



**SUPREME COURT OF CANADA**

**CITATION: R. v. Awashish, 2018 SCC 45**

**APPEAL HEARD: February 7, 2018**

**JUDGMENT RENDERED: October 26, 2018**

**DOCKET: 37207**

**BETWEEN:**

**Her Majesty The Queen**  
Appellant

and

**Justine Awashish**  
Respondent

- and -

**Attorney General of Ontario**  
Intervener

**CORAM:** Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

**REASONS FOR JUDGMENT:** Rowe J. (Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown and Martin JJ. concurring)  
(paras. 1 to 28)

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R. v. AWASHISH

**Her Majesty The Queen**

*Appellant*

v.

**Justine Awashish**

*Respondent*

and

**Attorney General of Ontario**

*Intervener*

**Indexed as: R. v. Awashish**

**2018 SCC 45**

File No.: 37207.

2018: February 7; 2018: October 26.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL OF QUEBEC

*Criminal law — Interlocutory orders — Review — Provincial court judge granting application by accused for disclosure of information regarding existence and relevance of records — Crown applying to superior court for certiorari to quash order — Whether certiorari available to challenge interlocutory rulings.*

*Prerogative writs — Certiorari — Availability of remedy — Application by Crown for certiorari to quash interlocutory order made by provincial court judge in criminal matter — Whether certiorari available to Crown to challenge order.*

The accused was charged with impaired driving and driving “over 80”. She successfully brought an application before the Court of Québec to compel the Crown to inquire into the existence of certain documents relating to breathalyzer maintenance. The Crown then sought *certiorari* to quash the order, which was granted by the Superior Court. The accused appealed. The Court of Appeal allowed the appeal, holding that *certiorari* is available to an accused where a judge acts without jurisdiction and, in certain circumstances, when a judge makes an error of law on the face of the record. In this case, it was of the view that *certiorari* should not have been granted as the decision was made in the exercise of the Court of Québec’s jurisdiction.

*Held:* The appeal should be dismissed.

*Certiorari* in criminal proceedings is available to parties only for a jurisdictional error by a provincial court judge. The availability of extraordinary

remedies, notably *certiorari*, is constrained by the general prohibition against interlocutory appeals in criminal matters. The use of *certiorari* is tightly limited so as to ensure that it is not used to run afoul of the prohibition. Fragmenting criminal proceedings by permitting interlocutory appeals risks having issues decided without the benefit of a full evidentiary record, which is a significant source of delay and an inefficient use of judicial resources. Permitting parties access to *certiorari* review for an error of law on the face of the record, in particular in an evidentiary ruling, gives rise to *de facto* interlocutory appeals and is in direct tension with the approach set out in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, to achieve prompt justice in criminal cases. Furthermore, allowing the use of *certiorari* to provide for *de facto* interlocutory appeals in criminal cases would give rise to an unprincipled distinction between trials that proceed before provincial courts and those before superior courts, since *certiorari* is not available against a superior court.

In the criminal context, jurisdictional errors occur where the court fails to observe a mandatory provision of a statute or where a court acts in breach of the principles of natural justice. In dealing with the accused's application, the Court of Québec made a legal error, not a jurisdictional one. The Crown was under no obligation to inquire into whether the records exist as the accused did not establish a basis for their existence or relevance. Nevertheless, given that the Court of Québec made no jurisdictional error, *certiorari* cannot be used to correct the error.

### **Cases Cited**

**Referred to:** *R. v. Gubbins*, 2018 SCC 44; *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *R. v. Awashish*, 2014 QCCQ 3984; *R. v. Paradis*, 2014 QCCS 4260; *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66; *Mills v. The Queen*, [1986] 1 S.C.R. 863; *R. v. Meltzer*, [1989] 1 S.C.R. 1764; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. DeSousa*, [1992] 2 S.C.R. 944; *R. v. Johnson* (1991), 3 O.R. (3d) 49; *Attorney General of Quebec v. Cohen*, [1979] 2 S.C.R. 305; *R. v. Robertson* (1988), 41 C.C.C. (3d) 478; *Skogman v. The Queen*, [1984] 2 S.C.R. 93; *Patterson v. The Queen*, [1970] S.C.R. 409; *Forsythe v. The Queen*, [1980] 2 S.C.R. 268; *Dubois v. The Queen*, [1986] 1 S.C.R. 366; *R. v. Deschamplain*, 2004 SCC 76, [2004] 3 S.C.R. 601; *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331; *R. v. Primeau*, [1995] 2 S.C.R. 60; *R. v. Black*, 2011 ABCA 349, 286 C.C.C. (3d) 432; *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631; *R. v. Chaplin*, [1995] 1 S.C.R. 727.

