File No. 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

and

CHIHEB ESSEGHAIER AND RAED JASER

RESPONDENTS

RESPONDENT'S FACTUM

FILED BY THE RESPONDENT, CHIHEB ESSEGHAIER

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

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PART I: OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. Where a trial judge fails to apply the mandatory statutory rules designed to ensure the impartiality of a jury, over the objection or without the consent of the accused, the result is a procedural error that cannot be cured by the application of the curative proviso in s. 686(1)(*b*)(iv).

2. There is no dispute that a challenge for cause was essential in this case to ensure an impartial jury. There is also no dispute that the trial judge erred by finding that the enactment of s. 640(2.1)[1] displaced his common law jurisdiction to exclude prospective jurors during the challenge for cause tried by rotating jurors. Because of the trial judge's error, the Respondents were wrongfully deprived of their statutory right to have rotating jurors determine the challenge for cause. As a result, the jury was improperly constituted and the appearance of fairness compromised. The Court of Appeal correctly concluded that s. 686(1)(*b*)(iv) was inapplicable.

3. The procedural curative proviso is intended to cure serious, but unintentional or inadvertent, procedural errors that may result in a loss of jurisdiction of the trial court but cause no prejudice to the accused or the administration of justice. This Court has made clear that the proviso cannot be used to imbue a court with jurisdiction it never had; nor can it be employed where the Crown fails to satisfy the appellate court that no prejudice arose from the procedural error.

4. Applying those principles to the facts of this case, the appeal must be dismissed. The jury selection process at the Respondents' trial did not comply with the mandatory rules of the *Criminal Code*. As such, the trial court never obtained jurisdiction because it was not properly constituted. Moreover, the Crown is unable (and notably, did not attempt

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[1] The provisions governing jury selection were amended in 2019 in Bill C-75. Except where stated otherwise, references herein to the provisions governing jury selection in Part XX of the *Criminal Code* refer to the provisions in force at the time of the Respondents' trial.

on appeal) to demonstrate that the appearance of fairness was uncompromised or that the Respondents were not otherwise prejudiced by the denial of a statutory right intended to safeguard the impartiality of the jury.

B. Statement of Facts

5. The Respondent accepts the facts as set out by the Crown, adopts the facts set out in the factum of the Respondent Jaser, and relies on the following additional facts.

6. Chiheb Esseghaier was alleged to have engaged in two conspiracies: a conspiracy to derail a passenger train for the benefit of a terrorist group; and a conspiracy to commit murder for the benefit of a terrorist group. Neither conspiracy came to fruition. Much of the evidence at trial consisted of the testimony of an undercover FBI agent who posed as a co-conspirator and encouraged Jaser and Esseghaier in planning their alleged schemes.[2]

i) The Trial Proceedings

7. At the time of his trial, Esseghaier did not recognize Canadian law and wanted to be tried under the Qur'an.[3] He was self-represented. Given Esseghaier's view of Canadian law, the trial judge anticipated that he would either be "unlikely to participate in or provide useful submissions" on the pre-trial motions.[4] *Amicus curiae* was appointed for the limited role of responding to the trial judge's need for "relevant submissions … [on] contested, uncertain, complex and important points of law or of fact."[5] *Amicus* took on an expanded role at the sentencing stage of the proceedings when issues relating to Esseghaier's mental health were addressed.[6]

8. It was not in dispute at trial that challenges for cause of prospective jurors to screen for partiality based on pre-trial publicity and racial or religious prejudice were necessary. The trial attracted a high public profile, in a climate "where public concerns about terrorism

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[2] *Reasons for Sentence* at paras. 2, 22-26, A.R. Vol. II, Tab 10, pp. 1-2, 7-15.
[3] *Appointment of Amicus Ruling* at para. 14, A.R. Vol. I, Tab 2, pp. 43-44.
[4] *Appointment of Amicus Ruling* at para. 41, A.R. Vol. I, Tab 2, p. 52-53.
[5] *Appointment of Amicus Ruling* at para. 42, A.R. Vol. I, Tab 2, p. 53.
[6] *Reasons for Sentence* at para. 4, A.R. Vol. II, Tab 10, p. 2.

offences and Islamic extremism [had] become pronounced."[7] The motion on the jury selection issues, including "whether to permit challenge for cause in relation to pre-trial publicity and racial/religious prejudices and, if so, what questions to permit", was brought "jointly by the Crown and counsel for Jaser."[8]

9. The trial judge ultimately approved six questions to be asked to all prospective jurors. The questions referred to both Esseghaier and Jaser.[9] A seventh question was added after a group of prospective jurors witnessed Esseghaier completing prayers in the prisoner box. He refused to stop after being told to sit down by the trial judge.[10] The seventh question asked whether the juror's ability to judge the evidence in the trial without prejudice or partiality would be affected by that incident.[11]

10. Trial counsel for Jaser first raised the issue of how the challenge would be tried on November 27, 2014. Counsel for Jaser wanted rotating triers and asked the trial judge to exercise his inherent jurisdiction to exclude the jury panel from the process. Counsel expressly stated that he would not make a request, pursuant to s. 640(2.1) or (2.2), for static triers.[12] The trial judge warned counsel that it would be an "uphill battle" and that he had issued rulings in other cases finding that a trial judge no longer had an inherent jurisdiction to exclude prospective jurors while employing rotating triers.[13] The matter was adjourned to be argued on December 9, 2014.

11. In this context, the trial judge told *amicus* that his presence was not needed on that day unless *amicus* could see "some impact on Mr. Esseghaier." *Amicus* responded that "all of this impacts on Mr. Esseghaier, obviously" but noted that he could not "define"

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[7] *Jury Selection Ruling* at para. 8, A.R. Vol. I, Tab 7, p. 118.
[8] *Jury Selection Ruling* at para. 2, A.R. Vol. I, Tab 7, p. 116-117.
[9] *OCA Reasons for Judgement* at paras. 32-33, A.R. Vol. II, Tab 14, pp. 100-101.
[10] *Transcript of Proceedings at Jury Selection* (23 January 2015), p. 78, l. 2-26, A.R. Vol. III, Tab 28, p. 188.
[11] *Transcript of Proceedings at Jury Selection* (27 January 2015), p. 35, l. 7-28, A.R. Vol. IV, Tab 30, p. 105.
[12] *Transcript of Proceedings, Submissions re: Jury Selection Procedure* (27 November 2014), p. 55 l. 1-26, R.R. Vol. II, Tab 13, p. 194.
[13] *Transcript of Proceedings, Submissions re: Jury Selection Procedure* (27 November 2014), p. 65, l. 28-29, R.R. Vol. II, Tab 13, p. 195.

Esseghaier's wishes.[14] *Amicus* suggested that Esseghaier's interests in relation to jury selection would mirror Jaser's. The trial judge agreed and concluded that Jaser's counsel would "cover the field adequately" on that point.[15]

12. On December 9, 2014, the trial judge heard submissions from counsel for Jaser who brought a common law application asking for rotating triers with all prospective jurors excluded.[16] At the time, there was a divided line of authority as to whether trial judges had a common law or inherent discretion to exclude the panel. Jaser's counsel indicated in their factum that "[i]f, but only if," the trial judge concluded he had no common law jurisdiction to exclude the panel, would they bring an application for static triers (with the panel excluded) pursuant to section 640(2.1) of the *Code*.[17] That is, if left with an untenable choice between using rotating triers with no jurors excluded, and using static triers with the panel excluded, they would choose the latter.

13. Esseghaier appeared by video for the jury selection application. After Jaser and the Crown made submissions, the trial judge turned his attention to Esseghaier. His submissions in response did not relate to the jury selection process. *Amicus* was not present for argument on the application.[18]

14. The trial judge denied the request for rotating triers with the panel excluded and granted the alternative application under s. 640(2.1) for the exclusion of the jurors and the use of static triers.[19] The trial judge imposed on the Respondents the practice that he felt was best, one which in his "experience, has consistently produced excellent triers."[20]

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[14] *Transcript of Proceedings, Submissions re: Jury Selection Procedure* (27 November 2014), p. 65, l. 28-29, R.R. Vol. II, Tab 13, p. 205.
[15] *Transcript of Proceedings, Submissions re: Jury Selection Procedure* (27 November 2014), p. 65, l. 26-p. 66, l. 8, R.R. Vol. II, Tab 13, pp. 205-206.
[16] *OCA Reasons for Judgement* at para. 43, A.R. Vol. II, Tab 14, p. 105.
[17] *Factum of Jaser at Trial on Jury Selection Issues* at para. 39, R.R. Vol. I, Tab 2, p. 38.
[18] *OCA Reasons for Judgement* at paras. 44-45, A.R. Vol. II, Tab 14, p. 105.
[19] *Jury Selection Ruling* at para. 46, A.R. Vol. I, Tab 7, p. 133.
[20] *Jury Selection Ruling* at para. 44, A.R. Vol. I, Tab 7, p. 132-133.

