Case Name:
R. v. 1353837 Ontario Inc.

Between
1353837 Ontario Inc., Lawrence Ryan, Pierre Jacques, applicants, and
Her Majesty the Queen, respondents

[2005] O.J. No. 166

[2005] O.T.C. 34

63 W.C.B. (2d) 312

Court File No. 04-CV-274168CM1

Ontario Superior Court of Justice

T. Ducharme J.

Heard: November 15, 2004.
Judgment: January 18, 2005.

(33 paras.)

Administrative law -- Prerogative remedies -- Certiorari -- Conditions precedent -- Judicial review and statutory appeal -- When available -- Bars -- Constitutional law -- Canadian Charter of Rights and Freedoms -- Legal rights -- Procedural rights -- Delay -- Criminal law -- Regulatory offences.

Application by the defendants Ryan, Jacques, and their numbered company for a writ of certiorari and a stay of proceedings based on an unreasonable delay contrary to their rights under s. 11(b) of the Canadian Charter of Rights and Freedoms. In the alternative, the defendants sought the transfer of their proceedings to another Justice of the Peace. The defendants faced two sets of charges laid in 2002 in relation to a parcel of land owned by the numbered company. Their pre-hearing application for a stay of proceedings based on unreasonable delay was denied by a Justice of the Peace. The defendants submitted that the Justice's decision was based on a jurisdictional error and was therefore patently unreasonable. The Crown submitted that the Provincial Offences Act expressly barred the review of a pre-trial application by way of certiorari where an avenue of appeal was available.

HELD: Application dismissed. The Provincial Offences Act barred the defendants from bringing a certiorari application. Although the Act did not provide for an interlocutory appeal, an appeal of the decision of the Justice was possible following a trial, and in the event of a conviction. In exceptional circumstances, where the demands of justice so required, a superior court was permitted to exercise its supervisory jurisdiction by way of certiorari to review an interlocutory s. 11(b) Charter application. It was not established that the ruling of the Justice was either patently unreasonable, or that she committed jurisdictional error by failing to take into account relevant considerations. Therefore, no exceptional circumstances existed in this case. Nor was it established that a substantial wrong or miscarriage of justice had occurred. There was no evidence that suggested that the presiding Justice of the Peace would not discharge her function as a trial judge fairly and impartially.

Statutes, Regulations and Rules Cited:

Building Code Act, 1992, S.O. 1992, c. 23.

Canadian Charter of Rights and Freedoms, 1982, ss. 11(b), 24(1).

Occupational Health and Safety Act, R.S.O. 1990, c. O.1.

Provincial Offences Act, R.S.O. 1990, c. P.33, ss. 85, 116(1), 140(1), 141(3), 141(4), 142, 142(5).

Counsel:

Paul H. Starkman for the applicants.

Jeremy Warning for the respondent, Ministry of Labour.

John M. Skinner for the respondent, City of Stratford.

MOTION

1 T. DUCHARME J. (endorsement):-- The Applicant, 1353837 Ontario Inc., is the owner of a 14.5-acre parcel of land in Stratford, Ontario. The Applicants, Mr. Ryan and Mr. Jacques, are associated with the numbered company. All three Applicants are facing charges relating to this land brought by the City of Stratford under the Building Code Act, 1992, S.O. 1992, c. 23. Related charges have also been brought by the Ministry of Labour under the Occupational Health and Safety Act, R.S.O. 1990, c. O.1. Both sets of charges were laid in September 2002 and the Applicants eventually brought a stay application before Her Worship Justice of the Peace Stewart based on unreasonable delay contrary to section 11(b) of the

Canadian Charter of Rights and Freedoms. Her Worship denied the application for reasons delivered on July 28, 2004.

2 This is an application under section 140(1) of the Provincial Offences Act, R.S.O. 1990, c. P.33 ("P.O.A.") seeking relief in the nature of certiorari and, among other things:

> (a) an order quashing the July 28, 2004 decision of Justice of the Peace Stewart;
> (b) an order staying the charges on the basis of a violation of s. 11(b) of the Charter;
>
> (c) in the alternative, an order remitting the delay application before another Justice of the Peace; and
>
> (d) an order that the proceedings, including the trial, continue before another Justice of the Peace.

