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

APPLICANT
(Appellant)

and

CHIHEB ESSEGHAIER AND RAED JASER

RESPONDENTS
(Respondents)

RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL
FILED BY THE RESPONDENT, CHIHEB ESSEGHAIER
PURSUANT TO RULE 27 OF THE *RULES OF THE SUPREME COURT OF CANADA*

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PART I: OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The respondents, Chiheb Esseghaier and Raed Jaser, were jointly tried by a court composed of a judge and jury on various terrorism-related offences in a high-profile trial in Toronto. They were convicted and sentenced to life in prison. The respondents appealed conviction and sentence raising numerous grounds. One issue, concerning the selection of the jury at trial, was argued in advance of the remaining grounds of appeal.

2. The respondents argued that as a result of the trial judge's errors, they were wrongfully deprived of their statutory right to have rotating jurors determine the challenge for cause. The result was an improperly constituted jury and the curative proviso was inapplicable. The Crown, in response, argued that the jury was properly constituted for Jaser because he made an alternative application for static triers; and properly constituted for Esseghaier because he chose not to participate in the challenge for cause process. It made no argument, in the alternative, that if a procedural error was established the proviso could be used to salvage the verdicts. The Court of Appeal rejected the Crown's arguments, unanimously concluded that the jury was improperly constituted, overturned the convictions and ordered a new trial.

3. The application for leave to appeal to this Court should be dismissed. The Crown has failed to identify any error of law in the decision of the Court of Appeal, much less one that raises an issue of national importance. The Crown advances two proposed grounds of appeal: first, that the Court of Appeal erred in finding that the jury was improperly constituted; and second, that the court erred in concluding the curative proviso could not be applied in this case. The Court of Appeal arrived at these findings by applying settled law to the facts of this case. The routine judicial application of well-established legal principles to the facts of a particular case is not somehow transformed into a matter of national importance because the case involves allegations of terrorism.

4. Moreover, both issues raised by the Crown are moot. The error in this case involved the imposition of static (rather than rotating) triers to determine the challenge for cause.

The *Criminal Code* has since been amended such that trial judges, not jurors, will try challenges for cause. The lower courts are in no need of guidance on how to interpret provisions of the *Criminal Code* that no longer exist; nor direction as to whether and when an error in respect of the application of those provisions can be cured. Moreover, the Crown has no basis to complain that the Court of Appeal erred in refusing to apply the proviso when it did not seek to invoke it on appeal.

5. The Crown's dissatisfaction with the result in this case does not amount to an issue of national importance. Nor should this case be used by the Crown to attempt to seek a pre-emptive ruling from this Court – in a factual and legal vacuum – regarding if and when errors made in respect of the new jury selections provisions can be cured by the application of the proviso.

B. Statement of Facts

6. The respondent accepts the facts as set out by the Crown, adopts the facts set out in the memorandum of the respondent, Jaser, and relies on the following additional facts.

7. Esseghaier was alleged to have engaged in two conspiracies: a conspiracy to derail a passenger train for the benefit of a terrorist group; and a conspiracy to commit murder for the benefit of a terrorist group. Neither conspiracy came to fruition. Much of the evidence at trail consisted of the testimony of an undercover FBI agent who posed as a co-conspirator and encouraged Jaser and Esseghaier in planning their alleged schemes.[1]

i) The Trial Proceedings

8. At the time of his trial, Esseghaier did not recognize Canadian law and wanted to be tried under the Qur'an.[2] He was self-represented. Given Esseghaier's view of Canadian law, the trial judge anticipated that he would be "unlikely to participate in or provide useful submissions" on the pre-trial motions.[3] *Amicus curiae* was appointed for the limited role of responding to the trial judge's need for relevant submissions on "contested, uncertain,

[1] *R. v. Jaser and Esseghaier*, 2015 ONSC 5855 at paras. 2, 24-26, A.R. Tab 11, pp. 175-176, 185-189 ("Reasons for Sentence").
[2] *R. v. Jaser*, 2014 ONSC 2277 at para. 14, A.R. Tab 3, pp. 45-46 ("*Amicus* Ruling").
[3] *Ibid* at para. 41, A.R. Tab 3, p. 55.

complex and important points of law or of fact."[4] *Amicus* took on an expanded role only at the sentencing stage, when issues relating to Esseghaier's mental health were litigated.[5]

9. It was not in dispute at trial that challenges for cause of prospective jurors to screen for partiality based on pre-trial publicity and racial or religious prejudice were necessary. The trial attracted a high public profile, "in a climate of public concern about terrorism and Islamic extremism." The six questions asked of the prospective jurors as part of the challenge for cause referred to both Esseghaier and Jaser.[6]

10. Counsel for Jaser wanted the challenges to be tried with rotating jurors and asked the trial judge to exercise his inherent jurisdiction to exclude unsworn jurors from the process. He made clear no request for static triers was being made. The trial judge warned counsel that it would be an "uphill battle" and that he had issued rulings in other cases finding that the court no longer had an inherent jurisdiction to exclude prospective jurors, while employing rotating triers.[7]

