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2006 CanLII 24454 (ON SC)

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
HER MAJESTY THE QUEEN	**JAMES W. LEISING and GEOFFREY ROY**, for the Respondent/Crown
Respondent	
- and -	
AHMAD MUSTAFA GHANY, ZACHARIA AMARA, ASAD ANSARI and QAYYUM ABDUL JAMAL	**ROCCO GALATI,** for the Applicant, Ahmad Mustafa Ghany, **DAVID KOLINSKY,** for the Applicant, Zacharia Amara, and **ANSER FAROOQ,** for the Applicants Asad Ansari and Qayyum Abdul Jamal
Applicants	
	HEARD: JULY 10 and 11, 2006

REASONS FOR JUDGMENT
[On application for an order that the bail hearings of the applicants be held before a judge of the Superior Court]

DURNO J.

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[1] The applicants and nine other men were arrested and charged with offences under Part II.1 of the *Criminal Code*, Terrorism, on June 2 and 3, 2006.[1] This is the second prosecution under the legislation, which has been in force since January 17, 2002. Five "young persons" arrested as a result of the same police investigation are charged separately under the *Youth Criminal Justice Act*. The bail hearings for the applicants are yet to be held in the Ontario Court of Justice.[2]

[2] They apply for orders that their bail hearings be held before a judge of the Superior Court of Justice, pursuant to s. 522 or 515 of the *Criminal Code*, contending that the offences with which they are charged are s. 469 offences, or akin to s. 469 offences, which are within the exclusive jurisdiction of the Superior Court of Justice. In the alternative, they submit that the bail hearing in any event ought to be heard in the Superior Court, because at their bail hearings they seek relief by way of *habeas corpus*, declaratory relief based on breaches of ss. 7, 11(e) and 15 of the *Charter,* and relief pursuant to s. 24(1) of the *Charter* and s. 52 of the *Constitution Act*.

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[1] This application was initiated by counsel on behalf of Ahmad Mustafa Ghany. On the date submissions started, the three other named applicants were granted leave to join the application. The written and oral submissions of the three applicants mirrored those made on behalf of Ghany, except where noted. Counsel on behalf of Shareef Abdelhaleen supported the position of the applicants, and made submissions in furtherance of their position without filing a Notice of Application.

[2] The applicant, Amara, started his bail hearing prior to the release of these reasons, but after counsel had been advised that the application would be dismissed.

[3] The applicants Zacharia, Ansari and Amara submit in the further alternative, that there should be an order that a judge of the Superior Court of Justice preside at the bail hearing as an *ex offico* justice of the peace.

[4] For the following reasons the applications are dismissed.

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Are s. 83.01 offences, s. 469 offences?

[5] The applicants submit that s. 83.01 offences are "akin, of the same class and indistinguishable from offences included in s. 469 of the *Criminal Code,* and therefore within the exclusive jurisdiction of the Superior Court of Justice. They argue that on the allegations as disclosed to date, "some of the allegations cited constitute, or may constitute, treason and/or intimidating Parliament or attempts thereunder". Further, the applicants submit the nature and content of terrorism charges are "either subsets or specific instances of s. 469 offences or indistinguishably akin to them".

Section 469 offences

[6] Section 469 of the *Criminal Code* provides that every court of criminal jurisdiction has jurisdiction to try an indictable offence, except for the following offences with the maximum sentence and *Criminal Code* sections bracketed: treason (s. 47, life imprisonment as a minimum sentence for high treason, and 14

years or life as maximum sentences for treason), acts intended to alarm Her Majesty or break public peace (s. 49, 14 years), intimidating Parliament or a legislature (s. 51, 14 years), inciting mutiny (s. 53, 14 years), seditious offences (s. 61, 14 years), piracy (s. 74, life imprisonment), piratical acts (s. 75, 14 years) or attempting to commit any of the foregoing offences (s. 463, 14 years for life offences, and one half the sentence for the full offence in other cases); murder (s. 235, life imprisonment as a mandatory minimum sentence), conspiracy to commit any of the foregoing offences (s. 465, 5 or 10 years), being an accessory after the fact to high treason (s. 463(a), 14 years), treason (s. 463(b) life or 14 years) or murder (s. 240, life imprisonment as a mandatory minimum sentence), and offences under sections 4 – 7 of the *Crimes Against Humanity and War Crimes Act* (genocide, crimes against humanity and war crimes, punishable by life imprisonment, although when the act which forms the basis of the crimes involves the intentional killing of a person or persons, the mandatory sentence is life imprisonment).

[7] Persons charged with “s. 469” offences must have their bail hearings and trial before judges of the superior court of criminal jurisdiction, judges appointed by the federal government pursuant to s. 96 of the *Constitution Act, 1867*. Their preliminary inquiries are held before provincial court judges.