3 The relevant portions of the Provincial Offences Act are as follows:

> Appeals, proceedings commenced by information 116. (1) Where a proceeding is commenced by information under Part III, the defendant or the prosecutor or the Attorney General by way of intervention may appeal from a conviction or dismissal or from a finding as to ability, because of mental disorder, to conduct a defence or as to sentence. R.S.O. 1990, c. P.33, s. 116 (1).
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> Mandamus, prohibition, certiorari
> 140 (1) On application, the Superior Court of Justice may by order grant any relief in respect of matters arising under this Act that the Applicant would be entitled to in an application for an order in the nature of mandamus, prohibition or certiorari. R.S.O. 1990, c. P.33, s. 140 (1); 2000, c. 26, Sched. A, s. 13 (5).
>
> Certiorari
> Where appeal available
> 141 (3) No application shall be made to quash a conviction, order or ruling from which an appeal is provided by this Act, whether subject to leave or otherwise. R.S.O. 1990, c. P.33, s. 141 (3).
>
> Substantial wrong
> 141 (4) On an application for relief in the nature of certiorari, the Superior Court of Justice shall not grant

> relief unless the court finds that a substantial wrong or miscarriage of justice has occurred, and the court may amend or validate any decision already made, with effect from such time and on such terms as the court considers proper. R.S.O. 1990, c. P.33, s. 141 (4); 2000, c. 26, Sched. A, s. 13 (5).

4 The Applicant's submission is that, since the P.O.A. does not provide for an interlocutory appeal from a pre-trial ruling, the privative clause in section 141(3) does not apply. They submit that the Justice of the Peace committed jurisdictional errors in that her decision was patently unreasonable, she failed to consider relevant considerations and her July 28, 2004 judgment rests on a previous decision made by her that has been set aside for jurisdictional error by Templeton J. of this court.[1]

Extension of Time

5 The Justice of the Peace rendered her decision on July 28, 2004. The Applicants issued their notice of application on August 17, 2004 but were unable to obtain a hearing date before November 15, 2005. As a result they were unable to comply with the strict time period set out in s. 141(1) of the P.O.A.:

> 141(1) A notice under section 140 in respect of an application for relief in the nature of certiorari shall be given at least seven days and not more than ten days before the date fixed for the hearing of the application and notice shall be served within thirty days after the occurrence of the act sought to be quashed.

6 The court, however, has a broad curative power under s. 85 of the P.O.A. to extend the time for service, a power that should be exercised in this case. Section 85 provides:

> 85. Any time prescribed by this Act or the regulations made thereunder or by the rules of court for doing any thing other than commencing or recommencing a proceeding may be extended by the court, whether or not the prescribed time has expired.

It is clear from Ontario (Ministry of Labour) v. NMC Canada Inc. (1995), 25 O.R. (3d) 461 (Ont. C.A.) that the times prescribed in s. 141(1) can be extended under s. 85. Moreover, in that case Laskin J.A. made it clear that a court should exercise this power unless to do so would prejudice the Respondents. No such prejudice would result here and I therefore would grant the Applicants' motion to extend the time for service.

Does Section 141(3) of the P.O.A. Bar the Certiorari Application in this Case?

7 In Ontario Securities Commission v. Caratel Ltd. (1992), 10 O.R. (3d) 491 (Ont. G.D.) the Applicants sought to review by way of certiorari the refusal of a trial judge to grant a pre-trial application quashing the information as a nullity. Mr. Justice Then agreed that there was no interlocutory appeal under the P.O.A. from this ruling. However, with respect to the certiorari application he concluded:

> I am nevertheless in agreement with the Respondent's alternative argument that since the Applicant may appeal the trial judge's pre-trial ruling once the trial has been completed, the privative clause contained in s. 141(3) (formerly s. 125(3)) of the POA constitutes an absolute bar to the accuseds' application to quash that ruling.

On appeal, the Court of Appeal said, 12 O.R. (3d) 319:

> Assuming Then J. erred in holding that s. 141(3) of the Provincial Offences Act precluded an application for an order in the nature of certiorari, the application was, in any event, properly dismissed.

8 The Respondents strenuously submit that I should adopt the same approach as Then J. and conclude that s. 143(3) of the P.O.A. is an absolute bar to the certiorari application of the Applicants. They stress that the Court of Appeal in the foregoing passage did not decide that Then J. was wrong in his conclusion about s. 141(3). The Applicants, on the other hand, argue that the decision of the Court of Appeal suggests that Then J. was wrong to rule as he did. They urge me to find that section 141(3) is not a bar to the present application.

