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, RAED JASER
PURSUANT TO RULE 27 OF THE *RULES OF THE SUPREME COURT OF CANADA*

Counsel for the Respondent, Raed Jaser:

MEGAN SAVARD
ADDARIO LAW GROUP
171 John Street, Suite 101
Toronto, Ontario, M5T 1X3
Tel.: (416) 649-5054
Fax: 1-866-714-1196
Email: msavard@addario.ca

Agent for Counsel for the Respondent, Raed Jaser:

MOIRA S. DILLON
SUPREME LAW GROUP
900 - 275 Slater Street
Ottawa, Ontario K1P 5H9
Tel: (613) 691-1224
Fax: (613) 691-1338
Email: mdillon@supremelawgroup.ca

Counsel for the Applicant,
Her Majesty the Queen in Right of Canada:

KEVIN WILSON AND JENNIFER CONROY
PUBLIC PROSECUTION SERVICE OF CANADA
Ontario Regional Office
130 King Street West, Suite 2400, Box 340
Toronto, Ontario, M5X 2A2
Tel: (416) 973-0026 / (416) 952-1505
Fax: (416) 973-8253
E-mail: kevin.wilson@ppsc-sppc.gc.ca
jennifer.conroy@ppsc-sppc.gc.ca

Agent for Counsel for the Applicant,
Her Majesty the Queen in Right of Canada:

FRANÇOIS LACASSE
PUBLIC PROSECUTION SERVICE OF CANADA
160 Elgin Street, 12th Floor
Ottawa, ON K1A 0H8
Tel: (613) 957-4770
Fax: (613) 941-7865
Email: flacasse@ppsc-sppc.gc.ca

Counsel for the Respondent,
Chiheb Esseghaier

EMBRY DANN LLP
ERIN DANN AND DEAN EMBRY
116 Simcoe Street, Suite 100
Toronto, Ontario, M5H 4E2
Tel.: (416) 868-1203
Fax: (416) 868-0269
Email: edann@edlaw.ca
Email: dembry@edlaw.ca

Agent for Counsel for the Respondent,
Chiheb Esseghaier

MOIRA S. DILLON
SUPREME LAW GROUP
900 - 275 Slater Street
Ottawa, Ontario K1P 5H9
Tel: (613) 691-1224
Fax: (613) 691-1338
Email: mdillon@supremelawgroup.ca

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The Applicant seeks leave to appeal from a unanimous judgment of the Ontario Court of Appeal. In doing so, the Applicant seeks to raise issues that this Court has previously said do not satisfy the public importance requirement for leave.[1] The Application should be dismissed. The Court of Appeal used established legal rules to interpret the words used by Jaser's counsel when they applied to exclude the jury panel during a challenge for cause. A fact-specific application of settled law does not rise to an issue of national importance, particularly where the docket has been cleared of cases raising similar issues.

2. The Applicant's complaints raise no issues of national importance requiring this Court's attention. The questions the Applicant wants this Court to address have already been answered, will not arise again, and are unrelated to the issues in this case. Specifically:

a. The Court of Appeal's conclusion that Jaser's jury was improperly constituted is plainly correct and consistent with past case law interpreting ss. 640(2.1) and (2.2). It was the inevitable result of the application of established legal rules which the Applicant does not now seek to challenge;

b. The question of whether the Court of Appeal properly interpreted and applied repealed legislation cannot meet the test for national importance. This Court should reject the Applicant's unfounded proposition that "the public importance of the jury's otherwise uncompromised verdict on these profoundly serious terrorism offences is sufficient to satisfy the test for leave."[2] The seriousness of the allegations cannot transform an unimportant legal issue into an important one. In the context of this bifurcated appeal, and given the errors the Court of Appeal found, it is wrong and misleading to suggest the verdict is "otherwise uncompromised"; and

c. The question of whether and to what extent the s. 686(1)(b)(iv) curative *proviso* applies to errors in the *current* jury selection process is entirely unrelated to this appeal. The *proviso* question arising from this case is: Is imposing static triers in the

[1] *R. v. Husbands,* SCC File No. 37766
[2] *Application for Leave to Appeal*, Tab 15, Applicant's Memorandum of Argument at para. 23

absence of a valid s. 640(2.1) application a serious or trivial procedural irregularity? That question was answered nearly five years ago in *Noureddine,* a decision of Doherty J.A. which the Applicant did not seek leave to appeal.[3] In *Noureddine,* Doherty J.A. said this error was incurable. In *Husbands,* this Court denied the Crown leave to appeal on this point. The Applicant now asks the Court to reconsider its leave decision in *Husbands,* arguing that *Noureddine* was wrongly decided and that the Respondents must prove actual prejudice to circumvent the *proviso*. This proposed overhaul of years of jurisprudence is both unnecessary and legally unsound. It is impossible to measure the prejudice caused by improperly limiting the pool of community members that pick the jury. Requiring the defendant to prove prejudice is inconsistent with the principle that *the Crown* bears the burden of justifying the *proviso*. Most importantly, the error the Applicant wants the *proviso* to cure will never be committed again. The Court does not engage in meaningless academic exercises.

