardless of whether or not the three inquiries of the *Residential Tenancies* test are satisfied. This marks a shift from the functional approach of the *Residential Tenancies* test for transfer of s. 96 powers toward a more categorical approach.

81 This revised version of the *Residential Tenancies* test finds its source in a passage from the reasons of Lamer C.J.C. in *Reference re Young Offenders Act*, supra. In considering the limits imposed by s. 96, he stated (at p. 264):

> ... if the jurisdiction conferred on Youth Courts by Parliament is within the core of jurisdiction of superior courts, Parliament cannot confer such jurisdiction on courts presided over by judges not appointed in accordance with s. 96.

However, this reference to "core" jurisdiction must be read in conjunction with the paragraph that follows it:

> The test for determining if a power can be constitutionally given to an inferior court or an administrative tribunal was set out in *Re Residential Tenancies* ...

Read in this context, the "core" referred to by Lamer C.J.C. in *Reference re Young Offenders Act* might have been seen simply as a shorthand reference to impermissible transfers under the *Residential Tenancies* test — i.e. transfers where the adjudicative function "is a sole or central function of the tribunal ... that the tribunal can be said to be operating 'like a s. 96 court' " (per Dickson J., in *Residential Tenancies*, supra, at p. 736).

82 In the reasons of the Court of Appeal in this case, however, the notion of "core" was given a different meaning. It was understood as designating a class of judicial powers — contempt and the like — which can never, under any circumstances, be transferred to inferior tribunals. The significance of this change should not be underestimated. If accepted, it would amount to an important new fetter on the ability of Parliament and the provincial legislatures to create effective tribunals to ensure compliance with regulatory schemes. The significance of the additional fetter is enhanced by the fact that it is constitutional, and hence incapable of being legislatively overridden, as well as by the fact that what falls within the core remains largely undefined.

83 Having suggested that the reasons of the Court of Appeal below and of the Chief Justice in this Court represent a significant departure from the existing test for the transfer of s. 96 judicial power to inferior tribunals, it remains to determine whether the departure is one which this Court should endorse. Before embarking on that inquiry, however, it may be useful to deal with two related notions which may otherwise cloud the analysis.

84 The first is the Chief Justice's observation that the problem lies in the *exclusive* nature of the transfer of the s. 96 power on the inferior tribunal. The second is his insistence that the focus of the problem is not the conferral of power on the inferior tribunal, but its removal from the s. 96 courts. I agree with both observations. It is rare for Parliament or a legislature to offer a choice between having one's case adjudicated by a s. 96 court or an administrative tribunal. If the administrative scheme is to operate effectively with a minimum of procedural confusion, it is typically essential that it have exclusive power to decide the matters at issue. As the facts of the cases on the question of transfer of s. 96 powers demonstrate, the issue is almost always whether Parliament or the legislatures can transfer the s. 96 power on the inferior tribunal and *exclude* the s. 96 courts from adjudication in that area. To point this out is not, with respect, to advance the analysis, but merely to define the problem which has preoccupied the courts since Lord Atkin's opinion in *Toronto v. York*, supra. Viewed thus, it becomes apparent that the issues of whether a power can be taken from a s. 96 court and whether it can be conferred on an independent tribunal, which the Chief Justice seeks to separate, are in fact reverse sides of the same coin. There is nothing exceptional in this respect in what Parliament did when it conveyed exclusive power over contempt not in the face of the court committed by juveniles to youth court. Rather, the conferral of exclusive power over the offence on the youth court brings this case directly within the ambit of the central problem addressed in *Residential Tenancies* and its predecessors.

85 Against this background, I come to the essential question on this appeal: should this Court alter the *Residential Tenancies* test by adding the additional concept of an immutable core of powers which can never be transferred from s. 96 courts to inferior tribunals? It is my conclusion, with the greatest respect to the Court of Appeal and the Chief Justice of this Court, that it should not.

(ii) The Argument in Principle for a "Core" Test

86 The crux of the Chief Justice's argument is that the superior courts can never be deprived of their "core" powers, which include the power to regulate their own process, including contempt not in the face of the court.

87 The difficulty which this argument faces is that it has long been settled that under the rule of law Parliament and the legislatures may limit and structure the ways in which the superior courts exercise their powers. These inherent powers of superior courts are simply innate powers of internal regulation which courts acquire by virtue of their status as courts of law. The inherent power of superior courts to regulate their process does not preclude elected bodies from enacting legislation affecting that process. The court's inherent powers exist to complement the statutory assignment of specific powers, not override or replace them: "The two heads of powers are generally cumulative, and not mutually exclusive" (I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 Current Legal Problems 23, at p. 25).

88 In fact, the superior courts of this country are controlled by an elaborate matrix of statute and regulation limiting the way they exercise powers over their own process. Legislation intrudes on a number of areas traditionally within the domain of the court's inherent power, including matters such as contempt of court, testimonial compulsion, the attendance of spectators, hours of sitting and the imposition of publication bans over court proceedings. Parliament and the legislatures routinely make rules limiting the scope for the exercise of the court's inherent powers in these and other areas. In every province Rules of Court limit and define the ways in which superior courts can exercise their inherent powers. The *Income Tax Act* restricts the circumstances in which courts may exercise their inherent jurisdiction to order the Minister of National Revenue to release confidential information: *Glover v. Glover* (1980), 113 D.L.R. (3d) 161, affirmed [1981] 2 S.C.R. 561. In the criminal sphere, s. 486(4) of the *Criminal Code*, R.S.C. 1985, c. C-46, removes the discretion a judge would have at common law to refuse a publication ban upon the request of a complainant or prosecutor where the accused is charged with one of the listed offences. How a court must deal with contempts arising in certain circumstances is now prescribed in some detail (see, e.g., ss. 127(1), 708(1), 605(2), 484, 486(1) and (5)). Interestingly, in order to *preserve* the court's jurisdiction over contempt in s. 9, the Code specifically excludes that offence from the general withdrawal of jurisdiction over the common law offences. The drafters clearly recognized the *competence* of Parliament to remove an aspect of inherent jurisdiction, and consequently the need to segregate contempt from the general provision eradicating those offences if the courts were to retain this power.

89 All of this is simply to restate the general principle that courts must conform to the rule of law. They can exercise more power in the control of their process, in different ways, than is expressly provided by statute, but must generally abide by the dictates of the legislature. It follows that Parliament and the legislatures can legislate to limit the superior courts' powers, including their powers over contempt, provided that the legislation is not otherwise unconstitutional. If this is so, then it is wrong to posit a core of inherent superior court powers to regulate the process of the courts which the legislators cannot touch. Parliament's transfer of an aspect of the contempt power from the superior courts to the youth courts may be seen as an example of a legislative limitation on the inherent power of the superior court, in the sense that absent the transfer, the superior court would possess that power. That however, does not render the transfer of power invalid. Nor does it rule out the power of a superior court to deal with exceptional situations threatening its status by the exercise of its inherent power which exists to complement the statutory assignment of specific powers: to use Jacob's phrase, "one set of powers supplements and reinforces the other" (Jacob, at p. 50). I conclude that Parliament may enact that all ex facie juvenile contempt charges should be heard in youth court, provided that the conditions of the *Residential Tenancies* test are met. The need to preserve the inherent powers of superior courts requires no further test.

