Case Name:

R. v. J.V.

Between
Her Majesty the Queen, applicant, and
J.V., respondent
And between
Her Majesty the Queen, applicant, and
L.(M.) (Young Person), respondent, and
Peel Criminal Lawyers Association, intervenor

[2002] O.J. No. 1027
Court File No.: CRIM. MOTION (P) 5711/01 & 5725/01

Ontario Superior Court of Justice
Hill J.

Heard: February 15, 2002.
Judgment: March 1, 2002.
(134 paras.)

Counsel:

D. Carruthers, S. Laufer, for the applicant.
O. Osmak, for the respondent J.V.
C. Morris, for the respondent L.(M.).
C. Letman, for the intervenor.

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HILL J.:—

INTRODUCTION

¶ 1 In separate judicial interim release hearings, the respondents V. and L.(M.) were ordered released on bail.

¶ 2 The Attorney General of Ontario submits that in both hearings, because the Crown was improperly denied the opportunity to be heard, the justices of the peace exceeded their jurisdiction.

¶ 3 As simple as the issue first appears, the story soon becomes more complicated.

THE V. BAIL HEARING

The Evidentiary Record

¶ 4 The respondent, J.V., was arrested on September 22nd, 2001 and charged with possession of cannabis marijuana (in an amount not exceeding 30 grams) and with breaching a term of a recognizance of bail which restricted him to his residence except for employment purposes or when in the presence of his surety.

¶ 5 The respondent was represented by duty counsel at the September 23rd, 2001 judicial interim release hearing. At the outset of the hearing, counsel appearing for the Attorney General of Ontario indicated he had been delegated authority to prosecute the charge of possession contrary to s. 4(1) of the Controlled Drugs and Substances Act.

¶ 6 Crown counsel announced that due to the nature of the charges the hearing would be a reverse onus proceeding with the accused required "to show cause why he should be released into the community". The presiding justice of the peace and duty counsel agreed.

¶ 7 Duty counsel stated his agreement "that the allegations be read in" by Crown counsel. The prosecutor then read a narrative of facts into the court record.

¶ 8 It was alleged that at 6:45 p.m. on September 22nd, police officers discovered the respondent in Victory Park in Mississauga with three other males. There was a strong odour of marijuana in the area. The respondent's eyes were bloodshot, red-rimmed and glossy. He appeared to have the butt of a marijuana cigarette in his hand. Police officers saw J.V. toss the cigarette away. On arrest, he was searched and, in the front of his shorts, the police found a white plastic baggie containing a green, leafy substance believed to be marijuana. The weight of the substance was six grams.

¶ 9 The breach of recognizance charge related to the respondent's release August 18th, 2001 on a recognizance following his arrest on a robbery allegation. A condition of the August 18th bail order was that J.V. remain in his residence at all times except for employment purposes, travelling to and from employment, or

when in the presence of his surety. Crown counsel asserted that at the time of his most recent arrest on September 22nd the respondent was unemployed and not in the presence of his surety.

¶ 10 The prosecutor informed the court of the circumstances of the outstanding robbery charge. On eight occasions in one page of transcript, counsel referred to the subject of the robbery as the "victim". On August 13th, according to the synopsis, the respondent together with two associates attacked the complainant choking him into unconsciousness. The suspects took $115.00 from the complainant's wallet. He did not require medical attention.

¶ 11 The respondent was arrested on August 17th and provided an inculpatory videotaped statement.

¶ 12 The Crown entered no evidence of a prior criminal record.

¶ 13 Once the factual allegations were read, duty counsel stated an intention to call the respondent's father to testify. The following exchange then ensued:

CROWN COUNSEL:	And just if my friend is planning to call two proposed sureties, I would ask that there be an exclusion of witnesses at this point, after the synopsis has been heard.
THE COURT:	Let's shorten this now. On the first bail, there was one R.V., so the onus is going to be very hard on - need to qualify R.V. as a surety.
DUTY COUNSEL:	I wasn't proposing R.V., I was going to call the father.
THE COURT:	All right. Well, let's call the father.

¶ 14 The respondent's father testified that he was employed, had $65,000.00 equity in his home, and was prepared to undertake the role of a surety if his son were released. The witness demonstrated an understanding of the duties of a surety. He had not before seen his son smoking marijuana. The witness informed the court that the respondent was attending Lincoln High School.

¶ 15 In cross-examination, the respondent's father acknowledged his son sometimes came in at 11:30 p.m. or midnight on Friday and Saturday nights. Crown counsel's examination also explored what contribution the witness had made assisting his wife, the surety on the outstanding recognizance, to supervise that bail order.

¶ 16 In re-examination, when duty counsel sought to question the proposed surety about his understanding of the different responsibility of being a surety as opposed to merely assisting a surety, the prosecutor objected to the line of questioning. The objection was overruled and duty counsel completed his re-examination.

¶ 17 The respondent testified on his own behalf at the show cause hearing. In his in-chief examination, J.V. admitted to a 1999 youth court disposition for shoplifting. In his direct testimony, the respondent agreed to house arrest except for school attendance were he to be released.

¶ 18 In cross-examination, the respondent stated he was taking seven courses in high school. While the respondent agreed that he set his own rules and did not always listen to his parents, he testified that he was not out of control. Toward the conclusion of cross-examination, this evidence was given:

Q.	So how are you going to make the Court be confident that if you're released now, all of a sudden you're going to start to listen?
A.	Well, I got caught the first time, so I'm thinking now, you know? If I get caught the second time, I'm gonna have to pay - my parents are gonna have to pay a lot of money, so I'll have to obey the rules.
Q.	And that's what will be the deciding factor for you, is that there's money at stake.
A.	Well, not only that, I just wanna get everything cleared up, trying to finish school. I don't want none of this on me no more. I just wanna finish it.

The Adjudication

¶ 19 Following the oral testimony, the court asked counsel for the respondent for submissions. Submissions were made by duty counsel but not transcribed for this application.

¶ 20 Once J.V.'s counsel completed his submissions, the presiding justice of the peace announced his decision:

> Mr. Crown, I am going to release - it's a reverse onus, and you had a very extensive cross-examination, so - and I am suspecting in a very great sense I know what your submissions would be. Please stand.

¶ 21 Crown counsel immediately objected:

CROWN COUNSEL:	Not withstanding that, Your Worship, and I don't mean to be disrespectful, I would like to make submissions regarding ...
THE COURT:	I am not accepting your submissions, sir. Please stand, J.V.
CROWN COUNSEL:	Just for the record, I'll make it clear that the Crown does object to his release on the secondary and the tertiary grounds, that there are outstanding matters of concern for public safety ...
THE COURT:	Thank you, sir.

¶ 22 The court then gave reasons for the respondent's release from custody:

> J.V., I do not like how you are operating. Mr. Price said that - he referred to this one last occasion, but from my count, sir, it is three, by adding the first one in regard to the theft under, and I add in the one with which you are charged with, the robbery that you are charged with, and then I add in these three or four conditions by themselves.
> Not withstanding that, I was impressed by your father. He is working long hours. I can understand. He was totally up front, I thought, and it is on basically his say so, sir, why you are going to be released.
> I suspect you love putting your parents through this or you would not do it. You must love doing that, but it is on his say so, basically, sir, that you will be released.
> The secondary grounds and the tertiary grounds I have considered. These are the reasons. You would have to show me on a balance of probabilities why you should be released. Your dad did that. He is even prepared to give up some of the overtime work he does to be better able to supervise you, sir.

¶ 23 The presiding justice of the peace ordered release on a recognizance in the amount of $5,000.00 (no deposit) with the respondent's father as the approved surety. Conditions of release were dictated, without the input of counsel, including a house arrest provision with limited exemptions.

¶ 24 The court then inquired:

> Mr. Crown, other than detention, is there any conditions you'd be seeking, sir?

The prosecutor made submissions respecting terms of release some of which were accepted.

¶ 25 The hearing concluded with Crown counsel requesting a Form 33 Certificate of Default be completed on the respondent's outstanding recognizance to trigger bail estreat proceedings. The court dismissed the application.

THE L(M.) BAIL HEARING

The Evidentiary Record

¶ 26 The respondent, L.(M.), was arrested September 29th, 2001 and charged with attempting to steal a motor vehicle of a value exceeding $5,000.00 as well as two counts of breaching a recognizance of bail.

¶ 27 On September 30th, 2001, L.(M.) and a second accused, R.(A.), appeared before a justice of the peace presiding over a judicial interim release court. A four-count information before the court charged L.(M.) and R.(A.) and O.(H.) with attempt to steal a vehicle (count #1), R.(A.) with breach of recognizance (count #2), and L.(M.) with two charges of breaching a recognizance (counts #3, 4). O.(H.) had been released on a promise to appear. A fourth co-accused on count #1, an adult, was not before the court.

¶ 28 Two duty counsel were present to represent L.(M.) and R.(A.). The first statement by Crown counsel was directed to L.(M.)'s counsel: "is there a surety here for this person?" Duty counsel replied that the respondent's parents and aunt were present.