ii) Esseghaier's Mental Health Status

15. The jury found Esseghaier guilty on all counts.[21] Between the finding of guilt and the imposition of sentence, issues were raised with respect to Esseghaier's mental health and fitness to stand trial.[22] At the time of his sentencing, Esseghaier had been examined by two forensic psychiatrists, Dr. Lisa Ramshaw and Dr. Philip Klassen. While they disagreed on whether Esseghaier was fit to stand trial,[23] both doctors concluded that he was mentally ill and suffering from psychotic delusions. The doctors also agreed that the most likely diagnosis was schizophrenia.[24]

16. The trial judge expressed skepticism about the diagnosis of schizophrenia.[25] During the pre-trial motions, the trial judge was clearly of the view that Esseghaier's refusal to recognize the validity of Canadian law, and insistence on interrupting the proceedings to espouse his religious views, was a product of Esseghaier's personality features and deeply held religious beliefs. During the severance motion, the trial judge stated "Mr. Esseghaier will always be Mr. Esseghaier" implying that these features of his behaviour would never change.[26] In his reasons on the application for a fitness assessment at sentencing, the trial judge found there was "not a scintilla of evidence" to suggest that Esseghaier was unfit.[27]

17. In his reasons for sentence, the trial judge held that even if Esseghaier was suffering from a mental illness, it did not render him unfit and did not have any casual connection to the offending behaviour and therefore was not a mitigating factor to be considered on sentence.[28]

18. A week after being sentenced to life in prison, Esseghaier signed an inmate notice of appeal. Though filed with the Court of Appeal on October 1, 2015, Esseghaier dated the

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[21] *Reasons for Sentence* at para. 1, A.R. Vol. II, Tab 10, p. 1.
[22] *Reasons for Sentence* at para. 4, A.R. Vol. II, Tab 10, p. 2.
[23] *Reasons for Sentence* at para. 4, A.R. Vol. II, Tab 10, p. 2.
[24] *Reasons for Sentence* at para. 74, A.R. Vol. II, Tab 10, pp. 36-37.
[25] *Reasons for Sentence* at para. 83, A.R. Vol. II, Tab 10, p. 40.
[26] *Transcript of Proceedings, Severance Application* (24 October 2014), p. 19 l. 4-6, R.R. Vol. II, Tab 12, p. 19.
[27] *Fitness Assessment Ruling* at para. 21, A.R. Vol. I, Tab 9, p. 152.
[28] *Reasons for Sentence* at paras. 83-87, A.R. Vol. II, Tab 10, pp. 40-41.

form 2014. [29] It listed one ground of appeal: that the trial judge erred in refusing to allow the trial to be conducted pursuant to the Holy Qur'an instead of the *Code*. On July 20, 2017, Esseghaier signed an amended notice of appeal in which he added additional grounds of appeal and sought an extension of time to appeal against sentence. Esseghaier explained why, at the time he filed his original notice, he only wanted to appeal conviction:

> At the time I filed that notice, I was very ill. I suffer from schizophrenia. I have been diagnosed with this mental disorder by multiple doctors. When I filed my original notice of appeal, I was suffering from delusions and believed that I would die, and my soul would ascend to heaven on December 25, 2014. Because of this delusion, I did not believe that the life sentence imposed was real and did not want to acknowledge the existence or legality of the sentence by appealing it.
>
> I now know that these beliefs are delusional. In December, after I was transferred to a prison in British Columbia, I was certified and treated with anti-psychotic medication. Initially, I did not agree with this treatment. However, I now see its benefits. I acknowledge that I have significant mental health issues and I understand that I need to continue to take the medication prescribed to me in order to stay well.
>
> The only reason I did not file a notice of appeal against sentence earlier, is because I was very unwell and did not understand the nature of the sentence imposed on me. I was unable to make rational decisions.[30]

19. The additional grounds of appeal in the amended notice focused largely on issues relating to Esseghaier's mental health at the time of his trial, and at the time the offences were allegedly committed.[31]

20. When the jury selection issue was argued at the Court of Appeal, Esseghaier remained self-represented but was assisted by *amicus*. He appeared by video at the

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[29] *Inmate Notice of Appeal to Court of Appeal re: Esseghaier* (2014 [*sic*]), R.R. Vol. I, Tab 4, pp. 87-89. The Notice of Appeal is dated 2014 because at the time it was signed, Esseghaier was firmly of the belief that it was still 2014 and that the jail authorities have been compressing time by manipulating the light: *Reasons for Sentence* at para. 83, A.R. Vol. II, Tab 10, p. 40.

[30] Supplementary Inmate Notice of Appeal to Court of Appeal re: Esseghaier (20 July 2017), R.R. Vol I, Tab 6, pp. 95-97.

[31] Supplementary Inmate Notice of Appeal to Court of Appeal re: Esseghaier (20 July 2017), R.R. Vol I, Tab 6, pp. 95-97.

hearing[32] and was content to allow *amicus* to make arguments on his behalf. At the end of the hearing, he was asked whether there was anything he wished to add in respect of the jury selection issue. In contrast to his presentation at trial, Esseghaier provided a coherent answer, responsive to the question. He stated:

> I would like to say that I didn't take part in the trial and challenge for cause because I was suffering from schizophrenia. My mind was completely outside the court… If I was not sick, I would have chosen rotating triers, not static triers. But because of illness, I wasn't able to participate in the trial and I didn't hire a lawyer and all these things happened to me.[33]

iii) Proceedings at the Court of Appeal

21. Counsel for Jaser and *amicus* sought the direction of Watt J.A., in his capacity as case management judge, as to how the appeal would proceed. Both Jaser and *amicus* took the position that, given its potentially determinative nature, the jury selection issue should be argued in advance of the other grounds of appeal. The Crown took no position.[34] Watt J.A. concluded that it was in the interests of justice to bifurcate the arguments on appeal.[35]

22. In reaching that conclusion, Watt J.A. noted that segregating the jury selection ground of appeal would allow *amicus* to pursue expert evidence about Esseghaier's fitness to stand trial and his criminal responsibility.[36] Had his appeal not been allowed on the jury selection issue, Esseghaier would have sought to adduce expert opinion fresh evidence in support of his argument that he was unfit at his original trial.

23. In relation to the jury selection issue, *amicus* argued that Esseghaier was statutorily entitled to rotating triers, that he did not make any application for static triers, and that the

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[32] *OCA Reasons for Judgement*, p. 2, A.R. Vol. II, Tab 14, p. 88.
[33] Unfortunately, the audio recording of the oral hearing did not capture the submissions of Esseghaier made on video. Those submissions were reported in a newspaper article published after the hearing: Michele Mandel "VIA Rail terrorists may just get new trial" *Toronto Sun* (20 February 2019), R.R. Vol. I, Tab 10, pp. 155-156.
[34] *OCA Decision on Bifurcation* at paras. 11-13, A.R. Vol. II, Tab 13, pp. 80-81.
[35] *OCA Decision on Bifurcation* at para. 21, A.R. Vol. II, Tab 13, p. 85.
[36] *OCA Decision on Bifurcation* at para. 18, A.R. Vol. II, Tab 13, pp. 83-84.

trial judge erred by imposing static triers in these circumstances. *Amicus* argued that where there are two accused and one applies under s. 640(2.1) and the other does not, the default rights of the accused who has not made an application trump the other accused's request for static triers. At minimum, the default rights of one accused to rotating triers is a factor that must be considered by the trial judge. *Amicus* also adopted the submissions of Jaser that the jury was not properly constituted because Jaser made no *valid* application for static triers pursuant to s. 640(2.1). Finally, *amicus* argued that if the Court accepted the position of either Jaser *or* Esseghaier, it must find that the jury was improperly constituted in respect of both Jaser *and* Esseghaier.[37]

24. The Crown argued that the jury was properly constituted because Esseghaier did not make a challenge for cause application and therefore his failure to make a s. 640(2.1) application had no impact on whether the jury was properly constituted for him.[38] The Crown further suggested that the jury could be found to be properly constituted for Esseghaier even if the Court found it was improperly constituted for Jaser.[39] The Crown did not raise the issue of the proviso in its factum or at the hearing of the appeal.[40]

25. The Court of Appeal found that the trial judge's error wrongfully deprived Jaser of an option for jury selection – using rotating triers – that he properly sought to invoke, and the same error deprived Esseghaier of his statutory right to have the challenges for cause determined by rotating triers. The result was an improperly constituted jury. While

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[37] *OCA Reasons for Judgement* at paras. 61-62, A.R. Vol. II, Tab 14, pp. 110-112.
[38] *OCA Reasons for Judgement* at paras. 65, A.R. Vol. II, Tab 14, p. 113.
[39] *Submissions of Crown Counsel at Court of Appeal* (19 February 2019), p. 19, l. 5-p. 20, l. 26, R.R. Vol. I, Tab 9, pp. 150-151; *OCA Reasons for Judgement* at paras. 93-94, A.R. Vol. II, Tab 14, pp. 123-124.
[40] The reasons of the Court of Appeal suggest that the Crown did argue that this was a case where the curative proviso could be applied: *OCA Reasons for Judgement* at para. 64, A.R. Vol. II, Tab 14, p. 112. A review of the Crown's factum and a transcript of the Crown's submissions before the Court of Appeal reveal that the Crown did not invoke the proviso in either written or oral argument: *Factum of Crown at Court of Appeal on Jury Selection* (January 2019), R.R. Vol. I, Tab 8; *Submissions of Crown Counsel at Court of Appeal* (19 February 2019), R.R. Vol. I, Tab 9.

prejudice, in terms of impact on the verdict reached by the jury, would be impossible to gauge in the circumstances, the error resulted in "prejudice to the due administration of justice flowing from the denial of a jury selection method which was in law properly invoked."[41]

[41] *OCA Reasons for Judgement* at paras. 75-77, 94-95, A.R. Vol. II, Tab 14, pp. 116-117, 124.