9 Section 141(3) has been held to bar certiorari applications to quash convictions: R. v. Murray, [1983] O.J. No. 1170 (Ont. H.C.J.); R. v. Gronka, [1996] O.J. No. 1936 (Ont. G.D.). Equally, section 141(3) has been held to bar certiorari applications to set aside dismissals: R. v. Hilaire, [1999] O.J. No. 898 (O.C.J.). However, none of these cases are particularly helpful since they do not deal with decisions in pre-trial applications and an appeal from both convictions and dismissals is expressly provided for in s. 116(1) of the P.O.A.

10 There have been a number of other cases where section 141(3) has been held, either expressly or implicitly, not to bar a certiorari application to set aside pre-trial decisions in which the information (or certificate of offence) has been declared a nullity: R. v. Brennan (1981), 61 C.C.C. (2d) 1 (Ont. H.C.J.); Ontario (Ministry of Labour) v. NMC Canada Inc. (1995), 25 O.R. (3d) 461 (Ont. C.A.); R. v. West (1982), 35 O.R. (2d) 179 (Ont.

H.C.J.); R. v. Ivaco (2001), 53 O.R. (3d) 675 (S.C.J.); R. v. Inco, [1997] O.J. No 4941 (Ont. G.D.); R. v. Kwoon, [1999] O.J. No. 4989 (S.C.J.). However, these cases are also of little assistance for two reasons. First, they all resulted in dispositions for which there were no appeals under s. 116. (1) of the P.O.A., so it was obvious that section 141(3) did not apply. Second, they resulted in dispositions that were final, i.e. absent intervention from a higher court they effectively ended the proceedings.

11 In R. v. Barker, [1992] O.J. No. 545 (Ont. G.D.) the question was whether the staying of charges for a violation of section 11(b) of the Canadian Charter of Rights and Freedoms constituted a dismissal giving rise to an appeal under s. 116. (1) of the P.O.A.. Justice Murphy found that it was and concluded that, while the appellant had a right to appeal, section 141(3) of the P.O.A. removed the appellant's right to apply for certiorari.

12 In Regina v. Tucker et. al (1992), 9 O.R. (3d) 291 (Ont. C.A.), leave to appeal denied (1993), 13 O.R. (3d) xvi, [1993] S.C.C.A. No. 166 (S.C.C.), Justice Finlayson for the unanimous court was faced with a combination of appeals and applications for prerogative relief relating to a number of Criminal Code and P.O.A. offences. At page 303, Finlayson J.A. noted:

> Similarly, s. 141(3) of the Provincial Offences Act creates a bar to the use of certiorari where an appeal is available under that Act. Section 141(3) precludes the bringing of an application for certiorari relief with respect to the provincial offences in this case: see Drinkwalter and Ewart, Ontario Provincial Offences Procedure (1980) at pp. 391 and 378:
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> In provincial offence proceedings, the availability of appellate recourse will virtually preclude certiorari being used, regardless of the basis upon which it is sought. The Legislature's intention to route litigants into the appellate channel is apparent from the enactment of s. 125(3) [now s. 141(3)].

Justice Finlayson had earlier made the following general observations about the use of prerogative writs and the remedial adequacy of post-conviction appeals:

> This court has repeatedly held that trial proceedings should not be interrupted so that Charter issues can be reviewed by higher courts. Prerogative relief should only be granted where a palpable infringement of a Charter right has taken place or is clearly threatened: see R. v. Multitech Warehouse Direct (Ontario) Inc. (1989), 52 C.C.C. (3d) 175, 35 O.A.C. 349 (C.A.), at p. 183 C.C.C., p. 356 O.A.C., leave to appeal to

> S.C.C refused (1990), 108 N.R. 240, 37 O.A.C. 182 n; R. v. Corbeil (1986), 27 C.C.C. (3d) 245, 24 C.R.R. 174 (Ont. C.A.), at p. 254 C.C.C., p. 183 C.R.R.; and Krakowski v. R. (1983), 41 O.R. (2d) 321, 4 C.C.C. (3d) 188 (C.A.), at pp. 323-25 O.R., pp. 191-92 C.C.C.
>
> Prerogative remedies for criminal charges will not ordinarily lie where an appeal is available. The Applicants were fully protected against any error that might have been made during the course of the trials and the motions that preceded the trials. In the event of convictions, the Applicants had a full right of appeal from the criminal charges pursuant to ss. 813, 830 or 675 of the Criminal Code and a full right of appeal from the provincial offences pursuant to s. 135 or 116 of the Provincial Offences Act, R.S.O. 1990, c. P.33.

