SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Cumberland*, 2019 NSSC 307

Date: 20190905
Docket: CRK 484729
Registry: Kentville

Between:

Her Majesty the Queen

v.

Aaron Byron Cumberland

Restriction on Publication:
Section 486.4 & 486.5 *CC* – bans information that will identify the complainant, victim or witnesses

Judge:	The Honourable Justice John A. Keith
Heard:	August 29, 2019, in Kentville, Nova Scotia
Oral Decision:	September 5, 2019 at Kentville, Nova Scotia
Counsel:	Sylvia Domoradzki and Brandon Trask, Crown Attorney Jonathan Cuming and Lindsay Cuvilier, Counsel for the Accused Accused present

Publication Ban provisions:

The Honourable Judge Ronda van der Hoek ordered on December 10, 2018, pursuant to Sections 486.4 & 486.5: bans ordered under these Sections direct that any information that will identify the complainant, victim or witnesses shall not be published in any document or broadcast or transmitted in any way. **No end date for the Ban stipulated in these Sections**.

BY THE COURT:

INTRODUCTION

[1] Aaron Cumberland's jury trial started on May 13, 2019. Twelve jurors were sworn that morning. At the time, the jury selection process still included 12 peremptory challenges available to both Mr. Cumberland and the Crown.

[2] The jury did begin hearing evidence, but a mistrial was declared on May 15, 2019.

[3] The jury trial in this matter was rescheduled for September 23, 2019, when a new jury was selected. On September 19, 2019, a few days before this jury trial did begin again, Bill C-75 came into force. Bill C-75 amended the *Criminal Code*, the *Youth Criminal Justice Act* and other Acts in a number of ways. For the purposes of this decision, one particular change is relevant: Section 269 of Bill C-75 removed Section 634 from the *Criminal Code* and eliminated peremptory challenges from the jury selection process.

[4] Counsel for Mr. Cumberland argued that certain amendments in Bill C-75 should not apply retrospectively. He stated that the effect of losing peremptory challenges undermined substantive, vested rights as enshrined in Section 11(d) of the *Canadian Charter of Rights and Freedoms* (the "***Charter***"). In other words, the effect of this change was not purely procedural. Thus, he submitted that Mr. Cumberland is entitled to the same "substantive" rights as existed at the time of his original trial – including the right to twelve peremptory challenges. To be clear, Mr. Cumberland did not bring a *Charter* challenge or argue that the elimination of peremptory challenges violated the *Charter*. His arguments were predicated entirely on principles of statutory interpretation.

[5] The Crown disagreed that the abolition of peremptory rights was substantive (as opposed to procedural) in effect. However, the Crown agreed that peremptory challenges should be available during the jury selection process because "the trial has already begun and that it would be improper to change even procedural aspects at this stage".

[6] In summary, the parties say that their full complement of peremptory challenges should be available for the purposes of the upcoming jury trial, but for different reasons.

[7] A *voir dire* was conducted on August 29, 2019, at which time I heard oral argument.

[8] On September 5, 2019 and given the pending trial, I gave a "bottom line" decision with reasons to follow. I disagreed with the positions being advanced by both parties. I found that, through Bill C-75, Parliament has eliminated peremptory challenges and that the amendment was purely procedural in nature. Thus, the amendment would apply to the jury selection process when the trial began on September 23, 2019.

[9] As indicated, the only issue before me on August 29, 2019 was one of statutory interpretation and whether the abolition of peremptory challenges in Bill C-75 was of immediate application in the upcoming jury selection process. Two additional preliminary points are germane:

1. Neither party sought to challenge for cause when applying for peremptory challenges as part of the jury selection process. After my decision disallowing peremptory challenges (or immediately applying Section 269 of Bill C-75), the accused requested the opportunity to challenge potential jurors for cause. The Crown consented and I determined the questions which would be put to the jurors based on two draft questions jointly provided to me by counsel; and

2. During jury selection in this trial, I was neither asked nor deemed it necessary to exercise my enhanced stand-by powers "for reasons of personal hardship, maintaining public confidence in the administration of justice or any other reasonable cause." as provided under Section 633 of the amended *Criminal Code*.

[10] As a final preliminary point, I echo the frustration expressed by The Honourable Justice Ferguson at paragraphs 8 and 9 of his decision in *R v Matthew Raymond (Ruling #4)*, 2019 NBQB 203 ("***Matthew Raymond (Ruling #4)***"), released September 23, 2019. Bill C-75 did include certain transitional provisions with respect to, for example, "Recognizance entered into before peace officer or officer in charge". It also included transitional provisions for certain amendments to the *Youth Criminal Justice Act*. Unfortunately, Parliament did not see fit to include clear transitional provisions for the changes to either jury selection or preliminary inquiries. In the absence of transitional provisions, trial judges and counsel across the country are now forced into a complex debate over whether the effect of such changes are purely procedural or substantive. The resulting uncertainty is reverberating in Courts across the country.