PART II: QUESTIONS IN ISSUE

26. The Appellant raises the following two questions:

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

The Respondent says **no**. The trial judge's error resulted in Esseghaier being deprived of his statutory right to rotating triers.

ii) 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 Respondent says **no**. Technical errors in the jury selection process that cause no prejudice to an accused or the administration of justice may be curable by the proviso in s. 686(1)(*b*)(iv). **The error in this case, however, was neither technical nor non-prejudicial. The Court of Appeal correctly concluded that the proviso was inapplicable.**

27. The Respondent raises no additional issues.

PART III: STATEMENT OF ARGUMENT

A. The Jury was Improperly Constituted for Esseghaier and Jaser

28. All parties in the court below agreed that the trial judge erred when he held that he lacked authority to order exclusion of unsworn jurors while rotating jurors tried the challenges for cause. The parties disagreed on the extent of that error and its effect.[42]

29. This was not an issue of first impression for the Court of Appeal. In multiple earlier cases, the Court considered the impact of jury selection errors. Sometimes the error proved fatal to the convictions.[43] Other times it did not.[44] The particular facts of the case were determinative in deciding whether each fell within or outside a basic principle:

> [W]here a jury has been selected by a challenge for cause procedure 'disavowed by an accused, thus depriving him or her of the option to invoke the method of selecting the composition of triers,' the verdict cannot stand and s. 686(1)(b)(iv) of the *Criminal Code* (the curative proviso) does not apply.[45]

30. At the Court of Appeal, the Crown did not argue that this two-part principle was wrong or needed to be revisited. Instead, in respect of Esseghaier, the Crown argued that any error in the jury selection process had no bearing on him because he did not apply for or participate in the challenge for cause. That argument, maintained before this Court, must be rejected.

i) Esseghaier was a Party to the Challenge for Cause

31. Esseghaier was a party to the challenge for cause, just as he was a party to the rest of his trial. His non-participation in the jury selection process, and the corresponding absence of any application for static triers made on his behalf, is what entitled him to the statutory default of rotating triers, designed to promote an impartial jury. Self-represented

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[42] *OCA Reasons for Judgement* at para. 51, A.R. Vol. II, Tab 14, pp. 107-108.
[43] See *e.g.*: *R. v. Noureddine*, 2015 ONCA 770; *R. v. Husbands*, 2017 ONCA 607, leave to appeal ref'd [2018] 1 S.C.R. ix; *R. v. Cumor*, 2019 ONCA 747.
[44] See *e.g.*: *R. v. Grant*, 2016 ONCA 639; *R. v. Riley*, 2017 ONCA 650, leave to appeal ref'd, [2018] 3 S.C.R. v; *R. v. Murray*, 2017 ONCA 393; *R. v. Kossyrine*, 2017 ONCA 388; *R. v. Mansingh*, 2017 ONCA 68; *R. v. Evans*, 2019 ONCA 715.
[45] *OCA Reasons for Judgement* at para. 67, A.R. Vol. II, Tab 14, p. 113.

accused who choose not to participate in trial proceedings are still entitled to fair trials. Non-participation does not relieve the court of its duties to ensure a fair process and to comply with the mandatory processes set out in the *Code*.

32. Despite Esseghaier's refusal to participate, he and Jaser were equal subjects of the challenge for cause. The pre-trial application in relation to jury selection issues – including whether and what challenges for cause would be permitted – was brought jointly by both counsel for Jaser and the Crown.[46] The subject matter of the challenge for cause was whether the jury could be impartial as between the Crown and *both* Jaser and Esseghaier given their race and religion, the publicity of the case, and the nature of the offences. Esseghaier was invited to make submissions on how the challenge would be tried, but his submissions were not responsive to the issue.[47] The trial judge acknowledged that exclusion of the panel during the challenge for cause was "almost essential."[48]

33. Importantly, the challenge for cause also addressed an additional issue specific to Esseghaier, who completed prayers in the prisoner's box in front of a group of prospective jurors and continued to do so after being told by the trial judge to sit down.[49] As the jury was being excused, one prospective juror said, "We are in Canada. Would you please sit down? …Jesus." Her comment was met with laughter.[50] Clearly, concerns about whether the jurors could be impartial even in light of Esseghaier's behaviour in court – punctuated with religious and political speeches and repeated pronouncements of his rejection of the Canadian legal system – were central to the challenge for cause.

34. The Appellant's suggestion that an accused's statutory right to have rotating triers is only engaged when he makes an application for a challenge for cause[51] is inconsistent

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[46] *Transcript of Proceedings at Jury Selection* (9 December 2014), p. 16, l. 11-24, A.R. Vol. III, Tab 27. *Jury Selection Ruling* at para. 2, A.R. Vol. I, Tab 7, p. 116-117.
[47] *OCA Reasons for Judgement* at para. 45, A.R. Vol. II, Tab 14, p. 105.
[48] *Transcript of Proceedings* (24 November 2014), p. 71, l. 6-8, A.R. Vol. II, Tab 21, p. 142.
[49] *Transcript of Proceedings at Jury Selection* (27 January 2015), p. 35, l. 7-28, A.R. Vol. IV, Tab 30, p. 105.
[50] *Transcript of Proceedings at Jury Selection* (23 January 2015), p. 78, l. 2-26, A.R. Vol. III, Tab 28, p. 188.
[51] *Appellant's Factum* at para. 34.

with the plain language of ss. 638(1) and 640(2). Pursuant to s. 638(1), either the prosecutor or an accused can make an application for a challenge for cause. When a challenge for cause is conducted, the default rule in s. 640(2) – that rotating triers will determine the challenge – is engaged regardless of which party makes the application under s. 638. A lack of participation by an accused does not change the statutory rules.

35. Even where, as here, it is the Crown who successfully brings a motion for a challenge for cause, it is still the accused who determines how the challenge will be tried, either by relying on the default of rotating triers, or successfully bringing an application for static triers.[52] The accused is therefore necessarily a "party" to the challenge.

36. The ability of the prosecutor to apply for a challenge for cause makes good sense and the importance of this power is well-demonstrated by the circumstances of this case. If only the accused could make the application there would have been no way to try the issue of impartiality as between the Crown *and Esseghaier* even though the circumstances surrounding the trial made the challenge essential.

37. Consider if Jaser was successful in his severance application. Had Esseghaier been tried alone, there is no realistic possibility that the jury would have been selected without a challenge for cause. In light of the media attention and spotlight on Islamic terrorism at the time, all parties agreed such a challenge was necessary. The Crown still could and would have made the application under s. 638(1). Esseghaier's refusal to participate would not somehow have prevented the operation of s. 640(2). There is no authority for the Crown to apply for static triers, and so in the absence of an application by Esseghaier under s. 640(2.1), rotating triers would have been ordered.

38. Esseghaier's non-participation in jury selection did not somehow strip him of his status as a party to the challenge for cause, just as his refusal to participate in the remainder of the trial did not make him any less subject to the verdicts ultimately returned by the jury

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[52] *R. v. Husbands*, 2017 ONCA 607 at paras. 37-38, leave to appeal ref'd [2018] 1 S.C.R. ix; *R. v. Cumor*, 2019 ONCA 747 at para. 32.

or the sentence imposed. Accused people who reject the authority of the *Code* are nevertheless bound by its prohibitions and benefit from its procedural protections.

ii) Esseghaier was Entitled to the Statutory Default

39. Once the joint application for a challenge for cause was granted, Esseghaier's statutory right to rotating triers was engaged. By doing nothing, the right was invoked by default.[53] In the absence of an application pursuant to s. 640(2.1), the trial judge had no authority to direct static triers be used to determine the challenge.[54] Rotating triers were the default for good reason. Employing rotating as opposed to static triers ensures the participation of members of a jury in its own selection, minimizes the risk of a rogue trier unable or unwilling to properly assess the validity of challenges,[55] and "guarantees that a variety of views and perspectives will be brought to bear on the fundamental question of how the jury is to be constituted."[56] The statutory default to rotating triers ensured that non-participating accused receive these benefits.

a) Co-Accused Bind Each Other on the Composition of the Court

40. Jaser's reluctant request for a discretionary order for static triers did not trump Esseghaier's statutory right to rotating triers. The default nature of rotating triers necessarily requires unanimity among co-accused in order to use static triers. Alternatively, and leaving aside whether the default rights of one accused will always trump an application for static triers by a co-accused, those default rights are at minimum a factor to be considered in assessing an application pursuant to s. 640(2.1). The trial judge erred in failing to give Esseghaier's statutory rights any consideration in determining the jury selection issue.