3. There is a particular irony in the Applicant's reliance on the potential for delay and wasted resources to support an application for leave in circumstances where it effectively engineered the outcome it now says is unfair, in the name of efficiency. The Applicant did not oppose Jaser's request to have the potentially determinative 'jury selection' ground heard first. Justice Watt relied on its non-objection in bifurcating the appeal. If this Court granted leave and allowed the appeal, the "victory" would be to restore verdicts that are potentially tainted by serious error and give the Respondents a chance to advance additional meritorious grounds of appeal in the court below. It would delay the result and may generate years of additional unnecessary litigation. The principle the Applicant says makes these otherwise unimportant errors publicly important – the public's entitlement to "verdicts on profoundly serious terrorism offences" – is undermined rather than advanced by this Application.

B. Statement of Facts

4. The Applicant's summary of the facts at paragraphs 3 to 14 of its *Memorandum of Argument* is correct but omits details that are relevant to the Applicant's claim that the jury selection error was harmless and the verdicts "otherwise uncompromised". This was not an overwhelming Crown case to which the defendants could only respond by raising technical

[3] *R. v. Noureddine*, 2015 ONCA 770, at paras. 64-68

defences. It was a complex trial that required the jury to consider difficult questions about the defendants' motivations and intentions and had procedural features that arguably created the appearance and reality of unfairness.

5. Jaser adopts the facts in the Respondent Esseghaier's *Memorandum of Argument* and relies on the following additional facts.

i) Summary of Allegations

6. The Crown alleged that Jaser and Esseghaier participated in two conspiracies: a conspiracy to derail a Via Rail passenger train and a conspiracy to commit murder. The jury convicted Esseghaier of both conspiracies. It could not decide if Jaser was guilty of the Via Rail conspiracy. It convicted him of a more general conspiracy to commit murder, presumably based on his discussions with Esseghaier about killing in the name of Islam, and his plan (rejected by Esseghaier) to shoot prominent Canadians and Jews with a sniper rifle.[4] The jury convicted both defendants of participating in the activities of a terrorist group by engaging in the conspiracy and by recruiting a 'member' (Tamer El Noury, an undercover FBI agent).[5]

7. Jaser's alleged involvement in terrorist activity was limited. He had no connection to any individual or group except Esseghaier and El Noury. His total alleged involvement with terrorist activity lasted less than a month. The Crown led evidence that, during that time, Jaser and Esseghaier hypothesized methods of derailing trains, gathered information about train schedules, and conducted 'reconnaissance' trips to track-side locations.[6] They did not decide on a course of action, purchase materials or learn skills or techniques relevant to derailing a train. In September 2012, after a month of talking and 'scouting', Jaser disavowed the plan and cut off contact with Esseghaier. There was no evidence of terrorist activity by Jaser in the subsequent seven months leading up to his arrest.

8. Jaser's defence was that he was a con artist who said and did these things to extract money from his alleged co-conspirators. In support of that theory, the defence pointed to evidence suggesting that Jaser convinced Esseghaier to give him money, bragged about his business acumen and repeatedly tried to 'pitch' an expensive (non-terror related) business plan

[4] *Application for Leave to Appeal*, Tab 11, Reasons for Sentence at paras. 1-2, 15-18
[5] *Application for Leave to Appeal*, Tab 11, Reasons for Sentence at paras. 1-2, 27
[6] *Application for Leave to Appeal*, Tab 11, Reasons for Sentence at para. 14

to the FBI agent, who was posing as a wealthy American. The absence of evidence that Jaser was involved in terror activity before or after his time with Esseghaier further supported the conclusion that he was not an extremist but an opportunist.[7]

ii) Relevant Procedural History

9. The case was procedurally complex, made more so by the fact that Esseghaier, who was self-represented, refused to acknowledge the court's jurisdiction or defend the case. In response to these challenges, the trial judge appointed *amicus curiae* to play a "narrowly circumscribed role."[8] This ruling governed *amicus'* role during the pre-trial proceedings. As a result, Jaser and the Crown brought several motions in which Esseghaier and *amicus* did not participate. The jury selection application was one of them.

