File Number: 38861

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

APPELLANT
(Respondent)

and

CHIHEB ESSEGHAIER AND RAED JASER

RESPONDENTS
(Appellants)

FACTUM OF THE APPELLANT, HER MAJESTY THE QUEEN IN RIGHT OF CANADA

(Pursuant to Rule 35 of the Rules of the *Supreme Court of Canada*)

Public Prosecution Service of Canada
Ontario Regional Office
130 King Street West, Suite 2400, Box 340
Toronto, Ontario, M5X 2A2

Kevin Wilson
Amber Pashuk
Tel: (416) 973-0026
Fax: (416) 973-8253
E-mail: kevin.wilson@ppsc-sppc.gc.ca
amber.pashuk@ppsc-sppc.gc.ca

Counsel for the appellant

Kathleen Roussel
Director of Public Prosecutions
160 Elgin Street, 12th floor
Ottawa, Ontario, K1A 0H8

Per: François Lacasse
Tel.: (613) 957-4770
Fax: (613) 941-7865
E-mail: flacasse@ppsc-sppc.gc.ca

Ottawa agent for the appellant

Embry Dann LLP
116 Simcoe Street, Suite 100
Toronto, Ontario M5H 4E2

Dean Embry
Erin Dann
Tel.: (416) 868-1203
Fax: (416) 868-0269
Email: dembry@edlaw.ca

Counsel for the respondent, Chiheb Esseghaier

Supreme Law Group
900 - 275 Slater Street
Ottawa, Ontario K1P 5H9

Moira Dillon
Tel.: (613) 691-1224
Fax: (613) 691-1338
Email: mdillon@supremelawgroup.ca

Ottawa agent for the respondent, Chiheb Esseghaier

Addario Law Group LLP
171 John Street, Suite 101
Toronto, Ontario M5T 1X3

Megan Savard
Tel.: (416) 979-6446
Fax: (866) 714-1196
Email: msavard@addario.ca

Counsel for the respondent, Raed Jaser

Supreme Law Group
900 - 275 Slater Street
Ottawa, Ontario K1P 5H9

Moira Dillon
Tel.: (613) 691-1224
Fax: (613) 691-1338
Email: mdillon@supremelawgroup.ca

Ottawa agent for the respondent, Raed Jaser

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PART I – STATEMENT OF FACTS

A. Overview

1. In 2015, the respondents Chiheb Esseghaier ("Esseghaier") and Raed Jaser ("Jaser") were convicted by a jury of terrorism offences arising primarily from a plan, inspired by Al Qaeda, to derail a VIA Rail passenger train. Both were sentenced to life in prison. On August 27, 2019, the Court of Appeal for Ontario overturned those convictions on the basis of a highly technical error in the jury selection process—conducting the challenge for cause using static triers with full exclusion of sworn and unsworn panel members rather than rotating triers with exclusion of unsworn members only—which did not cause any prejudice to the fair trial rights of either offender.

2. The appellant Her Majesty the Queen appeals that decision on the basis that the Court of Appeal for Ontario erred in law in finding: that the jury selection process in this case necessarily resulted in an improperly constituted jury; that if the jury was improperly constituted in respect of Jaser due to factors specific to him, it necessarily also rendered it improperly constituted for Esseghaier; and that appellate courts are prevented from applying the s. 686(1)(*b*)(iv) curative proviso in respect of procedural errors in jury selections which cause no demonstrable prejudice to the fairness of the trial.

3. The respondents were convicted of the most serious terrorism offences known to Canadian law after nearly 9 months of pre-trial motions and a 3-month jury trial. Overturning these convictions on the basis of a technical error that had no appreciable effect on the conduct of the trial is a triumph of form over substance. The Court of Appeal's formalistic approach and unduly narrow interpretation of the procedural proviso stands at odds with the broad approach articulated by this Court nearly twenty years ago in *R v Khan.*[1] Properly applied, the proviso is wholly capable of curing the entirely harmless procedural irregularity in this case. The convictions should be restored.

[1] *R v Khan*, 2001 SCC 86.

B. The Facts

4. Esseghaier and Jaser were convicted by a jury of the following offences:

- Count One: conspiracy to damage transportation infrastructure with intent to endanger safety (derailing a VIA passenger train) for the benefit of a terrorist group, contrary to ss. 83.2, 248 and 465(1)(*c*) of the *Criminal Code* (Esseghaier only).[2]
- Count Two: conspiracy to commit murder for the benefit of a terrorist group, contrary to ss. 83.2 and 465(1)(*c*) of the *Criminal Code* (Esseghaier and Jaser).
- Counts Three and Four: participating in or contributing to the activity of a terrorist group, contrary to s. 83.18(1) of the *Criminal Code* (Esseghaier and Jaser).
- Count Five: participating in or contributing to the activity of a terrorist group, contrary to s. 83.18(1) of the *Criminal Code* (Esseghaier only).[3]

5. Much of the evidence at trial consisted of the *viva voce* testimony of an undercover FBI agent under the pseudonym Tamer El Noury ("El Noury") and authorized interceptions of his conversations with Esseghaier and Jaser. Most of the evidence related to the "train plot" to derail a VIA Rail passenger train and kill its passengers, which was Esseghaier's preferred plan. Jaser's preferred plan was a "sniper plot" to assassinate prominent persons, and in particular wealthy members of the Jewish community. Both men went on "reconnaissance missions" to examine the railway station in St. Catharines, Ontario and railway bridges at Jordan Harbour, Ontario and East Point Park/Highland Creek in Scarborough, Ontario.[4] The intercepted conversations between Esseghaier, Jaser and El Noury included the following:

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[2] Jaser was also charged with this count, but the jury was unable to reach a unanimous verdict with respect to him.

[3] *Reasons for Sentence* at para 2 [Appellant's Record ("AR"), Vol II, Tab 10, pp 1–2].

[4] *Reasons for Sentence* at paras 14, 17–26 [AR, Vol II, Tab 10, pp 4–15]. Although the jury ultimately did not reach a unanimous verdict with respect to Jaser on Count One (the train plot), the trial judge found that his participation in these reconnaissance missions was still relevant to his role in the general Count Two conspiracy to commit murder.

a. On September 9, 2012, Esseghaier told El Noury that because the armies of America and Canada were spreading "corruption" and "evil" in places like Afghanistan, Somalia and Pakistan, it was their mission "to fight these countries" and "make trouble in their homes." He told El Noury he and Jaser were planning "to make a hole in the bridge of the train" so the train "will go through that hole … and of course the train is full of people, at least two hundred or three hundred people." The objective was "to make sure that they understand that as long as they're over there, their people will not feel safe on this side." [5]

b. In that same conversation, Jaser described his plan to get a "sniper rifle" in order to "fight the leaders of this people." He said this can be done "[e]asily in Canada" because "[t]hey do public speech", "they come to the gay parade", and the Mayor of Toronto takes the subway. He said, "Canada is not the U.S. … But they feel safe. We're gonna change all that." [6]

c. Jaser said they would create and post a video after the train derailment: "You can even hold up a Canadian newspaper or something … We are in the neighbourhood … Get out, get out before we kill you all. Because we want this whole city, the whole country to burn. I could care less who dies. Everyone is a target. They pay taxes, they vote. They're enemies." [7]

d. On September 23, 2012, Esseghaier and Jaser discussed how difficult damaging a railway bridge was, and considered various ways to accomplish it. They agreed that they would go to the Highland Creek bridge the following day to "check all the technical details in the bridge." They invited El Noury to join them.[8] After this discussion, when Jaser and El Noury were alone, Jaser disparaged the train plot: "[T]he whole set up is too much man … very small … twenty thirty people, forty people. And who are they? Slaves. Really, just like you and me, workers. You

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[5] *Reasons for Sentence* at para 22, bullet points 1–3 [AR, Vol II, Tab 10, pp 7–8].
[6] *Reasons for Sentence* at para 22, bullet point 6 [AR, Vol II, Tab 10, p 9].
[7] *Reasons for Sentence* at para 22, bullet point 7 [AR, Vol II, Tab 10, pp 9–10].
[8] *Reasons for Sentence* at para 23, bullet points 1–2 [AR, Vol II, Tab 10, p 10].

know? Sheep. We don't want sheep. We want the wolf. We can get the wolf, brother, we can get the wolf. The G eight summits are here …" [9]

e. During their final reconnaissance mission at the Highland Creek bridge the next day, Jaser, Esseghaier and El Noury were caught walking on the bridge when a GO Transit passenger train passed by. Jaser became frustrated that they had been seen by members of the public. After uniformed police officers later approached them in the parking lot, cautioned them about walking on the bridge, and took down their names and addresses, Jaser argued that the train plot was now compromised because the police would connect it to them. He advocated for the sniper plot: "You think they care about the life of 50 people on a train? … But the expensive Jew, the rich Jew, the Jew that is Zionist … when you take 50 of them out, what happens? You will drive them crazy." Esseghaier wanted to proceed with both plots, but with a different location for the train plot. Jaser said, "Trains man, the problem is … I have to think about it. Me, I don't work like you." After this day Jaser did not participate further.[10]

6. Because of the importance of preserving juror impartiality—especially given the extensive pre-trial publicity the offences had received—the jury selection process included challenges for cause, i.e., formal inquiries into the suitability of each prospective juror, conducted according to processes set out in the *Criminal Code*. Prior to 2008, s. 640(2) of the *Code* had required that each prospective juror's suitability be adjudicated on by "rotating triers": initially two persons appointed by the trial judge, and thereafter the two most recently sworn members of the jury. The trial judge had a *common law* discretion to exclude the unsworn members of the panel from the courtroom during the hearing of the challenges, if it was in the interests of justice to do so, to protect their impartiality against any prejudicial comments made by the panel members being challenged.[11] In 2008, new subsections 640(2.1) and (2.2) of the *Code* gave accused persons the *statutory* option of applying for the exclusion of all jurors—sworn and unsworn—with the suitability of each potential

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[9] *Reasons for Sentence* at para 23, bullet point 3 [AR, Vol II, Tab 10, pp 10–11].
[10] *Reasons for Sentence* at paras 24–26 [AR, Vol II, Tab 10, pp 11–14].
[11] The exclusion of sworn jurors—at least while they are functioning as triers—is obviously incompatible with the rotating trier process.

juror adjudicated by "static triers": two persons appointed for that purpose who themselves do not form part of the jury. Importantly, these provisions did not *entitle* accused persons to the exclusion of any jurors. The default process was rotating triers with the prospective jurors in the courtroom.