¶ 29 Once the young persons' ages were established (L.(M.) - July 3rd, 1985; R.(A.) - March 31st, 1986), the justice of the peace read counts #1 and 2 to R.(A.) and then counts #3 and 4 to L.(M.). Both the respondent and R.(A.) indicated they understood the charges.

¶ 30 After both duty counsel agreed to the prosecutor reading into the record the factual allegations said to support the charges before the court, Crown counsel returned to the surety issue asking: "is anyone appearing for [L.(M.)]?" Duty counsel responded that her aunt and her father were.

¶ 31 As to the charge of attempt theft over, the prosecutor stated that on September 29th, at 12:10 a.m., L.(M.), R.(A.), O.(H.), and their adult co-accused were in the underground parking lot of a building at 50 Elm Street in Mississauga. Crown counsel stated: "they were inside a vehicle", a 1990 Nissan Pathfinder, attempting to start the "victim's" vehicle for the purpose of stealing it. The narration of facts on count #1 concluded with the prosecutor stating:

> Now, the police were contacted, they attended and at 12:38 in the evening, 28 minutes later, in the early morning I should say, the parties were arrested, cautioned for that particular charge and then taken to 12 Division. That relates to both parties.

¶ 32 Crown counsel attempted to inform the court of the background to the breach recognizance charges faced by L.(M.):

> With regard to [L.(M.)], she is at the present time charged with possession obtained by crime, three counts, awaiting disposition, she was released on a recognizance as well. She's also charged with break, enter and commit theft, possession of property obtained by crime, awaiting disposition, again released on a recognizance. And, so that's what places her in a reverse onus situation as well. Now, with regard to count two [count #3] against [L.(M.)], it's a breach of recognizance, and I could advise you that, based on this arrest, investigation reveal[s] that she had been charged with possession under and that was on January the 14th, 2001, by Metro Toronto Police, and the recognizance was entered into, it contained a condition of house arrest, not to be away from her place of residence except in the [company] of one of her parents or sureties or with prior written permission from one of the sureties, and/or for the purposes of going to and from counselling directly. Now, there's an expiry on that, December 31st, 2001. Count number three [four] is also a breach of recognizance because based on these charges at her arrest, the investigation also revealed that she had been charged with, as I stated earlier, those earlier charges. The possession over as well as failing to comply with the recognizance, and that extends to an earlier date of April the 2nd, 2001. And, that deals with the outstanding charges for [L.(M.)].

¶ 33 Crown counsel stated that L.(M.) had no prior record. He then entered as an exhibit the outstanding bail recognizances of January 15th, 2001 and April 19th, 2001. The January 15th bail order contained a house arrest condition stating:

> House Arrest: Not to be away from your place of residence except in the company of one of your parents or sureties or with prior written permission from one of the sureties for the purpose of going to and from counselling directly.

The April 19th release order did not contain a term requiring the respondent to keep the peace and be of good behaviour.

¶ 34 The prosecutor then added:

> And, lastly before we leave that, I just want to provide you with a synopsis of the other event for [L.(M.)], and this dates to an offence date of March the 30th, 2001. Now, at this point, this is another vehicle, a 1998 Doge Neon, and this was outside of 15 Muskoka Avenue in the City of Toronto, and this vehicle had been reported stolen to the police and [L.(M.)] was observed to be a passenger in the stolen vehicle by a witness. On April the 10th, 2001, she ended up surrendering herself to 21 Division, she was placed under arrest. She readily admitted to being a passenger in the vehicle. She indicated that she was aware that the vehicle was stolen, and she had observed the ignition switch had been tampered with, and she was held for a show cause hearing and that resulted in the recognizance before the Court. The other event that relates to failing to comply with recognizance, when she was arrested on January the 14th, and charged with the offence of break, enter and commit, the possession of stolen property under $5,000.00, there was a condition that she was supposed to abide by which was house arrest, not to be away from her place of residence except in the [company] of one of her parents or sureties with prior written permission, and on the 10th of April, when she surrendered, she was held to be, at least alleged to have been in breach of that particular condition. Basically the other charges all relate to the same event and she was held for that and show cause hearing on a reverse onus. So, that deals with [L.(M.)] in her entirety, I believe. The Crown has concerns on all three grounds, primary, secondary and tertiary grounds. And, would ask that they show cause.

¶ 35 Duty counsel then sought some clarification as to whether the nineteen-year-old adult co-accused on count #1 was found by the police in the driver's seat of the vehicle. Crown counsel attempted to obtain the answer from his preliminary Crown brief. The court stated the answer "only goes to the weight". When no final answer appeared to be forthcoming, both the court and the prosecution concluded nothing would particularly turn on knowing the answer.

¶ 36 Both R.(A.) and his father testified at the show cause hearing. No evidence was called on behalf of L.(M.).

The Adjudication

¶ 37 Duty counsel for R.(A.) made submissions as to why his client ought to be released followed by responding submissions by the prosecutor and reply by defence counsel. Reasons for release were given orally. Neither the submissions nor the reasons were transcribed for this application.

¶ 38 When the discussion turned to setting a return date for R.(A.), counsel for L.(M.), apparently concerned that she might be held in custody and be deserving of a remand date within a short cycle, decided to raise the issue:

> I have spoken with my friend, Your Worship, the difficulty is that they are jointly charged. The result would be different with this young lady ...

The court cut counsel off and stated:

> ... justice in this county, we weigh evenly, there is no other result. I am going to release her as well.

Duty counsel, not surprisingly, responded:

> All right, very well then, that saves a lot of time.

¶ 39 Crown counsel immediately raised the issue of the court making a release decision regarding L.(M.) without a calling on the Crown to make submissions:

> CROWN COUNSEL: If I may, at this point, also address, perhaps a more [delicate] matter.
>
> THE COURT: Certainly.
>
> CROWN COUNSEL: Your Worship has made comments about the release of [L.(M.)].
>
> THE COURT: Yes.
>
> CROWN COUNSEL: And, my concern is that this is also a reverse onus situation.
>
> THE COURT: All right.
>
> CROWN COUNSEL: And, in the recent decision of Kaushal from the Superior Court that just came out with Justice Langdon.
>
> THE COURT: Do you have it with you?
> CROWN COUNSEL: I do.
> THE COURT: Could you share it with me.
>
> ...
>
> CROWN COUNSEL: Your Worship, I'm going to provide this to you, it is a written endorsement only, I have a typed portion, but I don't ...
>
> THE COURT: That's fine.
>
> CROWN COUNSEL: I don't think that's appropriate. This is with a matter that was reviewed from your brother Justice of the Peace, Justice Chang-Alloy.
>
> THE COURT: Yes, I heard about this.
> DUTY COUNSEL: Is this Justice Hill's decision?
>
> CROWN COUNSEL: Justice Langdon's decision, just for the benefit of [duty counsel].
> THE COURT: Well, this is only one decision, you see there is another decision and I intend to give you a copy of that.
>
> CROWN COUNSEL: Thank you.
>
> THE COURT: And, this copy would mean no person can advise the trier of fact when he or she has made up their minds as to juris (ph). What I will not disregard is your right to make submissions, I never disregard that. Fortunately, you have that right to make submissions. But, once the trier of fact has made his or her mind, and they can make up their mind at any stage at the hearing, and

that is also given, I believe, from the Supreme Court of Ontario, so I am intending to look at that point as well.

CROWN COUNSEL: Well, I would certainly welcome that, you know that, Your Worship.

THE COURT: Yes.

CROWN COUNSEL: But, the situation that I am in and I find myself in, for the record, where I am to say that given Your Worship's position, as articulated on the record, that it would be appropriate for [L.(M.)'s] matter to go over before another justice of the peace on Monday.

THE COURT: I disagree. I disagree with that.

CROWN COUNSEL: And, I understand, but I simply want to make that submission for the record.

THE COURT: All right. The only time that I am intending to allow that is if I feel prejudice by [L.(M.)] or her parents and have knowledge of them or any other reason. I am not being prejudice to the Crown by indicating that I heard the allegations on both charges. I have released one person on a particular charge that he is jointly charged with the other person, and I also have knowledge that the third person on that information was released on a promise to appear. And, in the interest of justice, as we indicated earlier, I must balance, it is my intention to do just that.

CROWN COUNSEL: I understand.

THE COURT: However, I would invite submissions as to the conditions you have-may I keep this, sir? Or, do you have a copy of that?

CROWN COUNSEL: I would ask that if I can return it to you in a few moments after I make a copy.

THE COURT: Actually, you may keep this and give me a written copy of, may I exchange this one next week, I'm still here.

CROWN COUNSEL: That's fine.

THE COURT: All right.

CROWN COUNSEL: And, my difficulty is, as Your Worship can appreciate, that submissions made after the fact, sort of speak, when the judicial officer has made a decision about related issues ...

THE COURT: The conditions, as to conditions.

CROWN COUNSEL: No, I understand that, but I'm speaking specifically about the reverse onus provisions so my submissions before that have been not provided to the Court based on the decision being made and I respect the position of the Court, but I think it is incumbent upon me to at least put on the record ...

THE COURT: Certainly.

