

# Court of Queen's Bench of Alberta

**Citation: R. v. Karmis, 2008 ABQB 525**

**Date:** 20080825  
**Docket:** 060196128U1  
**Registry:** Calgary

Between:

**Her Majesty the Queen**

Respondent  
(Crown)

- and -

**Alex Karmis**

Applicant  
(Accused)

---

**Reasons for Judgment  
of the  
Honourable Mr. Justice A.D. Macleod**

---

[1] This is an appeal and a concurrent application for a constitutional remedy and for certiorari against an order the Honourable Judge McIlhargey, who disqualified Richard Gariepy as the Applicant's counsel of record.

## **I. Background**

[2] On or about December 17, 2005, an incident took place at a Christmas party attended by the Applicant Alex Karmis and, as a result, Mr. Karmis was charged with assault causing bodily harm. Also present at the Christmas party that night was Mr. Richard Gariepy, a friend of Mr. Karmis. Mr. Gariepy was subsequently retained by Mr. Karmis to act as his counsel in connection with the assault charge. The Crown proceeded summarily, Mr. Karmis entered a plea of not guilty and a trial date of April 10, 2007 was set in the Provincial Court in Cochrane.

[3] In the course of pre-trial discussions with Crown counsel, Mr. Gariepy disclosed that he had been present at the Christmas party, and though he did not witness the incident giving rise to the assault charge, he had observed the complainant to be intoxicated. Following the pre-trial discussion between Mr. Gariepy and the Crown, Crown counsel sought an adjournment of this matter because it contended that Mr. Gariepy was not in a position to conduct the defence, due to an alleged conflict of interest. Neither the Crown nor the investigating authorities have asked Mr. Gariepy for a witness statement.

[4] The matter came before Judge Reilly of the Provincial Court on May 8, 2007. Judge Reilly recommended that the matter be referred to the Law Society of Alberta. Further adjournments were ordered as the matter proceeded before the Law Society. At a hearing before Judge McIlhargey of the Provincial Court, on August 14, 2007, Mr. Gariepy indicated that the parties had spoken with Mr. Ross McLeod Q.C. of the Law Society. Mr. McLeod said that Mr. Karmis should seek independent legal advice and that, otherwise, this was not a matter for the Law Society. This did not satisfy the Crown, which proceeded on August 14, 2007 with a motion to have Mr. Gariepy removed as trial counsel for Mr. Karmis.

[5] Prior to the hearing of August 14, 2007, Judge McIlhargey had not been provided with notice of the application to remove Mr. Gariepy. Nor had he been provided with briefs or copies of the relevant authorities. Nevertheless, after a brief adjournment, the matter proceeded. The Crown advised Judge McIlhargey that it did not intend to call Mr. Gariepy as a witness at trial, and Mr. Gariepy advised that he had no intention of appearing as a witness for the defence. The Crown argued that the application to have a solicitor removed as counsel of record involved both the consideration of real and potential conflict of interest. The Crown submitted that the test was whether there is a possibility of real mischief associated with the representation of the accused by the solicitor. The Crown contended that there was a potential for a conflict of interest arising out of the representation of Mr. Karmis by Mr. Gariepy, arguing that Mr. Gariepy could have personal knowledge that might counter that of a testifying witness and that he might say something to a witness arising out of his own personal knowledge of the incident that could give rise to a mistrial. Crown counsel conceded that he could not provide a specific example of how this might occur, but argued that the potential existed and, in light of what the Crown submitted was a low threshold, it would be appropriate to remove Mr. Gariepy.

[6] Near the end of his submissions, counsel for the Crown proposed to review the authorities submitted by Mr. Gariepy, but the Provincial Court Judge advised that would not be necessary, as Mr. Gariepy could speak to them. After hearing submissions from the Crown, and before Mr. Gariepy could address the matter on the merits, the Provincial Court Judge said:

Mr. Gariepy, it seems to me the Crown is entitled to have you removed as counsel on all three grounds of the – they have mentioned. There is a very real risk of prejudice to the Crown, it seems to me.

Apart from an advertent or inadvertent comment at trial or in cross-examination, certainly the Crown risks a very real prejudice that there may be a successful

appeal based on your representation of this individual, by the individual himself and alternate counsel, regardless of your best intentions.