[11] It is no secret that these debates can result in problematic delay and uncertainty as the issues wend their way through the Court system. In *R v Dineley*, [2012] 3 S.C.R. 272 ("***Dineley***"), the Supreme Court of Canada considered whether Parliament's repeal of the "Carter Defence" for certain breathalyzer tests was substantive (and therefore prospective in nature) or purely procedural (and therefore of immediate application). The "Carter Defence" previously enabled a person accused of driving while intoxicated to present "evidence to the contrary" (e.g. drinking patterns, age, weight etc.) in an effort to create a reasonable doubt as to whether the results of an approved instrument (e.g. a breathalyzer) were accurate. Absent transitional provisions, the question became whether Parliament's repeal was substantive and thus prospective in application or procedural and thus of immediate application. The Supreme Court of Canada determined the repeal was substantive in effect but was split 4-3. The subsequent observation of C.W. Hourigan, J.A. in *R v Bengy*, 2015 ONCA 397 ("***Bengy***") is worth repeating "The distinction between substantive change and procedural change is sometimes difficult to ascertain. Indeed, in *Dineley*, the court was closely split on this issue." (at para 45). Very briefly, in *Bengy*, the Ontario Court considered statutory amendments to the defence of self-defence. Again, no transitional provisions were included. A few months earlier, the British Columbia Court of Appeal had considered the very same issue in *R v Evans*, 2015 BCCA ("*Evans*"). At paragraph 22 of the British Columbia Court of Appeal decision, Frankel, J.A. listed 15 conflicting authorities from around the country.

[12] As to the statutory interpretation questions which surround the elimination of peremptory challenges, since September 17, 2019, no less than five decisions in three jurisdictions (Ontario, British Columbia and New Brunswick) were released. Two determined that the elimination of peremptory challenges was substantive in nature and therefore did not immediately apply to the jury selection process (*R v Subramaniam*, 2019 BCSC 1601 ("***Subramaniam***") and *Matthew Raymond (Ruling #4*)). Three determined that the elimination of peremptory challenges was purely procedural in nature and therefore immediately applied to the jury selection process (*R v Chouhan*, 2019 ONCJ 5512 ("***Chouhan***"); *R v Thomas Lako and William McDonald*, 2019 ONCJ 5362; and *R v Khan*, 2019 ONSC 5646).

[13] Pausing here, I note that *Chouhan* was the first decision to examine both the statutory interpretation and constitutional questions. More specifically, did

Bill C-75's repeal of peremptory challenges and expansion of a judge's stand-by powers violated Sections 11(d), 11(f) or 7 of the Charter? McMahon, J. concluded they did not.

[14] These decisions post-date my original "bottom-line" decision and, thus, had no bearing on it. Nevertheless, they reveal the uncertainty that has ensued with respect to peremptory challenges.

[15] Beyond that since September 10, 2019, there have been no less than five decisions in Ontario alone wrestling with the question as to whether Bill C-75's restrictions on preliminary inquiries are substantive or procedural in nature – with conflicting conclusions (*R v Fraser*, 2019 ONCJ 652; *R v R.S.*, 2019 ONCJ 629; *R v Kozac*, 2019 ONSC 657; *R v A.S.*, 2019 ONCJ 655; and *R v N.F.*, 2019 ONCJ 656).

BACKGROUND

[16] Mr. Cumberland is charged with:

1. Invitation to sexual touching contrary to Section 152 of the *Criminal Code;*

2. Luring or communicating with a person whom the accused knew or believed to be under the age 16 years of age, contrary to Section 172.1(1)(d) of the *Criminal Code;* and

3. Making available sexually explicit material to a person whom the accused knew or believed to be under 16 years of age, contrary to Section 172.1(1)(d) of the *Criminal Code*.

[17] The jury trial in this matter originally commenced on May 13, 2019. The jury was selected that morning. In selecting a jury during the original trial, both the Crown and the accused Mr. Cumberland used peremptory challenges. Before twelve jurors had been selected, Mr. Cumberland used nine of his peremptory challenges, with three left unspent. The Crown used five, leaving seven remaining.

[18] The jury heard testimony from Crown witnesses in the afternoon of May 13, 2019. That testimony caused an expert witness to be called later in the trial (RCMP Corporal Kevin MacDougall) to reconsider and then change his opinion evidence. The changes were described in a report entitled "Supplementary Disclosure", dated May 14, 2019.

[19] Defence counsel objected and moved for a mistrial. After hearing submissions, Justice Warner declared a mistrial on May 15, 2019.