(iii) The Argument on Policy for a "Core" Test

90 I have concluded that one cannot say, as a matter of principle, that Parliament can never legislate with respect to a matter that might be dealt with under the inherent jurisdiction of the court. But another argument was pressed in support of an untouchable core of s. 96 jurisdiction immune from legislative limitation. It is not an argument of principle but of policy. It is the argument that without an untouchable core of inherent jurisdiction, the constitutional position of s. 96 courts will, as a practical matter, be eroded. The functional approach of the *Residential Tenancies* test is inadequate to protect the s. 96 courts. We must, it is asserted, go further and build an impregnable wall around core court powers if the position of the superior courts is to be preserved.

91 It may initially be observed that the *Residential Tenancies* approach to the transfer of s. 96 powers has been the law in Canada since the *Tomko* case in 1977. It is not suggested that the role of s. 96 courts has been diminished in the 18 intervening years, despite the creation of a host of administrative tribunals exercising a variety of substantive and procedural powers traditionally exercised by s. 96 courts.

92 Indeed, it might be argued that the primal position of the superior courts during this period has been enhanced by the fact that they have jealously guarded their rights of review of the decisions of inferior tribunals. Where an aspect of their historical power has been transferred to the inferior tribunal, the courts have reserved the right to review the decision for conformity to the law and the rules of natural justice. Attempts by Parliament or the legislatures to insulate tribunal decisions from supervision by superior courts through the use of clauses purporting to oust judicial review, while offering protection against review of decisions on fact and exercise of discretion, have not deterred the courts from insisting that the decisions of tribunals meet the basic requirements of legality and fairness: see *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220. Viewed thus, transfers of s. 96 jurisdiction to inferior tribunals have not ousted the power of the superior courts, but merely elevated it one remove. Administrative tribunals deal with the factual minutae of multitudinous disputes; the superior courts ensure that the law is followed and fair process maintained.

93 Viewing the matter from the perspective of the power here in question, the conclusion is the same. The facts of this case simply do not support the contention that powers essential to the proper functioning of s. 96 courts are in danger of being eroded. The Court of Appeal accepted without much discussion the proposition that the power to try youths for contempt not in the face of the court is essential to maintaining the authority of the superior courts. Yet, with respect, this is far from self-evident. What is essential to maintaining the authority of a court is that consequences attach to the disobedience of its order. It would seem immaterial whether the consequences derive from the same court as issued the initial order, or from a different court. It is the attachment of criminal consequences which gives the order its force, not the source of those consequences. I accept the submissions of the Attorney General of Canada that the youth court is just as able to protect the validity and efficacy of a superior court order as is the superior court. No evidence was put forward by the Attorney General of British Columbia or

cited by the Court of Appeal to suggest otherwise. And if the youth court errs, or fails to proceed where it should, it is subject to the corrective power of the superior court on judicial review or of the Court of Appeal on appeal.

94 It was argued that contempt charges might not be pursued in youth court, leaving the superior court order unenforced. The superior court must have the power, it was submitted, to pursue and try charges for contempt out of the face of the court in such circumstances.

95 There are a number of answers to this submission. First, counsel for the young offender conceded that s. 47(2) does not deprive the superior court of the power to initiate proceedings by referring a charge of contempt out of the face of the court to the youth court.

96 Second, contempt not in the face of the court is generally prosecuted like any other crime by the Attorney General, who gathers the evidence and presents the case to the court. This follows from the fact that the contempt is not committed in the presence of the court. Unlike contempt in facie, which Parliament has left within the purview of the court where it was committed, the court whose order has been allegedly traversed will usually have no evidence itself of ex facie contempt, and cannot pursue it without the intervention of the Attorney General. For example, in the case at bar, the superior court judge had no personal knowledge of who had demonstrated, let alone when or where the injunction was supposedly violated. As in the case of any other crime, trial of the contempt was dependent on a case presented by the prosecution. This removes much of the force of the argument that the superior court must retain power to pursue charges for contempt out of the face of the court because the Attorney General may fail to bring such charges before the youth court. Whatever the court, the decision as to whether the charge proceeds will almost always be the Attorney General's.

97 The final guarantee that the process of the superior courts will not be undermined by transfer of juvenile contempt of court ex facie to the youth courts, lies in the residual inherent jurisdiction of the superior courts to take such measures as may be required to preserve their process. Should the administration of justice require that a particular case be tried in superior court, that court possesses the inherent power to hold such a trial. As discussed earlier, all rules of court must be read as subject to the inherent power of the superior court to do what is required to preserve their process. Where the use of a legislative provision or rule of court would itself amount to an abuse of the court's process, the court may invoke its inherent jurisdiction to ensure that justice is done. Section 47(2) of the *Young Offenders Act* is no exception.

98 In conclusion, I note that the argument on policy would have more force if Parliament had removed from the superior courts all power to try the offence of contempt. In fact, only contempt not in the face of the court committed by youths has been removed from the superior courts. To borrow the language of *McEvoy*, supra, at p. 722, this is a "mere alteration or diminution of criminal jurisdiction", cardinally different from a complete exclusion of Parliament.

99 Parliament appears to have carefully considered and weighed what is necessary to permit the superior courts to preserve their authority. Parliament left to the superior courts power to try youths for contempt in the face of the court, a power arguably necessary to enable a court to maintain order in its proceedings. At the same time, it transferred to youth court contempt not in the face of the court committed by youths. The latter, unlike the former, is concerned with the enforcement of orders rather than preservation of order in proceedings. This carefully calibrated scheme poses no threat to the authority of the superior courts, whose authority stands firm.

100 Before leaving the policy argument, it may be useful to ask whether, when all is considered, it can be said that the *Residential Tenancies* test might fail to maintain the protection of s. 96 courts which the Constitution requires. I would not suggest that the *Residential Tenancies* test is forever cast in stone, nor that situations may not arise affecting the stature and integrity of the superior court, which could require the court to invoke its inherent power to safeguard its own process in a manner which was not contemplated by the *Residential Tenancies* test. This said, the current test for transfer, developed in response to Canadian needs over a period of several decades, strikes a reasonable balance between the need to permit Parliament and the legislatures to annex effective administrative tribunals to their legislative schemes, and the need to maintain the constitutional position of the s. 96 courts. The test permits only incidental derogations of powers from s. 96 courts, and then only to the extent that their judicial nature is transformed by the administrative context in which they are exercised. The greater the powers sought

to transferred, the greater the curtailment of the inherent powers of the s. 96 courts, the more likely the powers are to be seen as judicial rather than administrative, barring their transfer from s. 96 courts to inferior tribunals.