10. Jaser twice applied to sever his case from Esseghaier's, primarily on the basis that Esseghaier's religious comments and conduct were self-incriminatory and would cause prejudice to Jaser before a jury. (As set out below and in the Respondent Esseghaier's *Memorandum of Argument*, Esseghaier has significant mental health challenges.) The trial judge dismissed the first application as premature.[9]

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

> UNIDENTIFIED FEMALE VOICE: We are in Canada. Would you please sit down?
> THE COURT: Madam…
> UNIDENTIFIED FEMALE VOICE: Ma'am…
> UNIDENTIFIED MALE VOICE: Ma'am…
> THE COURT: Madam, madam…
> [LAUGHTER]
> UNIDENTIFIED FEMALE VOICE: Jesus.[10]

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[7] *Application for Leave to Appeal*, Tab 11, Reasons for Sentence at para. 48
[8] *Application for Leave to Appeal*, Tab 3, Amicus Ruling at paras. 4, 18 and 42
[9] *Respondent Jaser's Application Record*, Tab C, Ruling on Severance Application, at p. 118, l. 10-15, p. 119, l. 24 - p. 120, l. 23.
[10] *Respondent Jaser's Application Record*, Tab E, Excerpt of Jury Selection, *Transcript of Proceedings*, Vol. VI(b) at p. 78, ll. 16-25

12. The trial judge dismissed Jaser's severance and mistrial application on the basis that Jaser might have benefitted from Esseghaier's conduct, and that a limiting instruction would cure the prejudice.[11] He agreed to add a question to the challenge for cause process, asking prospective jurors whether this episode would impact their ability to decide the case impartially.[12] He agreed to dismiss the prospective juror who confronted Esseghaier but the rest of the panel, including any members who may have laughed at the exchange, remained.[13] This became the pool from which the triers and jury were eventually drawn.

13. After the trial was over, and the Respondents had been convicted, the trial judge expanded *amicus'* role.[14] *Amicus* applied for a *Mental Health Act* assessment, the results of which called into question Esseghaier's ability to participate in the proceedings. By the time of the sentence hearing, two respected psychiatrists had agreed that Esseghaier likely suffered from schizophrenia and that his participation at trial was "shaped by his mental disorder."[15]

iii) Legislative Developments Relating to Jury Selection

14. The Applicant has accurately summarized the history of ss. 640(2.1) and (2.2) and the statutory interpretation conflict that existed in December 2014 and January 2015, when the jury in the Respondents' case was selected. In 2016, the Court of Appeal resolved the conflict.[16] It has now been settled for over three years that the 'static trier' amendments did not eliminate trial judges' inherent jurisdiction to exclude prospective jurors from a rotating trier selection process, and that such an order is a proper exercise of inherent discretion.[17] Errors of the type committed by the trial judge no longer occur.

15. On September 19, 2019, Bill C-75 came into force and changed the challenge for cause

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[11] *Respondent Jaser's Application Record*, Tab D, Ruling on Severance and Mistrial Motion, at p. 102, l. 30 - p. 103, l. 16
[12] *Respondent Jaser's Application Record*, Tab D, Ruling on Severance and Mistrial Motion, at p. 104, ll. 5-13
[13] *Respondent Jaser's Application Record*, Tab D, Ruling on Severance and Mistrial Motion, at p. 105, ll. 13-16
[14] *Application for Leave to Appeal*, Tab 11, Reasons for Sentence at para. 4
[15] *Application for Leave to Appeal*, Tab 11, Reasons for Sentence at paras. 64-65
[16] *R. v. Grant*, 2016 ONCA 639, at paras. 25-33.
[17] See for example: *R. v. Riley*, 2017 ONCA 650, at para. 62, *Grant*, at para. 61, *R. v. Murray*, 2017 ONCA 393, at para. 59, *R. v. Husbands*, 2017 ONCA 607, at para. 36, *R. v. Cumor*, 2019 ONCA 747, at para. 23

procedure. The line of case law interpreting and applying ss. 640(2.1) and (2.2), including the Court of Appeal's decision in this case, became irrelevant. Under the new procedure, only judges can determine whether the grounds for the challenge are true, removing the sworn juror's role (i.e., both rotating and static triers) in deciding the validity of a challenge.[18]

iv) The Jury Selection Motion in this Case

16. Against a backdrop of competing authority, Jaser and the Crown brought a motion to determine whether the trial judge had inherent jurisdiction to exclude unsworn jurors during the challenge for cause or whether Jaser needed to apply for static triers under s. 640(2.1) to get an exclusion order. All parties agreed that a challenge for cause and *some* exclusion order were necessary "to preserve the impartiality of the jurors".[19] They disagreed about whether the trial judge could make the order at common law without a s. 640(2.1) application.

17. On November 27, 2014, counsel and the court discussed jury selection for the first time. Counsel for Jaser made it clear that he was *not* bringing a s. 640(2.1) application for static triers, but asking the court to exclude unsworn jurors from the rotating trier selection process. The trial judge put counsel on notice that he was unlikely to grant such a request.[20] That same day, he told *amicus* he did not need his help on the jury selection motion.[21]

18. Facta were then filed and the motion argued on December 9, 2014. *Amicus* was absent. Esseghaier appeared by video and made no relevant submissions. Jaser applied for an order "excluding unsworn jurors." Counsel made clear that she wanted the benefits of rotating triers and was not bringing a s. 640(2.1) application. She gave notice that "if, but only if" the court found that s. 640(2.1) displaced its inherent jurisdiction to make an exclusion order, she would apply under s. 640(2.1) for static triers to access an exclusion order.[22] The Crown did not dispute the validity of Jaser's arguments in support of rotating triers.