Certainly if he is convicted and it is determined that there was a real conflict during the proceedings – but in any event, I will hear your cases, sir.

[7] Mr. Gariepy advised the Court that he took a very different view. In response, the Provincial Court Judge said:

Well, it seems to me that the Crown has already sustained prejudice. There has been no witness statement provided by you and certainly it seems to me they are entitled to do that. Based on that, they may be entitled to call you as a witness at trial.

Depending on how the trial unfolds, they may wish to call you as a witness at trial and may be precluded in doing that. Depending on how the trial unfolds, you may wish to testify on behalf, or you may be required to testify on behalf of the accused person.

[8] There followed an extended debate between Mr. Gariepy and the Provincial Court Judge. Mr. Gariepy reiterated that he had not witnessed the incident itself, that he had not been interviewed by police or the Crown, and that he did not intend to be a witness for the defence. He raised the issue of Section 10 of the Charter, but the Provincial Court Judge did not engage him on this point. Instead, Mr. Gariepy and the Provincial Court Judge debated whether Mr. Gariepy was a witness or a potential witness, and whether there was a real possibility of mischief arising out of his acting as counsel for Mr. Karmis. Eventually, Mr. Gariepy told the Provincial Court Judge that it was obvious to him that the Judge had made his ruling and ceased to advance his argument. He said:

I just want, for the record, to say that I don't believe your Honour heard me, but you made a ruling clearly to me that need – further argument from me was not going to change your mind, sir. I just want that to be on the record.

[9] The Provincial Court Judge responded by inviting Mr. Gariepy to make further submissions, but Mr. Gariepy declined. There was no discussion of the authorities submitted by Mr. Gariepy in support of his position. After the Crown made some brief additional submissions, the Provincial Court Judge provided oral reasons for judgment. He found that Mr. Gariepy was a potential witness at trial and that there was a potential conflict of interest if Mr. Gariepy was required to testify. He held that Mr. Gariepy's representation of Mr. Karmis at trial would cast the administration of justice in an unfavourable light, though it appears he concluded that this alone would not be sufficient grounds to disqualify him. Finally, looking to the decision of Wachowich J. (as he then was) of this Court in *R. v. Parmar* (1991), 126 A.R. 47 (Q.B.) the Provincial Court Judge found that representation of the accused by counsel who was a witness to the incident was poor practise and grounds for disqualification.

## II. Authorities Relied Upon by the Provincial Court Judge

[10] In coming to the conclusion that Mr. Gariepy should be removed as trial counsel, the Provincial Court Judge appears to have relied upon four authorities put to him by the Crown. In *R. v. Widdifield*, [1995] O.J. No. 2383 (C.A.), which dealt with joint representation of a husband and wife co-accused, Doherty J.A. held, at para. 33:

Where the issue is raised at trial, the court must be concerned with actual conflicts of interests and potential conflicts that may develop as the trial unfolds. In deciding whether counsel should be permitted to act for co-accused, trial judges must, to some degree, speculate as to the issue which may arise and the course the trial will take. The trial judges' task is particularly difficult since they cannot be privy to the confidential discussions which may have passed between the clients and counsel and which may reveal the source of potential conflicts. Given those circumstances, trial judges must proceed with caution and when there is any realistic risk of a conflict of interests they must direct that counsel not act for one or perhaps either accused.

[11] In *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, the conflict arose in the context of a counsel from one firm to another, and the risk of misuse of confidential information. Sopinka J. concluded that, in this context a "probability of mischief" threshold was insufficiently stringent, and held at para. 47:

...the test must be such that the public, represented by the reasonably-informed person, would be satisfied that no use of confidential information would occur. That, in my opinion, is the overriding policy that applies and must inform the court in answering the question: is there a disqualifying conflict of interest?

[12] The Provincial Court Judge also pointed to the decision of Wachowich J. in *Parmar*. In that case the accused's lawyer had been involved in breaking up a fight and went on to defend the accused at trial. After he was convicted, the accused appealed on the basis that his counsel had put himself in the position of both witness and advocate and could not properly represent him. Wachowich J. found this to be insufficient grounds for appeal, but noted, at para. 8:

It certainly would have been advisable for trial counsel in this case not to have acted as advocate. Good practise dictates that trial counsel not represent the accused if counsel is a potential witness. However, while deviation from good practise is inappropriate, it is not always sufficient grounds upon which to base a successful appeal. In the present case counsel could not be classified as an essential witness, nor was counsel unavailable as a witness for the opposition as a result of being an advocate in the proceedings... A potential prejudice to the accused based upon a potential conflict of interest at trial is an insufficient ground for an appeal...