This case was not cited by any of the counsel before me and was apparently not brought to Justice Then's attention in Caratel.

13 The decision of Then J. in O.S.C. v. Caratel, supra, was questioned at the trial level in R. v. DDM Plastics Inc. (1994), 20 O.R. (3d) 362 (Ont. G.D.). In that case the prosecutor relied on Justice Then's decision in Caratel and, in rejecting that argument, Misener J. wrote at pg. 368.

> I do not think the words of s. 141(3) bear the generous interpretation that Then J. places upon them. It would seem to me that the subsection is only a bar to an application to quash an order or ruling when an appeal is provided by the Act from that particular order or ruling.

An appeal from this decision was dismissed (1997), 32 O.R. (3d) 652 and, although the Court of Appeal did not address this precise point, Goudge J.A., writing for the Court did say, "We are in substantial agreement with the reasoning of Mr. Justice Misener." No reference to the decision of Regina v. Tucker, supra, was made in either the trial or appellate decisions.

14 The most recent case involving section 141(3) of the P.O.A. is the decision of our Court of Appeal in R. v. Arcand, [2004] O.J. No. 5017 (Ont. C.A.). In that case an application for prohibition with certiorari in aid was successfully brought in this court in relation to various rulings made by a Justice of the Peace in a trial of offences contrary to the Ontario Water Resources Act, R.S.O. 1990, c. O.40. Like the present case, Arcand dealt with complaints about disclosure and a resulting application to stay the charges based on a violation of s. 11(b) of the Charter. While, the Court of Appeal ruled that the Superior Court Judge was wrong to intervene as he did, they did not discuss whether the application was barred ab initio by s.

141(3). However, while Rosenberg J.A. did not address whether section 141(3) was a bar to review a pre-trial application by way of certiorari, he did point to section 141(3) as support for the proposition that, "[t]he circumstances in which a superior court may intervene in the course of a trial in a lower court are narrowly circumscribed by statute" (para. 12). More importantly, for the purposes of this application, he made the following observations about extraordinary remedies at paragraphs 13 to 15:

> 13 At common law, certiorari and prohibition are discretionary remedies and the Superior Court should generally decline to grant the remedy where there is an adequate appellate remedy. As Doherty J.A. said in R. v. Duvivier (1991), 64 C.C.C. (3d) 20 at 23-4 (Ont. C.A.),
>
> The jurisdiction to grant that relief, either by way of prerogative writ or under s. 24(1) of the Charter, is discretionary. It is now firmly established that a court should not routinely exercise that jurisdiction where the application is brought in the course of ongoing criminal proceedings. In such cases, it is incumbent upon the Applicant to establish that the circumstances are such that the interests of justice necessitate the immediate granting of the prerogative or Charter remedy by the Superior Court.
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> After referring to a number of cases supporting this proposition, Doherty J.A. continued as follows:
>
> These cases dictate that issues, including those with a constitutional dimension, which arise in the context of a criminal prosecution should routinely be raised and resolved within the confines of the established criminal process which provides for a preliminary inquiry (in some cases), a trial, and a full appeal on the record after that trial.
>
> Those same cases identify the policy concerns which underline the predilection against resort to the Superior Court for relief during criminal proceedings. Such applications can result in delay, the fragmentation of the criminal process, the determination of issues based on an inadequate record, and the expenditure of judicial time and effort on issues which may not have arisen had the process been left to run its normal course. The effective and efficient operation of our criminal justice system is not served by interlocutory challenges to rulings made during the process or by

