File Number: 38861

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO)

BETWEEN:

HER MAJESTY THE QUEEN

Appellant
(Respondent)

- and -

CHIHEB ESSEGHAIER AND RAED JASER

Respondents
(Appellants)

- and -

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF ALBERTA, CRIMINAL LAWYERS' ASSOCIATION

Interveners

FACTUM OF THE INTERVENER ATTORNEY GENERAL OF ALBERTA

RULES 37 AND 42 OF THE *RULES OF THE SUPREME COURT OF CANADA*

ANDREW BARG
Counsel for the Intervener

Attorney General of Alberta
Justice and Solicitor General
Appeals, Education & Prosecution Policy Branch
Suite 300, Centrium Place
332 – 6th Ave. S.W.
Calgary, AB T2P 0B2
Phone: 403-297-6005
Fax: 403-297-3453
Email: andrew.barg@gov.ab.ca

D. LYNNE WATT
Ottawa Agent for the Respondent

Gowling WLG (Canada) LLP
Barristers & Solicitors
2600, 160 Elgin Street
Ottawa, ON K1P 1C3
Phone: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Kevin Wilson
Amber Pashuk
Counsel for the appellant

Public Prosecution Service of Canada
Ontario Regional Office
130 King Street West, Suite 2400, Box 340
Toronto, ON M5X 2A2
Tel: (416) 973-0026
Fax: (416) 973-8253
E-mail: kevin.wilson@ppsc-sppc.gc.ca
amber.pashuk@ppsc-sppc.gc.ca

Per: François Lacasse
Ottawa agent for the appellant

Kathleen Roussel
Director of Public Prosecutions
160 Elgin Street, 12th floor
Ottawa, ON K1A 0H8
Tel.: (613) 957-4770
Fax: (613) 941-7865
E-mail: flacasse@ppsc-sppc.gc.ca

Dean Embry
Erin Dann
Counsel for the respondent, Chiheb Esseghaier

Embry Dann LLP
116 Simcoe Street, Suite 100
Toronto, ON M5H 4E2
Tel.: (416) 868-1203
Fax: (416) 868-0269
Email: dembry@edlaw.ca

Moira Dillon
Ottawa agent for the respondent, Chiheb Esseghaier

Supreme Law Group
900 - 275 Slater Street
Ottawa, ON K1P 5H9
Tel.: (613) 691-1224 Fax: (613) 691-1338
Email: mdillon@supremelawgroup.ca

Megan Savard
Counsel for the respondent, Raed Jaser

Addario Law Group LLP
171 John Street, Suite 101
Toronto, ON M5T 1X3
Tel.: (416) 979-6446 Fax: (866) 714-1196 Email: msavard@addario.ca

Moira Dillon
Ottawa agent for the respondent, Raed Jaser

Supreme Law Group
900 - 275 Slater Street
Ottawa, ON K1P 5H9
Tel.: (613) 691-1224 Fax: (613) 691-1338
Email: mdillon@supremelawgroup.ca

INTERVENERS

MICHAEL PERLIN
Counsel for the Attorney General of Ontario

Ministry of the Attorney General of Ontario
720 Bay Street – 10th floor
Toronto, ON M7A 2S9
Phone: (416) 326-4500
Fax: (416) 326-4656
Email: michael.perlin@ontario.ca

NADIA EFFENDI
Ottawa Agent for the Attorney General of Canada

Borden Ladner Gervais LLP
100 Queen Street ,Suite 1300
Ottawa, ON K1P 1J9
Phone: (613) 787-3562
Fax: (613) 230-8842
Email: neffendi@blg.com

NATHAN GORHAM

MATTHEW ESTABROOKS

Counsel for the Criminal Lawyers' Association (Ontario)

Gorham Vandebeek LLP
36 Lombard Street
Toronto, ON M5C 2X3
Telephone: 416-410-4814
FAX: 416-598-3384
Email: gorham@gvlaw.ca

Ottawa Agent for Criminal Lawyers' Association (Ontario)

Gowling WLG (Canada) LLP
2600 - 160 Elgin Street
P.O. Box 466, Stn. A
Ottawa, ON K1P 1C3
Telephone: 613-786-0211
FAX: 613-788-3573
Email: matthew.estabrooks@gowlingwlg.com

