File No. 38861

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

B E T W E E N:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Appellant
(Respondent)

- and -

CHIHEB ESSEGHAIER AND RAED JASER

Respondents
(Appellants)

- and -

ATTORNEY GENERAL OF ONTARIO
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CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

Interveners

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(Rule 42 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. This case presents an opportunity for this Court to correct a flawed approach to s. 686(1)(*b*)(iv) of the *Criminal Code* that has resulted in the wasteful repetition of fundamentally fair trials. The Court of Appeal's approach rests on three errors.

2. First, the Court of Appeal wrongly held that "an error in the method of selecting the jury … falls outside the curative proviso". Yet this Court has accepted that errors in jury selection are not categorically beyond the reach of s. 686(1)(*b*)(iv). They are curable unless they caused "the appellant … prejudice" (emphasis added).[1]

3. Second, the Court of Appeal wrongly treated prejudice "to the due administration of justice" as an additional form of prejudice that must be absent. This Court has held that the test for prejudice under s. 686(1)(*b*)(iv) mirrors the test under s. 686(1)(*b*)(iii), which focuses on the safety of the verdict. While systemic prejudice is irrelevant to that assessment, it may be relevant to whether an appellate court ought to exercise its discretion to cure a procedural error.

4. Third, analyzing harm "to the due administration of justice" as prejudice that had to be disproven rather than as a factor bearing on a residual exercise of discretion led the Court of Appeal to ignore relevant considerations. Harm to public confidence in the administration of justice can be caused both by (*i*) upholding a conviction despite a procedural error, and (*ii*) ordering a new trial because of such an error. Appellate courts should exercise their discretion by choosing the least harmful option. The Court of Appeal did not consider the harm associated with ordering a new trial, which will often weigh heavily in favour of applying the proviso to uphold the verdict.

PART II – POINTS IN ISSUE

5. Ontario intervenes on the appellant's second issue – whether "s. 686(1)(*b*)(iv) of the *Criminal Code* [is] inapplicable to error in the jury selection process, no matter how technical and non-prejudicial the error".[2] **Ontario submits s. 686(1)(*b*)(iv) can cure non-prejudicial errors in jury selection.**

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[1] Court of Appeal Reasons, at para. 70; *Criminal Code*, R.S.C. 1985, c. C-46, s. 686(1)(b)(iv), in force as of December 4, 1985; *R. v. Khan*, 2001 SCC 86, at para. 11.
[2] Appellant's factum, at para. 20.

PART III – STATEMENT OF ARGUMENT

A. Errors in failing to comply with the *Criminal Code*'s jury selection rules are within reach of s. 686(1)(*b*)(iv)

6. In this case, the Court of Appeal followed a line of its own authority providing that the failure to comply with the *Criminal Code*'s rules governing jury selection is an error that "leads to an improperly constituted court" and cannot be cured by s. 686(1)(*b*)(iv).[3] The appellant and respondents disagree whether this conclusion is consistent with *R. v. Khan*, the leading relevant authority from this Court. No party asks this Court to revisit *Khan*. Ontario submits that the appellant is correct: the Court of Appeal's conclusion is inconsistent with *Khan* in three ways.

7. **First**, *Khan* identified errors in jury selection as curable. Arbour J. held Parliament enacted s. 686(1)(*b*)(iv) to cure any procedural irregularity (if non-prejudicial) that had been deemed jurisdictional in the time leading up to the section's enactment. Arbour J. identified "irregularities in jury selection" as falling within that class. The case Arbour J. cited as evincing the state of law Parliament intended to redress – *R. v. Rowbotham* – involved a successful appeal from a trial judge's decision to depart from jury-selection procedures in the *Criminal Code*.[4]

8. **Second**, in *Khan*, Arbour J. "agree[d] with the analysis of the scope of … [s. 686(1)(*b*)(iv)] provided by Goodman J.A. in *R. v. Cloutier*", which also held that jury-selection errors are curable.[5] In *Cloutier*, Goodman J.A. identified three categories that define when s. 686(1)(*b*)(iv) may apply. The section may cure errors in the third category, involving serious procedural irregularities causing a loss of jurisdiction. Goodman J.A. held that "[i]t is clear" that "the procedural irregularity" that occurred in *R. v. Varga* "fell within the third category". There, a trial judge modified the nature and number of challenges both parties had in jury selection.[6]