101 On the other hand, the revised "core" test proposed would impose significant new restrictions on the power of Parliament and the legislatures to endow specialized tribunals with sufficient powers to meet particular problems and deprive many tribunals of powers which they have long exercised. The alternative of dual powers exercised by the tribunals and the courts would encourage forum shopping and contribute to expense and delay in the resolution of problems within these specialized areas. At the same time, the addition of a concept of a category of core of inherent powers which can never be transferred would add a new element of uncertainty to the law. As the Chief Justice admits, inherent jurisdiction "may be difficult to define". He declines, quite understandably, "to enumerate the precise powers which compose inherent jurisdiction". What is clear is that this concept of inherent jurisdiction includes some of what administrative tribunals now do. What is not clear is how far beyond this the penumbra of inherent powers may extend.

102 For these reasons, I remain unpersuaded that the *Residential Tenancies* test for transfer s. 96 judicial powers to inferior tribunals should be supplemented by the concept of immutable core powers which can never constitutionally be transferred from s. 96 courts, no matter how incidental their role in the overall administrative scheme. I would maintain the *Residential Tenancies* test.

(d) Application of the Residential Tenancies Test in This Case

103 As the Chief Justice concedes, application of the *Residential Tenancies* test in this case leads to the result that the transfer of contempt not in the face of the court committed by juveniles from s. 96 courts to the youth courts is valid and constitutional. The power was historically possessed by s. 96 courts, it is judicial, and it is merely ancillary to the larger role of the youth courts in relation to the special problems and needs of young offenders.

104 A number of assaults were made on the proposition that conferral of this power is ancillary only. None, in my view, succeed.

105 The Attorney General of British Columbia seeks to bring itself within the *Residential Tenancies* test by characterizing the power at issue simply as "the inherent jurisdiction of a superior court of record to maintain and enforce its authority by contempt proceedings for ... contempt *ex facie*". This power, it argues, has nothing to do with the goals of the *Young Offenders Act* and hence fails to satisfy the third enquiry under the test. But this is a mischaracterization of the power at issue. Parliament has not transferred power over all contempt out of the face of the court to the youth courts, only such contempt committed by young offenders. Only by reading the reference to young offenders out of s. 47(2) can the Attorney General argue that the power is not related to the goal of the *Young Offenders Act*. If the power transferred is properly characterized, there is no basis for parting from the analysis under *Reference re Young Offenders Act* and *Residential Tenancies*.

106 The Attorney General of British Columbia also argues that s. 47(2) is not necessarily incidental to the policy goals of the *Young Offenders Act*, because contempt not in the face of the court is different from other crimes, being a common law crime and the only crime whose actus reus is disobedience of a court order. These features, in my view, do not suffice to remove juvenile contempt not in the face of the court from the concerns of the *Young Offenders Act*. Like other crimes, it is generally prosecuted by the Attorney General, who gathers and presents evidence to the court, which must sit impartially and conclude on innocence or guilt based on the record before it. Like other crimes, it involves actus reus, mens rea, and consequences of imprisonment upon conviction. Like other crimes, conviction creates a criminal record. All these considerations suggest that it should be treated like any other crime. The special aims of the *Young Offenders Act* apply to it as much as to any other crime. Parents should be advised of pending charges. Rehabilitation should be the predominant consideration. Incarceration in facilities tailored to young people's special needs should be the norm. The argument that the transfer of criminal contempt not in the face of the court committed by youths is not ancillary to the powers exercised by the youth courts cannot succeed.

2. Conclusion

107 I conclude that Parliament's transfer of contempt not in the face of the court by juveniles from the s. 96 superior courts to the youth courts is valid. The test for transfer laid down in *Residential Tenancies* and approved in *Reference re Young Offenders Act* is met. The case for a modified test proposing an inviolable core of matters immune from trans fer which includes juvenile contempt not in the face of the court has not, in my respectful view, been established.

108 J.P. is charged with criminal contempt not in the face of the court, for violating a court order. Section 47(2) of the *Young Offenders Act* requires that he be tried in youth court. The constitutionality of s. 47(2) has not, for the reasons I have outlined, been successfully challenged. It follows that J.P. should have been tried in youth court. I would allow the appeal and set aside his conviction in superior court and remit the charges to youth court for trial in the forum Parliament has chosen.

109 Accordingly, I would answer the constitutional question stated by the Chief Justice as follows:

> Is it within the jurisdiction of Parliament to grant exclusive jurisdiction to youth courts through the operation of s. 47(2) of the *Young Offenders Act*, R.S.C., 1985, c. Y-1, over contempt of court committed by a young person against the superior court otherwise than in the face of that court?

Answer: Yes.

Appeal dismissed.

2010 SCC 10
Supreme Court of Canada

Cunningham v. Lilles

2010 CarswellYukon 21, 2010 CarswellYukon 22, 2010 SCC 10, [2010] 1 S.C.R. 331, [2010] S.C.J. No. 10, 254 C.C.C. (3d) 1, 283 B.C.A.C. 280, 317 D.L.R. (4th) 1, 399 N.R. 326, 480 W.A.C. 280, 73 C.R. (6th) 1, 87 W.C.B. (2d) 70, J.E. 2010-626

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

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

Heard: November 17, 2009
Judgment: March 26, 2010 *
Docket: 32760

Proceedings: reversing *Cunningham v. Lilles* (2008), 2008 CarswellYukon 42, 2008 YKCA 7, 257 B.C.A.C. 1, 432 W.A.C. 1, 59 C.R. (6th) 49 (Y.T. C.A.); reversing *Cunningham v. Lilles* (2006), 2006 YKSC 40, 2006 CarswellYukon 51, 41 C.R. (6th) 66 (Y.T. S.C.)

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Gregory P. DelBigio, for Intervener, Canadian Bar Association
Scott C. Hutchison, Andrea Gonsalves, for Intervener, Criminal Lawyers' Association (Ontario)

Subject: Criminal; Public; Torts; Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Criminal law --- Trial procedure — Rights of accused — Right to retain counsel — Duty of court to ensure representation

Jurisdiction of court to refuse to grant criminal defence counsel's request to withdraw should be exercised sparingly — Withdrawal should not be refused where adjournment will not be necessary or if counsel seeks withdrawal for ethical reasons — Where counsel seeks untimely withdrawal for non-payment of fees, relevant factors must be weighed to determine whether withdrawal could cause serious harm to administration of justice.

Professions and occupations --- Barristers and solicitors — Employment of lawyer — Representation by solicitor — Application for removal as solicitor of record

Jurisdiction of court to refuse to grant criminal defence counsel's request to withdraw should be exercised sparingly — If counsel reveals that withdrawal is sought for ethical reasons or non-payment of fees, this must be accepted at face value so as to avoid trenching on potential issues of solicitor-client privilege — Withdrawal should not be refused where

adjournment will not be necessary or if counsel seeks withdrawal for ethical reasons — Where counsel seeks untimely withdrawal for non-payment of fees, relevant factors must be weighed to determine whether withdrawal could cause serious harm to administration of justice.