Table of Contents

PART I – OVERVIEW AND FACTS **1**

OVERVIEW 1
STATEMENT OF FACTS 1

PART II – ISSUE **2**

PART III – ARGUMENT **2**

FOUNDATIONAL AUTHORITIES 2
DIVERGING JURISPRUDENCE 3
ONTARIO JURY SELECTION CASES 6
SAFEGUARDS OF JURY IMPARTIALITY 8
CONCLUSION 9

PART IV – COSTS **10**

PART V – ORDER SOUGHT **10**

PART VI – TABLE OF AUTHORITIES AND LEGISLATION **11**

FACTUM OF THE INTERVENER

PART I – OVERVIEW AND FACTS

OVERVIEW

1. The goal of every criminal trial is fairness. A fair trial is a trial that appears fair, both from the perspective of the accused and the perspective of the community. It must not be confused with a perfect trial.[1] It also should not be equated with a trial that achieves perfect adherence to technical procedures. The curative proviso in s. 686(1)(b)(iv) of the *Criminal Code* permits appellate courts to uphold verdicts in the face of serious procedural errors, as long as overall fairness is preserved.

2. Errors in the jury selection process should not automatically require a new trial: jurors are subject to vetting procedures, swear to act impartially, and are presumed to act impartially. Trial procedure has evolved over centuries to ensure that juries are impartial, independent, and representative. As long as these features are achieved, errors in the selection process do not necessarily undermine the verdict. The standard should not be perfection, but fairness.

3. Authorities are divided on the scope of s. 686(1)(b)(iv). One line of jurisprudence holds that certain procedural steps are necessary for a trial court to acquire jurisdiction, and if those steps are not taken then the trial is a nullity which cannot be saved. Another holds that even where fundamental procedural steps are overlooked, a verdict can be upheld where there is no prejudice to the accused. The divided jurisprudence dates back many years. Procedural defects that go to jurisdiction – trials that proceed without an indictment, without an election, without a plea, and so on – are rare. But the *Bill C-75* amendments to the jury selection process have created a difficult dilemma for trial judges, who have struggled to decide whether to apply them prospectively or retrospectively. This has led to different procedures being used to select juries across Canada. As appellate courts review these verdicts, it will be important to have clear guidance from this Court on the availability of the curative proviso to cure errors in jury selection procedures.

STATEMENT OF FACTS

4. The facts are as stated by the Appellant/Respondent on Cross-Appeal.

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[1] *R v Harrer*, [1995] 3 S.C.R. 562 at para 45

PART II – ISSUE

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?

Intervener's position: The curative proviso in s. 686(1)(b)(iv) is applicable to errors in the jury selection process. Even if the errors go to jurisdiction, the verdict may be upheld as long as the jury remained impartial, independent, and representative, and there was no miscarriage of justice.

PART III – ARGUMENT

FOUNDATIONAL AUTHORITIES

5. The curative proviso in 686(1)(b)(iv) of the *Criminal Code* is applicable to errors in jury selection as long as the essential jury attributes of impartiality, independence, and representativeness are not compromised. New trials should not be ordered solely based upon procedural errors absent evidence of actual prejudice.

6. Section 686(1)(b)(iv) came into force in 1985. In 1988, in *Cloutier*, the Ontario Court of Appeal explained that the newly added subsection applies to irregularities in procedure, including those which are so serious in nature that they are deemed to be matters of substance, which result in a loss of jurisdiction.[2]

7. In *Bain*., the trial judge had refused to allow the Crown to use its "stand aside" power, and instead gave both sides 4 peremptory challenges. The majority ruled that the stand asides were unconstitutional, and did not address the proviso. The minority held that the "stand asides" should have been used. Gonthier J. went on to consider whether the proviso could be applied to the trial judge's erroneous jury selection procedure, and decided that it could not. He wrote that where there is a problem in the application of the jury selection rules, it might be saved. However, in more extreme cases where the jury is not constituted according to the rules or where the jury is selected pursuant to other rules that those set out in the *Code,* then the "court" is not properly constituted and the trial is null.[3] The Appellant argues that this reasoning by the minority led to a cascading series of appellate decisions with devastating effect to the preservation of jury verdicts.[4] It must be observed that the minority reasons are not a decision of this Court; but they also need not be read as literally as