9. **Third**, the respondents' interpretation of *Khan* rests on a flawed reading of the following passage from Arbour J.'s reasons:

> [s. 686(1)(*b*)(iv)] was enacted to cure serious procedural irregularities, otherwise

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[3] Court of Appeal Reasons, at para. 70.
[4] *R. v. Khan*, 2001 SCC 86, at paras. 14, 16-18; *R. v. Rowbotham*, 1988 CanLII 147 (ON CA), at paras. 19, 71, 73,76.
[5] *R. v. Khan*, 2001 SCC 86, at para. 11.
[6] *R. v. Cloutier*, 1988 CanLII 199 (ON CA), at CanLII pp. 23, 26-28, leave ref'd, [1989] 2 S.C.R. vi, citing *R. v. Varga* (1985), 18 C.C.C. (3d) 281 (Ont. C.A.).

> amounting to errors of law, in cases where under the then existing case law, jurisdiction over the person, but not over the offence, had been lost.[7] [Emphasis added.]

10. The respondent Esseghaier points to this passage as evincing an intention to limit the section's application to cases where the court has jurisdiction and loses it, and to exclude situations where the court was improperly constituted and so never acquires jurisdiction.[8]

11. The section is not limited to situations where the court has jurisdiction and then loses it. *Khan* was decided after this Court decided *R. v. N.(C.)*, which established that s. 686(1)(*b*)(iv) can save a verdict where a trial court fails to acquire jurisdiction to try the offence. In *N.(C.)*, this Court relied on s. 686(1)(*b*)(iv) to restore a conviction rendered at a trial where the court never acquired jurisdiction, having failed to read out the indictment or take the accused's plea.[9] It is unclear why Parliament would make pre-trial errors of this nature curable, and exclude errors in jury selection. In fact, such an intent would be inconsistent with ss. 643(3), 670 and 671, where Parliament had said some jury-selection errors cannot lead to a new trial.[10]

12. The passage also does not imply a requirement of a properly constituted trial court. A more plausible interpretation of the passage is that Arbour J. was referring to the statutory requirement in s. 686(1)(*b*)(iv) that "the trial court had jurisdiction over the class of offence of which the appellant was convicted", but used the more concise language "jurisdiction … over the offence". This reading would make Justice Arbour's description of this requirement in the passage above consistent with her description of the same requirement earlier in her reasons:

> [Section 686(1)(*b*)(iv) permits] the dismissal of appeals in case of any procedural irregularity previously perceived as having caused a loss of jurisdiction at trial, as long as the accused suffers no prejudice and as long as the trial court maintained its jurisdiction "over the class of offence[s]".[11]

13. The question, then, is what Parliament intended by including the requirement that "the trial court had jurisdiction over the class of offence". The phrase must mean something other than that

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[7] *R. v. Khan*, 2001 SCC 86, at para. 16; Esseghaier's factum, at paras. 54-55.
[8] Esseghaier's factum, at paras. 54-55.
[9] *R. v. N.(C.)*, [1992] 3 S.C.R. 471, rev'g 1991 CanLII 3718 (QC CA); see also *R. c. Primeau*, 2000 CanLII 11306 (QC CA), at para. 49; Esseghaier's factum, at para. 55.
[10] *Criminal Code*, R.S.C. 1985, c. C-46, ss. 643, 670, 671; *R. v. Rowbotham*, 1988 CanLII 147 (ON CA), at paras. 63-71; *R. v. Noureddine*, 2015 ONCA 770, at paras. 39-45.
[11] *R. v. Khan*, 2001 SCC 86, at paras. 11, 16.

the trial court maintained "jurisdiction" or "jurisdiction over the offence" (*i.e.* the power to try a charge): s. 686(1)(*b*)(iv) was enacted to cure non-prejudicial errors where the trial court lost jurisdiction. Further, the addition of the words "class of" signifies an intention to distinguish the phrase "jurisdiction over the class of offence" from the term of art "jurisdiction over the offence". The latter phrase is used to describe the jurisdiction lost where a trial court fails to act on an information on a remand date, resulting in the charging document becoming a nullity. There was also no need for Arbour J. to address whether that error was curable under s. 686(1)(*b*)(iv), since, as she noted, Parliament enacted s. 485 to separately provide that such errors are no longer fatal.[12]