Criminal law --- Extraordinary remedies — Certiorari — Grounds for review — Miscellaneous

Accused was represented by lawyer employed by legal services society — Accused's legal aid funding was suspended when accused failed to respond to request to update financial information — Lawyer's application to withdraw as counsel of record was refused by preliminary inquiry judge — Lawyer unsuccessfully applied for order in nature of certiorari to quash preliminary inquiry judge's order — Chambers judge found that preliminary inquiry judge did not exceed his jurisdiction — Lawyer successfully appealed — Court of appeal found that preliminary inquiry judge had no discretion to refuse withdrawal — Crown appealed — Appeal allowed — Refusing lawyer's application to withdraw was coercive and conclusive order with respect to lawyer — Order in nature of certiorari should have been given its normal scope and could be allowed where there was error of jurisdiction or error of law on face of record.

Droit criminel --- Procédure lors du procès — Droits de l'accusé — Droit à l'assistance d'un avocat — Devoir du tribunal de veiller à ce que l'accusé soit représenté

Pouvoir du tribunal de refuser d'accorder à un avocat agissant en défense dans un procès criminel l'autorisation de cesser d'occuper doit être exercé avec circonspection — Demande pour cesser d'occuper ne devrait pas être refusée si un ajournement ne s'avérera pas nécessaire ou si l'avocat demande de cesser d'occuper en invoquant des questions déontologiques — Tribunal malencontreusement 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.

Professions et métiers --- Avocats — Emploi d'avocat — Représentation par un avocat — Demande pour cesser d'occuper

Pouvoir du tribunal de refuser d'accorder à un avocat agissant en défense dans un procès criminel l'autorisation de cesser d'occuper doit être exercé avec circonspection — Si l'avocat invoque le non-paiement de ses honoraires ou des questions relatives à la déontologie, 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 — Demande pour cesser d'occuper ne devrait pas être refusée si un ajournement ne s'avérera pas nécessaire ou si l'avocat demande de cesser d'occuper en invoquant des questions déontologiques — Tribunal malencontreusement 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.

Droit criminel --- Recours extraordinaires — Certiorari — Motifs de révision — Divers

Accusé était représenté par une avocate qui était à l'emploi d'une société d'aide juridique — Accusé a cessé de bénéficier de l'aide juridique à la suite de son défaut de mettre à jour l'information relative à sa situation financière — Demande de l'avocate pour cesser d'occuper a été rejetée par le juge de l'enquête préliminaire — Avocate a vainement tenté de déposer une demande de certiorari visant l'annulation de la décision du juge présidant l'enquête préliminaire — Juge en chambre a statué que le juge de l'enquête préliminaire n'avait pas outrepassé sa compétence — Avocate a interjeté appel avec succès — Cour d'appel a conclu que le juge de l'enquête préliminaire n'avait pas le pouvoir discrétionnaire de refuser la demande pour cesser d'occuper — Ministère public a formé un pourvoi — Pourvoi accueilli — Rejet d'une demande d'autorisation de cesser d'occuper était une décision contraignante et définitive vis-à-vis de l'avocate — On aurait dû reconnaître au certiorari sa portée normale et on pouvait l'accorder en présence d'une décision erronée sur la compétence ou d'une erreur de droit manifeste à la lecture du dossier.

The accused was represented by a lawyer employed by the legal services society. The accused's legal aid funding was suspended when the accused failed to respond to a request to update his financial information. Prior to the accused's preliminary inquiry, the lawyer brought an application to withdraw as counsel of record. The preliminary inquiry judge refused to grant the application to withdraw.

The lawyer unsuccessfully applied for an order in the nature of certiorari to quash the preliminary inquiry judge's order. The chambers judge held that the preliminary inquiry judge did not exceed his jurisdiction.

The lawyer successfully appealed. The court of appeal found that the preliminary inquiry judge had no discretion to refuse withdrawal. The court of appeal determined that 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 Crown appealed.

Held: The appeal was allowed.

Per Rothstein J. (McLachlin C.J.C., Binnie, LeBel, Deschamps, Fish, Abella, Charron, Cromwell JJ. concurring): The preliminary inquiry judge had the authority to refuse the lawyer's request to withdraw for non-payment of legal fees. This authority had to be exercised sparingly and only when necessary to prevent serious harm to the administration of justice.

Concern about the protection of solicitor-client privilege was warranted. However, the non-payment of fees in cases where it was unrelated to the merits and would not cause prejudice to the accused did not attract the protection of solicitor-client privilege. The remote possibility that a judge would inappropriately attempt to elicit privileged information in hearing the application did not justify leaving the decision to withdraw exclusively to counsel.

Oversight of lawyer withdrawal did not fall exclusively to law societies. Both the courts and the law societies played different roles in regulating withdrawal. Court supervision over withdrawal did not threaten the independence of the bar. Forcing unwilling counsel to continue would not create a conflict between the client's and lawyer's interests as lawyers were presumed to act ethically. Where counsel was required to continue to represent an accused, counsel had to do so competently and diligently.

The jurisdiction to refuse to grant counsel's request to withdraw should be exercised exceedingly sparingly. Where an adjournment was not necessary, then the withdrawal should be allowed. Where timing was an issue, the court was entitled to enquire further. If counsel revealed that the withdrawal was sought for ethical reasons or non-payment of fees, this had to be accepted at face value and no further enquiries made so as to avoid trenching on potential issues of solicitor-client privilege. If withdrawal was sought for an ethical reason, then the withdrawal had to be granted. Where counsel sought untimely withdrawal for non-payment of fees, the relevant factors had to be weighed to determine if withdrawal would cause serious harm to the administration of justice.

The chambers judge thought he had to find an excess of jurisdiction to interfere with the preliminary inquiry judge's exercise of discretion. Refusing an application to withdraw was a coercive and conclusive order with respect to the lawyer. Therefore, an order in the nature of certiorari should have been given its normal scope and could be allowed where there was an error of jurisdiction or an error of law on the face of the record.

The question of whether this case met the high threshold that had to be met to refuse leave to withdraw was moot and the record did not provide information or analysis on several of the relevant factors. It was not clear whether the circumstances of this case would justify a refusal of leave to withdraw.

L'accusé était représenté par une avocate qui était à l'emploi de la société d'aide juridique. L'accusé a cessé de bénéficier de l'aide juridique à la suite de son défaut de mettre à jour l'information relative à sa situation financière. Avant la tenue de

l'enquête préliminaire de l'accusé, l'avocate a déposé une demande pour cesser d'occuper. Le juge de l'enquête préliminaire a refusé d'accueillir la demande de l'avocate.

L'avocate a vainement tenté de déposer une demande de certiorari visant l'annulation de la décision du juge présidant l'enquête préliminaire. Le juge en chambre a statué que le juge de l'enquête préliminaire n'avait pas outrepassé sa compétence.

L'avocate a interjeté appel avec succès. La Cour d'appel a conclu que le juge de l'enquête préliminaire n'avait pas le pouvoir discrétionnaire de refuser la demande pour cesser d'occuper. La Cour d'appel a déterminé que la meilleure façon d'aborder la demande pour cesser d'occuper était de s'en remettre à la présomption que les avocats ne fuient généralement pas leurs obligations professionnelles et lorsqu'ils le font, alors les ordres professionnels vont entreprendre les mesures disciplinaires appropriées.