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[2] *R v Cloutier*, [1988] O.J. No. 570 at pages 20, 23

[3] *R v Bain,* [1992] 1 S.C.R. 91 at paras 160-164 (dissenting reasons of Gonthier J, McLachlin and Iacobucci JJ concurring)

[4] Appellant's factum at para 42

the Appellant suggests. In Alberta's view the minority was only expressing the sensible idea that the consequence of an error depends on its magnitude: a lesser error (of "application of the jury selection rules") can be saved, but a more serious error (where the "jury was selected pursuant to other rules than those set out in the *Code*") cannot.

8. Subsequent to *Bain* this Court decided *N.(C.)*, adopting a broad and flexible approach to the proviso. The accused had been tried and convicted, twice, even though the indictment was never read to him and he never entered a plea. The Quebec Court of Appeal set aside the verdict, holding that neither trial judge ever acquired jurisdiction at any stage of the proceedings: "*ils ont entrepris, continué et conclu des procès qui n'ont jamais eu d'existence légale.*"[5] In dissent, Brossard J.A. would have applied the curative proviso and upheld the verdict on the basis that despite the absence of jurisdiction, the accused suffered no prejudice. On further appeal, this Court allowed the appeal and restored the verdict. The Court unanimously adopted Brossard J.A.'s reasons and held that the procedural errors in the case were irregularities covered by the curative proviso.[6]

9. In 1994, this Court described the provision this way: "*Section 686(1)(b)(iv) … is also designed to permit a court to dismiss an appeal from a conviction, but in cases of procedural irregularity where the Crown can show that the accused suffered no prejudice. In other words, where the fairness of the proceedings has not been detrimentally affected, the Code effectively permits the error in question to be "cured", thereby allowing the appeal from conviction to be dismissed.*"[7]

DIVERGING JURISPRUDENCE

10. Two different approaches have emerged in applying the curative proviso in s. 686(1)(b)(iv). In *R v Mitchell*, the accused was tried in provincial court without ever being put to his election. The Ontario Court of Appeal held that a judge of the provincial division has no jurisdiction to try an indictable offence unless an accused has made an effective election for trial in that Court, so it followed that absent an election the proviso could not be applied because the trial would be a nullity.[8] The Court went on to find that the accused had waived the reading of the election and upheld the verdict on that basis.[9] It must be noted that provincial courts are statutory courts with the *Code* strictly confining its jurisdiction over the offence and the accused. No such issue arises in jury selection cases.

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[5] *R v N.(C.),* [1991] R.L. 430 at para 5
[6] *R v N.,* [1992] 3 S.C.R. 471
[7] *R v Tran,* [1994] 2 S.C.R. 951 at para 98
[8] *R v Mitchell,* [1997] O.J. No. 5148 at paras 29-30
[9] *R v Mitchell,* [1997] O.J. No. 5148 at paras 30-39

11. *R v Primeau* is one of the leading cases adopting a more flexible view. The accused was tried and convicted in superior court without an indictment. Although the error went to the jurisdiction of the trial court, the verdict could still be saved by the curative proviso. The Quebec Court of Appeal expressly disagreed with *Mitchell* and held that errors of this nature can be saved by 686(1)(b)(iv), as long as there is no prejudice to the accused person. The Court wrote:

> *[I]l ne suffit plus, aux fins du sous-al. 686(1)b)(iv) C.cr., de s'arrêter à la seule nature de l'erreur quand, par ailleurs, il n'est pas contesté que le tribunal était compétent « à l'égard de la catégorie d'infractions, dont fait partie celle dont l'appelant a été déclaré coupable ».*[10]

12. *Primeau* relied on *N.(C.),* holding that jurisdiction was not a bar to application of the proviso except where the court lacked jurisdiction over the class of offence (e.g. a provincial court judge pronouncing a verdict on a murder trial).[11] The Court noted that it would be significantly different if the parties had objected and the trial judge still allowed the trial to proceed: in that case, there would be a much stronger argument that the accused suffered legal prejudice.[12]

13. In *Khan,* a majority of this Court supported a flexible interpretation, writing that s. 686(1)(b)(iv) was enacted "*to put an end to the jurisprudence holding that procedural errors having caused a loss of jurisdiction in the trial courts could not be cured, even on appeal.*"[13] The Court listed some examples of errors that could be saved by the proviso, which included "*irregularities in jury selection.*"[14] The majority did not address the situation where an error prevents the trial court from acquiring jurisdiction in the first place.