11. On December 9, 2014, the trial judge heard submissions from counsel for Jaser who brought a common law application asking for rotating triers with all prospective jurors excluded. At the time, there was a divided line of authority as to whether trial judges had a common law or inherent discretion to exclude the panel. Jaser's counsel indicated that if, and only if, the trial judge concluded he had no common law jurisdiction to exclude the panel, would they bring an application for static triers (with the panel excluded) pursuant to section 640(2.1) of the *Criminal Code*.[8]

12. Esseghaier appeared by video for the jury selection application.[9] After Jaser and the Crown made submissions, the trial judged turned his attention to Esseghaier. His submissions in response did not relate to the jury selection process. *Amicus* was not present

[4] *Ibid* at para. 42, A.R. Tab 3, p. 55.
[5] Reasons for Sentence at para. 4, A.R. Tab 11, p. 176.
[6] *R. v. Esseghaier,* 2019 ONCA 672 at paras. 32-33, A.R. Tab 14, pp. 262-263 ("OCA Ruling").
[7] *Ibid* at paras. 34-35, A.R. Tab 14, pp. 263-264.
[8] *Ibid* at paras. 41-43, A.R. Tab 14, pp. 266-267.
[9] *Ibid* at para. 45, A.R. Tab 14, pp. 267-268.

for argument on the application. *Amicus* had earlier suggested that Esseghaier's interests in relation to jury selection would mirror Jaser's and the trial judge concluded that Jaser's counsel would "cover the field adequately" on that point.[10]

13. The trial judge denied the request for rotating triers with the panel excluded and granted the alternative application under s. 640(2.1) for the exclusion of the jurors and the use of static triers.[11] The trial judge imposed on the respondents the practice that he felt was best, one which in his "experience, has consistently produced excellent triers."[12]

ii) Esseghaier's Mental Health Issues

14. Esseghaier was found guilty of all counts by the jury. Between the finding of guilt and the imposition of sentence, issues were raised with respect to Esseghaier's mental health and fitness to stand trial. At the time of his sentencing, he had been examined by two forensic psychiatrists, Dr. Lisa Ramshaw and Dr. Philip Klassen. While they disagreed on whether Esseghaier was fit to stand trial, both doctors concluded that he was mentally ill and suffering from psychotic delusions. The doctors also agreed that the most likely diagnosis was schizophrenia.[13]

15. The trial judge expressed skepticism about the diagnosis of schizophrenia. He further held, that even if Esseghaier was suffering from a mental illness, it did not render him unfit and did not have a casual connection to the offending behaviour and therefore was not a mitigating factor to be considered on sentence.[14]

16. On September 30, 2015, a week after being sentenced to life in prison, Esseghaier signed an inmate notice of appeal.[15] It listed one ground of appeal: that the trial judge erred

[10] *Ibid* at paras. 39 and 44, A.R. Tab 14, pp. 265-267.
[11] *R. v. Jaser and Esseghaier*, 2014 ONSC 7528 at para. 46, A.R. Tab 8, p. 135 ("Jury Selection Ruling").
[12] *Ibid* at para. 44, A.R. Tab 8, pp. 134-135.
[13] Reasons for Sentence at para 74, A.R. Tab 11, pp. 210-211.
[14] *Ibid* at paras. 83-87, A.R. Tab 11, pp. 214-215.
[15] Inmate Notice of Appeal, September 30, 2014 [*sic*], R.R. Tab 3A. The Notice of Appeal is dated 2014 because at the time it was signed, Esseghaier was firmly of the

in refusing to allow the trial to be conducted pursuant to the Holy Quran instead of the *Criminal Code*. On July 20, 2017, Esseghaier signed an amended notice of appeal in which he added additional grounds of appeal and sought an extension of time to appeal against sentence. Esseghaier explained why, at the time he filed his original notice, he only wanted to appeal conviction:

> At the time I filed that notice, I was very ill. I suffer from schizophrenia. I have been diagnosed with this mental disorder by multiple doctors. When I filed my original notice of appeal, I was suffering from delusions and believed that I would die, and my soul would ascend to heaven on December 25, 2014. Because of this delusion, I did not believe that the life sentence imposed was real and did not want to acknowledge the existence or legality of the sentence by appealing it.
>
> I now know that these beliefs are delusional. In December, after I was transferred to a prison in British Columbia, I was certified and treated with anti-psychotic medication. Initially, I did not agree with this treatment. However, I now see its benefits. I acknowledge that I have significant mental health issues and I understand that I need to continue to take the medication prescribed to me in order to stay well.
>
> The only reason I did not file a notice of appeal against sentence earlier, is because I was very unwell and did not understand the nature of the sentence imposed on me. I was unable to make rational decisions.[16]

17. The additional grounds of appeal in the amended notice focused largely on issues relating to Esseghaier's mental health at the time of his trial, and at the time the offences were allegedly committed.[17]

18. When the jury selection issue was argued at the Court of Appeal, Esseghaier remained self-represented but was assisted by *amicus*. He appeared by video at the hearing and was content to allow *amicus* to make arguments on his behalf. At the end of the hearing, he was asked whether there was anything he wished to add in respect of the jury selection

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belief that it was still 2014 and that the jail authorities have been compressing time by manipulating the light: Reasons for Sentence at para. 83, A.R. Tab 11, p. 214.