Le ministère public a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Rothstein, J. (McLachlin, J.C.C., Binnie, LeBel, Deschamps, Fish, Abella, Charron, Cromwell, JJ., souscrivant à son opinion) : Le juge présidant l'enquête préliminaire avait le pouvoir de refuser la demande de l'avocate pour cesser d'occuper en raison du défaut de paiement des honoraires. Ce pouvoir devait être exercé avec circonspection et uniquement lorsqu'il le faut pour empêcher une atteinte grave à l'administration de la justice.

Le souci de protéger le secret professionnel de l'avocat était légitime. Toutefois, le non-paiement des honoraires lorsqu'il n'est pas lié au fondement de l'affaire et ne cause pas préjudice à l'accusé ne constituait pas une exception à l'application du secret professionnel. Le risque minime que le tribunal saisi de la demande tente indûment d'obtenir des renseignements protégés à l'audience ne justifiait pas que la décision de cesser d'occuper relève uniquement de l'avocat.

Les enjeux soulevés par la demande d'un avocat de cesser d'occuper ne concernaient pas uniquement les ordres professionnels. Tribunaux et ordres professionnels jouaient des rôles différents dans l'encadrement de l'exercice du droit de cesser d'occuper. Le fait qu'un tribunal ait un droit de regard en la matière ne compromettait pas l'indépendance professionnelle des avocats. En prenant pour acquis que les avocats respectent la déontologie, obliger un avocat à continuer de représenter un client ne créerait pas de conflit entre les intérêts du client et ceux de l'avocat. L'avocat enjoint de continuer de représenter un accusé devait le faire avec compétence et diligence.

Le pouvoir de refuser à l'avocat l'autorisation de cesser d'occuper devrait être exercé avec circonspection. Si un ajournement n'est pas nécessaire, le retrait devrait être autorisé. Si le délai est plus serré, le tribunal est justifié de pousser l'examen. Si l'avocat invoque le non-paiement de ses honoraires ou des questions relatives à la déontologie, 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. Si la demande d'autorisation de cesser d'occuper est présentée pour un motif d'ordre déontologique, elle doit être accueillie. Le tribunal malencontreusement 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.

Le juge en chambre croyait qu'il ne pouvait intervenir dans l'exercice du pouvoir discrétionnaire que si le juge de l'enquête préliminaire avait outrepassé sa compétence. Le rejet d'une demande d'autorisation de cesser d'occuper était une décision contraignante et définitive vis-à-vis de l'avocate. On aurait dû, en conséquence, reconnaître au certiorari sa portée normale et on pouvait l'accorder en présence d'une décision erronée sur la compétence ou d'une erreur de droit manifeste à la lecture du dossier.

La question de savoir si la présente affaire satisfaisait aux exigences strictes qui doivent être remplies pour qu'un tribunal puisse refuser l'autorisation de cesser d'occuper était théorique et le dossier ne renfermait ni information ni analyse concernant plusieurs des éléments pertinents. On ne pouvait pas affirmer avec certitude que les circonstances de la présente espèce justifieraient le refus d'autoriser l'avocate à cesser d'occuper.

Annotation

This is an important judgment that could have far-reaching effects on the criminal justice system. The first thing to be said is that there is now clarity across Canada about the circumstances under which a lawyer may withdraw from acting for a client in a criminal matter. This removes the apparent disparity between British Columbia and the Yukon Territory and the rest of the country. Second, the Court has come down on the side of judicial intervention in the interests of the administration of justice, although it has attempted to limit the discretion to refuse withdrawal to very rare circumstances and only where the reason for withdrawal relates to non-payment of fees. Since *Cunningham* was a legal aid case, it is apparent that non-payment of fees includes non-compliance with legal aid administrative and financial requirements. Third, however, and very important, is the ruling that courts have no jurisdiction to refuse withdrawal where ethical issues have arisen and must take a lawyer's statement that the withdrawal is for this reason at face value.

In an era when the incidence of unrepresented accused people and underfunded legal aid plans have both become issues, a discretion to refuse an application to withdraw as counsel may provide some complications. In order to avoid an accused being unrepresented, some courts may be tempted to exercise the discretion in spite of the Supreme Court's admonition that this should occur "exceedingly sparingly." If so, in provinces having salaried legal aid lawyers, this will add to their caseload. In provinces where legal aid work is carried out by private lawyers under legal aid certificates, lawyers may be very unhappy about having to continue acting even though the client has not complied with the administration requirements of the legal aid scheme. The Court has acknowledged that *certiorari* to control the discretion may be difficult to obtain and so it will be difficult to overturn any but the most egregious exercises of discretion. We might also expect an increase in the number of *Rowbotham* applications to have counsel appointed by the courts and to be accompanied by applications to increase the fees beyond the applicable legal aid tariff. The repercussions of *Cunningham* are therefore difficult to assess at this moment.

One other procedural matter was also decided in this case. Where the refusal to permit withdrawal occurs at the superior court level, the Supreme Court has held, at paragraph 56, that the aggrieved lawyer is a third party who may therefore appeal directly to the Supreme Court under section 40 of the *Supreme Court Act*. This is in line with the approach developed by the Court in *Dagenais v. Canadian Broadcasting Corp.* (1994), 34 C.R. (4th) 269 (S.C.C.) for entertaining appeals by third parties. Sadly, this is a procedural device adopted by the Court because of Parliament's failure to enact appeal procedures in such circumstances.

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R. v. Golding (2007), 325 N.B.R. (2d) 92, 836 A.P.R. 92, 2007 CarswellNB 510, 2007 NBQB 320 (N.B. Q.B.) — referred to

R. v. Ho (2003), 17 C.R. (6th) 223, 190 B.C.A.C. 187, 311 W.A.C. 187, [2004] 2 W.W.R. 590, 21 B.C.L.R. (4th) 83, 2003 CarswellBC 2970, 2003 BCCA 663 (B.C. C.A.) — referred to

R. v. Huber (2004), 2004 BCCA 43, 2004 CarswellBC 108, 192 B.C.A.C. 75, 315 W.A.C. 75 (B.C. C.A.) — referred to

R. v. McClure (2001), 40 C.R. (5th) 1, 195 D.L.R. (4th) 513, 151 C.C.C. (3d) 321, 142 O.A.C. 201, 80 C.R.R. (2d) 217, 2001 SCC 14, 2001 CarswellOnt 496, 2001 CarswellOnt 497, [2001] 1 S.C.R. 445, 266 N.R. 275 (S.C.C.) — considered

R. v. Morgan (2006), 2006 CarswellYukon 61, 2006 YKTC 61 (Y.T. Terr. Ct.) — referred to

R. v. Patterson (1970), [1970] S.C.R. 409, 10 C.R.N.S. 55, 72 W.W.R. 35, 2 C.C.C. (2d) 227, 9 D.L.R. (3d) 398, 1970 CarswellAlta 61 (S.C.C.) — referred to

R. v. Peterman (2004), 2004 CarswellOnt 1694, 185 C.C.C. (3d) 352, 70 O.R. (3d) 481, 19 C.R. (6th) 258, 186 O.A.C. 83, 119 C.R.R. (2d) 7 (Ont. C.A.) — referred to