[13] Finally, the Provincial Court Judge looked to *National Trust Co. Ltd. v. Palace Theatre Ltd.* (1928), 23 Alta. L.R. 427 (App.Div.). In that case, counsel for the appellant had been a witness at trial and was a director of the appellant corporation. Harvey C.J.A. noted, at p. 436:

Though we heard Mr. Barron as counsel, notwithstanding that he had been a witness, it should not be taken as a precedent for a disregard of the rule - a most salutary one - that a barrister who has been a witness should not thereafter act as counsel, which rule should not be departed from unless for special reasons.

### **III. Proceedings Brought by the Accused**

[14] Mr. Karmis has appealed the decision of the Provincial Court Judge. In addition, he has brought two separate but concurrent applications: an application for relief pursuant to s.24(1) of the Charter, and an application for judicial review by way of certiorari.

### **IV. Is the Decision Subject to Appeal?**

[15] It has been clear since the decisions of the Supreme Court of Canada in *R. v. Mills*, [1986] 1 S.C.R. 863 and *R. v. Meltzer*, [1989] 1 S.C.R. 1764 that criminal appeals are statutory and as such must follow the procedure set out in the Criminal Code. The relevant provisions of the Code have long been interpreted to preclude interlocutory appeals: *Mills*, at para. 15.

[16] In argument, counsel for Mr. Karmis relied upon s.830 of the Criminal Code, which provides:

830 (1) Appeals - A party to proceedings to which this Part applies or the Attorney General may appeal against a conviction, judgment, verdict of acquittal or verdict of not criminally responsible on account of mental disorder or of unfit to stand trial or other final order or determination of a summary conviction court on the ground that

- (a) it is erroneous in point of law;
- (b) it is in excess of jurisdiction; or
- (c) it constitutes a refusal or failure to exercise jurisdiction.

[17] The Crown contended that the appropriate provision of the Criminal Code is s.813 (a):

813. Appeal by defendant, informant or Attorney General - Except where otherwise provided by law,

(a) the defendant in proceedings under this Part may appeal to the appeal court

- (i) from a conviction or order made against him;
- (ii) against a sentence passed on him; or
- (iii) against a verdict of unfit to stand trial or not criminally responsible on account of mental disorder...

[18] Counsel for Mr. Karmis contends that the order made by the Provincial Court Judge was (a) a final order and; (b) a determination of a summary conviction court within the meaning of s.830. He further submits that the decision was erroneous in law and in excess of jurisdiction as a result of the Provincial Court Judge's failure to entertain argument from Mr. Gariepy with an open mind and an absence of any evidence upon which he could conclude that there was a conflict.

[19] In *R. v. Druken*, [1998] 1 S.C.R. 978 the Supreme Court of Canada considered whether the decision to remove defence counsel was truly interlocutory and therefore not subject to appeal under s.675 of the Criminal Code. A majority of the Newfoundland Court of Appeal had concluded that there was no connection between the ruling appealed from and the trial itself and that the issue was not, therefore, truly interlocutory. In a very brief, unanimous decision, the Supreme Court disagreed, expressly approving the decision of Cameron J.A. in dissent. Cameron J.A. held, in *R. v. Druken*, [1997] N.J. No. 231 (C.A.) at para. 29:

Further, with respect, I must disagree with my brother O'Neill's finding that the order removing counsel is a final order. While the decisions respecting what is an interlocutory order and what is a final order result in a morass of inconsistent opinion, there are core principles. Here, the order does not determine the real issue but only a collateral matter. It can certainly be said to be final in respect of that collateral matter but is not determinative of the matter before the court and therefore, in my view, is interlocutory.

[20] The appeal provision at issue in *Druken* was s.675, which governs appeals from indictable offences, not summary convictions. The language used in s.675, s.813 and s.830 varies somewhat. Section 675 makes no reference to "an order" as s.813 does; s.830 refers to a "final order or determination."

