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, RAED JASER

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

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TABLE OF CONTENTS

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The Court of Appeal for Ontario unanimously ordered a new trial for the Respondents, defendants in a notorious terrorism case, based on a serious procedural error that resulted in a loss of jurisdiction and invalidated the jury verdict. The Appellant seeks to recharacterize the error as either non-existent or unimportant. It uses the Respondents' case as a vehicle to advance the inapplicable – and incorrect – argument that Ontario courts have inappropriately "narrowed" the curative *proviso* in s. 686(1)(b)(iv) of the *Criminal Code.* The Court should decline the Appellant's invitation and dismiss the appeal. There is no basis to interfere with the Court of Appeal's decision, and no curative *proviso* 'problem' to be fixed.

2. The Court of Appeal's conclusion that Jaser's jury was improperly constituted is plainly correct and consistent with past case law interpreting ss. 640(2.1) and (2.2) of the *Criminal Code*. The Court of Appeal used established legal rules to interpret the words used by Jaser's counsel when they applied to exclude the jury panel during a challenge for cause. It was the inevitable result of the application of established legal rules which the Appellant does not now seek to challenge.

3. The Court of Appeal also correctly declined to apply the curative *proviso* in s. 686(1)(b)(iv). The *proviso* cannot cure jurisdictional and prejudicial errors, particularly in this case, where Jaser can point to specific features of his trial that would have unfolded differently if the trial judge had not erred. In any event, it is impossible to measure the prejudice caused by improperly limiting the pool of community members that pick the jury. It would unfairly reverse the Crown's burden to cure an error because the record discloses no apparent path to acquittal, when the error by its nature calls into question how the case unfolded and how the jury reached its verdict. The prejudice to the Respondents and the administration of justice stems from the fact that Respondents have not been dealt with fairly. The impact of the error is necessarily unknown, but the prejudice is real. A new trial is required.

4. Should this Court find that the Court of Appeal erred in its application of the law, the proper disposition is an order remitting the case to the Ontario Court of Appeal for reconsideration of this

ground of appeal alongside the other serious errors alleged by the Respondents. The jury selection error is one of many substantive and procedural errors claimed by the Respondents in the court below. The curative *proviso* cannot be applied until that court has considered and ruled on the extent and the impact of the trial judge's errors.

B. Statement of Facts

5. The Appellant's summary of the facts is correct but omits details that are relevant to its claim that the jury selection error was harmless. This was not an overwhelming Crown case to which the defendants could only respond by raising technical defences. It was a complex trial that required the jury to consider difficult questions about the defendants' motivations and intentions and had procedural features that created the appearance and reality of unfairness. While Jaser does not need to prove prejudice to avoid application of the curative *proviso,* he can, in this case, point to evidence supporting an inference that a different jury selection procedure would have generated different results.

6. Jaser adopts the facts in the Respondent Esseghaier's factum and relies on the following additional facts.

i) Summary of Allegations

7. The Crown alleged that Jaser and Esseghaier participated in two conspiracies over a one-month period in 2012: a conspiracy to derail a Via Rail passenger train and a conspiracy to commit murder. The jury convicted Esseghaier of both conspiracies. It could not decide if Jaser was guilty of the Via Rail conspiracy. It convicted him of a more general conspiracy to commit murder, presumably based on his discussions with Esseghaier about killing in the name of Islam, and his plan (rejected by Esseghaier) to shoot prominent Canadians and Jews with a sniper rifle.[1] The jury convicted both defendants of participating in the activities of a terrorist group by engaging in the conspiracy and by recruiting a 'member' (Tamer El Noury, an undercover FBI agent).[2]

8. The Crown alleges that Esseghaier, a devout Muslim, was instructed by one or more foreign-based Islamic extremists to pursue the 'Via Rail conspiracy.' It was unclear when

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[1] *Reasons for Sentence* at paras 1-2, 15-18, A.R. Vol. II, Tab 10
[2] *Reasons for Sentence* at paras 1-2, 27, A.R. Vol. II, Tab 10

Esseghaier was supposed to have received this instruction, but whenever he did, it was before Jaser's alleged involvement. At the first trial, the Crown did not try to prove Esseghaier's foreign contacts were genuine extremists, instead arguing that Esseghaier himself was a 'terrorist group.'[3]

9. Jaser's alleged involvement in terrorist activity was limited. He had no connection to any individual or group except Esseghaier, who introduced him to El Noury. His total alleged involvement with terrorist activity lasted less than a month. The Crown led evidence that, during that time, Jaser and Esseghaier hypothesized methods of derailing trains, gathered information about train schedules, and conducted 'reconnaissance' trips to track-side locations.[4] They did not decide on a course of action, purchase materials or learn skills or techniques relevant to derailing a train. In September 2012, after a month of talking and 'scouting', Jaser disavowed the plan and cut off contact with Esseghaier. There was no evidence of terrorist activity by Jaser in the subsequent seven months leading up to his arrest.

10. Jaser's defence was that he was a con artist who said and did these things to extract money from his alleged co-conspirators. In support of that theory, the defence pointed to evidence suggesting that Jaser convinced Esseghaier to give him money, bragged about his business acumen and repeatedly tried to 'pitch' an expensive (non-terror related) business plan to the FBI agent, who was posing as a wealthy American. The absence of evidence that Jaser was involved in terror activity before or after his time with Esseghaier further supported the conclusion that he was not an extremist but an opportunist.[5]

ii) Relevant Procedural History

11. The case was procedurally complex, made more so by the fact that Esseghaier, who was self-represented, refused to acknowledge the court's jurisdiction or defend the case. In response to these challenges, the trial judge appointed *amicus curiae* to play a "narrowly circumscribed role" confined to performing specific tasks assigned by the court.[6] This ruling governed *amicus'* role during the pre-trial proceedings. As a result, Jaser and the Crown brought several motions in which

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[3] Closing Submissions of Crown Counsel, *Transcript of Proceedings*, Vol. XVIII, at p. 115, ll. 25 to 29, R.R. Vol. II, Tab 11
[4] *Reasons for Sentence* at para 14, A.R. Vol. II, Tab 10
[5] *Reasons for Sentence* at para 48, A.R. Vol. II, Tab 10
[6] *Appointment of Amicus Ruling* at paras 4, 18 and 42, A.R. Vol. I, Tab 2

Esseghaier and *amicus* did not participate. The jury selection application was one of them.

12. Jaser twice applied to sever his case from Esseghaier's, primarily on the basis that Esseghaier's religious comments and conduct were self-incriminatory and would cause prejudice to Jaser before a jury. (As set out below and in the Respondent Esseghaier's factum, Esseghaier has significant mental health challenges.) The trial judge dismissed the first application as premature. He promised to instruct Esseghaier not to engage in such conduct.[7]

13. Jaser brought a second severance application, and an application for a mistrial, on the first day of jury selection, after Esseghaier disrupted court with an apparent act of prayer. In the presence of the full panel of over 400 prospective jurors, Esseghaier ignored the trial judge's direction to sit down, then descended to the floor in the prisoner's box in a display of religious observance. The trial judge ordered the panel to leave. As the panel exited, a prospective juror confronted Esseghaier. The following exchange took place:

> UNIDENTIFIED FEMALE VOICE: We are in Canada. Would you please sit down?
> THE COURT: Madam…
> UNIDENTIFIED FEMALE VOICE: Ma'am…
> UNIDENTIFIED MALE VOICE: Ma'am…
> THE COURT: Madam, madam…
> [LAUGHTER]
> UNIDENTIFIED FEMALE VOICE: Jesus.[8]

14. The trial judge dismissed Jaser's severance and mistrial application on the basis that Jaser might have benefitted from Esseghaier's conduct, and that a limiting instruction would cure the prejudice.[9] He agreed to add a question to the challenge for cause process, asking prospective jurors whether this episode would impact their ability to decide the case impartially.[10] He dismissed the prospective juror who confronted Esseghaier but the rest of the panel, including any

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[7] *Ruling on Severance Application*, at p. 118, l. 10-15, p. 119, l. 24 - p. 120, l. 23, R.R., Vol. II, Tab 12

[8] *Transcript of Proceedings at Jury Selection* (23 January 2015), at p. 78, ll. 16-25, A.R. Vol. III, Tab 28

[9] Ruling on Severance and Mistrial Motion, *Transcript of Proceedings at Jury Selection* (23 January 2015), at p. 102, l. 30 - p. 103, l. 16, A.R. Vol. III, Tab 28

[10] Ruling on Severance and Mistrial Motion, *Transcript of Proceedings at Jury Selection* (23 January 2015), at p. 104, ll. 5-13, A.R. Vol. III, Tab 28

members who may have laughed at the exchange, remained.[11] This became the pool from which the triers and jury were eventually drawn. During the challenge for cause, some prospective jurors described the outburst's effect on them:

> POTENTIAL JUROR: [W]hat I'd like to say about that is that I do believe that we have to, as Canadians, go with the laws that are here, so the sense that somebody is not going along with what was going on, what was expected, was upsetting to me. I do understand that the judge said that it was a communication issue, it's very -- I just feel very strongly that we have to live by the rules of, of our country and what's out there. So I don't know how that bides with how I feel.[12]
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> […]
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> POTENTIAL JUROR: …I was worried about the mental capability, like in terms of mental illness or that kind of thing - that's the only thing I was kind of worried about, to be truthful. So I don't know anything about the case, so just judging by that, I was worried about mental capability, that's what, that's the truth, so – I tried to take into consideration what he said, but it, that was what was going through my head.
> MR. NORRIS: And, and when you say 'he' you gestured, you mean Justice Code?
> POTENTIAL JUROR: Yeah, he said not to -- but I wasn't, I don't know anything about it, so that was my first instinct, was like I wasn't sure about mental health issues.[13]