CROWN COUNSEL: ... these comments, and I would be prepared to address

conditions. But, I also have to say that it goes farther than that for the Crown because we have a situation where we have the adult co-accused is coming before the Court, and my submissions would have been based on the fact that perhaps after hearing from the sureties, I haven't had the opportunity to do that. We have two other recognizance that [L.(M.)] is released on.

THE COURT: Actually, [Crown counsel], please bear this in mind that I am just drawing out something that is unnecessary, the adult is coming before Court, is an adult. The language given to the young persons somewhat varies in a great deal as to the language given to an adult person. The law as the Young Offenders Act will have it, there is a certain degree of understanding that the Court must have in dealing with the young persons. As that understanding does not go further than the young person. The adult person that is becoming before the Court, I will see his situation in a different light.

CROWN COUNSEL: I understand.

THE COURT: Make no mistake about that.

CROWN COUNSEL: I don't, Your Worship and you know I have the greatest of respect for the Court.

THE COURT: Make no mistake about that.

CROWN COUNSEL: As I said, just so I'm clear, my concern was that my submissions, on a reverse onus situation, would be based after hearing from proposed sureties, and I don't know who's going to be proposed today as being a surety but I can advise there are two recognizance[s] that are in existing.

THE COURT: Yes.

CROWN COUNSEL: That have been provided to the Court, and again, the same concerns that I have is whether they are suitable sureties given the history and that being deprived of that opportunity at this point, that's why I suggested that it may be appropriate for it to go over, and I will not say another word on that particular matter.

¶ 40 Counsel for L.(M.) then advised the presiding justice of the peace that the defence was advancing the respondent's aunt, who had not acted as a surety on any prior recognizance, as a person with "substantial" means. Counsel added that, although he was prepared to call prospective sureties "if need be", he was confident that at the appropriate time the justice of the peace could examine her as to matters relevant to suitability as a surety.

¶ 41 The court then observed:

> Again, as I indicated, it is in the Court's understanding and I have reviewed everything that is being said, and it is my intention, no matter where they will take me, they all are subject to a bail. That this is where I will stand. Professor Morale's (sp) wisdom indicated that the trier of fact, why would I be here if I could not make those decisions, and I may be spoken to by any one of the Superior Court judges, I will still hold that position. They make these decisions themselves on a day to day basis. No one suggest to them except by appeal that it can be curtailed or changed around. If I thought that I could not bring something to the system, I

would not be here, and I can be challenged anytime. I have been challenged several times in the past. I have been successful in those challenges and today is no different.

¶ 42 Crown counsel requested that the sureties be bound by a significant sum before recommending a number of release conditions for inclusion in the bail order.

¶ 43 The hearing concluded with the following reasons for release:

THE COURT: Please stand, [L.(M.)]. You seem very much that if you do not wish to understand or abide by any of the conditions laid down by this Court or by your parents, and you seem to think that you could come here with any frequency with the understanding that you may be let out from here as well. I want you to be very clear that the Court frown[s] on this kind of behaviour, the Court means business. What we do not, or perhaps, a consideration that the Act allows us, is that I did not wish to destroy his or your education and your ability to grow up to be a credit to your parents, to society and to yourself as a whole. If I should have held you in custody for one year, that would have turn back the time for you. You too are destroying your own life. I would suggest that you listen to your parents and deal with it. Are we clear on that.

[L.(M.)]: Yes.

¶ 44 The court ordered L.(M.)'s release on a recognizance in the amount of $10,000.00, no deposit, with two or more sureties allowing for "her aunt and her father". The court dictated the conditions of release aloud. Included in the terms was a house restraint provision except when attending school or court, meeting with counsel, for medical emergencies, or absence with permission of a surety.

¶ 45 Crown counsel then raised the issue of a Form 33 Certificate of Default being completed on L.(M.)'s outstanding recognizances effectively marking the earlier bails for estreat. The court refused the request.

POSITION OF THE PARTIES

The Attorney General of Ontario

¶ 46 While recognizing that certiorari is a discretionary remedy, the applicant submits that the conduct of the justices of the peace in reaching a decision on the ultimate issue in the respective judicial interim release hearings, without allowing the Crown an opportunity to advance argument on the issue of release, amounts to jurisdictional error.

¶ 47 The Crown submits that the courts' breach of the audi alteram partem principle constitutes a denial of natural justice to a party in the litigation. It is further argued that the courts committed jurisdictional error when the prosecution was denied a statutory right to join issue on the burden of proof through examining witnesses.

¶ 48 The applicant's written argument set out what it describes as the "applicable statutory procedural considerations at judicial interim release hearings" including:

(1) Section 518 of the Code permits a judicial officer to receive and base decisions regarding release or detention on evidence that is considered "credible and trustworthy".
(2) Pursuant to sections 515(1) and 515(6) of the Code either the Crown or the accused will bear "the burden of proof whether an individual may be granted bail". Depending on the circumstances, there may be a "Crown onus" (ss. 515(1)(5)) or a "reverse onus" (s. 515(6)) where the onus is upon the accused.
(3) The standard of proof is on a balance of probabilities.

(4) "Section 518 of the Code sets out the evidence that may be received by the court, and specifically the following categories of evidence enumerated,

(1) inquiries on oath to be made by the presiding justice at a bail hearing, and
(2) the proscribed areas of inquiry, and
(3) the evidence which may be led by the prosecutor, and
(4) consideration of any relevant matters agreed on by the prosecutor and the accused or his counsel, and

(d. 1) evidence obtained as a result of an interception of a private communication ..., and
(d. 2) consideration of any evidence submitted regarding the need to ensure the safety or security of any victim of or any witness to an offence, and

(5) the justice may receive and base his decision on evidence considered credible or trustworthy by him in the circumstances of each case."

(5) "The Code stipulates that each party shall be "given a reasonable opportunity to" show cause why, in the case of the accused, they should be released; or, in the case of the prosecutor, why they should be detained or the conditions of release that are appropriate (sections 515(4) (4.1) (4.12) (4.2) (5) (7) (8) (12) of the Code)".
(6) "Section 515(10) of the Code states the grounds when detention of an accused is justified; the grounds are referred to as the primary, secondary and tertiary grounds."

¶ 49 The orders requested of the Court in the applicant's factum are:

(49) An Order in the nature of declaratory relief regarding the appropriate and relevant procedure during judicial interim release hearings and the attending obligation of the court to hear argument or submissions and or the calling of evidence under oath of witnesses from a party against whom they intend to rule; therefore, respecting the legal principle audi alteram partem; and
(50) An Order allowing the applications and granting a writ of certiorari in aid to compel His Worship Justice of the Peace Mr. Chang-Alloy, regarding the case of R. v. J.V., and His Worship Justice of the Peace Mr. Farnum, regarding the case of R. v. M.L. (Young Person), to hear and weigh evidence and submissions at the judicial interim release hearing in these respective matters on the information before him; and
(51) An order quashing the judicial interim release and ordering a de novo bail hearing.

The Respondent J.V.

¶ 50 The respondent resists the relief sought by the applicant submitting that natural justice was not denied to the prosecution and accordingly no jurisdictional error exists.

¶ 51 Mr. Osmak argues that the justice of the peace has a wide discretion as to how the court will receive the submissions of the parties. Here, it is submitted, the court "understood the submissions of counsel for the applicant" as a result of Crown counsel's extensive cross-examination. In this regard, the respondent points to the judicial officer's statement: "the Crown does object to his release on the secondary and tertiary grounds, that there are outstanding matters of concern for public safety".

¶ 52 As an alternative submission, the respondent argues that because certiorari is a discretionary remedy, it "may be refused where, despite the proof of failure to observe natural justice, the result would have been the same anyway".

The Respondent L.(M.)

¶ 53 The respondent strenuously argues that certiorari ought not to issue where other conventional review procedures exist, for example, a s. 521 Code bail review. L.(M.) submits that the Crown has not applied for mandamus and in any event that extraordinary remedy as well is only available if no other remedy is available.

¶ 54 The respondent's written argument further submits that:

> 16. It is respectfully submitted that the procedures to be applied on a bail hearing are set out in section 518 of the Criminal Code. Section 518 conveys a wide discretion on the presiding justice. The section does not mandate the justice to hear viva voce evidence (or any evidence for that matter), but merely to "make such inquiries, on oath or otherwise, of and concerning the accused as he considers desirable." The jurisdiction to hear evidence is permissive, not mandatory. The evidence heard may be any that is "considered credible or trustworthy ..."
> 17. The learned Justice of the Peace did not, therefore exceed the jurisdiction afforded to him by statute, in declining to compel the Respondent to lead viva voce evidence before ordering her release.
> 18. While it may be regrettable that the Court indicated an intention to release prior to hearing submissions from the Applicant, the Court proceeded to invite counsel for the Applicant to make submissions in an attempt to persuade the Court to detain the respondent. Counsel for the Applicant did, in fact, make such submissions, albeit unsuccessfully.
> 19. It is respectfully submitted, therefore, that the principle audi alteram partem was applied in the present case. No excess of jurisdiction occurred.

