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TAB 2

# The Six-Minute Criminal Court Judge 2020

## When Is There a Basis to Challenge for Cause?

**The Honourable Michelle Fuerst**
*Superior Court of Justice*

January 25, 2020

# WHEN IS THERE A BASIS TO CHALLENGE FOR CAUSE?

JUSTICE MICHELLE FUERST
SUPERIOR COURT OF JUSTICE
NEWMARKET, ONTARIO

# STATUTORY BASIS

- *Criminal Code* s. 638
- Sets out *exclusive grounds* for challenge for cause
- After Bill C-75 provisions effective September 19, 2019:
    - S. 638(1)(b) "a juror is not impartial" [previously "not indifferent between the Queen and the accused"]
    - S. 638(1)(c) "a juror has been convicted of an offence for which they were sentenced to a term of imprisonment of two years or more and for which no pardon or record suspension is in effect"
    - S. 638(1)(d) "a juror is not a Canadian citizen"

# THRESHOLD CONSIDERATIONS

- Pre-Bill C-75 caselaw:
  - Uses "not indifferent" interchangeably with "not impartial", e.g. *R. v. Sherratt*, [1991] 1 S.C.R. 509; *R. v. Williams*, [1998] 1 S.C.R. 1128
  - Emphasizes trial judge can pre-screen panel using general questions, but only for "obvious", "clear-cut", "uncontested" matters of partiality, e.g. connection to party or witness
  - Trial judge *cannot* use pre-screening to decide controversial questions of partiality
  - Emphasizes challenge for cause *not* automatic right

# *SHERRATT* RULE

- *R. v. Sherratt*, [1991] 1 S.C.R. 509
- Prospective jurors *presumed to be impartial*
- Party seeking to challenge for cause must *displace presumption*
- *Sherratt* at para. 64: **Must establish a "realistic potential for the existence of partiality, on a ground sufficiently articulated" ["*Sherratt* rule"]**
- Judge has discretion to permit or refuse challenge for cause

# THE *FIND* TEST

- *R. v. Find*, 2001 SCC 32
- Partiality has *two components*:
    - 1. A widespread bias exists in community (*attitudinal* component); *and*
    - 2. Some jurors may be incapable of setting aside this bias, despite trial safeguards, to render impartial decision (*behavioral* component)
- Establishing realistic potential for juror impartiality generally requires establishing *both* components

# COMPONENT #1 (ATTITUDINAL)

- Is determined without consideration of cleansing effect of trial safeguards including directions of trial judge
- Requires evidence, judicial notice, or trial events demonstrating a bias in community *sufficiently pervasive* to raise possibility it may be harboured by one or more members of jury pool
- Threshold for judicial notice strict
- Can only take judicial notice of facts:
    - So notorious or generally accepted as not to be subject of debate among reasonable persons, or
    - Capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy

# COMPONENT #2 (BEHAVIORAL)

- Fact prospective jurors may harbour prejudicial attitudes, opinions or feelings *not in itself sufficient* to support entitlement to challenge for cause
- Must *also* exist a realistic possibility some jurors may be *unable or unwilling* to set aside these prejudices to render decision in strict accordance with law
- Even in absence of any evidence, judge may infer *some* kinds of bias not amenable to judicial cleansing

# CHALLENGE BASED ON NATURE OF OFFENCE

- Rejected in *Find*
- Charges of sexual assault against children
- Defence called no evidence in support of proposed challenge for cause based on "feelings concerning the rape and violence on young children"; relied on nature and circumstances of alleged offences
- SCC held insufficient basis to ground judicial notice of widespread bias in Canadian society against accused charged with such offences
- Not enough that crime of sexual assault frequently elicits strong attitudes and emotions

# CHALLENGE BASED ON NATURE OF OFFENCE (CONT'D)

- Even if widespread bias established, cannot infer, absent evidence, it would not be cleansed by trial safeguards including presumption of innocence, requirement of juror unanimity, specific directions from trial judge
- Para. 108: Court doesn't foreclose possibility of offence-based challenge for cause, but emphasizes need to establish *both* components of test; suggests those circumstances may be *exceptional*
- Para. 109: "Many criminal trials engage strongly held views and stir up powerful emotions—indeed, even revulsion and abhorrence. Such is the nature of the trial process."

# CHALLENGE BASED ON RACIAL BIAS

- *R. v. Parks* (1993), 84 C.C.C. (3d) 353 (Ont. C.A.): Black D, white deceased in murder case
- *R. v. Williams*, [1998]1 S.C.R 1128: Indigenous D, white complainant in robbery case
- Recognition racial prejudice buried deep in human psyche, cannot easily be set aside
- Cannot assume trial safeguards including directions from judge will effectively counter racial prejudice

# CHALLENGE BASED ON RACIAL BIAS (CONT'D)

- Accused must demonstrate widespread prejudice against his/her race in the community (if demonstrated at national or provincial level, can infer it at community level)
- May be notorious fact in particular community, and so subject of judicial notice
- Where widespread racial prejudice shown, accused need *not* establish second (behavioral) component; challenge should be permitted

# CHALLENGE BASED ON RACIAL BIAS (CONT'D)

- *R. v. Koh* (1998), 131 C.C.C. (3d) 257 (Ont. C.A.): Expands *Parks*
    - Permits challenge for cause requested by D of *any* visible *racial minority*, e.g. "East Asian/Chinese"

# CHALLENGE BASED ON RACIAL SYMPATHY

- *R. v. Spence*, 2005 SCC 71
- D sought to challenge for cause based on fact D black and complainant East Indian
- Defence argued East Indian potential jurors might feel natural sympathy for victim of same race
- Defence called no evidence, asked court to take judicial notice is tendency to favour someone of own race
- Rejected by SCC as unsupported expansion of *Parks, Williams*

# OTHER QUESTIONS

- *R. v. Hollwey* (1992), 52 O.A.C. 120 (C.A.): Question about whether prospective jurors had such strong dislike of hash oil they would be unable to render just verdict not permitted
- *R. v. Shchavinsky* (2000), 136 O.A.C. (C.A.) 1: Question about anti-immigrant bias not permitted
- *R. v. Koh* (1998), 131 C.C.C. (3d) 257 (Ont. C.A.): Question based on D's national/geographic origin not permitted
- *R. v. Bennight*, 2012 BCCA 190: Question based on D suffering from a mental illness not permitted bec no evidence to establish either component of test