41. In matters relating to mode of trial and composition of the court, there are constitutional and statutory presumptions in favour of the most procedurally protective manner of proceeding. Those presumptions operate, at times, to prevent defendants in

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[53] *R. v. Swite*, 2011 BCCA 54 at para. 54; *R. v. Cumor*, 2019 ONCA 747 at para. 31.
[54] *R. v. Husbands*, 2017 ONCA 607 at para. 37, leave to appeal ref'd [2018] 1 S.C.R. ix.
[55] *R. v. Grant*, 2016 ONCA 639 at para. 21.
[56] *R. v. W.V.*, 2007 ONCA 546 at para. 26, leave to appeal ref'd [2008] 1 S.C.R. v.

multi-defendant matters from conducting the proceedings in exactly the manner they would have if tried on their own.

42. Consider, for example, an accused's request for a preliminary hearing pursuant to s. 536(4) of the *Code*. The request is determinative: s. 536(4) provides that a court *shall*, at the request of the accused or prosecutor, hold a preliminary inquiry. Even if only one co-accused wants a preliminary hearing, if he or she requests one pursuant to s. 536(4), the mandatory nature of the application means the request is binding on all co-accused.

43. Similarly, when multiple accused are charged with indictable offences, the decision by one to choose a trial by judge and jury trumps the preference of all other accused individuals to elect a different mode of trial.[57] The consequences of non-participation in the election process were exemplified in this case. During Jaser's severance motion, the Crown was asked whether it would consent to a re-election for a judge-alone trial, which would have obviated the need for Jaser's severance application.[58] When the trial judge tried to solicit a position from Esseghaier about re-election, Esseghaier predictably took no position.[59] The result of Esseghaier's non-participation was not that he relinquished his right to a jury trial and therefore had to cede to Jaser's election, but rather that Jaser was bound to the statutory presumption. When counsel for Jaser noted that Esseghaier had dictated the outcome through his refusal to participate, the trial judge succinctly noted, "that's just the effect of the *Criminal Code.*"[60]

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[57] Where such disagreements arise, s. 567 of the *Code* permits the judge to decline to record the defendants' elections for a provincial court or judge-alone trial. Pursuant to s. 565(1), where no election is recorded, the jointly charged persons are all deemed to have elected a trial by judge and jury: *R. v. Ryan*, 2019 NBPC 11; *R. v. Burleigh*, 2016 ONCJ 539.

[58] *Transcript of Proceedings, Severance Application* (24 October 2014), p. 100, l. 9-p. 101, l. 12, R.R. Vol. II, Tab 12, pp. 100-101.

[59] *Transcript of Proceedings, Severance Application* (24 October 2014), p. 65, l. 18-27, R.R. Vol. II, Tab 12, p. 65.

[60] *Transcript of Proceedings, Severance Application* (24 October 2014), p. 34, l. 17-25, R.R. Vol. II, Tab 12, p. 34.

44. In the case of challenges for cause, the statutory default is rotating triers. The Respondent submits that, where any co-accused declines to apply for static triers, the court is prevented from departing from the statutory default even where there is an application made by another co-accused pursuant to s. 640(2.1). An accused has neither a constitutional nor statutory right to static triers. Orders for static triers are discretionary. In this case, absent a s. 640(2.1) application from Esseghaier, or his consent to Jaser's alternative application, the trial judge lacked jurisdiction to order static triers.[61]

45. Alternatively, even if unanimity among accused is not a prerequisite to imposing static triers, the default rights of one accused are at minimum a factor to be considered in determining whether to make the discretionary order for static triers. Where co-accused seek different modes of trying the challenge for cause, fairness requires the trial judge to balance the competing interests and make an order that is in the interests of justice.

46. Jaser's primary position aligned with Esseghaier's default right. Granting Jaser's application for the exclusion of prospective jurors while employing rotating triers had the distinct advantage of not interfering with Esseghaier's statutory right to rotating triers. As the Court of Appeal noted, the trial judge here failed to give any consideration to this factor.[62]

b) An Improperly Constituted Jury for One Accused is An Improperly Constituted for Both

47. A jurisdictional error in respect of the jury selection process resulted in a court that was not properly constituted. Both Esseghaier and Jaser are entitled to the "benefit" of any

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[61] The limited case law available on how to reconcile competing requests from counsel for co-accused in respect of static or rotating triers supports the Respondent's position. In *R. v. Daley*, Fairburn J. (as she then was) decided to use rotating triers, as requested by four of five co-accused before her, in the face of a request for static triers from counsel for the fifth co-accused: *R. v. Daley*, 2015 ONSC 7264 at paras. 38-39.

[62] *OCA Reasons for Judgement* at para. 58, A.R. Vol. II, Tab 14, p. 110.

errors made in the selection process that amounted to an improperly constituted court by which they were both tried and convicted.

48. Relying on case law which makes clear that *the Crown* cannot challenge an acquittal by an improperly constituted jury, the Appellant argues, as it did before the Court of Appeal, that because Esseghaier did not take part in the challenge for cause process, the jury in this case was properly constituted for *him* even if it was improperly constituted for Jaser.[63] As the Court of Appeal concluded, the Crown's analogy is inapt.[64]

49. The right to use rotating triers is a right which is personal to *accused* individuals. The failure to use rotating triers has no impact on any of the Crown's rights in the jury selection process.[65] For that reason, "[t]he improper use of static triers can only create rights in an accused to challenge convictions, not in the Crown to challenge acquittals."[66] The interests of both Esseghaier and Jaser in the jury selection process were compromised by the improper imposition of static triers. The error thus rendered the guilty verdicts voidable for both accused.

50. The issue of whether a jury improperly constituted for one accused will *necessarily* render that jury improperly constituted for co-accused in the same matter was neither considered nor decided by the court below. The Court of Appeal concluded that "*in the circumstances of this case*, as the jury was not properly constituted for Jaser, it cannot be considered to have been properly constituted for Esseghaier."[67] The circumstances of this case include that:

- Esseghaier was self-represented;
- He and Jaser were both the subject matter of the challenge for cause questions;

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[63] *Submissions of Crown Counsel at Court of Appeal* (19 February 2019), p. 19, l. 5-p. 20, l. 26, R.R. Vol. I, Tab 9, pp. 150-151.
[64] *OCA Reasons for Judgement* at para. 93, A.R. Vol. II, Tab 14, pp. 123-124.
[65] *R. v. Noureddine*, 2015 ONCA 770 at para. 87.
[66] *OCA Reasons for Judgement* at para. 93, A.R. Vol. II, Tab 14, pp. 123-124.
[67] *OCA Reasons for Judgement* at para. 94, A.R. Vol. II, Tab 14, p. 124 [Emphasis added].

- *Amicus* was not present when the rotating versus static trier issue was argued;
- The trial judge was of the view that Jaser's counsel would "cover the field adequately" in respect of both Jaser and Esseghaier's interests on the jury selection issue;[68]
- Esseghaier would have the benefit of any successful challenges by Jaser's counsel; and
- Esseghaier never made an application for static triers and never gave up his right to rotating triers.[69]

51. One jury was selected through one flawed process. Given these facts, the Court of Appeal's conclusion that the jury was improperly constituted for both Esseghaier and Jaser was plainly correct.

B. The Proviso Cannot Cure an Improperly Constituted Jury

52. In *R. v. Khan,* this Court identified two conditions precedent for the application of s. 686(1)(*b*)(iv) to cure procedural irregularities. The proviso only applies where (a) despite the error, the trial court has and maintains its jurisdiction over the offence charged; and (b) the error causes no prejudice to the accused or the administration of justice. Orders made by trial judges that contradict mandatory *Code* procedures for the selection of jurors, over the objection or without the consent of the accused, violate both these conditions.

53. First, such errors result in an improperly constituted trial court – a court with no jurisdiction over any class of offence. Second, and even if the lack of jurisdiction could somehow be cured, these errors are not harmless. It cannot be said that an accused suffers no prejudice from a procedural irregularity that results in his being tried by a court not constituted in accordance with the law. The demonstrable and inferred prejudice to both the accused and the administration of justice is insurmountable and irrebuttable.