R. v. Rowbotham (1988), 25 O.A.C. 321, 35 C.R.R. 207, 1988 CarswellOnt 58, 41 C.C.C. (3d) 1, 63 C.R. (3d) 113 (Ont. C.A.) — considered

R. v. Rushlow (2009), 96 O.R. (3d) 302, 245 C.C.C. (3d) 505, 66 C.R. (6th) 245, 250 O.A.C. 75, 2009 ONCA 461, 2009 CarswellOnt 3163 (Ont. C.A.) — considered

R. v. Vescio (1948), 6 C.R. 433, 92 C.C.C. 161, [1949] 1 D.L.R. 720, [1949] S.C.R. 139, 1948 CarswellMan 1 (S.C.C.) — referred to

Smith v. Jones (1999), 132 C.C.C. (3d) 225, 169 D.L.R. (4th) 385, 22 C.R. (5th) 203, (sub nom. *Jones v. Smith)* 60 C.R.R. (2d) 46, (sub nom. *Jones v. Smith)* 236 N.R. 201, 1999 CarswellBC 590, 1999 CarswellBC 591, [1999] 1 S.C.R. 455, (sub nom. *Jones v. Smith)* 120 B.C.A.C. 161, (sub nom. *Jones v. Smith)* 196 W.A.C. 161, 62 B.C.L.R. (3d) 209, [1999] 8 W.W.R. 364, 1999 SCC 16 (S.C.C.) — considered

Young v. Young (1993), [1993] 8 W.W.R. 513, 108 D.L.R. (4th) 193, 18 C.R.R. (2d) 41, [1993] 4 S.C.R. 3, 84 B.C.L.R. (2d) 1, 160 N.R. 1, 49 R.F.L. (3d) 117, 34 B.C.A.C. 161, 56 W.A.C. 161, [1993] R.D.F. 703, 1993 CarswellBC 264, 1993 CarswellBC 1269 (S.C.C.) — considered

Statutes considered:

Code de procédure civile, L.R.Q., c. C-25
art. 249 — referred to

Criminal Code, R.S.C. 1985, c. C-46
Generally — referred to

s. 537(1) — referred to

s. 674 — referred to

s. 784(1) — referred to

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

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

APPEAL by Crown from judgment reported at *Cunningham v. Lilles* (2008), 2008 CarswellYukon 42, 2008 YKCA 7, 257 B.C.A.C. 1, 432 W.A.C. 1, 59 C.R. (6th) 49 (Y.T. C.A.), finding that preliminary inquiry judge had no discretion to refuse withdrawal of accused's counsel for non-payment of fees.

POURVOI du ministère public à l'encontre d'un jugement publié à *Cunningham v. Lilles* (2008), 2008 CarswellYukon 42, 2008 YKCA 7, 257 B.C.A.C. 1, 432 W.A.C. 1, 59 C.R. (6th) 49 (Y.T. C.A.), ayant conclu que le juge de l'enquête préliminaire n'avait aucune discrétion pour refuser la demande de l'avocate de l'accusé pour cesser d'occuper en raison du défaut de paiement des honoraires.

***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 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,* R. v. Morgan, *2006 YKTC 61 (Y.T. Terr. Ct.)

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

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

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 (Y.T. C.A.)

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

7 The Court of Appeal allowed the appeal, finding that Lilles Terr. Ct. J. had no discretion to refuse withdrawal. It reached its conclusion on the basis of three factors. First, the law society has the primary interest in lawyer regulation and court oversight of withdrawal could create a conflict between the court's decision and any disciplinary decision by a law society. Second, the court's supervision of withdrawal potentially threatens solicitor-client privilege in cases where counsel is asked to disclose the reasons for wishing to withdraw. Third, compelled representation puts counsel in the position of a perceived or actual conflict between the client's best interest and the lawyer's interest in ending the matter as quickly as possible. It determined the better approach to withdrawal was to rely on the assumption that lawyers generally do not avoid their professional obligations and, if they do, then the law societies will take appropriate disciplinary action. The court acknowledged, however, that a court could use its contempt power "in extreme circumstances where a lawyer's conduct in connection with a withdrawal amounted to a

serious affront to the administration of justice" (para. 29). The court concluded that Lilles Terr. Ct. J. should not have ordered Ms. Cunningham to continue to represent Mr. Morgan.

4. Issue

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

5. Analysis

9 An accused has an unfettered right to discharge his or her legal counsel at any time and for any reason. A court may not interfere with this decision and cannot force counsel upon an unwilling accused (see *R. v. Vescio* (1948), [1949] S.C.R. 139 (S.C.C.), 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 *Leask v. Cronin* (1985), 18 C.C.C. (3d) 315 (B.C. S.C.). In *Leask*, the court, on an application for an order in the nature of prohibition, found that a provincial court judge has no right in law to order counsel to continue to represent an accused. McKay J. found that this conclusion recognized the role of a strong and independent bar and that the role of disciplining lawyers is vested in the law societies, not the court. He found that the relationship between a solicitor and client is a contractual one and that once the client breaches the contract, the solicitor is entitled to repudiate and bring the contract to an end. McKay J. was also concerned about potential infringements of solicitor-client privilege, which he thought may arise if counsel must disclose the reasons for withdrawal. Although lawyers may ask for leave, McKay J. found this was a matter of "politeness and courtesy" (p. 325), the court having no discretionary power to refuse.

12 I would note that the issue in *Leask* did not arise from non-payment of fees, like the present appeal, but rather from a breakdown in the solicitor-client relationship. Nonetheless, subsequent British Columbia jurisprudence has relied on *Leask* as a basis for finding that the court is not empowered to refuse counsel's request to withdraw for any reason (see also *Luchka v. Zens* (1989), 37 B.C.L.R. (2d) 127 (B.C. C.A.)), at p. 129, *R. v. Ho*, 2003 BCCA 663, 21 B.C.L.R. (4th) 83 (B.C. C.A.), at para. 19, *R. v. Huber*, 2004 BCCA 43, 192 B.C.A.C. 75 (B.C. C.A.), 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. Creasser* (1996), 110 C.C.C. (3d) 323 (Alta. C.A.), leave to

appeal refused, [1997] S.C.R. vii (S.C.C.)), has received the most attention. In *Creasser*, the Alberta Court of Appeal determined that in addition to counsel's contractual obligations to the client, a lawyer is also an officer of the court. It is in this capacity that counsel owes a duty to the court to "attend before a judge when requested" and "not to walk out on a client in the middle of a trial" (p. 327). So long as counsel has not expressed that he or she appears on a limited retainer, the court may refuse to grant a request to withdraw.

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

15 The Manitoba Court of Appeal has also considered the court's power to refuse counsel's request to withdraw for non-payment of fees: *R. v. Deschamps*, 2003 MBCA 116, 177 Man. R. (2d) 301 (Man. C.A.). 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 c. 9006-1474 Québec inc.* (Que. C.A.); 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. Saskatchewan (Minister of Justice)* (1995), 128 Sask. R. 142 (Sask. C.A.), at para. 4; *R. v. Brundia*, 2007 ONCA 725, 230 O.A.C. 29 (Ont. C.A.), at para. 44; *R. v. Peterman* (2004), 70 O.R. (3d) 481 (Ont. C.A.), at para. 38) as have trial courts in New Brunswick and Newfoundland (*R. v. Golding*, 2007 NBQB 320, 325 N.B.R. (2d) 92 (N.B. Q.B.), at paras. 18 and 20; *Dooling v. Banfield* (1978), 22 Nfld. & P.E.I.R. 413 (Nfld. Dist. Ct.)), at para. 27).

