1996 CarswellOnt 1818
Ontario Court of Justice (General Division)

R. v. Jones

1996 CarswellOnt 1818, [1996] O.J. No. 1771, 107 C.C.C. (3d) 517,
29 O.R. (3d) 294, 31 W.C.B. (2d) 46, 49 C.R. (4th) 136, 5 O.T.C. 81

Her Majesty The Queen (Respondent) and Emile Jones and Gary Francis (Applicants)

Then J.

Heard: December 4-13, 1995
Judgment: May 21, 1996
Docket: U 884/95

Counsel: *Gail Dobney* and *Jeff Kehoe*, for respondent.
David Midanik, for applicants.

Subject: Criminal; Constitutional

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

Headnote

Criminal law --- Preliminary inquiry — Miscellaneous issues

Criminal law --- Preliminary inquiry — Miscellaneous issues

Criminal law --- Preliminary inquiry — Procedure — Miscellaneous issues

Criminal law --- Constitutional issues in criminal law — Charter of Rights and Freedoms — Charter remedies — Stay of proceedings

Criminal law — Preliminary inquiry — Miscellaneous issues — Cross-examination — One lawyer representing two accused at preliminary inquiry — Lawyer being assisted by co-counsel in respect of one accused — Preliminary inquiry judge refusing to allow lawyer to cross-examine witness on behalf of one accused and co-counsel to cross-examine on behalf of other accused — Judge depriving accused of their statutory right to cross-examine Crown witnesses under s. 540 of Criminal Code — Judge losing jurisdiction — Criminal Code, R.S.C. 1985, c. C-46, s. 540.

Criminal law — Preliminary inquiry — Conduct of preliminary inquiry judge — Bias — Preliminary inquiry judge discussing case with Crown counsel in absence of defence counsel — Reasonable apprehension of bias existing — Crown's disclosure of conversation to defence counsel not curing impropriety — Writ of prohibition issued.

Criminal law — Preliminary inquiry — Procedure — Miscellaneous issues — Security — Preliminary inquiry judge erring in not holding hearing into issue of shackling of accused in courtroom once issue raised by accused.

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Criminal law — Constitutional issues in criminal law — Charter of Rights and Freedoms — Charter remedies — Stay of proceedings — Bias and loss of jurisdiction on part of preliminary inquiry judge being found and prerogative remedies being granted — Just and appropriate remedy being provided by prerogative relief — Stay of proceedings under Charter being inappropriate in circumstances — Canadian Charter of Rights and Freedoms.

The accused EJ and GF were charged with robbery and murder. At the preliminary inquiry, both accused were represented by DM, and another lawyer, W, was co-counsel with respect to GF only. The preliminary inquiry judge refused to allow W to cross-examine a Crown witness on behalf of GF, and to allow DM to cross-examine the witness on behalf of EJ, ruling that either W or DM had to cross-examine the witness on behalf of both accused. The accused applied for certiorari quashing the preliminary inquiry, and for prohibition to prevent the preliminary inquiry judge from continuing to preside over the preliminary inquiry. They also sought a stay of proceedings under the *Canadian Charter of Rights and Freedoms*.

Held:

Writs of prohibition and mandamus were granted.

The preliminary inquiry judge had denied the accused their statutory right to cross-examine Crown witnesses under s. 540 of the *Criminal Code*. A denial of natural justice leading to a loss of jurisdiction will arise where the judge breaches the mandatory provision of s. 540(1)(a), which entitles the accused to cross-examine Crown witnesses at a preliminary inquiry. As there had not yet been a committal for trial, it was inappropriate to quash the preliminary inquiry. Rather, a writ of prohibition should issue to prevent continuing breaches of jurisdiction. The matter should be sent back to the Provincial Court so that a new preliminary hearing could be held.

The preliminary inquiry judge had also erred in failing to hold a hearing into the issue of the shackling of the accused in the courtroom. If an issue is raised as to the shackling of a prisoner inside the courtroom, that issue is not to be determined by security officers. A hearing is required to enable the presiding judge to properly exercise his or her discretion on the issue. Section 137(3) of the *Police Services Act* (Ont.) was not intended to oust the jurisdiction of the preliminary inquiry judge to determine issues affecting the liberty of a prisoner within the confines of the courtroom. The appropriate remedy was a direction by way of mandamus to the inferior tribunal to conduct a hearing into the shackling issue.

The preliminary inquiry judge held a conversation with Crown counsel, in the absence of defence counsel, about the application for prerogative relief. The conversation was largely about when the application would be heard, but the judge also reiterated his views on the shackling issue. The prohibition against a judge speaking to one counsel about any case in the absence of other counsel is virtually absolute, permitting very few exceptions. The conversation in this case gave rise to an apprehension of bias. The fact that the Crown disclosed the conversation to the defence did not cure the impropriety. A writ of prohibition should issue, so that any new preliminary inquiry should commence before another judge.

Since prerogative relief was available to cure the jurisdictional error of the preliminary inquiry judge in not adhering to the mandatory provisions of s. 540(1)(a) of the Code, the court ought not to assume jurisdiction to provide relief under the *Charter*, unless the accused could demonstrate that they were entitled to relief in excess of that which the issuance of the prerogative writ could provide. The accused failed to do so. A stay of proceedings would not be appropriate in the circumstances.

Table of Authorities

Cases considered:

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Committee for Justice & Liberty v. Canada (National Energy Board), [1978] 1 S.C.R. 369, 9 N.R. 115, 68 D.L.R. (3d) 716 — *referred to*

Forsythe v. R., [1980] 2 S.C.R. 268, 15 C.R. (3d) 280, 19 C.R. (3d) 261, 32 N.R. 520, 53 C.C.C. (2d) 225, 112 D.L.R. (3d) 385 — *referred to*

Glassco v. Cumming, [1978] 2 S.C.R. 605, 3 R.F.L. (2d) 173, 22 N.R. 271 — *referred to*

Kennedy v. Cardwell, 487 F.2d 101 (U.S. 6th Cir. Ohio 1973) — *referred to*

R. v. Black (1984), 13 C.C.C. (3d) 379 (B.C. S.C.) — *considered*

R. v. Cambridge Justices (1992), 156 J.P. 895 (Q.B.) — *referred to*

R. v. Cohen, [1979] 2 S.C.R. 305, 13 C.R. (3d) 36, 97 D.L.R. (3d) 193, 46 C.C.C. (2d) 473, 27 N.R. 344 — *referred to*

R. v. Colley (1991), 105 N.S.R. (2d) 178, 284 A.P.R. 178 (C.A.) — *referred to*

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R. v. Greenwood (February 10, 1995), Doc. Sault Ste. Marie 5085/95 (Ont. Gen. Div.) — *considered*

R. v. Gushman (April 22, 1994), Doc. U1382/93 (Ont. Gen. Div.) — *referred to*

R. v. Legere (1991), 116 N.B.R. (2d) 350, 293 A.P.R. 350 (C.A.) — *referred to*

R. v. M. (T.) (1991), 4 O.R. (3d) 203, 7 C.R. (4th) 55 (Prov. Div.) — *referred to*

R. v. Martin (1991), 2 O.R. (3d) 16, 43 O.A.C. 378, 63 C.C.C. (3d) 71 [affirmed (1992), 7 O.R. (3d) 319, 71 C.C.C. (3d) 572, [1992] 1 S.C.R. 838, 145 N.R. 161, 59 O.A.C. 321] — *referred to*