15. The trial judge selected the static triers on the third day of jury selection, two court days after Esseghaier's display of religious observance. After dividing the panel into lettered groups, he picked five "likely candidates" from groups A and B.[14] He then vetted the candidates for their suitability, repeatedly noting that he needed "the right kind of person" for this "important task."[15] He asked the prospective triers questions about their background, potential biases, and knowledge of the case. The triers he chose to preside over the challenge for cause held management positions in large companies. The first had a high school education. The second was university-educated.[16]

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[11] Ruling on Severance and Mistrial Motion, *Transcript of Proceedings at Jury Selection* (23 January 2015), at p. 105, ll. 13-16, A.R. Vol. III, Tab 28
[12] *Transcript of Proceedings, Jury Selection Continued, January 28, 2015*, at p. 31, l. 24 to p. 32, l. 1, A.R., Vol. V, Tab 31, pp. 33-34
[13] *Transcript of Proceedings, Jury Selection Continued, January 28, 2015*, at p. 75, ll. 6-14, A.R., Vol. V, Tab 31, p. 77
[14] *Transcript of Proceedings at Jury Selection* (26 January 2015), p. 58 l. 19- p. 59 l. 20, A.R. Vol. IV, Tab 29, pp. 60-61
[15] *Transcript of Proceedings at Jury Selection* (27 January 2015), pp. 12-31, A.R. Vol. IV, Tab 30, p. 82-101. Specific quotations: p. 14, ll. 6-8, p. 16, ll. 22-24 and p. 30, ll. 22-25
[16] *Transcript of Proceedings at Jury Selection* (27 January 2015), p. 21 ll. 2-17 and p. 27 ll. 5-16, A.R. Vol. IV, Tab 30, pp. 91 and 97

The trial judge dismissed three prospective triers during the selection process. It was unclear whether the dismissed candidates re-entered the jury pool or were discharged.

16. The static triers were instructed and sworn on January 27, 2015 and picked the *petit* jury over the next two days. During this time, they were exposed to a number of further religiously-themed outbursts from Mr. Esseghaier.[17] They rejected a total of 25 prospective jurors.[18] Sometimes the reason for the triers' finding was apparent from the record (for example, if a prospective juror said he or she could not act impartially).[19] At other times, they found a prospective juror "unacceptable" for reasons that were entirely unclear.[20] After they had found

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[17] *Transcript of Proceedings at Jury Selection* (27 January 2015), p. 40, ll. 25-30, A.R. Vol. IV, Tab 30, pp. 110; *Transcript of Proceedings at Jury Selection* (27 January 2015), p. 80, ll. 24-27, A.R., Vol. IV Tab 30 p. 150; *Transcript of Proceedings at Jury Selection* (27 January 2015), p. 102 l. 10 to p. 173 l. 11, A.R., Vol. IV Tab 30, pp. 172-173; *Transcript of Proceedings at Jury Selection* (27 January 2015), p. 202, l. 16 to 204, l.6, A.R., Vol. IV, p. 272-274; *Transcript of Proceedings at Jury Selection* (28 January 2015), p. 5, l.3 to p. 6, l. 22, A.R., Vol. V, Tab 31, pp. 7-8; *Transcript of Proceedings at Jury Selection* (28 January 2015), p. 18, ll. 12-17 and p. 19, l. 19-21, A.R., Vol. V, pp. 20-21; *Transcript of Proceedings at Jury Selection* (28 January 2015), p. 81, l. 13 to p. 84, l. 6, A.R., Vol. V, Tab 31, pp. 83-86

[18] The triers also disagreed about the suitability of one prospective juror – a Muslim woman who wore *hijab* – an outcome that the trial judge and lawyers had never encountered. After an exhortation and further deliberation, the triers deemed the juror acceptable, at which point she was challenged by the Crown: *Transcript of Proceedings at Jury Selection* (28 January 2015), p. 203, l. 18 to p. 212, l. 28, A.R., Vol. V, pp. 205-214

[19] See, for example, Juror #53170's answer at *Transcript of Proceedings at Jury Selection* (27 January 2015), p. 51, l. 29, A.R., Vol. IV, Tab 30, p. 121; Juror #37801's answer at *Transcript of Proceedings at Jury Selection* (27 January 2015), p. 101, l. 30, A.R., Vol. IV, Tab 30, p. 171; Juror #50551's answer at *Transcript of Proceedings at Jury Selection* (27 January 2015), p. 111, ll. 7-8, A.R., Vol. IV, Tab 30, p. 181; Juror #14212's answers at *Transcript of Proceedings at Jury Selection* (27 January 2015), p. 162, ll. 21, 26, A.R. Vol. IV, Tab 30, p. 232; Juror #41711's answers at *Transcript of Proceedings at Jury Selection* (27 January 2015), p.188 l. 19 to p. 189, l. 9, A.R., Vol. IV, Tab 30, pp. 258-259; Juror #27920's answers at *Transcript of Proceedings at Jury Selection* (28 January 2015), p. 119, l. 20 to 121, l. 3, A.R. Vol. V, Tab 31 pp. 121-123; Juror #28643's answers at *Transcript of Proceedings at Jury Selection* (28 January 2015), p. 178, l. 24 to p. 179, l. 5, A.R., Vol. V, Tab 31, pp 180-181

[20] See, for example, the rejection of Juror #39588 at *Transcript of Proceedings at Jury Selection* (27 January 2015), p. 58, l. 13, A.R. Vol. IV, Tab 30, p. 128; Juror #13511 at *Transcript of Proceedings at Jury Selection* (27 January 2015), p.72, l. 5, A.R., Vol. IV, Tab 30, p. 142; Juror #48719 at *Transcript of Proceedings at Jury Selection* (27 January 2015), p. 124, l. 15, A.R. Vol. IV, Tab 30, p. 194; Juror #40964 at *Transcript of Proceedings at Jury Selection* (27 January

several potential jurors unacceptable, the Crown asked to make submissions to them before they made a decision, or have the trial judge re-read the instructions. The trial judge agreed to re-read the instructions but did not permit counsel to make submissions.[21] Later, in the static triers' absence, he said he was "sympathetic" to the Crown's concerns and suggested the triers had found one or more prospective jurors unacceptable for "dubious" reasons.[22] It was never discovered why the triers rejected the prospective jurors whose sworn answers suggested impartiality.

17. The jury selected by the static triers heard evidence for several weeks and deliberated for ten days. After eight days, the trial judge gave them an exhortation. Two days later, after receiving clarification from the trial judge that they could be discharged on a deadlocked count and deliver verdicts on the rest, the jury concluded its deliberations.[23] The jury was unable to reach a verdict on every count respecting Mr. Jaser; it found him guilty of a general conspiracy to commit murder but could not agree on a verdict respecting the Via Rail conspiracy.

18. After the jury was discharged, the trial judge expanded *amicus'* role.[24] *Amicus* applied for a *Mental Health Act* assessment, the results of which called into question Esseghaier's ability to participate in the proceedings. By the time of the sentence hearing, two respected psychiatrists had agreed that Esseghaier likely suffered from schizophrenia and that his participation at trial was "shaped by his mental disorder."[25]

iii) Legislative Developments Relating to Jury Selection

19. The Appellant has accurately summarized the history of ss. 640(2.1) and (2.2) and the statutory interpretation conflict that existed when the jury in the Respondents' case was selected.

2015), p. 151, l. 12, A.R., Vol. IV, Tab 30, p. 221; Juror #7448 at *Transcript of Proceedings at Jury Selection* (28 January 2015), p. 42, l. 5, A.R., Vol. V, Tab 31, p. 44; Juror #22420 at *Transcript of Proceedings at Jury Selection* (28 January 2015), p. 101, l. 11, A.R., Vol. V, Tab 31, p. 103; Juror #39842 at *Transcript of Proceedings at Jury Selection* (28 January 2015), p. 124, l. 31, A.R., Vol. V, Tab 31, p. 126

[21] *Transcript of Proceedings at Jury Selection* (27 January 2015), p. 124, l. 21-32, A.R., Vol. IV, Tab 30, p. 194

[22] *Transcript of Proceedings at Jury Selection* (27 January 2015), p. 128, l. 30 to p. 129, l. 5, A.R., Vol. IV, Tab. 30, pp. 198-199

[23] *Transcript of Proceedings* (March 20, 2015), R.R., Vol. II, Tab 14

[24] *Reasons for Sentence* at para. 4, A.R. Vol. II, Tab 10

[25] *Reasons for Sentence* at paras. 64-65, A.R. Vol. II, Tab 10

In 2016, the Court of Appeal resolved the conflict.[26] It has now been settled for over three years that the 'static trier' amendments did not eliminate trial judges' inherent jurisdiction to exclude prospective jurors from a rotating trier selection process, and that such an order is a proper exercise of inherent discretion.[27] Errors of the type committed by the trial judge in this case no longer occur.

20. On September 19, 2019, Bill C-75 came into force and changed the challenge for cause procedure. The line of case law interpreting and applying ss. 640(2.1) and (2.2), including the Court of Appeal's decision in this case, became moot. Under the new procedure, only judges can determine whether the grounds for the challenge are true, removing the sworn juror's role (i.e., both rotating and static triers) in deciding the validity of a challenge.[28]

iv) The Jury Selection Motion in this Case

21. Against a backdrop of competing authority, Jaser and the Crown brought a motion to determine whether the trial judge had inherent jurisdiction to exclude unsworn jurors during the challenge for cause or whether Jaser needed to apply for static triers under s. 640(2.1) to get an exclusion order. It was common ground that, given the case's high public profile, the current climate, and the "unusual" media coverage, a challenge for cause in relation to pre-trial publicity and racial/religious prejudice was necessary. The parties also agreed that *some* exclusion order were necessary "to preserve the impartiality of the jurors".[29] They disagreed about whether the trial judge could make the order at common law without a s. 640(2.1) application.