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[8] Regarding bail, anyone charged with a s. 469 offence, must be detained in custody and committed to jail pursuant to s. 515(11) of the *Criminal Code* at their first court appearance. Whether they should be released from custody is only determined upon an application by the accused to a judge of a superior court pursuant to s. 522 of the *Criminal Code*. At that hearing, the judge is required to detain the accused in custody, unless the accused shows cause why he or she should be released: s. 522 (2). There is no provision to review an order made under s. 522 except by the Court of Appeal, with leave from the Chief Justice or Acting Chief Justice: s. 680. If the parties consent, a judge of the Court of Appeal may conduct the review instead of three judges: s. 680(2)

The Charges against the Applicants

[9] All of the applicants are charged with nine others with "knowingly participating in or contributing to, directly or indirectly, activity of a terrorist group, for the purpose of enhancing the ability of a terrorist group to facilitate or carry out a terrorist activity", contrary to s. 83.18(1) of the *Criminal Code*, an offence punishable by 10 years imprisonment;

[10] Amara, Jamal and Ghany are charged with seven others with "receiving training, knowingly participating in or contributing to, directly or indirectly, activity of a terrorist group, for the purpose of enhancing the ability of a terrorist group to

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facilitate or carry out a terrorist activity, contrary to s. 83.18(1) of the *Criminal Code*, an offence punishable by ten years imprisonment;

[11] Amara is charged with four others with, by providing training or recruiting persons to receive training, knowingly participating in or contributing to, directly or indirectly, activity of a terrorist group, for the purpose of enhancing the ability of a terrorist group to facilitate or carry out a terrorist activity, contrary to s. 83.18(1) of the *Criminal Code*, an offence punishable by 10 years imprisonment,

[12] Amara, Ansari and Jamal are charged with four others with "doing anything with intent to cause an explosive substance that is likely to cause serious bodily harm or death to persons, or is likely to cause serious damage to property, contrary to s. 81 of the *Criminal Code* for the benefit of, at the direction of, or in association with a terrorist group, contrary to s. 83.2 of the *Criminal Code*, an offence punishable by life imprisonment.

[13] Other adults are charged in the same information with offences carrying maximum sentences of life and ten years imprisonment.

[14] The relevant portions Part II.I of the *Criminal Code* regarding terrorism offences are as follows;

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"entity" means a person, group, trust, partnership or fund or an unincorporated association or organization.

"terrorist activity" means

(a) an act or omission that is committed in or outside Canada and that, if committed in Canada, is one of the following offences:

(i) the offences referred to in subsection 7(2) that implement the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on December 16, 1970,

(ii) the offences referred to in subsection 7(2) that implement the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on September 23, 1971,

(iii) the offences referred to in subsection 7(3) that implement the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on December 14, 1973,

(iv) the offences referred to in subsection 7(3.1) that implement the International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on December 17, 1979,

(v) the offences referred to in subsection 7(3.4) or (3.6) that implement the Convention on the Physical Protection of Nuclear Material, done at Vienna and New York on March 3, 1980,

(vi) the offences referred to in subsection 7(2) that implement the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on February 24, 1988,

(vii) the offences referred to in subsection 7(2.1) that implement the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on March 10, 1988,

(viii) the offences referred to in subsection 7(2.1) or (2.2) that implement the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on March 10, 1988,

(ix) the offences referred to in subsection 7(3.72) that implement the International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on December 15, 1997, and

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(x) the offences referred to in subsection 7(3.73) that implement the International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on December 9, 1999, or

(b) an act or omission, in or outside Canada,

(i) that is committed

(A) in whole or in part for a political, religious or ideological purpose, objective or cause, and

(B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada, and

(ii) that intentionally

(A) causes death or serious bodily harm to a person by the use of violence,

(B) endangers a person's life,

(C) causes a serious risk to the health or safety of the public or any segment of the public,

(D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or

(E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C),

and includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission, but, for greater certainty, does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with

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> customary international law or conventional international law applicable to the conflict, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law.
>
> "terrorist group" means
>
> (a) an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity, or
>
> (b) a listed entity,
>
> and includes an association of such entities.
>
> 83.05 (1) The Governor in Council may, by regulation, establish a list on which the Governor in Council may place any entity if, on the recommendation of the Minister of Public Safety and Emergency Preparedness, the Governor in Council is satisfied that there are reasonable grounds to believe that
>
> (a) the entity has knowingly carried out, attempted to carry out, participated in or facilitated a terrorist activity; or
>
> (b) the entity is knowingly acting on behalf of, at the direction of or in association with an entity referred to in paragraph (a).

[15] Charged with offences not included in s. 469, the accused will have their bail hearing in the Ontario Court of Justice, presumably before a justice of the peace. At that hearing, pursuant to s. 515(6)(a)(iii), the justice of the peace shall order their detention, unless they show cause why they should not be detained. If an accused is detained at that hearing, he can apply to the Superior Court of Justice for a review of that decision on at least two clear days' notice to the prosecutor: s. 520(1)(2). Where a review has been held under s. 520, a further review cannot be brought for thirty days from the date of the last review without

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leave of a judge of the Superior Court: s. 520(8). There is no statutory limit on the number of reviews that can be brought.

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Analysis

[16] The applicants first submit that offences under s. 83.01 are required to be treated as s. 469 offences. As s. 469 offences, neither justices of the peace nor provincial court judges would have jurisdiction to conduct bail hearings for those charged under s. 83.01. They submit that Parliament could not remove jurisdiction reserved for the superior court without infringing s. 96 of the *Constitution Act, 1867*. Mr. Galati contends that Parliament's haste in drafting the legislation in the wake of the events of September 11, 2001, accounts for the omission to place s. 83.01 offences in s. 469.