7. At the time of trial, the jurisprudence in Ontario was deeply divided about whether the 2008 provisions formed a comprehensive code, prescribing the sole method for excluding jurors during the challenge process, or whether the common law discretion to exclude prospective jurors during a rotating triers process survived. One line of cases, flowing from the decision of Dambrot, J. in *R v Riley*, held that the common law discretion to exclude the panel no longer existed. The trial judge favoured that approach, observing, "I have followed the decision in *Riley* in numerous trials over the past five years, as have most judges in Toronto conducting criminal jury trials." The other line, flowing from the decision of Heeney, J. in *R v Sandham*, held that the discretion to exclude prospective jurors survived the 2008 amendments.[12]

8. Counsel for Jaser wanted the challenges to proceed with rotating triers with the unsworn members of the jury panel excluded. Esseghaier, who was unrepresented but assisted by *amicus*,[13] took no position on jury selection: he declined to rely in any way on the *Criminal Code* or the criminal justice system because of his position that he could only be judged pursuant to the Holy Qur'an.[14] Indeed, he made it a condition of his presence in the courtroom that the trial judge read into the record each day a statement disavowing his participation in the process: "Please take note that Chiheb Esseghaier considers himself as a visitor who gives sincere advice to the people of the courtroom, not as an accused who defends himself in the trial".[15]

9. The trial judge's overarching priority throughout the challenge for cause process was to ensure jury impartiality, especially "in the current climate where public concerns about terrorism offences and Islamic extremism have become pronounced" and where "some of the more recent

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[12] *Reasons for Judgment* (jury selection issues) at paras 35–36 [AR, Vol I, Tab 7, pp 128–129]; *R v Grant*, 2016 ONCA 639 at paras 13, 25; *R v Riley*, [2009] OJ No 1851 (Sup Ct); *R v Sandham*, [2009] OJ No 1853 (Sup Ct).
[13] Amicus was appointed in accordance with the principles set out in *Ontario v CLA of Ontario*, 2013 SCC 43; *Reasons for Judgment* (appointment of amicus curiae) [AR, Vol I, Tab 2].
[14] *Reasons of the Court of Appeal* at paras 7, 35, 50 [AR, Vol II, Tab 14, pp 90, 102, 107].
[15] *Transcript of Proceedings at Jury Selection* (January 23, 2015), p 4, l 29–32 [AR, Vol III, Tab 28, p 114]. The statement was read in the absence of the jury each day.

media coverage has been unusual and, arguably, improper."[16] He emphasized that this was "a case dealing with volatile issues of great public concern, where an unknown number of prospective jurors are likely to hold strong views that could taint other jurors, whether sworn or unsworn."[17] The trial judge was also acutely aware of the importance of taking steps to preserve the impartiality of all jurors, given Esseghaier's history of making political and religious speeches throughout the pre-trial proceedings.[18] This was highlighted by the negative reaction of one member of the panel when Esseghaier began performing his prayers in the prisoners' box, who said, "We are in Canada. Would you please sit down? …Jesus."[19]

10. Because of the conflicting Ontario jurisprudence on the existence of the discretion to exclude the panel in a rotating trier process, the trial judge engaged with counsel on that issue at some length. He specifically asked Jaser's counsel for her position in the event that he found he did not have such a discretion. Counsel expressed that position in writing as follows:

> If, but only if, this Honourable Court is of the view that subsection (2.1) displaces its inherent jurisdiction to order the exclusion of unsworn jurors during the challenge for cause process, the Applicant will make an application pursuant to subsection (2.1) in order to preserve juror impartiality.[20]

11. The trial judge also pressed counsel for Jaser in oral submissions about her position on static triers in the event that he found he *did* have inherent discretion but chose not to exercise it to exclude the panel. In this exchange, it is clear that the trial judge's exercise of discretion was tied to the particular circumstances of this case and that exclusion of the panel was at the core of Jaser's

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[16] *Reasons for Judgment* (jury selection issues) at para 8 [AR, Vol I, Tab 7, p 118].
[17] *Reasons for Judgment* (jury selection issues) at para 42 [AR, Vol I, Tab 7, p 132].
[18] See e.g. *Transcript of Proceedings at Jury Selection* (January 23, 2015), p 11, l 4–p 15, l 30 [AR, Vol II, Tab 14, pp 121–125].
[19] *Transcript of Proceedings at Jury Selection* (January 23, 2015), p 78, l 18–24 [AR, Vol II, Tab 14, p 188]. The prospective juror who made the outburst was excused and was not selected as one of the jurors for trial: *Transcript of Proceedings at Jury Selection* (January 26, 2015), p 21, l 31–p 22, l 5 [AR, Vol IV, Tab 29, pp 23–24].
[20] *Reasons of the Court of Appeal* at para 42 [AR, Vol II, Tab 14, pp 104–105].

request. It was also clear that the trial judge understood that static triers could not be imposed without an application by the accused:

> THE COURT: And **if I'm of the view** that there may still be some room for inherent jurisdiction here, but that **in this particular case**, I would not exercise inherent jurisdiction in a way that solved only half the problem,
>
> MS. DAVIES: Yes.
>
> THE COURT: I would insist on solving the whole problem, --
>
> MS. DAVIES: Um-hm.
>
> THE COURT: -- then you concede at that point that what you are bringing is an application under s. 640(2.1).
>
> MS. DAVIES: Yes. Which is very much our alternative position. If we are faced with the option of having all of the jurors present for the whole jury selection process or having none of them present, then at that point **in order to preserve the interests that we think need to be preserved, we would bring an application under s. 640(2.1),** but that is very much our alternate position.[21] [Emphasis added]

12. The trial judge ultimately ruled that ss. 640(2.1) and (2.2) displaced the common law discretion to exclude the panel, and that he could therefore only exclude the panel if the accused chose static triers.[22] He accepted Jaser's "alternative position" set out above, and directed that the challenges proceed with static triers.[23] He went on to say that if he was wrong, and he did have the discretion to exclude the unsworn members of the panel, he would not exercise that discretion, because exclusion of only the unsworn jurors did not address, "the far greater concern … with tainting the sworn jurors." In his view, juror impartiality was "the fundamental reason for the need to exclude prospective jurors" in this case and the static trier process most thoroughly protected

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[21] *Transcript of Proceedings of Pre-Trial Motions* (December 9, 2014), p 60, l 14–p 61, l 3 [AR, Vol III, Tab 27, pp 61–62].
[22] *Reasons for Judgment* (jury selection issues) at para 42 [AR, Vol I, Tab 7, p 132].
[23] *Reasons for Judgment* (jury selection issues) at paras 43–44 [AR, Vol I, Tab 7, pp 132–133].

juror impartiality.[24] Twenty months later, the Court of Appeal for Ontario held in *R v Grant* that the common law discretion did survive, and that a trial judge can exclude the panel either way.[25]

13. Jury selection proceeded with two static triers who had been vetted by the trial judge with input from counsel.[26] They were asked about their occupations, background, education, and upbringing, as well as their experience with diversity and their own potential biases.[27] Three potential triers were rejected in the process on the basis of answers that arose during the vetting process. Counsel for Jaser approved the two triers that were selected.[28] At one point during the challenge for cause process, the triers disagreed about whether a particular prospective juror was acceptable.[29] After submissions from counsel for Jaser and the Crown, the trial judge exhorted the triers to try to reach a mutual verdict.[30] The triers eventually agreed that the prospective juror was acceptable. The Crown, however, exercised one of its peremptory challenges and whatever issue caused the initial disagreement became moot.[31]

14. After a prospective juror was challenged for cause and accepted by the triers, each of the parties was given the opportunity to exercise their peremptory challenges. Jaser used 12 of his 14 peremptory challenges.[32] The Crown used nine. Esseghaier did not participate in the jury selection