R. v. Mills, (sub nom. *Mills v. R.)* 52 C.R. (3d) 1, [1986] 1 S.C.R. 863, 26 C.C.C. (3d) 481, 29 D.L.R. (4th) 161, 21 C.R.R. 76, 67 N.R. 241, 58 O.R. (2d) 544 (note), (sub nom. *R. v. Mills)* 16 O.A.C. 81 (S.C.C.) — *referred to*

R. v. R. (L.) (1995), 39 C.R. (4th) 390, 28 C.R.R. (2d) 173, 100 C.C.C. (3d) 329, 127 D.L.R. (4th) 170 (Ont. C.A.) — *referred to*

R. v. Rahey, 75 N.R. 81, 78 N.S.R. (2d) 183, 193 A.P.R. 183, [1987] 1 S.C.R. 588, (sub nom. *Rahey v. R.)* 57 C.R. (3d) 289, 33 C.C.C. (3d) 289, 39 D.L.R. (4th) 481, 33 C.R.R. 275 — *considered*

R. v. Tucker (1992), 9 O.R. (3d) 291, 56 O.A.C. 36 (C.A.) [leave to appeal to S.C.C. refused (1993), 150 N.R. 393 (note), 12 O.R. (3d) xvi (note), 64 O.A.C. 80 (note) (S.C.C.)] — *referred to*

R. v. Turner, [1970] 2 Q.B. 321, 54 Cr. App. Rep. 352, [1970] 2 All E.R. 281 (C.A.) — *considered*

R. v. Valley (1986), 13 O.A.C. 89, 26 C.C.C. (3d) 207 (Ont. C.A.) [leave to appeal to S.C.C. refused (1986), 67 N.R. 158 (note), 15 O.A.C. 240 (note), 26 C.C.C. (3d) 207n (S.C.C.)] — *considered*

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R. v. Vrastides, [1988] Crim. L.R. 251 — *referred to*

State v. Carter, N.E. 2d 622 (1977) — *referred to*

State v. Farmer, 90 Ohio App. 49, 103 N.E.2d (4th) 289 (U.S. Ottawa County 1951) — *referred to*

Zaor v. R. (1984), 12 C.C.C. (3d) 265, (sub nom. *Zaor c. Langlois)* [1984] C.A. 276 (Que.) — *considered*

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11

s. 7*referred to*

s. 10(b)*referred to*

s. 11(d)*referred to*

s. 24(1)*considered*

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

s. 537(1)*considered*

s. 540*considered*

s. 540(1)(a)*considered*

Police Services Act, R.S.O. 1990, c. P.15

s. 137*considered*

s. 137(3)*considered*

APPLICATION for prerogative relief.

***Then J.*:**

1 The applicants, Gary Francis and Emile Jones, were charged with manslaughter and twelve counts of robbery with respect to the death of Vivi Leimonis during the course of a robbery at the Just Desserts restaurant in the City of Toronto on the 5th day of April 1994. The co-accused, O'Neil Grant, has been charged with the same offences as the applicants while the co-accused Lawrence Brown has been charged with first degree murder in addition to the robbery charges. The preliminary inquiry with respect to all accused commenced on November 15, 1994 and proceeded until the service of this application on June 22, 1995.

2 The applicants Francis and Jones, seek by way of *certiorari*, an order quashing the preliminary inquiry, and by means of prohibition, with *certiorari* in aid, an order prohibiting the provincial court judge from continuing to preside over the preliminary inquiry in relation only to these applicants.

3 Finally, the applicants seek a permanent stay of proceedings under section 24(1) of the *Charter of Rights and Freedoms* (the *"Charter"*) for alleged breaches of ss. 7, 10(b), and 11(d) of the *Charter* as well as costs.

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4 The issues raised on this application have been raised as questions by counsel for the applicants as follows:

1. Did the preliminary inquiry Judge effectively violate the Applicant, Francis', *Constitutional rights* by refusing to permit Gary Francis to choose which of his counsel would conduct examinations and cross-examinations on his behalf? Did his ruling allowing only one of either Midanik or Webster/Mulligan to cross-examine potentially violate the Applicant, Jones', right to a fair trial and to make full answer and defence and did the Court thereby lose jurisdiction?

2. Did the provincial court Judge exceed his jurisdiction and violate s. 540(1)(a) of the *Criminal Code* by failing to grant the adjournment before cross-examination of witness Robert Charlie where there was incomplete disclosure?

3. Did the preliminary inquiry Judge exceed his jurisdiction by failing to permit the defence to call six witnesses on the K.G.B. application?

4. Did the preliminary inquiry Judge exceed his jurisdiction by ruling that counsel for the Applicant could not fully cross-examine Daniel Scarlett and Carolee Godelia?

5. Did the preliminary court Judge exceed his jurisdiction by applying the evidence from the preliminary hearing to the K.G.B. voir dire and the evidence from the K.G.B. voir dire to the preliminary hearing proper?

6. Did the preliminary inquiry Judge's allowing the Applicants to be shackled by their legs and his refusal to hold an inquiry into the reason for the applicants being leg shackled in the court room from January 17 1995 to the end of the preliminary hearing cause him to lose jurisdiction?

7. Did the failure of the preliminary inquiry Judge to direct security guards to stay out of the prisoner's box constitute a denial of the right to counsel?

8. Did the refusal by the preliminary inquiry Judge to allow counsel for the defence to make oral submissions on the K.G.B. application cause him to exceed his jurisdiction, constitute a violation of principles of natural justice?

9. Was the preliminary inquiry judge's ruling admitting the statement of Scarlett on October 21, 1994 pursuant to the principles of the Supreme Court of Canada in *R. v. K.G.B., supra*, an error of law and in excess of his jurisdiction where he refused to hear oral submissions on behalf of the Applicants after having heard oral submissions from the Crown?

10. Does the cumulative effect of the errors of law, all against applicants and in favour of the prosecution, give rise to a reasonable apprehension of bias?

11. Did the actions of the preliminary inquiry Judge, throughout the Preliminary Inquiry give rise to a reasonable apprehension of bias?

5 It is the general position of the applicants that in respect of each of these issues, viewed either individually or cumulatively, the preliminary inquiry judge either (a) committed jurisdictional error requiring the preliminary inquiry to be quashed or (b) that the nature of his rulings and his conduct in relation to each issue gave rise to a reasonable apprehension of bias requiring an order prohibiting the judge from continuing with the preliminary inquiry or (c) the rulings and conduct constitute breaches of the *Charter* requiring a permanent stay of proceedings.

6 The general position of the Crown on each of these issues is that there is individually and cumulatively no jurisdictional error, that there can be no reasonable apprehension of bias from the manner in which these issues were dealt with by the preliminary inquiry judge and finally, that there is no breach of the *Charter* amounting to jurisdictional error or requiring a stay of proceedings. It should be noted that the Crown concedes with respect to the allegation in issue six that the preliminary inquiry judge may have erred in failing to hold a hearing on the issue of the shackling of the applicants while in the courtroom. The Crown submits, however, if a hearing should have been held that the appropriate remedy is a direction by this court to the

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preliminary inquiry judge to exercise a jurisdiction which the judge possesses and thereby to hold a hearing into the issue of shackling. I shall return to this specific issue later in my reasons.