### **Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms.*

*Criminal Code*, R.S.C. 1985, c. C-46, ss. 253(1)(a),(b), 674.

### **Authors Cited**

Létourneau, Gilles. *The Prerogative Writs in Canadian Criminal Law and Procedure*. Toronto: Butterworths, 1976.

APPEAL from a judgment of the Quebec Court of Appeal (Thibault, Bouchard and Gagnon JJ.A.), 2016 QCCA 1164, 32 C.R. (7th) 111, [2016]

AZ-51303926, [2016] J.Q. n° 8060 (QL), 2016 CarswellQue 6306 (WL Can.), setting aside a decision of Dionne J., 2016 QCCS 115, [2016] AZ-51245554, [2016] J.Q. n° 41 (QL), 2016 CarswellQue 175 (WL Can.), which allowed an application for *certiorari* against a decision of Paradis J.C.Q., 2015 QCCQ 4516, [2015] AZ-51180611, [2015] J.Q. n° 4807 (QL), 2015 CarswellQue 5175 (WL Can.). Appeal dismissed.

*Justin Tremblay and Pierre Bienvenue*, for the appellant.

*Jean-Marc Fradette and Pascal Lévesque*, for the respondent.

*Milan Rupic and Avene Derwa*, for the intervener.

The judgment of the Court was delivered by

ROWE J. —

## I. Introduction

[1] This case was heard shortly after *R. v. Gubbins*, 2018 SCC 44 and arises from a similar context. However, it raises a distinct procedural issue, one that warrants separate reasons. The respondent, Ms. Justine Awashish, was charged with impaired driving and driving “over 80”. She sought to obtain additional disclosure

from the Crown. The provincial court judge ordered the requested additional disclosure. The Crown successfully petitioned the Superior Court for *certiorari* to quash the order on the basis that the relevance of the records sought had not been established. Ms. Awashish then sought information relating to the same documents in order to prepare a second disclosure application. The provincial court judge granted this application in part. The Crown again applied for *certiorari*, which was again granted. Ms. Awashish appealed. The Court of Appeal reinstated the provincial court judge's second order on the grounds that *certiorari* should not be granted in these circumstances, as to do so would circumvent the general prohibition against interlocutory appeals in criminal matters.

[2] *Certiorari* is an extraordinary remedy that is available only in narrow circumstances. Allowing parties to use it to challenge interlocutory rulings, including evidentiary matters, risks gravely slowing the criminal justice system. For similar reasons to those set out by the Court of Appeal, I would dismiss the Crown's appeal.

## II. Facts

[3] Ms. Awashish was charged with operating a vehicle while impaired by alcohol or drugs and with driving "over 80" contrary to s. 253(1)(a) and (b) of the *Criminal Code*, R.S.C. 1985, c. C-46. The Crown made disclosure of documents that it believed it was required to disclose under *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. Ms. Awashish then applied for disclosure of more records relating to, *inter alia*: the

breathalyzer device, the technician, the simulators used to calibrate the device, and the standard solution used for calibration. The Crown contested the application.

[4] Paradis J.C.Q. ordered the Crown to disclose the requested information (*R. v. Awashish*, 2014 QCCQ 3984). This information included: maintenance manuals, maintenance and repair logs, and evidence that the technician's training was up-to-date. The Crown sought *certiorari* to have Paradis J.C.Q.'s order quashed before the Superior Court. Lavoie J. found that Paradis J.C.Q. erred in granting the order in the absence of evidence establishing that the information sought existed and was relevant. Accordingly, Lavoie J. granted the Crown's application for *certiorari*, which had the effect of returning the matter for trial before Paradis J.C.Q. (*R. v. Paradis*, 2014 QCCS 4260).

### III. Judicial History

#### A. *Court of Québec, 2015 QCCQ 4516*

[5] In response to the decision by Lavoie J., Ms. Awashish, together with two other accused, brought a *McNeil* application seeking information regarding the existence and relevance of the records in question, as well as who had possession of them (see *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66). This was done to lay the foundation for a further disclosure application. The Crown informed Ms. Awashish that it would neither confirm nor deny the existence of the records sought, as in the Crown's view the records were not relevant. Paradis J.C.Q. was again seized of the



issue. She held that it was not sufficient for the Crown simply to reply as it did; rather, the Crown has a duty to inform itself of the existence and the relevance of the information sought by the defence. Paradis J.C.Q. ordered the Crown to inform Ms. Awashish, in writing, whether the documents existed, who had possession of them and whether they were subject to privilege.