> applications for rulings concerning issues which it is anticipated will arise at some point in the process.
>
> 14 Those policy concerns apply not only to criminal cases but also to proceedings under the Provincial Offences Act. See R. v. Felderhof, [2002] O.J. No. 4103 at paras. 11-16 (S.C.J.), aff'd (2003), 180 C.C.C. (3d) 498 (Ont. C.A.). Thus, for example, at the time the Respondent brought his application for prohibition there was an incomplete record. Mr. Rickey had not testified and so the complete picture of what occurred with the Montgomery Binder was not before the application judge. The result of the application was to delay and fragment the trial. As A. Campbell J. said in R. v. Felderhof at para. 14:
>
> The appellate search for hypothetical error in the middle of a trial defeats not only the integrity of the trial process but also the efficacy of the appeal process. The only efficient way to deal with alleged errors, and the fairest way to both sides, is to wait until the trial is over and then to appeal. From a practical point of view, trials would be endless if mid-trial rulings could be appealed or reviewed.
>
> 15 The limitation on intervention in on-going proceedings applies even where the accused or defendant claims that a ruling by the trial court has breached constitutional rights. Duvivier and Felderhof make clear that is not every erroneous ruling on an alleged Charter violation causes the trial court to lose jurisdiction. As was said by this court in Re Corbeil and the Queen (1986), 27 C.C.C. (3d) 245 at 254 "only in special and exceptional circumstances can it be said that the denial of a constitutional right has resulted in a loss of jurisdiction so as to justify the extraordinary remedies of certiorari and prohibition". The court described those circumstances as involving "a palpable infringement of a constitutional right that has taken place or is clearly threatened". [emphasis added]

15 Finally, echoing the decision in Tucker, Rosenberg J.A. also spoke to the remedial adequacy of a post conviction appeal. At paragraphs 16 and 17, he wrote:

> 16 This was not a proper case for intervention by the Superior Court. Even if the Justice of the Peace was wrong in failing to order disclosure the Respondent had at least two other options... .

> 17 ... the Respondent could have waited to the end of the trial and, if convicted, appealed to the Provincial Offences Appeal Court. At that time there would have been a complete record before the reviewing court concerning the documents in question and there would be a clearer picture as to whether the documents were necessary for the Respondent to make full answer and defence.

16 Having reviewed the jurisprudence dealing with section 141(3) of the P.O.A., I find the reasoning of Then J. in Caratel, supra, remains thoughtful and persuasive. In my view, section 141(3) of the P.O.A. is not a finality clause. It does not purport to enable an inferior tribunal to exceed its jurisdiction, or to make its decision as to its own jurisdiction final. What it does say is that if a person may have a decision reviewed through the appeal process, then he or she shall not be entitled to review by way of certiorari. I would only qualify my agreement with Caratel slightly. Then J. spoke of section 141(3) as an "absolute bar" to certiorari applications. I am not inclined to be quite so definitive. No doubt section 141(3) will be a bar to the vast majority of certiorari applications. However, as was recognized in Arcand, supra, there may be special and exceptional circumstances where the demands of justice require that a superior court exercise its supervisory jurisdiction by way of certiorari despite section 141(3).

17 There is nothing novel about such a statutory clause and there can be no suggestion that the Legislature lacks the authority to pass it. In 1969, the Supreme Court of Canada in Sanders v. The Queen, [1970] 2 C.C.C. 57 (S.C.C.) dealt with the question of whether or not section 682 (now section 776) of the Criminal Code barred the appellant from applying for habeas corpus with certiorari in aid after a magistrate had ordered that he was a dangerous sexual offender. Section 682 provided as follows:

> 682. No conviction or order shall be removed by certiorari (a) where an appeal was taken, whether or not the appeal has been carried to a conclusion, or (b) where the defendant appeared and pleaded and the merits were tried, and an appeal might have been taken, but the defendant did not appeal.

In holding that section 682 was a bar to the appellant's application Justice Martland for the majority wrote at pg. 87:

> There can be no doubt of the power of Parliament thus to limit the exercise of an extraordinary remedy, and it has done so in clear terms. Nor is there room here for implying a presumed intention that certiorari be available to compel an

> inferior tribunal to keep within its powers, because the obvious intention of s. 682 is that it is the procedure by way of appeal, and not certiorari, that, where available, should be used for that purpose.

In my view these comments are equally applicable to section 141(3) of the P.O.A.