[21] Though the language varies, I am not satisfied that it yields different interpretations, at least as far as an interlocutory appeal is concerned. Counsel for Mr. Karmis suggested in argument that there is a distinction to be drawn between a "final order" and a "determination" under s.830, but in my view the better interpretation is that the word "final" applies to any order or determination under appeal. While s.813 does not use the word "final", that section has been interpreted to be apply only to final orders: *R. v. Leitner* (1998), 173 Sask. R. 269 (Q.B.); *R. v. Oikle* (1994), 93 C.C.C. (3d) 481 (N.S.S.C.); *R. v. Ironeagle*, 202 Sask. R. 268 (Q.B.). As a consequence of the Supreme Court's endorsement of the decision of Cameron J.A. in *Druken*, the only proper conclusion is that the decision to remove counsel is not a final decision; it is interlocutory and as such is not subject to appeal under s.813 or s.830 of the Criminal Code.

## V. Is the Order to Remove Counsel Subject to Section 24(1) Charter Relief?

[22] S. 24. (1) of the *Canadian Charter of Rights and Freedoms* provides:

Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[23] Counsel for Mr. Karmis submits that this is an appropriate case for the Court to provide relief for the breach of Mr. Karmis' s.7 and/or s.10(b) Charter right to choice of counsel. In alternative to the appeal, he has brought an original application for Charter relief against the decision of the Provincial Court Judge. The Crown relies upon the decisions in *Mills*, *Meltzer* and *Druken* and contends that this Court has no jurisdiction to hear the application for Charter relief because Mr. Karmis is restricted to the appellate avenues set out in the Criminal Code. It is important to carefully consider what the Supreme Court decided in *Mills* and *Druken*.

[24] In *Mills*, the accused sought to have the charges against him stayed before the preliminary hearing judge and, when that application was denied, applied to the Supreme Court of Ontario as a superior court of general jurisdiction for a remedy under s.24(1) and as a superior court in its supervisory capacity by way of certiorari. The majority in the Supreme Court of Canada concluded that the provincial court judge presiding over the preliminary inquiry did not have jurisdiction to grant Charter relief, though a provincial court judge presiding over the trial would have the requisite jurisdiction. The majority also concluded that the Ontario Supreme Court did not err in refusing relief under s.24(1) of the Charter, but not because the Ontario Supreme Court did not have the jurisdiction to grant relief. Instead, the majority concluded that superior courts have concurrent jurisdiction along with trial (provincial) courts to deal with Charter claims. McIntyre J. (Beetz and Chouinard JJ. concurring) held, at para. 11:

[The Superior Court] will always be a court of competent jurisdiction under s.24(1) of the Charter at first instance, that is to say, in cases where the issue arises in matters proceeding before it or where the proceeding originated in that court because of the absence of another forum with jurisdiction. The superior court will, of course, continue to have jurisdiction as a reviewing court where prerogative claims are advanced. The superior court jurisdiction will not displace that of other courts of limited jurisdiction. Considerations of convenience, economy and time will dictate that remedies under s.24(1) will ordinarily be sought in the courts where the issue arise. Save for cases originating and proceeding in the superior court, resort to it will be necessary only where prerogative relief is sought.

Lamer J, dissenting with Dickson C.J.C., held at paras. 104 - 106:

In recognizing both original and supervisory jurisdictions in superior courts with respect to s.24(1) applications I am seeking to give effect to the basic proposition

that there should always be a court of competent jurisdiction to award such relief as is just and appropriate in the circumstances.

At the same time, however, superior courts will rarely be the only competent court. As a general rule it is the trial court that is not only competent *but to be preferred in matters arising under the Charter*. Viewed in this light, an unrestrained exercise of this jurisdiction by superior court judges is undesirable, in that it could only give way to unnecessary delay or disruption of proceedings.

For these reasons it is necessary that superior courts have a discretion to decline jurisdiction where there is a trial court and that court is competent to award just and appropriate relief. In this way it can be assured that the jurisdiction of superior courts will be invoked only where there is a need for such jurisdiction. The clearest, though not necessarily only, instances when there is a need for the exercise of such jurisdiction have already been suggested: when there is as yet no trial court within reach, and the timeliness of the remedy or the need to prevent a continuing violation of rights is shown; or when it is the process below which is itself alleged to be in violation of the Charter's guarantees, e.g. an allegation of bias in the court below.