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

B. Jurisdiction of the Court

18 Superior courts possess inherent jurisdiction to ensure they can function as courts of law and fulfil their mandate to administer justice (see I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Legal Probs.* 23, at pp. 27-28). Inherent jurisdiction includes the authority to control the process of the court, prevent abuses of process, and ensure the machinery of the court functions in an orderly and effective manner. As counsel are key actors in the administration of justice, the court has authority to exercise some control over counsel when necessary to protect its process. In *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 (S.C.C.), 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 & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 (S.C.C.), at para. 51)

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

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

C. Exercise of Jurisdiction

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

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

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

24 I will address each of these arguments in turn.

(1) Solicitor-Client Privilege

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

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

27 However, revealing that an accused has not paid his or her fees does not normally touch on the *rationale* for solicitor-client privilege in the criminal context. A client must be able to rely on the confidentiality of the communications made between lawyer and client because only then can there be full and frank discussion of the facts of the case, and the giving and receiving of soundly based legal advice (see *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644 (Eng. 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 c. Mierzwinski*, [1982] 1 S.C.R. 860 (S.C.C.), and *Maranda c. Québec (Juge de la Cour du Québec)*, 2003 SCC 67, [2003] 3 S.C.R. 193 (S.C.C.), where this Court held that, in the context of a law office search, an accused's financial and fee information may be privileged. In *Maranda*, the Court was concerned that fee information, specifically the amount of fees and disbursements, may appear to be "neutral" when in fact disclosure of the information could be prejudicial to the accused. In particular, LeBel J. stated that fee information

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

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

29 Counsel seeking to withdraw for non-payment of legal fees is a decidedly different context from a police search of counsel's accounts and records. The most significant difference is the content of the information being disclosed. The only information revealed by counsel seeking to withdraw is the sliver of information that the accused has not paid or will not be paying fees. It has not been explained how, in this case, this sliver of information could be prejudicial to the accused. Indeed, it is hard to see how this simple fact alone could be used against the accused on the merits of the criminal proceeding: it is unrelated to the information given by the client to the lawyer, and unrelated to the advice given by the lawyer to the client. It would not be possible to infer from the bare fact of non-payment of fees any particular activities of the accused that pertain to the criminal charges against him.

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

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

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

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

34 However, lawyers are presumed to know and respect their professional obligations. Judges are presumed to know the law (*R. v. B. (R.H.)*, [1994] 1 S.C.R. 656 (S.C.C.), at p. 664, *per* McLachlin J. (as she then was)). The integrity of the administration of justice rests on these assumptions. Delicate matters frequently come before courts. For example, although the initial decision not to produce a potentially privileged document is that of counsel, a judge may have to decide whether the document is in fact privileged. The remote possibility of inadvertent disclosure in the course of that proceeding does not mean that the ultimate decision must be left solely to counsel in disputed cases. I am of the view that the same is true with respect to withdrawal for non-payment of legal fees in criminal matters. The remote possibility that a judge will inappropriately attempt to elicit privileged information in hearing the application does not justify leaving the decision to withdraw exclusively to counsel.

(2) Exclusive Law Society Oversight

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

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

> A lawyer may withdraw upon reasonable notice to the client when justified by the circumstances. Circumstances that may justify, but not require, withdrawal include the following:
>
> > (a) the client fails after reasonable notice to provide funds on account of fees or disbursements in accordance with the agreement made with the lawyer; .... [c. 14, r. 1]

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

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

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

> The lawyer owes a duty to the client not to withdraw services except for good cause and upon notice appropriate in the circumstances.
>
> (*Code of Professional Conduct* (2009), c. XII)

The commentary to the rule states:

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

38 While the court is not bound to apply law society or Canadian Bar Association codes of professional conduct, these codes "should be considered an important statement of public policy" (*MacDonald Estate*, at p. 1246). These standards complement the court's discretion to refuse withdrawal where the effects on the administration of justice will be severe. For example, the Canadian Bar Association rules recognize the distinct, yet complementary, nature of the functions served by the court and law societies:

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

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

39 Ms. Cunningham and the interveners submit that court supervision over withdrawal threatens the independence of the bar. As I note above, lawyers are intimately involved in the administration of justice. I do not agree that an exceptional constraint on counsel, necessary to protect the integrity of the administration of justice, threatens counsel's independence. For instance, McLachlin J. in *Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.), 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 *Creasser* in 1996. There is no suggestion that this practice affects the independence of the Alberta bar. Finally, all law society rules recognize that an independent bar has obligations beyond those owed to clients. Lawyers must comply with their professional obligations to the administration of justice and the public; these obligations do not undermine counsel's independence (see, for example: Law Society of Yukon, Parts Two and Three; Law Society of Upper Canada, rr. 4 and 6; Law Society of Alberta, c. 1; Law Society of British Columbia, c. 1).

(3) Conflict of Interest

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

(4) Rowbotham Orders

41 The interveners, the Law Society of Yukon, Criminal Lawyers' Association and Attorney General of Ontario, directed the Court's attention to *Rowbotham* orders. In *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.), 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 (at p. 69).

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

43 That said, a *Rowbotham* order could not be a complete substitute to the court's authority to refuse counsel's request to withdraw. As stated by the Ontario Court of Appeal in *R. v. Rowbotham*, at p. 69, and later in *R. v. Rushlow*, 2009 ONCA 461, 245 C.C.C. (3d) 505 (Ont. C.A.), 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 affect on others is the determinative factor in an application for withdrawal for non-payment of fees, a *Rowbotham* order does nothing to address this concern and may even exacerbate it. A *Rowbotham* order requires a separate motion where an accused must satisfy rigorous criteria in order to succeed. A *Rowbotham* order might be relevant to the court's residual discretion to refuse withdrawal, but it cannot operate as a replacement to it.

(5) Remedy of Last Resort

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

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

D. Refusing Withdrawal

46 The court's exercise of discretion to decide counsel's application for withdrawal should be guided by the following principles.

47 If counsel seeks to withdraw far enough in advance of any scheduled proceedings and an adjournment will not be necessary, then the court should allow the withdrawal. In this situation, there is no need for the court to enquire into counsel's reasons for seeking to withdraw or require counsel to continue to act.