Issue 1

Did the preliminary inquiry Judge effectively violate the Applicant, Francis', *constitutional rights* by refusing to permit Gary Francis to choose which of his counsel would conduct examinations and cross-examinations on his behalf? Did his ruling allowing only one of either Midanik or Webster/Mulligan to cross-examine potentially violate the Applicant, Jones', right to a fair trial and to make full answer and defence and did the Court thereby lose jurisdiction?

7 This issue is, in my opinion, pivotal to this application and accordingly it will be necessary to set out the background facts.

8 On November 30, 1994, at the commencement of the preliminary inquiry Mr. Midanik indicated he was counsel for both the applicants Francis and Jones. Mr. Midanik introduced Mr. Webster as his co-counsel insofar as the applicant Francis was concerned.

9 That same day, following cross-examination of the first witness by counsel for the co-accused Brown, Mr. Midanik indicated to the court that Mr. Webster would be cross-examining this witness on behalf of Francis. Crown counsel indicated she was opposed to a witness being cross-examined by Mr. Webster on behalf of Francis and then being cross-examined by Mr. Midanik on behalf of Jones because Mr. Midanik was counsel of record for both applicants. In response to questions by the preliminary inquiry judge, Mr. Midanik indicated that he was retained by both Mr. Francis and Mr. Jones and that in respect of Francis he was senior to Mr. Webster. Mr. Midanik indicated that Mr. Webster was retained as co-counsel with respect to Mr. Francis but that Mr. Webster was not retained with respect to Mr. Jones and could accordingly not conduct any cross-examinations or make submissions on behalf of Mr. Jones.

10 Mr. Midanik indicated to the court that it was his intention to proceed to cross-examine witnesses in a fashion which was consistent with the retainers of Mr. Midanik and Mr. Webster. If Mr. Francis wished Mr. Midanik to cross-examine a witness on his behalf, then Mr. Midanik would conduct one cross-examination on behalf of both Mr. Francis and Mr. Jones. If, however, Mr. Francis wished Mr. Webster to conduct the cross-examination on his behalf, then Mr. Webster would conduct the cross-examination on behalf of Mr. Francis and Mr. Midanik would conduct the cross-examination on behalf of Mr. Jones.

11 The preliminary inquiry judge ruled as follows:

> THE COURT: All right. Well, if you wish to cross-examine Mr. Francis, you will have to do so and if you do not choose to cross-examine Mr. Francis then that is your decision as senior Counsel and there will be no cross-examination of Francis and you may then, if you wish to do so, cross-examine on behalf of Jones, that is to say, you are the person who will cross-examine and you will conduct that cross-examination both for Francis and for Jones and if Webster is to step in and assist with the cross-examination then he will cross-examine for Francis and for Jones. That is to say there will be one cross-examination from the unit, Midanik and Webster.
>
> MR. MIDANIK: But, sir, he is not retained by Jones, how can he?
>
> THE COURT: That is your choice, you are the senior Counsel. If you wish his assistance in a cross-examination, you can pause and confer with him if you wish.

12 On March 20, 1995, at the conclusion of the evidence called by the Crown on the K.G.B. application, Ms. Mulligan, who replaced Mr. Webster as co-counsel for Mr. Francis, renewed the application to permit her to cross-examine witnesses on behalf of Mr. Francis prior to Mr. Midanik's cross-examination on behalf of Mr. Jones. After hearing submissions from Ms. Mulligan and Mr. Midanik, the preliminary inquiry judge ruled as follows:

> Thank you. Well, your position is no different from the position of Mr. Webster, vis-a-vis Jones and Mr. Midanik and the ruling I make is exactly the same as the ruling I made previously in connection with Mr. Webster. I will not change it. All right, let us continue.

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13 It is the applicants' position that the applicant Francis has by virtue of s. 540(1)(a) of the *Criminal Code* an unfettered statutory right at a preliminary hearing to determine whether he or his counsel shall cross-examine a particular witness. The ruling by the preliminary inquiry judge that the applicant Francis' choice of counsel to cross-examine a particular witness would also determine which counsel would cross-examine on behalf of his co-accused Jones, compromised the statutory rights of the applicant under s. 540(1)(a) and, as well, constituted a denial of natural justice leading to jurisdictional error.

14 It is further the position of the applicant Jones that his right of cross-examination by counsel of his choice was potentially denied by the ruling of the preliminary inquiry judge that if either Mr. Webster or Ms. Mulligan cross-examined on behalf of Francis, that cross-examination would be deemed to have been made on behalf of Jones notwithstanding that Mr. Webster and Ms. Mulligan were retained only by Francis and not by Jones. The applicant Jones submits that his right to counsel of his choice was actually violated when Mr. Webster or Ms. Mulligan cross-examined on behalf of Francis but Mr. Midanik, who is counsel for Jones, was not permitted to cross-examine on his behalf. It is submitted that in the circumstances the ruling of the preliminary inquiry judge amounted to a denial of the applicant Jones' statutory right under s. 540(1)(a) of the *Criminal Code* leading to jurisdictional error and a denial of natural justice.

15 The Crown submits that because Mr. Midanik is counsel of record for both accused, this arrangement represents that there is no conflict of interest between either accused. Accordingly Mr. Midanik could, in all circumstances, cross-examine all witnesses for both applicants. It follows from this that if Mr. Midanik is senior counsel and if Mr. Webster and Ms. Mulligan are assisting him that they, too, should cross-examine on behalf of both accused who are represented to have no conflicting interests by virtue of Mr. Midanik's common representation of both.

16 In my respectful view the preliminary hearing judge by his ruling denied both the applicants Francis and Jones their statutory right to cross-examine Crown witnesses, under s. 540 of the *Criminal Code*. A denial of natural justice leading to a loss of jurisdiction will arise where the judge breaches the mandatory provision of s. 540(1)(a) of the *Criminal Code* which entitles the accused to cross-examine Crown witnesses at a preliminary inquiry: see *R. v. Forsythe* (1980), 53 C.C.C. (2d) 225 (S.C.C.) at pp. 228-29.

17 Section 540(1)(a) of the *Criminal Code* provides:

> 540(1) Where the accused is before a justice holding a preliminary inquiry the justice shall
>
> (a) take the evidence under oath, in the presence of the accused, of the witnesses called on the part of the prosecution and *allow the accused or his counsel to cross-examine them*; (My emphasis).

18 The principles informing the circumstances in which the breach by the justice of the right of cross-examination contained in s. 540(1)(a) of the Code can amount to jurisdictional error have been set out in *Zaor v. R.* (1984), 12 C.C.C. (3d) 265 (Que. C.A.). In that case the justice, purporting to exercise his discretion under s. 537(1)(i), refused the accused the right to cross-examine certain Crown witnesses personally on the ground that he was represented by counsel.

19 In *Zaor v. R.*, Rothman J.A. on behalf of the Quebec Court of Appeal stated the following with respect to the meaning of s. 540(1)(a) of the *Criminal Code* at p. 268:

> Quite clearly, therefore, the Code contains a mandatory provision requiring that the accused or his counsel be allowed to cross-examine witnesses called by the prosecution. The justice interpreted this provision as enabling him to decide, as between the accused and his counsel, who would be permitted to cross-examine. With respect, that was a decision that the justice had no jurisdiction to make. *The choice as to whether witnesses are to be cross-examined by the accused himself or by his counsel belonged to the accused and to no one else*. And if he wished to cross-examine himself any or all of the Crown witnesses, no one had the right to prevent him from doing so. (My emphasis).