Peel Criminal Lawyers Association

¶ 55 The Peel Criminal Lawyers Association was granted leave to intervene in these applications. At the hearing, the intervenor filed extensive affidavit and transcript material in an effort to demonstrate the Association's experience with "the practice in bail courts in the Region of Peel and the issues surrounding Bail Committees and bail reform from 1997 to the present". The intervenor supports the respondents' position that certiorari is an inappropriate remedy in the circumstances.

¶ 56 Included in the intervenor's written submissions were the following points:

> 12. It is respectfully submitted by the Intervenor that the actions of both Justices of the Peace reflect a desire to expedite the bail hearings on a weekend. Further, both Justices of the Peace are experienced and well-known and certainly familiar with the problems in the bail courts in the Region of Peel.
> 13. It is respectfully submitted by the Intervenor, that all parties have recognized problems in the bail courts since 1994 and that various attempts have been made to deal with the issues. Even in the year 2002, the operation of the bail courts remains a constant item of concern to court management, to the extent that a third bail court has now been implemented for most days of the week.
> 14. It is respectfully submitted by the Intervenor that in assessing the merits of the Crown's Applications for Writs of Certiorari, this Honourable Court should also examine the conduct of bail hearings in this jurisdiction, particularly in light of the on-going problems and the continued conduct of the Crown in protracting proceedings through various means up to and including these Applications.
> 15. Since the PCLA was granted Intervenor status, an effort was made to keep track of the bail courts over the past several weeks. It is respectfully submitted that even the summary of the information demonstrates the ongoing nature of the problems in delays in the bail courts.

...

17. It is respectfully submitted that one of the most obvious areas of concern in contributing to the delay in the bail courts, is the conduct of consent release matters. Although the two applications before this Honourable Court do not concern such hearings, this court could consider such matters as part of an overall review.
18. It is respectfully submitted that this Honourable Court, as a court of review in these matters, has the unique opportunity to contribute to the setting of guidelines for the bail courts, which might effectively contribute to better operation of the courts.

¶ 57 The intervenor's material raises a number of other complaints:

(1) Where defence counsel is prepared to have the prosecutor read in the alleged prior criminal record but does not otherwise "admit" the record's accuracy, the Crown threatens to seek an adjournment of the bail hearing in order to formally prove the prior record as it would in a trial.
(2) The prosecution reads in allegations of past bad conduct not the subject of criminal charges and findings of guilt and files documents, i.e. Domestic Violence Interview forms.
(3) The Crown withholds its consent to judicial interim release unless the accused agrees to call the prospective surety or sureties. Also, because individuals arrested by the police are only permitted by the police to telephone counsel or legal aid duty counsel, but not family or prospective sureties, they are denied bail because no sureties are in court.
(4) The prosecutor uses cross-examination of prospective sureties to elicit statements of the accused made to them about the outstanding charge(s).
(5) On a regular basis, show cause bail hearings are not reached on the date scheduled because of congestion in the bail courts and protracted judicial interim release hearings. Prospective sureties attend day after day.
(6) Bail hearings not reached on Friday cannot be adjourned to weekend bail courts - the accused are remanded to the following Monday.
(7) The bail courts are not always staffed by experienced Crown counsel.

¶ 58 The intervenor's documentation reveals that in 2000, of the 18,667 persons arrested in Peel, 7430 or about 40% were detained for bail hearings.

¶ 59 The current president of the Peel Criminal Lawyers Association deposes in his affidavit that:

> The conduct of bail hearings in our courts remains a serious problem, representing significant extended periods of detention for individuals who may be required to wait days simply to have a bail hearing. While the problem is partially related to the increase in the volume of charges laid in this jurisdiction, that is not the whole answer. Procedures have been suggested for many years to help stream-line the process, yet not followed. Additional resources continue to be allocated to bails, through the introduction of Saturday and Sunday bail courts and the use of additional bail courts during the week. Yet the problems with the bail courts remain, and continue to consume a great deal of time and attention.
>
> ...
>
> Issues of concern are the conduct of consent releases, the continued insistence on calling a surety on a consent release, the use of the bail hearing as a means to obtain evidence against an accused, the number of matters not being reached, and such other issues as may arise.

¶ 60 In her oral submissions, counsel for the intervenor suggested that the judicial officers in the hearings before the court may simply have acted as they did out of frustration with congested court lists.

ANALYSIS

Bail Hearing Procedure

¶ 61 The useful outline of bail hearing procedures reproduced from the applicant's factum (at para. 48 supra), as far as it goes, is correct.

¶ 62 However, the state of the record in these two show cause hearings, and the record produced by the intervenor, unfortunately require a restatement of the observations of this court in Re Brooks and the Queen (2001), 153 C.C.C. (3d) 533 (Ont. S.C.J.) at 543-4, 545-6:

> ... a restatement of first principles is warranted. A person charged with a criminal offence and detained on arrest has the constitutional right not to be denied bail without just cause according to s. 11(e) of the Charter.
>
> ...
>
> In certain circumstances, this obliges an officer in charge to release an accused pursuant to s. 498 or s. 499 of the Code. Failure to consider such a release at all or to release in circumstances where such a disposition is clearly correct from an objective point of view, amounts to an abdication of legal responsibility and a Charter infringement. In this case, the police are not to be faulted in any fashion for not authorizing bail.
>
> Crown counsel are expected to exercise discretion to consent to bail in appropriate cases and to oppose release where justified. That discretion must be informed, fairly exercised, and respectful of prevailing jurisprudential authorities. Opposing bail in every case, or without exception where a particular crime is charged, or because of a victim's wishes without regard to individual liberty concerns of the arrestee, derogates from the prosecutor's role as a minister of justice and as a guardian of the civil rights of all persons.
> Because the police and the prosecution have significant discretion to exercise respecting the release of accused persons, the administration of criminal justice logically expects that these parties will not simply dump all bail decisions into contested hearings before the Courts. Not only does this serve to choke the operation of the Bail Courts but, as said, the statutory and constitutional regime demands otherwise.
> In those instances where a show cause hearing is reasonably justified, and an adjournment is not requested, all parties should be prepared to proceed with witnesses available and properly admissible evidence. In turn, the Court is expected to conduct a judicious hearing applying the statutory and Judge-made standards necessary to ensure a fair hearing.
> A detention review pursuant to s. 520 of the Code is not a de novo hearing. The applicant for review must establish an error in principle in the reasoning of the show cause justice and/or a material change in circumstances since the original proceedings.
>
> ...
>
> A prospective surety may attend Court and testify at a s. 515 show cause hearing. The surety is then subject to cross-examination. Such a witness, or the accused person, or another witness may testify as to knowledge of another person or persons who are suitable and prepared to stand as surety should the Court order release. Not infrequently, a prospective surety takes time off work to be interviewed at the office of counsel for the accused ahead of the show cause hearing. He or she may not be in a position to lose another day from the workplace sitting and waiting to be called to testify in a Bail Court with a dozen to two dozen contested hearings, or worse still, finding that the relevant hearing is adjourned because it cannot be reached on the congested Court list.
> There is no legal requirement that a surety be present in Court and testify in order for judicial interim release to be considered. This is especially so where the Crown bears the onus of

establishing why continued detention is justified. By virtue of S.C. 1985, c. 19, s. 84(2), the Code was amended with the addition of what is now s. 515(2.1):

> Power of justice to name sureties in order 515(2.1) Where, pursuant to subsection (2) or any other provision of this Act, a justice, judge or court orders that an accused be released on his entering into a recognizance with sureties, the justice, judge or court may, in the order, name particular persons as sureties.

From the 1972 Bail Reform Act to the time of this amendment, the Court ordering release would set out in its order the number of sureties and the amount by which they were bound. In the pre-amendment era, the Justice supervising release of the accused, once the accused was in a position to comply with the order, would interview the prospective surety or sureties and, if suitable, proceed with execution of the recognizance. This is a function long exercised by a Justice of the Peace.

The inclusion of s. 515(2.1) confers a permissive authority in the Court - "... may, in the order, name particular persons as sureties". The Court is not required to do so and, because a prospective surety is not in Court or is as yet unidentified, the Court is often not in a position to in effect pre-approve a surety to be named in the order. It then falls to the Justice exercising the compliance jurisdiction contemplated by s. 519 of the Code to approve, or not, the sureties before release can occur.

The observations here should not be misunderstood to suggest that, on the facts of a particular case, a judicial officer could not justifiably, and within the exercise of her or his judicial duties, wish to see a prospective surety called to testify. A commonplace example is where the accused proposes to live with his surety. However, a blanket requirement that all prospective sureties, in every case, must appear before the Court at the show cause hearing amounts to an abuse of discretion.

¶ 63 Assuming the circumstances of the two bail hearings here do not simply reflect contempt on the part of some of the participants for binding authority of this court, perhaps, three decades after the 1972 Bail Reform Act and two decades after the Charter of Rights and Freedoms, a blunter if not more detailed elaboration of first principles is necessary in this jurisdiction.