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[68] *Transcript of Proceedings, Submissions re: Jury Selection Procedure* (27 November 2014), p. 65, l. 26-p. 66, l. 8, R.R. Vol. II, Tab 13, pp. 205-206.
[69] *OCA Reasons for Judgement* at para. 17, A.R. Vol. II, Tab 14, pp. 93-94.

i) The Scope of the Procedural Proviso

54. In *Khan,* Arbour J. considered the scope of the procedural proviso and expressly endorsed the analysis of Goodman J.A. in *R. v. Cloutier,* previously adopted by Gonthier J. in his dissent in *R. v. Bain.*[70] Arbour J. agreed with Goodman J.A. that "s. 686(1)(*b*)(iv) was enacted to cure serious procedural irregularities, otherwise amounting to errors of law, in cases where […] jurisdiction over the person, but not over the offence, had been lost."[71]

55. Goodman J.A. and Arbour J. made clear in their respective reasons that the proviso applies only "where a court has jurisdiction in the first instance but has lost jurisdiction as a result of some procedural irregularity."[72] The distinction between a procedural irregularity resulting in the loss of jurisdiction and an error preventing a properly constituted trial court from coming into being is an important one. As explained by LeBel J., in his minority opinion in *Khan*, the procedural proviso "will not remedy a failure of justice or an error of law which may affect the verdict in a significant manner or *in the absence of jurisdiction*."[73]

56. An improperly constituted trial court has no jurisdiction to hear any class of offence. This point is made eloquently by Gonthier J. in *Bain*:

> [A] jury is more than an incident or a procedural tool in a trial case. The jury is the court, together with the trial judge. If the jury is not constituted according to the rules, the court exists no more than if the judge had been unlawfully appointed. In the case at bar, the problem is not one of application of the jury selection rules, which could have been saved by s. 686(1)(*b*)(iv) of the Code. The rules were changed. The jury was selected pursuant to other rules than those set out in the Code. There was therefore no trial court properly constituted, and the appropriate sanction is annulment.
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> This holding does not detract from the classification proposed in Cloutier, supra. In order for the saving provisions of s. 686(1)(*b*)(iv) of the Code to find application,

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[70] *R. v. Khan*, 2001 SCC 86 at para. 11, citing *R. v. Cloutier,* 1988 CanLII 199 (Ont. C.A.), leave to appeal ref'd [1989] S.C.C.A. No. 194; *R. v. Bain*, [1992] 1 S.C.R. 91.
[71] *R. v. Khan*, 2001 SCC 86 at para. 16.
[72] *R. v. Cloutier,* 1988 CanLII 199 (Ont. C.A.), leave to appeal ref'd [1989] S.C.C.A. No. 194, p. 20.
[73] *R. v. Khan*, 2001 SCC 86 at para. 100 [Emphasis added].

> not only must the court have jurisdiction over the class of offence, but it must also be a court within the meaning of the Code.[74]

57. This Court has long recognized that certain procedural errors associated with the jury selection process are so fundamental in nature that they undermine the validity of the trial proceedings. In *Cloutier v. The Queen,* Pratte J., speaking for the majority of the Court, held that where an accused is erroneously denied a peremptory challenge, the accused is "entitled to ask that the trial and the guilty verdict returned by an irregularly empanelled jury be annulled; it is not necessary for him to prove a prejudice; there is a 'préjudice de droit'".[75]

58. In *R. v. Barrow,* Dickson C.J., for the majority of the Court wrote, "The selection of an impartial jury is crucial to a fair trial" and that trial judges have no authority to "upset the balance of the carefully defined jury selection process."[76] Dickson C.J. held that a judge's attempt to usurp the function of the jurors to determine partiality in a challenge for cause results in an error of law so grave that it mandates a new trial, "even if no prejudice to the accused can be shown."[77] Dickson C.J. cited with approval the Quebec Court of Appeal's decision in *R. v. Guérin,* which held that interference by a trial judge in challenges for cause meant the jury selection process was "tainted with illegality and that the appellants were denied the rights which the *Criminal Code* affords them", resulting in a "fundamental defect in the constitution of the tribunal which must judge the crimes against the appellants."[78]

59. Though the Supreme Court's decision in *Cloutier* and the Quebec Court of Appeal's reasons in *Guérin* pre-date the enactment of the procedural proviso, that does not change the fundamental nature of the errors as described in these cases. There is no

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[74] *R. v. Bain,* [1992] 1 S.C.R. 91, p. 136.
[75] *Cloutier v. The Queen*, [1979] 2 S.C.R. 790, p. 23.
[76] *R. v. Barrow,* [1987] 2 S.C.R. 694 at paras. 25 and 32, cited in *R. v. W.V.,* 2007 ONCA 546 at para. 23, leave to appeal ref'd [2008] 1 S.C.R. v.
[77] *R. v. Barrow,* [1987] 2 S.C.R. 694 at para. 32.
[78] *R. v. Guérin,* (1984) 13 C.C.C (3d) 231 (Q.C. C.A.), p. 248.

principled basis to retrospectively recast fundamental jury selection errors as mere procedural irregularities.

ii) Ontario's Approach is Consistent with This Court's Jurisprudence

60. Contrary to the Appellant's suggestion, the Court of Appeal has never held that the proviso is unavailable for errors affecting jury selection. Rather, the Court has made clear that the proviso is "indiscriminate about the source of the procedural irregularity that falls within its compass"[79] and has consistently held that errors in the jury selection process are not, categorically, beyond its reach. The Court of Appeal has, however, distinguished between errors falling outside the express provisions of the *Code* governing jury selection which are curable, and fatal errors which result from failures to comply with specific statutory requirements intended to protect the impartiality of the jury.[80]

61. Nine years before she wrote for the majority of this Court in *Khan,* Arbour J.A. (as she then was) wrote for the Court of Appeal in *R. v. Hollwey* that "a failure to comply with the mandatory jury selection procedures set out in the Criminal Code is jurisdictional rather than procedural and *can therefore not be cured* by s. 686(1)(b)(iv)."[81] She cited Gonthier's J.'s recognition of this principle in *Bain* reproduced above: "If the jury is not constituted according to the rules, the court exists no more than if the judge had been unlawfully appointed."[82]

62. Justice Arbour distinguished between procedural irregularities in the jury selection process, for example, an absence of the accused during a portion of the jury pick, and departures from the jury selection requirements of the *Code*. The former type of error is potentially curable. The latter suggests "that the court which tried the appellant was not

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[79] *R. v. Province,* 2019 ONCA 638 at para. 83.
[80] See *e.g.*: *R. v. Noureddine,* 2015 ONCA 770 at paras. 58-60; *R. v. Province,* 2019 ONCA 638 at para. 84-85.
[81] *R. v. Hollwey*, [1992] O.J. No. 348 (Ont. C.A.) (Q.L.) at para. 11 [Emphasis added].
[82] *R. v. Bain*, [1992] 1 S.C.R. 91, p. 136, cited in *R. v. Hollwey*, [1992] O.J. No. 348 (Ont. C.A.) (Q.L.) at para. 11.

constituted in accordance with the law and was without jurisdiction to try him."[83] There is no indication in *Khan* that the majority intended to overrule this distinction.

63. While some errors can be forgiven, "trial judges have no inherent authority to modify the codified procedure for jury selection even where it may seem expeditious to do so."[84] As Moldaver J.A. (as he then was) warned, while the challenge of cause process may seem "cumbersome, repetitive, and wasteful", trial judges must be mindful that looking for ways "to speed it up…can lead to impermissible corner-cutting."[85]

64. Only the British Columbia and Ontario Courts of Appeal have considered the application of the procedural proviso in cases where static triers were improperly imposed to try a challenge for cause. Both courts determined that a departure from the "carefully constructed scheme" of jury selection cannot be described as a minor procedural defect and cannot be cured by applying s. 686(1)(*b*)(iv) as the provision has been interpreted by this Court.[86]

65. This issue was first considered in 2007 in *R. v. W.V.*, prior to the 2008 amendments to s. 640 which provided for static triers on application by the accused. When *W.V.* was decided, rotating triers were mandatory for every challenge for cause.[87] The Ontario Court of Appeal held that the trial judge erred by contravening the mandatory *Code* procedure by permitting the same two jurors to try all the challenges for cause. Though the procedure was not opposed by defence or Crown counsel at trial, the Court concluded that it prevented a properly-constituted jury from coming into existence because the impartiality of the members of the jury was not assessed in the manner prescribed by the *Code*. The procedural proviso was of no application since the error fell "into the category that fatally infects the

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[83] *R. v. Hollwey*, [1992] O.J. No. 348 (Ont. C.A.) (Q.L.) at para. 12.
[84] *R. v. W.V.,* 2007 ONCA 546 at para. 22, leave to appeal ref'd [2008] 1 S.C.R. v.
[85] *R. v. Douglas* (2002), 170 C.C.C (3d) 126 (Ont. C.A.), cited in *R. v. W.V.,* 2007 ONCA 546 at para. 23, leave to appeal ref'd [2008] 1 S.C.R. v.
[86] *R. v. W.V.,* 2007 ONCA 546 at para. 26, leave to appeal ref'd [2008] 1 S.C.R. v.; *R. v. Swite,* 2011 BCCA 54 at para. 55.
[87] *Criminal Code*, R.S.C. 1985, c. C-46*,* s. 640(2) (in force in 2007).

jurisdiction of the court [to] try the accused."[88] The Crown's application for leave to appeal to this Court was denied.