22. On November 27, 2014, counsel and the court discussed jury selection for the first time, while scheduling a date for the motion and exchange of materials. Counsel for Jaser made it clear that he was *not* bringing a s. 640(2.1) application for static triers, but asking the court to exclude

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[26] *R v. Grant*, 2016 ONCA 639, at paras 25-33

[27] See for example: *R v. Riley*, 2017 ONCA 650, at para 62, *R v. Grant*, 2016 ONCA 639, at para 61, *R v. Murray*, 2017 ONCA 393, at para 59, *R. v. Husbands*, 2017 ONCA 607 at para 36, leave to appeal ref'd [2018] 1 S.C.R. ix, *R v Cumor*, 2019 ONCA 747 at para 23

[28] Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, 1st Sess., 42nd Parl., 2019 (SC, ch.25) ["Bill C-75"]

[29] *Jury Selection Ruling* at paras 9, 13, A.R. Vol. I, Tab 7; *OCA Reasons for Judgement* at para 32, A.R. Vol. II, Tab 14; *Criminal Code*, R.S.C. 1985, c. C-46, s. 640(2.2); *R. v. Husbands*, 2017 ONCA 607 at para 34, leave to appeal ref'd [2018] 1 S.C.R. ix

unsworn jurors from the rotating trier selection process:

> MR. NORRIS: We are not making that request [for static triers]. We are, however, requesting that the unsworn jurors be excluded so that the sworn jurors remain and thus there be rotating triers. But we're not applying to have both sworn and unsworn excluded pursuant to either (2.1) or (2.2).
> THE COURT: You want sworn jurors to sit there and watch the, the challenge for cause go on?
> MR. NORRIS: Yes.[30]

23. The trial judge put counsel on notice that he was unlikely to grant such a request which he perceived as a "difficult one for the defence."[31] Referring to the then-conflicting lines of authority respecting the interpretation of ss. 640(2.1) and (2.2.), he said:

> I can tell you I have had this argument in front of me, it comes up from time to time, although infrequently now. I think most of the bar have got comfortable with fixed triers, at least certainly, with me they've got comfortable with fixed triers. And I've, I've ruled already that I think Justice Dambrot is right and Justice Hainey [sic] is wrong…So you're going to have a bit of an uphill battle persuading me on that one.
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> […]
>
> I've given a number of short oral rulings and in which I say I'm persuaded by...Justice Dambrot's reasons and *Riley*, I think he's absolutely right…I've – I haven't written anything on it, I don't there's any much more one could say than what Justice Dambrot has already said.[32]

24. That same day, the trial judge told *amicus* he did not need his help on the jury selection motion. *Amicus* agreed, noting that "all of this impacts on Mr. Esseghaier, obviously," but that the position just articulated by counsel for Jaser would also help Esseghaier.[33]

25. Facta were then filed and the motion argued on December 9, 2014. *Amicus* was absent. Esseghaier appeared by video and made no relevant submissions. Jaser applied for an order

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[30] *Transcript of Proceedings, Submissions re: Jury Selection Procedure* (27 November 2014), p. 54, R.R. Vol. II, Tab 13
[31] *OCA Reasons for Judgement* at paras. 34-35, A.R. Vol. II, Tab 14; *Transcript of Proceedings, Submissions re: Jury Selection Procedure* (27 November 2014) at pp. 55, 65, R.R. Vol. II, Tab 13
[32] *Transcript of Proceedings, Submissions re: Jury Selection Procedure* (27 November 2014) at pp. 55, R.R. Vol. II, Tab 13
[33] Judgment of the Court of Appeal at paras. 39, 44; *Transcript of Proceedings, Submissions re: Jury Selection Procedure* (27 November 2014) at p. 65, R.R. Vol. II, Tab 13

"excluding unsworn jurors." Counsel made clear that she wanted the benefits of rotating triers and was not bringing an application "pursuant to subsection (2.1) for the exclusion of both sworn and unsworn jurors"[34]. She sought a common law order excluding the unsworn jurors to ensure their convenience, avoid exposing them in advance to the challenge for cause questions, and reduce the risk of tainting that might arise from listening to other jurors' answers.[35] She gave notice that "if, but only if" the court found that s. 640(2.1) displaced its inherent jurisdiction to make an exclusion order, she would apply under s. 640(2.1) for static triers to access an exclusion order.[36]

26. The Crown did not dispute the validity of Jaser's arguments in support of rotating triers. Crown counsel took no position on whether Jaser had established the statutory or common law precondition for an exclusion order – i.e., that an order was necessary to preserve juror impartiality.[37] The Crown did not challenge a single point identified by Jaser's lawyers in support of the exclusion order, or suggest to the trial judge that the facts were different than as portrayed by defence counsel.

v) The Trial Judge's Ruling

27. Adopting the opinion he previewed with counsel two weeks earlier, the trial judge dismissed Jaser's application. Instead, he made an order pursuant to s. 640(2.1) excluding all sworn and unsworn jurors and requiring the appointment of static triers to determine the challenge for cause.[38]

28. The trial judge held that ss. 640(2.1) and (2.2) had removed his inherent discretion to exclude unsworn jurors and that the only route to exclusion was through an application for static triers. He treated counsel's submissions in support of her anticipated alternative position as the functional equivalent of a s. 640(2.1) application. He made an order excluding sworn and unsworn

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[34] *Factum of Jaser at Trial on Jury Selection Issues* (dated 5 December 2014), at para 33, R.R., Vol. I, Tab 2; *Transcript of Proceedings at Pre-Trial Motions* (December 9, 2014), at p. 60, ll. 13-28, 86-87, A.R., Vol. III, Tab 27

[35] *Factum of Jaser at Trial on Jury Selection Issues* (dated 5 December 2014), at para 38, R.R., Vol. I, Tab 2; *Transcript of Proceedings at Pre-Trial Motions* (December 9, 2014), at pp. 47, 50-51, 86-88, A.R., Vol. III, Tab 27

[36] *OCA Reasons for Judgement* at paras 40-44, A.R. Vol. II, Tab 14

[37] *Transcript of Proceedings at Pre-Trial Motions* (December 9, 2014), at p. 79

[38] *Jury Selection Ruling* at para 47, A.R. Vol. I, Tab 7

jurors under s. 640(2.1) and appointed static triers as a necessary corollary of that order. The trial judge also held that it would be "improper" in any event to use the common law to exclude *prospective* jurors when the *Code* offered the option of excluding *all* jurors. In his view, an exclusion order was an all-or-nothing proposition: either all jurors were at an unacceptable risk of tainting and should be excluded, or none of them should be. He offered this reasoning as an alternative basis for concluding that a s. 640(2.1) application was the only way to exclude jurors in this case.[39]

vi) The Proceedings in the Ontario Court of Appeal

29. The Respondents appealed their convictions and life sentences. The appeal was complex. In addition to arguing that the jury selection was illegal, Jaser alleged numerous errors in the trial judge's rulings relating to *O'Connor* production, step six of *R. v. Garofoli*, national security privilege, exclusion of evidence, severance, the elements of conspiracy, the fitness of his mentally ill co-defendant, and the mitigating effects of entrapment on sentence.[40]

30. By 2018, it was clear that the trial judge's jury selection ruling was legally wrong. It was also clear that *if* the effect of the error invalidated Jaser's 'in the alternative' application for a s. 640(2.1) exclusion order, the error was jurisdictional and incurable in nature.[41] In the court below, all parties proceeded as if this ground of appeal involved a straightforward application of established law to the trial judge's decision. The Crown did not apply to have the appeal heard by a five-judge panel, and did not argue that, if the s. 640(2.1) application were invalid, the curative *proviso* should apply.[42] The dispute on Jaser's appeal was fact-specific: did his reluctant 'back-up' position, which he only advanced as a result of the trial judge's error, count as a *valid* s. 640(2.1) application?

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[39] *Jury Selection Ruling* at para 42-47, A.R. Vol. I, Tab 7; *OCA Reasons for Judgement* at paras 46-50, A.R. Vol. II, Tab 14

[40] Notice of Appeal filed October 22, 2015, R.R., Vol. I, Tab 5; Supplementary Notice of Appeal filed July 24, 2017, R.R., Vol. I, Tab 6. Esseghaier was unrepresented on appeal and did not file a Solicitor's Notice of Appeal.