[25] La Forest J., who agreed with McIntyre J. that a preliminary hearing magistrate was not a court of competent jurisdiction within the meaning of s.24(1), also agreed with Lamer J. and Dickson C.J.C. in respect of superior court jurisdiction, holding at para. 326:

...[I]t is the Charter that governs, and if the ordinary procedures fail to meet the requirements of the Charter fully then a means must be found to give it life... The problem does not directly arise here, of course, because the Charter by s.24(1) provides that a court of competent jurisdiction may provide such remedy as it considers appropriate and just in the circumstances. But there must at all times be a court to enforce this remedy. The notion that the remedy must fail or be ineffective for lack of a competent court within the confines of the ordinary procedures for the administration of criminal justice can no more be imagined than can the notion of a right without a remedy. While, therefore, the trial court will ordinarily be the appropriate court to grant the remedy, situations can arise where a trial court has not yet been set at the time when a remedy is required, or where a court is an inappropriate forum to seek a remedy because it is itself implicated in the breach of a constitutional right. In such cases, the competent court must be the superior court of the province in the exercise of its inherent jurisdiction. To this extent, I agree with Lamer J. on this issue.

[26] Wilson J., dissenting, also expressed her agreement with Lamer J's treatment of the jurisdictional issue, at para. 312. *Mills*, therefore, does not stand for the proposition that the trial court enjoys exclusive jurisdiction in respect of constitutional claims arising out of a proceeding before that court; instead the majority of the Supreme Court in *Mills* clearly endorsed the

principle of concurrent jurisdiction, though cautioned that the superior court should exercise discretion when invoking its jurisdiction.

[27] In *Druken*, the Supreme Court expressed “substantial agreement” with the dissenting reasons of Cameron J.A. of the Newfoundland Court of Appeal. Cameron J.A. concluded that there was no right to appeal the decision of the Trial Division of the Superior Court to the Newfoundland Court of Appeal outside of s.674 of the Criminal Code. Cameron J.A. further noted that the Court of Appeal did not have jurisdiction to grant a prerogative remedy in respect of orders of the Trial Division of the Superior Court. Cameron J.A. clearly pointed out that the situation was different where the order originates in Provincial Court, because the superior court retains its supervisory jurisdiction by way of prerogative remedies. Cameron J.A. also referred to *Mills* and characterized the “minority opinion” of Lamer J. as espousing “an exception where the alleged violation of the Charter would, if accepted, result in a loss of jurisdiction.”

[28] I am not satisfied that the Supreme Court, in expressing substantial agreement with the Reasons of Cameron J.A., went so far as to preclude a s.24(1) application to superior court in circumstances such as those in the case at bar. Nor am I satisfied that the decision of Lamer J. was the minority opinion or that Cameron J.A. has described its full ambit. In *Mills*, Lamer J., together with Dickson C.J.C., LaForest J. and Wilson J. endorsed the principle of concurrent jurisdiction subject to the appropriate exercise of discretion. That discretion is not strictly limited to circumstances in which there is a loss of jurisdiction. Indeed, Lamer J. wrote, at para. 114:

I do not share the view of some that all decisions as regards Charter violations should be characterized as jurisdictional in order to provide access to the superior courts through review by way of the prerogative writs of certiorari, prohibition or mandamus... the superior court’s concurrent original jurisdiction meets that need. We should not distort our prerogative writs, which have been developed in Canadian law and procedure over time, to become ipso facto instruments of review under the Charter. The use of such an expanded notion of jurisdictional error would unnecessarily alter the prerogative writ process beyond recognition.

## **VI. Should This Court Exercise its Discretion to Grant Charter Relief?**

[29] The right of an accused to retain counsel of choice is recognized as a fundamental right, enshrined in the Charter. It is not an absolute right and as such is subject to reasonable limits, but disqualification is not an order that should be made in the absence of very compelling reasons. In *R. v. McCallen*, [1999] O.J. No. 202 (C.A.) the Ontario Court of Appeal dealt at some length with the issue of why individuals might select one lawyer over another, and why the right to that selection is a fundamental component of the criminal justice system. From the perspective of a judge, who has the opportunity to see and interact with a significant number of competent lawyers every day, it may be easy to forget that the issue is not one of competence alone. As O’Connor J.A. held, at para. 39:

Although it may be said that in some cases there will not be any practical difference whether an accused is represented by one counsel rather than another,

nevertheless, the intangible value to the accused and the symbolic value to the system of criminal justice of the s.10(b) Charter right are of fundamental importance and must be vindicated when breached.