[17] While the applicants concede the offences they face were not offences in 1867, they submit that "some of the allegations cited constitute, or may constitute, treason, and/or intimidating Parliament or attempts thereunder" and that the "nature and content of terrorism charges under s. 83.01 are either a subset or specific instances of s. 460 offences, or indistinguishably akin to them".

[18] Parliament's power over criminal law and procedure enables it not only to create substantive law relating to crimes, but also to grant jurisdiction over the offences to specific courts. Parliament can attribute criminal jurisdiction to

provincially constituted courts: *Reference re Young Offenders Act* (*P.E.I.)* [1991] 1 S.C.R. 252 at par 11. In *R. v. Trimarchi* (1987), 63 O.R. (2d) 515 the Court of Appeal for Ontario held that s. 96 did not prevent Parliament from altering criminal jurisdiction, so long as it stopped short of destroying the criminal jurisdiction of the superior court. The applicants contend *Trimarchi* does not determine the issue they raise because the Court did not deal with s. 469 offences. They submit that Parliament cannot attribute s. 469 offences to the provincial courts.

[19] The starting point for the analysis is *Re Residential Tenancies Act*, [1981] 1 S.C.R. 714, where the Supreme Court established a three-step analysis to determine whether the matter in question was within the exclusive jurisdiction exercised by s. 96 courts at the time of Confederation. The first step, the historical inquiry, involves a consideration of whether, in light of the historical conditions existing in 1867, the particular power or jurisdiction was exercised by "s. 96 judges" at the time of Confederation. Only if the power was identical or analogous to a power exercised by a s. 96 court at Confederation did it become necessary to proceed to the second step. The question is whether the power or jurisdiction conforms to the power or jurisdiction exercised by superior, district or county courts at the time of Confederation – were these offences within the "core jurisdiction" of the superior court at that time?

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[20] The second step involves a consideration of the function within its institutional setting, to determine whether the function was still “judicial”, with the subject matter rather than the apparatus of adjudication determinative. Only if the power could be described as judicial was it necessary to proceed to the third step. The final step involves a review of the tribunal’s function as a whole, in order to appraise the impugned function in its entire institutional context. A provincial scheme remained valid so long as the adjudicative function was not the sole or central function of the tribunal, so that it could be said to be operating like a s. 96 court.

[21] Addressing the first question, the “core jurisdiction” of the superior court comprises those powers which are essential to the administration of justice and the maintenance of the rule of law: *MacMillan Bloedel v. Simpson* [1995] 4 S.C.R. 725 at par 26.

[22] The applicants have provided no information regarding the “historical conditions existing in 1867”. Mr. Galati submitted that all of the s. 469 offences were formerly punishable by death. When capital punishment was abolished in Canada, there were 17 offences in s. 469, only 3 were punishable by death. When questioned on his comments regarding capital punishment, he said it

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would have referred to the time of Confederation, but provided no authority for his position.

[23] The 1859 *Offences Against the Person Act,* provided that the penalty for being an accessory after the fact to murder or attempted murder was life, but that it was not a minimum sentence. In the 1892 *Criminal Code* 26 offences were listed in the predecessor of s. 469; 2 offences were subject to the death penalty, murder and rape.

[24] The short answer to the applicants' submission is to focus on whether the s. 83.01 *offences* and not *conduct* were within the "core jurisdiction" of the superior court at the time of confederation. None of the offences with which they are charged existed in 1867, so that it is difficult to see that they were within the 'core jurisdiction" of the superior court at the time of Confederation. The conventions listed in 83.01 did not exist in 1867. As was the case with the *Young Offenders Act,* the jurisdiction over young persons charged with criminal offences was not significantly exercised by any judicial body at Confederation. Since the juvenile delinquent legislation was the consequence of a concern that appeared in the legal world after 1867, and led to the creation of a new scheme and new powers, they could constitutionally be entrusted to an inferior court: *Reference re Young Offenders Act (P.E.I.)* (S.C.C.) at para 25. Here, while no doubt acts

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which could be regarded as “terrorist activity” as defined above existed at the time of Confederation, there were no specific terrorism offences as defined above.

[25] If that conclusion does not resolve the issue against the applicant, I will consider their contention that terrorism offences are “in fact, and/or ought to be treated as s. 469 offences”, that the allegations are the same as or akin to s. 469 offences, an analysis based on the *conduct* and not the offence. To assess this submission, requires an examination of the s. 469 offences, s. 83.01 offences, the allegations and other offences not included in the s. 469.

[26] Dealing first with the s. 469 offences, there can be no dispute that those offences are not “fixed in stone” at any given date, as reflected in the analysis above. Parliament can attribute criminal jurisdiction to provincially constituted courts. Section 469 has changed since Confederation, with some offences being removed, such as manslaughter, and others, such as the *Crimes against Humanity and War Crimes* offences, being added. I am unable to find any authority to support that these changes are unconstitutional.