[16] Supplementary Inmate Notice of Appeal, July 20, 2017, R.R. Tab 3B.
[17] *Ibid.*

issue. In contrast to his presentation at trial, Esseghaier provided a coherent answer, responsive to the question. He stated:

> I would like to say that I didn't take part in the trial and challenge for cause because I was suffering from schizophrenia. My mind was completely outside the court… If I was not sick, I would have chosen rotating triers, not static triers. But because of illness, I wasn't able to participate in the trial and I didn't hire a lawyer and all these things happened to me.[18]

iii) Proceedings at the Court of Appeal

19. Counsel for Jaser and *amicus* sought the direction of Watt J.A., in his capacity as case management judge, as to how the appeal would proceed. Both Jaser and *amicus* took the position that, given its potentially determinative nature, the jury selection issue should be argued in advance of the other grounds of appeal. The Crown took no position. Watt J.A. concluded that it was in the interests of justice to bifurcate the arguments on appeal.[19]

20. In reaching that conclusion, Watt J.A. noted that segregating the jury selection ground of appeal would allow *amicus* to pursue expert evidence about Esseghaier's fitness to stand trial and his criminal responsibility.[20] Had his appeal not been allowed on the jury selection issue, Esseghaier would have sought to adduce that expert opinion as fresh evidence in support of his remaining grounds of appeal on conviction and sentence.

21. In relation to the jury selection issue, *amicus* argued that Esseghaier was statutorily entitled to rotating triers, that he did not make any application for static triers, and that the trial judge erred by imposing static triers in these circumstances. *Amicus* argued that where there are two accused and one applies under s. 640(2.1) and the other does not, the default rights of the accused who has not made an application, trump the other accused's request for static triers. At minimum, the default rights of one accused to rotating triers is a factor

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[18] Unfortunately, the audio recording of the oral hearing does not capture the submissions of Esseghaier made on video. Those submissions were reported in a newspaper article published after the hearing: Michele Mandel "VIA Rail terrorists may just get new trial" *Toronto Sun* (20 February 2019), R.R. Tab 4.

[19] *R. v. Esseghaier*, Motion for Directions, C61095 and C61185 (Ont. C.A.) per Watt J.A. at para. 21, R.R. Tab 3C.

[20] *Ibid* at para. 18.

that must be considered by the trial judge. *Amicus* also adopted the submissions of Jaser that the jury was not properly constituted because Jaser made no *valid* s. 640(2.1) application. Finally, *amicus* argued that if the Court accepted the position of either Jaser *or* Esseghaier, it must find that the jury was improperly constituted in respect of both Jaser *and* Esseghaier.[21]

22. The Crown argued that the jury was properly constituted because Esseghaier did not make a challenge for cause application and therefore the fact that he did not make a s. 640(2.1) application had no impact on whether the jury was properly constituted for him.[22] In oral argument, the Crown further suggested that the court could find the jury was properly constituted for Esseghaier even if it concluded they jury was improperly constituted for Jaser. The Crown did not raise the issue of the proviso in its factum or at the hearing of the appeal.[23]

23. The Court of Appeal found that the error of the trial judge wrongfully deprived Jaser of an option for jury selection – using rotating triers – that he properly sought to invoke; the same error deprived Esseghaier of his statutory right to have the challenges for cause determined by rotating triers. The result of the trial judge's error was an improperly constituted jury. While actual prejudice in the circumstances would be impossible to gauge, the error resulted in "prejudice to the due administration of justice flowing from the denial of a jury selection method which was in law properly invoked."[24]

[21] OCA Ruling at paras. 58 and 61-62, A.R. Tab 14, p. 272-274.
[22] *Ibid* at paras. 64-65, A.R. Tab 14, pp. 274-275.
[23] The reasons of the Court of Appeal suggest that the Crown argued that this was a case where the curative proviso could be applied: OCA ruling, at para. 64, A.R. Tab 14, p. 274. A review of the Crown's factum and a transcript of the Crown's submissions before the Court of Appeal reveals that the Crown did not invoke the proviso in either written or oral argument. See R.R., Tabs 3D and 3E.
[24] OCA ruling at paras. 75-77, 94-95, A.R. Tab 14, pp. 278-279, 286.

