



# SUPREME COURT OF CANADA

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## Case in Brief: *R. v. Esseghaier*

Judgment of October 7, 2020 (written reasons issued March 5, 2021) | On appeal from the Court of Appeal for Ontario  
Neutral citation: 2021 SCC 9

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### ***The Supreme Court has ruled that jury selection errors can be remedied if certain requirements are met.***

In 2015, Mr. Esseghaier and Mr. Jaser were found guilty of terrorism offenses in connection with a series of plots designed to kill people. A judge sentenced them both to life in prison with potential availability of parole after serving 10 years from the date of their arrest. They appealed their conviction. The Court of Appeal for Ontario overturned their convictions and ordered a new trial. It found that the jury had not been chosen correctly, in accordance with the rules governing jury selection. The Crown (prosecution) appealed the case to the Supreme Court of Canada.

Mr. Esseghaier and Mr. Jaser chose to be tried by a jury. In Canada, a jury is a group of 12 people (jurors) who decide if a person charged with a criminal offence is guilty or not guilty. The members of the jury are chosen randomly from a group of regular people who have been asked to report for jury duty. That group is called the jury panel.

The prosecutor or the defence lawyer may challenge members of the jury panel if they feel someone might not be fair-minded. This is called a “challenge for cause” and can be used to exclude people from the jury based on their responses to questions.

Before the trial, Mr. Jaser’s lawyer requested a “challenge for cause” to find out if any potential juror might not be fair-minded as a result of having read pre-trial news reports, or because the two accused men are members of visible minorities and Muslim.

At the time, the *Criminal Code* outlined two separate systems for determining if a potential juror was biased, both of which relied on people known as “triers”, whose job was to decide whether each potential juror was fair-minded or not.

One way to decide if someone on the panel was biased was by using “rotating triers”. That’s when the judge would choose two people to serve as deciders until the first juror was chosen (being chosen would mean that the deciders believed the person to be fair-minded). The first juror would then replace one of two deciders (who would be sent home). This process would continue, with the newly selected jurors replacing the existing triers, until the entire jury had been selected. With this “rotating triers” approach, all potential members of the jury would be in courtroom during the “challenge for cause” questioning (meaning that they could hear everyone’s answers).

Another method of choosing jurors was through “static triers”. That’s when the judge would select two people from the jury panel to determine the fair-mindedness of every juror. After the full jury was selected, these two deciders would be sent home. With this process, all potential members of the jury would be asked to wait outside during the questioning (meaning that they could not hear everyone’s answers).

Mr. Jaser wanted “rotating triers”. He also wanted the trial judge to use his discretion (power) to remove potential jurors from the courtroom during the process because hearing other people’s answers might make them biased. If his request could not be granted, Mr. Jaser wanted “static triers”.

The trial judge refused Mr. Jaser’s request for “rotating triers”. He concluded that trial judges did not have the power to exclude unsworn jurors from the courtroom where “rotating triers” were being used. In any event, he said that he would not have used the discretion even if he had it. He believed that to accept Mr. Jaser’s request would be to expose the sworn jurors (actual members of jury) to the possible biased comments of potential jurors, and this could pose a risk to the trial’s fairness.

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In the end, the trial judge imposed “static triers” in accordance with Mr. Jaser’s alternative request.

All nine judges of the Supreme Court agreed with the Court of Appeal that the jury was improperly formed. The trial judge made an error in refusing Mr. Jaser’s requests for two reasons. First, the trial judge had the discretion to exclude potential jurors from the courtroom while using “rotating triers”. Second, his refusal to use his discretion was unreasonable.

As a result of the error, the Supreme Court said the jury was not properly formed for Mr. Jaser, as it was incorrectly selected by “static triers” instead of “rotating triers” with potential jurors removed from the courtroom. The jury was also improperly formed for Mr. Esseghaier, as he was denied his right to “rotating triers”.

The judges all agreed that a specific section of the *Criminal Code* could be used to remedy jury selection errors. They said the requirements of that section had been met in this case. Although the procedure for selecting jurors was technically incorrect, it was one of two alternatives to ensure that an accused person’s right to a fair trial by an independent and impartial jury was protected. While Mr. Esseghaier and Mr. Jaser did not receive the specific jury selection process they wanted, the law does not demand procedurally perfect justice, but fundamentally fair justice.

The Supreme Court reinstated Mr. Esseghaier and Mr. Jaser’s convictions. Mr. Esseghaier and Mr. Jaser will now be able to appeal their convictions on other grounds before the Court of Appeal for Ontario.

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**Breakdown of the decision: *Unanimous*:** Justice Michael J. [Moldaver](#) and Justice Russell [Brown](#) allowed the appeal (Chief Justice [Wagner](#) and Justices [Abella](#), [Karakatsanis](#), [Côté](#), [Rowe](#), [Martin](#) and [Kasirer](#) agreed)

**More information (case # 38861):** [Decision](#) | [Case information](#) | [Webcast of hearing](#)

**Lower court rulings:** [judgment on jury selection](#) (Ontario Superior Court of Justice) | judgment on conviction (Ontario Superior Court of Justice - unreported) | [appeal](#) (Court of Appeal for Ontario)

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