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[24] *Reasons for Judgment* (jury selection issues) at paras 42, 45–46 [AR, Vol I, Tab 7, pp 132–133].
[25] *R v Grant*, 2016 ONCA 639 at paras 34, 37, 39; *Reasons of the Court of Appeal* at para 27 [AR, Vol II, Tab 14, pp 97–98].
[26] *Transcript of Proceedings at Jury Selection* (January 26, 2015), p 59, l 2–13 [AR, Vol IV, Tab 29, p 61]; *Transcript of Proceedings at Trial, Jury Selection* (January 27, 2015), p 19, l 23–p 23, l 5; p 26, l 15–p 30, l 18 [AR, Vol IV, Tab 30, pp 89–93, 96–100].
[27] *Transcript of Proceedings at Trial, Jury Selection* (January 27, 2015), p 14, l 1–p 15, l 28 [AR, Vol IV, Tab 30, pp 84–85].
[28] *Transcript of Proceedings at Trial, Jury Selection* (January 27, 2015), p 22, l 30–p 23, l 5; p 29, l 31–p 30, l 3 [AR, Vol IV, Tab 30, pp 92–93, 99–100].
[29] *Transcript of Proceedings, Jury Selection Continued* (January 28, 2015), p 203, l 18 [AR, Vol V, Tab 31, p 205].
[30] *Transcript of Proceedings, Jury Selection Continued* (January 28, 2015), p 206, l 30–p 208, l 10 [AR, Vol V, Tab 31, pp 208–210].
[31] *Transcript of Proceedings, Jury Selection Continued* (January 28, 2015), p 212, l 13–16 [AR, Vol V, Tab 31, p 214].
[32] *Transcript of Proceedings, Jury Selection Continued* (January 28, 2015), p 154, l 24–26; p 193, l 10; p 224, l 25 [AR, Vol V, Tab 31, pp 156, 195, 226].

process at all. Counsel for Jaser declared that he was content with each of the jurors that were ultimately selected to be on the panel.[33]

15. Both offenders appealed their convictions to the Court of Appeal for Ontario. Esseghaier was still unrepresented, but again had his interests addressed by *amicus*. The appeal was bifurcated, with the first appeal addressing only the issue of whether the jury was properly constituted. All other grounds were deferred to a second appeal if required.[34]

16. On the appeal on the jury selection issue, counsel for Jaser and *amicus* both argued that the jury was improperly constituted, in that the intervening decision in *Grant* had established that the trial judge's determination on the discretion to exclude the panel was wrong in law. The Crown did not dispute that *Grant* had rendered that determination wrong in law. Its position was that the trial judge had properly accepted Jaser's alternative request for static triers, and that he specifically held that he would not have proceeded with rotating triers and an excluded panel *even if* he'd had that discretion.[35] The Crown also took the position that the jury was properly constituted for Esseghaier in any event, because *amicus'* reliance on the technicalities of s. 640 was incompatible with Esseghaier's complete rejection of any reliance on the Canadian criminal justice system.[36]

17. The Court of Appeal unanimously allowed the appeals and ordered a new trial for both offenders. It accepted that the trial judge's finding that he did not have a discretion to exclude the panel during a rotating trier process was wrong in law in light of *Grant*. (The appellant does not contest this determination.) It rejected the notion that the trial judge had properly relied on Jaser's alternative request for static triers, on the basis that this request flowed from the judge's own error of law. It held that this error "forced Jaser to elect between the two remaining options, rotating

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[33] *Transcript of Proceedings at Trial, Jury Selection* (January 27, 2015), p 94, l 13; p 98, l 9; p 119, l 10; p 136, l 22; p 154, l 19; p 175, l 10; p 195, l 11; p 199, l 24 [AR, Vol IV, Tab 30, pp 164, 168, 189, 206, 224, 245, 265]; *Transcript of Proceedings, Jury Selection Continued* (January 28, 2015), p 57, l 31; p 64, l 21; p 69, l 31; p 153, l 9; p 241, l 3; p 265, l 12 [AR, Vol V, Tab 31, pp 59, 68, 71, 155, 243, 267].
[34] *Reasons of the Court of Appeal* at para 2 [AR, Vol II, Tab 14, p 88].
[35] *Reasons of the Court of Appeal* at paras 51–52, 64 [AR, Vol II, Tab 14, pp 107–108, 112].
[36] *Reasons of the Court of Appeal* at paras 62, 65 [AR, Vol II, Tab 14, pp 112–113].

triers with no one excluded or static triers with sworn and unsworn jurors both excluded, when he ought not to have had to do so."[37]

18. The Court also held that the trial judge's *Grant* error "deprived Esseghaier of his default right to rotating triers, which he had invoked by doing nothing to select static triers," and that, in any event, "as the jury was not properly constituted for Jaser, it cannot be considered to have been properly constituted for Esseghaier."[38]

19. The Court also held, relying on its own decision in *R v Noureddine*,[39] that "an error in the method of selecting the jury leads to an improperly constituted court, and thus falls outside the curative proviso [in s. 686(1)(*b*)(iv)], which is available to cure errors by a properly constituted court."[40] The Court found that the proviso could not have been invoked, even if it had been available, because there was "prejudice to the due administration of justice flowing from the denial of a jury selection method which was in law properly invoked."[41] This was, in their view, incurable.

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[37] *Reasons of the Court of Appeal* at paras 76, 82 [AR, Vol II, Tab 14, pp 117, 119].
[38] *Reasons of the Court of Appeal* at paras 77, 94 [AR, Vol II, Tab 14, pp 117, 124].
[39] *R v Noureddine*, 2015 ONCA 770.
[40] *Reasons of the Court of Appeal* at para 70 [AR, Vol II, Tab 14, pp 114–115].
[41] *Reasons of the Court of Appeal* at para 95 [AR, Vol II, Tab 14, p 124].

PART II – QUESTIONS IN ISSUE

20. This appeal raises the following questions:

a. Did the Court of Appeal for Ontario err in law in finding that the jury was improperly constituted?

The appellant says **yes**. The trial judge's *Grant* error did not render the jury improperly constituted.

b. Is the curative proviso in s. 686(1)(*b*)(iv) of the *Criminal Code* inapplicable to errors in the jury selection process, no matter how technical and non-prejudicial the error?

The appellant says **no**. The proviso should be available.

PART III – STATEMENT OF ARGUMENT

A. The Court of Appeal erred in law in finding that the jury was improperly constituted

1. The jury was properly constituted for Jaser

21. The crucial context for what follows is that the trial judge's overarching concern—and, perhaps more importantly, that of Jaser's counsel—was the preservation of juror impartiality. That impartiality was fully preserved by the process that was followed: the exclusion of *all* jurors, sworn and unsworn, during the challenge for cause process, as contemplated by s. 640(2.1).

22. For context, it is worth highlighting the reasoning on the issue of static/rotating triers in the appellate authorities that were before the Court of Appeal (bold emphasis added throughout):

R v Swite, 2011 BCCA 54	[30] … [The trial judge] embarked on a challenge for cause process using static triers for the truth of the challenges in circumstances where Mr. Swite had not only not applied for static triers, but where Mr. Swite had made it clear through his counsel that his choice was for rotating triers. … The fact is that, **in these circumstances, ss. 640(2.1) and (2.2) were never engaged.** [54] … In this case, the jury was selected by a process disavowed by Mr. Swite and which effectively deprived him of his statutory "right" (albeit by default) under s. 640(2), **in the absence of an application pursuant to s. 640(2.1)**, to be tried by a jury selected by rotating triers.
R v Noureddine, 2015 ONCA 770	[30] The trial judge **unilaterally** decided that static triers would be used to decide the challenge for cause, and that he would exclude all jurors, sworn and unsworn, during the challenge for cause process. His reasons for so holding are brief: > The application for rotating jurors is dismissed. In as much as the sworn and unsworn jurors will be excluded, the triers of cause will be static jurors. I find that the court has **inherent jurisdiction** to make that order. [37] The trial judge made no reference to the relevant provisions of the *Criminal Code*. Specifically, he made no reference to the criterion in s. 640(2.1). He misapprehended the nature of the application and purported to dismiss "the application for rotating triers." The appellants made no such application, but instead insisted on their statutory right under

	s. 640(2) to rotating triers, expressly indicating that no application was being brought under s. 640(2.1). **Absent that application**, static triers could not be used in the challenge for cause process.
R v Grant, 2016 ONCA 639	[15] The trial judge appeared to recognize that he had this discretion [to exclude unsworn jurors during a rotating trier process], but he did not grant the order the appellant's sought. Instead, after a dialogue with defence counsel, he asked whether they wanted rotating or static triers. **They replied: "if … the Court does not want to exercise discretion to allow rotating triers and the jury out, then we'll take the static triers."** [18] For reasons I will discuss, I have concluded as follows: • Trial judges **still have discretion** to exclude unsworn but not sworn jurors from the courtroom during challenges for cause on the ground of partiality. … • The trial judge recognized that he had this discretion and **did not err in refusing to exercise it because the appellants gave him no good reason for doing so**. • The appellants' **decision to choose to have static triers should be treated as an application under s. 640(2.1)** to exclude both unsworn and sworn jurors from the courtroom during the challenge for cause proceedings.
R v Mansingh, 2017 ONCA 68	[12] This case is distinguishable from *Noureddine* and is governed by *R. v. Grant*, 2016 ONCA 639, at paras. 50-51. At trial, defence counsel made it clear that he wanted prospective jurors excluded during the challenge process. He was happy to use properly vetted static triers as long as the panel was excluded. As stated in *Grant*, substance must supersede form. Counsel got what he wanted and, in substance, if not in form, made the requisite application under s. 640(2.1).
R v Kossyrine, 2017 ONCA 388	[28] In the case before us, as in *Mansingh*, Kossyrine wanted static triers. Unlike in *Noureddine*, Kossyrine did not ask for rotating triers or object to the trial judge's practice of using static triers. His sole concern was that the static triers the trial judge identified be properly vetted. This court's conclusion in *Mansingh* is entirely appropriate in this case: "[c]ounsel got what he wanted and, in substance if not in form, made the requisite application under s. 640(2.1)." The jury in this case was thus properly constituted.
R v Murray, 2017 ONCA 393	[55] What also emerges from *Grant* is that the absence of a formal application under s. 640(2.1) to have sworn and