14. The prevailing view is that the requirement that "the trial court had jurisdiction over the class of offence" is meant to exclude situations "where the court did not have subject matter jurisdiction in the primary sense of the term, as opposed to the lack of jurisdiction resulting from non-compliance with a formality or to the loss of this jurisdiction". Jurisdiction "over the class of offence", properly interpreted, means nothing more than that the court in which the accused was tried – Superior or provincial – *could have* subject matter jurisdiction over the charge if it did not make a mistake. In other words, the section can cure anything the court *did or did not do* that resulted in it not having jurisdiction to try the offence. But if the absence of jurisdiction relates to *the type of court where the matter was tried*, it cannot be cured.[13]

15. Under this definition of "jurisdiction over the class of offence", s. 686(1)(*b*)(iv) cannot save, for example a murder conviction rendered by a provincial court, a summary conviction rendered by a Superior Court, or a *Criminal-Code* conviction rendered by the Federal Court.[14] It is understandable that Parliament would exclude this type of error from the section's ambit. This error involves a court answering questions that Parliament never intended it to answer.[15]

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[12] *R. v. Khan*, 2001 SCC 86, at paras. 15, 16.
[13] *R. c. Bebawi*, 2019 QCCS 4393, at paras. 126-27; *R. c. Primeau*, 2000 CanLII 11306 (QC CA), at para. 29; *R. v. Cloutier*, 1988 CanLII 199 (ON CA), at CanLII pp. 21-22, leave ref'd, [1989] 2 S.C.R. vi; *R. v. Sciascia*, 2016 ONCA 411, at paras. 79-80 (*c.f.* paras. 81-83), rev'd on other grounds, 2017 SCC 57; *R. v. Giovannini*, 1992 CanLII 7119 (NL CA), at para. 12; *R. v. G.(A.M.)*, 2000 NSCA 6, at paras. 1-3, 6-7.
[14] *R. c. Primeau*, 2000 CanLII 11306 (QC CA), at para. 26; *R. v. D.M.E.*, 2014 ONCA 496, at paras. 56- 66.
[15] *R v. Sciascia*, 2017 SCC 57, at paras. 71-74, *per* Côté J., dissenting, but on a point not addressed by the majority.

16. However, where, but for a procedural irregularity, the trial court had authority to convict the accused of the "class of offence" (summary conviction, indictable, or s. 469), the fundamental flaw Parliament sought to exclude from the section's ambit is absent. The trial court answered a question it had been empowered to answer but made a mistake in the process. In such circumstances, if there is no prejudice, the procedural irregularity can be cured.

B. For the proviso to apply, the Crown must establish the error caused no *personal prejudice* to the appellant

17. In this case, the Court of Appeal for Ontario held, as it has in previous decisions, that prejudice "to the due administration of justice" (*i.e.* systemic prejudice) must be absent for s. 686(1)(*b*)(iv) to apply. The Court of Appeal has explained that this prejudice is different than "actual prejudice" to the accused.[16] The respondents ask this Court to adopt this proposition.

18. However, this proposition is inconsistent with the text of s. 686(1)(*b*)(iv) and the leading authorities interpreting the section, which explain that only personal prejudice to the accused is relevant and must be absent for the section to apply. By its terms, s. 686(1)(*b*)(iv) can only apply to cure a procedural irregularity where "the court of appeal is of the opinion that the appellant suffered no prejudice" (emphasis added). Compare the broader language used in the curative proviso, s. 686(1)(*b*)(iii), which can cure errors of law only if "no substantial wrong or miscarriage of justice has occurred" (emphasis added).

19. The plain meaning of the narrower phrase "the appellant suffered no prejudice" is prejudice suffered by the appellant personally. Accordingly, in *Cloutier*, the prejudice inquiry was interpreted to require that the irregularity "did not affect the outcome of the trial adversely to [the appellant]". To similar effect, in *Khan*, Arbour J. held that "the test of prejudice under [s. 686(1)(*b*)(iv)] should be the same as the no substantial wrong or miscarriage of justice [test], under s. 686(1)(*b*)(iii)". It may apply "where there is no 'reasonable possibility that the verdict would