[20] The trial was subsequently rescheduled to September 23, 2019, which is when jury selection would begin. At around this same time, Bill C-75 was making its way through the legislative process.

[21] Bill C-75 heralded numerous amendments to the *Criminal Code*, the *Youth Criminal Justice Act* and other Acts. For the purposes of this decision, one particular change is relevant: Section 269 of Bill C-75 removed Section 634 from the *Criminal Code* and eliminated peremptory challenges from the jury selection process. A summary published by the Minister of Justice at the time Bill C-75 was introduced described the amendments as intending to, among other things, "abolish peremptory challenges of jurors, modify the processes of challenging a juror for cause so that a judge makes a determination of whether a ground of challenge is true and allows a judge to direct that a juror standby for reasons of maintaining public confidence in the administration of justice".

[22] By the time the mistrial in this matter was declared (May 15, 2019), Bill C-75 had completed Third Reading in Parliament and was before the Senate. On June 20, 2019, Bill C-75 received Royal Assent. The relevant provisions around peremptory challenges (Section 269) would come into force 90 days later: September 19, 2019.

[23] In short, between the date of the mistrial in this matter (May 15, 2019) and the date the new trial began (September 23, 2019), Bill C-75 came into force and peremptory challenges were eliminated from the jury selection process. The question became: did that amendment apply to the selection process on September 23, 2019?

Mr. Cumberland's Position

[24] Counsel for Mr. Cumberland argued that at the original trial each party was afforded twelve peremptory challenges pursuant to Section 634(2)(b) of the *Criminal Code*. As indicated, Mr. Cumberland used 9 of his 12 peremptory challenges. The Crown used 5.

[25] Counsel for Mr. Cumberland argued that peremptory challenges are "used to protect against a breach of his Section 11(d) *Charter* rights." Section 11(d) of the *Charter* states that: "Any person charged with an offence has the right

to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."

[26] Notwithstanding this reference to the *Charter*, counsel for Mr. Cumberland confirmed that he was neither seeking to strike Bill C-75 on the basis that it was unconstitutional nor arguing that the elimination of peremptory challenges violated Mr. Cumberland's rights under the *Charter*. This was appropriate in the circumstances as counsel acknowledged that any such challenge would require the parties to file notice pursuant to the *Constitutional Questions Act*, R.S.N.S. 1989, c. 89; and also file an evidentiary record sufficient for the Court to make a proper determination. None of this was done here.

[27] Instead, counsel for Mr. Cumberland raised an issue of statutory interpretation. He argued that legislation abolishing peremptory challenges ought to be interpreted as impacting upon a substantive right (as opposed to a procedural right) and therefore applied prospectively only. Thus, the same number of peremptory challenges originally available would again be granted when the new jury is selected.

[28] In support of these arguments, counsel for Mr. Cumberland did not tender any evidence and cited only one case: *R v Bain* [1992], 1 SCR 91, ("***Bain***"). In written submissions, counsel for Mr. Cumberland suggested that in *Bain*, "the Court was concerned that if the [jury selection] procedure was utilized, the substantive rights of the Accused could be impacted". In other words, Mr. Cumberland maintains, the entire process by which a jury is selected (including peremptory rights) is not simply procedural but the effect impinges upon a party's vested, substantive rights.

[29] Finally, counsel for Mr. Cumberland proposed that the number of available challenges be re-set for the rescheduled trial. Thus, each party would have a minimum of twelve challenges, depending on the size of the jury. The Crown agreed that "in fairness to the parties" all peremptory challenges previously available to the parties be fully restored - even though its argument was premised on the suggestion that the trial had already begun and was, therefore, being continued. I return to this issue below.

Crown's Position

[30] The Crown did not agree that the effect of eliminating peremptory rights impinges substantive rights or offends the *Charter*. However, the Crown

said that the same jury selection process used in the original trial should be continued because the parties agreed prior rulings regarding after-the-fact conduct continued to bind them. Therefore, the argument continued: "The trial has already begun" and "it would be improper to change even procedural aspects at this stage." The Crown concluded that the procedural aspects which should not be changed at this stage include the availability of peremptory challenges.

[31] In written submissions, the Crown offered no caselaw to support its position. During the course of oral argument, however, the Crown located the following two cases:

1. *R v Hudnut-Pelletier & Melanson*, 2017 NBQB 209 ("***Hudnut-Pelletier***"); and

2. *R v Lee and Wu* (2002), 170 CCC (3d) 225, 2002 CanLII 8304 (Ont. C.A.) ("***Lee***")

[32] In essence, the Crown argued that because the parties have agreed to allow certain rulings to stand at the new trial, the new trial had "already begun" and therefore, the same ground rules which originally applied to jury selection when the trial "began" must continue to apply to jury selection during the "continuation" of the trial.