	unsworn jurors excluded during the trial of the challenge for cause and to have static triers try that challenge is not dispositive against the use of static triers. Substance trumps form. A decision by defence counsel to choose static triers may amount to the functional equivalent of an application to exclude sworn and unsworn jurors under s. 640(2.1): *Grant*, at para. 51. Likewise, a desire to exclude prospective jurors during the challenge process and satisfaction with properly vetted static jurors: *R. v. Mansingh* [cites omitted], at para. 12.
R v Husbands, 2017 ONCA 607, leave to appeal ref'd, [2018] 1 SCR ix.	[45] In this case, defence counsel repeatedly told the trial judge that he was not applying under or invoking s. 640(2.1) of the *Criminal Code*. It follows ineluctably from **the absence of any application** that the provisions of s. 640(2.1) and (2.2), which alone permit the use of static triers, never became engaged. It necessarily follows from **the absence of an application** under s. 640(2.1) that no order could be made under that subsection. The absence of an order under s. 640(2.1) engages s 640(2) which required the trial of the challenge for cause to be determined by rotating triers.
R v Riley, 2017 ONCA 650, leave to appeal ref'd, [2018] 3 SCR v and [2019] SCCA No 412	[83] To guard against this potential compromise of impartiality, **trial counsel expressly invoked s. 640(2.1)**. They succeeded. As a result, as the subsections expressly provide, all jurors—sworn and unsworn—were excluded from the courtroom as the challenge for cause and jury selection process unfolded. In the end, no juror, sworn or unsworn, participated in, heard or saw any challenge for cause other than his or her own. **The prospect of compromise of juror impartiality on this basis never materialized**.

23. The Court of Appeal erred in law in finding that Jaser's conditional request for static triers was retroactively invalid. [42] The condition that engaged that request was that the trial judge be "of the view" that s. 640(2.1) displaced his discretion to exclude the panel during the challenges for cause. The trial judge was of that view. The condition was accordingly satisfied. It was not part of the condition that this view also eventually be endorsed by the Court of Appeal. The fact that the trial judge's view was found to be wrong in law some 20 months later does not alter the fact that the condition was satisfied at the time of trial. It was therefore open to the trial judge to rely on

[42] The appellant appreciates that the law in this area has been overtaken by the coming-into-force of the Bill C-75 challenge for cause provisions.

Jaser's alternative request for static triers, as he did. It follows that the jury was properly constituted.

24. It is important to note that Jaser's position on this point was not unequivocal. If he had unequivocally asked for rotating triers without advancing his "in the alternative" position that he would accept static triers with the panel excluded, then the trial judge's imposition of static triers would have been a *Husbands* error (imposing static triers in the absence of *any* application under s. 640(2.1)). If the trial judge had allowed rotating triers without excluding the panel, he would have compromised jury impartiality. As it actually unfolded, Jaser's "in the alternative" position prevented a *Husbands* error, and preserved jury impartiality by resulting in the exclusion of the panel.

25. In any event, the trial judge made an "in the alternative" determination that, even if he had a discretion to exclude the unsworn jurors, he would not exercise it, because "a limited order protecting only prospective jurors from tainting, but ignoring the far greater danger of tainting the sworn jurors, would not 'fulfil the judicial function of administering justice … in an … effective manner'."[43] This discretionary decision was his to make, and as a discretionary decision it was entitled to deference on appellate review.[44] The Court of Appeal erred in law in not treating it with that deference.

26. At that "in the alternative" stage in the analysis, this case is virtually on all fours with *Grant*, in which a different panel of the same Court went the opposite way. In *Grant*, the accused asked for rotating triers with the unsworn jurors excluded. The trial judge "appeared to recognize that he had this discretion," but declined to make such an order.[45] In the present case the trial judge—proceeding at this stage on the alternate premise that *he* had this discretion[46]—similarly said he would decline to make such an order.

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[43] *Reasons for Judgment* (jury selection issues) at para 46 [AR, Vol I, Tab 7, p 133].
[44] *R v Moore-McFarlane*, 2001 CanLII 6363 (ON CA) at para 85; *R v Grant*, 2016 ONCA 639 at para 22.
[45] *R v Grant*, 2016 ONCA 639 at paras 14–15.
[46] *Reasons for Judgment* (jury selection issues) at para 45 [AR, Vol I, Tab 7, p 133].

27. In *Grant*, the Court of Appeal for Ontario upheld the use of static triers and found that the jury was properly constituted.[47] In the present case, the Court of Appeal rejected the use of static triers and found that the jury was improperly constituted. It distinguished *Grant* on the basis that, in *Grant*, the trial determination was "not the product of legal error on the trial judge's part, but of the defence failure to provide *any reason* for using rotating triers excluding unsworn jurors" (emphasis added).[48] There are two fundamental errors in this reasoning:

a. The trial judge's discretionary decision at this stage—like the trial judge's decision in *Grant*—was not the product of his earlier legal error. To the contrary, its express premise was "[i]f I am wrong about the effect of the 2008 amendments, and if some residual common law or inherent discretion still exists to exclude only the prospective jurors, in a case where juror impartiality is the issue, I would not exercise such a discretion (underlining added)."[49]

b. The material language in *Grant* is actually that trial judges are "entitled to insist on a sufficient reason or reasons" (underlining added) for exercising their discretion to exclude unsworn jurors, with the determination of that sufficiency "best left to individual trial judges to decide."[50] The asserted reason in this case was "Jaser's desire to pick the jury with the assistance of 'rotating triers'".[51] It is apparent from the trial judge's decision that, for him, this was not a sufficient reason for using a process that risked tainting the sworn jurors.[52]

28. The general benefits to accused persons of the rotating trier process are not, in and of themselves, a sufficient reason. The Court in *Grant* expressly acknowledged those benefits—avoiding the risk of a so-called rogue trier and promoting a sense of cohesiveness in the jury—yet

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[47] *R v Grant*, 2016 ONCA 639 at paras 50–52; *Reasons of the Court of Appeal* at para 81 [AR, Vol II, Tab 14, p 119].
[48] *Reasons of the Court of Appeal* at para 82 [AR, Vol II, Tab 14, p 119].
[49] *Reasons for Judgment* (jury selection issues) at para 45 [AR, Vol I, Tab 7, p 133].
[50] *R v Grant*, 2016 ONCA 639 para 41. See also *R v Husbands*, 2017 ONCA 607 at para 43, leave to appeal ref'd, [2018] 1 SCR ix.
[51] *Reasons for Judgment* (jury selection issues) at para 34 [AR, Vol I, Tab 7, p 128].
[52] *Reasons for Judgment* (jury selection issues) at para 46 [AR, Vol I, Tab 7, p 133].

still upheld the trial judge's finding that the accused had given him "no good reason" for excluding the panel during a rotating trier process.[53]

29. This case's similarity to *Grant* stands in sharp contrast with its dissimilarities from *Swite*, *Husbands* and *Noureddine*. In *Swite*, the trial judge imposed static triers on the mistaken assumption that the then newly enacted provisions in ss. 640(2.1) and (2.2) *required* them for all challenges for cause.[54] In *Husbands*, the trial judge ordered static triers in the face of the accused's consistent and unequivocal rejection of that process.[55] In *Noureddine*, the trial judge purported to exercise an "inherent jurisdiction" to order static triers, contrary to the express provisions of the *Criminal Code*.[56] None of these circumstances resemble those in the present case.

30. In *Noureddine*, the Court held that the value of rotating triers "may be sacrificed, but only if the judge is satisfied, on the accused's motion, that the exclusion of all jurors is necessary to preserve the impartiality of the jury."[57] That is precisely what happened here: counsel for Jaser brought such a motion (albeit in the alternative), and the trial judge was satisfied that the exclusion of all jurors was necessary to preserve the impartiality of the jury, as the rotating triers process would necessarily have precluded the exclusion of the sworn jurors.[58]

31. The Court of Appeal is critical of the trial judge for "treat[ing] the indication in Jaser's factum and in his dialogue with counsel, that in the event of such a ruling [that he had no discretion to exclude only unsworn jurors] Jaser would apply under s. 640(2.1), as the application itself."[59] The Court's concern is presumably that the conditional language "would apply" meant that the actual application remained inchoate. That concern is misplaced for either or both of two reasons:

a. The language "would apply" only meant that the application was conditional on the trial judge's making of the ruling. Once he made that ruling, the condition was satisfied and the application crystallized.

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[53] *R v Grant*, 2016 ONCA 639 at paras 18, 21.
[54] *R v Swite*, 2011 BCCA 54 at para 26.
[55] *R v Husbands*, 2017 ONCA 607 at paras 10–16, 50, leave to appeal ref'd, [2018] 1 SCR ix.
[56] *R v Noureddine*, 2015 ONCA 770 at paras 27–30, 38.
[57] *R v Noureddine*, 2015 ONCA 770 at para 66.
[58] *Reasons for Judgment* (jury selection issues) at para 46 [AR, Vol I, Tab 7, p 133].
[59] *Reasons of the Court of Appeal* at para 47 [AR, Vol II, Tab 14, p 106].

b. In any event, the cases consistently say that a s. 640(2.1) application does not have to be in any particular form. It is the substance that matters.[60] Treating this linguistic subtlety as a fundamental legal distinction would be the triumph of form over substance.

