S.C.C. File No. 38944

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Queen's Bench of Alberta)

Between:

T.J.M.

Appellant
(Appellant)

- and -

HER MAJESTY THE QUEEN

Respondent
(Respondent)

AMENDED FACTUM OF THE APPELLANT

(PURSUANT TO RULE 42 OF THE *RULES OF THE SUPREME COURT OF CANADA)*

GRAHAM JOHNSON &
KATHERINE CLACKSON
Dawson Duckett Garcia & Johnson
300, 9924 – 106 Street
Edmonton, Alberta
T5K 1C4
Tel: (780) 424-9058
Fax: (780) 425-0172
Email: gjohnson@dsscrimlaw.com
Email: kclackson@dsscrimlaw.com

Counsel for the Appellant

COLLEEN BAUMAN

Goldblatt Partners LLP
500 – 30 Metcalfe Street
Ottawa, Ontario
K1P 5L4
Tel: (613) 235-5327
Fax: (613) 235-3041
Email: cbauman@goldplattpartners.com

Ottawa Agent for the Appellant

MATTHEW GRIENER
Appeals Branch, Alberta Justice
3rd Floor, 9833 – 109 Street
Edmonton, Alberta
T5K 2E8
Tel: (780) 422-5042
Fax: (780) 422-1106
Email: matthew.griener@gov.ab.ca

Counsel for the Respondent

D. LYNNE WATT
Gowling WLG (Canada) Inc.
2600, 160 Elgin Street
Ottawa, Ontario
K1P 1C3
Tel: (613) 233-1781
Fax: (613) 563-9869
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for the Respondent

TABLE OF CONTENTS

Part I - Overview and Facts

Overview

1. This is an appeal (leave having been granted) of a decision of Mr. Justice Renke of the Court of Queen's Bench of Alberta, pronounced October 9, 2019. In that decision, Renke J declined to take jurisdiction over bail for the Appellant young person. The Appellant was facing a charge of second-degree murder and had previously elected to be tried by a superior court justice sitting alone. The Appellant's position was that the entry of that election made the superior court the Youth Justice Court for the purposes of bail. Renke J disagreed and found he did not have jurisdiction to hear the application. There being no route to the Court of Appeal from a refusal to take jurisdiction over bail, the Appellant successfully applied for leave to this Honourable Court pursuant to section 40 of the *Supreme Court Act*[1].

2. This appeal will define if, and when, a young person charged with murder can apply for bail in the superior court. It will also touch on issues of statutory interpretation and how broadly or narrowly the procedural protections in the *Youth Criminal Justice Act (YCJA)*[2] are to be construed.

3. Competing approaches to the jurisdictional issue on bail have arisen from courts across Canada such that clarity in the law is now required. The Appellant submits that reading the bail and election provisions of the *YCJA* in the context of the *Act* as a whole, the correct interpretation is that jurisdiction over bail for a young person accused of a section 469 *Criminal Code*[3] offence (such as murder) vests at the time of the entry of the election.

Background of the Offence

4. The decision appealed from is silent on the facts. For the purposes of this appeal, a brief overview will suffice. The Appellant, an Indigenous youth, was charged with second degree murder contrary to section 235(1) of the *Criminal Code* arising from a shooting on Cold Lake First

[1] *Supreme Court Act*, RSC 1985, c S-26, s 40 [Appendix A]
[2] *Youth Criminal Justice Act*, SC 2002, c 1 [*YCJA*].
[3] *Criminal Code of Canada*, RSC 1985, c C-46 [*Criminal Code*].

Nation on January 29, 2019. He was alleged to be part of a group which fired shots into a house, killing one person as part of a turf dispute involving the sale of drugs on the reserve. The Appellant was the only youth charged. Five adult males were also charged with the murder.

5. There was a delay in arresting the Appellant and at the time of his arrest, he was in custody at the Edmonton Young Offender Centre on another matter for which he was nearly finished serving a sentence. Prior to his incarceration on that matter, the Appellant had resided with his grandmother on Cold Lake First Nation. At the time of his arrest for murder, the Appellant had a criminal record, which included violent offences.

Procedural Background

6. The Appellant was over 14 years of age at the time of the alleged murder and was given notice that the Crown would seek an adult sentence upon conviction. He was therefore given an election as to mode of trial pursuant to both sections 67(1)(d) and 67(1)(b) of the *YCJA*[4]. On August 14, 2019, the Appellant elected trial by superior court judge alone and requested a preliminary inquiry.

7. Given that he had already elected to be tried in the superior court, and following the line of authority from Saskatchewan, Ontario, and a 2006 case from Alberta (discussed below), the Appellant filed an application for bail in the Alberta Court of Queen's Bench. The application was scheduled to be heard on October 9, 2019 before Justice Renke, sitting in St. Paul, Alberta. Ahead of that date, Renke, J sought the submissions of counsel relating to a jurisdictional question arising out of section 33(8)[5] of the *YCJA* and a previous decision of his colleague, Mr. Justice Ouellette, in *R v TRM*[6]. Both Crown and defence provided written and oral submissions on that issue, which is the same one now before this Honourable Court.

8. Following the Saskatchewan, Ontario, and previous Alberta approach, the defence position was that the Court of Queen's Bench had been deemed the youth justice court upon the entry of the election, and that that Court was the appropriate venue to hear the application. The Crown,

[4] See *YCJA* s 67 [Appendix B]
[5] See *YCJA* s 33(8) [Appendix C]
[6] *R v TRM*, 2013 ABQB 571 [*TRM*][TAB 1].

mainly for reasons of judicial comity, argued that the approach in *TRM* ought to be followed and that the Court should decline to take jurisdiction. In a decision which relied heavily on the reasoning in *TRM*, Renke J ruled that he did not have jurisdiction over the Appellant's bail, and that the provincial court youth justice court was the appropriate venue for such an application.

9. The Appellant maintained his position on the jurisdictional issue. For that and other reasons, a bail application was never brought in provincial court. At the time leave to appeal to this Court was granted, the Appellant remained in custody.

10. The Appellant's preliminary inquiry was scheduled to take place on March 2-6, 2020. However, on February 25, 2020, a stay of proceedings was entered by the Crown and the Appellant was released.

Decision Below

11. In declining to take jurisdiction over the Appellant's judicial interim release application, Renke J discussed and cited portions of Ouellette J's decision in *R v TRM* at length and found some support in Devine PJ's decision in *R v BWH*[7]. He relied upon Ouellette J's analysis of four important *YCJA* provisions which he held allowed him to follow the line of reasoning in *TRM*: sections 33(8), 13(2), 14(1), 14(7), and 67(7). The wording of each section, and Renke J's reasons with respect to each section, are set out below.

i. Section 33(8)

> ***33(8)*** *If a young person against whom proceedings have been taken under this Act is charged with an offence referred to in section 522 of the Criminal Code, a youth justice court judge, but no other court, judge or justice, may release the young person from custody under that section.*

12. Rather than conducting an independent analysis of section 33(8), Renke J quoted that of Ouellette J:

> So first, as regards 33(8), Justice Ouellette wrote in *TRM* at paragraphs 44, 61, and 64 as follows: Paragraph 44, (As Read):
>
> > "In relation to a young person charged with a 469 offence, such as murder, 33(8) of the *YCJA* explicitly provides that only a youth justice

[7] *R v BWH*, 2005 CanLII 57045 (MBPC)[*BWH*][TAB 2].

> court judge may release a young person from custody. On a plain reading, it is clearly inconsistent with 522 of the *Criminal Code* relating to an adult charged with murder, which allows release only by a judge in the superior court of criminal jurisdiction."

And paragraph 61, (As Read):

> "One must go back to the wording in 33(8) of the *YCJA*. Again, there is an important distinction between the English and French version of the *YCJA*. The English version states that only a youth justice court judge 'but no other court, judge or justice, may release a young person.....' The French version is more explicit in stating the 'exclusion' of other courts or judges."

Then paragraph 64, (As Read):

> "If Parliament had intended to provide concurrent jurisdiction regarding bail for young offenders in relation to a murder charge, it would have said so. The fact is that Parliament chose to grant exclusive jurisdiction of granting bail to a young person charged with murder to a youth justice court judge, specifically excluding superior court judges. <u>There is no ambiguity as to what 33(8) states in English or French, and therefore, no additional powers are conferred to a superior court judge simply because the *YCJA* deems that judge to be a youth justice court judge for the sole purpose of conducting a trial</u>. If Parliament had intended to include 'deemed' youth justice court judges in 33(8), it would have said so."[8]

13. It should be noted that the defence position was not that there was concurrent jurisdiction regarding bail for young persons charged with murder; rather, the defence position was that upon entering the election (as a result of section 13(2)), the superior court became the youth justice court, and a judge of that court became the youth justice court judge.