14. In concurring reasons, Lebel J addressed the scope of both provisos. His reasons on s.686(1)(b)(iii) have frequently been cited as authoritative by this Court and several provincial courts of appeal.[15] His reasons on s.686(1)(b)(iv) cite *Primeau* with approval, and are treated as binding by the Quebec Court of Appeal.[16] He wrote that:

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[10] *R c Primeau,* [2000] R.J.Q. 696 at para 40
[11] *R c Primeau,* [2000] R.J.Q. 696 at para 29
[12] *R c Primeau,* [2000] R.J.Q. 696 at para 48
[13] *R v Khan,* [2001] 3 S.C.R. 823 at para 12
[14] *R v Khan,* [2001] 3 S.C.R. 823 at para 14
[15] For example: *R v Davey,* 2012 SCC 75 at paras 50, 74; *R v Cawthorne,* 2016 SCC 32 at para 39; *R v Spiers,* 2012 ONCA 798 at paras 30, 32, 50, 85; *R v Sinclair,* 2013 ONCA 64 at para 26; *Jones v Frohlick,* 2018 BCCA 170 at para 30; *R v GC,* 2018 ONCA 392 at para 3; *R v Miller,* 2019 BCCA 78 at para 30
[16] *R c Bebawi,* 2019 QCCS 4393 at para 128; *R c Robert,* 25 C.R. (6th) 55 at paras 57-59; *R c Levesque,* 2015 QCCA 1898 at para 20

> *[T]he flexible provision of s. 686(1)(b)(iv) may also cover situations where a serious breach of a rule of procedure has occurred. In order to apply s. 686(1)(b)(iv), the court of appeal does not have to inquire whether or not it resulted in a loss of jurisdiction, or whether it will cause (within the technical sense of the word) such a loss of jurisdiction or to extend the meaning of the concept of a loss of jurisdiction in order to cure it. Even if the error is significant, the clause allows the court of appeal to focus on the core issues of the trial, whether it took place in conformity with the principles of the criminal law and justice and in essential fairness to the accused... [Underlining added]* [17]

15. This flexible approach has been applied by some provincial courts of appeal. In *R v Skin* counsel for the accused indicated that he was going to re-elect to be tried by a judge sitting alone. No re-election was ever filed, but the trial proceeded before a judge alone, and the accused was convicted. On appeal, he argued that he ought to have been tried by a jury and the judge lacked jurisdiction to hear the trial. The British Columbia Court of Appeal agreed, but upheld the conviction on the basis of the curative proviso.[18] In *R v Roy*, the accused was deemed to have elected a trial by judge and jury, but the provincial court clerk made a clerical error and recorded an election by judge alone. The trial proceeded in front of a judge alone with no objection by the accused, and he was convicted. On appeal, he argued that given the election for a judge and jury, the trial judge sitting without a jury lacked jurisdiction to try him. The BC Court of Appeal held that the error could be cured by applying s. 686(1)(b)(iv).[19] In *Porisky*, a panel of the same Court noted the conflicting jurisprudence, and wrote that "*[i]t may be that a case will be presented that requires a full analysis of this issue, which I note parenthetically was not undertaken in either Skin or Roy, but this is not that one.*" The Court decided that the accused had been prejudiced and the proviso could not be applied for that reason alone.[20] The Alberta Court of Appeal followed *Primeau* in *Lamoureux.*[21]

16. Another case in support of a flexible approach is *Sciascia,* where an accused was tried for a *Criminal Code* offence and a traffic offence in the same trial. The Ontario Court of Appeal ruled the provincial court judge did not have jurisdiction to try both offences together, but did have jurisdiction over both classes of offence. The Court went on to apply the curative proviso and uphold the verdicts.[22] On further appeal to this Court, the majority held that there was jurisdiction to hear the charges together, and did not address the curative proviso. Côté J. in dissent would have held there