32. As noted above, preserving juror impartiality was the overarching concern not only for the trial judge, but also for counsel for Jaser. The trial judge noted that counsel "conceded that preserving the impartiality of the prospective jurors, by protecting them from tainting, was one of the reasons for her Application," though she was prepared to balance the risk of tainting the *sworn* jurors against "Jaser's desire to pick the jury with the assistance of 'rotating triers'."[61]

2. <u>The jury was properly constituted for Esseghaier</u>

33. Regardless of whether the jury was properly constituted for Jaser, it was properly constituted for Esseghaier. The Court of Appeal does not cite any authority for its view that, if the jury was improperly constituted for Jaser, it was *necessarily* also improperly constituted for Esseghaier, which the Court appears to take as self-evident.[62] Yet the Court correctly notes in its reasons that "[t]he right to use rotating triers is a right which is personal to the accused."[63] This is supported by its own earlier determination in *Noureddine* that "only the party whose interest was adversely affected by the error made in the jury selection process can rely on that error to set aside a verdict returned by the jury."[64] It follows that any factors specific to Jaser that deprived him of that personal right would not necessarily have had the same effect on Esseghaier.

34. The Court of Appeal repeatedly relies on what it erroneously characterizes as Esseghaier's "right to rotating triers" under s. 640(2),[65] which the Court refers to as "the default rule."[66] The

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[60] *R v Grant*, 2016 ONCA 639 at paras 50–51; *R v Murray*, 2017 ONCA 393 at paras 55, 62–66; *R v Husbands*, 2017 ONCA 607 at paras 38–39, leave to appeal ref'd, [2018] 1 SCR ix; *R v Riley*, 2017 ONCA 650 at para 66, leave to appeal ref'd, [2018] 3 SCR v and [2019] SCCA No 412.
[61] *Reasons for Judgment* (jury selection issues) at para 34 [AR, Vol I, Tab 7, p 128].
[62] *Reasons of the Court of Appeal* at para 94 [AR, Vol II, Tab 14, p 124].
[63] *Reasons of the Court of Appeal* at para 93 [AR, Vol II, Tab 14, pp 123–124].
[64] *R v Noureddine*, 2015 ONCA 770 at paras 77 and 86; see also *Cloutier v The Queen*, [1979] 2 SCR 709 at 725–726.
[65] *Reasons of the Court of Appeal* at paras 17, 58, 62, 77 [AR, Vol II, Tab 14, pp 93–94, 110, 112, 117].
[66] *Reasons of the Court of Appeal* at para 22 [AR, Vol II, Tab 14, pp 95–96].

Court is right that it is *a* default rule, but is mistaken as to when it becomes *the* default. By definition, an accused only becomes entitled to the s. 640(2) process for challenges for cause if he or she actually challenges jurors for cause. The Court is accordingly mistaken that "[t]he accused need do nothing to be entitled to rotating triers."[67] To become entitled to rotating triers, the accused needs to challenge for cause.

35. Esseghaier did not. Not only did he not participate in the challenges themselves,[68] he categorically rejected any reliance on any provisions of the *Criminal Code*, insisting throughout that he could only be judged pursuant to the laws of the Holy Qur'an:

> … I am Muslim and I believe in the holy Koran. So, I will say and I will repeat the same thing, I will never – I will never get a lawyer who is working under the *Criminal Code*. The only lawyer I can get is the lawyer who is believe that my judgment is based on the holy Koran. So if the lawyer, he is agree with me, to help me to be judged based on the holy Koran, I don't have problem to seek my rights and to get that lawyer. But, I will never get a lawyer who is working under the *Criminal Code*. If you want to apply on me the laws of the *Criminal Code*, me, I am in the jail. I am prisoner. I cannot do anything. I don't – I am not free. So, you, you have the power, you can apply whatever you – but me, I will never seek my rights on the *Criminal Code*, never.[69]

36. Esseghaier's complete rejection of the provisions of the *Criminal Code* necessarily included the rejection of the s. 638 right to challenge for cause. Having rejected that right, he never became entitled to any particular process for its exercise. It follows that even if the jury was improperly constituted for Jaser because of considerations personal to him, that does not mean it was improperly constituted for Esseghaier, to whom those considerations did not apply.

37. The fact that the judge, the Crown, and counsel for Jaser all agreed that challenges for cause were necessary, and took comfort from the fact that Jaser's challenges would protect Esseghaier's interests, does not change Esseghaier's situation. He rejected any reliance on the *Criminal Code*,

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[67] *Reasons of the Court of Appeal* at paras 22, 24 [AR, Vol II, Tab 14, pp 95, 96].
[68] *Reasons of the Court of Appeal* at para 50 [AR, Vol II, Tab 14, pp 107].
[69] *Transcript of Proceedings before Justice Durno* (August 26, 2013), p 27, l 3–29 [AR, Vol II, Tab 20, p 136]; *Endorsement of the Superior Court of Justice* (motion on applicable law) [AR, Vol I, Tab 4].

including on its invocation by *amicus* or by counsel for Jaser. It is fundamental to our system of justice that a fit accused has the right to choose how they conduct their defence at trial.[70] In the trial judge's post-conviction reasons for ordering a pre-sentence fitness assessment of Esseghaier, he specifically finds "there is not a scintilla of evidence from the pre-trial and trial record to suggest that he was unfit to stand trial nor did anyone ever raise the matter and suggest otherwise."[71] Esseghaier, knowing he was facing serious charges that could result in imprisonment for life, decided not to participate in the challenge for cause, or any other part of his trial. He must live with these choices on appeal.

B. The procedural proviso applies to procedural errors that cause no demonstrable prejudice to the fairness of the trial

38. Parliament introduced s. 686(1)(*b*)(iv) of the *Criminal Code* in 1985 "in the face of a body of case law that was becoming increasingly technical and complex and which had restricted considerably the possibility for appellate courts to conclude that an error at trial was not such that it required setting aside the verdict."[72] Never has this been of greater import than it is today. However, provincial courts of appeal, like the Ontario Court of Appeal in this case and the B.C. Court of Appeal in *Swite,*[73] have narrowed the scope of the procedural proviso to the point where it could almost never be used to cure any technical error in the jury selection process. Where, as here, there is no actual demonstrable prejudice to the fairness of the trial and the accused were satisfied with the composition of the jury, the verdict properly reached by the trier of fact after a long and arduous trial should not be so easily set aside.

1. Section 686(1)(*b*)(iv) applies to procedural irregularities in jury selection

39. When the provision was first enacted[74], appellate courts interpreted s. 686(1)(*b*)(iv) expansively: where there was no prejudice to the accused, serious procedural irregularities that resulted in a loss of jurisdiction could be cured by the proviso. In *R v Cloutier,*[75] a decision whose

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[70] *R v Swain*, [1991] 1 SCR 933 at 972.
[71] *Reasons on Application for Fitness Assessment* at para 21 [AR, Vol I, Tab 9, p 152].
[72] *R v Khan*, 2001 SCC 86 at para 16.
[73] *R v Swite*, 2011 BCCA 54.
[74] A review of legislative debates did not provide any helpful information on the curative proviso set out in s 686(1)(*b*)(iv) of the *Criminal Code.*
[75] *R v Cloutier*, 1988 CarswellOnt 795 (CA).

reasoning has been expressly adopted by this Court,[76] the Court of Appeal for Ontario delivered one of the earliest analyses of the scope of the procedural proviso [in what was then s. 613(1)(*b*)(iv)]. At issue in *Cloutier* was whether the accused's absence from the courtroom during part of his trial was "so fundamental an error" that it fell outside the ambit of the procedural proviso.[77] The Court rejected this argument, finding that the procedural proviso had been enacted for exactly this kind of error: a procedural irregularity that is "so serious that it is deemed to be fundamental in nature and results in a loss of jurisdiction."[78]

40. Goodman J.A., writing for the Court, distinguished between three types of errors: "(1) errors of substance such as exist in cases where the court has no jurisdiction over the class of offences charged and which are not procedural in nature at all; (2) irregularities in procedure of a relatively minor nature which do not result in a loss of jurisdiction on the part of the trial court, and (3) irregularities in procedure which are so serious in nature that they are deemed to be matters of substance which result in a loss of jurisdiction."[79] The procedural proviso could cure neither the first type of error (because the court had *no* jurisdiction over the class of offences and the errors were not procedural) nor the second (which could be addressed under s. 686(1)(*b*)(iii)). The third category of error – the very error at issue in the present case – was curable.

41. Although *Cloutier* was concerned with the accused's absence from the trial, Goodman J.A. expressly considered the line of cases which held, prior to the enactment of the procedural proviso, that irregularities in jury selection issues led to an incurable loss of jurisdiction.[80] Goodman J.A. acknowledged that there may be a *prima facie* inference of prejudice in these circumstances, but held that inference was nevertheless rebuttable and reiterated the broad scope of the provision:

> It is my opinion that the wording of s. 613(1)(*b*)(iv) is such that it clearly indicates that Parliament intended by its enactment to give to the court of appeal the right to apply its curative provisions by exercising its discretion in favour of dismissing an appeal in cases where the trial court had jurisdiction over the class of offence of which the appellant was convicted notwithstanding the fact that an error of law had been made by a procedural

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[76] *R v Khan*, 2001 SCC 86 at para 11.
[77] *R v Cloutier*, 1988 CarswellOnt 795 (CA) at para 37.
[78] *R v Cloutier*, 1988 CarswellOnt 795 (CA) at para 40.
[79] *R v Cloutier*, 1988 CarswellOnt 795 (CA) at para 40.
[80] *R v Varga*, [1985] OJ No 52 (CA); *Cloutier v The Queen*, [1979] 2 SCR 709; *R v Rowbotham*, 1988 CanLII 147 (ON CA).