¶ 64 The grant or denial of bail implicates not only s. 11(e) of the Charter but also the accused person's liberty and security of the person interests. Bail is not a privilege. Judicial interim release should only be withheld where it is necessary: The Queen v. Morales (1992), 77 C.C.C. (3d) 91 (S.C.C.) at 197 per Lamer C.J.C.; Regina v. Hall (2000), 147 C.C.C. (3d) 279 (Ont. C.A.) at 295-6 per Osborne A.C.J.O. (leave to appeal granted [2000] S.C.C.A. No. 552); Report of the Canadian Committee on Corrections (the Ouimet Report) (1969), at pages 99, 108. Where bail is unjustly denied, there is a miscarriage of justice. It cannot be over emphasized that pre-trial bail rests on the presumption of innocence: The Queen v. Pearson (1992), 77 C.C.C. (3d) 124 (S.C.C.) at 135-9 per Lamer C.J.C.; Regina v. Farinacci (1993), 86 C.C.C. (3d) 32 (Ont. C.A.) at 39 per Arbour J.A. (as she then was).

¶ 65 The bail reform legislation of 1972, in force in much the same terms today, is recognized as a liberal and enlightened system of pre-trial release: Regina v. Bray (1983), 2 C.C.C. (3d) 325 (Ont. C.A.) at 328 per Martin J.A. (cited with approval in The Queen v. Pearson, supra at 141). The statutory regime was designed to ensure early pre-trial release with a speedy or quick determination of the bail issue: Regina v. Gillespie (1984), 16 C.C.C. (3d) 140 (Ont. C.A.) at 143-4 per Robins J.A.; Regina v. Saracino (1989), 47 C.C.C. (3d) 185 (Ont. H.C.J.) at 186 per Doherty J. (as he then was); The Law of Bail in Canada (2d ed., 1999), Professor G. Trotter, at pages 198-9; Report of the Criminal Justice Review Committee (Ontario, February, 1999) at page 13.

¶ 66 Where a person, arrested and detained for a bail hearing, is taken before the court within twenty-four hours of arrest (Code s. 503(1)), and the prosecution and the accused are prepared for a show cause hearing, a hearing should forthwith be held whenever possible. In a jurisdiction such as this, serving a population of nearly one million persons, bail courts run seven days a week. An arrested person should not face the prospect of having to, in effect, make an appointment for his or her bail hearing. Unjustified detention includes

unreasonably prolonged custody awaiting a bail hearing. At page 13, the Report of the Criminal Justice Review Committee, supra, lamented the fact that, in some locations, Friday and weekend arrestees are held for show cause hearings the following Monday.

¶ 67 The routine adjournment of bail hearings other than at the request of the prosecutor or the accused (Code s. 516(1)), as "not reached" cases, is an entirely unacceptable threat to constitutional rights, a denial of access to justice, and an unnecessary cost to the court system: The Law of Bail in Canada, supra at 199; Report of the Criminal Justice Review Committee, supra at 13-14. We must remain vigilant not to lapse back into the pre-Charter regime described in 1965 in the Report of the Royal Commission Into Civil Rights (the McRuer Report), Vol. 2, page 743:

> There appears to be a widespread indifference to the injustice done to accused persons by reason of unnecessary incarceration pending arraignment.

¶ 68 While resource allocation is undoubtedly an instrumental factor in the provision of bail hearings with expedition, it is by no means the only factor. Equally important is the conduct of the show cause hearing itself in terms of the nature of the participation by those involved. In any event, where constitutional rights are at stake, pleading lack of resources is, as a general rule, no answer to government imperilling such rights: Regina v. Chief of Police Catney et al. (2000), 149 C.C.C. (3d) 356 (Ont. S.C.J.) at 394-6.

¶ 69 The prosecution carries a duty to protect the public, including complainants and witnesses, by ensuring that detained persons are not released on bail who fail to meet the criteria for bail shaped by s. 515(10) of the Code. Unjustified risk to the community through release of an arrested individual must be avoided. The bail system does not function properly if, for example, individuals commit crimes while on bail: The Queen v. Morales, supra at 197 per Lamer C.J.C.

¶ 70 It has been said that criminal proceedings are less adversarial "because of the Crown's duty to present all the evidence fairly": S.(R.D.) v. The Queen (1997), 118 C.C.C. (3d) 353 (S.C.C.) at 364 per Major J. As a quasi-judicial officer, Crown counsel, in any adversarial proceeding, is duty-bound to protect the legal and constitutional rights of the arrested person. To this end, the prosecutor's exercise of discretionary judgment on bail issues cannot be driven by slavish adherence to zero tolerance policies or the recommendations of high profile coroner's inquest recommendations. This would amount to the exercise of no discretion at all and guarantee arbitrariness on the facts of certain cases. Crown counsel have enormous control over information about the offence and are required to assume a leadership role in bail hearings to secure justice in the bail system: Report of the Commission on Systemic Racism in the Ontario Criminal Justice System (1995), at pages 155, 158-9, 167.

¶ 71 Although it was observed by McKinnon A.C.J.O. in Reference re Justices of the Peace Act, Re Currie and Niagara Escarpment Commission (1985), 16 C.C.C. (3d) 193 (Ont. C.A.) at 209, that it might be preferable for justices of the peace to be legally trained, the judicial officer presiding over the show cause hearing is, nevertheless, required to correctly apply the law respecting bail hearings as such may emerge from both statutory and jurisprudential authority. Consistent with his or her oath of office, the justice of the peace must faithfully discharge his or her duties "without ... favour" for any party (Justices of the Peace Act, R.S.O. 1990, c. J.4, s. 3). Not only must the independent discharge of judicial duties be undertaken with impartiality, the court must be seen to be even-handed between the litigants: S.(R.D.) v. The Queen, supra at 384 per Cory J.

¶ 72 Although a show cause hearing is not a trial, it is nevertheless an adversarial proceeding. As noted by this court, however, the orderly conduct of bail hearings is best achieved with goodwill and cooperation of counsel: Regina v. John, [2001] O.J. No. 3396 (S.C.J.) at para. 32, 54. Similar observations appear elsewhere: Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions (the Martin Committee Report, 1993) at 44-5; Report of the Criminal Justice Review Committee, supra at 5, 102-4. Formalism and inflexibility are undesirable. Professor Trotter, in The Law of Bail in Canada, supra, at 198, quite rightly comments that there is a need in bail hearings to resolve the tension between fairness and efficiency. As noted at page 45 of the Martin Committee Report, because there are co-operative dependencies in the administration of criminal proceedings, each of the participants independently

possesses the power to nullify the system's continued viability. Within reasonable bounds, bail hearing procedure should be sufficiently flexible to promote both a fair and an expeditious proceeding.

¶ 73 Counsel for the detained person, whether duty counsel or retained counsel, should not undertake representation unless knowledgeable of the relevant law and prepared to vigorously assert the rights of those facing the prospect of continued deprivation of liberty. It does little to protect constitutional rights or to foster minimum delay in securing bail when the accused's interests and rights are asserted for the first time in the context of a bail review hearing.

¶ 74 Equally, it is expected that the prosecutor will be sufficiently experienced to discharge his or her duties. For example, an incorrect assertion as to the onus in the show cause hearing (Regina v. Kirk, [2001] O.J. No. 5014 (S.C.J.) at para. 3) or a flip-flop on the issue (Regina v. John, supra at para. 39) is singularly unhelpful.

¶ 75 This court does not contemplate that, in this jurisdiction, its statements of law will not be applied to the conduct of bail hearings on such issues as the absence of a legal requirement to call sureties (Re Brooks and the Queen, supra at para. 33-39); the nature of evidence and reading in of factual allegations as to the offence(s) charged (Regina v. John, supra at para. 56-66; Regina v. Reid (2000), 38 C.R. (5th) 416 (Ont. S.C.J.) at para. 15); proof of the detained person's prior criminal record (Re Brooks and the Queen, supra at para. 5, 26; Regina v. John, supra at para. 63; Regina v. Kirk, supra at para. 15, 31-33); the giving of reasons by the judicial officer (Regina v. Reid, supra at para. 8; Re Brooks and the Queen, supra at 548; Regina v. Currie and Francis, Ont. S.C.J. (unreported March 9, 1998), (Hill J., Brampton File DR(F)1940/98, DR(F)1968); consent variation of recognizance (Regina v. Ford (1998), 129 C.C.C. (3d) 189 (Ont. S.C.J.)); the meaning of showing cause on a balance of probabilities (Regina v. Krnic, Ont. S.C.J. (unreported, February 19, 2002), (Thomas J., Brampton File DR(P) 5900/02); and, as will be more fully developed below, adherence to the principle that the court may not engage in prejudgment on the ultimate issue without both parties having an opportunity to be heard (Regina v. Kaushal, Ont. S.C.J. (unreported, August 3, 2002), (Langdon J., Brampton File DR(P) 5540/01); Regina v. John, supra at para. 11).