[8] Transcript of Proceedings, p 13 ln 25 – p 14 ln 11, citing *TRM*, *supra* note 6, at paras 44, 61 and 64 [emphasis added].

ii. Section 13(2)

> ***13(2)*** *When a young person elects to be tried by a judge without a jury, the judge shall be a judge as defined in section 552 of the Criminal Code, or if it is an offence set out in section 469 of that Act, the judge shall be a judge of the superior court of criminal jurisdiction in the province in which the election is made. In either case, the judge is deemed to be a youth justice court judge and the court is deemed to be a youth justice court for the purpose of the proceeding.*

14. In examining this section, Renke J concluded that it refers only to trial and is a "proceeding in the singular" which does not refer to other proceedings.[9] He found support for that reading in *TRM*, which he cited as follows:

> Since 13(2) and 13(3) deem a superior court judge a youth justice court judge for the purpose of a proceeding, what is that proceeding? It is clear that the reference to 'purpose of the proceeding' is in relation to a young person having elected to be tried by a superior court judge with or without a jury. That right of a young person is provided for in section 67 of the YCJA. Section 67 allows a young person in circumstances to elect to be tried by superior court judge with or without a jury. Section 67(2), which contains the wording of the election, gives the young person the option to be tried before a youth justice court judge without having had a preliminary inquiry or to be tried by a judge without a jury or a court composed of a judge and jury. Pursuant to 67(1) of the YCJA, those three options of a young person apply to all charges, including murder. The result being that, unlike an adult who is charged with murder and not entitled to elect trial before a provincial court judge, a young person can elect a trial before a youth justice court judge (provincial court judge).[10]

iii. Section 14(7)

> ***14(7)*** *A judge of a superior court of criminal jurisdiction, when deemed to be a youth justice court judge for the purpose of a proceeding, retains the jurisdiction and powers of a superior court of criminal jurisdiction.*

15. Renke J noted what he called a "true division"[11] between the youth justice court judge (provincial court judge) and deemed youth justice court judge (superior court judge). He cited the analysis in the *BWH* decision from the Manitoba Provincial Court to support the proposition that

[9] Transcript of Proceedings, p 14 ln 34.
[10] Transcript of Proceedings, p 14 ln 40 – p 15 ln 11, citing *TRM*, *supra* note 6, at para 55.
[11] Transcript of Proceedings, p 15 ln 14, citing *TRM*, *supra* note 6, at para 60.

the phrase "for the purpose of the proceeding" is a clear reference to the trial "rather than to the entirety of the prosecution."[12]

iv. Section 67(7)

> ***67(7)*** *When a young person elects to be tried by a judge without a jury, or elects or is deemed to have elected to be tried by a court composed of a judge and jury, the youth justice court referred to in subsection 13(1) shall, on the request of the young person or the prosecutor made at that time or within the period fixed by rules of court made under section 17 or 155 or, if there are no such rules, by the youth justice court judge, conduct a preliminary inquiry and if, on its conclusion, the young person is ordered to stand trial, the proceedings shall be conducted*
>
> ***(a)*** *before a judge without a jury or a court composed of a judge and jury, as the case may be;*

16. Renke J held that section 67(7) exists to clarify and confirm "the distinct roles of 13(1) youth justice court justices and 13(2) and (3) youth court justices"[13] before quoting further from *TRM*:

> When an adult is charged with an offence, the *Criminal Code* does not require that the provincial court judges and the superior court judges always be referred to by the same name. However, Parliament has decided that in relation to young persons, all process will be conducted before the youth justice court which has exclusive jurisdiction over all young persons. The definition of youth justice court as provided in section 2 of the *YCJA* is a youth justice court referred to in section 13. A superior court judge conducting a trial with or without a jury shall be deemed a youth justice court. However, this situation only exists because of the exclusive jurisdiction conferred under section 14.[14]

[12] Transcript of Proceedings, p 15 ll 30-33, citing *BWH*, *supra* note 7, at para 18.
[13] Transcript of Proceedings, p 16 ll 19-20.
[14] Transcript of Proceedings, p 16 ll 22-30, citing *TRM*, *supra* note 6, at para 54 [while it is not clear from this passage, we presume Ouellette J and Renke J are referring to *YCJA* s 14(1)].

v. Section 14(1)

> ***14(1)*** *Despite any other Act of Parliament but subject to the Contraventions Act and the National Defence Act, a youth justice court has exclusive jurisdiction in respect of any offence alleged to have been committed by a person while he or she was a young person, and that person shall be dealt with as provided in this Act.*

17. Based on the analyses in *TRM* and *BWH*, Renke J concluded that "a provincial court judge sitting as a youth justice court judge has the exclusive jurisdiction to release a young person who is charged with an offence under 469 of the *Criminal Code*".[15]

vi. Judicial Comity

18. While Renke J noted that the decision of his colleague, LoVecchio J, in the 2006 decision of *R v TS*[16] was contrary to that of Ouellette J, he held that *TRM* provided a more fulsome analysis of the issues than *TS*, and that *TRM* was directly on point with the Appellant's case while *TS* was distinguishable. Further, *TRM* engaged in an analysis of the French and English versions of the *YCJA* which added to its persuasiveness. Finally, while Renke J acknowledged that there was case law from other provinces contrary to *TRM*, he noted those cases were not binding on him. He therefore declined to follow *TS* in favour of *TRM*.

[15] Transcript of Proceedings, p 16 ll 37-39.
[16] *R v TS*, 2006 ABQB 631 [*TS*][TAB 3].

Part II - Ground of Appeal

1. The learned application judge erred in interpreting section 13(2) of the *YCJA* to find he did not have jurisdiction to hear the judicial interim release application of a youth charged with murder, a section 469 *Criminal Code* offence.

Part III - Statement of Argument

A. Mootness

19. The Appellant's charge was stayed just prior to his scheduled preliminary inquiry, and he is no longer in pre-trial custody. Unless the Attorney General reactivates the charge against the Appellant, this appeal is moot. However, the Appellant submits that this Honourable Court should nonetheless hear this appeal, as there is divergent authority across the country and the broad criteria set out in *Borowski v Canada (Attorney General)*[17] are satisfied here.

i. The Adversarial System

20. The Court's competence to resolve legal issues is rooted in the adversary system.[18] The present case maintains the necessary adversarial element. First, as the Appellant's murder charge was stayed, it can be reactivated by the Crown within one year. Second, the ground of appeal here in issue remains contentious and will require the vigorous submissions of counsel on both sides. This militates in favour of the appeal being heard.

21. As Sopinka J stated in *Borowski*, the adversarial requirement may be satisfied if "despite the cessation of a live controversy, the necessary adversarial relationships will nevertheless prevail."[19] While the "live controversy" of the Appellant's judicial interim release application no longer exists, the adversarial relationship has not ceased.

ii. Judicial Economy

22. The Appellant recognizes the ongoing issue of scarce judicial resources but notes that this appeal will have a practical effect on his case should the Crown reactivate his murder charge. This is a relevant consideration:

> The concern for conserving judicial resources is partially answered in cases that have become moot if the court's decision will have some practical effect on the

[17] *Borowski v Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 SCR 342 [*Borowski*][TAB 4]
[18] *Ibid*, at p 358.
[19] *Ibid*, at p 359.

> rights of the parties notwithstanding that it will not have the effect of determining the controversy which gave rise to the action.[20]

23. In addition, there is divergent authority across the country which must be settled. In some provinces, binding authority requires young persons in the Appellant's position to speak to bail in the superior court; in other provinces, young persons in the Appellant's position must speak to bail in provincial court. This case provides an opportunity to provide much-needed clarity in the law.

24. The youth bail context is fleeting in nature, and it may otherwise evade appellate review.[21] The question arising on this appeal has a limited temporal element. Sopinka J's comment relating to the brief nature of temporary injunctions in labour cases applies to the present case: "[i]f the point was ever to be tested, it almost had to be in a case that was moot."[22] The same is true of the issue in the present appeal. This too weighs in favour of this case being heard on its merits.

iii. <u>The Court's Law-Making Function</u>

25. This rationale centres on the notion that "[p]ronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch."[23] However, the Appellant is seeking clarity on the proper interpretation and interplay of two federal statues which this Court routinely considers: the *Youth Criminal Justice Act* and *Criminal Code*. This Court regularly engages in statutory interpretation and to do so in the Appellant's case would not overstep its role, especially when clarity is needed to create a uniform approach across Canada.

26. Moreover, this case not only raises a question of great public importance, it is also in the public interest to address it on its merits to settle the state of the law not only for this Appellant but for all future young people who come before the court seeking bail on the charge of murder.

27. The Appellant respectfully submits that the *Borowski* criteria are satisfied here and that his case should be heard on its merits.