> irregularity which was so serious in nature as to cause a loss of jurisdiction provided that the court of appeal is of the opinion that the appellant suffered no prejudice thereby.[81]

42. In *R v Bain*[82], a majority of this Court declined to opine on the availability of the proviso to cure a defect in the jury selection process.[83] In that case, the trial judge decided to unilaterally limit the peremptory challenges of the parties and prevent the Crown from invoking its standby rights. Justice Gonthier, writing in dissent, suggested that where the problem stems from the application of the jury selection rules, it *could* be saved by the procedural proviso. However, where the jury was selected by rules other than those set out in the *Code*, the court was not properly constituted *ab initio* and a remedy did not lie.[84] From this one comment in dissent, a series of cascading appellate level decisions have followed—with devastating effect to the preservation of jury verdicts.

43. Nearly a decade after *Bain,* this Court, in *R v Khan,* gave a liberal interpretation to the scope and meaning of the procedural proviso found in s. 686(1)(*b*)(iv), adopting the approach taken in *Cloutier*. Justice Arbour wrote that the provision was enacted to extend the curative provisos "to put an end to the jurisprudence holding that procedural errors having caused a loss of jurisdiction in the trial courts could not be cured, even on appeal".[85] This was necessary in order to overcome an increasingly complex body of case law concerning "incurable" jurisdictional error.[86] The list of examples of what constituted a jurisdictional error *included* irregularities in jury selection. It was made clear in that case that the proviso was meant to cure serious procedural irregularities, and not just trivial matters:

> "Prior to the enactment of s. 686(1)(*b*)(iv) in 1985, some procedural irregularities, although they amounted to errors of law, had been ruled "jurisdictional" and courts had decided that they could therefore not be cured by the proviso since jurisdiction had been lost. In that context, it is clear that the new provision was not meant to deal with trivial procedural irregularities which in any event would have been curable under the proviso as long as they constituted errors of law. I agree with Goodman J.A. in *Cloutier* that s. 686(1)(*b*)(iv) was enacted to cure serious procedural irregularities, otherwise amounting

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[81] *R v Cloutier*, 1988 CarswellOnt 795 (CA) at para 46.
[82] *R v Bain*, [1992] 1 SCR 91.
[83] *R v Bain*, [1992] 1 SCR 91 at 145.
[84] *R v Bain*, [1992] 1 SCR 91 at 136.
[85] *R v Khan*, 2001 SCC 86 at para 12.
[86] *R v Khan*, 2001 SCC 86 at paras 11–16.

> to errors of law, in cases where under the then existing case law, jurisdiction over the person, but not over the offence, had been lost.[87]

Justice Arbour also reiterated that, although prejudice flowing from serious errors could be inferred without evidence of actual prejudice, this inference was rebuttable:

> I also agree with Goodman J.A. that under this new subparagraph, since the procedural irregularities in issue would have been serious ones, it is appropriate to infer prejudice without requiring in every case that the accused demonstrate prejudice. The inference may of course be rebutted and the test of prejudice under that subsection should be the same as the no substantial wrong or miscarriage of justice, under s. 686(1)(*b*)(iii), which has been the subject of extensive pronouncement by this Court.

In short, *Khan* set out clear guidance for the application of the procedural proviso which rejected the undue formalism of the earlier jurisprudence.

2. Appellate courts have unduly narrowed the application of the procedural proviso

44. Since the error in *Khan* was found to be an error of law falling within the ambit of s. 686(1)(*b*)(iii), this Court did not apply those principles to the facts of that case and has not considered their application in any subsequent case. Instead, the jurisprudence in this area has been primarily developed by provincial courts of appeal, relying not on Justice Arbour's comments in *Khan,* but on Justice Gonthier's dissent in *Bain.*

45. In *R v W.V.*[88], the Court of Appeal for Ontario took a restrictive approach to the application of the procedural proviso to errors in jury selection. In that case, the trial judge unilaterally imposed static triers seven years before the 2008 enactment of ss. 640(2.1) and (2.2): static triers were simply not available. Sharpe J.A., writing for the Court, declined to apply the procedural proviso because the failure to follow the statutorily mandated process for jury selection was not "a minor procedural irregularity."[89] He acknowledged that there was no case precisely on point, but found that the "weight of authority is against the application of s. 686(1)(*b*)(iv) to cure departures from mandatory

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[87] *R v Khan*, 2001 SCC 86 at para 16.
[88] *R v W.V.*, 2007 ONCA 546, leave to appeal ref'd, [2008] 1 SCR v.
[89] *R v W.V.*, 2007 ONCA 546 at para 26, leave to appeal ref'd, [2008] 1 SCR v.

Criminal Code provisions relating to jury selection."[90] Sharpe J.A. held that the jury was not properly constituted and, consequently, s. 686(1)(*b*)(iv) had no application.[91]

46. The "weight of authority" relied upon by the Court of Appeal for Ontario in *W.V.* to distinguish the approach taken in *Cloutier*, consisted of its own decisions in *Bain*[92] and *R v Rowbotham,*[93] as well as Justice Gonthier's dissent in *Bain*. However, closer examination of these authorities does not support the restrictive approach taken in *W.V.* The Court of Appeal's decision in *Bain* was overturned on appeal and its interpretation of the proviso was not addressed by the majority of this Court. Justice Gonthier's dissenting comments in *Bain* were not, as *W.V.* suggests, wholly endorsed by Arbour J. in her majority judgment in *Khan*; rather, Justice Arbour makes a single reference to his reasons when she says, "I agree with the analysis of the scope of the section provided by Goodman J.A. in *R v Cloutier* [citation omitted] and adopted by Gonthier J. in *R v Bain*."[94] And in *R v Rowbotham,* which preceded *Cloutier* by several months, the Court's analysis of the scope of the procedural proviso was limited to a single sentence.[95]

47. Even if the Court in *W.V.* reached the right result on the facts of that case, its broader application has been problematic. The decision in *W.V.*, like *Bain,* was concerned with juries being selected by procedures *outside* what was provided for in the *Code.* That is not what happened here. What happened in this case, and others before it, is a problem of a lower magnitude: a problem with the application of the jury selection rules *as set out in the Code.*

48. Nevertheless, the approach taken in *W.V.* has been expressly followed in these cases despite the markedly different circumstances. The British Columbia Court of Appeal applied *W.V.* in *Swite,* a case where the trial judge imposed static triers on the mistaken assumption that the then-newly enacted provisions in ss. 640(2.1) and (2.2.) *required* static triers for all challenges for cause.[96] The Crown's attempt to distinguish *W.V.* on the basis that the *Code* now provided for the

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[90] *R v W.V.*, 2007 ONCA 546 at para 27, leave to appeal ref'd, [2008] 1 SCR v.
[91] *R v W.V.*, 2007 ONCA 546 at para 41, leave to appeal ref'd, [2008] 1 SCR v.
[92] *R v Bain*, [1989] OJ No 111 (CA).
[93] *R v Rowbotham*, 1988 CanLII 147 (ON CA).
[94] *R v Khan*, 2001 SCC 86 at para 11.
[95] *R v Rowbotham*, 1988 CanLII 147 (ON CA) at para 71. The jury trial in *R v Rowbotham* commenced on April 30, 1985, prior to the enactment of the procedural proviso: para 14.
[96] *R v Swite*, 2011 BCCA 54 at paras 35–47.

appointment of static triers was rejected; that is, it did not matter that the error was one of application of the jury selection procedures.[97] The Court acknowledged the broad scope of the procedural proviso articulated in *Khan*, but nonetheless concluded that the trial judge's error deprived the accused of a trial before a properly constituted court. Section 686(1)(*b*)(iv) *could not* apply. The Court went further, finding that the appearance of justice was irreparably compromised because the challenge for cause proceeded by way of a process other than that chosen by the accused.[98] In other words, even if the proviso applied to these kinds of jury selection errors, it could never be relied upon since prejudice would always be assumed.

49. Since *Swite*, the Ontario Court of Appeal has taken an equally restrictive approach to the procedural proviso, leading to inconsistent results in cases dealing with the application of static versus rotating triers. Recall that, between 2008 and 2016, there was a genuine disagreement among many experienced trial judges about whether there remained any common law discretion to exclude unsworn jurors if rotating triers were used. As in the present case, a number of trial judges came down on the wrong side of the issue. A survey of recent cases from the Ontario Court of Appeal demonstrates the difficulties created by an inflexible approach to the procedural proviso in these cases.