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[17] *R v Khan,* [2001] 3 S.C.R. 823 at para 99
[18] *R v Skin,* 1988 CarswellBC 3892 (BCCA) [Tab 2]
[19] *R v Roy,* 2010 BCCA 448 at paras 1-11 (leave to appeal refused at 2011 CarswellBC 1085)
[20] *R v Porisky,* 2014 BCCA 146 at para 42
[21] *R v Lamoureux,* 2013 ABCA 85 at paras 15-17
[22] *R v Sciascia,* 2016 ONCA 411

was a total absence of jurisdiction to hear the two charges together, and therefore the proviso was inapplicable.[23]

17. Several appellate courts have followed the restrictive approach in *Mitchell*. In *Sewell*, the Saskatchewan Court of Appeal declined to follow *Primeau* and accepted *Mitchell*.[24] And in *Trites*, the New Brunswick Court of Appeal declined to follow *Primeau*, and held that s. 686(1)(b)(iv) could not apply where the trial was held in provincial court without the necessary election.[25]

18. There is also a line of authority holding that the curative proviso can only be applied to jury selection errors where the Crown can show there is no reasonable possibility that the jury would have been differently constituted. For example, in *Hobbs* the Nova Scotia Court of Appeal ordered a new trial as a result of non-disclosure of police research into members of the jury panel. *Hobbs* drew an analogy to this Court's decision in *McQuaid*, which held that an appellant seeking a remedy for failure to disclose must show a reasonable possibility the non-disclosure affected the outcome of the trial. In context of jury selection, *Hobbs* concluded that the jury would have been differently constituted if the information had been disclosed. The Court was satisfied that the possibility of a differently constituted jury satisfied the *McQuaid* test.[26]

19. In *Davey*, this Court questioned the reasoning in *Hobbs*, observing that where non-disclosure interfered with an accused's use of his peremptory challenges, "*it may be that the Crown should then have the opportunity to show, on balance, that the jury was impartial.*" Since the Court decided the jury would not have been differently constituted, it did not decide the matter.[27] In *Chouhan*, the Ontario Court of Appeal was significantly influenced by its observation that "*in most cases, the absence of any peremptory challenges will result in a differently constituted jury.*"[28]

ONTARIO JURY SELECTION CASES

20. Ontario appellate authorities have solidified an inflexible approach to the curative proviso to jury selection errors. In *Noureddine* the Ontario Court of Appeal held that where a trial judge had erroneously used static triers to decide challenges for cause, the court was improperly constituted and the verdicts had to be quashed.[29] The Court drew an analogy to a case where an accused person is

[23] *R v Sciascia*, 2017 SCC 57
[24] *R v Sewell*, 2003 SKCA 52; also see *R v Ali*, 2019 SKCA 83
[25] *R v Trites*, 2011 NBCA 5 at paras 36-41; also see *R v Albert*, 2014 NBCA 27
[26] *R v Hobbs*, 2010 NSCA 62 at paras 29-39; *R v McQuaid*, [1998] 1 S.C.R. 244 at para 34
[27] *R v Davey*, 2012 SCC 75 at paras 52-55; also see *R v Yumnu*, 2012 SCC 73 at para 75-76
[28] *R v Chouhan*, 2020 ONCA 40 at para 208
[29] *R v Noureddine*, 2015 ONCA 770 at para 61; see also *R v Hollwey*, 1992 CarswellOnt 954 at paras 11-12 [Tab 1]

tried in the wrong court: "*it is no answer to assert that since the court would have had jurisdiction, had the accused elected trial in that court, and the accused received a fair trial, she suffered no prejudice and the verdict should stand…*"[30] Accordingly, following this line of authority even seemingly minor errors in jury selection undermine the jury's jurisdiction to decide the case, and are therefore beyond the scope of the curative proviso.