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20 Rothman J.A. continued at pp. 270-71 to make the point that the right of the accused to choose to cross-examine a Crown witness himself is no less entrenched than the right of the accused to choose which of the two counsel that he has retained will conduct the cross-examination:

> In the present case, there was no question of any abuse of the right of cross-examination or of the trial judge exercising his discretion to prevent irrelevant or repetitive questioning of witnesses. No cross-examination of those witnesses had even begun. *The sole basis on which the accused was refused the right to cross-examine was the fact that he was represented by counsel*.
>
> But an accused who is represented by counsel is entitled, if he wishes, to withdraw from counsel the normal mandate to examine or cross-examine witnesses so that he can cross-examine some or all of the witnesses himself. *He ought to be in no less favourable a position than he would be if he had engaged two attorneys who were to divide the witnesses to be cross-examined*. (My emphasis).

21 Finally, at p. 271 Rothman J.A. concluded that the right of the accused to cross-examine under s. 540(1)(a) must not be impaired or limited.

> The justice, in refusing to allow the accused to cross-examine, suggests that he had the discretion to do so under s. 465(1)(k) as part of his power to
>
> > (k) regulate the course of the inquiry in any way that appears to him to be desirable and that is not inconsistent with this Act.
>
> But s. 468(1)(a) specifically requires that the accused or his counsel be permitted to cross-examine so that any limitation of that right was, indeed, inconsistent with the Criminal Code.
>
> While it is undoubtedly true that a justice conducting a preliminary inquiry has a great deal of discretion in regulating how it will proceed, he is none the less bound by the provisions of the Criminal Code and the principles of natural justice. At the stage of preliminary inquiry, an accused is entitled to try to show that the evidence is not sufficient to put him on trial and to obtain his discharge at that stage, if he can (s. 475). If that is the case, his right to cross-examine Crown witnesses and to call his own witnesses must *not be impaired or limited*.
>
> *I would therefore conclude that the refusal of the judge to permit him to cross-examine was a jurisdictional error which should be remedied by certiorari*. (My emphasis).

22 In my opinion, in the present case the applicant Francis was denied his statutory right to cross-examine Crown witnesses not because he was specifically denied the right to choose which of his counsel would conduct the cross-examination but because he was not allowed by the justice to exercise that choice free of extraneous considerations. In my opinion the applicant Francis should have been allowed to determine which of his counsel, Mr. Midanik, Mr. Webster or Ms. Mulligan ought to cross-examine Crown witnesses strictly on his assessment as to whether cross-examination by one or the other of his counsel was in his best interest. Unfortunately the ruling of the trial judge prevented the applicant Francis from choosing on the basis of his own best interest but compelled him to assess the impact of his choice on the interest of his co-accused Jones. This was a completely extraneous consideration causing the statutory right of the applicant to cross-examine Crown witnesses in the words of Rothman J.A. in *Zaor v. R.*, to be "impaired or limited". In my opinion, the preliminary inquiry judge thereby fell into jurisdictional error.

23 It would appear to me that the jurisdictional error committed by the preliminary inquiry judge is even more obvious in the case of the applicant Jones. Jones was represented only by Mr. Midanik and had not retained either Mr. Webster or Ms. Mulligan. In ruling that the cross-examination of Crown witnesses by either Mr. Webster or Ms. Mulligan was nevertheless cross-examination on behalf of the applicant Jones, the preliminary inquiry judge usurped the right of counsel for the applicant Jones to cross-examine Crown witnesses and thereby committed jurisdictional error.

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24 In *Zaor v. R.* the appropriate remedy was to grant the petition for certiorari and to quash the ruling of the preliminary hearing judge. However, there has at this stage been no committal for trial. Accordingly, it is not, in my view, appropriate to quash the preliminary hearing as the applicants seek, but rather to issue prohibition to prevent continuing breaches of jurisdiction. I agree with counsel for the applicants that the jurisdictional error of the preliminary inquiry judge has vitiated the proceedings to this point. Accordingly, I propose to send the matter back to the Provincial Court so that a new preliminary hearing involving the applicants, Francis and Jones, may be completed before a different preliminary inquiry judge for reasons which I shall presently address.

25 It is necessary at this juncture to deal briefly with the shackling issue raised by counsel for all of the accused and specifically by counsel for the applicants on several occasions throughout the preliminary inquiry. For present purposes it is sufficient to note that the issue of the shackling of all of the accused became more contentious as the preliminary inquiry proceeded. On the first day of the preliminary inquiry, notwithstanding the offer of the Crown to adduce evidence on the issue the preliminary inquiry judge ruled as follows:

> I do not think it is necessary to have the Sergeant testify
>
> . . . . .
>
> I do not mean to foreclose you upon this issue, but if there is a security problem in this present courtroom then we will just have to have more officers. If it is transported through the hallway, that is their responsibility and I will not interfere with that.

26 A later ruling of the preliminary inquiry judge is representative of his position and as well of the difficulties resulting from that position:

> Well, as I said before, I am required to rely on the custodial officers to take such actions as they deem to be fit to protect the security of persons in custody and, indeed, to protect the security of everyone connected with this system. I will not enquire into what has gone on in the cell block for a couple of reasons. One reason is that this preliminary inquiry must not [be] diverted into trial of yet another issue — that is, whether the accused were treated properly or improperly in the cell block or outside of the presence of the Court.
>
> Now, secondly, as I believe, it is the duty of the custodial officers to protect the security of the accused and the people in connection with the court and I do not want to, nor am I really required to inquire into and have yet another issue tried, that is to say, whether it is necessary to handcuff the accused in the fashion in which they are or secure the accused by leg irons or whatever that the custodial officers have found to be necessary. That is yet another issue and I will not enquire into that but simply impose my trust on the custodial officers to protect everyone in the system, including the accused. Therefore, then, I make no order as to
>
> . . . . .

At this point His Honour was interrupted by the accused Brown who said "Shut up, man". His Honour then continued:

> order as to the security devices which the security people have found to be necessary. I am ready to continue now.

27 The applicants before me have taken the position that the failure of the preliminary inquiry judge to hold a hearing into the issue of the shackling of the applicants in the courtroom is jurisdictional error and a denial of natural justice. The Crown submits that if this court finds a hearing was required, then the failure of the judge to hold a hearing does not result in a loss of jurisdiction but rather constitutes a failure to exercise jurisdiction so that the appropriate remedy is *mandamus*. In the circumstances of this case the preliminary inquiry judge should be directed to exercise his jurisdiction to hold a hearing and further, to exercise his discretion on appropriate principles on the issue of shackling. It should be noted that the authorities referred to by the Crown both in its factum and in oral argument uniformly support the proposition that if an issue is raised as to the shackling of a prisoner inside the courtroom as distinct from the Court House premises that issue is not to be determined

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by security officers. Rather, the authorities hold that a hearing is required to enable the presiding judge to properly exercise his or her discretion on the issue.