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[16] CA Reasons, at para. 71, 95; *R. v. Kakegamic*, 2010 ONCA 903, at paras. 35-39; *R. v. Cumor*, 2019 ONCA 747, at para. 51; *R. v. Sinclair*, 2013 ONCA 64, at para. 23; *R. v. F.E.E.*, 2011 ONCA 783, at paras. 33, 51; *R. v. Sciascia*, 2016 ONCA 411, at para. 85, rev'd, 2017 SCC 57; *R. v. McDonald*, 2018 ONCA 369, at paras. 52-54; *R. v. Riley*, 2017 ONCA 650, at para. 72, leave ref'd, [2018] S.C.C.A. No. 216; *R. v. Noureddine*, 2015 ONCA 770, at paras. 47, 62-64, 68; *R. v. Husbands*, 2017 ONCA 607, at para. 40, leave ref'd, 2018 CanLII 4677 (SCC); *R. v. Province*, 2019 ONCA 638, at para. 81; *R. v. Rose*, 2020 ONCA 306, at paras. 27, 32.

have been different had the error … not been made'" because (*i*) the error is minor or serious but harmless or (*ii*) the case is so overwhelming that "any other verdict but a conviction would be impossible".[17]

20. The majority's reasons in *Khan* belie the respondent Jaser's suggestion that an appearance of unfairness would amount to "prejudice" within the meaning of s. 686(1)(*b*)(iv) that must be completely disproven for the section to apply. Both unfairness "in fact" and "the appearance of unfairness" can cause a miscarriage of justice. But they are distinct concepts.[18] And s. 686(1)(*b*)(iv) is concerned only with the former, since the latter does not involve actual unfairness at trial.

21. Jaser's approach would also improperly treat an appearance of unfairness differently under s. 686(1)(*b*)(iv) than in other contexts. While actual unfairness "is in general a miscarriage of justice", an appearance of unfairness can only establish a reversible miscarriage of justice where it is "so serious that it shakes public confidence in the administration of justice".[19] Yet Jaser's approach would lead to new trials for even the slightest appearance of unfairness.

22. Both respondents also suggest that where an error has or may have influenced the composition of the jury, it may be impossible for the Crown to demonstrate an absence of prejudice. They argue that a different jury might have acquitted. Similarly, the Court of Appeal implicitly accepted that an "actual effect on the constitution of the jury" is personal prejudice that bars the application of the proviso.[20]

23. Ontario disagrees. The fact that an error results in different people sitting on a jury, and the speculative possibility that a different jury might have reached a different verdict, are not, on their own, enough to establish prejudice for s. 686(1)(*b*)(iv). The accused is entitled to be tried by an independent and impartial jury selected from a representative panel. Where a procedural error

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[17] *R. v. Cloutier*, 1988 CanLII 199 (ON CA), at CanLII p. 29, leave ref'd, [1989] 2 S.C.R. vi; *R. v. Khan*, 2001 SCC 86, at paras. 16, 28-31; see *e.g. R. v. White*, 2011 SCC 13, at paras. 91-94; see also *R. v. Tran*, [1994] 2 S.C.R. 951, at pp. 1008-09; *c.f. R. v. Beaulac*, [1999] 1 S.C.R. 768, at para. 54; *R. v. Leaney*, [1989] 2 S.C.R. 393, pp. 409-412 (Wilson J.), 415-16 (McLachlin J.).
[18] See *e.g. R. v. Davey*, 2012 SCC 75, at paras. 50-51; *R. v. Babos*, 2014 SCC 16, at paras. 34-35.
[19] *R. v. Davey*, 2012 SCC 75, at paras. 50-51.
[20] Esseghaier's factum, at para. 77; Jaser's factum, at para. 86; CA Reasons, at para. 71.

leaves those interests intact, the fact that the jury's composition was or may have been affected is irrelevant. Rosenberg J.A. applied a similar approach for the Court of Appeal for Ontario in *R. v. Brown*, a case where the trial judge had organized groups of prospective jurors so that groups including visible minorities would be called first, and thereby interfered with what was supposed to be a random process. The approach "arguably … violated" the required procedure, and almost certainly affected the composition of the jury. Nonetheless, Rosenberg J.A. found no reversible error, since the erroneous approach did not impair the fundamental characteristics of the jury: independence and impartiality.[21]