50. In eight cases, as in the present case, the trial judge effectively presented the accused with a binary choice: rotating triers with the full panel in, or static triers with the panel out.[99] In some of these cases, it was because the trial judge concluded he had no residual discretion to exclude the panel without an application for static triers,[100] while in others the trial judge opined that he would not exercise his discretion in this way.[101] In any event, both of these options were available under s. 640, as it stood at the time. Yet despite the striking factual similarities, the results have been

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[97] *R v Swite*, 2011 BCCA 54 at paras 46–47.
[98] *R v Swite*, 2011 BCCA 54 at para 61.
[99] *R v Grant*, 2016 ONCA 639; *R v Mansingh*, 2017 ONCA 68; *R v Kossyrine*, 2017 ONCA 388; *R v Murray*, 2017 ONCA 393; *R v Husbands*, 2017 ONCA 607, leave to appeal ref'd, [2018] 1 SCR ix; *R v Riley*, 2017 ONCA 650 at para 66, leave to appeal ref'd, [2018] 3 SCR v and [2019] SCCA No 412; *R v Evans*, 2019 ONCA 715; *R v Cumor*, 2019 ONCA 747.
[100] *R v Husbands*, 2017 ONCA 607, leave to appeal ref'd, [2018] 1 SCR ix; *R v Riley*, 2017 ONCA 650 at para 66, leave to appeal ref'd, [2018] 3 SCR v and [2019] SCCA No 412; *R v Evans*, 2019 ONCA 715; *R v Cumor*, 2019 ONCA 747.
[101] *R v Grant*, 2016 ONCA 639; *R v Mansingh*, 2017 ONCA 68; *R v Murray*, 2017 ONCA 393; *R v Kossyrine*, 2017 ONCA 388 (albeit implicitly).

drastically different with the jury selections in one group of cases upheld on appeal without resort to the proviso[102] and in the other group found void *ab initio*.[103]

51. In each case where the ground of appeal was dismissed, the Court of Appeal found that the accused had made an effective application for static triers (whether by abandoning a request for rotating triers, acquiescing to the procedure laid out by the trial judge, or bringing an actual application), regardless of whether the accused had made a request for rotating triers. The outcome turned entirely on the persistence of counsel in asking for rotating triers, not on the range of choices offered by the trial judge. Indeed, in *Kossyrine*, the Court of Appeal remarked, "The result in each case was driven by the position defence counsel took at trial."[104] In these cases, the Court of Appeal held that it was *not an error* for static triers to have been appointed. That is, the procedural proviso itself was not relied on.[105]

52. The procedural proviso has not been relied on by provincial appellate courts to cure any serious procedural irregularity in jury selection, despite this Court's guidance in *Khan*. At most, it has been used to cure trivial errors (which *Cloutier* suggests could be dealt with under s.

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[102] The Court of Appeal for Ontario dismissed the appeals, and upheld the convictions, on the issue of static versus rotating triers in the following cases: *R v Grant*, 2016 ONCA 639; *R v Riley*, 2017 ONCA 650 at para 66, leave to appeal ref'd, [2018] 3 SCR v and [2019] SCCA No 412; *R v Murray*, 2017 ONCA 393; *R v Kossyrine*, 2017 ONCA 388; *R v Mansingh*, 2017 ONCA 68; *R v Evans*, 2019 ONCA 715.

[103] In addition to the case on appeal, the Court of Appeal for Ontario allowed the appeals, and overturned the convictions, on the issue of static versus rotating triers in the following cases: *R v Noureddine*, 2015 ONCA 770; *R v Husbands*, 2017 ONCA 607, leave to appeal ref'd, [2018] 1 SCR ix; *R v Cumor*, 2019 ONCA 747.

[104] *R v Kossyrine*, 2017 ONCA 388 at para 22.

[105] In *R v Kossyrine*, 2017 ONCA 388 at paras 29–31, Laskin JA suggested, without deciding, that the procedural proviso might have been another basis on which to dismiss the appeal.

686(1)(*b*)(iii)) [106] or it has been relied on in the alternative, where the Court has already concluded that no error existed.[107]

53. Indeed, the Court of Appeal for Ontario has all but said that the procedural proviso is unavailable for errors affecting jury selection, regardless of whether there is *any* actual prejudice to the accused or to the fairness of the trial. Notwithstanding an acknowledgment that "[n]o reason in principle removes procedural irregularities in the jury selection process from its potential application"[108], the Court has declined to apply the proviso in these circumstances. In *R v Cumor* an appeal on all fours with the present case, Zarnett J.A. described the narrow application of the proviso taken by the Court of Appeal:

> This court's jurisprudence makes it clear that there is very little scope for the operation of the curative proviso where an error has been made that affects the accused's rights regarding the procedure for selecting the jury. In *Noureddine*, two reasons for this were given. First, the result of an error that deprived the accused of a jury selection method to which he was entitled is an improperly constituted jury, and that is beyond the scope of the errors that can be cured by in curative proviso: at paras. 52-53, 57, 61 and 68; see also: *Riley*, at para. 73. (underlining added)
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> Second, the curative proviso can only be applied where the Crown shows absence of prejudice to the accused. Prejudice extends beyond actual prejudice (which is impossible to gauge in this kind of situation) to prejudice to the due administration of justice, which occurs where a jury selection method the accused was entitled to under the *Criminal Code*

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[106] See *R v Lo*, [1995] BCJ No 1528 (CA) at paras 23–30 (court would have dismissed appeal under either s 670(a) or 686(1)(*b*)(iv) where trial judge may have selected 12th juror from a different panel); *R v Katoch*, 2009 ONCA 621 at paras 55–58 (court dismissed Crown appeal finding that an irregularity in withdrawing the challenge for cause from the triers was not prohibited by the statutory provisions; appeal was dismissed under s 686(4), but the Court considered the test set out in s 686(1)(*b*)(iv)); *R v Cece*, [2004] OJ No 3938 (CA) at paras 3–4 (ineligible juror served as rotating trier).

[107] *R v Province*, 2019 ONCA 638 at para 95 (trial judge replacing two static triers on own motion); *R v Paterson*, [1998] BCJ No 126 (CA) at paras 66–67, leave to appeal ref'd, [1999] 1 SCR xii (trial judge replacing a juror in the absence of statutory authority).

[108] *R v Province*, 2019 ONCA 638 at para 83.

> was invoked by the accused, but denied in favour of one disavowed by the accused: *Noureddine*, at paras. 62-64, 68; see also: *Swite*, at paras. 58-59.[109]

Even if the proviso was engaged, the existing appellate jurisprudence has created a nearly irrefutable presumption of prejudice in cases involving error in jury selection where the accused would have chosen a different procedure. This approach puts the proviso out of reach for the very types of cases it was designed to address. This cannot be the law.

54. The only situation in which reliance on the proviso has been contemplated (but never actually applied) is the case where the accused wanted a particular procedure (i.e., static triers), but forgot to bring a formal application.[110] The fallacy of this hypothetical exception is belied by the jurisprudence: courts have repeatedly said that no formal application for static triers was necessary. In these circumstances, there is no error to be cured by the proviso.

55. The problem with the restrictive approach to the procedural proviso taken in this line of cases is evinced in *R v Rose*, where the Court of Appeal for Ontario refused to apply the proviso to a procedural irregularity involving the jury that occurred at the *end* of the trial.[111] The jury, which included two additional jurors selected under s. 631(2.2) of the *Criminal Code*, was *initially* properly constituted.[112] However, at the end of the evidence, the trial judge confused the process for dismissing an "additional" juror (under s. 652.1 of the *Criminal Code*) with the process for dismissing an "alternate" juror appointed under s. 631(2.1), and simply dismissed the remaining additional juror rather than randomly selecting a juror. There was no suggestion of actual prejudice to the accused.[113] Nevertheless, the Court of Appeal found that any contravention in the error *retroactively* invalidated the proper constitution of the jury, depriving the trial court of jurisdiction such that the procedural proviso could not be argued.[114] In the alternative, the Court found that the lack of actual prejudice was irrelevant; the inferred prejudice to the administration of justice was irremediable even if the proviso could be invoked.[115]

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[109] *R v Cumor*, 2019 ONCA 747 at para 51.
[110] *R v Cumor*, 2019 ONCA 747 at para 41.
[111] *R v Rose*, 2020 ONCA 306 at paras 15–33.
[112] *R v Rose*, 2020 ONCA 306 at para 29.
[113] *R v Rose*, 2020 ONCA 306 at para 32.
[114] *R v Rose*, 2020 ONCA 306 at paras 28–29.
[115] *R v Rose*, 2020 ONCA 306 at paras 30–32.

56. If the approach in *Rose* is correct, it is difficult to imagine *any* error in jury selection which would be curable by the procedural proviso. Instead, the decision appears to be a return to the line of "jurisprudence holding that procedural errors having caused a loss of jurisdiction in the trial courts could not be cured, even on appeal" that was eschewed by this Court in *Khan*.[116]

57. The approach taken in Ontario has been the subject of some criticism in other jurisdictions where a less restrictive interpretation to the procedural proviso has been followed. For example, in *R v Bebawi,*[117] a case dealing with the temporal application of the Bill C-75 amendments to the jury selection provisions, Justice Cournoyer considered the consequences on appeal if it turned out he had erred in his approach. In his view, the interpretation adopted in Ontario, which he described as creating a "very narrow window of applicability" was problematic. Cournoyer J. noted that the approach taken in Quebec was much less restrictive than that taken by the Court of Appeal for Ontario, citing the authors of the *Traité général de preuve et procédure pénales:*

> Toutefois, la cour d'appel ne pourra avoir recours à ce pouvoir dans l'hypothèse où la cour n'avait pas compétence d'attribution au sens premier du terme, par opposition à l'absence de compétence découlant de l'inobservation d'une formalité ou à une perte de cette compétence. Dans l'arrêt *Primeau*, la Cour d'appel du Québec, rappelant le libellé du sous-alinéa 686(1)*b*)(iv), a indiqué qu'on peut invoquer cette disposition dans tous les autres cas. D'autres cours d'appel ont adopté une approche plus restrictive, indiquant que le défaut de respecter une formalité préalable à l'acquisition de cette compétence est fatal, comme c'est le cas si la sélection du jury comporte un vice fondamental ou que l'accusé, qui a été jugé par un juge de la cour provinciale, n'a pas, sans renonciation de sa part, été appelé à choisir son mode de procès.[118]
>
> [TRANSLATION]
>
> However, the appellate court cannot resort to this power in the case where the court did not have subject matter jurisdiction in the primary sense of this term, as opposed to the lack of jurisdiction resulting from non-compliance with a formality or to the loss of this jurisdiction. In *Primeau*, the Quebec Court of Appeal, referring to the wording of s. 686(1)(*b*)(iv), indicated that this provision can be relied on in all other cases. Other appellate courts have adopted a more restrictive approach, indicating that non-compliance

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[116] *R v Khan*, 2001 SCC 86 at para 12.
[117] *R v Bebawi*, 2019 QCCS 4393 at para 121.
[118] *R c Bebawi*, 2019 QCCS 4393 at para 126, citing Martin Vauclair et Tristan Desjardins, Béliveau-Vauclair - *Traité général de preuve et de procédure pénales*, 26e éd., Montréal, Éditions Yvon Blais, 2019 at para 3210, p 1590. See also, in the context of a failure to put the accused to his election: *R v Primeau*, 2000 CanLII 11306 (QC CA) at para 40; *R v Lamoureux*, 2013 ABCA 85 at paras 13–18; *R v Roy*, 2010 BCCA 448 at paras 2–11, leave to appeal ref'd, [2011] 2 SCR x.