[27] As currently structured, it is difficult to see that there is any unifying theme to the s. 469 offences. While 7 of the offences are found in Part II of the *Criminal Code*, Offences Against Public Order, not all offences in Part II are in s. 469. For

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example, sabotage (s. 52, 10 years), inciting mutiny (s. 53, 14 years), passport offences (s. 57, summary conviction to 14 years), unlawful assembly or riots (s. 63-66, summary conviction to 2 years), forcible entry and detainer (s. 72-73, summary conviction to 2 years), hijacking (s. 76, life), endangering the safety of aircrafts or airports (s. 77, life), taking an offensive weapon or explosives substance on any civil aircraft (s. 78, 14 years), possession or control of dangerous substances (s. 79 and 80 14 years to life), using explosives (s. 81, 14 years to life) and possessing any explosive substance (s. 82, 5 or 14 years), are not included in s. 469. Some of the offences could be included in terrorist activity. Using this approach, some of the allegations in this case would be akin to those excluded from s. 469, particularly in regard to explosives, aircrafts, firearms and ammunition.

[28] There are also offences in s. 469 which are not included in Part II: murder, bribery by the holder of a judicial offence, attempted murder, conspiracy to commit murder, and the *Crimes Against Humanity and War Crimes* offences.

[29] The fact that some of the offences under s. 83.01 involve elements of other offences does not assist the applicants. For example, another count of the information charges two accused with importing a firearm and prohibited ammunition contrary to s. 103 of the *Criminal Code* for the benefit of, at the

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direction of, or in association with a terrorist group, thereby committing an offence contrary to s. 83.2 of the *Criminal Code*. Doing so does not turn those offences into s. 469 offences. Section 103 is not covered by s. 469.

[30] The fact that an offence when committed under certain circumstances becomes another criminal offence, does not equate with a s. 469 offence. For example, certain offences when committed for the benefit of, at the direction of, or in association with a criminal organization, become a further offence pursuant to s. 467.12. The criminal organization offences are not included in s. 469.

[31] The intended target of terrorist activities in s. 83.01 does not in itself, or in conjunction with other factors, support the applicants' position. Terrorist activity is either offences contrary to one of the enumerated conventions, or acts or omissions described earlier in s. 83.01. While some of those could be described as against the sovereign, most are not, unless one views all criminal offences as against the sovereign.

[32] Finally, the maximum penalties for the offences do not assist the applicants. The s. 83.01 offences range from 14 years to life imprisonment as maximum sentences. There are no minimums, as occur for murder which is under s. 469. Indeed, the initial applicant, Ghany, faces two counts with 10 year

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maximum sentences. The *Criminal Code* provides penalties of two, five, seven, ten, fourteen years, and life imprisonment as a mandatory sentence.

[33] There is no basis upon which it could be concluded that the offences in s. 83.01 are "in fact, and/or ought to be treated as" s. 469 offences. An examination of those offences, the allegations and s. 469, does not support their position. Section 83.01 offences were not within the "core jurisdiction" of the superior court at the time of confederation. Parliament's decision to place s. 83.01 offences outside of s. 469 was *intra vires* s. 96 of the *Constitution Act, 1867*.

Is the non-inclusion of s. 83.01 offences in s. 469 a further breach of ss. 7, 11(e) and 15 of the *Charter*?

[34] The applicants submit that even if not *ultra vires* s. 96 of the *Constitution Act, 1867*, the non-inclusion of s. 83.01 offences in s. 469 constitutes a constitutional breach by way of legislative omission, as set out by the Supreme Court of Canada in *Vriend v. Alberta* [1998] 1 S.C.R. 493.

[35] Further, they submit that the non-inclusion under s. 469 deprives the applicants of their s. 7 rights to the presumption of innocence at the bail stage, by depriving them of the ability to obtain declaratory relief, remedial relief under s.

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24(1) of the *Charter* and 52 of the C*onstitution Act, 1982*, as well as any other *Charter* relief sought relying on ss. 7 and 11(e) of the *Charter*.

[36] The applicants further submit that their s. 15 *Charter* rights are impacted by this constitutional omission. Mr. Galati argues that having these offences "against the Canadian state tried by provincially appointed "lower magistrates" infringes sections 7 and 15 of the *Charter,* as well as infringing the pre-amble to the *Constitution Act, 1982* in placing offences against the Canadian state before provincially appointed "lower magistrates and justices". Finally, they submit that s. 469 "offers certain procedural and judicial benefits and protections for the accused" which mitigates in favour of having "the highest judicial scrutiny, and review by exclusive jurisdiction at first instance". In regard to the contention that the cases are being "tried" in the Ontario Court of Justice, the issue on this application is the forum of the bail hearings.

[37] In *Vriend*, the Supreme Court of Canada examined the Alberta *Individual Human Rights Protection Act* that did not include sexual orientation as a protected ground of discrimination. The applicants had to establish that there was an omission and that the omission violated the *Charter*. The Supreme Court held there was an omission, that it violated s. 15 of the *Charter,* and that the infringement could not be justified under s. 1.

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[38] The issue on this application is the forum of the applicants' bail hearings. I am not persuaded by Mr. Galati that Parliament's haste in drafting and passing this legislation accounts for an "omission" regarding bail. Parliament did consider the issue of bail in regard to s. 83.01 offences by making them "reverse onus" offences. A decision was made to place the offences within the limited number of offences where the onus is on the accused to show cause why they should be released. In these circumstances, to assume Parliament did not address the issue of the forum of bail is inappropriate.