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[20] *Ibid* at p 360.
[21] See *R v Oland*, 2017 SCC 17 (CanLII), [2017] 1 SCR 250 at para 17 [Oland][TAB 5].
[22] *Borowski*, *supra* note 17, at p 360-361
[23] *Ibid*, at p 362.

iv. The Appellant's case is akin to *Oland* and *Myers*

28. Two recent bail cases from this Honourable Court are instructive on the mootness issue: *R v Myers*[24] and *R v Oland*[25].

29. In the bail pending appeal case of *Oland*, the Appellant had already been successful on appeal and was awaiting re-trial on bail. Despite the mootness of his appeal, the parties and interveners urged the Court to hear the case on its merits. The Appellant anticipates the Respondent will join in requesting that his case also be heard on its merits.

30. The following comment of this Court in that case is relevant to the mootness inquiry here:

> [A]ll concerned submitted that guidance was needed from this Court to resolve inconsistent approaches to bail taken by appellate courts across the country. And as bail pending appeal was, by its temporary nature, evasive of appellate review, this was an appropriate case to resolve the conflicting jurisprudence: see *Borowski v. Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 S.C.R. 342; *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66, at para. 2.[26]

31. As in *Oland*, the present case requires guidance from this Court to resolve competing case law from various Canadian jurisdictions. Similarly, as the present case involves a bail matter, it too is by its nature temporary.

32. In *Myers*, the Appellant filed his application for leave to appeal to this Court while in pre-trial custody, then pleaded guilty prior to his hearing. He was no longer in custody at the time his appeal to this Court was heard. As in *Oland*, the parties agreed guidance from the Court was needed to establish clarity in the law – this time with respect to 90-day detention reviews.

33. The Appellant submits that his case, while moot, fits squarely with the previous bail cases of *Oland* and *Myers*, as it too requires the pronouncement of this Honourable Court to settle competing lines of authority from across Canada.

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[24] *R v Myers*, 2019 SCC 18 (CanLII)[*Myers*][TAB 6].
[25] *Oland*, *supra* note 21.
[26] *Ibid*, at para 17 [emphasis added].

B. Arguments on the Merits

i. Differing approaches toward youth bail in relation to section 469 offences across Canada

34. A youth justice court judge is defined in section 13(1) of the *YCJA*[27]. In most cases, a youth justice court judge will be a provincial court judge sitting in a court established or designated as a youth justice court. However, this is not the case when a youth who is presented with an election under *YCJA* section 67(1) elects to be tried by a superior court judge, as the Appellant did. In that case, section 13(2)[28] states that the superior court judge is deemed to be a youth justice court judge and the court is deemed to be a youth justice court "for the purpose of the proceeding".

35. Various courts across the country have now interpreted this section in different ways. This appeal centres on the need to clarify the law as it relates to the proper application of these sections. While the cases on this issue sometimes differ in their path of reasoning, three clear approaches have emerged. They are accordingly grouped here based on their ultimate conclusions.

ii. The Saskatchewan, Ontario, and Previous Alberta Approach[29]: The meaning of "proceeding" in ss. 13(2) and 13(3) is broader than trial

a. Saskatchewan

36. In ***R v EEW***[30], the Saskatchewan Court of Appeal considered which court had jurisdiction to hear a release application for a youth charged with second degree murder, a section 469 offence. The young person first applied for judicial interim release in provincial court and was denied. After electing trial in superior court, he applied for bail there. Crown was opposed and argued the superior court lacked jurisdiction over bail. The superior court determined it had exclusive jurisdiction over bail based on *YCJA* section 13(2), and that the provincial court had denied release

[27] See *YCJA* s 13(1) [Appendix D].
[28] See *YCJA* s 13(2) [Appendix D].
[29] As well, in at least one reported decision, this was the approach in the Northwest Territories. In *R v KM*, 2015 NWTSC 14, a young person charged with first degree murder and committed to stand trial in superior court sought bail in that court. Both Crown and defence counsel agreed that the bail application could be heard in that forum. Accordingly, Charbonneau CJ did not go into an in-depth analysis on the jurisdictional issue but did note the competing case law surrounding it.
[30] *R v EEW*, 2004 SKCA 114 [*EEW*][TAB 7].

without jurisdiction. The superior court judge released the young person on bail. Crown appealed under sections 33(9) of the *YCJA* and 680 of the *Code*.

37. On appeal, the Court considered the relevant sections of the legislative scheme and concluded that the superior court has broad jurisdiction over proceedings following an election to that level of court:

> Subsection 13(2) is clear with respect to all young persons charged with presumptive offences other than s. 469 offences. Since it takes effect only when a young person elects to be tried by a judge without a jury, all proceedings prior to the election are within the jurisdiction of a ss. 13(1) judge; all proceedings thereafter are within the jurisdiction of a s. 552 judge, in Saskatchewan, a Queen's Bench judge. Young persons charged with s. 469 offences are dealt with in the same subsection, but must be distinguished from the others charged with presumptive offences, since the subsection applies to them irrespective of their election. This is where confusion arises. Since ss. 13(2) applies to them irrespective of their election, when does its application take effect? There are two possible answers. The first is that it takes effect from the moment the young person is charged with the s. 469 offence. The second is that it takes effect at the same time as for all other young persons to whom the subsection applies: at the time of election of mode of trial.[31]

38. The Court considered the temporal element of the legislative scheme – when the jurisdiction vests for the purposes of bail – and held:

> On the first several readings of ss. 13(2), it appears from the words used to be intended to apply unconditionally to all young persons charged with s. 469 offences with no restrictions as to time of application, and that is how the Queen's Bench judge interpreted it. However, when it says "the judge shall be a judge of the superior court of criminal jurisdiction in the province in which **the election is made**", one must ask why the legislators referred to "the province in which **the election was made**" rather than to the province in which the offence was committed or in which the young person is to be tried. The only possible reason is that it was intended that the subsection apply to s. 469 offenders at the same time as to all other offenders to which the subsection applies, namely, at the time of election of mode of trial.[32]

39. The Court of Appeal concluded that section 13(2) "applies to s. 469 offenders *from the time of election of mode of trial*"[33] such that the superior court is deemed as the youth justice court

[31] *EEW, supra* note 30 [emphasis added].
[32] *Ibid*, at para 14 [emphasis in original].
[33] *Ibid*, at para 21 [emphasis added].

once the election is entered. In the circumstances, the superior court was the youth justice court and the *only* court which had jurisdiction over the young person's bail.

b. Ontario

40. The law has similarly developed in Ontario. In ***R v F(M)***[34], Gage J considered whether a youth charged with second degree murder could pursue bail before him after having elected trial in superior court by judge and jury. The young person's preliminary inquiry proceeded before Gage J, and bail was sought at the conclusion of the Crown's evidence but prior to committal to stand trial.

41. Gage J gave broad interpretation to the term "proceeding" in sections 13(2) and 13(3):

> I am unable to discern any logical support for the contention that the term "proceeding" as it is used in subsections 13(2) and 13(3) should be interpreted as being limited to the trial process. If this were the proper interpretation there would be no need for subsection 67(7) to stipulate that a section 13(1) judge conduct the preliminary hearing. The fact that subsection 67(7) does so stipulate suggests that as soon as the election is made there is concurrent jurisdiction in the two courts referenced in subsections 13(1) on the one hand and 13(2) and (3) on the other.[35]

He then held:

> The logic [*sic*] and ordinary grammatical meaning of the provisions of the *YCJA* read in conjunction with Part XVI of the *Code* lead to a conclusion that after a youth has elected trial by judge alone or by judge and jury, as provided for in section 67, subsection 13(2) and 13(3) youth justice court judges acquire concurrent jurisdiction with section 13(1) youth justice court judges and at that point, the provisions of section 522 of the *Code* are not in conflict with either section 33(8) or the legislative scheme and object of the *YCJA*, with the result that judges of the superior court of criminal jurisdiction in the province in which the election is made acquire exclusive jurisdiction to conduct bail hearings for youths charged with the offences listed in section 469 of the *Code*.[36]

[34] *R v F(M),* 2006 ONCJ 161 (CanLII)[*F(M)*][TAB 8].
[35] *Ibid,* at para 46.
[36] *Ibid,* at para 38.

42. In the Ontario case of ***R v JB***[37], the Crown applied for *certiorari* seeking to quash the bail decision of a provincial court judge who released the youth accused after he was committed to stand trial in superior court for first degree murder. Molloy J held that both sections 13(2) and 13(3) were in play, as the young person was charged with a section 469 offence and was deemed to have elected trial by judge and jury. At the bail hearing, both Crown and defence submitted – based on section 33(8) of the *YCJA* – that the provincial court judge had exclusive jurisdiction over the young person's bail. The Crown then changed its position and sought to quash bail based on the lack of jurisdiction of the provincial court judge.