66. The reasoning in *W.V.* was adopted by the British Columbia Court of Appeal in 2011 in *R. v. Swite*. In that case, the trial judge ordered static triers absent any application by the accused, under the mistaken belief that the recent amendment to s. 640 required static triers be used in all cases. The Court found that the error deprived the trial court of jurisdiction and resulted in a nullity. The Court further concluded that even if the proviso was theoretically available, the imposition of static triers resulted in actual and presumed prejudice and so the verdict could not be saved.[89]

67. Four years later, in *R. v. Noureddine*, the Ontario Court of Appeal considered the application of the procedural proviso in the context of static triers being used without a valid s. 640(2.1) application. The Court affirmed *W.V.* and adopted the approach in *Swite,* holding that the proviso was unavailable for two reasons.

68. First, the imposition of static triers absent an application from the accused prevented a properly constituted jury from coming into existence.[90] Second, the Court found that the procedural error was not harmless. The Court concluded prejudice could be inferred in the circumstances of that case. Its finding was based on three factors: the error denied the accused the benefits of using rotating triers; the denial of rotating triers occurred in the face of clear statutory language providing that static triers were available only when sought by the accused; and the denial occurred "despite the express and repeated insistence of the appellants that rotating triers be used." This combination of factors combined to create "the appearance of unfairness and compromised the due administration of justice."[91] The Crown did not seek leave to appeal the decision to this Court.

69. Two years later, in *R. v. Husbands*, the Court of Appeal again concluded that convictions tainted by the improper imposition of static triers could not be "salvaged" in

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[88] *R. v. W.V.*, 2007 ONCA 546 at para. 41, leave to appeal ref'd [2008] 1 S.C.R. v.
[89] *R. v. Swite*, 2011 BCCA 54 at paras. 55-56.
[90] *R. v. Noureddine*, 2015 ONCA 770 at paras. 57-61.
[91] *R. v. Noureddine*, 2015 ONCA 770 at paras. 68-69.

light of the nature of the error made by the trial judge. The Crown's application for leave to appeal to this Court was denied.[92]

70. The current approach in Ontario can be summarized as follows: where a trial judge's error amounts to a failure to follow the mandatory statutory jury selection provisions and/or results in a challenge for cause procedure "disavowed by an accused" that deprives him of the option to invoke "the method of selecting the composition of triers," the verdict reached by the jury will not be saved by s. 686(1)(*b*)(iv).[93] Conversely, procedural errors in the jury selection process will be amendable to the proviso where the error had no impact on the constitution of the jury;[94] where, despite a procedural irregularity or shortcoming, the defence got the jury selection process it wanted;[95] or where the error was otherwise harmless.[96]

71. The Court of Appeal has upheld convictions and cured serious errors that occurred during jury selection, for example, where a trial judge:

- substituted a different pair of static triers on the second day of jury selection of his own motion;[97]

- dismissed a prospective juror where two triers were unable to agree whether the prospective juror was partial or impartial, contrary to the process set out in s. 640(4) of the *Code*;[98]

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[92] *R. v. Husbands*, 2017 ONCA 607 at para. 49, leave to appeal ref'd [2018] 1 S.C.R. ix.
[93] *R. v. Husbands*, 2017 ONCA 607 at paras. 40-41, leave to appeal ref'd [2018] 1 S.C.R. ix; *R. v. Noureddine*, 2015 ONCA 770 at paras. 52-53. See also *R. v. Cumor*, 2019 ONCA 747 at paras. 38-41.
[94] *R. v. Hollwey*, [1992] O.J. No. 348 (Ont. C.A.) (Q.L.).
[95] *R. v. Grant*, 2016 ONCA 639 at paras. 50-52; *R. v. Noureddine*, 2015 ONCA 770 at para. 57; *R. v. Riley*, 2017 ONCA 650, leave to appeal ref'd, [2018] 3 S.C.R. v at paras. 66, 80 and 85; *R. v. Province*, 2019 ONCA 638 at para. 69.
[96] *R. v. Province*, 2019 ONCA 638.
[97] *R. v. Province*, 2019 ONCA 638.
[98] *R. v. Gayle* (2001), 154 C.C.C (3d) 221 (Ont. C.A.).

- had private discussions with prospective jurors, after which 11 were dismissed, in the absence of the accused and counsel,[99]

- pre-screened and dismissed prospective jurors absent any obvious ground of partiality and after dismissing the accused's application to challenge the jurors for cause;[100]

- awarded additional peremptory challenges where a sworn juror was replaced;[101] and

- determined the order in which groups of prospective jurors would be called by the presence of persons of colour in the group.[102]

72. That some irregularities in the jury selection process will generally result in the need for a new trial and others will not is entirely consistent with Part XX of the *Code*. Sections 643 and 670-672 provide that a failure to comply with specified directions in respect of the jury selection procedure will not affect the validity of the proceedings. Parliament in legislating these provisions clearly turned its mind to the types of jury selection irregularities that could be forgiven. It is significant that s. 640 was never included in the list of sections covered by the saving provisions specific to jury selection procedure.[103]

73. The Appellant's complaint that the Court of Appeal has narrowed the scope of the proviso to prevent its application to harmless errors in the jury selection is unwarranted. Ontario's approach is consistent with this Court's jurisprudence and should be upheld.

C. An Improperly Constituted Jury is not a Harmless Error

74. Even if this Court accepts that errors in jury selection which result in an improperly constituted jury are not categorically beyond the scope of s. 686(1)(*b*)(v), the proviso will

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[99] *R. v. Sinclair*, 2013 ONCA 64.
[100] *R. v. Betker* (1997), 115 C.C.C (3d) 421 (Ont. C.A.), p. 449.
[101] *R. v. Brown* (2005), 194 C.C.C (3d) 76 (Ont. C.A.) at paras. 50-53.
[102] *R. v. Brown* (2006), 215 C.C.C (3d) 330 (Ont. C.A.) at paras. 22-29.
[103] *R. v. W.V.*, 2007 ONCA 546 at para. 20, leave to appeal ref'd [2008] 1 S.C.R. v.

nevertheless be inapplicable unless the appellate court is satisfied that no prejudice arose from the error. Where the error deprives an accused of a procedural right intended to protect jury impartiality, the burden on the Crown to convince an appellate court that the mistake was harmless is necessarily heavy and in some cases will be insurmountable. This does not mean, as the Appellant suggests, that the proviso is inapplicable to all errors in the jury selection process, no matter how technical and non-prejudicial. Rather, due to the nature of jury selection and its role in ensuring fair trials, the prejudice resulting from inherently harmful errors cannot be overcome.

i) There is No Burden on the Accused to Demonstrate Prejudice

75. The Appellant invites this Court to adopt an interpretation of s. 686(1)(*b*)(iv) that would extend the proviso to any procedural error that caused "no demonstrable prejudice to the fairness of the trial."[104] On this proposed approach, every procedural error is *prima facie* curable unless the accused can point to evidence of demonstrable prejudice. It presumes the safety of the verdict and places the onus on the accused to rebut a presumption of fairness in the face of a serious procedural error. On the Appellant's proposed test, no jury selection error is unforgivable. This approach would undermine Parliament's "carefully constructed scheme for deciding who shall sit in judgement of the accused."[105] The Appellant's submission finds no support in the case law, logic, or experience.