21. Despite the observation in *Riley* that "*The extent to which s. 686(1)(b)(iv) will hold harmless procedural irregularities in the selection and empanellment of jurors remains a work in progress,*"[31] the Court in *Husbands* wrote simply that "*in accordance with the current state of the law concerning the reach of the procedural proviso in s. 686(1)(b)(iv), what occurred here cannot be salvaged.*"[32] The Ontario jurisprudence does not say that *any* error in jury selection will be fatal. But it holds that where a procedural irregularity amounts to a failure to comply with a mandatory statutory provision – as opposed to an error in an area not governed by statute – the verdict cannot be saved.[33]

22. *Esseghaier* followed *Noureddine* and *Husbands*. It repeated the principle that *"an error in the method of selecting the jury leads to an improperly constituted court, and thus falls outside the curative proviso, which is available to cure errors by a properly constituted court…*"[34] It further stated that even if the proviso were legally available, it should not be applied because the administration of justice was prejudiced by the denial of a properly-invoked jury selection method.[35]

23. This absolute principle has been applied even in cases where the accused person agreed to a particular procedure. For example, in *Vincent*, the Ontario Court of Appeal overturned a verdict where static triers were used decide challenges for cause, even though the accused person consented to their use. Again, the reasoning was that the Court was improperly constituted, so the verdict could not be saved by resort to the curative proviso.[36] This underscores the reality that, following this line of jurisprudence, almost any error in jury selection procedure will require a re-trial.

24. *Noureddine* and *Vincent* can be contrasted with *R v Brown*, another Ontario case where the trial judge incorrectly gave each accused and the Crown an extra peremptory challenge. The two accused each used their extra challenge, but the Crown did not. In these circumstances, the Ontario Court of Appeal held that the erroneous decision to grant extra challenges did not prejudice the

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[30] *R v Noureddine,* 2015 ONCA 770 at para 56
[31] *R v Riley,* 2017 ONCA 650 at para 73
[32] *R v Husbands,* 2017 ONCA 607 at para 49
[33] *R v Province,* 2019 ONCA 638 at paras 81-85
[34] *R v Esseghaier,* 2019 ONCA 672 at para 70
[35] *R v Esseghaier,* 2019 ONCA 672 at para 95
[36] *R v Vincent,* 2007 ONCA 546 at paras 25-26

accused or render the process unfair.[37] However, the Court appeared to place significant weight on the fact that the Crown did not use its extra challenge.

25. In *Bebawi,* a recent trial-level decision, Cournoyer J. of the Quebec Superior Court considered the proviso in the context of *Bill C-75.* He found, as the Ontario Court of Appeal did in *Chouhan*, that the amendments are constitutional, but that the right to exercise peremptory challenges was substantive and survived the repeal. He then went on to consider whether, if he was in error, the curative proviso could be applied, because the "*fear of adopting an interpretation that is likely to lead to numerous new trials warrants serious consideration of the consequences of the temporal application of Bill C-75.*" He noted the apparent contradiction between the Ontario jurisprudence described in *Noureddine* and the Quebec jurisprudence in *Primeau*. After some attempt to reconcile the two lines of cases, he concluded he was bound by the approach of the Quebec Court of Appeal.[38]

SAFEGUARDS OF JURY IMPARTIALITY

26. Alberta submits there is no logical reason why an error in jury selection should be automatically fatal to the verdict. The jury system has many overlapping safeguards to ensure that trials are fair. Viewed in totality, these safeguards will often be sufficient to preserve trial fairness even in the face of some errors in the selection process.

27. Trial procedure has evolved over centuries to ensure juror impartiality. Jurors swear to render a true verdict based on evidence heard in court.[39] At that point, absent some evidentiary foundation, jurors are presumed to have acted impartially.[40] Opening addresses impress upon jurors the gravity of their task and the need to be objective. The rules of process and evidence underline the fact that the verdict depends not on this or that person's views, but on the evidence and the law. At the end of the case, the jurors are objectively instructed on the facts and the law by the judge, and sent out to deliberate in accordance with those instructions. They are asked not to decide on the basis of their personal, individual views of the evidence and law, but to listen to each other's views and evaluate their own inclinations in light of those views and the trial judge's instructions. Finally, they are told that they must not convict unless they are satisfied of the accused's guilt beyond a reasonable doubt and that they must be unanimous. In *Find,* this Court wrote that "*It is difficult to conceive stronger antidotes than these to emotion, preconception and prejudice.*" The Court observed:

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[37] *R v Brown,* 194 C.C.C. (3d) 76 at paras 44-53
[38] *R c Bebawi,* 2019 QCCS 4393 at paras 108 and 117-134
[39] *Criminal Code of Canada,* R.S.C., 1985, c. C-46, s 631(4)
[40] *R v Dowholis,* 2016 ONCA 801 (Ont. CA).