43. Molloy J reviewed the phrase "for the purpose of the proceeding" in section 13(2) and held it was far broader than simply "trial". He then went on to find that jurisdiction vests in the superior court at the time of the young person's election:

> J.B. is charged with murder, an offence listed in s. 469 of the *Criminal Code*. That was also the situation before the Saskatchewan Court of Appeal in *R. v. W.(E.E.)*. In that case, the Court of Appeal considered whether the wording of s. 13(2) transferred all jurisdiction in respect of s. 469 offences to the superior court, or if this only occurred after the accused had elected his mode of trial. The section is awkwardly worded. The first part of the section refers to "when a young person elects to be tried by a judge without a jury or if it is an offence set out in section 469. This seems to imply that the rest of the section applies to s. 469 offences without qualification. However, the next clause goes on to state, "the judge shall be a judge of the superior court of criminal justice in the province in which the election is made". The logical implication of referring to the judge in the province in which the election is made is that there must have been an election before there can be any application. The clause applies equally to a person charged with a s. 469 offence. In my opinion, that must mean that the transfer of jurisdiction to the superior court only arises in a s. 469 case upon an election of mode of trial being made. That conclusion is also consistent with s. 67(7) of the *YCJA* which provides that where a young person elects to be tried by a judge without a jury or elects or is deemed to have elected trial by a judge and jury, and a preliminary hearing is requested, "the youth justice court referred to in s. 13(1)" shall conduct the preliminary inquiry. This section is required so that the preliminary inquiry is conducted by a provincial court judge, notwithstanding s. 13(2) of the *YCJA*.[38]

[37] *R v JB*, 2012 ONSC 4957 [*JB*][TAB 9].
[38] *JB*, *supra* note 37, at para 30 [emphasis added].

c. Alberta (prior to 2013)

44. In ***R v TS***[39], the young person, charged with first degree murder, sought release in superior court following an election to be tried by judge and jury. Given that election, section 13(3) of the *YCJA* was engaged rather than section 13(2). The young person had previously sought bail in provincial court prior to entering his election and had been denied.

45. LoVecchio J interpreted "proceeding" in section 13(3) as follows:

> In my view, the plain and ordinary meaning of the word proceeding must be seen as encompassing more than simply the ultimate trial of T.S. on the charge. Where [*sic*] that not the case, there would be no need for Section 67(7) of the *YCJA*, which stipulates that if a young person has elected to be tried by a court consisting of a judge sitting with a jury, the preliminary inquiry, if held, is to be held in the court mentioned in Section 13(1) of the *YCJA* which is the Provincial Court.[40]

46. However, LoVecchio J did not determine the issue of *when* jurisdiction for bail in superior court vests. He cited *R v EEW* and the Manitoba case of *R v BWH* (discussed below), holding:

> A decision of the Saskatchewan Court of Appeal would suggest pre-trial release prior to an election is the exclusive domain of the Provincial Court and the exclusive domain of the superior courts (albeit in its role as deemed youth justice court) after the time of the election.
>
> While I prefer the decision of the Court of Appeal (which does not limit the meaning of the word in the fashion suggested in the **R. v. H.** case), I am not sure the role of this court post election needs to be to the exclusion of the Provincial Court but I need not decide that issue. All I need to decide is that this Court (albeit in its role as deemed youth justice court) has a role to play in the proceeding after the time of the election which is more comprehensive than just being the trial court.[41]

47. He then exercised jurisdiction to hear the young person's application for judicial interim release.

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[39] *R v TS*, 2006 ABQB 631 [*TS*][TAB 10].
[40] *TS*, *supra* note 39, at para 40.
[41] *TS*, *supra* note 39, at paras 38-39.

iii. <u>The Manitoba and Quebec Approach: Jurisdiction over bail for s. 469 offences vests in superior court at the time of committal to stand trial or arraignment</u>

48. In ***R v BWH***[42], the youth accused, charged with second degree murder, came before the provincial court seeking bail having previously elected to be tried in superior court by a judge and jury. Crown argued that the provincial court did not have jurisdiction over release following the young person's election to be tried in superior court.

49. Devine PJ engaged in statutory interpretation of the relevant legislative sections and held:

> Both convenience and common sense would support the conclusion that if Parliament had intended to drastically alter and limit the bail jurisdiction of the provincial court with respect to youths charged with such presumptive offences, and to enhance the original bail jurisdiction of the superior court in such cases, the language would have been more explicit. Even if section 13(2) were to read, for example: "After a young person elects…" or "Once a young person elects…" the interpretation advanced by the Crown, giving superior courts exclusive jurisdiction immediately upon the youth's making an election on a charge like [assault causing bodily harm], would be more easily justified. There is no obvious policy reason advancing the objectives of the Act that would support such a crown interpretation. Rather factors such as the straightforwardness of procedures consistent with the adult system would favour the defence interpretation.
>
> In my view the more logical interpretation of the *YCJA* provisions is one which puts youths who have an election on a presumptive offence in the same position as an adult charged with such a category of offence, not merely for the purpose of sentencing, but also for the purpose of bail. <u>The original jurisdiction for bail applications would then remain with the provincial court, the youth justice court, until one of two occurrences. On the youth's committal for trial after a preliminary inquiry, or on the youth's arraignment date in superior court, if the youth opted not to have a preliminary under the 2004 amendments to section 67(7) of the *YCJA*, the original bail jurisdiction would shift to the superior court</u>. This procedure would mirror that for adults under the Code.[43]

[42] *BWH*, *supra* note 7.
[43] *BWH*, *supra* note 7, at paras 36-37 [emphasis added].

50. Devine PJ's finding that jurisdiction for bail vests in the superior court at the time of arraignment or committal to stand trial was cited with approval in the 2010 decision of *R v NM*[44], such that the Manitoba approach has been firmly established.

51. Quebec appears to have taken the same approach as Manitoba. In *Protection de la jeunesse*[45], the youth accused was charged with second-degree murder and was first deemed to have elected trial by judge and jury, then formally entered that election. He filed a motion for judicial interim release in superior court. Prior to the scheduled bail hearing date, the young person sought an adjournment of that application but was advised by the Court that a hearing was required on the issue of jurisdiction.

52. Di Salvo J concluded that the word "proceeding" in section 13(3) *YCJA* is narrow and refers only to trial. She held the Quebec Superior Court did not have jurisdiction to hear the young person's bail application, despite his election to be tried by judge and jury, as he had not yet been committed to stand trial. She held that jurisdiction moves to the superior court for the purposes of bail at the time of committal to stand trial.[46]

iv. The Recent Alberta Approach (*R v TRM* and the decision below): Provincial court youth justice court judges have exclusive jurisdiction over bail for youth charged with s. 469 offences

53. This appeal is primarily predicated upon Renke J's acceptance of the analysis and decision in ***R v TRM***[47].

54. In *TRM*, the youth accused was charged with second degree murder and elected to be tried in the superior court by judge alone. His preliminary hearing commenced in provincial court but was adjourned for continuation approximately two months later. The young person then sought bail in superior court before Ouellette J prior to the continuation of the preliminary hearing.

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[44] See *R v NM*, 2010 MBPC 45, at paras 45-55 [*NM*][TAB 10].
[45] *Protection de la jeunesse*, 2017 QCCS 5165 [TAB 11].
[46] *Ibid*, at para 34.
[47] *TRM, supra* note 6.

55. Ouellette J assessed the various approaches to the issue of jurisdiction for bail arising from the Manitoba case of *BWH*, the Saskatchewan case of *EEW*, the Ontario cases of *MF* and *JB*, and the Alberta case of *TS*. He declined to follow the reasons set out in any of those cases.

56. He held:

> If Parliament had intended to provide concurrent jurisdiction regarding bail for young offenders in relation to a murder charge (s. 469 offences), then it would have said so. The fact is that Parliament chose to grant the exclusive jurisdiction of granting bail to a young person charged with murder to a youth justice court judge, specifically excluding superior court judges. There is no ambiguity as to what s. 33(8) states (English or French), and therefore, no additional powers are conferred to a superior court judge simply because the *YCJA* deems that judge to be a youth justice court judge for the sole purpose of conducting a trial. If Parliament had intended to include "deemed" youth justice court judges in s. 33(8), it would have said so.[48]

v. Errors in the analysis in *R v TRM* and the decision below

i. Statutory Interpretation and the Plain Reading of the YCJA

57. To assess the words and meaning of the pertinent *YCJA* sections upon which this appeal centres, we must recall the first principles of statutory interpretation. This Honourable Court has repeatedly reiterated the approach to be taken to statutory interpretation, as set out in *Rizzo & Rizzo Shoes Inc Ltd (Re)*[49]:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[50]

58. In the present case, while the *YCJA* is not a model of clarity, its aims, as set out in section 3 of the Act, are clear. The *YCJA*'s Declaration of Principle[51] ensures that young persons are afforded enhanced procedural protection (section 3(1)(b)(ii)); that young persons are entitled to promptness in which those responsible for enforcing the *YCJA* must act given "young persons'