76. This Court has consistently held that the burden to establish a lack of prejudice in the proviso analysis lies with the Crown, both with respect to s. 686(1)(*b*)(iii)[106] and (iv).[107] Indeed, in relation to s. 686(1)(*b*)(iv), this Court has concluded that it is appropriate to *infer* prejudice given the seriousness of the irregularities at issue.[108] The necessary inference of prejudice and the unfairness that would arise in requiring an accused to demonstrate actual

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[104] *Appellant's Factum* at para. 38 (Heading III.B).
[105] *R. v. W.V.*, 2007 ONCA 546 at para. 26, leave to appeal ref'd [2008] 1 S.C.R. v.
[106] *R. v. O'Brien*, 2011 SCC 29 at para. 34; *R. v. Khan*, 2001 SCC 86 at paras. 26-31; *R. v. Jolivet*, 2000 SCC 29 at paras. 48-54; *R. v. Van*, 2009 SCC 22 at paras. 34-36.
[107] *R. v. Khan*, 2001 SCC 86 at para. 16; *R. v. Tran*, [1994] 2 S.C.R. 951, p. 1008; *R. v. Beaulac*, [1999] 1 S.C.R. 768 at para. 53.
[108] *R. v. Khan*, 2001 SCC 86 at para. 16.

prejudice is particularly acute in jury selection cases. It is impossible to gauge the impact of the error on jury impartiality or the verdict reached:

> It is obvious that one could never be certain that the verdict would have been the same if the irregularity was such that different jurors may have been selected. It may be that this type of procedural irregularity is of such a kind that it cannot be said that no substantial wrong or miscarriage of justice has occurred and accordingly that no prejudice has been suffered by the accused.[109]

77. What is certain is that one cannot assume that a differently constituted jury would have returned the same verdict.[110] This makes the task of rebutting the presumption of prejudice difficult, if not impossible, where the relevant error results in an improperly constituted jury.

ii) The Denial of Due Process Prejudices the Administration of Justice

78. Quite apart from the question of whether the verdict would have been affected, denying procedural protections designed to enhance the impartiality of the jury over the objection or without the consent of the accused results in prejudice to the administration of justice.[111] The "ultimate requirement" of the *Code*'s jury selection system is that it results in a fair trial.[112] Where a legitimate concern over the potential for bias in prospective jurors has been established, and a procedure designed to promote jury impartiality to which the

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[109] *R. v. Cloutier,* 1988 CanLII 199 (Ont. C.A.), p. 28, leave to appeal ref'd [1989] S.C.C.A. No. 194. See also *R. v. Davey*, 2012 SCC 75 at para. 55; *R. v. Yumnu,* 2012 SCC 73 at paras. 75-76.

[110] The safety of the verdict cannot be presumed where the jury would have been differently-constituted but for the error. See *e.g., Husbands*, where the jury returned a different verdict at retrial: *R. v. Husbands,* 2017 ONCA 60 at paras. 1 and 5, leave to appeal ref'd [2018] 1 S.C.R. ix; *R. v. Husbands*, 2019 ONSC 6824 at para. 42.

[111] See *e.g.*: *OCA Reasons for Judgement* at paras. 71 and 95, A.R. Vol. II, Tab 14, pp. 115 and 124; *R. v. Kakegamic,* 2010 ONCA 903 at paras. 36-41; *R. v. Cumor,* 2019 ONCA 747 at para. 51; *R. v. Riley,* 2017 ONCA 650 at para. 72, leave to appeal ref'd, [2018] 3 S.C.R. v; *R. v. Husbands,* 2017 ONCA 607 at para. 40, leave to appeal ref'd [2018] 1 S.C.R. ix; *R. v. Swite,* 2011 BCCA 54 at para. 61.

[112] *R. v. Find,* 2001 SCC 32 at para. 28; *R. v. Barrow,* [1987] 2 S.C.R. 694 at para. 25.

accused is entitled is denied, "not only [is] the process fatally flawed, but the appearance of justice [is] compromised."[113] Justice must be seen to have been done.[114]

79. The procedural proviso is intended to cure errors that are *serious*, in that they cause a loss of jurisdiction, but are nevertheless *harmless*. The complexity of the *Code* and the fallibility of justice system participants means that procedural irregularities are bound to occur – often without notice or complaint by any party at trial. Such errors are curable, even when they have jurisdictional consequences, but only when they do not fundamentally alter the manner in which the accused was actually tried, or otherwise prejudice the accused or the administration of justice. In this way, the curative provisions serve the interests of justice, "including the interests of an accused because they avoid multiple and unnecessary trials arising from an *unintentional* breach of statutory rules."[115] The prejudice inferred from a serious procedural error may well be rebutted where the irregularity coincides with the position taken by an accused at trial.[116]

80. Conversely, where a judge purposefully departs from mandatory procedures *over the objections or without the consent of the accused*, the resulting prejudice is two-fold. It lies first in the loss of the procedural advantage sought by, or to which the accused was entitled, and secondly in the detriment to "the appearance of fairness of the proceedings and the due administration of justice" when a statutory right is denied.[117]

81. Consider, for example, the application of the proviso to errors related to the election procedure. The failure to comply with the election requirements in s. 536(2) goes to the jurisdiction of the trial court over the offence and will generally be beyond the reach of the curative proviso in the absence of waiver.[118] Nevertheless, s. 686(1)(*b*)(iv) has been applied

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[113] *R. v. Swite*, 2011 BCCA 54 at para. 61.
[114] *R. v. Cloutier*, 1988 CanLII 199 (Ont. C.A.), p. 32, leave to appeal ref'd [1989] S.C.C.A. No. 194.
[115] *R. v. Cloutier*, 1988 CanLII 199 (Ont. C.A.), p. 25, leave to appeal ref'd [1989] S.C.C.A. No. 194 [Emphasis added].
[116] See *e.g.*: *R. v. Sciascia*, 2016 ONCA 411 at para. 95.
[117] *R. v. Noureddine*, 2015 ONCA 770 at para. 64.
[118] *R. v. Shia*, 2015 ONCA 190 at paras. 32-33; *R. v. Varcoe*, 2007 ONCA 194 at paras. 14-22; *R. v. Mitchell*, [1997] O.J. No. 5148 (Ont. C.A.) (Q.L.) at para. 28.

to cure errors in the election procedure where it is clear the accused was, despite the procedural irregularity, tried in the forum of his choice.[119]

82. Similarly, if an accused, despite an error in the application of the rules with respect to the challenge for cause process, effectively picked the jury in the manner he wanted, an appellate court could cure the procedural defect as no prejudice arises *vis-à-vis* the accused or the administration of justice.[120]

83. The Quebec Court of Appeal in *R. c. Primeau* held that an appellant cannot rely on a technical irregularity – which could have been but was not invoked at trial – to invalidate a trial "whose fairness is not in issue."[121] By the same token, where an accused does invoke or rely on a statutory right at trial, and it is nevertheless denied, the curative proviso will rarely be applicable. Resistance to the manner of proceeding ultimately imposed is a telling indicator of the prejudice suffered.

84. Even where the safety of the verdict is not put in jeopardy by this kind of procedural irregularity, the appearance of fairness suffers. Goodman J.A. recognized this point in *Cloutier*, noting that an appellate court need not apply the proviso in every case where it is satisfied the accused did not suffer "real" prejudice as a result of a procedural error:

> There may be cases, for example, where a trial judge excludes an appellant intentionally after it has been brought to his attention that such exclusion is contrary to the provisions of s. 577(1). It may be that in such a case, the court of appeal is satisfied that an appellant suffered no real prejudice as a result of such exclusion. Nevertheless, it seems to me that in such circumstances the court of appeal may refuse to exercise the discretion given to it under s. 613(1)(b)(iv) to dismiss the appeal so that justice will not only be done but will be seen to be done.[122]

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[119] See *e.g.*: *R. v. Roy*, 2010 BCCA 448 at paras. 6-10.
[120] See *e.g.*: *R. v. Murray*, 2017 ONCA 393 at paras. 57, 63 and 65; *R. v. Grant*, 2016 ONCA 639 at paras. 49-52; *R. v. Atkins*, 2017 ONCA 650 at paras. 80 and 85, leave to appeal ref'd, [2018] S.C.C.A. No. 216; *R. v. Mansingh*, 2017 ONCA 68; *R. v. Kossyrine*, 2017 ONCA 388 at para. 28.
[121] *R. c. Primeau*, 2000 CanLII 11306 (Q.C. C.A.), p. 705 (translation) [Emphasis added]. See also *R. c. Bebawi*, 2019 QCCS 4393.
[122] *R. v. Cloutier*, 1988 CanLII 199 (Ont. C.A.), pp. 31-32, leave to appeal ref'd [1989] S.C.C.A. No. 194.

85. A trial judge's failure to apply the mandatory provisions of the *Code*, in the context of full litigation of the issue and without the consent of the accused, cannot be characterized as an inadvertent, unintentional or technical irregularity. Significant prejudice to the due administration of justice necessarily flows from the denial of a jury selection process available and properly invoked.

D. The Proviso Does Not Apply to the Respondents' Case

86. The Respondents had the right to determine what method those who would determine their fate would be chosen. Jaser made his choice for rotating triers clear. Esseghaier refused to participate and so his statutory right to rotating triers was engaged. The jury selection issues were fully litigated before the trial judge, and the trial judge erred by imposing static triers against the wishes and rights of the accused.