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

[19] *Application for Leave to Appeal*, Tab 8, Ruling on Jury Selection Issues at paras. 9, 131; *Application for Leave to Appeal*, Tab 14, Judgment of the Court of Appeal at para. 32; See *Criminal Code*, R.S.C. 1985, c. C-46, s. 640(2.2); *Husbands*, at para. 34

[20] *Application for Leave to Appeal*, Tab 14, Judgment of the Court of Appeal at paras. 34-35

[21] *Application for Leave to Appeal*, Tab 14, Judgment of the Court of Appeal at paras. 39, 44

[22] *Application for Leave to Appeal*, Tab 14, Judgment of the Court of Appeal at paras. 40-44

v) The Trial Judge's Ruling

19. The trial judge dismissed Jaser's application. He held that ss. 640(2.1) and (2.2) had removed his inherent discretion to exclude unsworn jurors and that the only route to exclusion was through an application for static triers. He treated counsel's submissions in support of her anticipated alternative position as the functional equivalent of a s. 640(2.1) application. He made an order excluding sworn and unsworn jurors under s. 640(2.1) and appointed static triers as a necessary corollary of that order. The trial judge also held that it would be "improper" in any event to use the common law to exclude *prospective* jurors when the *Code* offered the option of excluding *all* jurors. In his view, an exclusion order was an all-or-nothing proposition: either all jurors were at an unacceptable risk of tainting and should be excluded, or none of them should be. He offered this reasoning as an alternative basis for concluding that a s. 640(2.1) application was the only way to exclude jurors in this case.[23]

vi) The Proceedings in the Ontario Court of Appeal

20. The Respondents appealed their convictions and life sentences. The appeal was complex. In addition to arguing that the jury selection was illegal, Jaser alleged numerous errors in the trial judge's rulings relating to *O'Connor* production, step six of *R. v. Garofoli*, national security privilege, exclusion of evidence, severance, the elements of conspiracy, the fitness of his mentally ill co-defendant, and the mitigating effects of entrapment on sentence.[24]

21. By 2018, it was clear that the trial judge's jury selection ruling was legally wrong. It was also clear that *if* the effect of the error invalidated Jaser's 'in the alternative' application for a s. 640(2.1) exclusion order, the error was jurisdictional and incurable in nature.[25] In the court below, all parties proceeded as if this ground of appeal involved a straightforward application of established law to the trial judge's decision. The Crown did not apply to have the appeal heard by a five-judge panel, and did not attempt to argue that, if the s. 640(2.1)

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[23] *Application for Leave to Appeal*, Tab 8, Ruling on Jury Selection Issues at paras. 42-47; *Application for Leave to Appeal*, Tab 14, Judgment of the Court of Appeal at paras. 46-50

[24] *Respondent Jaser's Application Record*, Tab A, Notice of Appeal filed October 22, 2015; *Respondent Jaser's Application Record*, Tab B, Supplementary Notice of Appeal filed July 24, 2017. Esseghaier was unrepresented on appeal and did not file a Solicitor's Notice of Appeal.

[25] *Noureddine*, at paras. 57, 61. See also *Grant*, *Murray*, *Riley*, *Husbands*, *Cumor*, and *R. v. Kossyrine*, 2017 ONCA 388

application were invalid, the curative *proviso* should apply.[26] The dispute on Jaser's appeal was fact-specific: did his reluctant 'back-up' position, which he only advanced as a result of the trial judge's error, count as a *valid* s. 640(2.1) application?

22. Given the potentially dispositive nature of the error, Jaser brought a motion for directions asking the Court of Appeal to consider the jury selection ground of appeal first. The Applicant took no position on the motion.[27] Justice Watt granted Jaser's request. The factors he identified as relevant to determining whether to bifurcate the appeal included:

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

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

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

d. Whether the hearing and determination of the other grounds of appeal may be delayed by further appellate proceedings relating to the segregated ground of appeal.[28]

23. In bifurcating the appeal, Watt J.A. relied on the potentially dispositive nature of the segregated ground, and the fact that the Crown had not opposed Jaser's request.[29]

24. The Court of Appeal unanimously allowed the appeals and ordered a new trial for both Respondents. The trial is scheduled to start in September of 2020. Esseghaier, whose mental illness has been diagnosed and treated, is now represented by counsel.[30]