DECISION AND ANALYSIS

Assessment of the Parties' Positions

[33] The caselaw presented by the parties was relatively limited.

[34] Mr. Cumberland relied entirely on the Supreme Court of Canada decision in *Bain*. However, I disagree that *Bain* supports the contention that the abolition of peremptory challenges in Bill C-75 has the effect of undermining Mr. Cumberland's vested, substantive rights and, therefore, does not apply to the upcoming trial.

[35] *Bain* is not a statutory interpretation case. It did not consider the distinction between legislation which impinges upon vested, substantive rights (which is not retroactive absent clear statutory language) versus legislation which is purely procedural in nature (which applies immediately). In particular, *Bain* does not state that statutory provisions creating a process for selecting a jury (including peremptory challenges) are substantive in nature.

[36] *Bain* was a *Charter* challenge. The accused attacked the jury selection process as it existed at the time as being contrary to Section 11(d) of the *Charter*. As indicated, no *Charter* or constitutional question has been raised here. Even if *Charter* issues were raised (which they are not), *Bain* does not stand for the proposition that peremptory challenges are essential to the presumption of innocence "until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal" as enshrined in Section 11(d) of the *Charter*. Rather, *Bain* simply concluded that a jury selection process in which the total number of "stand by" rights combined with peremptory challenges available to the Crown far outnumbers the peremptory challenges granted to the accused is inconsistent with Section 11(d) of the *Charter*. It was the numerical superiority of procedural rights favouring the Crown in the jury selection process that concerned the court – not the inherent nature of peremptory challenges as somehow substantive or essential to a fair jury selection process.

[37] Similarly, in *R v Gayle* (2001), 154 CCC (3rd) 221 (Ont. C.A.) (leave to appeal refused, (2002) 89 CRR (2d) 188 (Note) ("***Gayle**")*), the Court focussed on how the Crown exercised its peremptory challenges and whether the exercise of that power was somehow at odds with the quasi-judicial nature of the Crown's duty in criminal proceedings or, alternatively, *Charter* rights. The Court's concern was not so much the nature of peremptory challenges in and of themselves – or whether peremptory challenges as part of the jury selection process were integral to *Charter* guarantees. In short, the Court did not consider whether the effect of eliminating peremptory challenges violated the *Charter* or impinged upon vested, substantive rights.

[38] As to the position taken by the Crown, neither of the decisions found by the Crown during the oral submissions are helpful:

1. *Lee* is distinguishable as it relates to the question of whether certain pretrial rulings were rendered void because of a mistrial. That decision was released in 2002 and it predates the addition of Section 653.1 in 2011. Section 653.1 of the *Criminal Code* specifically addresses the binding nature of certain rulings in the event of a mistrial, subject to the interests of justice. I return to this issue below.

2. In *Hudnut-Pelletier*, a mistrial was declared when the original panel of 146 potential jurors was exhausted after only 10 jurors had been sworn. The jury panel proved to be insufficiently large because there

had been a pretrial ruling ordering a bilingual trial. Too many of the potential jurors were unilingual.

The Crown sought to vary the Order requiring a bilingual trial under Section 530 of the *Criminal Code*. In considering that request and in *obiter*, the Court commented that the motion to vary the trial order requiring a bilingual trial "is not a trial *de novo.* I am the trial judge entitled to reconsider and change the original order only if the current circumstances warrant." (para 13). He further warned the parties against simply refiling materials identical to those filed at the original motion for a bilingual trial (para 14). In accordance with Section 530(5), the moving party must prove that circumstances have sufficiently changed to warrant a variation of the original order requiring a bilingual trial.

In this *voir dire*, the Crown focussed on the statement that a proceeding which occurred after the declaration of a mistrial was not a "trial *de novo*" but conceded that *Hudnut-Pelletier* did not fully stand for the proposition that a new trial following a mistrial was a "continuation" of the original trial. Among other things, the statements in *Hudnut-Pelletier* were made in the context of an anticipated pre-trial motion and not in respect to the new trial itself. In addition, *Hudnut-Pelletier* did not address the specific procedures (e.g. peremptory challenges) that would apply when the second trial actually commenced. Indeed, the accused eventually pled guilty and was sentenced so the second trial never began. The sentencing decision may be found at *R v Hudnut-Pelletier & Melanson*, 2018 NBQB 110. Moreover, *Hudnut-Pelletier* involved the interpretation and operation of Section 530, which has limited applicability as it deals specifically with the language rights of the accused. And, as indicated, the comment regarding a "trial *de novo*" was *obiter* in any event.