B. *Quebec Superior Court, 2016 QCCS 115*

[6] The Crown sought *certiorari* to quash Paradis J.C.Q.'s *McNeil* order. Dionne J. granted *certiorari* on the basis that the fruits of the investigation had already been disclosed by the Crown; as to the records sought, they were in the possession of third parties and their likely relevance had not been established. In Dionne J.'s view, Paradis J.C.Q.'s order constituted an error of law on the face of the record; the superior courts ought to be able to review such matters.

[7] Dionne J. also took the view that the order by Paradis J.C.Q. went against Lavoie J.'s statement that [TRANSLATION] "the trial can and must commence without the disclosure of further evidence being necessary" (*Paradis*, at para. 50 (CanLII)). By ignoring a ruling of a superior court relating to essentially the same issue, Paradis J.C.Q. failed to give effect to the doctrine of *res judicata* and she acted in excess of jurisdiction. As the order by Paradis J.C.Q. could not be appealed, *certiorari* was the only avenue available to the Crown. On this basis, Dionne J. granted the Crown's application for *certiorari* which had the effect of quashing Paradis J.C.Q.'s order.

C. *Quebec Court of Appeal 2016 QCCA 1164, 32 C.R. (7th) 111*

[8] Thibault J.A., writing for the court, allowed the appeal and set aside Dionne J.'s order. She stated that *certiorari* is available to an accused where a judge acts without jurisdiction and, in certain circumstances, when a judge makes an error of law on the face of the record. This latter category of cases is narrow and does not include where an accused argues that a judge has erred regarding disclosure. There is no reason to treat the Crown differently. In addition to jurisdictional errors, *certiorari* is available to parties where there would be irreparable harm to fundamental rights of one of the parties; in such circumstances an appeal would not provide adequate relief. The situation of third parties is different in that they have no right of appeal. For this reason, *certiorari* should be available to them for both errors of jurisdiction and errors of law on the face of the record. *Certiorari* should not have been granted here as the decision was made in the exercise of Paradis J.C.Q.'s jurisdiction.

[9] Thibault J.A. also held that Dionne J. erred on the question of *res judicata*. She found that Dionne J. did not assess the objective underlying the *McNeil* application. Had he done so, he would have determined that the initial disclosure order does not preclude Ms. Awashish from verifying the existence of certain information. Thus, in Thibault J.A.'s view, Dionne J. erred in finding that Paradis J.C.Q. ignored *res judicata* in granting the *McNeil* application. Paradis J.C.Q.'s *McNeil* order was reinstated. After receiving further information from the Crown

under that order, it would be open to Ms. Awashish to seek to establish the relevance of the records originally sought so as to obtain their disclosure.

#### IV. Analysis

##### A. *When Is Certiorari Available?*

[10] Criminal appeals are statutory; with limited exceptions, there are no interlocutory appeals (*Criminal Code*, s. 674; *Mills v. The Queen*, [1986] 1 S.C.R. 863, at p. 959; *R. v. Meltzer*, [1989] 1 S.C.R. 1764, at p. 1774; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 857). There are a few statutory exceptions; and the extraordinary remedies, notably *certiorari*, provide relief in narrow circumstances. The general rule is that “criminal proceedings should not be fragmented by interlocutory proceedings which take on a life of their own” (*R. v. DeSousa*, [1992] 2 S.C.R. 944, at p. 954). Fragmenting criminal proceedings by permitting interlocutory appeals risks having issues decided without the benefit of a full evidentiary record — a significant source of delay and an inefficient use of judicial resources (*R. v. Johnson* (1991), 3 O.R. (3d) 49 (C.A.), at p. 54.)

[11] The availability of extraordinary remedies is constrained by similar concerns (*Attorney General of Quebec v. Cohen*, [1979] 2 S.C.R. 305, at p. 310). The use of *certiorari* is therefore tightly limited by the *Criminal Code* and the common law so as to ensure that it is not used to do an “end-run” around the rule against interlocutory appeals (*R. v. Robertson* (1988), 41 C.C.C. (3d) 478 (Alta. C.A.), at p.

480). For example, in preliminary inquiries, jurisdictional error must be shown for *certiorari* to be granted. This includes where the preliminary inquiry judge commits an accused to stand trial in the absence of any evidence on an essential element of the offence (*Skogman v. The Queen*, [1984] 2 S.C.R. 93, at p. 104) or acts contrary to the rules of natural justice (*Patterson v. The Queen*, [1970] S.C.R. 409, at p. 414, per Hall J.; *Forsythe v. The Queen*, [1980] 2 S.C.R. 268, at p. 272; *Dubois v. The Queen*, [1986] 1 S.C.R. 366, at p. 377, *R. v. Deschamplain*, 2004 SCC 76, [2004] 3 S.C.R. 601, at para. 17).