[39] Here, there is no omission. Parliament has not omitted the forum or procedure to be applied at the bail hearings. Rather, Parliament has chosen to place these offences with the vast majority of criminal cases with bail hearings conducted in the provincial court, with reviews without leave to the superior court.

[40] The provisions of ss. 515, 517 and 519 apply to hearings under s. 515 and those under s. 522. The same three grounds must be examined to determine, in accordance with the applicable onus, whether detention is necessary. I am unable to find that there has been an omission as described in *Vriend*.

[41] The applicants' next submissions, regarding their s. 7, 11(e) and 15 *Charter* rights, as well as the contention that the bail "ought to be heard in the

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Superior Court", can be conveniently dealt with together at the outset, because of the reliance on the judgments in *France v. Ouzchar* [2001] O.J. No. 5713 (S.C.J.) and *R. v Phillion* [2003] O.J. No. 3422 (S.C.J.), and a consideration of the nature of bail hearings. It is the applicants' position that by having their bail hearings before a justice of the peace or provincial court judge they are deprived of their ability to obtain declaratory relief or remedial relief under s. 24(1) of the *Charter* and s. 52 of the *Constitution Act, 1982*, as well as other remedial relief under s. 7 and s. 11(e) of the *Charter*.

[42] What the applicants anticipated is not a bail hearing to determine whether the applicants should be released from custody. What the applicants seek is an omnibus hearing to determine the constitutional validity of all or portions of s. 83.01, to argue that in some circumstances, the tertiary ground should not be relied upon, or that there should be special evidentiary rules relating to bail hearing where the tertiary ground is relied upon, that there should be a prohibition on police disseminating information at the time of arrests or thereafter, and to argue that there is a right to disclosure before a bail hearing. To paraphrase Mr. Galati's position, it should not depend on which wicket he attends, all of his *Charter* and other remedies must be available at the bail hearing. That can only occur if his client is not deprived of "judicial access" in the appropriate forum to obtain the relief he seeks.

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[43] Before addressing the substantive submissions, as a preliminary matter, I asked counsel whether I had jurisdiction to order that a bail hearing on charges in an information currently before the Ontario Court of Justice, and not s. 469 offences, should be held before a judge of the Superior Court. Mr. Galati submitted I had the inherent jurisdiction to do so in the capacity of a superior court supervising inferior courts, notwithstanding s. 36 of the *Courts of Justice Act* provides the Chief Justice of the Ontario Court of Justice shall direct and supervise the sittings and assignments of that court. I have serious reservations that I have such authority, either as a judge of the Superior Court or as the Regional Senior Judge of the Superior Court in Central West region. However, given my determination of the other issues raised by the applicants, it is not necessary to determine this issue. Suffice it to say, that assuming there was inherent jurisdiction to do so, it would be a most extraordinary case where such a decision would be considered.

[44] A fundamental premise of the applicants' position is that *Charter* relief can be granted at a bail hearing in the absence of a separate discreet *Charter* application. They contend that *Ouzchar* and *Phillion* support their position. I disagree.

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[45] In *Phillion*, the applicant had been convicted of murder. The Minister of Justice ordered a review of his conviction, having concluded there was a reasonable basis to conclude that a miscarriage of justice had occurred when Phillion was convicted. The Minister delegated the investigation to a member of the bar, as permitted under s. 696.2(3) of the *Criminal Code*. Phillion applied for bail pending that review.

[46] As Watt J. noted at the outset, the application was novel. There was no express authority in the new Part XXI.I of the *Criminal Code* for such an application, which was based on constitutional and common law grounds. One of the bases for the application was that he was entitled to release pursuant to s. 24(1) of the *Charter,* through the vehicle of *habeas corpus* or directly. A second basis was that by analogy to extradition and court martial cases, a superior court had inherent jurisdiction to grant release.

[47] None of that rationale applies here. There is a statutory route for the bail hearing pursuant to s. 515. Watt J. was dealing with an application that had not been dealt with before. Bail hearings pursuant to s. 515 are held countless times daily in Canada. The applicants have a statutory procedure available to determine their pre-trial status.

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[48] In *Ouzchar*, France sought the extradition of a Canadian citizen, after his conviction *in absentia* in France for preparing a terrorist act and acting as an accessory in the falsification of an administrative document. After he was sentenced to 5 years in jail, France sought his extradition. He applied for bail before Nordheimer J. In the course of the judgment, His Honour addressed the primary ground, and found there was no evidence he was a flight risk. His Honour then examined the secondary ground, and concluded there was no evidence at all to suggest the defendant was a risk to the public.

[49] Finally, His Honour examined the tertiary grounds, and found the manner in which the charges proceeded was “highly disturbing”. The investigation started in France in 1999. In 1999, at the request of the French Government, a search warrant was obtained and executed at Ouzchar’s home in Canada. He was ordered to, and did attend an examination at RCMP offices in Ontario. Without any notice to him, he was tried and convicted in France. There was no pre-trial application for extradition. His Honour found the allegations were only as disclosed in the judgment, which was “long on generalities and short on specifics as to exactly what the events and activities of this defendant in respect of offences with which he was charged”.