¶ 76 Further comment is deserved on the issue of the court giving reasons for release or detention as required by ss. 515(5) and (6) of the Code. At page 66 of the Law Reform Commission of Canada report, Compelling Appearance, Judicial Interim Release and Pre-trial Detention (1988), it was recognized that reasons in a bail case are an important aspect of procedural fairness. In The Queen v. Morales, supra, at 122, Gonthier J. stated that "just cause" respecting bail implies two elements - a cause or reason, and, proportionality between the reason and the deprivation of liberty which makes the cause just. In Supermarchés Jean Labrecque Inc. v. Flamand, [1987] 2 S.C.R. 219 at 233, L'Heureux-Dubé J. held that where a tribunal is obliged by legislation to give reasons for its decision, certain authorities suggest an absence of reasons vitiates the decision and constitutes an excess of jurisdiction.

The Procedural Departures in these Bail Hearings

¶ 77 Given the relatively narrow nature of the applications before the court, I must resist the invitation of the intervenor to engage in a broad public inquiry into the serious and ongoing problems in Peel's bail courts. The guidance of this court on matters of law properly arises in a case-by-case context. However, some further scrutiny of the J.V. and L.(M.) bail hearings is warranted in order not only to fully appreciate the jurisdictional arguments of the applicant but also to assess the conduct of the applicant insofar as that is a relevant consideration to the issuance of the discretionary remedy of certiorari.

¶ 78 The show cause hearing in J.V.'s case proceeded on the basis of a reverse onus. However, the possession of marijuana charge was a summary conviction offence (Controlled Drugs and Substances Act, ss. 4(1)(5) and Schedules II and VIII) which did not trigger any of the paragraphs of s. 515(6) of the Code. According to the Peel Criminal Lawyers' Association, the approach here is the one commonly seen in Peel's bail courts where there is at least one reverse onus charge before the court. It is entirely antithetical to the spirit of Part XVI of the Code and s. 11(e) of the Charter to adopt a default position in this way against the liberty interests of the accused. Indeed, the finding of constitutionality of the s. 515(6)(a) reverse onus provision rested in large

measure on its limitation to indictable offenses only: The Queen v. Morales, supra at 112. In J.V.'s case, the burden of persuasion on the different charges resided in different parties.

¶ 79 Senior Crown counsel, Mr. Carruthers, agreed that the use of the word "victim" in the prosecutor's recitation of the facts relating to the outstanding robbery charge faced by J.V. was improper. While the term appears in Part XVI of the Code, i.e. s. 515(4.1), in-court use of the expression vis-à-vis the accused, prior to a finding of guilt, is obnoxious to the presumption of innocence: see Seaboyer v. The Queen; Gayme v. The Queen (1991), 66 C.C.C. (3d) 321 (S.C.C.) at 333 per L'Heureux-Dubé J.

¶ 80 Crown counsel sought to curtail entirely proper re-examination of the prospective surety by J.V.'s counsel relating to the witness' appreciation of his duty as a surety as opposed to the informal role of a non-surety assisting a surety to supervise a bail order - a matter raised for the first time in cross-examination by the prosecutor.

¶ 81 A theme pervaded L.(M.'s) show cause hearing that if her prospective sureties were not present in court and were not called to testify, she would not be entitled to have a bail hearing. The Peel Criminal Lawyers Association reported that the prosecution and justices of the peace in Peel almost universally adopt this approach. As canvassed in the Brooks decision, the presence of a prospective surety in court is not a jurisdictional or essential prerequisite to the conduct of a judicial interim release hearing. While the defence case may be tactically disadvantaged by failing to call a prospective surety or sureties to testify, in many cases the surety approval process is best left to an informal interview by the releasing justice of the peace. There is abundant authority for this approach: Regina v. Gillespie, supra at 142-5; Regina v. Schaefer (1999), 97 O.T.C. 161 (S.C.J.) at para. 29-31, 34, 36, 43; Annotation: Bail in Criminal Cases, E. Armour (1927), 47 C.C.C. 1 at 7, 12-12, 16; The Law of Bail in Canada, supra at 294-5. Restricting consideration of the sufficiency of sureties to the bail hearing stage inevitably lengthens bail hearings and compounds the congestion already existing in busy courts: Fundamental Justice and the Approval of Sureties by the Crown, G.T. Trotter (1987-88), 30 C.L.Q. 238 at 247, 249.

¶ 82 L.(M.) was not afforded her right under s. 12(1)(a) of the Young Offenders Act to have count #1 in the information read to her. The requirement was not waived expressly or implicitly.

¶ 83 Counts #2 and #3 in the information, the breach recognizance charges, contrary to the drafting approach usually seen in this jurisdiction, were unparticularized as to the date the outstanding bail orders had been entered into. This defect became especially significant here where more than one bail order existed at the time of L.(M.)'s most recent arrest.

¶ 84 The Crown's narration of facts relating to count #1, the attempt theft of a motor vehicle, made no reference to the source(s) of the information or grounds supporting the account provided and accordingly no sense of the strength of the prosecution case was possible. Were the parties caught in the act? Were the accused arrested in the vicinity based on eye-witness testimony?

¶ 85 The prosecution statement of facts as to the breach recognizance charges was nearly incomprehensible. The house arrest term of the January 15th, 2001 recognizance did not require L.(M.) to have on her person the written permission of a surety to be away from her residence. There is no evidence in this record supporting the absence of such permission. Crown counsel tied the alleged recognizance breach in count #4, failing to keep the peace and be of good behaviour, to the outstanding April 19, 2001 recognizance. However, there is no such condition in that recognizance.

¶ 86 The prosecution account of an unlawful possession charge faced by L.(M.) in Toronto, that she was present in a motor vehicle she knew to be stolen, entitles the young person to an acquittal: The Queen v. Terrence (1983), 4 C.C.C. (3d) 193 (S.C.C.) at 198 per Ritchie J.

¶ 87 Contrary to the position of the court and the prosecution, whether the adult co-accused had been in the driver's seat, in the circumstances of an attempt charge, may have been quite relevant to a determination of the degree of L.(M.)'s liability, if any, and the strength of the prosecution case.

¶ 88 The reasons for judgment of the court in L.(M.)'s case amount, in law, to no reasons at all. There is no identification possible between these reasons and the overarching statutory test in s. 515(10) of the Code.

¶ 89 For reasons which escape me, Crown counsel injected into the hearing the issue of completion of a certificate of default on the outstanding recognizances of L.(M.) triggering the initiation of the bail entreatment process. Had the court not refused the request, for L.(M.) to oppose the certification of bail default, she would be forced to speak out prior to trial on the facts of the very offenses before the court. This offends the young person's self-incrimination protection.

Certiorari and Natural Justice

¶ 90 In review of criminal proceedings, the extraordinary remedy of certiorari, including a motion to quash, is limited to review of loss of jurisdiction, an absence or refusal of jurisdiction, or an excess of jurisdiction: Forsythe v. The Queen (1980), 53 C.C.C. (2d) 225 (S.C.C.) at 228-9 per Laskin C.J.C.; Patterson v. The Queen (1970), 2 C.C.C. (2d) 227 (S.C.C.) at 229 per Judson J.

¶ 91 Certiorari lies only where the error goes to jurisdiction and not non-jurisdictional error: Dubois v. The Queen (1986), 25 C.C.C. (3d) 221 (S.C.C.) at 224 per Estey J. Sometimes referred to as "the right to be wrong", the incorrectness of a decision, or an error of law, made within the court's assigned jurisdiction does not constitute jurisdictional error: Russell v. The Queen (2001), 157 C.C.C. (3d) 1 (S.C.C.) at 10 per McLachlin C.J.C.; Forsythe v. The Queen, supra at 235; Dubois v. The Queen, supra at 229-231; Re Corbeil and The Queen (1986), 27 C.C.C. (3d) 245 (Ont. C.A.) at 251 per Lacourcière J.A.

¶ 92 A denial of natural justice goes to jurisdiction: Forsythe v. The Queen, supra at 229; Skogman v. The Queen (1984), 13 C.C.C. (3d) 161 (S.C.C.) at 167 per Estey J. A breach of the principles of natural justice "is taken as an excess of jurisdiction": Russell v. The Queen, supra at 10.

¶ 93 Wilson J. in Singh et al. v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177 at 196 observed that the existence of a duty of fairness does not define its content. However, the rules of natural justice are pre-eminently concerned with a fair hearing. The rules of natural justice have enshrined certain guarantees regarding procedure and a denial of these rules justifies the court's intervention: Université du Québec à Trois-Rivières v. Laroque, [1993] 1 S.C.R. 471 at 493 per Lamer C.J.C. A fair hearing is the essence of the duty to act fairly: Supermarchés Jean Labrecque Inc. v. Flamand, supra at 238 per L'Heureux-Dubé J.

¶ 94 While the requirements of natural justice depend on the circumstances of the case, the nature of the inquiry, the subject matter being dealt with, and the statutory provisions under which the tribunal is acting (Moreau-Bérubé v. New Brunswick (Judicial Council), [2002] S.C.J. No. 9 at para. 14 per Arbour J.; Telecommunications Workers Union v. Canadian Radio-television and Telecommunications Commission et al., [1995] 2 S.C.R. 781 at 787 per Sopinka J. dissenting in the result), judicial proceedings are generally bound by the requirements of natural justice to a greater degree than administrative tribunals: S.(R.D.) v. The Queen, supra at 368 per L'Heureux-Dubé and McLachlin JJ.; Moreau-Bérubé v. New Brunswick (Judicial Council), supra at para. 75.