[12] *Certiorari* is available to third parties in a wider range of circumstances than for parties, given that third parties have no right of appeal. In addition to having *certiorari* available to review jurisdictional errors, a third party can seek *certiorari* to challenge an error of law on the face of the record, such as a publication ban that unjustifiably limits rights protected by the *Canadian Charter of Rights and Freedoms* (see *Dagenais*) or a ruling dismissing a lawyer's application to withdraw (*R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331). The order has to have a final and conclusive character vis-à-vis the third party (*R. v. Primeau*, [1995] 2 S.C.R. 60, at para. 12).

[13] In this case, one of the issues is whether *certiorari* is available where a party alleges an error of law on the face of the record, in particular in an evidentiary ruling. Differing views have been expressed. In his treatise on the use of prerogative writs in criminal proceedings, Professor Gilles Létourneau (later a judge of the

Federal Court of Appeal) opined that “judgments or orders made by a court in the course of criminal proceedings cannot be quashed on the basis of error of law on the face of the record”, and that Parliament’s failure to provide for interlocutory appeals indicates the “intent that there should be no review, except perhaps in extreme cases such as for jurisdictional errors” (*The Prerogative Writs in Canadian Criminal Law and Procedure* (1976), at pp.152-53).

[14] The Alberta Court of Appeal has held that *certiorari* is available to parties for both errors of jurisdiction and errors of law on the face of the record “[i]f the order is such that it immediately and finally disposes of a legal right” (*R. v. Black*, 2011 ABCA 349, 286 C.C.C. (3d) 432, at para. 25). In the Alberta Court of Appeal’s view, such an error of law on the face of the record is a proper basis for superior courts to quash the decision. The Quebec Court of Appeal seemed to support this view when it stated that [TRANSLATION] “[a]n accused can have an interlocutory decision reviewed if the judge acted without jurisdiction or made an error of law on the face of the record” (para. 29). However, the court later held that:

A trial judge’s interlocutory decision to order or not to order the Crown to disclose information generally does not raise a question of want or excess of jurisdiction, but is a decision made in the exercise of the judge’s jurisdiction; in such a case, *certiorari* does not lie. In keeping with the paramount objective of limiting the intervention of superior courts in a trial and the delays that could result from such interventions, care must be taken not to see every order for the disclosure of information as an irreparable violation of a fundamental right. Dionne J. applied the wrong test. He should have asked whether the disclosure order irreparably violated a fundamental right of [Ms. Awashish], not whether the interlocutory order had a final and conclusive character vis-à-vis that right. [Emphasis added; para. 39.]

[15] In its submissions to this Court, the Attorney General of Ontario proposes a third view, that *certiorari* should be available to review an error of law on the face of the record where: first, the error engages an issue of overarching importance to the administration of justice; and, second, the error is one that does not normally crystallize on appeal. These would be “test cases” for difficult issues that recur, but tend not to be addressed on appeal.

[16] Statements made by this Court in *Dagenais*, at pp. 864-65, and *Cunningham*, at para. 57, have been taken by some lower courts to mean that errors of law on the face of the record are a basis to grant *certiorari* to both parties and third parties. This was the interpretation given by the Alberta Court of Appeal in *Black*, at para. 27. Having regard to the appellate jurisprudence (see above, at paras. 10-12) and the policy considerations underlying that jurisprudence, I respectfully differ from the view set out by the Alberta Court of Appeal. The approach in *Black* runs contrary to the general rule against interlocutory appeals and to the legislative objective behind s. 674 of the *Criminal Code* which abolishes appeals save as provided for in the *Code*.

[17] Permitting parties access to *certiorari* review for an error of law — even one that “immediately and finally disposes of a legal right” — risks fragmenting criminal trials, thereby introducing inefficiency, delay, and the determination of issues on an incomplete record. Such a rule would be in direct tension with the approach set out in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, to achieve prompt justice in criminal cases. For these reasons, I would not adopt the wider view

taken by the Quebec Court of Appeal at para. 29 where it suggested that *certiorari* would be available to parties to correct errors of law on the face of the record (see above, at para. 14).

[18] Finally, the approach suggested by the Attorney General of Ontario, while it would open the door less fully, nonetheless, would also run afoul of the prohibition against interlocutory appeals in criminal proceedings. While more circumscribed than a broad right to *certiorari* as described in *Black*, it would likely result in extensive litigation as the superior courts grapple with the boundaries of this approach. For counsel, issues that engage their clients' interests are often seen as issues of overarching importance to the administration of justice. Thus, I would decline to adopt either of these three approaches.