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[50] Nordheimer J., in considering the tertiary grounds approached "the matter from the point of view of a reasonably informed, right thinking member of the community, cognizant of the presumption of innocence and the notion that an accused should not be deprived of liberty without a sufficient legal basis." His Honour acknowledged "recent world events" in the November, 2001 judgment, and continued that he would hope the vast majority of reasonably informed, right thinking members of our community would agree that, notwithstanding those events, every citizen of this country is still entitled to their basic constitutional rights and freedoms, including the right to be informed without unreasonable delay of the offence alleged, and the right not to be denied bail without just cause.

[51] His Honour found there was some evidence Ouzchar had been denied the former right, and he did not intend that he should be denied bail. He concluded this section of the reasons:

> I conclude, therefore, that the defendant's detention is not justified on the tertiary ground. I therefore grant judicial interim release ….

[52] Nordheimer J. did not grant a *Charter* remedy at the bail hearing. He considered the three grounds upon which detention could be justified in the context of the *Charter* and the rights thereunder. He does not mention s. 24(1) or

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s. 24(2), nor does he mention *Charter* relief. What His Honour did was examine the grounds of bail as justices of the peace and judges do on a daily basis.

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[53] In *R. v. John*, [2001] O.J. No. 3396 (S.C.J.) Hill J. dealt with the procedure followed in most bail hearings in Ontario, with the Crown reading in a synopsis of the allegations with the consent of the accused. In dealing with the content of the synopsis, His Honour noted:

> … Not unreasonably, it is anticipated that this preliminary documentation will be fair and balanced, without vagueness or unstated or unsupported conclusions, and inclusive of factors capable of detracting from the reliability of the accumulated evidence, for example, known bias or interest of principal witnesses, the circumstantial limits of investigative facts in possession crimes, identification evidence frailties, *and without concealment of acts suggesting constitutionally questionable evidence-gathering techniques*. The circumstances of the alleged offence(s) impacting on the probability of conviction of the accused are particularly relevant to the secondary and tertiary grounds for detention. (emphasis added)

[54] Whether there are reasonable grounds to believe that the admissibility of the Crown's evidence is in question is always a relevant consideration on the basis identified by Hill J. It does not take a *Charter* application to consider that issue on a bail hearing. It can be considered by a judge or justice of the peace presiding in the Ontario Court of Justice. In determining if there should be a release order under s. 515(10), a judge or justice of the peace is not precluded from considering *Charter* implications as they relate to the grounds for detention.

[55] Section 11(e) of the *Charter*, the right "not to be denied reasonable bail without just cause", informs the determinations to be made at any bail hearing under s. 515 or s. 522. To suggest there has to be a *Charter* remedy at a bail hearing, or that the bail hearing must be conducted by a judge of a superior court for there to be any consideration of *Charter* implications as they relate to the grounds for release, is inconsistent with the law and criminal procedure in Ontario.

[56] Here, the applicant, Ghany, at least seeks to challenge the constitution validity of s. 83.01 at the bail hearing. If successful, and the legislation were found to violate s. 15 of the *Charter*, that would be the end of the matter. In the previous paragraph I am not suggesting that under the guise of examining the strength of the Crown's case, the applicant, with the onus on the bail hearing, would be entitled to a full hearing to determine or consider whether s. 83.01 survives *Charter* scrutiny as though it were a *Charter* application relying on s. 24(1). I say this for the following reasons.

[57] First, even if the applicant brought a separate challenge to the legislation and sought it to be heard at the time of the bail hearing, while it would be for the presiding judge to determine, I doubt any judge would embark on that hearing in the course of the bail hearing. If such an application were brought it would have

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to be brought before a judge of the superior court, since neither a judge nor a justice of the peace of the Ontario Court of Justice would have jurisdiction to consider the issue at a bail hearing. If brought in the Superior Court, there would still have to be a separate application for *Charter* relief, and it would be for the presiding judge to determine if it should proceed at the same time.

[58] Second, the Supreme Court of Canada has held that judges of the Superior Court should generally decline jurisdiction to hear *Charter* applications before the trial, as is contemplated here, in favour of the trial judge who will have the full evidentiary record available: *R. v. Mills* [1986] 1 S.C.R. 863. *Mills* dealt with a s. 24(1) application to stay proceedings for trial delay. A similar position has been taken by our Court of Appeal regarding the exclusion of evidence: *R. v. Zevallos* (1987), 37 C.C.C.(3d) 97.

[59] Third, bail hearings are not meant to be trials, nor should this "summary proceeding assume the complexities of trials". The show cause hearing is meant to be expeditious, with a degree of flexibility and procedural informality sufficient to protect the liberty interests and security of the public: *R. v. John* [2001] O.J. No. 3396 (S.C.J.)

[60] The procedural "informality" is supported by s. 518(1), which provides the justice may make "such inquiries, on oath or otherwise, of and concerning the

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accused as he considers desirable", except the accused cannot be questioned about the offence except by his or her own counsel, unless they were questioned about the offence in their examination in chief. The judge or justice of the peace can consider "any other relevant evidence" led by the prosecution regarding the accused person's criminal record, outstanding charges, previous failures to attend court and the circumstances of the offence, particularly as they relate to the probability of a conviction: s. 518. Evidence obtained from intercepted communications can be led without compliance with the notice provisions: s. 518(1)(d). The judge or justice of the peace can base his or her decision on "credible and trustworthy" evidence.