PART II: QUESTIONS IN ISSUE

24. The Applicant raises the following two questions:

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

ii) Is the curative proviso in s. 686(1)(b)(iv) of the *Criminal Code* always inapplicable to errors in the jury selection process?

25. The respondent raises no additional issues.

PART III: STATEMENT OF ARGUMENT

A. Whether this Jury was Properly Constituted is not a Matter of National Importance

26. All parties in the court below agreed that the trial judge erred when he held that he lacked authority to order the exclusion of unsworn jurors while rotating jurors tried the challenges for cause. The area of disagreement was as to the extent of that error and its effect.[25]

27. This was not an issue of first impression for the Court of Appeal. In multiple earlier cases, the court considered the impact of similar errors. Sometimes the error proved fatal to the convictions.[26] Other times it did not.[27] The particular facts of each case determined whether each fell within or outside a basic principle:

> [W]here a jury has been selected by a challenge for cause procedure "disavowed by an accused, thus depriving him or her of the option to invoke the method of selecting the composition of triers," the verdict cannot stand and s. 686(1)(b)(iv) of the *Criminal Code* (the curative proviso) does not apply.[28]

28. At the Court of Appeal, the Crown did not argue that this two-part principle was wrong or needed to be revisited. Instead, the Crown argued that in the circumstances of

[25] OCA ruling at para. 51, A.R. Tab 14, pp. 269-270.
[26] See: *R. v. Noureddine*, 2015 ONCA 770 [*Noureddine*]; *R. v. Husbands*, 2017 ONCA 607, leave to appeal ref'd [2018] 1 S.C.R. ix [*Husbands*]; *R. v. Cumor*, 2019 ONCA 747.
[27] See: *R. v. Grant*, 2016 ONCA 639 [*Grant*]; *R. v. Riley*, 2017 ONCA 650 [*Riley*]; *R. v. Murray*, 2017 ONCA 393 [*Murray*]; *R. v. Kossyrine*, 2017 ONCA 388; *R. v. Mansingh*, 2017 ONCA 68; *R. v. Evans*, 2019 ONCA 715.
[28] OCA ruling at para. 67, A.R. Tab 14, p. 275.

this case, the respondents were not improperly denied the option of rotating triers and the jury was therefore properly constituted for both Jaser and Esseghaier. The rejection of that argument and the conclusion by the Court of Appeal that the jury was improperly constituted involved the straightforward application of the particular facts of this case to well-settled legal principles.

29. The Crown is dissatisfied with the result. It does not, however, suggest that the Court of Appeal changed or advanced the law and it does not identify any legal issue in the Court of Appeal's analysis that warrants consideration by this Court. Indeed, the Crown recognizes that the question of whether the jury was properly constituted in this case does not raise an issue of national importance. It concedes there are no conflicting appellate decisions in other provinces and that the issue has been rendered moot by amendments to the *Criminal Code* that reassign the task of trying challenges for cause to the trial judge. For all these reasons, leave should be denied.

B. The Seriousness of the Allegation Does not Transform the Nature of the Issue

30. Despite acknowledging the lack of public importance of the jury selection issue, the Crown asks this Court to grant leave because the terrorism offences with which the respondents were charged are "profoundly serious" and the guilty verdicts were otherwise "uncompromised."[29]

31. Neither factor supports the granting of leave. First, it is misleading to describe the jury's verdicts as otherwise uncompromised when those verdicts were otherwise unchallenged only because of the order to bifurcate the hearing of the appeal. The jury selection issue was not the only basis upon which Jaser and Esseghaier challenged the validity of the jury's verdicts below; nor necessarily the strongest. If the Crown were successful in obtaining leave, and in ultimately persuading this Court to allow the appeal, the result would not be a final restoration of the guilty verdicts. Rather, the matter would be remanded to the Court of Appeal for a determination of the remaining grounds of appeal.

[29] Applicant's Memorandum of Argument at paras. 23 and 25, A.R. Tab. 15, pp. 297-298.

32. In relation to Esseghaier, those grounds would involve an application to adduce fresh evidence in respect of Esseghaier's mental health issues. His demonstrated change in presentation after treatment with anti-psychotic medication, and its impact on his ability to meaningfully participate in his legal proceedings, make clear that concerns as to his fitness at the original trial and sentencing are far from frivolous.

33. Second, the Crown cites no authority for the proposition that leave should be granted, even where the proposed issues have no significance to the administration of justice beyond the four corners of the case, because the charges at issue are serious. The seriousness of the case cannot transform unimportant legal errors into important ones.

34. The function of this Court is to "settle questions of law of national importance in the interests of promoting uniformity in the application of the law across the country."[30] Settling the question of whether the jury was properly constituted in the particular circumstances of this case would not promote the interests of uniformity in the application of the law across the country. It would have no applicability beyond this case. That reality is not changed because of the nature of the offences at issue.