28 In *R. v. Cambridge Justices* (1992), 156 J.P. 895 (Q.B.) Leggatt, L.J. at p. 896 cited the ancient authority of what was written in 1726 Hawkins, Hawk PC ch. 28, s. 1 as follows:

> That every person at the time of his arraignment, ought to be used with all the humanity and gentleness which is consistent with the nature of the thing, and under no other terror or uneasiness than what proceeds from a sense of his guilt, and the misfortune of his present circumstances; and therefore ought not to be brought to the bar in a contumelious manner; as with his hands tied together, or any other mark or ignominy and reproach; nor even with fetters on his feet, unless there be some danger of a rescous or escape.

29 Leggatt, L.J. then stated the following at p. 902:

> They, [Magistrates] not the gaoler, must decide whether a prisoner should be handcuffed in court. No prisoner should be handcuffed in court unless there are reasonable grounds for apprehending that he will be violent or will attempt to escape. If an application is made that a prisoner should be handcuffed, the magistrates must entertain it.

(See also *R. v. Vrastides*, [1988] Crim. L.R. 251.)

30 Similarly, American jurisprudence holds that it is the judge and not court security that is charged with the responsibility of determining whether an accused should be shackled in the courtroom.

31 In *Kennedy v. Cardwell*, 487 F.2d 101 (U.S. 6th Cir. Ohio 1973) Justice William Miller stated the following at p. 105:

> The rule that a prisoner brought into court for trial is entitled to appear free from bonds or shackles is an important component of a fair and impartial trial. And shackles should never be permitted except to prevent the escape of the accused, to protect everyone in the courtroom, and to maintain order during the trial.
>
> This historical development of the rule that a defendant should be unfettered while standing trial, except in extraordinary instances, has been traced from Virgil and the Bible through the Magna Carta and the great English legal scholars — Bracton, Coke and Blackstone — into our own jurisprudence.

32 See also: *State v. Carter*, N.E.2d 622 at 627 (1977); *State v. Farmer*, 103 N.E.2d (4th) 289 (1951) at 292-293.

33 There is scant Canadian authority on the subject but *R. v. M. (T.)* (1991), 4 O.R. (3d) 203 (Prov. Div.) at pp. 220-21 suggests that the issue of shackling is to be determined by the presiding judge in the exercise of his or her discretion in the context of a rebuttable presumption that shackling ought not to obtain unless the Crown shows cause why shackling is necessary. In terms of appellate authority the New Brunswick Court of Appeal in *R. v. Legere* (1991), 116 N.B.R. (2d) 350 has noted that courtroom security is a matter within the discretion of the presiding judge at p. 352:

> The next submission of the appellant is that he was chained to the floor in such a way as to give the impression that he was guilty of the offences charged. The control of security measures in the course of a trial is within the discretion of the trial Judge. We have not been persuaded that he failed to exercise his discretion properly. Neither has it been shown that the appellant, in the circumstances, was deprived of his fundamental rights by the security measures taken.

34 It should be noted that counsel for the Crown has drawn my attention to s. 137 of the *Police Services Act*, R.S.O. 1990, c. P.15 which reads as follows:

> 137.-(1) A board that is responsible for providing police services for a municipality has the following responsibilities, with respect to premises where court proceedings are conducted:
>
> 1. Ensuring the security of judges and of persons taking part in or attending proceedings.

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2. During the hours when judges and members of the public are normally present, ensuring the security of the premises.

3. Ensuring the secure custody of persons in custody who are on or about the premises including persons taken into custody at proceedings.

4. Determining appropriate levels of security for the purposes of paragraphs 1, 2 and 3. [1989, c. 24, s. 1(1), part; 1990, c. 10, s. 148(2, 3).]

(2) The Ontario Provincial Police Force has the responsibilities set out in paragraphs 1, 2, 3 and 4 of subsection (1) in those parts of Ontario in which it has responsibility for providing police services.

(3) The responsibilities created by this section replace any responsibility for ensuring court security that existed at common law. [1989, c. 24, s. 1(1), part.]

35 I am informed that the co-accused have applied for judicial review in the Divisional Court in order to determine the scope of s.137. For the purposes of the application before me I cannot accept that the legislature either intended to or in law could by way of a provincial statute and more specifically by means of s. 137(3) of the *Police Services Act*, oust the jurisdiction of the preliminary inquiry judge functioning under the *Criminal Code* to determine issues affecting the liberty of a prisoner within the confines of the courtroom. In my opinion in respect of the conduct of a preliminary inquiry the provisions of s. 137(3) of the *Police Services Act* do not oust the jurisdiction of the ordinary inquiry judge as set out in s. 537(1) of the *Criminal Code*.

36 The authorities cited by the Crown persuade me that the preliminary inquiry judge erred in not holding a hearing once the issue of shackling of the applicants in the courtroom was raised. Thereupon he ought to have exercised his discretion on the basis of the evidence adduced and the submissions of counsel.

37 The manner in which the discretion is to be exercised is for the judge to determine in the particular circumstance of each case in which the issue of shackling of a prisoner in the courtroom is raised. The authorities which have been cited to me suggest that a balance should be struck between the duty of the judge to ensure the safety in all participants to the proceeding and to prevent escape on the one hand, and the need to maintain the dignity of the prisoner in the context of the presumption of innocence on the other. In effecting this balance the views and expertise of the security personnel will no doubt be given considerable weight. The ultimate determination, however, must be made by the presiding judge and not by security staff.

38 I agree with the Crown, however, that in circumstances where the error of the preliminary inquiry judge is limited to the refusal to conduct a hearing on the shackling issue, a direction, by way of *mandamus*, to the inferior tribunal to conduct such a hearing is the appropriate remedy. It must be remembered that the purpose of the preliminary inquiry is to inquire as to the sufficiency of the evidence in respect of a committal for trial. In that context I am not prepared to hold that a failure to hold a hearing to deal with security arrangements which is not an issue central to the preliminary inquiry ousts the jurisdiction of the court. In my opinion it is an appropriate exercise of my discretion in the circumstances to cure the error by directing the preliminary inquiry court by way of *mandamus* to hold a hearing on the issue of shackling and to exercise its discretion on the issue.

39 Having determined that the issue of shackling must be sent back to the Provincial Court for a proper hearing and determination, it remains to assess whether such hearing and determination ought to be made by the original preliminary inquiry judge. In my opinion, if the Crown wishes to recommence the preliminary inquiry with regard to the applicants, Francis and Jones, the determination of any shackling issue which may arise must be undertaken by a judge other than the original preliminary inquiry judge, for reasons which I will presently elaborate.

40 On November 17, 1995, Ms. Dobney, who represented the Crown in the application before me, but who was not the Crown on the preliminary inquiry, sent a letter to Mr. Midanik, who represents the applicants, informing him of a conversation initiated by the preliminary inquiry judge on November 15, 1995, to one of the Crown Attorneys on the preliminary inquiry.

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41 In the letter of November 17, Ms. Dobney informed Mr. Midanik that the preliminary inquiry judge in the course of his conversation with the Crown Attorney stated he believed that the application was to be heard that week and the Crown replied that it had been adjourned. The judge indicated he understood that a judge of this court had been seized of the matter to which the Crown Attorney replied that she was not sure who would hear the matter. The Crown Attorney then indicated to the judge that the factums were filed and that the matter was ready for argument. The Crown Attorney further indicated to the judge that it would be the position of the Crown on the application for prerogative relief that none of the matters being advanced by the applicants went to the jurisdiction of the judge to continue the preliminary inquiry although an order for *mandamus* could be made as a result of these proceedings regarding the shackling issue. The judge replied that just as he had stated in court he had not wanted any evidence adduced regarding the behaviour of the accused outside the courtroom. The Crown Attorney replied that she understood that position and that she was not aware of any Canadian authority on this issue. According to Ms. Dobney's letter to Mr. Midanik the conversation between the judge and the Crown Attorney ended at this point.