87. The proviso is inapplicable for two reasons. First, the court was improperly constituted because, absent a valid s. 640(2.1) application, the trial judge had no jurisdiction to depart from the statutorily-mandated rotating trier process. The court existed "no more than if the judge had been unlawfully appointed"[123] and the application of s. 686(1)(*b*)(iv) is of no assistance. The fatal flaw in the constitution of the court by which they were tried entitle both Respondents to a new trial.

88. Second, it cannot be said that the imposition of static triers caused no prejudice to the Respondents. Notably, the Appellant made no attempt to meet that burden at the Court of Appeal. Their attempt to do so before this Court must fail.

i) Prejudice to the Respondents and to the Administration of Justice

89. Any attempt to determine how the jury that tried the Respondents might have differed but for the trial judge's error quickly descends into speculation. It is impossible to measure the impact of the error on the impartiality of the jurors ultimately selected, or to say whether employing rotating triers would have made any difference to the verdicts ultimately reached. What is clear, however, is that all parties were gravely concerned that Esseghaier's race and religion, and the publicity associated with his case, could give rise

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[123] *R. v. Bain*, [1992] 1 S.C.R. 91, p. 136.

to bias on the part of some of the prospective jurors. Having decided not to participate in the process, Esseghaier was entitled to rely on the statutory default of rotating triers to determine who would decide his guilt or innocence. That right was thwarted by the procedure chosen by the trial judge.[124]

90. The prejudice to the Respondents was significant. They were denied the advantages of rotating triers, including: the participation of members of a jury in its own selection, therefore promoting a sense of responsibility and cohesion; avoiding the risk of a rogue trier tainting the entire selection process; and the guarantee that a variety of views and perspectives would be "brought to bear on the fundamental question of how the jury is to be constituted."[125] They were also exposed to the corresponding disadvantages of static triers. Particularly, as noted by the Respondent Jaser, multiple prospective jurors in this case were found to be unacceptable by the static triers for "dubious" reasons, or for no apparent reason at all.

91. The recent amendments to the challenge for cause procedure, which abolished the use of lay triers and assigned to the trial judge the task of trying all challenges for cause,[126] do not assist is assessing prejudice in this case. The fact that Parliament has since seen fit to do away with all lay triers in no way diminishes the relative benefits of rotating triers over static triers at the time of the Respondents' trial. Moreover, the prejudice to the administration of justice arises in this case from the denial of what was then a statutory procedural right. Parliament at the time of the Respondents' trial had not dictated the method by which the triers of a challenge were to be selected but instead left the choice with the accused. Had the trial judge used the *current* method at the time of the trial and tried the challenges for cause himself, the result would still have been an incurable error.

92. Where a self represented accused is denied his statutory right to a default process designed to protect against partiality, the prejudice to the administration of justice is evident. This is brought into even sharper focus where, as here, a co-accused litigated the

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[124] *R. v. Swite*, 2011 BCCA 54 at para. 61.
[125] *R. v. W.V.*, 2007 ONCA 546 at para. 26, leave to appeal ref'd [2008] 1 S.C.R. v.
[126] *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, S.C. 2019, c. 25, ss. 269-272 (Bill C-75).

issue in an area of unsettled law, arguing for the procedural safeguard to which Esseghaier was entitled and against the manner of jury selection imposed by the trial judge. Jaser's opposition to the process ultimately imposed is "perhaps the most accurate measuring stick by which to determine whether the [accused were] prejudiced by what occurred."[127]

93. It is difficult to imagine circumstances where an accused would be more vulnerable to a partial jury than in Esseghaier's case. Confidence in the administration of justice would be shaken if a conviction was left to stand in light of these circumstances.

ii) Irrelevant Factors in Assessing Prejudice

94. The Appellant urges this Court to expand the scope of the curative proviso to respond to *Jordan*-era concerns about efficiency. That suggestion must be rejected. Society's interest in the finality of jury trials is irrelevant to the question of whether an error at the Respondents' trial resulted in prejudice. The prejudice to be assessed in determining whether the proviso can remedy a procedural irregularity at trial is that which does (or does not) arise out of the error. The public's potential perception should the appeal be allowed does not inform that analysis.

95. Undoubtedly, both society and the accused have an interest in the finality of trials. This is the spirit underlying the enactment of the curative provisions. However, the laudable goal of finality is constrained by the paramount requirement of fairness – a constraint that is mechanized through the requirement in s. 686(1)(*b*)(iv) that the appellate court be satisfied that the accused suffered *no prejudice*. The question is not whether the degree of prejudice suffered is *acceptable*, balanced against other countervailing interests. The cost and delay of further proceedings is an unfortunate but necessary product of a just appellate system: "occasional injustice cannot be accepted as the price of efficiency."[128] Society's interest in finality and efficiency does not bear on whether the error of the trial judge in this case caused prejudice to the Respondents or compromised the appearance of

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[127] *R. v. Province*, 2019 ONCA 638 at para. 66. See also *R. v. Sinclair*, 2013 ONCA 64 at para. 26.
[128] *R. v. Find*, 2001 SCC 32 at para. 28, citing *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 at para. 32; *R. v. Leipert*, [1997] 1 S.C.R. 281.

fairness at their trial. Parliament's intent is evident in the narrowly-crafted curative provisions. While there is a strong interest in not repeating fundamentally fair trials, society has no interest in preventing retrials where prejudice is suffered.

96. In the event this Court decides that the delay and costs associated with multiple proceedings are relevant to the consideration of prejudice to the administration of justice in this case, the Respondent makes one final submission. Counsel for the Crown at trial knew the state of the law in Ontario at the time and noted the importance of "having a very thoughtful consideration" of what the law is during the jury selection process due to the potential to have a long trial overturned on appeal because a jurisdictional error "made the whole thing void from the start."[129] While the issue of whether a trial judge retained a residual discretion to exclude unsworn jurors during the challenge for cause remained unsettled at the time of the trial, the Ontario Court of Appeal had decided seven years earlier, in *W.V.*, that the incorrect imposition of static triers resulted in an improperly empanelled jury that could not be cured on appeal.

97. In that context, Crown counsel made a choice to litigate the jury selection issue, arguing that the trial judge's discretion had been supplanted by the enactment of s. 640(2.1).[130] The Crown opposed Jaser's request to use rotating triers with the panel excluded, aware of the divided case law on the issue and presumably alive to the risk that an error in this regard could result in an improperly constituted jury necessitating a retrial.

98. If the Crown wanted to ensure that the trial would not be unnecessarily repeated, it could have taken no position on the issue, or supported Jaser's application. The Crown now has to live with the impact of its litigation choices on the scarce resources of the justice system, and on public perception.

PART IV: COSTS

99. The Respondent makes no submissions on costs.

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[129] *Transcript of Proceedings at Jury Selection* (28 January 2015), p. 209, l. 26-p. 210, l. 3, A.R. Vol. V, Tab 31, pp. 211-212.
[130] *Jury Selection Ruling* at para. 34, A.R. Vol. I, Tab 7, p. 128.

PART V: NATURE OF RELIEF REQUESTED

100. The Respondent respectfully requests that the appeal be dismissed.

101. In the alternative, the Respondent submits that the convictions should not be restored but rather that the matter be remitted to the Court of Appeal for determination of the outstanding grounds of appeal, pursuant to s. 46.1 of the *Supreme Court Act*.[131] The Respondents have a right of appeal at the court below that has not been exhausted. The bifurcation of the appeal did not constitute an abandonment of the other grounds. The potential application of s. 686(1)(*b*)(iv) – or of any other curative provision – must be determined by the court below after deciding the outstanding grounds of appeal.

102. The jury selection issue was not the only basis upon which Jaser and Esseghaier challenged the validity of the jury's verdicts below, nor necessarily the strongest. In relation to Esseghaier, the outstanding grounds of appeal relate to his mental health status at the time of the trial and will involve an application to adduce fresh evidence.

103. The impression of the trial judge regarding Esseghaier's mental health, particularly that there was no suggestion he was unfit, is called into serious question by Esseghaier's transformation since being treated with anti-psychotic medication. His demonstrated change in presentation after treatment for schizophrenia, and its impact on his ability to meaningfully participate in his legal proceedings, make clear that concerns as to his fitness at trial and sentencing are far from frivolous.

104. Issues as to Esseghaier's mental health and fitness to stand trial constitute a distinct and separate ground of appeal but are also relevant to the jury selection issue and potential application of s. 686(1)(*b*)(iv). In particular, the validity of the Appellant's claim that Esseghaier must "live with the choices" he made at trial, can only be determined in the context of assessing Esseghaier's complaint that he was unfit during his trial. The determination of prejudice is necessarily a fact-driven analysis that cannot be determined in a vacuum without the benefit of a full record and submissions.

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[131] *Supreme Court Act,* R.S.C. 1985, c. S-26, s. 46.1.

PART VI: SUBMISSIONS ON CASE SENSITIVITY

105. 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 Toronto, in the Province of Ontario, this 31st day of August, 2020.

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PART VII: TABLE OF AUTHORITIES

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