24. To similar effect, in *R. v. Davey* and *R. v. Yumnu*, this Court questioned whether a *Charter* breach affecting the composition of a jury should require a new trial if it can be shown that the jury was impartial. In *Davey*, Karakatsanis J. was "not persuaded" that an effect on the jury's composition was enough. Reasoning from the fact that "[t]he jury selection process is designed to provide safeguards to ensure the impartiality of the jury", Karakatsanis J. accepted that "a reasonable possibility that the jury would have been differently constituted" rebuts the presumption of jury impartiality. "However", she held, "it may be that the Crown should then have the opportunity to show, on balance, that the jury was impartial" (although an appellate court might still find an appearance of unfairness amount to a miscarriage of justice). Moldaver J. echoed this reasoning in *Yumnu*.[22]

25. *Davey* affirms the core interest at stake in jury selection: the right to be tried by an independent and impartial jury.[23] An appellate court satisfied that this interest has been upheld should find a procedural error affecting the composition of the jury to be harmless. With or without the error, the accused received what the *Criminal Code* and *Charter* aim to ensure: a fair trial. Where the trial was "fundamentally fair", even if "not … perfect", the results are tolerable to our justice system.[24]

26. The speculative possibility that the result at a retrial before a different jury might be different is not a reason to invalidate a verdict rendered following a fair trial by an independent

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[21] *R. v. Brown*, 2006 CanLII 42683 (ON CA), at paras. 22-29.
[22] *R. v. Davey*, 2012 SCC 75, at para. 55 and FN 5; *R. v. Yumnu*, 2012 SCC 73, at paras. 75-76.
[23] See also *R. v. Find*, 2001 SCC 32, at para. 28.
[24] *Ibid*, at para. 28.

and impartial jury. Depriving the accused of a particular jury or particular jurors is not on its own prejudice. The accused has no right to demand a particular jury. Random selection from a representative panel – not control – is an essential characteristic of Canadian jury selection.[25] This Court explained in *Yumnu* that "[a]ttempts … to obtain a favourable jury are inimical to … [the right to be tried by an independent and impartial tribunal]."[26]

C. Appellate courts can consider broader, systemic prejudice in deciding whether to exercise their discretion to dismiss an appeal under s. 686(1)(*b*)(iv)

27. Since systemic prejudice – *i.e.* prejudice to public confidence in the administration of justice – is not personal prejudice to the appellant, it is not prejudice that the Crown must entirely disprove in order to rely on s. 686(1)(*b*)(iv).

28. However, systemic prejudice may still be considered. An appellate court's power to make an order under s. 686(1)(*b*)(iii) or (iv) is discretionary: *i.e.* the court "may dismiss" an appeal. In *Cloutier*, the Court of Appeal for Ontario reasoned that even when the conditions in s. 686(1)(*b*)(iv) have been met, an appellate court may "refuse to exercise the discretion … to dismiss the appeal" where instead allowing the appeal would ensure "that justice will not only be done but will be seen to be done."[27]

29. In this analysis, as the Saskatchewan Court of Appeal held in *R. v. T.(L.W.)*, the question should be whether the error caused prejudice so great that the appellate court should refuse to exercise its discretion in favour of upholding the conviction.[28] Decisions driven by a concern over public confidence in the administration of justice should be decided in a manner that best achieves that objective.[29] As such, to decide whether or not to apply the proviso, courts should consider two options – (*i*) upholding the conviction despite the error and (*ii*) ordering a new trial because of the error – and select the least harmful to the administration of justice.

30. On the one hand, a conviction rendered following a court's non-compliance with the law

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[25] *R. v. Sherratt*, [1991] 1 S.C.R. 509, at p. 525; *R. v. Davey*, 2012 SCC 75, at paras. 30-31.
[26] *R. v. Yumnu*, 2012 SCC 73, at paras. 71-72.
[27] *R. v. Cloutier*, 1988 CanLII 199 (ON CA), at CanLII pp. 31-32, leave ref'd, [1989] 2 S.C.R. vi; see also *R. v. T.(L.W.)*, 2008 SKCA 17, at paras. 28-33.
[28] *R. v. T.(L.W.)*, 2008 SKCA 17, at paras. 28-33.
[29] See *e.g.*, *R. v. Babos*, 2014 SCC 16, at paras. 35, 41; *R. v. Grant*, 2009 SCC 32, at para. 79.

can harm public confidence in the administration of justice. It could be argued that at least some such harm is caused by any non-compliance serious enough to result in a loss of jurisdiction. To determine the extent of the harm, courts should consider factors relating to the error, like (*i*) whether the accused benefited from it, was harmed by it, precipitated it, or actively opposed it; (*ii*) the nature of any interests affected by the error and their import in the particular case; (*iii*) whether the error harmed both parties equally, or one party more than another; and (*iv*), as the respondent Esseghaier submits, whether the error was intentional or unintentional. Contrary to Esseghaier's submission, however, the fact that the impugned course of action was deliberate does not mean that the error was intentional. *Cloutier* explains that the question is not whether the conduct was intentional, but rather whether the trial judge "realized … [the conduct] constituted a breach".[30] A good faith, but incorrect, decision by a trial judge resolving a thorny issue of law can hardly be characterized as deliberate non-compliance with the law.