42 In her letter to Mr. Midanik, Ms. Dobney indicated that she wished to advise the judge by letter with Mr. Midanik's consent that the judge's communication with the Crown Attorney conducting the preliminary inquiry had been disclosed to Mr. Midanik. On November 21, 1995, a letter was sent to the judge by Ms. Dobney with a copy to both the Crown Attorney and Mr. Midanik to which was appended Ms. Dobney's letter outlining the disclosure to Mr. Midanik of the judge's communication with the Crown Attorney.

43 Mr. Midanik submits that the communication between the judge and the Crown Attorney conducting the preliminary inquiry raises a reasonable apprehension of bias requiring this court to prohibit the preliminary inquiry judge from continuing with the preliminary inquiry, at least with respect to the applicants. In Mr. Midanik's submission it is improper for a judge to discuss issues pertaining to the case before him with one counsel in the absence of opposing counsel. It is Mr. Midanik's contention that the clear impropriety of the judge in discussing, *ex parte*, issues pertaining to the preliminary inquiry, constitutes a reasonable apprehension of bias. It is submitted that in the circumstances of this case, given the contentious nature of the shackling issue and given the adamant position of the judge that he was prepared, without holding a hearing, to defer to the security staff on issues of security both in and out of the courtroom, the *ex parte* communication between the judge and the Crown conducting the preliminary inquiry on the shackling issue would raise a reasonable apprehension of bias.

44 Ms. Dobney submits that while the unilateral communication between the judge and the Crown conducting the preliminary inquiry is unfortunate and perhaps even imprudent the purpose of the communication was merely to obtain information about scheduling. Ms. Dobney submits that the further communication was merely a discussion about matters already known to the applicants and can therefore not raise a reasonable apprehension of bias.

45 To my understanding the prohibition against a judge speaking to one counsel about any case in the absence of other counsel is virtually absolute, permitting very few exceptions. In order to maintain public confidence in the administration of justice the prohibition must be strictly enforced.

46 The Honourable J.O. Wilson in *A Book for Judges* (1980), written at the request of the Canadian Judicial Council states the prohibition unequivocally at p. 52 as follows:

> No judge should talk with one counsel about any case in the absence of other counsel. The one probably unavoidable exception to this rule is that, before the opening of a criminal assize or sittings, it may be necessary to have Crown Counsel advise you of the order in which he has arranged the various trials to be heard and it may not be practicable to have all defence counsel present at this time. The discussion should be strictly confined to trial dates or priorities already arranged with defence counsel and if any disagreements have developed, the date or priority can only be settled in court in the presence of all necessary counsel. Any arrangement made is always subject to change by the judge who is in charge of the list. The arrangements agreed to should be stated by the trial judge at the opening of the sittings.

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47 The classical statement of the care which must be taken in dealings between counsel and the judge is found in *R. v. Turner*, [1970] 2 All E.R. 281 (C.A.). Although he was speaking in the context of plea bargaining, the words of Lord Parker, L.C.J. define the limits of any out of court discussions between counsel and judge. At p. 285 the following is stated:

> There must be freedom of access between counsel and judge. Any discussion, however, which takes place must be between the judge and both counsel
>
> . . . . .
>
> This freedom of access is important because there may be matters calling for communication or discussion, which are of such a nature that counsel cannot in the interests of his client mention them in open court. Purely by way of example, counsel for the accused may by way of mitigation wish to tell the judge that the accused has not long to live, is suffering maybe from cancer, of which the accused is and should remain ignorant
>
> . . . . .
>
> It is, or (sic) course, imperative that, so far as possible, justice must be administered in open court. Counsel should, therefore, only ask to see the judge when it is felt to be really necessary and the judge must be careful only to treat such communications as private when, in fairness to the accused person, this is necessary.

48 Based on the view articulated by Justice Wilson and Lord Parker it seems to me that the discussion between the preliminary inquiry judge and counsel for the Crown should not have occurred in the absence of defence counsel. Further, it seems to me that even if it were possible to characterize that position of the discussion pertaining to scheduling matters as merely unwise and imprudent, the portion of the discussion with respect to the contentious issue of shackling raised in this application and of the respective positions of both the judge and the Crown on that issue was totally improper.

49 The situation in this case may usefully be compared to the facts in *R. v. Black* (1984), 13 C.C.C. (3d) 379 (B.C. S.C.). In that case the judge conducting a preliminary inquiry was advised by the Crown Attorney that because of certain difficulties with the police the Crown was unable to make appropriate disclosure to the defence. The judge unilaterally telephoned a police superintendent but revealed to all counsel that he had done so. As a result the lines of communication between the Crown and the police were re-opened and the Crown was able to discharge its disclosure obligations to the accused. The Crown nevertheless took exception to the unilateral judicial involvement in the case and sought prohibition. In dismissing the Crown's application for prohibition Dohm, J. stated the following at p. 384:

> Judge Collins' communication with Superintendent Gillard is conduct inconsistent with the time-tested principles governing proper judicial behaviour. It is conduct which cannot be encouraged, regardless of the motive. *It is conduct which endangers judicial independence. Communication by a judge concerning a matter before him is reserved to the courtroom, and only between the parties and their counsel. A breach of these principles provides a firm ground for disqualification*. (my emphasis)

50 However, in considering whether in the circumstances of that case a reasonable man fully apprised of all of the circumstances would feel a serious apprehension of bias Dohm, J. held as follows at pp. 385-86:

> I am concerned on this application not whether the provincial court judge is biased or whether there is an actual likelihood of bias but, rather, whether there is a 'reasonable apprehension of bias'
>
> . . . . .
>
> Considering the matter, objectively, a fair and reasonable view leads me to conclude that there is no clear and firm basis for disqualifying Judge Collins from continuing the trial. His neutrality in the proceedings has in no way been compromised. His action did not favour one side over the other. There certainly was no predisposition as to guilt or innocence. The telephone call, in my view, removed a 'log jam' for the benefit of everyone concerned. It poses no real or apparent threat to Judge Collins remaining indifferent as between the accused and Her Majesty the Queen. In the result, I can find no basis for finding a reasonable apprehension of bias.

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> Sometimes a comparison is helpful in testing one's result. Let us suppose in the present case Miss McNeely advised Judge Collins that the Crown did not intend to disclose the evidence prior to presentation in court for security reasons, i.e., safety of the witnesses. If Judge Collins had then made the same telephone call the result would be quite different than in the case at bar. Clearly, in those circumstances, the judge would have been held to have entered the arena, a position from which he could not retreat short of disqualifying himself.

51 It is apparent that *ex parte* communication between the judge and counsel on issues pertaining to the case will invariably be improper no matter how well motivated the judge. However, such communication may not be fatal to the impartiality of the judge. It remains to determine in the circumstances of this case whether in transgressing the bounds of propriety prohibition should issue on the basis of a reasonable apprehension of bias on the part of the judge.