[39] As indicated, the Crown's argument that the trial has "begun" is premised on the fact that the parties will abide by earlier rulings from Justice Warner (from before this trial was declared with respect to the initial attempt at a jury trial in this matter) concerning the admissibility of evidence of certain after-the-fact conduct. However, that agreement merely reflects the statutory requirements of Section 653.1, which is entitled "Mistrial – rulings binding on at <u>new</u> trial" (emphasis added). It states:

> "In the case of a mistrial, unless the court is satisfied that it would not be in the interests of justice, rulings relating to the disclosure or admissibility of evidence or the *Canadian Charter of Rights and Freedoms* that were made during the trial are binding on the parties in any new trial if the rulings are made — or could have been made — before the stage at which the evidence on the merits is presented." (emphasis added)

[40] Subject to the interests of justice, Section 653.1 enumerates three specific types of rulings which would remain binding on the parties following a mistrial (rulings regarding disclosure, admissibility of evidence and the *Charter*). In this case, the parties agreed that prior rulings regarding the admissibility of evidence would remain binding on them. The Crown may not elevate the effect of that agreement as something other than that which is mandated under Section 653.1 in any event. Section 653.1 does not state that the second trial had already because certain rulings bind the parties. On the contrary, Section 653.1 expressly described any subsequent trial following a mistrial as being a "new" trial – not the continuation of a trial that had begun.

[41] Moreover, as indicated, the issues which remain binding on the Court under Section 653.1 are limited to three specific types of rulings (disclosure, admissibility of evidence and the *Charter*). Section 653.1 does not say that the original procedures in place during the original trial also remain binding regardless of any legislative amendments enacted after the mistrial and before the retrial. As indicated above, the caselaw clearly states that purely procedural statutory amendments are presumed to apply immediately. Absent express, clear statutory language, it would not be in the interests of justice to interpret Section 653.1 in such a way as to sidestep this well-established case law.

[42] The conclusion that the trial has not begun is also consistent with other statutory provision and case law. For example, Section 669.2 of the *Criminal Code* deals with situations where a trial is "discontinued" before one judge and continued before another. The circumstances under Section 669.2, where a trial is continued as if it had already begun, are relatively narrow in scope and are generally limited to a judge being is unable to carry on with the proceedings due to death or illness, for example. Under those unique circumstances, the judge who becomes seized with the matter may either continue the trial as if the trial had already begun or commence the trial again as if no evidence on the merits had been taken (Section 669.2(4)). In any event, Parliament chose to specify the circumstances under which a

trial would be continued as if it already had begun and they do not include either a mistrial or an agreement between the parties to accept certain existing rulings as binding – an agreement that, as indicated, simply complies with Section 653.1.

[43] Finally, there is caselaw to the effect that the course of the trial begins when members of the jury are sworn, and the accused is given in charge of the jury (See: *R v Emkeit* (1971), 3 C.C.C. (2d) 309 (Alta. S.C. App.)) and not when the parties may have agreed that prior rulings would be binding. In this case, a jury for the new trial has yet to be sworn.

ELIMINATING PEREMPTORY CHALLENGES FROM JURY SELECTION: SUBSTANTIVE OR PROCEDURAL?

(a) Distinguishing Substantive from Procedural

[44] On this issue of statutory interpretation, there is a strong presumption that legislative is prospective. A statute is presumed not to be retroactive (i.e. does not apply immediately) unless the language clearly confirms that legislative intent – or retroactivity or retrospectivity is evident by necessary implication. (See, for example, *Gustavson Drilling (1964) Ltd. v M.N.R.*, [1977] 1 S.C.R. 271 and *R. v. Bickford* (1989), 51 C.C.C. (3d) 181 (Ont. C.A.) at p. 165). Bill C-75 neither states that the amendments are retroactive nor does it contain clear transitional provisions.

[45] In these circumstances, the Courts consider the effect of the legislation in question. Statutory amendments which have the effect of impinging upon vested rights will not be interpreted retrospectively absent clear statutory language. However, amendments which are purely procedural in nature will apply immediately to existing proceedings (See: *Shannex RCL Ltd. v. WHW Architects Inc.*, 2014 NSCA 75, at para 20).

[46] In *R. v. Bickford* (1989), 51 C.C.C. (3d) 181 (Ont. C.A.) ("*Bickford*"), at para 185, Robins, J.A. wrote:

> …the presumption against retrospective construction has no application to enactments which relate only to procedural or evidentiary matters. Speaking generally, no person can be said to have a vested right in procedure or a right in the manner of proof that may be used against him: *Howard Smith Paper Mills Ltd. v. The Queen* (1957), 118 C.C.C. 321, 8 D.L.R. (2d) 449, [1957] S.C.R. 403 (S.C.C.); *Wildman v. The Queen* (1984), 14 C.C.C. (3d) 321, 12 D.L.R. (4th) 64, [1984] 2 S.C.R. 311

> (S.C.C.) ... His right is to be tried according to law; that is, in accordance with the evidentiary rules and procedural requirements in effect at the time of his trial. How does one distinguish between legislation that impinges upon substantive or vested rights from legislation that is purely or exclusively procedural?