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[48] *TRM*, *supra* note 6, at para 64 [emphasis added]. This passage was cited in Transcript of Proceedings, p 14 ll 4-11.
[49] *Rizzo & Rizzo Shoes Inc Ltd (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27 [*Rizzo*][TAB 12]
[50] *Rizzo*, *supra* note 49, at para 21.
[51] See *YCJA* Declaration of Principle [Appendix E].

perception of time" (section 3(1)(b)(v)); and that the *YCJA* "shall be liberally construed" to ensure young persons are dealt with in accordance with the Act's guiding principles (section 3(2)).[52]

- ***Defining "youth justice court" and "youth justice court judge"***

59. Section 13 of the *YCJA* sets out the designation of a youth justice court, and defines a youth justice court judge.[53] Presumptively, the youth justice court is any court which may be designated or established under the *YCJA* in a given province or territory. In Alberta, it is the Provincial Court of Alberta. A judge of the youth justice court is a youth justice court judge.[54] Pursuant to section 14(1) of the *YCJA*, a court sitting as the youth justice court has exclusive jurisdiction over young persons charged with criminal offences.[55]

60. While in Alberta the provincial court is presumptively the youth justice court, there are circumstances where a young person is entitled to an election as to mode of trial. These are set out in section 67 of the *YCJA*.[56] Two of these applied to the Appellant: he was over 14 years of age on the alleged offence date and the Crown had given notice to seek an adult sentence (section 67(1)(b)), and he was charged with an office set out in section 469 of the *Criminal Code* (section 67(1)(d)).

61. Where an accused elects (as the Appellant did) to be tried in the superior court, sections 13(2) and 13(3) deem that court to be the youth justice court, and a judge of that court to be a youth justice court judge, "for the purpose of the proceeding". Where a judge of the superior court is deemed to be a youth justice court judge, that judge also retains the jurisdiction and powers of a judge of a superior court of criminal jurisdiction.[57] Where an accused elects a mode of trial in the superior court (thus deeming the superior court the youth justice court and the superior court judge a youth justice court judge) and requests a preliminary inquiry, the *YCJA* specifies that the

[52] See *YCJA* ss 3(1)(b)(ii), 3(1)(b)(v), and 3(2) [Appendix E].
[53] See *YCJA* s 13 [Appendix D].
[54] See *YCJA* s 13(1) [Appendix D].
[55] See *YCJA* s 14 [Appendix F].
[56] See *YCJA* s 67 [Appendix B].
[57] See *YCJA* s 14(7) [Appendix F].

preliminary inquiry will be conducted by a judge of the youth justice court as defined in section 13(1), that is, a provincial court judge.[58]

- ***Interpreting the YCJA bail provisions in their ordinary context***

62. The bail regime set out in the *Criminal Code* is to be followed except where it conflicts with the bail provisions set out in sections 28 and 33 of the *YCJA*[59]. Ouellette J's interpretation of section 33 of the *YCJA* in *TRM*, followed by Renke J in the Appellant's case, requires fulsome examination as it grounds the recent Alberta approach to which level of court has jurisdiction over youth bail in murder cases.

63. While the *YCJA* is at times difficult to interpret, its bail sections, in their grammatical and ordinary sense, are clear and can be interpreted based on their plain meaning.

64. The starting point for bail when an accused (youth or adult) is arrested and taken before a justice is section 515 of the *Criminal Code*.[60] That section requires a "justice" (defined as a justice of the peace or provincial court judge) to release any person, except persons charged with section 469 offences (such as murder), unless the prosecutor can show cause why the person should be detained. To that point, the procedure for youths and adults is the same, namely, that a justice of the peace can release anyone except a person charged with a section 469 offence such as murder.

65. If a justice of the peace adjudicates the bail of a young person, however, the provisions of the *YCJA* take over and create a different regime. Section 33(1) *YCJA* states that where a justice of the peace adjudicates the bail application of a young person, a subsequent application for release or detention (as the case may be) may be made to a youth justice court judge, and the youth justice court judge shall hear the matter as an original application. A young person charged with an offence (other than an offence in section 469) who is denied bail by a justice of the peace may therefore speak to bail afresh before a youth justice court judge.

[58] See *YCJA* s 67(7) [Appendix B].
[59] See *YCJA* ss 28 and 33 [Appendix G and C].
[60] See *Criminal Code* s 515 [Appendix H]

66. *YCJA* sections 33(5), 33(7) and 33(8) then clarify section 33(1) and its interplay with the *Criminal Code* bail provisions:

> ***33(5)*** *An application under section 520 or 521 of the Criminal Code for a review of an order made in respect of a young person by a youth justice court judge who is a judge of a superior court shall be made to a judge of the court of appeal.*[61]
>
> ***33(7)*** *No application may be made under section 520 or 521 of the Criminal Code for a review of an order made in respect of a young person by a justice who is not a youth justice court judge.*[62]
>
> ***33(8)*** *If a young person against whom proceedings have been taken under this Act is charged with an offence referred to in section 522 of the Criminal Code*[63]*, a youth justice court judge, but no other court, judge or justice, may release the young person from custody under that section.*[64]

67. To interpret the meaning of these subsections, we must begin with the context of section 33: justices of the peace can release young persons on all non-section 469 offences. However, if a justice of the peace adjudicates a young person's bail application, a subsequent application can be made before a youth justice court judge, not as a review, but as an *original* application. If an order granting or denying release is made by a youth justice court judge who is a judge of the provincial court, that order may be reviewed on application to a judge of the superior court, as set out in sections 520 and 521 of the *Code*.

68. If an order granting or denying release has been made by a superior court judge sitting as a youth justice court judge, an application for review under section 520 or 521 of the *Code* would be made to the Court of Appeal, as set out in section 33(5) *YCJA*.

69. Section 33(7) *YCJA* exists to clarify that sections 520 and 521 of the *Code* may not be used to review a decision of a justice of the peace in relation to a young person's bail. This is because

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[61] *YCJA* s 33(5) [Appendix C].
[62] *YCJA* s 33(7) [Appendix C].
[63] See section 522 of the *Criminal Code* referencing section 469 offences, which include murder [Appendix I].
[64] *YCJA* s 33(8) [Appendix C].

under section 33(1), a review of a justice of the peace's decision can be done on the application of the young person or prosecutor in the youth justice court (provincial court).

70. Finally, section 33(8) *YCJA*, the interpretation of which much of Ouellette J's decision in *TRM* centres upon, simply states that a young person charged with a section 522 offence may be released on bail only by a youth justice court judge. This section clarifies section 33(1) by informing the reader that unlike young persons charged with other offences, those charged with offences under section 469 of the *Code* cannot seek bail before a justice of the peace.

71. The drafters of the *YCJA* presumably referenced section 522 of the *Code*, rather than section 469 directly, to signal that just as there are restrictions on which court, judge, or justice can release an adult charged with a 469 offence, so too are there restrictions for youths charged with those offences. In other words, section 33(8) *YCJA* exists to make it clear that just as adults charged with section 469 offences cannot be released by justices of the peace, neither can young persons.

72. The following charts summarize the routes through the bail system for adults and young persons:

ADULT ACCUSED

Non-Section 469 Offences	**Section 469 Offences**
• Justices of the peace and provincial court judges have concurrent jurisdiction over bail (s. 515 *CC*) • Once a justice of the peace or provincial court judge adjudicates on a bail application, any review occurs by application to the superior court (ss. 520 & 521 *CC*)	• Justices of the peace and provincial court judges have no jurisdiction to release a person (s. 515(1) *CC*) • Bail may only be granted by a judge of the superior court (s. 522 *CC*) • A review of any bail decision made under s. 522 is to the Court of Appeal (s. 680 *CC*)

YOUTH ACCUSED

Non-Section 469 Offences	**Section 469 Offences**
• A justice of the peace or a provincial court judge can adjudicate over bail (s. 515 *CC*) • If a justice who is not a youth justice court judge (ie. a justice of the peace) adjudicates on bail, an application can be brought before a youth justice court judge, who will hear it as an original application (s. 33(1) *YCJA*) • A decision on bail of a youth justice court judge who is a judge of the provincial court may be reviewed by a judge of the superior court (ss. 520 & 521 *CC*) • A decision on bail of a youth justice court judge who is a judge of the superior court may be reviewed by a judge of the Court of Appeal (s. 33(5) *YCJA*)	• A justice of the peace has no jurisdiction to release a young person (s. 515(1) *CC*) • Bail may only be granted by a youth justice court judge (s. 33(8) *YCJA*) • A review of any bail decision by a youth justice court judge under s. 33(8) is to the Court of Appeal (s. 33(9) *YCJA*)

ii. The interpretation of s 33(8) by Ouellette J and followed by Renke J is incorrect and does not arise on a plain reading of the Act

73. While Ouellette J cited the correct principles of statutory interpretation in *TRM*, the Appellant submits that his analysis of the relevant bail sections, then adhered to by Renke J, was erroneous.