PART II – QUESTIONS IN ISSUE

25. Jaser's position on the Applicant's questions is as follows:

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

26. No. The Court of Appeal applied settled law relating to the question of when an

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[26] *Memorandum of Argument of the Respondent Esseghaier*, at paras. 45-49
[27] *Respondent Jaser's Application Record*, Tab G, Ruling on Motion for Directions, at para. 13
[28] *Respondent Jaser's Application Record*, Tab G, Ruling on Motion for Directions, at para. 14
[29] *Respondent Jaser's Application Record*, Tab G, Ruling on Motion for Directions, at paras. 23, 26
[30] *Memorandum of Argument of the Respondent Esseghaier*, at para. 16

application is 'brought' under s. 640(2.1). Its conclusion – that Jaser brought no valid application – was consistent with that law, and the established principle that a defendant's waiver of a procedural right must be clear and unequivocal.[31] The fact that the trial judge offered an alternate discretionary basis to dismiss Jaser's application did not cure the unfairness. The Court of Appeal correctly found that the proposed exercise of discretion was unreasonable. In any event, no question of national importance arises here. The Applicant advances a fact-specific argument in a case of no appreciable relevance to the *current* law of jury selection. The seriousness of the allegations cannot transform an unimportant legal issue into an important one.

(2) Is the curative *proviso* in s. 686(1)(b)(iv) of the *Criminal Code* inapplicable to errors in the jury selection process, no matter how technical and non-prejudicial the error or how serious the offence?

27. The question as framed is not before the Court. The only *proviso* question arising on these facts is: Is the imposition of static triers in the absence of a valid s. 640(2.1) application a serious or trivial procedural irregularity? This question was satisfactorily answered five years ago in *Noureddine*.[32] The Applicant has not explained why *Noureddine* was wrong, or why its application in this case raises a question of national importance. Sections 640(2.1) and (2.2) have been repealed and the option of choosing between rotating or static triers is no longer available. The Court is not in the business of settling questions of law that will not arise again.

28. Jaser raises no additional issues.

PART III: STATEMENT OF ARGUMENT

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

29. The Court of Appeal's conclusion that Jaser's jury was improperly constituted was

[31] Jaser adopts the argument of the Respondent Esseghaier about why the jury was improperly constituted for him: *Memorandum of Argument of the Respondent Esseghaier,* at paras. 37-44

[32] Jaser adopts the Respondent Esseghaier's arguments that the Court should not exercise its discretion to hear argument on the scope of the *proviso* for the first time, the *proviso* could not apply in this case, and the *proviso* issue proposed by the Crown does not arise here: *Memorandum of Argument of the Respondent Esseghaier,* at paras. 45-62

correct and consistent with the law interpreting and applying ss. 640(2.1) and (2.2). The Applicant does not seek to challenge that law. It accepts that: (a) the trial judge can only order static triers if the defendant brings a valid s. 640(2.1) application;[33] (b) Parliament's introduction of the 'static triers' mode of jury selection did not oust trial judges' inherent jurisdiction to exclude the panel;[34] (c) appellate courts should look at substance over form in deciding whether there is a valid s. 640(2.1) application (did the defendant "get what he wanted"?);[35] and (d) imposing static triers in the absence of a valid s. 640(2.1) application is a jurisdictional error.[36] The Applicant also accepts that Jaser met the statutory and common law threshold justifying an exclusion order. Its only arguments relating to Jaser are:

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

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

30. The Applicant put forward both arguments at the Court of Appeal. Neither succeeded. With respect to the first argument, the Court of Appeal correctly found that Jaser's reluctant 'back-up' position was not a valid s. 640(2.1) application. It held:

> I would not give the alternative request of Jaser for static triers the effect the Crown contends for. It became operative only due to a legal error by the trial judge, one Jaser had attempted to prevent from occurring. At the point that his notice that he would pursue the alternative of a s. 640(2.1) application became operative, that is, the trial judge's ruling that he lacked the discretion that he in law had, Jaser had already been deprived of his preferred option to invoke a method of selecting the composition of triers that the law entitled him to select. A choice of which of the remaining options should be used, in those circumstances, cannot cure the error.[37]

31. This ruling was the inevitable result of the application of settled law. At the time, the *Criminal Code* permitted trial judges to appoint static triers if the defendant applied for a s. 640(2.1) exclusion order, or brought the "functional equivalent" of such an application.[38] To

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[33] *Husbands*, at para. 37; *Application for Leave to Appeal*, Tab 14, Judgment of the Court of Appeal at para. 24
[34] *Grant*, at para. 41
[35] *Grant*, at paras. 50-51; *R. v. Mansingh*, 2017 ONCA 68, at para. 12; *Kossyrine*, at para. 28; *Murray*, at paras. 65-66; *Riley*, at para. 85
[36] *Noureddine*, at para. 57; *Husbands*, at paras. 40-41
[37] *Application for Leave to Appeal*, Tab 14, Judgment of the Court of Appeal at para. 92
[38] *Husbands*, at paras. 38, 46; *Grant*, at paras. 50-51; *Murray*, at paras. 57-66

determine whether a defendant had brought the functional equivalent of such an application, appellate courts considered substance over form: did the defendant get what he wanted'?[39]