18 This view of section 141(3) of the P.O.A. is consistent with that expressed by the Ministry of the Attorney General at the time of its introduction. In a publication by the Ministry of the Attorney General meant to explain the Provincial Offences Act, 1978, the following was said with respect to sections 118 to 120 (now 140 to 142) of the P.O.A.:

> These provisions clear up the judicially-noted confusion in the availability of extraordinary remedies in provincial offences proceedings. ...
>
> The core provisions permit the extraordinary remedies to be brought in a simplified, non-technical manner. The availability of a remedy in the nature of certiorari to quash a decision is restricted to matters from which there is no appeal, this keeping most challenges to decisions in the appellate review stream.[2]

19 This interpretation of section 141(3) of the P.O.A. is also supported by the views of those commentators who have discussed the provision. In Drinkwalter and Ewart, Ontario Provincial Offences Procedure (Toronto, Canada: The Carswell Company Limited, 1980) the authors note at page 391:

> In provincial offence proceedings, the availability of appellate recourse will virtually preclude certiorari being used, regardless of the basis upon which it is sought. The Legislature's intention to route litigants into the appellate channel is apparent from the enactment of s. 125(3) [now s. 141(3)].

Similarly, in Segal and Libman, Ontario Provincial Offences Act (Toronto: Thomson Carswell, 1995) the authors note at page 370:

> An application for certiorari is not available where an appeal is provided under the Provincial Offences Act in respect of the conviction, order or ruling which the Applicant seeks to quash: subsection 141(3). Given the availability of appeals in respect of all convictions under the Act, the use of certiorari

> will be restricted to matters such as challenging the issuance of search warrants under section 158.

20 Most importantly, this interpretation of section 141(3) of the P.O.A. is consistent with the decision of Finlayson J.A. in Tucker and of Rosenberg J.A. in Arcand. Consequently, I would rule that section 141(3) of the P.O.A. does bar the Applicant from bringing a certiorari application in this case. While the decision of the Justice of the Peace cannot be appealed by way of an interlocutory appeal, as was the case in Arcand, it can be appealed after trial should the Applicants be convicted.

Can Certiorari Ever Be Available to Review a Pre-Trial 11(b) Ruling With Respect to a P.O.A. Offence?

21 In Mills v. The Queen, [1986] 1 S.C.R. 863 (S.C.C.), Lamer J., dissenting on this point, expressed the view that a violation of section 11(b) always went to jurisdiction and that it would therefore be appropriate to review decisions about section 11(b) violations by way of certiorari. If that view had prevailed, the Applicants would have been in a much better position to argue that review by way of certiorari is appropriate in this case. But the views expressed by Lamer J. were expressly rejected by a majority of the Mills court. However, this does not completely foreclose the possibility of interlocutory review of an 11(b) ruling. Less than a year later, in R. v. Rahey, [1987] 1 S.C.R. 588 (S.C.C.) the Supreme Court recognized that interlocutory relief might be appropriate for a violation of section 11(b). While Rahey involved an interlocutory application under section 24(1) of the Charter, the following comments at paragraph 16-17 are equally relevant to attempts to obtain a remedy by way of certiorari:

> As was decided in Mills v. The Queen, supra, a court of competent jurisdiction for the purposes of s. 24(1) in an extant case is, as a general rule, the trial court. It is the judge sitting at trial who would have jurisdiction over the person and the subject matter and would have jurisdiction to grant the necessary remedy. In Mills, it was also decided that the Superior Courts should have "constant, complete and concurrent jurisdiction" for s. 24(1) applications. But it was therein emphasized that the Superior Courts should decline to exercise this discretionary jurisdiction unless, in the opinion of the Superior Court and given the nature of the violation or any other circumstance, it is more suited than the trial court to assess and grant the remedy that is just and appropriate. The clearest, though not necessarily the only, instances where there is a need for the exercise of such jurisdiction are those where 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, and those where it is the process below itself which is alleged to be in violation of the Charter's guarantees. The burden should be upon the claimant, in this case Mr. Rahey, to establish that the application is an appropriate one for the Superior Court's consideration.
>
> The present appeal provides a perfect example of a situation where, although the trial court is a court of competent jurisdiction for the purpose of a s. 24(1) application, it would obviously be preferable that the matter be dealt with by the Superior Court. The delay in trying the appellant which is being challenged as unreasonable is the result of the trial judge's inaction for eleven months while deliberating on a motion for a directed verdict. It is the presiding judge who is alleged to be the cause of a violation of the appellant's rights under s. 11(b) (emphasis added).