[41] *R. v. Noureddine*, 2015 ONCA 770, at paras 57, 61. See also *R. v. Grant*, 2016 ONCA 639, *R. v. Murray*, 2017 ONCA 393, *R. v. Riley*, 2017 ONCA 650, leave to appeal ref'd, [2018] 3 S.C.R. v, *R. v. Husbands*, 2017 ONCA 607, leave to appeal ref'd [2018] 1 S.C.R. ix, *R. v. Cumor*, 2019 ONCA 747, and *R. v. Kossyrine*, 2017 ONCA 388

[42] *Factum of the Respondent Esseghaier*, at para 24

31. Given the potentially dispositive nature of the error, Jaser brought a motion for directions asking the Court of Appeal to consider the jury selection ground of appeal first. The Appellant took no position on the motion.[43] Justice Watt granted Jaser's request. The factors he identified as relevant to determining whether to bifurcate the appeal included:

a. The nature and apparent strength of the segregated ground of appeal;

b. The impact of a bifurcated hearing on the timely hearing and determination of any remaining grounds of appeal;

c. Whether bifurcation represents a timely and efficient use of judicial resources; and

d. Whether the hearing and determination of the other grounds of appeal may be delayed by further appellate proceedings relating to the segregated ground of appeal.[44]

32. In bifurcating the appeal, Watt J.A. relied on the potentially dispositive nature of the segregated ground, and the fact that the Crown had not opposed Jaser's request.[45]

33. The Court of Appeal unanimously allowed the appeals and ordered a new trial for both Respondents. The trial is scheduled to start in April of 2021. Esseghaier, whose mental illness has been diagnosed and treated, is now represented by counsel.

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[43] *OCA Decision on Bifurcation*, at para 13, A.R. Vol. II, Tab 13
[44] *OCA Decision on Bifurcation*, at para 14, A.R. Vol. II, Tab 13
[45] *OCA Decision on Bifurcation*, at paras 23, 26, A.R. Vol. II, Tab 13,

PART II – QUESTIONS IN ISSUE

34. Jaser's position on the Appellant's questions is as follows:

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

35. **No**. The Court of Appeal applied settled law relating to the question of when an application is 'brought' under s. 640(2.1). Its conclusion – that Jaser brought no valid application – was consistent with that law, and the established principle that a defendant's waiver of a procedural right must be clear and unequivocal.[46] The fact that the trial judge offered an alternate discretionary basis to dismiss Jaser's application did not cure the unfairness. The Court of Appeal correctly found this proposed exercise of discretion was unreasonable.

(2) 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?

36. **No**. The Respondent Jaser agrees with the Appellant that technical and non-prejudicial procedural errors made during the jury selection process are curable under s. 686(1)(b)(iv). The errors in this case, however, were not technical or harmless. The Court of Appeal correctly declined to apply the *proviso.*

37. Jaser raises no additional issues.

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[46] Jaser adopts the argument of the Respondent Esseghaier about why the jury was improperly constituted for him, and why an improperly constituted court for one defendant is improperly constituted for both.

PART III: STATEMENT OF ARGUMENT

A. The Court of Appeal was Right to Find that Jaser Made no Valid s. 640(2.1) Application

38. Only two provincial appellate courts, the British Columbia Court of Appeal and the Ontario Court of Appeal, have interpreted and applied ss. 640(2.1) and (2.2) of the *Criminal Code*. The British Columbia Court of Appeal did so in *Swite*, and the Ontario Court of Appeal did so in a line of cases commencing with *W.V.*, and culminating in the decisions in this case and the case of *Cumor*.[47] The Court of Appeal's conclusion that Jaser's jury was improperly constituted was correct and consistent with that jurisprudence. The Appellant does not seek to challenge this body of law. It accepts that, under these provisions: (a) the trial judge can only order static triers if the defendant brings a valid s. 640(2.1) application;[48] (b) Parliament's introduction of the 'static triers' mode of jury selection does not oust trial judges' inherent jurisdiction to exclude the panel;[49] (c) appellate courts should look at substance over form in deciding whether there is a valid s. 640(2.1) application (did the defendant "get what he wanted"?);[50] and (d) imposing static triers in the absence of a valid s. 640(2.1) application is a jurisdictional error.[51] The Appellant also accepts that Jaser met the statutory and common law threshold justifying an exclusion order. Its only arguments relating to Jaser are:

a. The Court of Appeal erred by refusing to characterize Jaser's reluctantly expressed 'back-up' position as a valid s. 640(2.1) application; and

b. The Court of Appeal erred by failing to defer to the trial judge's alternative ruling that he would not have exercised his discretion to exclude the panel in any event.

39. The Appellant put forward both arguments at the Court of Appeal. Neither succeeded. This Court should reject both of them.

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[47] *R v Swite*, 2011 BCCA 54, *R v. W.V.*, 2007 ONCA 546, *R v Cumor*, 2019 ONCA 747
[48] *R. v. Husbands*, 2017 ONCA 607 at para 37, leave to appeal ref'd [2018] 1 S.C.R. ix; *OCA Reasons for Judgement* at para 24, A.R. Vol. II, Tab 14
[49] *R v Grant*, 2016 ONCA 639 at para 41
[50] *R v Grant*, 2016 ONCA 639 at paras 50-51, *R. v. Mansingh*, 2017 ONCA 68 at para 12 *R v. Kossyrine*, 2017 ONCA 388 at para 28, *R v Murray*, 2017 ONCA 393 at paras 65-66, *R v. Riley*, 2017 ONCA 650 at para. 85
[51] *R v Noureddine*, 2015 ONCA 770 at para 57, *R. v. Husbands*, 2017 ONCA 607, at paras. 40-41, leave to appeal ref'd [2018] 1 S.C.R. ix

i) Jaser Made No Valid s. 640(2.1) Application

40. With respect to the first argument, the Court of Appeal correctly found that Jaser's reluctant 'back-up' position was not a valid s. 640(2.1) application. It held:

> I would not give the alternative request of Jaser for static triers the effect the Crown contends for. It became operative only due to a legal error by the trial judge, one Jaser had attempted to prevent from occurring. At the point that his notice that he would pursue the alternative of a s. 640(2.1) application became operative, that is, the trial judge's ruling that he lacked the discretion that he in law had, Jaser had already been deprived of his preferred option to invoke a method of selecting the composition of triers that the law entitled him to select. A choice of which of the remaining options should be used, in those circumstances, cannot cure the error.[52]

41. This ruling was the inevitable result of the application of settled law. At the time, the *Criminal Code* permitted trial judges to appoint static triers if the defendant applied for a s. 640(2.1) exclusion order, or brought the "functional equivalent" of such an application.[53] To determine whether a defendant had brought the functional equivalent of such an application, appellate courts considered substance over form: did the defendant get what he wanted?[54] The Appellant does not dispute the general correctness of the "functional equivalent" test, but argues that the Court of Appeal was wrong to apply it *in this case*.

42. The Court should reject that argument. There is no question that Jaser wanted rotating triers and an exclusion order. If the trial judge had properly applied the law, Jaser would have been entitled to the common law exclusion order he sought. The circumstances of the case dictate whether the judge will grant such an exclusion order.[55] Here, everything pointed to exclusion. Further, once a case meets the s. 640(2.1) threshold for a 'full' exclusion order – as this one did – it necessarily meets the common law threshold for a 'partial' exclusion order, since the latter

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[52] *OCA Reasons for Judgement* at para 92, A.R. Vol. II, Tab 14
[53] *R. v. Husbands*, 2017 ONCA 607 at paras 38, 46, leave to appeal ref'd [2018] 1 S.C.R. ix; *R v. Grant*, 2016 ONCA 639 at paras 50-51; *R v Murray*, 2017 ONCA 393 at paras 57-66
[54] *R v Murray*, 2017 ONCA 393 at para 62; *R. v. Mansingh*, 2017 ONCA 68 at para 12; *R v. Kossyrine*, 2017 ONCA 388, at paras 12, 22
[55] *R. v. Husbands*, 2017 ONCA 607 at para 36, leave to appeal ref'd [2018] 1 S.C.R. ix; *R v. Grant*, 2016 ONCA 639 at para 41, *R v Murray*, 2017 ONCA 393 at para 53

requires the judge to apply the same test.[56]

43. In this case, the following facts supported a statutory or common law exclusion order:

a. Jaser wanted to convenience the jurors, avoid exposing them to challenge for cause questions in advance, and reduce the risk of tainting.[57] Exclusion orders routinely issue for these reasons.[58]

b. The Crown did not dispute the sufficiency of Jaser's reasons for seeking exclusion, or oppose the request, except to argue wrongly that the exclusion order should issue under s. 640(2.1) instead of at common law.

c. The trial judge himself recognized there was a heightened risk of jury tainting in this case. He found that, "[t]his is 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."[59] In fact, one of the reasons he would have declined to exercise his inherent jurisdiction to make the order was his belief that a partial exclusion order would not do *enough* to reduce the risk of tainting.[60]

44. Jaser wanted a jury selected by rotating triers and a reduced risk of jury tainting. His lawyers made clear, from the moment the topic first arose, that they did not want static triers, only a common law order excluding unsworn jurors.[61] They gave a detailed explanation of their reasons. When the trial judge expressed skepticism during an early discussion about the value of rotating triers, counsel responded, "I've gained a lot of confidence in the wisdom of the jury selecting itself. There's a certain alchemy that, that happens. But — and, and you'll hear from us in writing and perhaps orally."[62] Counsel reiterated that position in written and oral submissions. In oral argument, counsel repeatedly explained why her client attached "significant value" to involving

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[56] *R v. Riley*, 2017 ONCA 650 at para 63; see also *R v. Grant*, 2016 ONCA 639 at para 41; *R v Murray*, 2017 ONCA 393 at para 53

[57] *Transcript of Proceedings at Jury Selection* (December 9, 2014), at p. 49, l. 28 to p. 50, l. 18, A.R., Vol. III, Tab 27

[58] *R v. Sandham*, [2009] OJ no 1853, *R v Millard*, 2015 ONSC 6582 at para 35, *R v. Daley*, 2015 ONSC 7264 at paras 41-42, *R v. Teng*, 2017 ONSC 675 at paras 6-8

[59] *Jury Selection Ruling* at para 42, A.R. Vol. I, Tab 7

[60] *Jury Selection Ruling* at paras 45-46, A.R. Vol. I, Tab 7

[61] *Transcript of Proceedings, Submissions re: Jury Selection Procedure* (27 November 2014), at p. 54, R.R. Vol. II, Tab 13

[62] *Transcript of Proceedings, Submissions re: Jury Selection Procedure* (27 November 2014), at p. 56, R.R. Vol. II, Tab 13

the jury in its selection.[63] She acknowledged that proceeding with rotating triers created inefficiencies and a risk of tainting, but explained that this was a risk Jaser was prepared to take, and that a common law exclusion order would reduce it.[64]

45. This Court should reject the Appellant's argument that the "general benefits" of the rotating trier process do not give judges sufficient reason to exercise their common law discretion. It is difficult to imagine a case in which the risk of 'rogue triers' was greater (the case was complicated and notorious and the triers were exposed to consistently bizarre behaviour from Esseghaier) or for which the need for jury cohesiveness was *more* important (the path to a verdict was sufficiently unclear that the jury deliberated for ten days and reached a deadlock for Jaser on the central conspiracy). It is also difficult to imagine how counsel could have better articulated their desire to maximize jury cohesiveness and diversity of thought through the use of rotating triers. If Jaser has not put forward a sufficient basis to support a request for common law exclusion, it is difficult to imagine any case in which such an order would be granted.