74. Ouellette J began his analysis of section 33 as follows:

> Section 33(1) provides an additional option to either the young person or the Crown in relation to all non-s. 469 offences if the first order under s. 515 was made by a justice of the peace. Section 33(1) provides that in such a case, the young person or the Crown, as the case may be, may seek a hearing before a youth justice court judge (which includes a provincial vourt [*sic*] judge) and the matter will then be heard as an original application. Following a decision of the youth justice court judge, a young person has the same access as an adult to the provisions for review before a superior court judge, as provided for in ss. 520(1) and 521(1) of the *CC*. The right of review of an order of the justice of the peace or youth justice court judge is no different than that which is available to an adult because the *YCJA* does not contain sections similar to

> ss. 520(1) and 521(1) and therefore they would apply as they are not inconsistent with any provisions contained in s. 33 of the *YCJA* (s. 28 *YCJA*).
>
> If the youth justice court judge who made the order is a superior court judge, an application for review under s. 520 or s. 521 *CC* is to be made to a judge of the court of appeal (s. 33(5) *YCJA*). Section 33(7) also confirms that ss. 520 and 521 of the *CC* apply to a young person. It provides that a review under those sections to a superior court judge can only be made in relation to an order of a youth justice court judge, and not from a justice of the peace.[65]

75. It is submitted that to this point, the analysis is correct. The errors in Ouellette J's reasoning then arise in the following passage:

> The purpose of s. 33(5) is to allow an additional level of review for a young person, which does not exist for an adult in relation to all offences except s. 469. An adult charged with any non-s. 469 offence is limited to a review of the decision of the justice of the peace or provincial court judge to a superior court judge (s. 520(1)). However, a young person charged with any non-s. 469 offence is entitled to seek a review of a decision of the superior court judge made pursuant to s. 520(1) or s. 521(1) and that review will be conducted by a judge of the Court of Appeal.
>
> In summary, the release provisions contained in the *YCJA* provide a young person charged with any non-s. 469 offence two additional remedies of review (s. 33(1) and s. 33(5)), not available to an adult under the *CC*. The procedures and rights as contained in part XVI of the *CC* as supplemented in Part 3 (s. 33) of the *YCJA* apply to all non-s. 469 offences and apply irrespective of the election, whether it be a youth justice court judge, superior court judge without a jury or superior court judge with a jury.
>
> In relation to a young person charged with a s. 469 offence such as murder, s. 33(8) of the *YCJA* explicitly provides that only a youth justice court judge may release a young person from custody. On a plain reading, it is clearly inconsistent with s. 522 of the *CC* relating to an adult charged with murder which allows release only by a judge in a superior court of criminal jurisdiction.
>
> The question is whether the youth justice court judge referred to in s. 33(8) includes a superior court judge who is deemed to be a youth justice court judge under s. 13(2) and s. 13(3).[66]

He then concluded that the answer to that question was "no".

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[65] *TRM, supra* note 6, at paras 40-41.
[66] *TRM, supra* note 6, at paras 42-45 [emphasis added].

76. With due respect to Ouellette J, his interpretation of section 33 of the *YCJA* neither arises on plain reading, nor aligns with the guiding principles of the Act. That interpretation, followed by Renke J in the Appellant's case, is erroneous for several reasons.

77. First, section 33(8) of the *YCJA* clarifies that where a young person is charged with an offence under section 522 of the *Code*, he or she can only be released by a youth justice court judge (not a justice of the peace, nor a judge sitting not as a youth justice court judge).

78. By clarifying that only a youth justice court judge can release a young person charged with an offence referred to in section 522, section 33(8) does nothing to detract from the meaning of "youth justice court judge" as set out in section 13 of the *YCJA*.

79. Secondly, Ouellette J finds that the section 520 or 521 review described in section 33(5) of the *YCJA* essentially contemplates a review of a review. The suggestion on his reading is that section 33(5) applies when a young person has already sought a review from the decision of a youth justice court judge (provincial court judge) to a superior court judge sitting as a youth justice court judge, which the young person then wishes to have reviewed again.

80. That interpretation is simply not borne out by a plain reading of the section. Section 33(5) is clear in its language that an application for a review of an order "by a youth justice court judge who is a judge of a superior court" is made to the Court of Appeal. In other words, it contemplates a superior court judge (sitting as a youth justice court judge) making an adjudication on bail <u>in the first instance</u>, and specifies that an application to review that decision shall be made to a judge of the Court of Appeal. This differs from the adult system, in which accused persons must seek a review of an adjudication on bail in the first instance in superior court.

81. Section 33(5) does not refer to a bail review application arising from a decision of a superior court judge which itself arose from a review of a provincial court judge's decision. In circumstances where a superior court judge is reviewing a youth bail decision under section 520 or 521 of the *Code*, the superior court judge is not sitting as a youth justice court judge, but is simply exercising the powers of the superior court of criminal jurisdiction to review a decision by a lower court.

82. It is important to note at this juncture that while Ouellette J and Renke J cite section 14(7) of the *YCJA* as confirming the "true division"[67] between the youth justice court (provincial court) and superior court (deemed youth justice court), that section in fact contemplates a scenario where a youth who is in the midst of a trial in the deemed youth justice court (superior court) can be subject to a bail review under section 520 or 521 of the *Code*. The superior court retains its inherent jurisdiction even during youth trial proceedings. A situation may therefore arise when a deemed youth justice court judge is simultaneously sitting as a bail review judge using the court's inherent jurisdiction. Section 14(7) does not detract in any way from the superior court's jurisdiction as a deemed youth justice court.

83. Section 33(5) of the *YCJA* makes it clear that there is a distinction between superior court judges exercising their inherent jurisdiction and superior court judges sitting as deemed youth justice court judges for the purpose of bail. The language in the section is unambiguous: "a youth justice court judge who is a judge of a superior court". Parliament clearly contemplated superior court judges making adjudications on bail in the first instance. Parliament specifically legislated a path to review the decision of a superior court judge sitting as a youth justice court judge for the purpose of bail, which is different than the path set out for adults.

84. If it is the case that a young person can appear before a superior court judge sitting as a youth justice court judge seeking release in the first instance on a non-section 469 offence under section 33(5) *YCJA*, it is unreasonable to conclude that a young person charged with a section 469 offence cannot. The same legislative scheme which is intended in the former instance to create a system of enhanced procedural protection cannot be held in the latter instance to detract from that same protection. It must be the case that a young person charged with murder, the most serious offence in the *Criminal Code*, is afforded the same procedural protections within the scheme of the *YCJA* as a young person charged with an offence such as assault causing bodily harm who is given an election as to mode of trial. In both cases, the young person's election as to mode of trial gives rise to his or her *choice* of youth justice court for the purpose of seeking bail.

85. The misunderstanding of *YCJA* section 33(5) then gives rise to the critical error of statutory interpretation put forth in *TRM*. Section 33(5) is predicated on the notion that a superior court

[67] Transcript of Proceedings, p 15 ln 14, citing *TRM*, *supra* note 6, at para 60.

judge can sit as a youth justice court judge for the purpose of bail. While this section can be said to apply only to non-section 469 offences, the way in which the superior court judge *obtains* jurisdiction over youth criminal charges is the same for section 469 offences like murder. That is, *YCJA* sections 13(2) and 13(3) deem the superior court the youth justice court in situations where the young person has made an election to that court or is deemed to have elected to be tried there, regardless of whether the charges fall under section 469 of the *Code* or not.

86. In *either case* the language of sections 13(2) and 13(3) is the same: "the court is deemed to be a youth justice court for the purpose of the proceeding". If it is true that a superior court judge can be a deemed youth justice court judge for the purpose of bail under *YCJA* section 33(5), and that jurisdiction arises from one of section 13(2) or 13(3), then it must also be true that a deemed youth justice court judge can acquire jurisdiction over bail for a section 469 offence. Put another way, if it is true that the word "proceeding" in sections 13(2) and 13(3) refers only to trial as Ouellette J and Renke J held, then section 33(5) of the *YCJA* would be inconsistent and have no place within the scheme of the Act.

87. The *YCJA* must be liberally construed to meet its aims[68]. The clearest interpretation of section 33 is also the more liberal, which is to allow young persons charged with serious offences to address bail in the court they have elected to be their youth justice court. Contrary to Ouellette J's finding that Parliament would have included "deemed" youth justice court in *YCJA* section 33(8) had it intended it to be there, no more needs to be read into that section than what is already stated. That is, a young person charged with a section 469 offence can seek bail before a youth justice court judge as that phrase is defined in the Act. That will presumptively be a provincial court judge under section 13(1), but is deemed to be a judge of the superior court where the young person elects a mode of trial in the superior court, as set out in sections 13(2) and 13(3).