52 The appropriate test to be applied by the court has been articulated by the Supreme Court of Canada in *Committee for Justice & Liberty v. Canada (National Energy Board)* (1978), 68 D.L.R. (3d) 716 where DeGrandpré J. stated the following at p. 735:

. . . . .

> the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information.

. . . . .

> that test is 'what would an informed person, viewing the matter realistically and practically — and having thought the matter through, conclude.'

53 (See also *R. v. Colley* (1991), 105 N.S.R. (2d) 178 (C.A.); *R. v. Gushman* (1994), 23 W.C.B. (2d) 382 (Ont. Gen Div.).

54 On applying the test to the facts of this case I find that the initiation by the judge of an *ex parte* telephone conversation with the Crown Attorney conducting the preliminary inquiry was improper. Unlike the situation in *R. v. Black*, the fact of the communication was disclosed not by the judge but by Ms. Dobney who promptly disclosed the communication to Mr. Midanik. In doing so Ms. Dobney is to be commended for her conduct which is, in my opinion, in keeping with the highest traditions of Crown counsel. I should also add that while I appreciate that the communication initiated by the judge placed the Crown Attorney in a difficult situation her participation in the ensuing discussion was nevertheless inappropriate. However, it must also be noted that the Crown Attorney nevertheless demonstrated her integrity by making the conversation immediately known to Ms. Dobney and thereby to Mr. Midanik.

55 The fact of the disclosure of the communication does not in my view cure the impropriety. In the circumstance of this case, I regrettably accept Mr. Midanik's contention that a reasonable person, apprised of the circumstances, on a realistic and practical assessment would conclude that the conduct of the preliminary inquiry judge in initiating the telephone conversation to the Crown Attorney and by engaging in a discussion of the shackling issue raises a reasonable apprehension of bias because of the impropriety of discussing a ground of prerogative relief with the Crown Attorney while the matter is pending in the reviewing Court. I wish to make it quite clear that while I find that the judge ought not to have engaged in an ex parte discussion with the Crown Attorney I specifically do not find any *mala fides* or any actual bias on the part of the judge or indeed, that anything was done or said by the judge to assist Crown counsel on the application before me. However, the prohibition against *ex parte* communication is virtually absolute in order to preserve the confidence of the public in the impartiality of the judiciary and thereby in the administration of justice because ex parte communication between judge and counsel such as that in the instant case will almost invariably raise a reasonable apprehension of bias. In the circumstances of this case I believe that it is appropriate to issue the writ of prohibition on the basis that the communication between the judge and the Crown raised a reasonable apprehension of bias. It follows therefore that if the Crown is to conduct a preliminary inquiry with respect to these applicants, the preliminary inquiry must commence before another judge.

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56 In view of my conclusions on the issues which I have discussed it is not necessary to deal with the other grounds advanced by the applicants alleging jurisdictional error: see *Glassco v. Cumming*, [1978] 2 S.C.R. 605 per Pigeon J. at p. 611. Nevertheless, it is noteworthy that in respect of those grounds (e.g. issues 3-5,9) which essentially raise errors of law pertaining to evidentiary rulings, such errors do not constitute jurisdictional error resulting in a loss of jurisdiction. In matters pertaining to the admissibility of evidence it is axiomatic that the preliminary inquiry judge has the right to be wrong: see *Forsythe* [*Forsythe v. R.* (1980), 53 C.C.C. (2d) 225 (S.C.C.)] at p. 229; *R. v. Cohen* (1979), 46 C.C.C. (2d) 473 (S.C.C.) per Pigeon J. at p. 477.

57 Nor, is it in the circumstances necessary to deal in detail with the various constitutional arguments advanced by the applicants. In the seminal case of *R. v. Mills* (1986), 26 C.C.C. (3d) 481 (S.C.C.) it was established that not every breach of the *Charter* will result in jurisdictional error giving rise to a prerogative remedy except in exceptional circumstances. (See *R. v. Mills* at p. 500). I accept the respondent's submission that this principle has been followed by the appellate counts: see *R. v. Tucker* (1992), 9 O.R. (3d) 291 (C.A.) at p. 302; *R. v. Corbeil* (1986), 27 C.C.C. (3d) 245 (Ont. C.A.) at p. 254; *R. v. Martin* (1991), 63 C.C.C. (3d) 71 (Ont. C.A.) at p. 85). I further accept the respondent's submission that the Applicants have not demonstrated "exceptional circumstances" with respect to any of the grounds of error alleged.

58 In coming to this conclusion I have in mind the proposition articulated by Lamer J. (as he then was) in *R. v. Rahey* (1987), 33 C.C.C. (3d) 289 (S.C.C.) which asserts that a superior court has concurrent jurisdiction to grant *Charter* relief as well as prerogative relief where a preliminary hearing has not been concluded but that such relief is discretionary and to be exercised with caution. In this respect, Lamer J. stated the following at p. 299:

> In *Mills*, it was also decided that the superior courts should have "constant, complete and concurrent jurisdiction" for s. 24(1) applications. But it was therein emphasized that the superior courts should decline to exercise this discretionary jurisdiction unless, in the opinion of the superior court and given the nature of the violation or any other circumstance, it is more suited than the trial court to assess and grant the remedy that is just and appropriate. The clearest, though not necessarily the only, instances are those where there is as yet no trial court within reach and the timeliness of the remedy or the need to prevent a continuing violation of rights is shown, and those where it is the process below itself which is alleged to be in violation of the *Charter's* guarantees. The burden should be upon the claimant, in this case Mr. Rahey, to establish that the application is an appropriate one for the superior court's consideration.
>
> (See also: Mills, supra, at pp 519-20)

59 In pressing his argument for a stay of proceedings based on breaches of the *Charter* Mr. Midanik submitted that the refusal of the preliminary inquiry judge to permit the applicants to utilize counsel of their choice in respect of the cross-examination of witnesses constituted a breach of s. 7, s. 10(b) and s. 11(d) of the *Charter*. In support of this argument reliance is placed upon the decision of Pardu J. in *R. v. Greenwood* (unreported, released February 10, 1995 at Sault Ste. Marie, Ont. Gen. Div.)

60 In my view *R. v. Greenwood* is of no assistance to the applicants in the circumstances of this case. In *Greenwood* an application was brought to immediately vacate the order made by the preliminary inquiry judge at the commencement of the preliminary inquiry disqualifying the accused's counsel on the basis of conflict of interest. The applicant sought relief by way of *certiorari* and under the *Charter*. Pardu J. held that while the preliminary inquiry judge erred in law in disqualifying counsel, prerogative relief was unavailable. At page 7 of her reasons she stated the following:

> I do not conclude that this error in law deprived the preliminary inquiry judge of jurisdiction, although the error had the effect of depriving the accused of his right under the Charter of Rights and Freedoms to retain counsel of his choice. In regulating the hearing before him, the preliminary inquiry judge had the power to consider whether counsel should be disqualified because of a conflict of interest.