¶ 95 In criminal proceedings, the obligation to hold a fair hearing, reflected in the principles of natural justice, is due to both the accused and to the Crown: S.(R.D.) v. The Queen, supra at 385-6 per Cory J.; Phillips and Parry v. The Queen (1997), 113 C.C.C. (3d) 481 (S.C.C.) at 486 per La Forest J. To this end, in Regina v. Coreas (1996), 115 C.C.C. (3d) 353 (Ont. C.A.) at 354, the court stated: "The right to a fair trial enures to the benefit of both the defence and the Crown". Beyond the equality of fairness to each party, the reputation of the administration of justice demands impartiality and the appearance of impartiality.

¶ 96 It follows that where principles of natural justice are breached in a manner amounting to an excess of jurisdiction, the Crown too has access to prerogative relief subject to the court's discretion to otherwise deny access to the remedy. At pages 13-14 of Russell v. The Queen, supra, the Chief Justice agreed that the availability of certiorari does not turn on the identity of the party seeking that relief.

The Right to be Heard as a Principle of Natural Justice

¶ 97 The bedrock of our jurisprudence is the adversary system: S.(R.D.) v. The Queen, supra at 364 per Major J. Within the rules of natural justice is the duty to act fairly including the need to afford to the parties a right to be heard, also known as the audi alteram partem rule: Moreau-Bérubé v. New Brunswick (Judicial Council), supra at para. 75; Telecommunications Workers Union v. Canadian Radio-television and Telecommunications Commission et al., supra at 796 per L'Heureux-Dubé J.

¶ 98 The "right to be heard" rule has been described as a "venerable principle": L'Alliance des Professeurs Catholiques de Montreal v. La Commission des Relations Ouvrieres de la Province de Quebec et la Commission des Ecoles Catholiques de Montreal (1953), 107 C.C.C. 183 (S.C.C.) at 195 per Rinfret C.J.C. Adherence to the audi alteram partem rule is a matter of "elementary justice": Harlekin v. University of Regina, [1979] 2 S.C.R. 561 at 598 per Dickson J. (as he then was, dissenting in the result). In Supermarchés Jean Labrecque Inc. v. Flamand, supra at 233-234, L'Heureux-Dubé J. observed:

> This rule is so fundamental in our law that I do not think there is any necessity to discuss it at length.
>
> ...
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> Respect for the rule goes back to the origins of our democratic institutions and is part of our most cherished legal heritage.

And finally, in Regina v. Dodson (2000), 142 C.C.C. (3d) 134 (Ont. C.A.) at 142, O'Connor J.A. (as he then was) observed that the principle is "one of the fundamental components of natural justice".

¶ 99 Especially in proceedings of a penal nature, it is essential that the parties be afforded the right to be heard: Supermarchés Jean Labrecque Inc. v. Flamand, supra at 237, 239.

¶ 100 The rule that each party has a right to be heard is so fundamental that it need not be embodied in the legislation under which the tribunal acts: Supermarchés Jean Labrecque Inc. v. Flamand, supra at 234. Indeed, to suspend the rule's operation would require specific legislative text to that effect or, in the circumstances, an inference equivalent thereto: L'Alliance des Professeurs Catholiques de Montreal v. La Commission des Relations Ouvrieres de la Province de Quebec et la Commission des Ecoles Catholiques de Montreal, supra at 209 per Fauteux J. (as he then was).

¶ 101 The audi alteram partem rule includes a right to be heard on the facts and the law: L'Alliance des Professeurs Catholiques de Montreal v. La Commission des Relations Ouvrieres de la Province de Quebec et la Commission des Ecoles Catholiques de Montreal, supra at 208-9 per Fauteux J. In other words, it is a principle of natural justice that a party has a right to be heard and "make representations": Supermarchés Jean Labrecque Inc. v. Flamand, supra at 238.

¶ 102 A departure from this rule of natural justice constitutes an excess of jurisdiction: Supermarchés Jean Labrecque Inc. v. Flamand, supra at 236; L'Alliance des Professeurs Catholiques de Montreal v. La Commission des Relations Ouvrieres de la Province de Quebec et la Commission des Ecoles Catholiques de Montreal, supra at 199. In effect, the court acts unfairly and arbitrarily in breaching the rule and it should go without saying there is no jurisdiction to act arbitrarily: Dubois v. The Queen, supra at 230.

¶ 103 A bail hearing is an "adversarial proceeding": The Queen v. Morales, supra at 109 per Lamer C.J.C. As noted by Doherty J.A. in Regina v. Jones and Francis, (1997), 113 C.C.C. (3d) 225 (Ont. C.A.) at 236, in a judicial interim release proceeding: "both sides would have an opportunity to make their case for release or detention". Similarly, in Regina v. Sommervill (1962), 133 C.C.C. 323 (Sask. Q.B.) at 331-2, Disbery J. stated that Crown counsel has "the right on an application for bail to make ... representations".

¶ 104 In the context of a show cause hearing, the right of Crown counsel to be heard was discussed by P.K. McWilliams in The Law of Bail (1966-67), 9 C.L.Q. 21 at 25:

> To say that a justice or magistrate in admitting an accused to bail is performing a judicial act means that in the performance of the act our fundamental principles of justice must be observed. One of them is that both sides be represented and heard. It is the responsibility of Crown counsel, and often a heavy one, to advise the court as to bail. It is in turn the responsibility of the police to brief him on the factors which are relevant ... This effort would be wasted if the accused could be released ex parte without the Crown being heard.

¶ 105 In the show cause hearing reviewed in Regina v. Kaushal, supra, after the evidence was completed, Justice of the Peace Chang-Alloy called on the Crown first for submissions as the government had the onus of showing why continued detention was justified. Counsel for Kaushal was not called upon for submissions with the court saying: "I've made my decision, so I really don't need to hear from you ... It's a Crown onus anyway". The court commenced its reasons. When the defence objected, the court stated: "The Crown has ... shown cause so I don't need to hear from you". The accused was detained in custody. Langdon J., seven weeks before the bail hearing in the respondent J.V.'s case, in the clearest terms, stated:

> The conduct of the justice of the peace in refusing to hear argument from a party against whom he intended to rule was a FLAGRANT violation of the most fundamental rule of any court - audi alteram partem. If such conduct were persisted in, it could give cause for removal from office of a judicial officer. It is not possible to be critical enough of this conduct. It was a clear and serious legal error and entitles the prisoner to review. (emphasis of original)

¶ 106 In a show cause hearing, the prosecutor has a right to be heard. The court is not entitled to frustrate this right by predicting the Crown's submissions. This amounts to usurping the role of a party and endangers the court's impartiality. The Attorney General's agent brings an independent perspective of the public interest and constitutional rights to the hearing which the court is obliged to consider.

¶ 107 While not every breach of the audi alteram partem rule during a proceeding will warrant intervention for excess of jurisdiction, a denial of the right to be heard on the ultimate issue in the hearing is a flagrant violation of natural justice. Of course, statement of a tentative position or tentative conclusion, with a clear opportunity afforded to make submissions prior to a final decision, does not breach a party's right to be heard: Rex v. Kovacevic (1951), 99 C.C.C. 258 (Ont. H.C.J.) at 261-2 per Ferguson J.; Regina v. Mullin (1990), 56 C.C.C. (3d) 476 (P.E.I.C.A.) at 485-6 per Carruthers C.J.P.E.I.

¶ 108 In addition, a final decision made in circumstances of a denial of the right to be heard almost inevitably raises the spectre of pre-judgment and a reasonable apprehension of bias. Would a reasonable member of the public or a complainant, reasonably informed, viewing bail proceedings in the circumstances here, conclude there was an appearance of bias against the prosecution? Quite apart from the unfairness to the Crown, this in turn brings the repute of the administration of justice into disrepute. Osborne A.C.J.O. in Regina v. Hall, supra at 297, stated: "... decisions on bail have the real capacity to affect confidence in the administration of justice and in the bail system itself" and that "maintaining confidence in the administration of justice is not a value `extraneous' to the bail system".

Was Natural Justice Breached in these Cases?

¶ 109 Prior to the court's announcement of its decision, "I am going to release", only counsel for J.V. was afforded an opportunity to make submissions on the facts and the law. Accordingly, the respondent was the sole beneficiary of a real opportunity to be heard.

¶ 110 Crown counsel's cross-examination amounted to the production of evidence. The court erroneously equated examination with submissions. Examination of witnesses does not constitute exercise of a right to make representations.

¶ 111 The court failed to extend to the prosecution an opportunity to be heard on the facts and the law before reaching a decision. In effect, the court conducted an ex parte bail hearing.

¶ 112 Unfortunately, in the joint bail hearing conducted with respect to two co-accused, L.(M.) and R.(A.), the presiding judicial officer did not hear the submissions of all counsel before deciding the result for either detained person.