[61] Where oral evidence is presented, as will occur here, Hill J. found that the Court is "tasked with control of its own process, prohibiting the abuse of a meandering discovery, while maintaining focus on the s. 515 test.

[62] Fourth, a feature of bail hearings which supports the position that a bail hearing is not the location, regardless of the forum, for a full *Charter* application seeking relief under s. 24(1), is that Parliament has established procedures to have bail hearings heard in a timely manner. In his text, *The Law of Bail in Canada,* Carswell Thomson Profession Publishing, Toronto, 1999, Trotter J., notes that time is a monumental concern when it comes to bail, as it is essential

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that the hearing be conducted as soon as possible. The need for "swift justice" requires a "certain level of informality", which translates into the relaxation of certain rules of evidence at bail hearings and an expansive approach to relevance, (at pages 221 and 223).

[63] Finally, the provision that the presiding justice *may* adourn the proceedings and remand the accused in custody for not more than three clear days without the consent of the accused, supports the premise that Parliament intended bail issues be dealt with expeditiously. To embark on a full hearing to determine the constitutional validity of s. 83.01 or a portion of it at a bail hearing is inconsistent with the intent of the bail sections.

[64] Returning to the specific issues raised by the applicants, the applicants seek *Charter* relief based upon the nature of the allegations, as well as prosecution, police and media conduct at the time of the arrests and thereafter. I am not persuaded that any of the grounds suggested support the exercise of any discretion I might have to order the hearing before a judge of the Superior Court of Justice. They contend that they are deprived of their s. 7 right to the presumption of innocence at the bail hearing, by being deprived of their ability to obtain declaratory relief and remedies under s. 24(1) of the *Charter* and s. 52 of the *Constitution Act, 1987,* and that their rights under s. 7 and 11 (e) of the

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Charter are violated by s. 83.01 offences not being in s. 469. As noted earlier, the applicants are subject to the same law as those charged with s. 469 offences. The Supreme Court of Canada has made it clear that the presumption of innocence is “an animating principle throughout the criminal justice process”: *R. v. Pearson* (1992), 77 C.C.C. (3d) 124. There is no need to have a separate s. 24(1) application for a judge to consider those issues in examining at least the secondary and tertiary grounds.

[65] To the extent that the applicants seek relief under s. 7, that there has been an abuse of process as a result of the prosecution and police “manufacturing” the tertiery grounds for detention, with police leaks and unnamed source reports in the media, the application ignores the test to be applied under that ground by the Supreme Court of Canada. The reasonable person making the assessment in the tertiary ground is “one properly informed about the philosophy of the legislature provisions, *Charter* values, and the actual circumstances of the case”: *R. v. Hall* [2002] 3 S.C.R. 309 par 41. The consideration of the tertiary ground or any other ground is informed by the circumstances of the case as presented in court, not through leaks to the media. There is nothing in the material before me to indicate the applicants’ *Charter* rights have been breached or placed in jeopardy by leaks to the media, when the

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grounds for detention are examined in light of *Hall* and subsequent decisions, such as *R. v. Laframboise* (2006), 203 C.C.C. (3d) 492 (Ont. C.A.)

[66] The applicants also seek a declaration that the Crown and police are estopped from making public statements and/or representations, or from "engineering any 'confidential source' leaks to the media" or from parading any alleged evidence at press conferences with respect to the accused upon issuance of a warrant in the first instance, and that the engineering of any media event prior to, at, or after the arrest is a breach of the accused's constitutional rights. Where the Crown has "manufactured" the tertiary ground, they should be estopped from relying on the tertiary ground. As noted above, this argument is inconsistent with the law applicable at bail hearings.

[67] The applicants would also seek a declaration that they be provided with disclosure of the information the Crown seeks to lead at the bail hearings. To date, they have received an 8 page synopsis, common to all of the adults and youths charged. Each accused also received a separate page outlining specific allegations against them. As I understand the applicants' position, it is not that they would seek full disclosure before their bail hearing. If that were their submission, it would be answered in the negative by *R. v. Girimonte* (1997), 121 C.C.C. (3d) 33 at 42. (Ont. C.A.) They submit that they should have disclosure of

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the evidence the Crown will lead at the hearing. Here, the Crown has indicated they will lead evidence of the synopsis, and call an officer to give further details. That evidence will basically be the same for all accused. Since some adults have already had their bail hearings, the transcripts of that evidence are obtainable. If an accused is taken by surprise by evidence at a bail hearing or believes that contrary evidence is available, they have the right to seek an adjournment of the hearing to obtain that evidence.

[68] The applicants also seek to argue *habeas corpus* at the bail hearing. That application could only be heard by a judge of the superior court. While *R. v. Pearson* (1992), 77 C.C.C. (3d) 124 (S.C.C.) held that *habeas corpus* was available "in the narrow circumstances of this case," I am not persuaded there is a basis upon which this application can fit within the *Pearson* criteria.