22 I take Rahey as authority for the proposition that interlocutory relief for a violation of section 11(b) could be granted in exceptional circumstances. While Rahey dealt with an offence under the Criminal Code, given my interpretation of section 141(3) of the P.O.A., I conclude that the logic of Rahey must equally be applicable to P.O.A. offences. Thus, while section 141(3) will be a bar to the vast majority of certiorari applications with respect to alleged violations of section 11(b), there may be, as there was in Rahey, exceptional circumstances where the demands of justice require that a superior court exercise its supervisory jurisdiction by way of certiorari despite section 141(3).

Should This Court Exercise Its Supervisory Jurisdiction By Way Of Certiorari And Review The Section 11(b) Ruling In This Case?

23 In Tucker, Duvivier and Arcand, the Court of Appeal has made it clear that it is only in exceptional circumstances that review of a pre-trial ruling by way of certiorari would be appropriate. In Arcand, Rosenberg J.A. cited Re Corbeil and the Queen (1986), 27 C.C.C. (3d) 245 (Ont. C.A.) as authority for the proposition that:

> 'only in special and exceptional circumstances can it be said that the denial of a constitutional right has resulted in a loss of jurisdiction so as to justify the extraordinary remedies of certiorari and prohibition'. The court described those circumstances as involving 'a palpable infringement of a constitutional right that has taken place or is clearly threatened'.

In Rahey the Supreme Court made it clear that the onus is clearly on the Applicants to establish that the Superior Court should hear the section 24(1) application. In Tucker, Duvivier and Arcand a similar onus has been imposed on Applicants seeking relief by way of certiorari. Therefore, the question is whether the Applicants in this case have discharged this onus.

24 Mr. Starkman for the Applicants points to a number of factors which he submits justify supervisory intervention by this court: irst, he submits that the decision of the Justice of the Peace was patently unreasonable and she failed to take into account relevant considerations; second, he submits that the decision of the Justice of Peace rests on a decision which has been set aside for jurisdictional error; third, he argues that the Applicants have been prejudiced by the death of Tom Finlay, an important defence witness; and finally, he argues that the Applicants should not have to bear the costs of the trial when their section 11(b) rights have already been violated. I will deal with each of these in turn.

25 While I might not have reached the same conclusion as the Justice of the Peace, I do not accept that her ruling is either patently unreasonable or that she committed jurisdictional error by failing to take into account relevant considerations. In reality, Mr. Starkman's submissions amount to a complaint that the Justice of the Peace reached the wrong decision. However, the law is clear that this does not justify intervention by way of certiorari. As Justice Watt explained in R. v. Sarson (1992), 73 C.C.C. (3d) 1 (Ont. G.D.); aff'd (1994), 88 C.C.C. (3d) 95 (Ont. C.A.); aff'd (1996), 107 C.C.C. (3d) 21 (S.C.C.) at p. 26:

> The extraordinary remedies are concerned with jurisdiction. It is their purpose to ensure that courts of limited jurisdiction do not exceed, or for that matter decline their mandate. It necessarily follows that what is said to warrant their grant must be a loss, refusal or excess of jurisdiction. Nothing less will suffice. Neither is more required.
>
> ... the trial judge has jurisdiction to decide whether the impugned provisions, any or all of them, are constitutionally flawed. The jurisdiction of the trial judge to determine the question of constitutional validity is not, however, contingent upon the correctness of the decision made. A trial judge has as much jurisdiction to decide an issue wrongly as he or she does to determine it rightly. Jurisdiction is not acquired or retained only by a correct decision. Neither is it lost by a wrong decision. Jurisdiction is concerned with the authority to decide an issue. It matters not to that authority the correctness of the decision. It is as much so in cases where

> the issue to be decided is "constitutional" in nature as it is where it is not so.

As was made clear in Tucker and Arcand, if the decision of the Justice of Peace was wrong this can be dealt with by way of appeal if the Applicants are, in fact, convicted.

26 As for the third and fourth factors identified by Mr. Starkman neither is particularly unique in the context of delay applications. Certainly, neither raises jurisdictional concerns that would justify review by this court at this time.