31. On the other hand, the laudable goal of strict compliance with statutory law is not the only relevant interest. The discretion to cure an error is conferred by s. 686(1)(*b*)(iv) and should be applied in a manner that advances Parliament's intent in enacting the section.[31] Considering only the systemic harm of upholding the conviction would fail to accord proper weight to the section's purpose. Where a verdict's safety is unaffected by the error and an appellate court is considering allowing an appeal based on systemic prejudice, compelling societal interests underlying s. 686(1)(*b*)(iv) militate in favour of upholding the conviction.

32. Public confidence is usually best served by affirming a conviction if the trial was fundamentally fair. As Taschereau J. explained for this Court regarding the predecessor to s. 686(1)(*b*)(iii), "[i]t would indeed be a shocking impediment to the proper administration of criminal justice, if criminals were allowed to go free because of a trivial error in law or of an oversight of no material consequence."[32] In *Jolivet*, the Court confirmed that s. 686(1)(*b*)(iii) focuses on the safety of the verdict because of the manifest "public interest to avoid the cost and delay of further proceedings":

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[30] *R. v. Cloutier*, 1988 CanLII 199 (ON CA), at CanLII pp. 30-31, leave ref'd, [1989] 2 S.C.R. vi; see Esseghaier factum, at paras. 79-82, 90-91.
[31] *R. v. Thomas*, [1998] 3 S.C.R. 535, at paras. 14, 17, 20, 32.
[32] *Chibok v. The Queen* (1956), 24 C.R. 354 (S.C.C.), at p. 246, cited in *R. v. Khan*, 2001 SCC 86, at para. 29.

> allocation of resources. Where the evidence against an accused is powerful and there is no realistic possibility that a new trial would produce a different verdict, it is manifestly in the public interest to avoid the cost and delay of further proceedings. Parliament has so provided.[33]

33. Concerns about the repute of our justice system and wasteful relitigation weigh firmly in favour of curing procedural errors that do not affect the verdict. As Lamer C.J.C. wrote in *R. v. Clunas*, "the gravity of any alleged procedural deviation" depends on the extent to which it impedes the objective of a fair trial upholding the accused's right to make full answer and defence, and non-prejudicial errors should not generally invalidate proceedings:

> [T]he importance of departures from the traditional form of procedure from which no prejudice arises should not be so escalated as to result in the invalidity of the proceedings where a Court is satisfied that the result would have been the same had the trial proceeded in the manner in which it is alleged it should have.[34]

34. This philosophy underlies s. 686(1)(*b*)(iv). It must be considered when a court is contemplating allowing an appeal based on a residual discretion in a case where a procedural error had no effect on the verdict. In many cases, the harm that would result from upholding a conviction in a fair trial where a procedural error was made will be trivial in comparison to the harm that would result from ordering a new trial.

PARTS IV AND V – SUBMISSIONS AS TO COSTS AND ORDER SOUGHT

35. Ontario makes no submissions as to costs. By order dated August 12, 2020, the Honourable Justice Martin granted Ontario permission to present oral argument not exceeding five minutes at the hearing of the appeal.

ALL OF WHICH is respectfully submitted by:

Michael Perlin
Counsel for the intervener,
Attorney General of Ontario

DATED at Toronto, Ontario, this 9th day of September, 2020.

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[33] *R. v. Jolivet*, 2000 SCC 29, at para. 46.
[34] *R. v. Clunas*, [1992] 1 S.C.R. 595, at pp. 598-99.

PART VI – SUBMISSIONS ON CASE SENSITIVITY

36. Not applicable.

PART VII – TABLE OF AUTHORITIES

CASE LAW **Paragraphs**

CANADIAN LEGISLATION **Paragraphs**