[19] Allowing the use of *certiorari* to provide for *de facto* interlocutory appeals in criminal cases would give rise to an unprincipled distinction between trials that proceed before provincial courts and those before superior courts. As *certiorari* is not available against a superior court (*Dagenais*, at p. 865), interlocutory decisions by provincial courts would be reviewable, while those by superior courts would not be.

[20] Thus, to summarize, *certiorari* in criminal proceedings is available to parties only for a jurisdictional error by a provincial court judge (see above, at para. 11). For third parties, *certiorari* is available to review jurisdictional errors as well as errors on the face of the record relating to a decision of a final and conclusive character vis-à-vis the third party (see above, at para. 12).

[21] In *obiter*, Thibault J.A. stated that *certiorari* could be available where fundamental rights of an accused are irremediably affected by a ruling and where an appeal would offer no effective remedy. The example she gave was ordering an accused to remove her niqab while testifying. I leave for another day whether *certiorari* would be available in such circumstances.

B. *Is Certiorari Available in This Case?*

[22] The Crown argues that in dealing with the *McNeil* application, Paradis J.C.Q. also made two jurisdictional errors. First, Paradis J.C.Q. erred by disregarding the decision by Lavoie J. granting the Crown's first *certiorari* application. Second, the substance of Paradis J.C.Q.'s order exceeded her jurisdiction as a court cannot order the Crown to look into the existence of records until the accused demonstrates that they exist, they are relevant, and that it is possible for the Crown to obtain them.

[23] However, neither of these is a jurisdictional error. In the criminal context, jurisdictional errors occur where the court fails to observe a mandatory provision of a statute or where a court acts in breach of the principles of natural justice: see *Skogman*. Failure to give effect to *res judicata* is not a jurisdictional issue, it is a legal error. That said, I would question whether such an error occurred. Nothing in Lavoie J.'s order precluded Paradis J.C.Q. from ordering the Crown to inquire into the existence of the records. Indeed, Lavoie J. did not find that the records were irrelevant; she simply found that Ms. Awashish had not demonstrated their relevance.



Further, an error as to whether the accused met his or her burden of proof on a disclosure application is not a jurisdictional error, but merely a legal error.

[24] In the absence of jurisdictional error, the Crown's appeal must fail, as *certiorari* is unavailable. This leaves Paradis J.C.Q.'s order standing. However, this Court's reasons should not be taken as endorsing Paradis J.C.Q.'s order insofar as it is based on a legal error, which I discuss below. While not necessary for the disposition of this case, I will clarify the nature of such orders, as guidance for the future.

[25] Ms. Awashish sought to compel the Crown to inquire into the existence of certain documents relating to breathalyzer maintenance, amongst others. I agree with the Crown that Paradis J.C.Q. erred in ordering it to look into whether the records exist; she applied the wrong framework to address the issue. Paradis J.C.Q. relied on *McNeil* as a basis of her order. But, *McNeil* does not require the Crown to look into the existence of records at the behest of the defence. Rather, it imposes an obligation on the Crown to make reasonable inquiries of other state agencies that *only* crystallizes once the Crown is made aware that the records in question exist: see *McNeil*, at para. 49.

[26] The Crown in this case denied the records' existence. When the Crown denies the existence of the records in question, the governing framework is that set out in *R. v. Chaplin*, [1995] 1 S.C.R. 727. Sopinka J. articulated the following procedure, at para. 30:

Once the Crown alleges that it has fulfilled its obligation to produce it cannot be required to justify the non-disclosure of material the existence of which it is unaware or denies. Before anything further is required of the Crown, therefore, the defence must establish a basis which could enable the presiding judge to conclude that there is in existence further material which is potentially relevant.

[27] Ms. Awashish did not establish a basis for the records' existence or relevance. The Crown was therefore under no obligation to inquire into the matter. Paradis J.C.Q. erred in holding otherwise. However, given that she made no jurisdictional error, *certiorari* cannot be used to correct that error.

#### V. Conclusion

[28] The Crown's appeal is dismissed. Paradis J.C.Q.'s order therefore stands. In the event that a disclosure application follows, the relevance of the documents should be considered in light of this Court's decision in *Gubbins*.

*Appeal dismissed.*

*Solicitor for the appellant: Director of Criminal and Penal Prosecutions,  
Québec.*

*Solicitors for the respondent: Fradette & Le Bel, Chicoutimi.*

*Solicitor for the intervener: Attorney General of Ontario, Toronto.*