[47] In *Bickford* above, Robins, J.A. offered the terms "procedural requirements" and the "manner of proof" or "evidentiary rules" to help identify legislative provisions which are exclusively procedural. Similarly, at page 161 of Professor Sullivan's text *Statutory Interpretation*, 3d Edn. (2016), she describes "procedural legislation" as "...law that does not affect substantive rights in any way; it merely sets out modalities for the enforcement of existing rights, obligations or prohibitions." (page 361). In *Re Application Under s. 83.28 of the Criminal Code*, 2004 SCC 42 ("*Re Application Under s. 83.28 of the Criminal Code")*, the Supreme Court of Canada further clarified that "procedural legislation concerns the conduct of actions" or the process by which hearings "are to be carried out" (at para 56) or, quoting from *Sullivan and Driedger on the Construction of Statutes* (4th Ed, 2002) at page 582, "the methods by which facts are proven and legal consequences are established in any type of proceedings."

[48] In *Angus v Hart*, [1988] 2 SCR 256 (SCC) ("*Angus v Hart*") the Supreme Court observed:

> Normally, rules of procedure do not affect the content or existence of an action or defence (or right, obligation, or whatever else is the subject of the legislation), but only the manner of its enforcement or use….Alteration of a "mode" of procedure in the conduct of a defence is a very different thing from the removal of the defence entirely. (at pp. 265 to 266)

[49] The notion that amendments will only have immediate effect if they are "purely" procedural responds to the majority decision in *Dineley* which stated that:

> Procedural provisions may, in their application, affect substantive rights. If they do, they are not purely procedural and do not apply immediately (P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at p. 191). Thus, the key task in determining the temporal application of the Amendments at issue in the instant case lies not in labelling the provisions "procedural" or "substantive", but in discerning whether they affect substantive rights. (para 11)

[50] Having said that, the majority in *Dineley* continued by adopting the following statement from the decision of LaForest, J. in *Angus v Hart*:

> Normally, rules of procedure do not affect the content or existence of an action or defence (or right, obligation, or whatever else is the subject of the legislation), but only the manner of its enforcement or use. ... Alteration of a "mode" of procedure in the conduct of a defence is a very different thing from the removal of the defence entirely." [Emphasis in original (cited at para 15 of *Dineley*)]

[51] Beyond these broad statements of principle, the assessment of whether a statutory provision is procedural "must be determined in the circumstances of each case" and "for a provision to be regarded as procedural, it must be exclusively so" (*Re Application Under s. 83.28 of the Criminal Code* at para 56). If the provisions impinge upon substantive rights, they are not exclusively procedural and will not apply immediately. (See also *Dineley*, para 11, and *Re Application Under s. 83.28 of the Criminal Code,* para 57).

[52] By way of example, legislative amendments which are recognized as effecting "substantive" rights include changes to the nature (or elements) of the offence (*Angus v Hart*); or changes to the defences which would have been available to Mr. Cumberland (e.g. *Dineley* regarding the repealed "Carter Defence" and *Evans* or *Bengy* regarding changes to the defence of self-defence. (See para. 11 above).

[53] By contrast, as indicated, "procedural" legislation relates to the way an action or defence is enforced; or the method of proof (evidence). For example, in *R v Wildman*, [1984] 2 S.C.R. 311 (*"Wildman*"), the accused's stepdaughter was murdered. The trial judge improperly excluded important, admissible evidence that would have corroborated the accused's version of events and potentially undermined a damaging factual inference that the accused was present at the scene of the murder. The Court concluded that the excluded evidence "while sufficient to support a conviction, would not make an acquittal unreasonable."

[54] The Court ordered a new trial but was left with another residual issue regarding whether the accused's wife was a compellable witness. She was not called as a witness because, Crown counsel told the jury, the prosecution was prohibited from calling her. The Court concluded that the dispute over whether the accused wife could be compelled to give evidence was resolved with the introduction of a new Section 4 to the *Canada Evidence Act.* That section specifically confirmed that the accused's wife was "a competent and compellable witness for the prosecution without the consent of the person charged."

[55] Lamer, J (as he then was) acknowledged that some rules of evidence "are not merely procedural, they create rights and not merely expectations and, as such, are not only adjectival but of a substantive nature. Such has been found to be the case for rules or laws creating presumptions arising out of certain facts" (at para 47). However, he concluded that "[s]pouses do not have a substantive right to confidentiality as to what either was seen doing by the other or to the confidentiality of what was to the other communicated by either" and that the subject matter of the new Section 4 in the *Canada Evidence Act* was "not the result of a substantive right to confidentiality and is merely procedural." (at para 48).