35. The Crown's suggestion that public importance is directly tied to the seriousness of the offence would necessitate a distasteful ranking of offences. The Crown here seeks leave to appeal on largely the same grounds the Crown sought, and was denied, leave to appeal in *Husbands*.[31] The Crown offers no explanation why issues relating to the imposition of static triers are of sufficient national importance to warrant leave where they arise in the context of an unexecuted terrorism plot that resulted in no injury, loss of life or property destruction, but not in the case of *Husbands*, where a shooting in a busy shopping mall in downtown Toronto resulted in two deaths and five other gunshot wounds. The decision-making process in leave applications should not include a value judgment by which the Court signals to the public that some "bad facts" (but not others) are bad enough to justify the attention of the Court and the expenditure of resources.

[30] *R. v. Gardiner*, [1982] 2 S.C.R. 386, p. 397, 1982 CanLII 30 (SCC).
[31] *Husbands*, *supra* note 26, leave to appeal ref'd [2018] 1 S.C.R. ix.

36. Moreover, the Crown's position suggests a greatly expanded scope for leave to appeal to this Court. The Crown has not advanced any argument as to why only serious cases involving overturned convictions, as opposed to convictions that are upheld on appeal, are sufficient to satisfy its new proposed test for leave. Profoundly serious cases are, sadly, not an uncommon occurrence in the Canadian criminal justice system. Unless the Court wishes to encourage applications and is prepared to grant leave in all such cases, even where they raise no legal issues of broader importance, it should not take up the invitation of the Crown to grant leave on that basis in this case.

C. The Jury was not Properly Constituted for Esseghaier

37. The Crown has failed to identify any error made by the Court of Appeal in reaching its conclusion that the jury was improperly constituted for Esseghaier. The Crown's complaint about the Court of Appeal's decision in respect of Esseghaier is that the court found, without sufficient analysis, that if improperly constituted for Jaser, the jury was also improperly constituted for Esseghaier.

38. The difficulty with this argument is two-fold. First, the Court of Appeal allowed Esseghaier's appeal not only because the jury was improperly constituted for Jaser and therefore could not be properly constituted for Esseghaier but also, and importantly, because the trial judge's error "deprived Esseghaier of *his* default right to rotating triers, which he had invoked by doing nothing to select static triers."[32]

39. Second, the Court of Appeal's analysis of whether the jury could be found to be properly constituted for Esseghaier even if it was improperly constituted for Jaser was responsive to the sole argument made by the Crown on this point.

40. On appeal, *amicus* argued that any finding that static triers were improperly forced on either Esseghaier *or* Jaser must result in a new trial for both appellants because if a jury is not properly constituted, "the court exists no more than if the judge had been unlawfully appointed."[33]

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[32] OCA Ruling at para. 77, A.R. Tab 14, p. 279 [emphasis added].
[33] *Noureddine*, *supra* note 26 at paras. 51 citing *R. v. Bain*, [1992] 1 S.C.R. 91 at p. 136.

41. The Crown did not respond to this argument in its factum. In oral argument, the Crown pointed to the decision in *Noureddine* in support of a submission that it might be possible to allow the appeal for Jaser and not for Esseghaier.[34] In *Noureddine*, the Court of Appeal held that "only the party whose interest was adversely affected by the error made in the jury selection process can rely on that error to set aside a verdict returned by the jury" and therefore *the Crown* could not challenge an acquittal on the basis of a jury selection error relating to the challenge for cause process. The Crown argued, by analogy, that because Esseghaier did not take part in the challenge for cause process, the jury in this case was properly constituted for *him* even if it was improperly constituted for Jaser.[35]

42. The Court of Appeal rejected that argument and found the analogy drawn by the Crown inapt. The right to use rotating triers is a right which is personal to *accused* individuals. Thus, "[t]he improper use of static triers can only create rights in an accused to challenge convictions, not in the Crown to challenge acquittals."[36]

43. Not surprisingly, there is no further analysis of the point by the Court of Appeal. Counsel for the Crown at the oral hearing, argued that *Noureddine* suggested "it is at least possible" for the court to allow one appeal and not the other, but told the panel, "I don't want to make too much of this." He said that he was "putting it forward as an alternative argument" and that, "[f]rankly, it might be more complicated, procedurally, if this Court granted one appeal and rejected the other."[37] None of these comments suggest the argument being put forward was one of national importance.