32. The Applicant does not dispute the general correctness of the "functional equivalent" test, but argues that the Court of Appeal was wrong to apply it *in this case*. There is no question that Jaser wanted rotating triers and an exclusion order, and did not get it. In the court below, the Crown argued that the statutory preconditions for ordering static triers were nonetheless *technically* satisfied because, once the trial judge illegally deprived Jaser of his preferred mode of jury selection, Jaser said he would bring a s. 640(2.1) application. The Crown invited the Court of Appeal to ignore what Jaser truly wanted, depart from the 'substance over form' approach and return to the technical approach that it had rejected in *Grant*.

33. The Court of Appeal correctly declined the invitation. Jaser's decision to opt for a particular compromise, after the trial judge erroneously limited his statutory right to rotating triers, did not cure the unfairness of denying him a legally available option. Every improper imposition of static triers is followed by a compromise choice by counsel about how to proceed. The case law shows that these reluctant compromises are never the functional equivalent of a s. 640(2.1) application. Jaser's compromise (advancing an application for static triers as a fallback position) was practically similar to that of the defendants in *Husbands* and *Noureddine* (choosing not to withdraw a common law application after learning that it would trigger an order for static triers). In each case, the defendant picked the 'lesser of two evils', opting for static triers and an exclusion order as best of the remaining choices.

34. In reaching its conclusion, the Court of Appeal acted consistently with the principles of informed waiver articulated by this Court. A party can waive a procedural requirement enacted for his benefit only if the waiver is clear and unequivocal. This has been the law in Canada for over 30 years. As pointed out by Lamer J. in *Korponay*, such a waiver has preconditions: its validity "is dependent upon it being clear and unequivocal that the person is waiving the procedural safeguard and is doing so with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process."[40] Jaser's compromise – the product of an illegal binary choice forced upon him

[39] *Murray*, at para. 62; *Mansingh*, at para. 12; *Kossyrine*, at paras 12, 22
[40] *Korponay v. AG Canada*, [1982] 1 S.C.R. 41, at pp. 48-49

by the trial judge – was the opposite of a clear and unequivocal waiver.

35. With respect to the Applicant's second argument, the Court of Appeal correctly found the proposed exercise of discretion unreasonable and not entitled to deference. It said:

> It was an error of law for the trial judge to refuse to exercise a discretion based on a view that a remedy not sought by Jaser would have better achieved his ends.
>
> […]
>
> The discretion to exclude unsworn jurors while using rotating triers cannot properly be refused on the basis that there is a better way to ensure jury impartiality, that is, by the exclusion of all jurors, when doing so negates the ability to use rotating triers. This approach makes the discretion unavailable.[41]

36. This again was the inevitable result of applying established law to the facts of the case. In *Grant*, Laskin J.A. accepted that using static triers reduced the risk of jury tainting and that using rotating triers increased that risk, but affirmed that this is a risk for the defendant to take.[42] Here, the trial judge was satisfied that exclusion was necessary to preserve juror impartiality.[43] He only rejected Jaser's request because he (wrongly) believed it was not legally available and that there were better ways of protecting impartiality.[44] It was not for the trial judge to refuse a legally valid request on the basis that he *personally* prioritized the benefits of total exclusion over the competing benefits of adjudication by rotating triers. It is clearly unreasonable to withhold an effective and necessary remedy as a means of forcing the defendant to pursue a different remedy.

B. The Alleged Legal Errors Relating to Jaser are Unimportant

37. The Applicant acknowledges that the alleged errors relating to Jaser do not satisfy the national importance requirement. Its argument for granting leave in this otherwise unimportant case rests on the premise that overturning convictions in a serious and complicated case on the basis of a single technical error undermines public confidence in the justice system. It says the public has an interest in seeing the jury's "otherwise uncompromised verdicts" restored.[45] Jaser adopts Esseghaier's submission that the seriousness of the

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[41] *Application for Leave to Appeal*, Tab 14, Judgment of the Court of Appeal at paras. 55-56
[42] *Grant*, at para 40
[43] *Application for Leave to Appeal*, Tab 14, Judgment of the Court of Appeal at para. 53
[44] *Application for Leave to Appeal*, Tab 8, Ruling on Jury Selection Issues at paras. 45-46
[45] *Application for Leave to Appeal*, Tab 15, Applicant's Memorandum of Argument at paras. 23, 37

allegations cannot transform an unimportant error into an important one[46] Jaser further points out that the underlying premise, that the verdicts are "otherwise uncompromised," is incorrect.