46. Indeed, the trial judge accepted – after full submissions and careful consideration of the factual context – that an exclusion order was necessary to preserve jury impartiality. That 'necessity' precondition *supported* Jaser's request for a common law order.[65] The trial judge only rejected Jaser's request because he (wrongly) believed it was not legally available and that there were "better ways" of protecting impartiality.[66] The record offers no other basis for doing so.

47. Counsel's insistence on and justification for a preferred method of jury selection sets this case apart from those in which counsel's informal request to exclude jurors amounted to a 'functional' s. 640(2.1) application. Jaser wanted a particular mode of jury selection and his lawyers advocated forcefully in support of this position. Given their clear preference for rotating triers, Jaser's request to exclude unsworn jurors cannot be recast as a s. 640(2.1) application for

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[63] *Transcript of Proceedings at Jury Selection* (December 9, 2014), at p. 47, A.R., Vol. III, Tab 27

[64] *Transcript of Proceedings at Jury Selection* (December 9, 2014), at p. 50, l. 19 to p. 51, l. 4, p. 52 ll. 17-23, p. 58 ll. 21-30; pp. 86-88, A.R., Vol. III, Tab 27

[65] *R v. Riley*, 2017 ONCA 650 at para 63, see also *R v. Grant*, 2016 ONCA 639 at para 41, *R v. Murray*, 2017 ONCA 393 at para 53

[66] *Jury Selection Ruling* at paras 45-46, A.R. Vol. I, Tab 7*; Transcript of Proceedings at Jury Selection* (December 9, 2014), at p. 54, l. 20 to p. 63, l. 8, A.R., Vol. III, Tab 27

static triers. Counsel's conduct is practically equivalent to that of the defence counsel in the successful appeals of *Noureddine* and *Husbands*, in which the defendants repeatedly "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)."[67]

48. In the court below, the Crown argued that the statutory preconditions for ordering static triers were nonetheless *technically* satisfied because, once the trial judge illegally deprived Jaser of his preferred mode of jury selection, Jaser said he would bring a s. 640(2.1) application. The Crown invited the Court of Appeal to ignore what Jaser truly wanted, depart from the 'substance over form' approach, and return to the technical approach that it had rejected in *Grant*.

49. The Court of Appeal correctly declined the invitation. Jaser's decision to opt for a particular compromise, after the trial judge erroneously limited his statutory right to rotating triers, did not cure the unfairness of denying him a legally available option. Every improper imposition of static triers is followed by a compromise choice by counsel about how to proceed. The case law shows that these reluctant compromises are never the functional equivalent of a s. 640(2.1) application. Choosing a method of jury selection requires a balancing of competing interests.[68] Like the defendants in *Husbands* and *Noureddine*, Jaser picked the 'lesser of two evils', opting for static triers and an exclusion order as best of the remaining choices.

50. In reaching its conclusion, the Court of Appeal acted consistently with the principles of informed waiver articulated by this Court. A party can waive a procedural requirement enacted for his benefit only if the waiver is clear and unequivocal. This has been the law in Canada for over 30 years. As pointed out by Lamer J. in *Korponay*, such a waiver has preconditions: its validity "is dependent upon it being clear and unequivocal that the person is waiving the procedural safeguard and is doing so with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process."[69]

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[67] *R v Noureddine*, 2015 ONCA 770 at paras. 27 and 37, *R. v. Husbands*, 2017 ONCA 607 at paras. 10, 11, 15, leave to appeal ref'd [2018] 1 S.C.R. ix
[68] *Transcript of Proceedings at Jury Selection* (December 9, 2014), at p. 58, ll. 18 to 30, A.R., Vol. III, Tab 27
[69] *Korponay v. AG Canada*, [1982] 1 S.C.R. 41, at pp. 48-49

51. Jaser's compromise – the product of an illegal binary choice forced upon him by the trial judge – was the opposite of a clear and unequivocal waiver. Jaser did not want static triers. The circumstances show his anticipated s. 640(2.1) application was a back-up position, triggered by the trial judge's early hint that he would dismiss any common law application. Counsel's application materials sought only a common law order excluding unsworn jurors. In submissions, counsel clarified they would apply for a s. 640(2.1) order *only* if the trial judge dismissed their application for a common law remedy.[70] The trial judge acknowledged this.[71] Having dismissed the application, he made a premature s. 640(2.1) order, treating counsel's notice and submissions as a formal application. The fact that Jaser identified his back-up position before the trial judge formally dismissed his primary application does not change the fact that it was a back-up position in the event of a loss, not an equally satisfactory alternative.

ii) The Court of Appeal Was Right to Find the Trial Judge Unreasonably Exercised His Discretion

52. With respect to the Appellant's second argument, the Court of Appeal correctly found that the trial judge's proposed exercise of discretion was unreasonable and not entitled to deference. It said:

> It was an error of law for the trial judge to refuse to exercise a discretion based on a view that a remedy not sought by Jaser would have better achieved his ends.
>
> […]
>
> The discretion to exclude unsworn jurors while using rotating triers cannot properly be refused on the basis that there is a better way to ensure jury impartiality, that is, by the exclusion of all jurors, when doing so negates the ability to use rotating triers. This approach makes the discretion unavailable.[72]

53. This again was the inevitable result of applying established law to the facts of the case. In *Grant*, Laskin J.A. accepted that using static triers reduced the risk of jury tainting and that using rotating triers increased that risk, but affirmed that this is a risk for the defendant to take.[73] Here,

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[70] *Transcript of Proceedings at Jury Selection* (December 9, 2014), at p. 60, l. 27 to p. 61, l. 3; p. 63, ll. 4-15, A.R., Vol. III, Tab 27. *Factum of Jaser at Trial on Jury Selection Issues* (dated 5 December 2014), at para 39, R.R., Vol. I, Tab 2

[71] *Jury Selection Ruling* at paras 43, 46, A.R. Vol. I, Tab 7

[72] *OCA Reasons for Judgement* at para 55-56, A.R. Vol. II, Tab 14

[73] *R v. Grant*, 2016 ONCA 639 at para. 40

the trial judge was satisfied that exclusion was necessary to preserve juror impartiality.[74] He only rejected Jaser's request because he (wrongly) believed it was not legally available and that there were better ways of protecting impartiality.[75] It was not for the trial judge to refuse a legally valid request on the basis that he *personally* prioritized the benefits of total exclusion over the competing benefits of adjudication by rotating triers. It is clearly unreasonable to withhold an effective and necessary remedy as a means of forcing the defendant to pursue a different remedy.

B. The Curative *Proviso* Cannot Apply

54. Jaser agrees with the Appellant that the curative *proviso* in s. 686(1)(b)(iv) can cure technical, non-prejudicial errors in the jury selection process. But this error was neither technical nor harmless. Errors of this type go to the composition of the jury and are by definition incurable, just as if the trial judge were unlawfully appointed.[76] In the alternative, they support an inference of prejudice that the Crown bears the burden of displacing. The Appellant cannot do so here, where the inference of prejudice is reinforced by evidence that Jaser's case would have unfolded differently if the trial judge had not erred.

i) This Court Should Reaffirm the Limited Application of the Proviso: There is No "Narrowing" Problem

55. Jaser adopts the Respondent Esseghaier's characterization of the scope of the curative proviso under s. 686(1)(b)(iv).[77] Jaser makes the following additional arguments.

56. The Court should reject the Appellant's argument that provincial appellate courts 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."[78] This is an imaginary problem, invented by the Appellant to avoid results it does not like. Justice Doherty recognized in *Noureddine* that the prejudice in cases like this "lies in the negative effect the improper use of static triers, over the express objection of counsel, had on the appearance of the fairness of the proceedings and the due administration of justice."[79] This is not a novel proposition but an established rule that permits

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[74] *OCA Reasons for Judgement* at para 53, A.R. Vol. II, Tab 14
[75] *Jury Selection Ruling* at paras 45-46, A.R. Vol. I, Tab 7
[76] *R. v. Bain*, [1992] 1 S.C.R. 91, p. 136.
[77] *Factum of the Respondent Esseghaier* at paras 54-59
[78] *Factum of the Appellant* at para 38
[79] *R v Noureddine*, 2015 ONCA 770 at para 64

appellate courts to set aside verdicts in unfairly conducted trials, thereby preserving confidence in the administration of justice. An appearance of unfairness – regardless of whether the evidence supports a conviction or whether there is an apparent path to an acquittal – has *always* been the basis for a new trial. Ontario has done nothing since *Khan* to narrow the *proviso* but, rather, has consistently applied it.