27 However, even if any of these factors raised jurisdictional concerns, I would still decline to review the decision given my interpretation of section 141(3) of the P.O.A. Certainly, none of these factors present the sort of special and exceptional circumstances where the demands of justice require that this court exercise its supervisory jurisdiction be way of certiorari despite section 141(3) of the P.O.A.

Did the Justice of the Peace Commit Jurisdictional Error in Her Decision that satisfies 141(4)?

28 Pursuant to s. 141(4) of the P.O.A., an application for relief in the nature of certiorari shall not be granted, "unless the court finds that a substantial wrong or miscarriage of justice has occurred". Relief does not issue as of right, rather it remains a discretionary remedy. As Archibald J. noted in Ontario (Ministry of Labour) v. Intracorp Developments (Lombard) Inc., [2002] O.J. No. 1209 (S.C.J.) at paragraph 29, "[t]here is a paucity of authority on the issue of what constitutes a substantial wrong or miscarriage of justice under s. 141(4)." However, just as the Applicants have failed to persuade me that there are special and exceptional circumstances that require this court to intervene, they have failed to persuade me that a substantial wrong or miscarriage of justice has occurred. So even if I were wrong with respect to the effect of section 141(3) of the P.O.A., I would have declined to grant the relief sought on this basis.

Transfer of The Proceedings to Another Justice of the Peace

29 Mr. Starkman for the Applicants did not address the relief sought in paragraphs 1(c) or 1(d) of his notice of application in either his written or oral submissions. Neither did he indicate that he was no longer seeking this relief. Presumably, his request to disqualify the Justice of Peace is based on the same sort of reasonable apprehension of bias arguments that were advanced before Templeton J.

30 Judicial impartiality is a central feature of our judicial process and, until displaced, it is presumed. As the Supreme Court observed in Wewaykum Indian Band v. Canada, [2003] 2 S.C.R. 259 at para 59:

> The presumption of impartiality carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption. Thus, while the requirement of judicial impartiality is a stringent one, the burden is on the party arguing for disqualification to establish that the circumstances justify a finding that the judge must be disqualified.

In Canadian law, the criterion for disqualification was expressed in the dissent of de Grandpré J. in Committee for Justice and Liberty v. Canada (National Energy Board), [1978] 1 S.C.R. 369 at p. 394:

> ... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is 'what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.'

31 On the record before me, I find no evidence that suggests that the Justice of the Peace would not discharge her function as a trial judge fairly and impartially. As a result, I decline to grant this relief.

Costs

32 The City of Stratford seeks its costs on this Application. The Ministry of Labour does not. While section 142(5) of the P.O.A. does empower me to award costs, they generally are not awarded in quasi-criminal proceedings. There is no principled reason to distinguish costs involved in applications for prerogative relied from those involved in trials or appeals: R. v. Felderhof, [2003] O.J. No. 393 (S.C.J.); aff'd (2003), 68 O.R. (3d) 481 (Ont. C.A.). As Lamer C.J.C. said in R. v. C.A.M. (1996), 105 C.C.C. (3d) 327 (S.C.C.) at p. 377:

> ... the prevailing convention of criminal practice is that whether the criminal defendant is successful or unsuccessful on the merits of the case, he or she is generally not entitled to costs. ...

This passage was adopted with respect to P.O.A. offences by A. Campbell J. in Felderhof and, in upholding his refusal to award costs, Rosenberg J.A. observed:

> The rule in proceedings under the Act [the P.O.A.] is that generally no costs are awarded either against the Crown or the defendant.

It is clear, therefore, that costs are only to be awarded in exceptional cases, which do not exist in this case. Therefore, I decline to make any order with respect to costs.

Order

33 The application is dismissed and the matters are remitted to the Provincial Offences Court for trial.

T. DUCHARME J.

cp/e/qlplh/qlkjg/qlbdp

e/drs/qljzb/qlmll

1 An appeal from the decision of Justice Templeton was argued in the Ontario Court of Appeal on October 20, 2004 and, at the time of the release of these reasons, it was still on reserve. In his reasons Templeton J. did not explicitly address the issue of whether s. 141(3) of the P.O.A. barred review by certiorari of a pre-trial disclosure order.

2 Provincial Offences Procedure An Analysis and Explanation of Legislative Proposals: The Provincial Offences Act, 1978 and The Provincial Courts Amendment Act, 1978 (Toronto: Ministry of the Attorney General, April 1978) at pg. 80.