[69] In *Pearson*, there was a special type of constitutional claim, with two remedies sought. First, he sought a declaration a bail section of the *Criminal Code* was of no force and effect under s. 52 of the *Constitution Act,* and a remedy under s. 24(1), namely, a new bail hearing in accordance with constitutionally valid grounds. Given the judgment in *Hall*, there is no application to find the tertiary ground of no force and effect. In addition, as Hill J. noted in *John*, since none of the applicants have had their bail hearing yet, the application

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for *habeas corpus* is premature. What would be ordered is the bail hearing. Pearson had had his bail hearing *before* invoking *habeas corpus.* I am unable to see any basis upon which it could be argued the applicants are unlawfully detained now.

[70] The applicants' reliance on a s. 15 violation is based on the constitutional validity which I found was most unlikely to be litigated at a bail hearing in the superior court. That hearing would be lengthy and deal with complex issues. That the legislation will be challenged, and the bases upon which the challenge will be brought in summary form will help to inform the analysis of the secondary and tertiary grounds at the bail hearing. In the alternative, if the s. 15 claim is based on the exclusion of s. 83.01 offences from s. 469, the applicants would have to establish they were subject to i) differential treatment, which is established, ii) that the basis of the differentiation was the enumerated or analogous grounds, and, iii) which conflict with the purpose of s. 15(1) and amount to substantive discrimination: *Lovelace v. Ontario* [2001] 1 S.C.R. 950. Here, there is no evidence the discrimination in regard to the forum of the bail hearing was on enumerated or analogous grounds.

[71] The final issues in the *Charter* aspects of the application are set out in paragraph 11 of the factum filed on behalf of Ghany. The applicants state:

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> It is clear that s. 469 offers certain procedural and judicial benefits and protections for the accused, and that historically, and by 1867, constitutionally, these most serious of offences and charges were, and continue to be, the exclusive jurisdiction of the Superior Court owing to:
>
> a) the seriousness of the offences alleged;
>
> b) the clear nature of the offences as against the Crown and its sovereignty;
>
> c) the penal consequences to the accused which carried the death penalty, and since its abolition, 14 years to life;
>
> d) the benefit that the Superior Court have plenary jurisdiction, even at the bail hearing, to deal with any and all statutory and/or constitutional issues preliminary, ancillary to, or remedial, going to the crux of the bail application, which inferior courts do not possess,
>
> which mitigates in favour of having the highest judicial scrutiny, and review by exclusive jurisdiction at first instance, failing which the s. 7 and 11(e) *Charter* remedies sought by the applicant would be deprived, and further aggravated by the breach of s. 15 of the *Charter*.

[72] It is difficult to see the "procedural benefits" accruing to those charged with s. 469 offences, as opposed to those charged with other offences. At this time, the applicants were not subject to an automatic detention order on their first appearance, as those charged with s. 469 offences are. They can have their bail hearing without serving notice of the application at least two clear days before the hearing (Rule 20.04 of the *Superior Court of Justice Criminal Proceeding Rules*), or filing affidavits from the accused, employers, and sureties, (Rule 20.05). If detained in custody or released on terms, they can review the detention order or release in the Superior Court of Justice, and if unsuccessful or there is a change in circumstances, have a statutory right to apply again after 30 days. Those charged with s. 469 offences have no such right of review and must

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apply for leave to do so in the Court of Appeal, as noted earlier, with no statutory right to bring successive reviews.

[73] As noted earlier, not only have the applicants filed no evidence to support their position regarding bail in 1867, their submission is factually wrong. While the most serious offence in the *Criminal Code*, murder, is included in s. 469, many other serious offences are not. Neither the clear nature of the charges nor the penal consequences supports the applicants' position. The submission that "the penal consequences … which carried the death penalty, and since abolition, 14 years", is incorrect. I have already dealt with the contention that judges of a superior court have the *Charter* jurisdiction contended at a bail hearing, and whether it is appropriate to deal with those issues at a bail hearing.

[74] The final issue raised in argument by counsel on behalf of Ansari, Amara and Jamal, was that if the other arguments failed, I should direct that a judge of the Superior Court hear the application in any event, because a judge of the Superior Court would bring an added "experiential factor" to the bail hearing. No evidence was filed on this issue, and no further submissions made. However, it is clear that the vast majority of bail hearings are held in the Ontario Court of Justice, with the reviews heard in the Superior Court.

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[75] I agree with Mr. Galati's submission that based on *Canada (Minister of Indian Affairs and Northern Development) v. Ranville* [1982] 2 S.C.R. 518, were a judge of the Superior Court to preside at the bail hearings, he or she would be acting as a judge of the Superior Court and not as a justice of the peace. In these circumstances and for the reasons indicated earlier, I decline to make the order.

Conclusion

[76] The applications are dismissed.

Durno J.

Released: July 20, 2006

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COURT FILE NO.: 1035/06
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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

HER MAJESTY THE QUEEN

Respondent

- and –

AHMAD MUSTAFA GHANY, ZACHARIA AMARA, ASAD ANSARI and QAYYUM ABDUL JAMAL

Applicants

REASONS FOR JUDGMENT

DURNO J.

Released: July 20, 2006