57. The proposition that some jury selection errors are jurisdictional in nature and prevent a properly constituted court from coming into existence is also not new. It has always been Parliament's role to decide which court (e.g., provincial court or superior court) and which circumstances (e.g., consent of the accused or the Attorney General) are prerequisites to the grant of jurisdiction. When the wrong court adjudicates a trial, the trial is a nullity. The Appellant does not quarrel with this proposition. It simply does not like the frequency with which the wrong court ended up presiding over jury trials between 2008 and 2016 due to misunderstandings about the meaning of the applicable legislation. This is not a valid policy reason to revisit the *proviso*. If Parliament's jurisdictional rules are sufficiently confusing that trial judges have trouble understanding and following them, then Parliament should change the rules. With respect to the jurisdictional problem at issue in this case, it has done so. The problem was never with the procedural *proviso* but rather, with the wording and application of s. 640(2.1) and (2.2) – a problem that Parliament has solved.

58. Jaser also asks the Court to clarify the scope of the curative *proviso* in s. 686(1)(b)(iv). The Appellant suggests inconsistently that the procedural *proviso* was never intended to remedy "*abstract* prejudice to the administration of justice," and yet can be applied to prevent the public from losing confidence in the administration of justice.[80] Both cannot be true. Jaser agrees with the second proposition: prejudice to the administration of justice is a form of "prejudice" that prohibits the application of s. 686(1)(b)(iv). The Court should reject the Appellant's suggestion to the contrary.

59. In *Khan*, this Court stated that the test for prejudice under the procedural *proviso* is the same as "the no substantial wrong or miscarriage of justice" test, i.e., whether "the verdict would

[80] *Factum of the Appellant* at para 60, 68

necessarily have been the same if such error had not occurred."[81] Denying the defendant a new trial in the face of an error will only be justified if "there is no realistic possibility of any result other than conviction."[82]

60. This standard requires resort to the trial record to determine if there is a viable route to acquittal. But the inquiry cannot end there. The "realistic possibility" standard has to take into account the necessarily unknowable effect of procedural unfairness – including the possibility that the record and the trier of fact's reasoning might have looked different without the error. As Justice Binnie explained in *Sarrazin*, respecting both *provisos*:

> It seems to me that there is a significant difference between an error of law that can be confidently dismissed as "harmless", and an assessment that while the error is prejudicial, it is not (in the after-the-fact view of the appellate court) *so* prejudicial as to have affected the outcome. Such delicate assessments are foreign to the purpose of the curative proviso which is to avoid a retrial that would be superfluous and unnecessary but to set high the Crown's burden of establishing those prerequisites.[83]

61. In assessing the prejudice arising from procedural errors, therefore, there is no need to prove that the result would have been different or that the jury would have been constituted differently. The *proviso* cannot apply unless the Crown disproves prejudice both to the administration of justice (i.e., proves the trial appeared fair) and to the accused (proves the error did not affect the course or outcome of the trial).[84] With respect to the latter, the Court should also infer prejudice from the existence of a serious procedural error.[85]

62. Jaser asks the Court to reaffirm that the procedural *proviso*, like the curative proviso in s. 686(1)(b)(iii), is broad enough to remedy the unquantifiable unfairness that arises from *unfairly conducted* trials, regardless of whether there is an apparent path to acquittal in the record. To this end, the Court should formally recognize that it is never appropriate to apply the *proviso* where the error or procedural irregularity would leave the defendant "with a justifiable sense of

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[81] *R v Khan*, 2001 SCC 86 at para 16; *R v Bevan*, [1993] 2 SCR 599 at para 42
[82] *R v Sekhon*, 2014 SCC 15 at para 86-87
[83] *R v Sarrazin*, 2014 SCC 15 at para 28
[84] *R. v. Kakegamic*, 2010 ONCA 903, 265 C.C.C. (3d) 420, at paras 35-39, *R. v. Sinclair*, 2013 ONCA 64, 300 C.C.C. (3d) 69, at paras 21-25, *R v Noureddine*, 2015 ONCA 770 at para 62
[85] *R v Khan*, 2001 SCC 86 at para 16, *R v. Riley*, 2017 ONCA 650 at para 72, *R v Noureddine*, 2015 ONCA 770 at para 62

injustice."[86] This principle animates both *provisos* – and neither should apply – in cases where there is a realistic possibility that the legal or procedural error influenced the record or the reasoning underlying the outcome. This Court could consider adopting the Ontario Court of Appeal's approach in such cases.[87] In *Walker*, for example, the court combined its analysis of the *provisos*, noting: "This case is not predicated on an error of law. Rather, it is predicated on unfairness arising from a cumulative number of procedural deficiencies…That unfairness resulted in a miscarriage of justice that cannot be solved by the application of the curative *proviso*."[88] In *McDonald*, the court considered subsections 686(1)(b)(iii) and (iv) together and declined on both fronts to cure a serious procedural error. It said a miscarriage of justice "need not always be supported by the demonstration of actual prejudice…sometimes, public confidence in the administration of justice is just as shaken by the appearance as by the fact of an unfair proceeding"[89] and that 'prejudice' refers not only to the ability to properly defend the case but also to "prejudice in the broader sense of prejudice to the appearance of the due administration of justice."[90]

63. The language of the procedural *proviso*, which requires the Crown to prove "no prejudice," is, if anything, more exacting than the "no substantial wrong or miscarriage of justice" test in the curative *proviso*. When Parliament chose to allow serious jurisdictional errors to be cured, it asked as a trade-off that the Crown prove the accused suffered absolutely no prejudice thereby. The types of cases where an absence of prejudice can be so definitively proven are different in character from the case at bar, where the prejudice is unknowable but potentially significant.

ii) The Error Gave Rise to an Improperly Constituted Court: The Procedural Proviso Does Not Apply

64. Jaser adopts and expands on Esseghaier's argument that the error in this case is by

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[86] *R v Cloutier*, 1988 CarswellOnt 795 (CA) at p. 13, quoting *R. v. Hertrich*, (1982), 67 CCC (2d) 510, per Martin J.A. at p. 537, approved by Dickson C.J.C. in *R v. Barrow*, [1987] 2 S.C.R. 694

[87] These include allegations of ineffective assistance of counsel (*R v Joanisse* (1995), 102 CCC (3d) 35 (Ont CA) at para 77) and cases involving serious procedural deficiencies: e.g., *R v Walker*, 2019 ONCA 765 at paras 122-127; *R v McDonald*, 2018 ONCA 369 at paras 50-55

[88] *R v Walker*, 2019 ONCA 765 at para 124

[89] *R v McDonald*, 2018 ONCA 369 at para 51

[90] *R v McDonald*, 2018 ONCA 369 at para 52

definition uncurable because the jury was improperly constituted, contrary to the law in force at the time. To paraphrase the Court of Appeal's language in *Cloutier*, this was an error of substance, not procedure, which resulted in the selected jury having no jurisdiction to hear the trial.[91] Because the jury was not constituted according to the rules, "the court exists no more than if the judge had been unlawfully appointed."[92]

65. Errors that go to the constitution of the court are errors that Parliament has said make the court unqualified to 'take on' the matter (a.k.a., the "class of offences") in the first place. The error is made out when a court, prohibited by Parliament from presiding over a particular type of trial, *in fact presides over such a trial.* The question of whether the trial is or appears to be fair is beside the point. Parliamentary rules preclude certain courts from hearing certain matters regardless of whether the court is otherwise qualified, and regardless of whether this is what the defendant wants. Parliament has decided, for example, that some offences can be tried only by a provincial court,[93] others only by a superior court,[94] and that criminal jury trials can be tried by no fewer than ten jurors.[95] If a superior court judge conducted a marijuana possession trial, a provincial court judge conducted a murder trial, or a superior court judge dismissed a jury and continued a murder trial over the parties' objection, the resulting verdict would be a nullity *because the court broke Parliament's rules*, not because the defendant was unhappy or the court incapable of fairly deciding the case.

66. At the time of Jaser's trial, a jury chosen by static triers could not preside over *any* class of offence unless the accused successfully applied for such a jury. Jaser never did, and so his static-trier-selected jury lacked jurisdiction. The fact that Parliament, by virtue of s. 640(2.1) and (2.2), has said static-trier-selected juries are *capable* of trying the same kind of cases as rotating-trier-selected juries is immaterial to the question of whether they have *jurisdiction* to do so. Some examples illustrate the irrelevance of the 'capacity' question to the jurisdictional analysis:

a. Section 669.3 of the *Criminal Code* permits a judge appointed to another court to

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[91] *R v Cloutier*, 1988 CarswellOnt 795 (CA) at para 40.
[92] *R v. Bain*, [1992] 1 S.C.R. 91, p. 136
[93] *Criminal Code,* R.S.C. 1985, c. C-46, s. 553
[94] *Criminal Code,* R.S.C. 1985, c. C-46, s. 469
[95] *Criminal Code,* R.S.C. 1985, c. C-46, s. 644

maintain jurisdiction over an ongoing trial of an offence from a "class" she no longer has jurisdiction to try. If a federal court judge illegally presided over a murder trial, no one would argue the error was curable just because federal court judges can hear murder cases in the limited circumstances contemplated by s. 669.3.

b. Section 644 of the *Criminal Code* prohibits jury trials from continuing with less than a 10-member jury but permits the trial judge to discharge the jury and continue the trial alone with the consent of the parties. If, however, a judge dismissed the defendant's jury and continued the trial over the defendant's objection, no one would argue the error was curable just because the trial judge was *capable* of continuing without a jury.

