S.C.C. File No. 37207

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC)

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant

- and -

JUSTINE AWASHISH

Respondent

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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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TABLE OF CONTENTS

PART I – OVERVIEW. 1

PART II – POSITION OF INTERVENER. 2

PART III – STATEMENT OF ARGUMENT. 3

A) The evolution of *certiorari* since *Skogman*. 3

i) The state of the law in *Skogman* (1984). 3

ii) The enlargement of *certiorari* under *Dagenais* (1994). 4

iii) The consolidation of *certiorari* in *Cunningham* (2010).. 5

iv) Jurisprudence post-*Cunningham*. 6

a) *Regina v. Black*, 2011 ABCA 349. 6

b) *Regina v. Jackson*, 2015 ONCA 832 7

c) *Awashish v. Her Majesty*, 2016 QCCA 1164.. . 8

B) A proposal for an incremental revision of *certiorari*. 9

PART IV – SUBMISSION AS TO COSTS. 10

PART V – ORDER REQUESTED. 10

PART VI – TABLE OF AUTHORITIES 11

S.C.C. File No. 37112

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC)

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant

- and -

JUSTINE AWASHISH

Respondent

FACTUM OF THE INTERVENER ATTORNEY GENERAL FOR ONTARIO

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

PART I – OVERVIEW

1. An important issue in this case is whether parties in a criminal trial should have access to *certiorari* for errors of law on the face of the record, in exceptional circumstances. In the arc of cases from *Skogman* to *Cunningham*, this Honourable Court made incremental expansions to the scope of *certiorari*. The guiding principles in this evolution were efficiency and fairness in trial process. However, what has remained unchanged is the rule that *certiorari* is not available to a party to review an error of law on the face of the record. The Intervener proposes that the scope of *certiorari* be slightly expanded so that a party may seek to review an error of law in circumstances where the error engages an issue of overarching importance to the administration of justice, and is also unlikely to crystallize on appeal. This formula would permit expeditious review in cases where the issue at stake is of pressing importance, but without opening the floodgates to other interlocutory review.

2. The Intervener relies on the facts contained in the Appellant's factum. However, for the purposes of these submissions, what is pertinent is the test applied by the court below with respect to the availability of *certiorari* (at paras. 38 to 39 of the judgment).

PART II – POSITION OF INTERVENER

3. The Intervener's submissions are restricted to the Appellant's second ground of appeal (*i.e.* whether *certiorari* is available to a party in a criminal trial for the purposes of reviewing an error of law on the face of the record). It is the intervener's position that this Honourable Court should incrementally expand the scope of *certiorari* so that parties in a criminal proceeding may seek review of an error of law in circumstances where the error engages an issue of general importance to the administration of justice, and is not likely to crystallize on appeal.

PART III – STATEMENT OF ARGUMENT

A) The evolution of *certiorari* since *Skogman*

i) The state of the law in *Skogman* (1984)

4. Judicial review by *certiorari* permits superior courts to exercise their supervisory jurisdiction over ongoing proceedings in inferior courts. In its origins, the focus of *certiorari* was on correcting jurisdictional error. However, as noted by Estey J. in *Skogman*, the scope of *certiorari* has waxed and waned over the centuries:[1]

> In its earliest application by the courts, the prerogative or royal writs, including *certiorari*, were a mechanism whereby the Royal Courts of Justice maintained a surveillance over the conduct of the inferior tribunals of the land. Gradually, as the organization of justice and the judiciary developed, these review mechanisms were broadened in their reach and refined in the degree of control until, by 1878, *certiorari* was available not only for the review of jurisdictional transgressions by statutory tribunals, but also for errors committed by those tribunals in the course of the discharge of their assigned function, where such errors were apparent on the face of the record. . . Other refinements in this branch of the law have come and gone. . .

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[1] *Regina v. Skogman*, [1984] 2 S.C.R. 93 at pp. 98-99

Estey J. further noted that, through the twentieth century, the doctrine of *certiorari* was gradually simplified by a "Darwin-like elimination" of various ornate sub-doctrines.

5. In *Skogman*, Estey J. concisely summarized the scope of *certiorari* as it had developed up to that time:[2]

> . . .*certiorari*, or the newer term of judicial review, runs largely to jurisdictional review or surveillance by a superior court of statutory tribunals, the term 'jurisdiction' being given its narrow or technical sense. In the absence of a privative clause, the Court may also review for error of law on the face of the record. However, even then, under the most recent authorities, the error must assume a jurisdictional dimension. . .