38. The Applicant argues that the Court of Appeal was wrong to void a publicly important trial "over a technicality".[47] But that is not what happened. By its conduct in the court below, the Applicant effectively engineered the result it now says is unfair. This was never a technical appeal about jury selection. The Applicant is only able to portray it this way because the Court of Appeal heard the jury selection ground first. Importantly, the Crown accepted that this ground was potentially determinative and chose not to oppose segregating it. The potentially dispositive nature of the error was one of the factors favouring bifurcation.[48] The Crown never told the panel or Watt J.A. (who relied on its position in making the bifurcation order) that, if the Respondents succeeded, it would argue that the outcome was invalid from a public policy perspective and capable of singlehandedly transforming an otherwise case-specific decision into an issue worthy of the Supreme Court's attention. Having participated in a process that removed other grounds of appeal from the panel's consideration and left a single ground for them to decide, the Applicant cannot fairly argue that the public would be offended by the Court of Appeal's decision to allow the appeal *on that ground*.

39. Nor is the proposed appeal about restoring an otherwise-uncompromised verdict. If leave is granted and the Crown wins its appeal, the case would be remitted to the Court of Appeal to address the other profound errors alleged by the Respondents. The spectre of a compromised trial and sentence hearing would continue to hang over the proceeding until the Court of Appeal has determined, for example, the legality of the trial judge's highly unusual and unprecedented *Garofoli* vetting process[49], and the fairness of his refusal to sever Jaser from an unrepresented, non-participating co-defendant with a history of prejudicial in-court behaviour.[50] The panel may ultimately prove to have many reasons for overturning these

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[46] *Memorandum of Argument of the Respondent Esseghaier*, at paras. 30-36
[47] *Application for Leave to Appeal*, Tab 15, Applicant's Memorandum of Argument at paras. 23, 37
[48] *Respondent Jaser's Application Record*, Tab G, Ruling on Motion for Directions, at paras. 23, 26
[49] *Application for Leave to Appeal*, Tab 6, Ruling on s. 8 Charter Motion, at paras. 6-7
[50] *Respondent Jaser's Application Record*, Tab C, Ruling on Severance Application, at p. 117, l. 1 – p. 122, l. 27; *Respondent Jaser's Application Record*, Tab D, Ruling on Severance and Mistrial Motion, at p. 102, l. 19 - p. 105, l. 22

serious convictions. It is misleading for the Applicant, having participated in a process that prevented the panel from arriving at or delivering those reasons, to suggest in this Court that leave should be granted because the appeal could restore an otherwise uncompromised verdict.

40. The Applicant's current course of action risks frustrating the rationale underlying Watt J.A.'s decision – to permit state and judicial resources to be used efficiently and facilitate a final outcome by hearing meritorious and potentially determinative grounds of appeal first. The Applicant asks this Court to participate in a process that will undo the effects of a bifurcation order it did not oppose, and force the Court of Appeal to hear a complex and potentially unnecessary appeal, delaying the final resolution of the case well beyond the end of 2020, when the currently-scheduled retrial is scheduled to conclude. The irony of advocating for such a result, while at the same time expressing concern about litigating efficiently in the *Jordan* era, is palpable. The public has an interest in fair trials, not verdicts, in serious cases. A fair trial in this case is scheduled to proceed in less than a year – this time with Esseghaier medically treated and represented by counsel. The Court should not endorse a course of conduct aimed at frustrating provincial appellate courts' attempts to marshal their resources effectively. It does not need to grant the Crown's leave application to give the public the outcome to which it is entitled.

C. The Application of s. 686(1)(b)(iv) to a Repealed Rule of Jury Selection does not Raise an Issue of National Importance

41. The Applicant asks the Court to answer the question: Is the curative *proviso* in s. 686(1)(b)(iv) inapplicable to errors in the jury selection process, no matter how technical and non-prejudicial the error or how serious the offence? This question is not before the Court and the Court should decline to answer it.[51]

42. In framing the question this way, the Applicant attempts to manufacture an issue of national importance by suggesting that the decision below will affect how appellate courts characterize and remedy errors by trial judges applying the new jury selection regime. This suggestion is speculative. It may be that future appellate courts will grapple with the questions

[51] Jaser adopts the Respondent Esseghaier's argument that the Court is not in the business of determining legal issues in a factual or legal vacuum: *Memorandum of Argument of the Respondent Esseghaier,* at paras. 48-49

of whether juries selected by trial judges, and without peremptory challenges, are properly constituted and – if not – whether the errors are sufficiently trivial to apply the *proviso*.[52] But there is no reason to think that the decision in *this* case (or any case interpreting the old jury selection provisions) will operate to create the apocalyptic scenario envisioned by the Applicant, or that granting leave in this case could prevent it. The Canadian legal system continued to operate effectively through the transitional confusion wrought by the introduction of the 2008 amendments. The total number of cases in which verdicts were quashed due to the legitimate disagreement about the operation of s. 640(2.1) and (2.2) is four.[53] If the Crown is sufficiently concerned about the confusion that may arise from the new legislation, it can seek appellate guidance in the form of a reference.[54]

43. The *proviso* question that properly arises from the facts of this case is: Is the imposition of static triers in the absence of a valid s. 640(2.1) application a serious or trivial procedural irregularity? It is not of national importance because the legislation is no longer in force, and the error the Applicant is worried about curing has not been committed by trial judges since *Grant* was released in 2016. The Canadian public simply has no interest, in 2019, in knowing whether the improper imposition of static triers is a curable or incurable error.