> with a formality which is a prerequisite to the acquisition of this jurisdiction is fatal, as is the case if the jury selection contains a foundational defect or if the accused, having been tried by a judge of the Provincial Court, without waiving his right to do so, was not called to elect his mode of trial.[119]

58. The *Primeau* decision predated this Court's decision in *Khan*, but was cited with approval by LeBel J. in his concurring opinion in *Khan* for the proposition that the curative provisos were designed to avoid "an unduly formalistic approach to criminal procedure."[120] This is entirely consistent with the majority's approach: errors that cause no apparent prejudice to the fairness of the trial should be curable by the proviso.

3. The procedural proviso should apply to this case

59. This is not a case where the trial judge failed to follow the mandatory statutory provisions,[121] nor is it a case where the trial judge purported to impose static triers in the absence of any application by the accused.[122] What happened here was the trial judge misapprehended the limits of his own common law discretion and thereby limited the options to the ones expressly set out in the *Code*. Fundamentally, Jaser wanted an impartial jury. So did the trial judge and the Crown. And they got what they wanted: an objectively impartial jury with the exclusion of the panel during the process. There was no apparent prejudice to either of the accused.

60. There is a complete record of the jury selection process. The triers were carefully vetted by the trial judge, with input from counsel. Several triers were rejected for reasons that became obvious through the vetting process.[123] Jaser was provided with peremptory challenges; if he had any suspicion that a juror approved by the triers was biased, then he could have peremptorily challenged that juror. Yet at the end of that process Jaser had unused peremptory challenges left over. Esseghaier chose not to participate in jury selection at all. There is no *actual* demonstrable prejudice arising in this case, but rather an assertion of *abstract* prejudice to the administration of justice.

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[119] *R c Bebawi*, 2019 QCCS 4393 (English version).
[120] *R v Khan*, 2001 SCC 86 at para 99.
[121] *Cf R v W.V.*, 2007 ONCA 546, leave to appeal ref'd, [2008] 1 SCR v.
[122] *Cf R v Noureddine*, 2015 ONCA 770.
[123] *Transcript of Proceedings at Trial, Jury Selection* (January 27, 2015), pp. 12-30 [AR, Vol IV, Tab 30, pp 82–100].

61. The abstract prejudice arising from the accused not getting to exercise a choice that had no appreciable impact on the fairness of their subsequent trial should not be overstated. The Court below followed its own reasoning in *Noureddine* to find prejudice to the due administration of justice for reasons that are premised on the idea that the use of rotating triers is the preferable procedure—a procedure that has now been abolished by Parliament.

62. Central to the Court of Appeal's ruling is the idea that the accused were forced to choose between the exclusion of the panel and the benefits of having the jury be involved in its own selection through the use of rotating triers.[124] But the same Court has recently and correctly acknowledged the limited advantages of rotating triers. In upholding the constitutionality of the legislative amendment replacing lay triers with the trial judge in challenges for cause, Watt J.A. observed that "the self-selecting nature of the lay trier procedure is not constitutionally mandated. What is more, the term 'self-selecting' rather overstates the previous scheme of lay triers in assessing the truth of a challenge for cause."[125]

63. The very fact that Parliament has seen fit to abolish the notion of "triers" and have the trial judge decide challenges for cause suggests that the integrity of the trial is not determined by the particular procedure for determining whether a prospective juror can decide the case impartially, but rather, whether the jury once selected can perform its role independently and impartially. The comments of the Court of Appeal for Ontario in *Chouhan* in support of their conclusion that the elimination of lay triers was a purely procedural amendment are apposite:

> The essential difference between the former and current provisions is twofold. The identity of the trier. And the availability of a choice of trial procedure (rotating versus static triers). Unlike the abolition of peremptory challenges, however, the challenge for cause procedure remains available with the same threshold for access, burden of proof, standard of proof and consequence if successful. **The change effected by the amendment does not impair or negatively affect the right to trial by judge and jury as it existed prior to the amendment**. [Emphasis added]

64. The new legislation underscores that Jaser was not prejudiced. The very things he says he was deprived of—rotating triers—are no longer a feature of criminal trials. Their absence from his

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[124] *Reasons of the Court of Appeal* at paras 56, 85, 87 [AR, Vol II, Tab 14, pp 109–110, 120, 121].
[125] *R v Chouhan*, 2020 ONCA 40 at para 158, leave to appeal granted, [2020] SCCA No 19.

trial cannot be said to have rendered his trial unfair, any more than their absence will render all jury trials henceforth unfair. The new legislation "compromises neither the independence nor the impartiality of the trial jury or the process of its selection."[126] In other words, the due administration of justice does not require one form of triers over another—it does not require form over substance.

65. This is especially so in this case, given the comments by the trial judge in the alternative, that if he *did* have the discretion to do what the accused wanted, he would not have exercised it in any event. The paramount concern of all parties was juror impartiality and the trial judge did not think using his discretion to exclude only the unsworn jurors accomplished the goal in *this particular case*.[127] Given the extensive pre-trial publicity, the nature of the offences and Esseghaier's past behaviour, the trial judge was just as concerned, if not more concerned, about the sworn jurors being tainted through the challenge for cause process.

66. There was real judicial disagreement about the existence of this discretion at the time, and there has been no suggestion that the trial judge's error with respect to this discretion caused any specific prejudice to the accused or to the fairness of the trial. This Court has repeatedly emphasized that a fair trial should neither be confused with a perfect trial nor the most advantageous trial imaginable from the accused's point of view. Rather, a fair trial is "one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness for the accused."[128] That is what happened in this case.

67. As the law currently stands, a reasonable error by a trial judge on a disputed issue related to jury selection can and often will invalidate the trial that follows, regardless of any prejudice. In the *Jordan* era with increased pressure to get trials through the system with greater efficiency, voiding trials over a technicality without requiring any manner of prejudice to the accused calls for a more measured approach.

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[126] *R v Chouhan*, 2020 ONCA 40 at para 157, leave to appeal granted, [2020] SCCA No 19.
[127] *Transcript of Proceedings of Pre-Trial Motions* (December 9, 2014), p 60, l 14–19 [AR, Vol III, Tab 27, pp 61].
[128] *R v Harrer*, [1995] 3 SCR 562 at para 45; *R v Bjelland*, 2009 SCC 38 at para 22.

68. As this Court stated in *Khan*, the proviso was aimed at *serious* procedural irregularities that went to a loss of jurisdiction and was not meant to be limited to only irregularities of a trivial nature.[129] To overturn convictions for the most serious terrorism offences known to Canadian law following nearly nine months of pre-trial motions and a complex three-month jury trial on the basis that the trial judge wrongly assessed the limits of his common-law discretion would be a miscarriage of justice. What happened in this case—an error in the application of the jury selection procedures that resulted in no prejudice to the fairness of trial—is precisely the kind of technical error that the proviso in s. 686(1)(*b*)(iv) was enacted to address.

PART IV – COSTS

69. The appellant does not seek costs, and makes no submission in that regard.

PART V – ORDER SOUGHT

70. That the appeal be granted, without costs and the convictions restored.

PART VI – SUBMISSIONS ON CASE SENSITIVITY

71. There is no sealing or confidentiality order, publication ban, classification of information in the file that is confidential under legislation, or restriction on public access to information in this file that could have an impact on the Court's reasons in the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Ottawa, in the Province of Ontario, this 17th day of June, 2020.

Kevin Wilson
Counsel for the appellant,
Her Majesty the Queen in Right of Canada

Amber Pashuk
Counsel for the appellant,
Her Majesty the Queen in Right of Canada

[129] *R v Khan*, 2001 SCC 86 at para 16.

PART VII – TABLE OF AUTHORITIES

Criminal Code, RSC 1985, c C-46, ss 640 (2), (2.1), (2.2) – as it appeared in 2015	6, 12, 16, 21, 22, 23, 24, 29, 31, 34, 45, 48, 50
Criminal Code, RSC 1985, c C-46, ss 631(2.1), (2.2.), s 638, s 652.1, ss 686(1)(*b*)(iii), (iv)	2, 19, 36, 38–40, 43–45, 48, 52, 55, 68