By any measure, the scope of *certiorari* under *Skogman* was narrow. Subsequent cases continued to stress that review of "an error of law on the face of the record" was limited to errors of "jurisdictional dimension".[3] *Certiorari* was available to both the Crown and the defence to address jurisdictional error,[4] but *not* third parties. Moreover, the full scope of *certiorari* was unavailable in several specific contexts for a variety of policy reasons. For example, when reviewing an order of committal or discharge at a preliminary inquiry, the court was restricted to jurisdictional error.[5]

6. Two principles accounted for the restricted availability of *certiorari.* First, as with most of the prerogative writs, *certiorari* is generally unavailable in cases where the party has an effective alternative remedy. Accordingly, the rights of appeal in the *Criminal*

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[2] *Skogman*, *supra*, at pp. 99-100

[3] *Regina v. Felderhof*, [2002] O.J. No. 4103 (S.C.J.) at paras. 11-17

[4] *Regina v. Dubois*, [1986] 1 S.C.R. 366 at para. 24

[5] *Skogman*, *supra* at pp. 99-100. The limited scope of review regarding an order of committal or discharge at a preliminary inquiry has not changed since *Skogman*. The policy reasons for the restricted jurisdiction are explained in *Dubois, supra* at pp. 373-74. The test for *certiorari* in the review of a search warrant is another example of a situation where the full scope of the remedy is not available: see *Regina v. Garofoli*, [1990] 2 S.C.R. 1421 at paras. 55-56, and *Regina v. Vice Media Canada Inc.,* 2017 ONCA 231 at para. 20.

Code weigh against the availability of *certiorari* to the parties in a criminal trial. Second, *certiorari* is informed by the principle that criminal proceedings should not be unnecessarily interrupted, fragmented, or delayed.[6] Taken together, these principles have generally precluded *certiorari* for anything other than jurisdictional error. However, up until now, this Honourable Court has not considered whether the rule against interlocutory review should be relaxed in cases where a party seeks review of an error of law that cannot readily be corrected on appeal.

ii) The enlargement of *certiorari* under *Dagenais* (1994)

7. Until *Dagenais*, third parties who were entangled in criminal proceedings had no recourse to *certiorari. Dagenais* expanded the scope of *certiorari* to provide third parties with an opportunity to seek judicial review, as follows:[7]

i) *Certiorari* was made available to third parties who were affected by an interlocutory order of an inferior court, and did not have a right of appeal;

ii) *certiorari* was made available to correct an error of law on the face of the record, without the added requirement that the error possess a "jurisdictional dimension"; and

iii) the remedial scope of *certiorari* was expanded to include s. 24(1) *Charter* remedies, in limited circumstances.

However, parties in a criminal trial remained unable to apply for *certiorari* to review an error of law. In *Primeau*, this Honourable Court stressed that the distinction drawn in *Dagenais* between parties and third parties complied "with the general rule barring interlocutory appeals in criminal matters".[8]

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[6] See *Regina v. Mills*, [1986] 1 S.C.R. 863 at pp. 958-64 , and *Regina v. Meltzer*, [1989] 1 S.C.R. 1764 at pp. 1773-74

[7] *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at pp. 857-858, 864-867, 870

[8] *Regina v. Primeau*, [1995] 2 S.C.R. 60 at para. 12

8. Third parties have been able to use this expanded scope of *certiorari* in a variety of contexts. For example, third parties have been able to obtain review of publication bans (*Dagenais*); orders for the production of a complainant's medical records (*L.L.A. v. A.B*);[9] subpoenas issued to unindicted co-perpetrators at the trial of a co-perpetrator (*Jobin* and *Primeau*);[10] and orders that required a witness to remove her Niqab while testifying (*N.S.*).[11] Nonetheless, the actual use of *certiorari* by third parties has remained relatively uncommon. It does not appear that the expansion of *certiorari* under *Dagenais* resulted in a proliferation of trials that were wrecked by reason of fragmentation or delay.

iii) The consolidation of *certiorari* in *Cunningham* (2010)