67. In each of these examples, as in this case, jurisdiction over the "class of offence" is limited both by (a) the type of trier that Parliament deems suitable to preside over the case, and (b) the case-specific circumstances that Parliament has said make it fair for that particular type of trier to do so, rather than another.

68. For these reasons, Jaser asks this Court to endorse the Court of Appeal's conclusion that a court is improperly constituted, and the verdict a nullity, where the static-trier option is unfairly transformed into a mandatory feature of the case. This is narrow holding. Contrary to the Appellant's suggestion, it would not prohibit appellate courts from applying the procedural *proviso* to serious jury selection errors, including errors relating to static trier applications under s. 640(2.1) and (2.2). Jaser adopts the Respondent Esseghaier's submission that the procedural *proviso* can cure procedural jury selection errors where the error had no impact on the jury's constitution; where, despite a procedural shortcoming, the defence got the jury selection process it wanted; or where the error was otherwise harmless.[96]

iii) The Error Caused Actual Prejudice and Supports an Inference of Prejudice

69. If not a fundamental jurisdictional error, this was a serious procedural irregularity that caused prejudice to the Respondents and cannot therefore be saved under s. 686(1)(b)(iv). Here, the error caused both actual prejudice to the administration of justice and an irrebuttable inference

[96] *Factum of the Respondent Esseghaier,* at paras 70-71

of prejudice to Jaser. The *proviso* should not be applied.

70. The actual prejudice to the administration of justice arises from the fact that the trial judge, over Jaser's objection, deprived him of an important safeguard – safety in numbers – that lies at the heart of community decision-making in criminal cases. The trial judge overrode Jaser's wishes by delegating to two lay members of the community the task of judging an "important part" of the trial, one that would normally be presided over by a combination of thirteen community members – twelve of whom would go on to become members of the jury that try the case. This is the kind of decision that should *only* be made with the consent of the defendant. As Justice Doherty recognized in *Noureddine,* the prejudice in cases like this "lies in the negative effect the improper use of static triers, over the express objection of counsel, had on the appearance of the fairness of the proceedings and the due administration of justice."[97]

71. Unilaterally reducing the number of community members charged with making a decision in a criminal case has a negative effect on the administration of justice. Canadian criminal law is premised on the idea that, when the community participates in criminal trial decisions, there is safety in numbers. Section 644 of the *Criminal Code* prohibits juries of less than ten members for this reason. If eight jurors became unavailable and a trial judge continued a trial with the remaining four, the defendant and the public would undoubtedly see the resulting trial and outcome as tainted by unfairness for reasons entirely unrelated to the fact that this was statutorily prohibited. A trial by a four-member jury would create the perception that the trial was unfair even if the record otherwise supported the verdict and outcome. The greater the number of decision-makers, the less likely it is that the decision will be tainted by individual idiosyncrasies.

72. The 'safety in numbers' offered by the rotating trier process is a feature of jury selection that courts have always presumed – and should continue to presume – inures to the defendant's benefit. Jury decision-making benefits from a diversity of opinions. Ensuring such a diversity of opinions preserves both fairness, and the appearance of fairness, in criminal trials. As Justice Doherty put it in *R v Parks*:

> The accused's statutory right to challenge potential jurors for cause based on partiality is the only direct means an accused has to secure an impartial jury. The significance of the

[97] *R v Noureddine*, 2015 ONCA 770 at para 64

> challenge process to both the appearance of fairness, and fairness itself, must not be underestimated.
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> […]
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> A diversity of views and outlooks is part of the genius of the jury system and makes jury verdicts a reflection of the shared values of the community."[98]

73. Rotating triers are, for similar reasons, the default decision-makers in challenges for cause. The perceived benefits of this form of adjudication to the defendant are well-known: namely, the use of rotating triers promotes in jurors a sense of responsibility to ensure impartiality and guarantees that a variety of perspectives will be brought to bear on the fundamental question of how the jury is constituted. A jury selected by rotating triers is more likely to be cohesive and less likely to be compromised by a 'rogue trier' with a skewed sense of impartiality.[99] In *R v Sandham*, the reasoning of which was adopted by the Court of Appeal in *Grant* and subsequent cases, an experienced trial judge explained why defendants routinely opted for the old system of rotating triers over the use of static triers:

> There is a reason for this. The jury selection process will take several weeks. While the process could go smoothly with two static triers, provided that they were alert and capable and understood their duties, there is no guarantee this would happen. If we had the misfortune to draw one or two triers who had difficulty comprehending their duties, or who were prone to capricious behaviour, we would, in effect, be stuck with them for the duration of the process. With rotating triers that risk is eliminated.[100]

74. Similarly, in *Noureddine*, Justice Doherty noted that the "potential benefits of rotating triers are particularly important to the accused," who is the party usually challenging for cause.[101] The 2008 amendments created an alternative, but, given the benefits of rotating triers to the defendant, it remained for the defendant alone to decide whether his interest in impartiality and efficiency – the benefits of static triers – was sufficiently high to justify giving up the benefits of

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[98] *R v Parks,* [1993] OJ No 2157 at paras 28, 36 (Ont. C.A.)
[99] *R. v. W.V.*, 2007 ONCA 546 at para. 26, *R v Noureddine*, 2015 ONCA 770, paras 34, 64 – 65, *R v. Grant*, 2016 ONCA 639, at para 21,
[100] *R v Sandham*, 2009 Canlii 22574 at paras 43-44 (ON SCJ)
[101] *R v Noureddine*, 2015 ONCA 770 at para 67

adjudication by rotating triers.[102]

75. The Appellant attempts to characterize jury selection by triers as a meaningless procedural step, and selection by rotating triers as fundamentally the same as selection by static triers. It suggests that Parliament's decision to eliminate the option of having a jury selected by fellow community members proves the relative *unimportance* of rotating triers, and, consequently, the triviality of denying that option.

76. This argument is flawed in two ways. First it assumes that Parliament's choice to abolish or change a statutory right is, in and of itself, evidence that the right was meaningless. That is not the case. A statutory right can be an important mechanism by which a substantive right – in this case, the right to a fair trial – is protected. As long as the *Criminal Code* permitted jury selection by community members, this Court has recognized that this community-based selection process must be conducted *properly*, if the trial is to appear fair. As Chief Justice Dickson stated in *Barrow*:

> The selection of an impartial jury is crucial to a fair trial. The *Criminal Code* recognizes the importance of the selection process and sets out a detailed procedure to be followed ... The challenge for cause involves trial of the impartiality of potential jurors, with examination by either side. The accused, the Crown, and the public at large all have the right to be sure that the jury is impartial and the trial fair; on this depends public confidence in the administration of justice. Because of the fundamental importance of the selection of the jury and because the Code gives the accused the right to participate in the process, the jury selection should be considered part of the trial for the purposes of s. 577(1) [now s. 650].
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> […]
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> The trier of partiality is not the judge but the mini-jury of two potential or previously selected jurors. **Overall, it is a comprehensive scheme designed to ensure as fair a jury as possible and to ensure that the parties and the public at large are convinced of is impartiality**. Any addition to this process from another source would upset the balance of the carefully defined jury selection process. This is especially the case of any attempt to add to the powers of the judge.[103]

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[102] *R v Noureddine*, 2015 ONCA 770, at para 68; *R. v. Husbands*, 2017 ONCA 607 at para. 50, leave to appeal ref'd [2018] 1 S.C.R. ix; *R v. Murray*, 2017 ONCA 393, at para 43. *R v. Grant*, 2016 ONCA 639 at para. 39-40

[103] *R v. Barrow*, [1987] 2 S.C.R. 694, at paras. 25 and 32 [emphasis added], see also *R. v. Bain*, [1992] 1 S.C.R. 91, at p. 114, *R. v. Stillman*, 2019 SCC 40, at para. 132, *R. v. Kokopenace*, 2015 SCC 28, at paras. 48-50, 53, *R. v. Find*, 2001 SCC 32, at paras. 31-33, *R. v. Hubbert* (1975), 29 C.C.C. (2d) 279 (Ont. C.A.)

77. Second, the Appellant mischaracterizes the change wrought by the Bill C-75 amendments. The Appellant tries to argue that because Parliament got rid of rotating triers, being deprived of rotating triers is inherently non-prejudicial. But that is not what Parliament did. Parliament got rid of 'jury selection by the community' and replaced it with 'jury selection by trial judge.' Jaser was therefore deprived, not of a right to rotating triers, but a right to maximize the number of community members participating in an important decision about his case, and minimize the risk that a rogue decision-maker would undermine the process. By removing community-based jury selection altogether, Parliament eliminated that risk and the corresponding need for protection. Defendants no longer have the right to rotating triers because they do not face the risks inherent to community-based jury selection to begin with.

78. Unlike defendants under the new Bill C-75 regime, Jaser was forced to accept those risks and denied the corresponding protection to which he was entitled. Depriving him of the option of choosing 'safety in numbers' was intangibly prejudicial in the same way that unilaterally reducing the number of jurors below the statutorily-permitted minimum would be. The Appellant cannot prove that the administration of justice was *not* prejudiced by this violation of a basic premise of Canadian criminal law.