[56] Similarly, in *R v Howard Smith Paper Mills Ltd.*, [1957] S.C.R. 403 (SCC) ("***Howard Smith Paper***"), a dispute arose around the effect of amendments to the *Combines Investigation Act*, 1927. The amendments provided that written interoffice memoranda were *prima facie* evidence against that corporation and the other conspirators mentioned in the documents. The Supreme Court of Canada concluded:

> While section 41 (the amendment at issue) makes a revolutionary change in the law of evidence, it creates no offence, it takes away no defence, it does not render criminal any course of conduct which was not already so declared before its enactment, it does not alter the character or legal effect of any transaction already entered into; it deals with a matter of evidence only and, in my opinion, the learned trial judge was right in holding that it applied to the trial of the charge before him.

[57] Finally, in *R v Chaudhary*, 67 C.R.R. (2d) 107 (Ont. S.C.J.) ("***Chaudhary***"), the applicant was convicted of first degree murder and sentenced to life imprisonment with no possibility of parole for 25 years. She served 15 years and applied to have her parole ineligibility reduced under what is referred to as the "faint hope" provisions of the *Criminal Code*.

[58] Just prior to making her application, the "faint hope" provisions of the *Criminal Code* were amended to require a unanimous jury. Previous legislation only required a 2/3 majority.

[59] LeSage, C.J.S.C. upheld the constitutionality of this provision and concluded that the amendment was purely procedural in nature. He wrote at paragraph 11:

> This legislation does not change the applicant's right, that is the right to apply to have her period of parole ineligibility reduced. It does not lengthen her sentence. It does not increase her period of ineligibility. What it does do is simply change the way she is

> required to establish the right to seek earlier parole. The applicant has not had her right to parole nor even her right to apply for parole changed by the amendments. Her pre-existing right was simply to ask the Court to permit her the right to seek parole. That has not changed. The change is in how she achieves the right to apply and that, in my opinion, is procedural, not substantive. The new legislation, therefore, is retrospective and not in violation of section 7 of the Charter of Rights and Freedoms.

[60] As to the possible connection between peremptory challenges and the *Charter*, there is an underlying theme in the arguments of defence counsel that the elimination of peremptory rights may engage either Section 11(d), 11(f) or 7 of the *Charter*; and that *Charter* rights might somehow be at risk. Again, this is not a *Charter* challenge. However, the argument seems to be that the potential implication of *Charter* rights might somehow elevate the nature of peremptory challenges to a vested, substantive right.

[61] At paragraph 21 of *Dineley*, Deschamps, J. wrote for the majority that:

> the conclusion that the infringement is justified in the context of the new legislation does not alter the fact that constitutional rights are affected. This is a further indication that the new legislation affects substantive rights, since constitutional rights are necessarily substantive. When constitutional rights are affected, the general rule against the retrospective application of legislation should apply." [Emphasis added]

[62] While constitutional rights are necessarily substantive in nature, I do not agree that the Supreme Court of Canada concluded in *Dineley* that constitutional rights are "affected" (and therefore substantive rights are engaged) by simply raising an argument that statutory amendments might conceivably attract a *Charter* argument – without having to actually make that *Charter* argument and present the necessary evidence to support it. I note the following:

1. The Supreme Court of Canada has previously cautioned against leaping to these sorts of conclusions without supporting evidence or research (See, for example, *R v Find*, 2001 SCC 32, at para 59);

2. Context is important. In *Dineley*, the Court had already determined in the prior case of *R v St-Onge Lamoureux*, (2012), 2012 SCC 57, 2012 CarswellQue 10777, 2012 CarswellQue 10778 (S.C.C.) that there was a *Charter* violation. Specifically, the Supreme Court previously determined that "statutory presumptions that the results of the breathalyzer analyses are accurate and that they are identical to the blood alcohol level of the accused at the time of the alleged offence infringe the constitutionally protected right

to be presumed innocent, as they relieve the Crown of the requirement of proving the guilt of the accused beyond a reasonable doubt before he or she need to respond." (*Dineley*, para 20). As a result, the focus turned to Section 1 of the *Charter* and whether the violation could be justified through statutory means by which an accused may rebut that defence (e.g. the Carter Defence). Put slightly differently, the statement in *Dineley* that constitutional rights were "affected" was made in the circumstances of an actual (not potential) *Charter* violation and a corresponding section 1 analysis. It did not deem potential *Charter* arguments to be substantive rights and effectively allow an argument to masquerade as a right. Here, there is no such *Charter* violation and I note the recent decision of *Chouhan* where McMahon, J. concluded that the abolition of peremptory rights does not violate sections 11(d), 11(f) or 7 of the *Charter*.