[30] The right to counsel of choice is a vital component of the right of the accused to control his or her own defence, the importance of which was recognized by Lamer C.J.C. in *R. v. Swain*, [1991] 1 S.C.R. 933, at para.35:

Given that the principles of fundamental justice contemplate an accusatorial and adversarial system of criminal justice which is founded on respect for the autonomy and dignity of human beings, it seems clear to me that the principles of fundamental justice must also require that an accused person have the right to control his or her own defence.

[31] It is in view of the intangible value to the accused and the symbolic value to the system of Criminal Justice that the remedy of post-trial appeal from the decision of the Provincial Court Judge rings hollow. By that time, regardless of whether a conviction or acquittal has been entered, the interference with a constitutionally protected right is complete.

[32] In *R. v. Greenwood*, [1995] O.J. No. 387 (Gen.Div.) Pardu J. considered an application for relief under s.24(1) after the judge presiding at the preliminary inquiry disqualified defence counsel. After considering *Mills* and concluding that the superior court is a court of competent jurisdiction to hear an application under s.24(1), irrespective of whether an application has been made in the court below, she held, at paras. 15 -16:

...[A] superior court will be reluctant to intervene in concurrent proceedings under the Charter, where the effect will be to fragment the hearing in the lower court... However, the right of application conferred by s.24(1) of the Charter is not to be “cut down by limitations placed upon the exercise of discretionary powers or prerogative remedies in non-Charter situations.”...

I have concluded that this is an appropriate case in which to intervene to provide relief for a breach of the Charter guarantee to an accused person to counsel of his choice. To suggest that the accused person wait until trial to challenge the decision removing his counsel would be a hollow remedy, and one which would deny to the accused the opportunity to have his counsel participate in the preliminary inquiry. This is not a question of admissibility of evidence which will depend on findings of fact to be made at trial, nor is it a question of assessing the factual prejudice caused to an accused by a Charter breach such as delay. In fact, the prejudice to an accused caused by deprivation of his counsel of choice is not likely a matter which would be assessed on the basis of evidence adduced at trial.

[33] Counsel provided a number of authorities with respect to the test for disqualification. Some of those authorities were also provided to the Provincial Court Judge. *MacDonald Estate*, which dealt with the potential use of confidential information in the context of civil litigation and

counsel moving from one law firm to another, is not particularly helpful. In *Widdifield*, Doherty J.A. held that the court must consider actual conflicts and the risk of potential conflicts that could develop as the trial proceeds. He framed the test as whether there was any “realistic risk” of a conflict of interests developing.

[34] In argument before me, the Crown pointed to *Druken* and *Parmar* in support of the proposition that there is a risk of conflict arising out of Mr. Gariepy’s representation of Mr. Karmis. In *Druken*, the conflict was found to arise when counsel for the deceased victim entered into partnership with counsel for the accused the day before the trial was to commence. It is worth pointing out that *Druken* is both distinguishable on its facts and not particularly compelling as authority, since a majority of the Newfoundland Court of Appeal concluded that the trial judge erred in disqualifying counsel and the Supreme Court’s disagreement with the Court of Appeal is based solely on jurisdictional grounds. In *Parmar*, Wachowich J. opined, in obiter, that a lawyer who witnessed and indeed played a role in breaking up the very fight that was the subject of the charge may have deviated from good practice in proceeding to represent the accused. *Parmar*, too, is distinguishable, since Mr. Gariepy did not witness the alleged assault and because Wachowich J. was not called upon to consider whether the circumstances warranted disqualification of counsel, with the attending Charter implications.