9. This Honourable Court further refined the doctrine of *certiorari* in *Cunningham*.[12] The trial judge in that case refused defence counsel's request to be removed as counsel of record at trial. The Court held that defence counsel on her application was equivalent to a third party, and that *certiorari* was available under *Dagenais*. More importantly, the Court also held that the remedy is generally available to cure both jurisdictional errors and errors of law on the face of the record (that is the "normal scope of *certiorari*").[13] Unlike *Skogman*, it was no longer necessary for an "error of law on the face of the record" to have a "jurisdictional dimension." (As noted by Rothstein J. in his unanimous judgment, "it is difficult to see how a decision to refuse withdrawal could amount to a jurisdictional error."[14])

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[9] *L.L.A.v. A.B.,* [1995] 4 S.C.R. 536

[10] *Regina v. Jobin*, [1995] 2 S.C.R. 78, *Primeau*, *supra*

[11] *Regina v. N.S.,* 2010 ONCA 670, aff'd [2012] 3 S.C.R. 726

[12] *Regina v. Cunningham*, [2010] 1 S.C.R. 331

[13] *Cunningham, supra,* at paras. 57-58

[14] *Cunningham, supra,* at para. 58

iv) Jurisprudence post-*Cunningham*

10. Subsequent to *Cunningham*, several courts have addressed the availability of *certiorari* to parties in criminal cases. The cases involved issues of general importance to the administration of justice, but ones not readily amenable to correction on appeal. These cases illustrate the point that, in rare circumstances, it would benefit the administration of justice to allow parties to have an expeditious avenue of review.

a) *Regina v. Black,* 2011 ABCA 349

11. In *Black*, the threshold procedural issue was whether the Crown could apply for *certiorari* to review the trial judge's disclosure order for production of calibration records of an approved screening device (ASD), covering several months before and after the alleged offence. The substantive issue had broad implications for the prosecution of all drinking and driving offences that depended on the results of an ASD. Moreover, the issue by its nature was not one that might come to life on an appeal, regardless of the result at trial.[15] Applications for *certiorari* were brought by both the Crown and the police. The reviewing judge dismissed the Crown's application on the basis that *certiorari* was not available to a party for an error of law. The police application was dismissed on the basis that there was no error of law.

12. On appeal, the court allowed the appeal and held that the scope of *certiorari* was the same for parties and third parties. In considering the previous decisions of this Honourable Court, the court inferred that the availability of *certiorari* depended on

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[15] See *Regina v. Black,* 2011 ABCA 349 at para. 27, leave to appeal ref'd [2012] S.C.C.A. No. 49. The disclosure order in *Black* was effectively immune from appellate review because, in the event of conviction, the Crown had no right of appeal, and, in the event of an acquittal, the Crown's right of appeal was circumscribed by *Regina v. Vézeau*, [1977] 2 S.C.R. 277. Furthermore, the Crown in *Black* was not at liberty to abruptly terminate the proceedings for the purpose of launching an appeal. The Crown's discretion to terminate a proceeding for the purpose of overturing an unfavourable interlocutory ruling is circumscribed by the doctrine of abuse of process: see *United States of America v. Fafalios,* 2012 ONCA 365 at paras. 42-45.

whether the order in issue was "final" or "preliminary". The court held that, in cases where an order immediately and finally disposes of a legal right, both parties and third parties have access to *certiorari* for errors of law. On the other hand, the court held that where an order is preliminary in nature, the scope of review for both parties and third parties is limited to errors of jurisdiction.[16]

13. The judgment in *Black* is based on a misreading of the prior judgments of this Honourable Court. There is no support for the proposition that parties in criminal proceedings should be afforded a right of *certiorari* when an interlocutory order is "final" but not when it is "preliminary". More importantly, *Black* effectively circumvents the principle that interlocutory appeals in criminal proceedings should generally be avoided. The test in *Black* also invites a significant increase in interlocutory proceedings, thereby diminishing efficiency in trial process. Nevertheless, the court in *Black* correctly appreciated that, in certain cases, it may be in the interests of justice to allow a party to have access to *certiorari.*

b) *Regina v. Jackson*, 2015 ONCA 832

14. In *Jackson*, the threshold issue was whether the Crown and/or the police could apply for *certiorari* to review an alleged error of law, namely, a trial judge's disclosure order regarding service and calibration records for an "approved instrument". As in *Black*, the substantive issue had broad implications for the prosecution of all drinking and driving offences that depended on the results of such instruments. The court applied the normal rule that *certiorari* was not available to a party to review an error of law, but was available to third parties for both jurisdictional error and an error of law. In the result, the court allowed the police application and quashed the disclosure order. In its reasons on the substantive issue, the court in *Jackson* provided guidance to courts across Ontario on an important question that otherwise would not have crystallized in an appeal.