48 Assuming that timing is an issue, the court is entitled to enquire further. Counsel may reveal that he or she seeks to withdraw for ethical reasons, non-payment of fees, or another specific reason (e.g. workload of counsel) if solicitor-client privilege is not engaged. Counsel seeking to withdraw for ethical reasons means that an issue has arisen in the solicitor-client relationship where it is now impossible for counsel to continue in good conscience to represent the accused. Counsel may cite "ethical reasons" as the reason for withdrawal if, for example, the accused is requesting that counsel act in violation of his or her professional obligations (see, e.g., Law Society of Upper Canada, r. 2.09(7)(b), (d); Law Society of Alberta, c. 14, r. 2; Law Society of British Columbia, c. 10, r. 1), or if the accused refuses to accept counsel's advice on an important trial issue (see, e.g., Law Society of Upper Canada, r. 2.09(2); Law Society of Alberta, c. 14, r. 1; Law Society of British Columbia, c. 10, r. 2). If the real reason for withdrawal is non-payment of legal fees, then counsel cannot represent to the court that he or she seeks to withdraw for "ethical reasons". However, in either the case of ethical reasons or non-payment of fees, the court must accept counsel's answer at face value and not enquire further so as to avoid trenching on potential issues of solicitor-client privilege.

49 If withdrawal is sought for an ethical reason, then the court must grant withdrawal (see *Creusser*, at p. 328, and *Deschamps*, at para. 23). Where an ethical issue has arisen in the relationship, counsel may be *required* to withdraw in order to comply with his or her professional obligations. It would be inappropriate for a court to require counsel to continue to act when to do so would put him or her in violation of professional responsibilities.

50 If withdrawal is sought because of non-payment of legal fees, the court may exercise its discretion to refuse counsel's request. The court's order refusing counsel's request to withdraw may be enforced by the court's contempt power (*Creasser*, at p. 327). In exercising its discretion on the withdrawal request, the court should consider the following non-exhaustive list of factors:

- whether it is feasible for the accused to represent himself or herself;
- other means of obtaining representation;
- impact on the accused from delay in proceedings, particularly if the accused is in custody;
- conduct of counsel, e.g. if counsel gave reasonable notice to the accused to allow the accused to seek other means of representation, or if counsel sought leave of the court to withdraw at the earliest possible time;
- impact on the Crown and any co-accused;
- impact on complainants, witnesses and jurors;
- fairness to defence counsel, including consideration of the expected length and complexity of the proceedings;
- the history of the proceedings, e.g. if the accused has changed lawyers repeatedly.

As these factors are all independent of the solicitor-client relationship, there is no risk of violating solicitor-client privilege when engaging in this analysis. On the basis of these factors, the court must determine whether allowing withdrawal would cause serious harm to the administration of justice. If the answer is yes, withdrawal may be refused.

51 Harm to the administration of justice is not simply administrative inconvenience as the interveners suggest. Harm to the administration of justice recognizes that there are other persons affected by ongoing and prolonged criminal proceedings: complainants, witnesses, jurors and society at large. Because of this, I would respectfully observe that the consideration suggested by the Alberta Court of Appeal in *Creasser* of whether allotted court time can be otherwise usefully filled is not a relevant consideration in this balancing of interests.

52 The Manitoba Court of Appeal's decision in *Deschamps* offers a useful example of the appropriate exercise of the court's discretion. Defence counsel was representing the offender in a dangerous offender proceeding. Five days into the proceeding counsel requested an adjournment to allow the offender to be assessed for and receive treatment. The matter was remanded for approximately eight months. During this time difficulties arose with legal aid funding. Because the dangerous offender proceedings were of high complexity, counsel was initially promised a higher fee than provided by the regular tariff. "Financial difficulties" called into question Legal Aid's ability to follow through with the commitment to a higher fee. Defence counsel sought to withdraw due to Legal Aid's alleged breach of contract.

53 The motions judge determined that there was no breach of contract. However, she found that even if there had been a breach, she would have refused counsel's request to withdraw. In the Court of Appeal, Steel J.A. upheld this decision. She agreed with the motions judge that the factors relevant to denying withdrawal were: the proceeding was serious and complex, the offender could not represent himself, the proceeding had already begun, there was no immediate prospect of obtaining another lawyer, and the offender was a difficult client who had finally developed a relationship of trust and confidence with this particular counsel. The Court of Appeal agreed with the motions judge that further delay would have resulted from allowing withdrawal and would have caused serious prejudice to the offender. The Court of Appeal noted that after the initial motion, Legal Aid ensured that fees would still be paid, just not at the higher rate. Counsel's application to withdraw was refused.

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

E. Procedure to Review a Decision Refusing Withdrawal

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

56 There is some question as to how the matter would have proceeded had it originated in a superior court. Both the Alberta and Manitoba Courts of Appeal have found that they do not have jurisdiction over appeals of withdrawal applications from superior courts (*Creasser*, 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 (S.C.C.). *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 (*R. v. Patterson*, [1970] S.C.R. 409 (S.C.C.), at p. 413; *R. v. Dubois*, [1986] 1 S.C.R. 366 (S.C.C.), at p. 380;*R. v. DesChamplain*, 2004 SCC 76, [2004] 3 S.C.R. 601 (S.C.C.), at para. 17). This high threshold for review is premised on the fact that a preliminary inquiry does not result in a final determination of guilt or innocence; therefore, there is less need for broad supervisory remedies (*Dubois*, at pp. 373-74). However, a lawyer seeking withdrawal is not analogous to a committal or discharge at a preliminary inquiry; it is more closely analogous to *Dagenais*, a third-party application. The judge at first instance has the authority to make an immediate and final determination on counsel's application to withdraw. As noted by Steel J.A. in *Deschamps*, refusing an application to withdraw is a coercive and conclusive order with respect to the lawyer (para. 38). Therefore, in this context an order in the nature of *certiorari* should be given its normal scope and can be allowed where there is an error of jurisdiction or an error of law on the face of the record (*Dagenais*, at pp. 864-65).

58 Because the authority to supervise the conduct of counsel falls within the inherent or necessarily implied jurisdiction of the court, it is difficult to see how a decision to refuse withdrawal could amount to a jurisdictional error. However, it would be open for counsel to argue that the provincial or territorial court judge committed an error of law on the face of the record. Such errors would include, for example, refusing withdrawal when counsel seeks to withdraw for ethical reasons, or failing to consider a relevant factor when exercising discretion over withdrawal for nonpayment of fees (see *R. v. Canadian Broadcasting Corp.*, 2008 ONCA 397, 231 C.C.C. (3d) 394 (Ont. C.A.), at para. 26, and *Ottawa Citizen Group Inc. v. Ontario* (2005), 75 O.R. (3d) 590 (Ont. C.A.), at para. 49).

6. Conclusion

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

7. Disposition

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

Appeal allowed.

Pourvoi accueilli.

Footnotes

* A corrigendum issued by the Court on May 7, 2010 has been incorporated herein.

ONTARIO ENERGY BOARD **EB-2014-0116**

IN THE MATTER OF the *Ontario Energy Board Act 1998*, Schedule B to the *Energy Competition Act*, 1998, S.O. 1998, c.15;

AND IN THE MATTER OF an Application by Toronto Hydro-System Electric Limited for an Order or Orders approving just and reasonable rates and other charges for electricity distribution to be effective May 1, 2015.

ONTARIO ENERGY BOARD

BOOK OF AUTHORITIES
RE MOTION AND CROSS MOTION
OF THE CANADIAN ELECTRICITY ASSOCIATION
(Re: School Energy Coalition's Notice of Motion dated December 19, 2014)

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