44. The broad issue which the Crown seeks to raise on now – whether a jury improperly constituted for one accused will *necessarily* render that jury improperly constituted for co-accused in the same matter – was neither considered nor decided by the Court of Appeal in this case. The court concluded that "*in the circumstances of this case*, as the jury was not properly constituted for Jaser, it cannot be considered to have been properly constituted for Esseghaier." The circumstances of this case include that Esseghaier was self-

[34] *R. v. Esseghaier*, Partial Transcript of Oral Argument (Ont. C.A.), p. 19, R.R. Tab 3E.
[35] *R. v. Esseghaier*, Partial Transcript of Oral Argument (Ont. C.A.), p. 18, R.R. Tab 3E .
[36] OCA Ruling at para. 93, A.R. Tab 14, pp. 285-286.
[37] *R. v. Esseghaier*, Partial Transcript of Oral Argument (Ont. C.A.), p. 20, R.R. Tab 3E .

represented; that he and Jaser were both the subject matter of the challenge for cause questions; that Esseghaier would have the benefit of any successful challenges by Jaser's counsel; and that Esseghaier never made an application for static triers and never gave up his right to rotating triers.[38] One jury was selected through one flawed process. Given these facts, the Court of Appeal's conclusion that the jury was improperly constituted for both Esseghaier and Jaser was plainly correct.

D. The Crown did not Invoke the Proviso at the Court of Appeal

45. The second argument the Crown seeks to raise before this Court – that the proviso should apply to errors in jury selection that cause no demonstrable prejudice to the fairness of the trial – was not made at or considered by the Court of Appeal. Indeed, the Crown made *no submissions* in respect of the proviso at the court below and did not ask the court to apply it. The Crown has not articulated why it should be permitted to raise this issue for the first time before this Court.

46. Counsel for Jaser and *amicus* each argued in their respective facta that the curative provision in s. 686(1)(b)(iv) could not be used to preserve the verdicts. The Crown chose not to respond to this argument. Instead, it took the position that the jury was properly constituted for both Esseghaier and Jaser. It did not, in the alternative, invoke the proviso.[39]

47. This Court has stated clearly that the proviso should be applied only upon submissions from the Crown who has the burden of showing it is applicable.[40] Where the proviso is not explicitly invoked, the Crown still bears the burden of establishing the "substance" of the proviso[41] – in this case, that no prejudice arose from the procedural error. Where, as here, the Crown does not rely on the proviso either explicitly or implicitly, it has no basis to complain that the Court of Appeal erred in refusing to apply it.

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[38] OCA Ruling at paras. 17 and 94, A.R. Tab 14, pp. 255-256 and 286.
[39] *R. v. Esseghaier,* Factum of the Respondent (Ont. C.A.) at para. 4, R.R. Tab 3D; *R. v. Esseghaier*, Partial Transcript of Oral Argument (Ont. C.A.), p. 16, R.R. Tab 3E.
[40] *R. v. Pétel*, [1994] 1 S.C.R. 3, p. 18; *R. v. McMaster*, [1996] 1 S.C.R. 740 at para. 37. See also: *R. v. P.G.*, 2017 ONCA 351 at para. 14.
[41] *R. v. Ajise,* 2018 SCC 51 at para. 1.

48. The respondent recognizes that this Court may, in appropriate circumstances, allow a party to raise an argument on appeal that was not raised in the court below. The test, however, for whether new issues should be considered is a stringent one. The Court will consider a new issue where "the refusal to do so would risk an injustice"[42] This discretion is not exercised routinely or lightly. Factors the Court will consider include: "the state of the record, fairness to all parties, the importance of having the issue resolved by this Court, its suitability for decision and the broader interests of the administration of justice."[43]

49. This is not an exceptional case and none of the above factors weigh in favour of granting leave. The only issue relating to the curative proviso that could be said to arise in this case is whether it can be applied where static triers are imposed in the absence of a valid s. 640(2.1) application. That is not a question of national or public importance. Indeed, given that s. 640(2.1) has now been repealed, the importance of having the issue resolved by this Court is minute and would not serve the broader interests of justice.

E. Well-Settled Law Meant the Proviso Could not be Applied in this Case

50. The Crown complains that provincial appellate courts have narrowed the scope of the curative proviso to the point where "it could almost never be used to cure any technical error in the jury selection process." This problem is exemplified, says the Crown, by the Court of Appeal's decision in this case.[44]

51. That claim finds no support in the record. The Court of Appeal did not narrow the scope of the proviso. It made no new law in respect of s. 686(1)(b)(iv) but rather applied the law as it had previously been developed in *Noureddine*. There, the Court of Appeal held that the proviso was unavailable for two reasons. First, the court held that the proviso was inapplicable because in the circumstances of that case, the error in respect of the imposition of static triers prevented a properly constituted jury from coming into existence. The Court of Appeal recognized, however, that not all cases in which static triers are

[42] *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19 at para. 33.
[43] *Guindon v. Canada*, 2015 SCC 41 at paras. 20 and 22.
[44] Applicant's Memorandum of Argument at para. 26, A.R. Tab. 15, p. 298.

imposed in the absence of a s. 640(2.1) application will necessarily result in an improperly constituted jury or a new trial.[45]

52. Second, the court found that the procedural error was not harmless. Section 686(1)(b)(iv) cannot be used to uphold a verdict unless there is no prejudice to the accused. The court concluded prejudice could be inferred in the circumstances of that case. Its finding was based on three factors: the error denied the accused the benefits of using rotating triers; that denial occurred in the face of clear statutory language providing that static triers were available only when sought by the accused; and the denial occurred "despite the express and repeated insistence of the appellants that rotating triers be used." It was this combination of factors that combined to create "the appearance of unfairness and compromised the due administration of justice."[46] The Crown did not seek leave to appeal to this Court the decision in *Noureddine*.