88. It is clear from reading the *YCJA* in its entire context that Parliament intended superior court judges deemed to be youth justice court judges to exercise the function of youth justice court judges beyond simply presiding over the trial.

[68] See *YCJA* Declaration of Principle [Appendix E].

89. If Parliament intended superior court judges to be deemed youth justice court judges only for the purposes of presiding over a young person's trial, it would have said so in sections 13(2) and 13(3). Instead, Parliament used the word "proceeding" (English text) and "*procédures en cause*" (French text). Parliament could easily have used the word "trial" or "*procès*" if that is what was intended.

90. As the Court stated in the Ontario case of *JB*[69]:

> In my view, the word "proceeding" is a far broader term than the word "trial" and encompasses all aspects of the case, not merely the trial itself. If Parliament had intended these provisions to apply only to the trial proper, it would have used the word "trial" rather than "proceeding". In my view, there is no logical basis for restricting the word "proceeding" to only the trial portion of the proceeding. There is no requirement within the legislation to interpret it in this manner, nor is such an interpretation more consistent with the context or purpose of the legislation.

91. Moreover, if Parliament intended superior court judges to be deemed as youth justice court judges only for trials, while all other functions of a youth justice court judge remained in the provincial court, section 67(7) of the *YCJA* would be redundant. That section states that where a young person elects a mode of trial in the superior court but requests a preliminary inquiry, that preliminary inquiry will be conducted by a section 13(1) youth justice court judge (a provincial court judge). The existence of section 67(7) only makes sense if Parliament intended that once a young person elects a mode of trial in the superior court, the superior court judge fulfills all functions of a youth justice court judge *except* presiding over a preliminary inquiry.

vi. The Saskatchewan, Ontario and Previous Alberta Approach is the Correct One

i. A broad interpretation of "proceeding" is required

92. If, as Renke J held, "proceeding" should be interpreted narrowly as referring only to trial, absurd situations not intended by the *YCJA* would result.

93. As noted above, section 33(5) of the *YCJA*, which applies to non-section 469 offences and contemplates bail before a superior court judge sitting as a youth justice court judge, would be redundant if "proceeding" referred only to trial. If a superior court judge sitting as a youth justice

[69] *JB*, *supra* note 37, at para 24.

court judge can hear a young person's bail application on a non-section 469 offence arising from an election to trial in that court (which is clear on plain reading of the *YCJA*), it must also be true that a judge of that court can hear a young person's bail application on a section 469 offence following an election of mode of trial in that court. This is because the sections deeming the superior court as a youth justice court encompass both section 469 *Criminal Code* offences and other offences for which young persons are given an election.

94. In addition, the process with respect to sentence reviews arising from the *YCJA* would become absurd if the *TRM* approach were followed. Sections 59 and 106-109 of the *YCJA* deal with sentence reviews of non-custodial and custodial sentences, respectively[70]. Each section states that the review shall be in the youth justice court (and therefore presided over by a youth justice court judge). If a young person elects to be tried in superior court and is thereafter convicted and sentenced to a custody and supervision order, sections 106-109 would govern the procedure in the event of an alleged breach.

95. If "proceeding" in sections 13(2) and 13(3) was intended to refer only to trial, youth accused would face an unfair and irrational review procedure. A young person who proceeded to trial in provincial court would have his or her alleged breach heard by the same judge who presided over their trial and was aware of their personal circumstances in crafting a fit sentence, while one who proceeded to trial in superior court would be forced to appear for a review before a different judge from a different court who is otherwise unfamiliar with that young person.

ii. Exclusive vs. Concurrent Jurisdiction over Judicial Interim Release

96. The Appellant submits that the Saskatchewan Court of Appeal's finding that the election to be tried in superior court triggers the jurisdiction of that court as the youth justice court, which then gives it *exclusive* jurisdiction over judicial interim release, is the correct view:

> Subsection 33(8) is the operative provision of s. 33 in this case, as it allows the interim release from custody of young persons charged with s. 522 offences (which are s. 469 offences) by youth justice court judges and, at the same time, prohibits interim release from custody of a such young persons by any court, judge or justice other than a youth justice court judge. This conflicts with s. 522, which prohibits release of s. 469 offenders by any judges

[70] See *YCJA* ss 59, 106-109 [Appendix J].

> other than superior court judges, but ss. 33(8) must prevail because of s. 28 of the *Act.* The term "youth justice court judge" as used in the subsection is defined by ss. 2(1) and refers to a ss. 13(1) judge, a ss. 13(2) judge or a ss. 13(3) judge as the case may require. Nothing in these provisions is in conflict with the view that ss. 13(2) comes into effect with respect to s. 469 offenders at the time of election of mode of trial.[71]

97. On this same point, Renke J cited the following passage from *TRM*:

> The fact is that Parliament chose to grant exclusive jurisdiction of granting bail to a young person charged with murder to a youth justice court judge, specifically excluding superior court judges. There is no ambiguity as to what 33(8) states in English or French, and therefore, no additional powers are conferred to a superior court judge simply because the YCJA deems that judge to be a youth justice court judge for the sole purpose of conducting a trial. If Parliament had intended to include 'deemed' youth justice court judges in 33(8), it would have said so.[72]

98. The Appellant submits that this reasoning is flawed. Parliament did not specifically exclude superior court judges from granting bail to young persons charged with murder. Rather, Parliament stated that only a youth justice court has jurisdiction to hear a youth bail application in relation to a section 522 *Criminal Code* offence. In turn, Parliament deemed the superior court the youth justice court for the "purpose of the proceeding" following an election to that court. The questions are *for what purpose* a superior court is deemed by section 13(2) to be a youth justice court and *which court is the youth justice court* for the purpose of section 33(8). While different courts have found jurisdiction vests in the superior court at different times, be it at the time of election or the time of committal to stand trial, the approach across all provinces, excluding Alberta, is that a superior court judge sitting as a youth justice court judge can hear the judicial interim release application of a youth charged with murder. That jurisdiction is exclusive and does not exist concurrently with the provincial court youth justice court.

iii. Timing of deeming a youth justice court and YCJA Section 67

99. Courts in Manitoba and Quebec have held that it is the committal to stand trial, rather than the entering of an election as to mode of trial, which gives the superior court jurisdiction over bail.

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[71] *EEW*, *supra* note 30, at para 19.
[72] Transcript of Proceedings, p 14 ll 4-11, citing *TRM*, *supra* note 6, at para 64 [emphasis added].

It is submitted this was not the intention of Parliament, and that section 67(7) of the *YCJA* clearly refutes this view.

100. The Saskatchewan Court of Appeal commented upon section 67(7) of the *YCJA* in *R v EEW*:

> [R]eference should be made to ss. 67(7) of the *Act*, which provides that where a young person elects to be tried by a judge without a jury, or elects or is deemed to have elected trial by a judge and jury, and either the prosecutor or the young person requests a preliminary inquiry, "the youth justice court referred to in ss. 13(1)" shall conduct the preliminary inquiry. This subsection is notable in that it is the only place in the *Act* (other than in s. 13 itself) that a distinction is made between ss.13(1) youth justice court judges and other youth justice court judges. The distinction is made necessary because otherwise, in the case of s. 469 offenders, the preliminary inquiry would have to be conducted by a ss. 13(2) or ss. 13(3) judge.[73]

101. As noted by the Saskatchewan Court of Appeal, a young person who elects to be tried in superior court can also request a preliminary inquiry. Section 67(7) makes it clear that the preliminary inquiry is conducted in youth justice court as defined in section 13(1); that is, provincial court. Section 67(7) then states that if on the conclusion of the preliminary inquiry the young person is ordered to stand trial, "the proceedings" shall be conducted before a judge or judge and jury as the case may be.

102. Sections 13(2) and 67(7) must be read together. If, as has been the approach in Manitoba and Quebec, a superior court is not entitled to exercise the functions of a youth justice court until the time of committal to stand trial, there would be no need to state that a preliminary inquiry must be held in the section 13(1) youth justice court (provincial court) as all proceedings prior to committal would necessarily occur there.

103. As is the case with section 33, the plain reading of section 67(7) is also the one which affords the most liberal interpretation of the Act. Section 67(7) exists to clarify that the provincial court youth justice court carries jurisdiction over a young person's preliminary inquiry even though jurisdiction vests in the superior court at the time of the young person's election. Section 67(7) only fits within the scheme of the *YCJA* if Parliament intended the superior court to exercise all

[73] *EEW, supra* note 30, at para 20 [emphasis added].

functions of the youth justice court from the time of election, *except* conducting a preliminary inquiry.

iv. Charter Considerations and the Practical Effect of the Recent Alberta Approach

104. The *YCJA* is clear in its aim of ensuring enhanced procedural protections, promptness, and speed in enforcing its provisions, given young persons' perception of time[74]. These aims must be met to comply with *Charter* sections 7 and 11(b)[75]. As Cromwell, J stated in *R v Godin*, section 11(b) of the *Charter* protects "liberty, as regards to pre-trial custody or bail conditions".[76] That principle is nowhere more important than when applied to in-custody youth accused.