79. The extent of the prejudice can be illustrated by an analogy: Parliament would be entitled to enact a law that abolished the twelve-member jury and permitted a criminal defendant to consent to trial by a smaller jury – six instead of ten, for example – to avoid a mistrial. The consent requirement would likely preserve the law's constitutionality; just as a defendant can choose a trial by judge alone, the defendant could conceivably choose to be tried by fewer than ten jurors. It would be obviously unfair, however, if a trial judge faced with the prospect of a mistrial wrongly told the defendant he *had* to choose between continuing with six jurors or continuing with the judge alone. That defendant, like Jaser, would be deprived of a legally available choice (in this example, a mistrial). Like Jaser, he would not be able to point to a way in which the deprivation affected the record or outcome. It is the unfairness of the process that would undermine confidence in the administration of justice.

80. The prejudice to the administration of justice is compounded by the fact that the trial judge's illegal order affected the composition of the court for Jaser's unrepresented, mentally ill

co-defendant. Esseghaier never brought a s. 640(2.1) application. At the point at which the trial judge and *amicus* discussed whether *amicus* should participate, neither knew what Jaser would do. No one made submissions on Esseghaier's behalf about whether, in the absence of an application by him, a s. 640(2.1) order should be made. In multi-defendant cases where the defendants seek different modes of jury selection, the trial judge should balance the competing interests and make an order that is in the interests of justice.[104] Esseghaier's failure to bring an application was one more factor favouring a common law remedy.

81. The Appellant accepts that it bears the burden of showing the error caused no actual prejudice. This is true regardless of whether the prejudice is to the defendant personally or the administration of justice more broadly. This Court should reject any attempt by the Crown to create an artificial distinction between "personal prejudice" and "systemic prejudice."[105] This novel proposition finds no support in the law and undermines decades of judicial recognition, including from this Court, that unfairness *and the appearance of unfairness* are incurable under both *provisos*. In procedural unfairness cases, it is impossible to distinguish between the two. The prejudice to both arises from "the denial of [an] opportunity to an accused [which] may well leave him with a justifiable sense of injustice."[106] If the error leaves the defendant with a justifiable sense of injustice, it necessarily leaves the informed public with the same feeling. The Crown bears the burden of showing that the sense of injustice is either non-existent or unreasonable.

82. The Appellant cannot do so in this case. Where, as here, the defendant wants the benefit of a procedural right, clearly asks for it, is entitled to it, is denied it, and expresses dissatisfaction when he does not get it, it will be nearly impossible for the Crown to prove that he feels no justifiable sense of injustice. The difficulty faced by the Appellant is not a sign that the law is dysfunctional, but a reflection of the established principle that serious procedural errors can influence a jury's thinking and verdict in numerous unpredictable ways. It is no more appropriate for the Crown to complain about 'incurable' procedural errors than it is to complain about

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[104] Justice Fairburn (as she then was) took this approach in *R v. Daley*, 2015 ONSC 7264, where only one of five co-accused requested static triers. Justice Fairburn rejected the request and made a common law exclusion order: see para 39

[105] *Factum of the Appellant* in *R. v. Chouhan* (S.C.C. Case File No. 39062) at paras. 96-105

[106] *R v Cloutier*, 1988 CarswellOnt 795 (CA) at p. 13

'incurable' miscarriages of justice. Section 686(1)(b) of the *Criminal Code* has always recognized that once an error rises to the level of causing prejudice, it cannot be cured under either *proviso*.

83. The *inferred* prejudice to Jaser's trial in this case provides an additional reason to find that the Crown has not met its burden. Unlike the average jury selection case, where the prejudice flows entirely from the impact of the legal error on the appearance of fairness, Jaser can point to three specific ways in which the use of static triers may have negatively affected the course or outcome of the trial.

84. First, the static triers in this case were repeatedly exposed to potentially prejudicial conduct by Esseghaier during jury selection. This increased the risk that they would become prejudiced in their decision-making over time – a risk that would have been mitigated had rotating triers heard the challenge for cause.

85. Second, the static triers were unusually interventionist and, at times, seemed to have trouble following instructions. They rejected 25 prospective jurors, some for "dubious" reasons. They reached a near-impasse in their decision-making about the suitability of a Muslim juror who wore *hijab* – a development that the experienced trial judge and counsel had never seen before. Their decision-making, like that of the *petit* jury, could not be interrogated. In these circumstances, the Crown cannot rebut the inference that illegal reasoning pervaded the decision-making in a way that it would not have done had the decisions been made by a new set of triers each time. The fact that Jaser did not use all his peremptory challenges does not negate the prejudice arising from the fact that there was *nothing he could do* about the triers' "dubious" rejection of apparently-suitable prospective jurors.

86. Third, the jury in this case did not achieve the cohesiveness that selection by rotating triers is supposed to promote. This was not an overwhelming Crown case leading inevitably to conviction. To convict Jaser of conspiracy, the Crown had to prove he intended to agree to commit murder *and* put the common design into effect.[107] The Crown also had to prove that Esseghaier was a party to the conspiracy. On the face of the record, the jury struggled to reach a decision. It

[107] *R. v. Root*, 2008 ONCA 869, at paras 65-66, citing *United States v. Dynar*, [1997] 2 S.C.R. 462 and *R. v. O'Brien*, [1954] S.C.R. 666

deliberated for ten days. After eight days, it reported a deadlock and the trial judge exhorted it to continue. The jury deliberated for two more days and remained deadlocked on the most important charge for Jaser – the Via Rail conspiracy. A more cohesive jury might have been able to agree to acquit him of this charge – an outcome which could have affected the trial judge's sentencing decision. The record and outcome of the jury's deliberations reflect the very type of disharmony that selection by rotating triers aims to avoid.

87. These features of the trial prevent the Appellant from rebutting the inference of prejudice that necessarily flows from a serious procedural error.[108] The Appellant cannot ask this Court to infer that the static triers were as impartial as rotating triers when the static triers were exposed to prejudicial information that rotating triers might not have seen. Similarly, the Appellant cannot argue that this jury was as cohesive as one selected by rotating triers when this jury was unable to reach a unanimous verdict on the central conspiracy. Canadian criminal law operates on the premise that a trial becomes unfair when the jury is exposed to information that *could* improperly affect its reasoning. The Appellant's task of rebutting inferred prejudice is, properly, a difficult one. In this case, where Jaser can point to actual and likely ways in which his trial unfolded differently as a result of the trial judge's error, it is impossible.

C. If the Curative *Proviso* Can Be Applied, the Case Should Be Remitted to the Court of Appeal

88. If the Court concludes that errors of this type are curable, and is unprepared to find or infer prejudice on this record, the appropriate remedy is not an order restoring the convictions, but an order under s. 46.1 of the *Supreme Court Act* remitting this ground of appeal to the Court of Appeal for reconsideration in accordance with this Court's direction, together with the other grounds of appeal. Regardless of whether the curative proviso *can* apply to a jury selection error of this type, it *should* not be applied at a point in the proceedings when only part of the appeal has been heard and decided.

89. Appellate courts must consider the cumulative effect of all the trial judge's errors when deciding whether the appearance of fairness of the trial has been compromised, and whether the curative *proviso* should apply. Individual errors may not cause unfairness, but the combined effect

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

of many errors may do so.[109] The same rule should apply in procedural *proviso* cases.[110] One procedural irregularity may be harmless; multiple procedural errors that operate to the defendant's detriment may give rise to the perception that the trial as a whole was unfairly conducted.

90. In this case, the Court of Appeal has yet to hear or decide most of the Respondents' grounds of appeal. Some grounds, particularly those relating to the trial judge's failure to assess Esseghaier's fitness, and his refusal to sever Jaser from his co-accused, are errors which, if made out, provide added context for the "prejudice" analysis on the jury selection ground. If the Court of Appeal agrees with Jaser, for example, that Esseghaier's religious outbursts were quasi-incriminatory statements that prejudiced Jaser before a jury, it will be easier for Jaser to argue that the improper imposition of static triers caused him prejudice (by virtue of their position, they were exposed to more prejudicial conduct than rotating triers would have been). Similarly, if the Court of Appeal agrees that the trial judge should have more fully explored the link between Esseghaier's mental illness and his refusal to participate, the Crown's claim that Esseghaier "chose" not to participate in jury selection loses its force and Esseghaier's prejudice claim on this ground of appeal becomes stronger.

91. The Court of Appeal may ultimately prove to have many reasons for overturning these serious convictions. Against this backdrop, the Court cannot apply the curative *proviso.* The public has an interest in fair trials, not verdicts, in serious cases. The case should be remitted to the Court of Appeal.

PART IV – COSTS

92. The Respondent makes no submissions as to costs.

PART V – ORDER SOUGHT

93. The Respondent seeks an order dismissing the appeal. In the alternative, the Respondent asks the Court to exercise its discretion under s. 46.1 of the *Supreme Court Act*, remand the appeal to the Court of Appeal for Ontario and order the Court of Appeal to reconsider this ground of

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[109] *R v R.V.*, 2019 SCC 41 at para 110, *R. v. Jackson*, (1991) 68 C.C.C. (3d) 385 at 411-412 (Ont. C.A.), *R. v. Klymchuk*, (2005) 203 C.C.C. (3d) 341 at 356 (Ont. C.A.), *R. v. Brown*, 2018 ONCA 481 at para 75, *R v Bomberry*, 2010 ONCA 542 at para 79, *R v Hill*, 2015 ONCA 616 at para 101

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

appeal together with the other grounds of appeal raised by the Respondents in the court below.

PART VI – SUBMISSIONS ON CASE SENSITIVITY

94. 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 this 1st day of September, 2020.

Megan Savard and Riaz Sayani
Counsel for the Respondent Raed Jaser

PART VII – TABLE OF AUTHORITIES