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[16] *Black*, *supra*, at paras. 20-28

c) *Awashish v. Her Majesty,* 2016 QCCA 1164

15. In the present case, the court below considered the scope of *certiorari* for parties to the proceedings and rejected the approach in *Black*. The court held that the availability of *certiorari* differs for parties and third parties. In particular, the court held that parties in a criminal proceedings can seek *certiorari* to review errors of law only when the impugned decision has an "irreversible impact on a fundamental right". [17]

16. The test articulated in the court below, like the test in *Black*, is not supported by the prior judgments of this Honourable Court. The requirement that a decision have a "irreversible impact on a fundamental right" is unclear and difficult to apply. (It is not apparent what, if anything, would constitute a "fundamental right" of the Crown.) The test is unduly restrictive because it would not allow for review in cases where an order did not upend a "fundamental right" of a party, but, nonetheless, involved an issue of importance to the administration of justice that was unlikely to be addressed on appeal. More importantly, the test is unduly broad as it would permit interlocutory review even in cases where the issue of law possesses no overarching significance to criminal justice.

B) A proposal for an incremental revision of *certiorari*

17. The within case illustrates the shortcomings inherent in the scope of *certiorari* as currently defined in the arc of cases from *Skogman* to *Cunningham*. The Intervener proposes that the scope of *certiorari* be incrementally expanded so that a party may seek to review an error of law on the face of the record in circumstances where the error engages an issue of overarching importance to the administration of justice, and is one

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[17] *Awashish v. Her Majesty*, 2016 QCCA 1164, at paras. 38-39. In particular, see para. 39, where the Court stated

> [The reviewing judge] a appliqué un test erroné. *Il devait se demander si l'ordonnance de divulgation violait un droit fondamental de l'intimée, et ce, de façon irréparable* et non pas se demander si l'ordonnance interlocutoire avait sur ce dernier un caractère contraignant et définitif. [emphasis added]

that does not normally crystallize on appeal.[18] The solutions or approaches adopted by the courts of appeal in *Black*, *Jackson*, and in the within case, are unsatisfactory, either because they are unduly restrictive or unduly expansive, or both, or otherwise impractical.

18. The Intervener's proposal for this modest reform of *certiorari* is partly based on the comments of Doherty J.A. in *Regina v. Duvivier* et al. (1991), 64 C.C.C. (3d) 20 (Ont. C.A.). After considering the normal prohibition against interlocutory appeals in criminal proceedings, Doherty J.A. wrote the following, at pages 24 and 25:

> I stress, however, that this limitation on resort to. . . extraordinary remedy relief during criminal proceedings has been judicially imposed and cannot be taken as the equivalent of an absolute privative clause barring all such applications. *Where the circumstances are such that the interests of justice require immediate intervention by the superior court, that jurisdiction can and will be exercised*. [emphasis added]

19. The Intervener acknowledges that, ordinarily, *certiorari* should be denied to the parties in a criminal proceeding with respect to errors of law. The principle that criminal proceedings should not be interrupted by interlocutory review will generally trump any complaint about an unfavourable ruling in a particular case. However, it would benefit the interests of justice if *certiorari* was available in unique cases where the issue at stake is of broad importance, and is essentially immune from effective appellate review. Applications for *certiorari* in such cases should be understood as "test cases" for difficult issues that recur frequently but seldom get addressed on appeal.[19]

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[18] The intervener does not propose that the restricted test for *certiorari* that is applicable on the reviewing of orders of committal or discharge following a preliminary inquiry, or the review of search warrants, be modified. The test in those particular situations is governed by specific policy reasons.

[19] The procedures governing such application should provide that the proceedings in the lower court will continue uninterrupted unless otherwise ordered by the superior court, thereby reducing the possibility of unnecessary delay.

PART IV – SUBMISSION AS TO COSTS

20. It is submitted that there should be no order of costs for or against the Intervener.

PART V – ORDER REQUESTED

21. The Intervener takes no position on the outcome of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY

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PART VI – TABLE OF AUTHORITIES

PARAS.

JUDGMENTS

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