61 By way of contrast, in the instant case, prerogative relief by way of prohibition is, as I have already held, available to cure the jurisdictional error of the preliminary inquiry judge in not adhering to the mandatory provisions of s. 540(1)(a) of the *Criminal Code*. In such circumstances this court ought not to assume jurisdiction to provide relief under the *Charter* unless the applicants can demonstrate that they are entitled to relief in excess of that which the issuance of the prerogative writ can

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provide: see: *R. v. Mills*, at pp 519-22). In this respect it is also appropriate to consider what was said by Arbour J.A. in *R. v. R. (L.)* (1995), 100 C.C.C. (3d) 329 (Ont. C.A.) at p. 341:

> Once an accused asserts a statutory or common law right at the preliminary inquiry, or in any other forum, he or she is entitled to an adjudication of that right in its statutory or common law form without recourse to the *Charter*. For example, when the accused at the preliminary inquiry asks to be permitted to cross-examine a Crown witness, he or she is asserting a statutory right under the *Criminal Code*, not a constitutional right under ss 7 and 11(d) of the *Charter*. To hold otherwise would mean that the presiding judge would be precluded from permitting cross-examination if it were characterized as a constitutional remedy.

62 In the special circumstances of *Greenwood*, Pardu J. in the absence of the availability of prerogative relief ordered that counsel be reinstated on the basis of the reasoning found at pp 15-16:

. . . . .

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

. . . . .

> *an appellate or trial court would not be in a position to afford the accused an appropriate and just remedy for the breach of his right to counsel of his choice*.

> (Emphasis added).

63 In my view the discretion to grant *Charter* relief in the exceptional circumstances existing in *Greenwood* was properly exercised by Pardu J. given the timeliness of the application, the unavailability of prerogative relief in the superior court or of other relief in the trial court in order that the applicant would obtain a just and appropriate remedy. However, special and exceptional circumstances do not obtain in the instant case. A just and appropriate remedy for the breach of a mandatory provision of the *Criminal Code* has been granted. Moreover, a stay of proceedings is manifestly inappropriate. Had the applicants in this case, as did the applicant in *Greenwood*, brought a timely application their full rights to cross-examine would have been exercised throughout the proceeding. The applicants cannot rely upon their own delay in asserting their rights to counsel of their choice to now obtain a stay of proceedings under the *Charter* in excess of the relief available to them by way of prohibition. In the circumstances it is my view that the applicants have not shown this is one of those special or exceptional cases in which this court ought to exercise its discretion to grant *Charter* relief within the narrow confines articulated by Lamer J. in *R. v. Rahey*, at p 299.

64 I now turn to those alleged errors of law contained in grounds 2-5 and 8-9 which Mr. Midanik submits constitute breaches of s. 7 and s. 11(d) of the *Charter* and which he contends either individually or cumulatively ought to give use to a stay of proceedings. Of particular relevance to the disposition of this argument, in view of the nature of the grounds of error alleged by the applicants is the admonition by Lamer J. at p. 521 of *Mills*:

> We should not distort our prerogative writs, which have have become developed in Canadian law and procedure over time, to become *ipso facto* instruments of review under the *Charter*. The use of such an expanded notion of jurisdictional error would unnecessarily alter the prerogative writ process beyond recognition.

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65 If I am correct in my assessment that grounds 3-5 and 9 essentially allege errors of law as to the admissibility of evidence, I must reject as untenable Mr. Midanik's submission that such errors of law are nevertheless *Charter* breaches because they somehow attenuate the applicants' right to full answer and defence.

66 Most of the remaining errors involve allegations of error made by the judge with respect to several aspects of the Crown's K.G.B. application. In this regard, there is at this stage no certainty as to what effect the alleged errors will have on the applicants' potential committal for trial and accordingly on the issue of whether their ability to exercise full answer and defence has been prejudiced. Secondly, it must be noted that notwithstanding the outcome of the K.G.B. application at the preliminary inquiry no final prejudice will result to the applicants because a fresh K.G.B. application including rulings on the evidence in support of the application must be brought at trial with the relevant rulings made by the trial judge. In the circumstances, I am of the view that in respect of grounds 3-5 and 8-9 I ought not to exercise my discretion to consider the applicants' *Charter* applications within the parameters articulated by Lamer J. in *Rahey*.

67 Finally, Mr. Midanik has submitted that the conduct of the judge during the preliminary raises a reasonable apprehension of bias. This conduct, coupled with his consistently adverse legal rulings with respect to the applicants allegedly constitutes a breach of the applicants' right to full answer and defence. The applicants submit that this court should exercise its discretionary jurisdiction under the *Charter* to grant a stay of proceedings. I have carefully examined the myriad of examples advanced both in the applicants' factum and oral submissions of what the applicants submit raises a reasonable apprehension of bias including the refusal of the preliminary inquiry judge to hold a hearing on the shackling issue and his alleged threat at one stage to have the accused forcibly brought to court. In this respect I have been required to read much of the more than seventy volumes of transcript so as to fully come to appreciate these submissions in the context of the entire proceeding.

68 As to the failure to hold a hearing into the shackling issue, I am satisfied that there was no bias against the applicants in this respect. The failure of the presiding judge to have a hearing was erroneous and not deliberate. In fairness it must be remembered that in making his rulings on the shackling issue the preliminary inquiry judge did not have the benefit of the authorities which have been provided by the Crown for my assistance and was required therefore to rule in a legal vacuum.

69 Also, at one stage of the proceedings when the accused refused to attend court the judge stated that they may have to be brought forcibly. I am satisfied that these remarks were made in a moment of exasperation at the continually unruly and disruptive behaviour on the part of the accused. In any event no force was in fact used with regard to the accused at the instance of the judge. It should also be noted that the preliminary inquiry judge took steps to provide the accused with clothing and expressed his concern with their physical condition in the cells on several occasions.

70 There is no doubt that when a firm judge, forceful counsel (for both the Crown and the applicants) and unruly accused interact there will be, as in the instant case, sharp exchanges, intemperate remarks and perhaps discourtesy on the part of all participants. In assessing this ground I adopt the test posited by Martin J.A. in *R. v. Valley* (1986), 26 C.C.C. (3d) 207 (Ont. C.A.) at p 232:

> Interventions by the judge creating the appearance of an unfair trial may be of more than one type and the appearance of a fair trial may be destroyed by a combination of different types of intervention. The ultimate question to be answered is not whether the accused was in fact prejudiced by the interventions but whether he might *reasonably* consider that he had not had a fair trial or whether a reasonably minded person who had been present throughout the trial would consider that the accused had not had a fair trial: see *Brouillard v. The Queen, supra; R. v. Racz, [1961]* N.Z.L.R. 227 (C.A.).

71 Without detailing the myriad of matters said by the applicants to raise a reasonable apprehension of bias it is readily apparent that the proceedings were far from exemplary. Nevertheless I am satisfied that the conduct of the judge would not cause a reasonably minded person who had been present for the entire proceeding to have concluded that the applicants had not been treated fairly. In this respect I note that even though Martin J.A. found that certain of the judicial interventions in *Valley* were excessive, those errors on the part of the trial judge did not result in a stay of proceedings but in a new trial. Having assessed the grounds of alleged bias individually and cumulatively, I see no reason to exercise my discretion to entertain *Charter*

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relief in this respect. Further, I can find no reason to exercise my discretion to grant *Charter* relief in excess of that which I have already held to be available to the applicants by way of prohibition. The application for a permanent stay of proceedings is accordingly denied.

72 In accordance with these reasons a writ of prohibition will go directing that this matter be remitted to the Provincial Court in order that the Crown, if so advised, commence a fresh preliminary hearing before another judge with respect to these applicants.

73 There will be no order as to costs of this application in the circumstances.

Application allowed.

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