[35] In order to justify disqualification of counsel, it is incumbent upon the Crown to establish a realistic risk that a conflict will arise. In the present case, there is no issue of dual allegiance with a past or present client and no issue of joint representation of multiple clients. There is only the fact that Mr. Gariepy attended the party on the night of the incident and had occasion to observe the accused and the complainant over the course of the evening. Mr. Gariepy has stated that he observed the complainant to be intoxicated. He intends to call five other witnesses who would give the same evidence. The Crown has evidenced no intention to call him as a witness and the investigating authorities have not interviewed him. Mr. Gariepy has said that he will not be a witness for the defence. His client has had the benefit of a discussion with Mr. McLeod of the Law Society of Alberta and independent legal advice and has undertaken not to call Mr. Gariepy as a witness.

[36] In argument before the Provincial Court Judge, the Crown suggested that the risk posed by Mr. Gariepy’s representation of Mr. Karmis was that, because of personal knowledge, he could potentially say something in the course of the trial that could give rise to a mistrial. In argument before me, the Crown contended that a risk would arise if a witness gave evidence contrary to Mr. Gariepy’s personal knowledge, requiring him to become a witness at trial whether he wanted to or not. These arguments are speculative at best. There are any number of ways by which counsel may come into information that conflicts with testimony given on the witness stand at trial. The risk arises any time counsel interviews a witness prior to trial. Generally speaking, competent counsel know how to deal with these situations without causing a mistrial. The mere fact that counsel for the accused has direct knowledge that might possibly become relevant in the course of the trial is not sufficient to warrant presumptively disqualifying counsel. But this is the import of the Crown’s argument and the decision of the Provincial Court Judge.

[37] It is worth noting that, in the course of argument before the Provincial Court Judge, the Crown suggested that the threshold for the disqualification of counsel was “not demanding”, a principle with which the Provincial Court Judge agreed. In my view, this was an error. While it is correct that the test for disqualification requires an assessment of risk, rather than the existence of actual prejudice, it is necessary to balance that the state’s interest in avoiding that risk against the Charter rights of the accused. This is not a low threshold. Courts should be reluctant to interfere with accused’s choice of counsel, and certainly should not do so without regard to the importance of the accused’s right to control his or her own defence.

[38] In effectively applying a presumption that, as a “potential witness,” counsel for the accused must be disqualified, and failing entirely to consider Mr. Karmis’ rights under the Charter, the Provincial Court Judge erred, and the result is that Mr. Karmis would be deprived of his right to counsel of choice. This violation of Mr. Karmis’ Charter rights cannot be adequately remedied by appeal after trial. In the circumstances, I conclude that this is an appropriate case to exercise my discretion to intervene and provide relief under s.24(1) of the Charter. Mr. Karmis is entitled to be represented by his counsel of choice.

[39] I note, moreover, that there is an additional reason for this exercise of discretion. It is incumbent upon any judge hearing a matter in which Charter rights are implicated to ensure that the hearing proceed in accordance with the highest standards of natural justice. Having carefully reviewed the transcript of the proceeding before the Provincial Court Judge, I agree with counsel for Mr. Karmis that there is an appearance that he prejudged the matter prior to hearing submissions from Mr. Gariepy. Indeed, before Mr. Gariepy could begin his submissions on the merits, the Provincial Court Judge indicated that it appeared to him that the Crown had *already* suffered prejudice, a conclusion for which there is simply no basis in the evidence. Though I recognize that the Provincial Court Judge gave Mr. Gariepy a final opportunity to continue to make submissions, I cannot fault Mr. Gariepy for concluding, at that point, that the Provincial Court Judge was not hearing him.

[40] In view of my conclusion with respect to the remedy under s.24(1) of the Charter, it is not necessary to consider the application for certiorari.

**VII. COSTS**

[41] I have reviewed the authorities in respect of costs cited by counsel for Mr. Karmis. In these circumstances, a costs award should only be made where there is “a marked and unacceptable departure from the reasonable standards expected of the prosecution.” I am not satisfied that there has been such a departure in the present case and, as such, I make no award of costs.

Heard on the 18<sup>th</sup> day of March, 2008.

**Dated** at the City of Calgary, Alberta this 25<sup>th</sup> day of August, 2008.

---

**A.D. Macleod**  
**J.C.Q.B.A.**

**Appearances:**

Mr. Marvin Bloos, Q.C.  
for the Applicant

Ms. Shirley Jackson, Q.C.  
for the Respondent