¶ 113 While the bail disposition of a co-accused is a material factor for consideration in a show cause hearing, it is by no means determinative. In a minority of cases can it be said, in terms of alleged participation in offence(s) charged and individual backgrounds of the accused persons, that they are identically positioned. In other words, there is no absolute principle that because a co-accused is granted judicial interim release, all co-accused are, as a matter of fact and law, deserving of similar dispositions.

¶ 114 The justice of the peace, without calling on either L.(M.)'s counsel or Crown counsel, announced his decision: "I am going to release her as well". The basis of the court's decision was the decision to release R.(A.) - "... we weigh [justice] evenly, there is no other result".

¶ 115 In effect, on this approach, the submissions on L.(M.)'s behalf were indirectly made by R.(A.)'s counsel. With the justice of the peace's adoption of an `As goes one so go all' principle, the court considered Crown counsel's submissions respecting R.(A.) to constitute the government's position respecting L.(M.). This amounts to legal error.

¶ 116 Remarkably, after a respectful objection by Crown counsel, the justice of the peace advanced the proposition that the court could arrive at a final position on the facts in the absence of legal submissions relating thereto. Of course, the premature announcement of the decision to release in this case, prior to hearing the prosecution submissions, amounted to a final determination of fact and law.

¶ 117 At the time of her arrest, L.(M.) was facing a greater number of outstanding charges than R.(A.) and significantly, and unlike R.(A.), she was free in the community on two judicial interim release orders. The result in R.(A.)'s case by no means predicted the correct disposition on the issue of judicial interim release for L.(M.).

¶ 118 The Crown was not afforded a real opportunity to be heard on the issue of whether the young person had discharged the onus of establishing why her continued detention was not justified.

¶ 119 It is unnecessary, on this record, to determine whether principles of natural justice also were compromised in L.(M.'s) bail hearing by the court preventing the prosecutor from calling evidence. The respondent did not call her prospective sureties to testify. No affidavit material was filed in this application to clarify this ground of complaint. It is entirely unclear from the transcript what evidence the Crown had at hand or believed it was entitled to lead.

The Discretionary Nature of Certiorari

¶ 120 The prerogative writ of certiorari is a discretionary remedy: Forsythe v. The Queen, supra at 574; Dubois v. The Queen, supra at 232; Harlekin v. University of Regina, supra at 574 per Beetz J. Accordingly, the extraordinary writ does not issue ex debito justitiae, or as of right, simply because significant jurisdictional error is identified. How the discretion is to be judicially exercised depends on the circumstances of each case: Harlekin v. University of Regina, supra at 575-6 per Beetz J.

¶ 121 While there is perhaps no closed list of factors informing the exercise of discretion as to whether certiorari will issue, there is abundant authority for consideration of the relevance of the applicant's conduct including delay in the proceedings, and, the existence of an adequate alternative remedy.

¶ 122 Unreasonable delay is a relevant consideration: Harlekin v. University of Regina, supra at 575 per Beetz J. and at 610 per Dickson J.; The Queen v. Board of Broadcast Governors and the Minister of Transport, ex parte Swift Current Telecasting Co. Ltd., [1962] O.R. 657 (C.A.) at 670 per Laidlaw J.A. Similarly, the

remedy may be denied where the applicant has done something to disentitle itself to relief (Regina v. Corbeil, supra at 251), for example, misconduct of some sort (Harlekin v. University of Regina, supra at 575 per Beetz J.).

¶ 123 Certiorari is an extraordinary remedy. Resort to this prerogative writ cannot be routine - wherever possible, the legal complaint should be resolved in the context of established criminal process: Regina v. Paterson (2000), 132 O.A.C. 266 (C.A.) at 268 per curiam. To this end, Chief Justice Laskin noted at page 3 of the Forsythe case that the discretionary remedy "may be refused where there is another recourse". Alternative remedies to cure the injustice, other than an appeal, have been considered to justify a refusal of certiorari, "i.e. where the statute sets out specific alternatives other than an appeal": Dubois v. The Queen, supra at 232-3. The alternative in question must, however, be an "adequate" or efficacious alternative (Harlekin v. University of Regina, supra at 575, 588 per Beetz J.), at times referred to as "truly alternative" (Dubois v. The Queen, supra at 233).

¶ 124 In Re Keenan and The Queen (1979), 57 C.C.C. (2d) 267 (Que. C.A.) at 284-5, Lamer J.A. (as he then was) expressed the view that a bail review was not an "appeal". However, in Harlekin v. University of Regina, supra at 590, Beetz J. held that, in a certiorari case, in assessing the alternative remedy of an "appeal", that term should be construed flexibly to be capable of meaning "review".

¶ 125 In the Harlekin decision, at 588-592, Beetz J., and at 613-617, Dickson J., recommended consideration of sub-factors of cost, convenience, and effectiveness of the other remedy or remedies said to represent an adequate alternative. Similar factors were considered by Morden J.A. in Re Zevallos and the Queen (1987), 37 C.C.C. (3d) 79 (Ont. C.A.) at 84-6. The discretionary exercise may require attention to such matters as burdens of production and persuasion and the capacity of the remedial body to exercise original jurisdiction over the subject matter at hand.

¶ 126 An orderly system of law avoids circumvention of ordinary appellate and review process in favour of extraordinary remedies. As well, the law does not favour a useless multiplicity of actions and costs resulting therefrom: L'Alliance des Professeurs Catholiques de Montreal v. La Commission des Relations Ouvrieres de la Province de Quebec et la Commission des Ecoles Catholiques de Montreal, supra at 211 per Fauteux J. In The Queen v. Pearson, supra at 134, in language logically instructive as to the availability of certiorari, Lamer C.J.C. observed that since any error in the denial of bail occurs within the normal bail process, a challenge to a denial of bail should ordinarily be brought by means of a review rather than resort to habeas corpus. The Chief Justice cautioned against creation of a costly and unwieldy parallel system of bail review - "In the context of bail, a ... review is the `appropriate appeal process' which should not be circumvented". In his article, Bail in Criminal Cases, supra, at 25, E. Armour stated that certiorari ought not to be used as a mechanism of review in bail cases, unless there are "exceptional circumstances", if another adequate remedy exists.

Whether the Discretionary Remedy of Certiorari Should Issue in these Applications

¶ 127 During the argument of these applications, counsel for the applicant quite properly withdrew reliance on para. 50 of the applicant's factum which requested mandamus issue to compel the justices of the peace to hear and weigh evidence and submissions in the judicial interim release hearings of the respondents J.V. and L. (M.). No notice of application for mandamus had issued and accordingly the respondents and intervenor appeared here on certiorari applications alone.

¶ 128 With his customary candour and fairness, Mr. Carruthers did not press for the release orders to be quashed in the circumstances of these applications. He was right not to do so. The balance of equities here weigh against an exercise of discretion to grant the relief initially requested by the applicant.

¶ 129 There has been delay in the hearing of these applications heard some four and a half months after the show cause hearings during which the respondents have been on bail. Bail matters are to be dealt with expeditiously. Quite apart from the unexplained delay in perfection of the applications and argument thereon, the rules of court do not permit a certiorari application (Rule 43 of the Superior Court of Justice Rules

Respecting Criminal Proceedings (the Rules)) to be placed before the court with the dispatch of a bail review (Code, s. 521(2), Rule 20).

¶ 130 In assessing whether the applicant's conduct contributes to disentitlement to the discretionary writ, in addition to the delay and the present exposure of the respondents to a loss of liberty months after the excesses of jurisdiction complained of, regard must be had to the manner in which the government conducted itself in the show cause hearings. Elementary mistakes, apparent lack of familiarity with relevant and legally binding authorities of this court or disregard therefor, and an absence of preparation contributed significantly to error-ridden and unnecessarily elongated proceedings. While the applicant chose these hearings as apparent test cases reflecting a pattern of jurisdictional abuse involving the audi alteram patem rule, the record of the two bail hearings equally stand as eloquent examples of some of the problems described by the intervenor.

¶ 131 Jurisdictional error of the magnitude identified here, flagrant breaches of the Crown's right to be heard, without any doubt constitute error in principle by the presiding judicial officers. Such error is accordingly clearly subsumed within the review jurisdiction exercised by this court in a bail review pursuant to s. 521 of the Code. While issuance of the prerogative relief of certiorari necessarily involves a declaratory component, and therefore not only a corrective quality but also an educative element, that objective alone does not favour exercise of the discretion to grant the remedy. As stated by Beetz J. in Harlekin v. University of Regina, supra at 582, there should be more to the request for an extraordinary remedy than simply "inflicting upon the [inferior court] a symbolic rebuff from the Court". As is readily apparent, in the context of bail review judgments, many of which have been referred to here, this court has not shied away from statements respecting jurisdictional abuse and error of law and indeed practice pointers regarding the efficient conduct of bail hearings in this jurisdiction.

¶ 132 The s. 521 bail review is a speedy remedy. Where, in such a proceeding, error of principle is established, this court exercises original authority with a de novo assessment of the issue of entitlement to bail.

¶ 133 In the particular circumstances of this case, the discretion respecting the issuance of certiorari including a motion to quash, must be exercised against granting the relief.

CONCLUSION

¶ 134 The applications are dismissed.

HILL J.

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