> *The presumption of innocence, the oath or affirmation, the diffusive effects of collective deliberation, the requirement of jury unanimity, specific directions from the trial judge and counsel, a regime of evidentiary and statutory protections, the adversarial nature of the proceedings and their general solemnity, and numerous other precautions both subtle and manifest — all collaborate to keep the jury on the path to an impartial verdict …*[41]

28. In addition, the independence and impartiality of the jury are safeguarded by (1) the representativeness of the panel; (2) the randomness of selection of the jury panel and petit jury; (3) the availability of challenges for cause; (4) the judge's discretion to excuse prospective jurors; and (5) the judge's discretion to stand aside jurors.[42]

CONCLUSION

29. The curative proviso in s. 686(1)(b)(iv) of the *Criminal Code* is applicable to errors in jury selection as long as the essential jury attributes of impartiality, independence, and representativeness are not compromised. A reviewing court should not distinguish between (a) errors which caused the trial court to lose jurisdiction and (b) errors which prevented the trial court from acquiring jurisdiction. Rather, the reviewing court should focus on whether the trial was fair.

30. Fairness must take into account not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process.[43] Fundamental justice requires a consideration of a spectrum of interests, including broader societal concerns. Concepts like "fairness" and "principles of fundamental justice" vary with the context in which they are invoked, and call for a balancing between the interests of the individual and those of the state in providing a fair and workable system of justice.[44]

31. Alberta submits that the cases holding that imperfections in jury selection are beyond the reach of the proviso are at odds with the flexible, contextual concept of fairness that governs other aspects of criminal law. Fairness demands an independent, impartial, and representative jury. Where an erroneous procedure is used, but those features remain intact, the proper question to ask is whether the erroneous procedure resulted in prejudice to the accused or a miscarriage of justice. If not, then the curative proviso may be applied and the verdict may be upheld.

32. Alberta respectfully agrees with the Quebec Court of Appeal in *Primeau*, and Justice Lebel's concurring reasons in *Khan*. Even where an error may, technically, mean that a trial Court never acquired jurisdiction, a retrial should not be automatic. A reviewing court should consider the error

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[41] *R v Find,* 2001 SCC 32 at paras 41-42, 107
[42] *R v Chouhan,* 2019 ONSC 5512 at paras 43-59
[43] *R v O'Connor,* [1995] 4 S.C.R. 411 at paras 64-65, 194-195
[44] *R v Mills,* [1999] 3 S.C.R. 668 at paras 72-73

in context to assess whether it prejudiced the accused or caused a miscarriage of justice. Similarly, a reasonable possibility that the jury would have been differently constituted does not necessarily establish a reasonable possibility that the verdict would have been different. It may. But that assessment requires a contextual, common sense analysis. It should not be automatic.

33. Automatic re-trials impose significant costs on the justice system. In the *Jordan* era, as trial courts work through the backlog caused by Covid-19, a rule requiring automatic re-trials will lead to further strain on the justice system and greater stress to victims and their families.

34. In *Yumnu*, this Court wrote that flexibility and common sense are essential in applying the rules and regulations that govern jury selection, which must take into account the needs and special problems that exist in the region where the trial is being held.[45] Yet much of the jurisprudence on the curative proviso holds that failure to strictly adhere to technical rules results in an incurable loss of jurisdiction. If flexibility and common sense are to prevail in jury selection, then this Court should tell trial judges that good faith mistakes may be salvaged.

PART IV – COSTS

35. The Attorney General of Alberta does not seek costs and submits that the ordinary rule that costs are not awarded against interveners should apply.

PART V – ORDER SOUGHT

36. The Attorney General of Alberta takes no position on the disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Calgary, Alberta, this 11th day of September, 2020.

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ANDREW BARG
Counsel for the Intervener,
The Attorney General of Alberta

[45] *R v Yumnu,* 2012 SCC 73 at para 72

PART VI – TABLE OF AUTHORITIES AND LEGISLATION

AUTHORITIES	Cited at Paragraph No.	Tab No. (if applicable)
Jones v Frohlick, 2018 BCCA 170 at para 30	14	
R c Bebawi, 2019 QCCS 4393 at para 108, 117-134	14, 25	
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