44. Moreover, this question was satisfactorily answered five years ago in *Noureddine*.[55] In that case, Doherty J.A. said this error was incurable. He was right. Imposing static triers against the wishes of the defendant is a serious procedural irregularity: it prejudices the appearance of fairness and the due administration of justice. The choice of whether to move for static triers belongs to the defendant alone. It is only up to the defendant to determine whether he prefers the benefits of rotating triers: namely, to avoid the risk that jury selection is tainted by

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[52] This issue is likely to be resolved at least at the provincial appellate level, well before the Court decides this application: the constitutionality and retrospectivity of the jury selection provisions are scheduled to be heard by the Ontario Court of Appeal in *R. v. Chouhan,* 2019 ONSC 5512, File No. C67600 (oral hearing scheduled for December 19, 2019). The Court of Appeal has already expedited and released one decision relating to the application of Bill C-75: *R. v. R.S.*, 2019 ONCA 906

[53] Besides the case at bar, see: *Husbands, Noureddine,* and *Cumor*

[54] *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 53

[55] *Noureddine,* at paras. 64-68

a single static trier, and to promote a sense of responsibility and cohesiveness in the jury selected to try the case. The Crown did not seek leave to appeal these conclusions in *Noureddine,* and when they sought leave to appeal them in *Husbands*, the Court declined to grant it.[56]

45. In arguing otherwise, the Applicant attempts to characterize jury selection by triers as a meaningless procedural step, and selection by rotating triers as fundamentally the same as selection by static triers. It suggests that Parliament's decision to eliminate the option of having a jury selected by fellow community members proves the relative *unimportance* of rotating triers, and, consequently, the triviality of denying that option.[57]

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

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

[56] The relative unimportance of this question is underscored by the fact that the Crown did not seek leave to appeal the determination in *Noureddine* that such errors were incurable, even though the legislation in question was in force at the time.

[57] *Application for Leave to Appeal*, Tab 15, Applicant's Memorandum of Argument at para. 33

> **convinced of is impartiality**. Any addition to this process from another source would upset the balance of the carefully defined jury selection process. This is especially the case of any attempt to add to the powers of the judge.[58]

47. Second, the Applicant mischaracterizes the change wrought by the Bill C-75 amendments. The Applicant tries to argue that because Parliament got rid of rotating triers, being deprived of rotating triers is inherently non-prejudicial. But that is not what Parliament did. Parliament got rid of 'jury selection by the community' and replaced it with 'jury selection by trial judge.' Unilaterally reducing the number of community members charged with making a decision in a criminal case risks tainting the integrity of the decision. Canadian criminal law is premised on the idea that, when the community participates in criminal trial decisions, there is safety in numbers. A twelve-member jury is fairer than a four-member jury. The greater the number of decision-makers, the less likely it is that the decision will be tainted by individual idiosyncrasies. This rationale underlies the pre-Bill C-75 jury selection scheme; a jury selected by rotating triers is less likely to be compromised by a 'rogue trier' with a skewed sense of impartiality. [59] By removing community-based jury selection altogether, Parliament eliminated that risk and the corresponding need for protection. Defendants do not have the right to rotating triers because they do not face the risks inherent to community-based jury selection to begin with.

48. Jaser was therefore deprived, not of a right to rotating triers, but a right to maximize the number of community members participating in an important decision about his case, and minimize the risk that a rogue decision-maker would undermine the process. Unlike defendants under the new Bill C-75 regime, he was forced to accept that risk and denied the corresponding protection to which he was entitled. Depriving him of the option of choosing 'safety in numbers' was inherently and intangibly prejudicial in the same way that unilaterally reducing the number of jurors below the statutorily-permitted minimum would be. The Applicant's assertion that a defendant in Jaser's position should have to demonstrate prejudice to access a remedy in either situation is equally untenable.

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

[59] *R. v. W.V.*, 2007 ONCA 546, at para. 26; *Noureddine*, at paras. 34, 64-65; *Grant*, at para. 21

PART IV – COSTS

49. The Respondent makes no submissions as to costs.

PART V – ORDER SOUGHT

50. The Respondent seeks an order dismissing the Application for leave to appeal.

All of which is respectfully submitted.

Dated this 28th day of November, 2019.

Megan Savard
Counsel for the Respondent Raed Jaser

PART VI – TABLE OF AUTHORITIES

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