53. Two years later, in *Husbands*, the Court of Appeal again concluded that convictions tainted by the improper imposition of static triers could not be "salvaged" in light of the nature of the error made by the trial judge. The Crown's application for leave to appeal to this Court in *Husbands* was denied.[47]

54. The Crown in this case was aware of the state of the law concerning the reach of the curative proviso in the circumstances involving the imposition of static triers. Yet the Crown did not request a five-judge panel or ask the Court of Appeal to reconsider its previous decisions with respect to the scope of the proviso. Indeed, as set out above, the Crown chose not to advance a curative proviso argument at all. In this context, the Court of Appeal addressed the applicability of the proviso in one paragraph. It applied the law as developed in *Noureddine* and properly held that the curative proviso was not available in the circumstances of this case.[48]

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[45] *Noureddine*, *supra* note 26 at paras. 57, 68.
[46] *Ibid at* paras. 68-69.
[47] *Husbands*, *supra* note 26 at para. 49.
[48] OCA Ruling at para. 95, A.R. Tab 14, p. 286.

F. The Proviso Issue Proposed by the Crown Does not Arise in this Case

55. The Crown seeks leave to appeal so that this Court can revisit jurisprudence that "requires verdicts in complex trials of profoundly serious offences to be overturned due to non-prejudicial technical errors in the jury selection process."[49]

56. There are two problems with the Crown's request: First, there is no jurisprudence prohibiting the application of the proviso in the circumstances described by the Crown; and second, the issue as framed does not arise in this case. Determining the availability of the proviso to cure procedural errors is a context-specific exercise that should not be decided in a factual and legal void, without the benefit of any analysis by the court below.

i) There is no General Rule Prohibiting the Application of the Proviso to Jury Selection Errors

57. There is no general rule established by the Court of Appeal in this or any other case that errors in the jury selection process can never be cured by the proviso; or that every procedural error in relation to jury selection necessarily results in prejudice to the accused. The Court of Appeal has consistently held that while certain errors in the jury selection process are not amenable to cure under s. 686(1)(b)(iv), others will be.[50] Indeed, the Court of Appeal has applied the proviso and upheld convictions even in cases involving serious errors that occurred during jury selection.[51]

58. The application of the proviso is an inherently fact-driven process. An analogy to election cases is helpful. A failure to comply with the election requirements in s. 536(2), goes to the jurisdiction of the trial court and will generally be beyond the reach of the curative proviso, in the absence of waiver.[52] However, there are cases that have applied s. 686(1)(b)(iv) to cure errors in the election procedure where it is clear the accused was, despite the procedural irregularity, tried in the forum of his choice.[53] If an accused, despite

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[49] Applicant's Memorandum of Argument at para. 17, A.R. Tab. 15, p. 295.
[50] *R. v. W.V.*, 2007 ONCA 546 at paras. 39-40, citing *R. v. Brown*, 2005 CanLII 3939 (Ont. C.A.).
[51] See *e.g.*: *R. v. Sinclair*, 2013 ONCA 64.
[52] *R. v. Shia*, 2015 ONCA 190 at paras. 32-33; *R. v. Varcoe*, 2007 ONCA 194 at para. 22; *R. v. Mitchell*, 1997 CanLII 6321 (Ont. C.A.) at para. 29.
[53] See *e.g.*: *R. v. Roy*, 2010 BCCA 448 at paras. 6-10.

a procedural error in respect of the jury selection process, effectively got the jury he wanted, an appellate court might similarly find that the proviso could cure the procedural defect.[54] The assessment depends on the particular facts and circumstances of the case and cannot be decided in the abstract.

ii) The Applicability of the Proviso Cannot be Determined in a Factual and Legal Vacuum

59. As counsel for Jaser explains in her memorandum of argument, there is only one procedural proviso question that could conceivably arise in this case: "Is the imposition of static triers in the absence of a valid s. 640(2.1) application a serious or trivial procedural irregularity?" Given the repeal of s. 640(2.1) and the reassignment to trial judges the task of trying challenges for cause, the answer to that question is of no relevance beyond this case. The Crown does not really suggest otherwise. Instead, it proposes the Court answer a much broader question: When will the curative proviso be available to cure errors in the jury selection process? The Crown argues that the Court should answer this question in order to provide guidance as to if and when errors in respect the newly enacted jury selection procedures might be cured by the application of the proviso.

60. This is not an appropriate basis on which to grant leave to appeal in this case. Given the nature of the fact-driven proviso inquiry, further guidance on when the curative proviso might be applicable to cases involving the erroneous imposition of static triers will be of no benefit to appellate courts attempting to determine the extent and impact of unrelated errors in a new jury selection process.