105. Youth accused are not only entitled to procedural certainty as they wade through the justice system, they are also entitled to timely access to justice. If the approach in *TRM* and affirmed by Renke J in the present case is followed, a youth charged with murder and awaiting trial within one level of court would be required to seek bail in another.

106. In addition to the need for certainty in criminal law across Canada, other practical issues arise in relation to bail applications for youth accused. While larger urban centres have youth justice courts and judges specifically dedicated to applying and upholding the principles of the *YCJA*, smaller centres, such as the jurisdiction in which the Appellant faced his criminal charge, might have only one or two sitting judges tasked with hearing all manner of cases, including adult criminal, youth, family, and civil matters.

107. Moreover, a youth accused might repeatedly find him or herself before the same local provincial court judges on numerous occasions, and might therefore make the strategic decision to elect to proceed to trial before a superior court judge in order to have a fresh audience for all proceedings, including bail. This was the case for the Appellant.[77]

108. In *NM*, the Court noted the *Charter* implications which arise from procedural uncertainties relating to bail matters:

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[74] See *YCJA* ss 3(1)(b)(iii) and 3(1)(b)(v) [Appendix E].
[75] *Canadian Charter of Rights and Freedoms*, Being Part I of the Constitution Act, 1982.
[76] *R v Godin*, 2009 SCC 26, at para 30 [not reproduced].
[77] Transcript of Proceedings, p 3 ll 8-16.

> [T]he legislation concerning bail for youths as well as for adults seems to be confusing and procedurally complex. This is regrettable and broadly inconsistent with sections 7 and 11 of the Canadian Charter of Rights and Freedoms, which provide important guarantees concerning the liberty of Canadians, including the right not to be denied reasonable bail without just cause. Procedural issues can thwart substantive rights. Perhaps the old adage "justice delayed is justice denied" is no where more appropriately intoned than when dealing with bail matters. That observation is particularly appropriate in the context of a youth justice system. That is because the criminal justice system for youths must emphasize "the promptness and speed with which persons responsible for enforcing [the Youth Criminal Justice Act] must act, given young persons' perception of time."[78]

109. From a practical perspective, the approach set out in *TRM* would create procedural delays which would only further detract from the protections of the *Charter* in youth matters.

110. The following hypothetical is demonstrative of the potential for delay if the *TRM* approach is followed: A young person charged with second degree murder elects to be tried in superior court by judge alone. The young person waits several months for trial but refrains from seeking bail as he has a long youth record for violent offences and is known to the local youth court bench.

111. The young person's trial finally begins, but a key Crown witness takes ill such that the Crown requires an adjournment and the next available dates are several weeks in the future. The adjournment is granted by the Court. The young person wants to apply for release given the delay in the trial. The Crown is opposed to release. The trial judge refuses to hear the bail application citing a lack of jurisdiction over that type of proceeding. The youth is then required to set a date in the provincial youth justice court, on some date thereafter, to apply for bail before a youth court judge who has no familiarity with the case nor knowledge of the circumstances surrounding the adjournment. This cannot have been the intention of Parliament.

112. The *YCJA* must be liberally construed to meet the unique goals of the youth criminal justice system[79]. This must include allowing young persons who are entitled to an election to have their bail adjudicated in the court of their choosing, in accordance with that election.

[78] *NM, supra* note 44, at para 3.
[79] See *YCJA* s 3(2) [Appendix E].

C. Conclusion

113. The Appellant comes before this Honourable Court seeking not only to achieve clarity in the law on the bail procedure to be followed in murder cases involving youth accused, but also to ensure the most expansive and liberal interpretation of the *YCJA* in accordance with its stated principles.

114. The view in the decision below is a narrow one and has the real potential to limit the enhanced procedural protections that are a hallmark of the youth criminal justice system in Canada. This is especially troubling in cases involving Indigenous youth charged with murder on reserve, like this one. The Appellant respectfully urges this Court to give effect to the most liberal view of the *YCJA*, which would establish the superior court as the deemed youth justice court *at the time of election* as to mode of trial.

Part IV - Costs

115. The Appellant does not seek costs on this appeal, and respectfully requests that no costs be ordered against him.

Part V - Relief Sought

116. The Appellant seeks an order that the appeal be allowed, and that the decision of Justice Renke, dated October 9, 2019, be set aside.

Part VI - Impact of Any Publication Ban on the Court's Reasons

117. The name of the Appellant may not be published pursuant to s. 110 of the Youth Criminal Justice Act. Accordingly, the court's reasons must refrain from mentioning the Appellant's name. In the Appellant's submission, there are no other restrictions on the court's reasons.

All of which is respectfully submitted this 16 day of June, 2020.

Graham Johnson
Dawson Duckett Garcia & Johnson
Counsel for the Appellant

Part VII – Table of Authorities

Case Law	Paragraph No.
R v TRM, 2013 ABQB 571	7, 8, 11, 12, 14, 16, 17, 18, 53, 54, 62, 70, 73, 85, 94, 97, 105, 109, 110
R v BWH, 2005 CanLII 57045 (MBPC)	11, 15, 17, 46, 48, 55
R v TS, 2006 ABQB 631	18, 44, 55
Borowski v Canada (Attorney General), 1989 CanLII 123 (SCC)	19, 21, 27, 30
R v Oland, 2017 SCC 17 (CanLII)	28, 29, 31, 32, 33
R v Myers, 2019 SCC 18 (CanLII)	28, 32, 33
R v EEW, 2004 SKCA 114	36, 46, 55, 100
R v F(M), 2006 ONCJ 161 (CanLII)	40
R v JB, 2012 ONSC 4957	42, 55, 90
R v NM, 2010 MBPC 45	50, 108
Protection de la jeunesse, 2017 QCCS 5165	51
Rizzo & Rizzo Shoes Inc Ltd (Re), 1998 CanLII 837 (SCC)	57
R v Godin, 2009 SCC 26	104

Appendix	Paragraph No.
Section 40, *Supreme Court Act*, RSC 1985, c S-26 L'article 40, *Loi sur la Cour suprême* (L.R.C. (1985), ch. S-26)	1
Section 67, *Youth Criminal Justice Act, SC 2002, c 1* L'article 67, *Loi sur le système de justice pénale pour les adolescents* (L.C. 2002, ch. 1)	6, 11, 14, 16, 34, 41, 43, 45, 49, 60, 67, 91, 99, 100, 101, 102, 103

Section 33, *Youth Criminal Justice Act, SC 2002, c 1* L'article 33, *Loi sur le système de justice pénale pour les adolescents* (L.C. 2002, ch. 1)	7, 11, 12, 33, 36, 41, 42, 56, 62, 65, 66, 67, 68, 69, 70, 71, 74, 75, 76, 77, 78, 79, 80, 81, 83, 84, 85, 86, 87, 93, 96, 97, 98, 103
Section 13, *Youth Criminal Justice Act, SC 2002, c 1* L'article 13, *Loi sur le système de justice pénale pour les adolescents* (L.C. 2002, ch. 1)	11, 13, 14, 16, 34, 36, 37, 38, 39, 41, 42, 43, 44, 45, 49, 52, 59, 61, 75, 78, 85, 86, 87, 88, 89, 91, 95, 96, 98, 100, 102
Section 3, Declaration of Principle, *Youth Criminal Justice Act, SC 2002, c 1* L'article 3, *Loi sur le système de justice pénale pour les adolescents* (L.C. 2002, ch. 1)	58, 87, 104, 112
Section 14, *Youth Criminal Justice Act, SC 2002, c 1* L'article 14, *Loi sur le système de justice pénale pour les adolescents* (L.C. 2002, ch. 1)	11, 16, 59, 82
Section 28, *Youth Criminal Justice Act, SC 2002, c 1* L'article 28, *Loi sur le système de justice pénale pour les adolescents* (L.C. 2002, ch. 1)	62, 74, 96
Section 515, *Criminal Code of Canada, RSC 1985, c C-46* L'article 515, *Code criminel* (L.R.C. (1985), ch. C-46)	64, 74
Section 522, *Criminal Code of Canada, RSC 1985, c C-46* L'article 522, *Code criminel* (L.R.C. (1985), ch. C-46)	12, 41, 70, 71, 75, 77, 78, 96, 98
Section 59, *Youth Criminal Justice Act, SC 2002, c 1* L'article 59, *Loi sur le système de justice pénale pour les adolescents* (L.C. 2002, ch. 1)	94

Section 106-109, *Youth Criminal Justice Act*, *SC 2002*, *c 1* L'articles 106-109, *Loi sur le système de justice pénale pour les adolescents* (L.C. 2002, ch. 1)	94