61. This Court has explained, in the context of *Charter* arguments, the necessity of adjudicative facts for the determination of a legal issue:

> *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as

[54] *Murray*, *supra* note 27 at paras. 57, 63 and 65.

> this in a factual void. *Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.[55]

62. The same concerns arise in the context of arguments about the applicability of the proviso. The question posed by the Crown in its application for leave cannot be answered in the abstract. It requires adjudicative facts to provide context for the legal question at issue. There are "profound functional justifications"[56] for the general rule against raising new arguments on appeal, which apply with even greater force where, as here, the new issue sought to be advanced does not arise from the facts of the case upon which leave is being sought. First, the Court's appellate function is compromised where the evidentiary record is insufficient to permit proper legal analysis of an issue; second, granting leave undermines the goal of finality in litigation (and in the context of this case would significantly prolong the proceedings); and third, the Court is denied the benefit of considered reasons on the question at issue prepared by the provincial appellate courts.[57]

iii) The New Jury Selection Regime is not Relevant to this Appeal

63. Bill C-75 changed the procedure for jury selection by: eliminating peremptory challenges; assigning the trial judges the task of deciding challenges for cause; and giving trial judges an expanded authority to stand jurors aside.[58] Parliament's decision not to state in the legislation whether the amendments were to apply retrospectively or only prospectively has caused "great confusion and extensive litigation" in courts across Canada."[59] Recently, in *R. v. Craig*, Dawe J. summarized the current state of affairs:

> The statutory interpretation issue… has now been addressed in at least twenty-four superior court decisions from eight different provinces. Nine of these decisions – eight from Ontario and one from Nova Scotia – have concluded that the Bill C-75 jury selection amendments operate retrospectively. However, thirteen decisions from six other provinces – British Columbia, Alberta, Saskatchewan, Manitoba, Quebec and New Brunswick – have

[55] *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, pp. 361-362.
[56] *R. v. Gill*, 2018 BCCA 144 at para. 9 [*Gill*].
[57] See e.g.: *Gill*, *supra* note 56.
[58] *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 (assented to 21 June 2019).
[59] *R. v. Craig*, 2019 ONSC 6732 at para. 2 [*Craig*].

> reached the opposite conclusion and held that the new jury selection provisions should be interpreted to apply only prospectively.[60]

64. In addition, at least five courts in Ontario alone have already considered the constitutionality of the elimination of peremptory challenges, again with varying results.[61]

65. This judicial disagreement is not surprising. The cases raise complicated issues. Provincial appellate courts have already been called upon to review the decisions of the trial courts. The Court of Appeal for Ontario will hear an appeal in the matter of *R. v. Chouhan* in December.[62] Mr. Chouhan challenged the constitutionality of the elimination of peremptory challenges and argued that the amendments to the jury selection process should apply prospectively only. The trial judge rejected both arguments. It is open to the Crown to argue, *in that case*, that if the trial judge was wrong, any resulting error in the jury selection process can be cured by the proviso. That case – and those that will inevitably follow in other provincial appellate courts – are the appropriate venue for the Crown to make its argument that "overturning every trial in the stream that winds up being … "wrong"… would bring the administration of justice into disrepute"[63] There, the courts will have the necessary factual and legal context to make a meaningful assessment of the argument.

66. In the face of the uncertainty caused by the amendments, prosecutors from the various Crown agencies across the country have options available to them. They could take the strategic position of not opposing, or even joining in, defence applications to treat the amendments as operating prospectively only.[64] Such a position might assist the Crown in arguing on appeal that, even if ultimately found to be incorrect, the error in respect of the

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[60] *Ibid* at para. 7 [citations omitted].
[61] *R. v. Chouhan,* 2019 ONSC 5512 [*Chouhan*]; *R. v. Kakekagumick,* 2019 ONSC 6008; *R. v. Muse,* 2019 ONSC 6119; *R. v. Gordon,* 2019 ONSC 6508; and *R. v. King,* 2019 ONSC 6386.
[62] *Chouhan, supra* note 61, appeal to be heard December 19, 2019 (C-67600).
[63] Applicant's Memorandum of Argument at para. 32, A.R. Tab. 15, p. 301.
[64] Indeed, in October 2019, the Public Prosecution Service of Canada (the Crown agency seeking leave in this appeal) has directed its counsel to take the position that the provisions operate only prospectively: *Craig, supra* note 59 at para. 7, fn 14.

jury selection process is harmless since the defence "got what it wanted." What is not open to the Crown is to use *this* case to seek a pre-emptive ruling from this Court as to whether errors made in respect of the newly enacted provisions for jury selection can be cured by the application of the curative proviso.

PART IV: ORDER SOUGHT

67. The respondent seeks an order dismissing the application for leave to appeal and makes no submissions on costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated this 28th day of November, 2019.

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