(b) **Peremptory Challenges: Origins and A Brief Comparative Analysis**

[63] Peremptory challenges are part of a jury selection process that has been in place for many centuries and which originated in a world far removed from our own. The Assize of Clarendon of 1166 established by King Henry II is often viewed as a point of origin in that it established the grand jury, or presenting jury, consisting of 12 men in each hundred and 4 men in each township.

[64] Peremptory challenges were introduced to the jury selection many, many centuries ago. It was an age which did not share, for example, the more modern concept of what constitutes a diverse or representative jury. The jury selection process was also born in an age that did not share our more modern views of impartiality. For example, a juror's qualifications were considered *enhanced* if they knew and were familiar with the accused. Indeed, there is some authority suggesting that the concept of peremptory challenges originated because the jurors would be well known to the parties and that, therefore, their obvious biases would be equally apparent, even if those biases were not in the evidence.

[65] A helpful historical summary is provided at paragraphs 50 to 53 of *Matthew Raymond (Ruling #4)*. Another very helpful summary of the history behind the jury system is provided at paragraphs 41 to 57 of Justice Warner's decision in *Geophysical Service Inc. v Sable Mary Seismic Inc*, 2009 NSSC 79.

[66] The following quote from Blackstone, *Commentaries on the Laws of England*, W.D. Lewis, ed., Vol. 4, at page 353 and page 1738 (of Lewis's edition) is often cited to explain at least the historical purpose and advantages associated with peremptory challenges:

> In criminal cases, or at least in capital ones, there is, *in favorem vitae*, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all, which is called a *peremptory* challenge; a provision full of that tenderness and humanity to prisoners for which our English laws are justly famous. This is grounded on two reasons. 1. As everyone must be sensible what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another, and how necessary it is that a prisoner (when put to defend his life), should have a good opinion of his jury, the want of which might totally disconcert him, the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike. 2. Because, upon challenges for cause shown, if the reasons assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment, to prevent all ill consequences from which the prisoner is still at liberty, if he pleases, peremptorily to set him aside. (Quoted in *Bain*, at para 54 and *R v Cloutier*, [1979] 2 S.C.R. 709 ("*Cloutier*"), at para 24)

[67] That said, the same "arbitrary and capricious" nature of peremptory challenges has also given has not always generated salutary results. The same "arbitrary and capricious" nature, however, has also been the source of problems. It is not unfair to say that reform has typically responded to perceived abuses of peremptory challenges arising from these "arbitrary and capricious" qualities. For example, in *Bain*, Stevenson, J. described the interesting origins of the Crown's stand-by powers. By way of background, the Crown historically had an unlimited number of peremptory challenges. Abuses arose in which the Crown peremptorily challenged almost the entire array thus precipitating a mistrial – with the accused remaining in custody in the interim. This abuse was curtailed in 1305 by *An Ordinance for Inquests*, 33 Edw. 1, c. 4, which required the Crown to provide a reason for any challenge, effectively a challenge for cause. However, the "cause" did not have to be articulated unless or until all potential jurors in the panel had been exhausted. Thus, the stand-by power was born (*Bain*, paras 50 to 51).

[68] Many common law jurisdictions inherited the jury selection process as originally conceived in England and, in doing so, also inherited the notion of

peremptory challenges. Each has responded in different ways to problems associated with peremptory challenges.

[69] The number of peremptory challenges in England's criminal jury trial were progressively reduced to four until 1988 when they were eliminated altogether. (*Criminal Justice Act, 1988*, s. 118(1)).

[70] In Northern Ireland, the accused had twelve peremptory challenges in a criminal trial until 2007 when peremptory challenges were abolished (*Justice and Security (Northern Ireland) Act*, 2007, s. 13).

[71] In Australia:

1. The State of Western Australia reduced the number of peremptory challenges in criminal jury trials from five to three in 2011 (*Juries Legislation Amendment Act*, 2011 (Western Australia) s. 4). This occurred despite their Law Reform Commission's recommendation that no change be made (Law Reform Commission of Western Australia, Selection, Eligibility and Exemption of Jurors: Final Report, Report No 99 (2010));

2. The State of New South Wales reduced the number of peremptory challenges from eight (and twenty in murder trials) to three in 1987 (*Jury (Amendment) Act*, 1987 (NSW) sch 1, cl 5); and

3. The Law Reform Commission for the State of Victoria published its "Jury Empanelment Report" in September 2014. It confirmed that the number of peremptory challenges available in criminal proceedings was reduced from 20 in 1857 to 15 in 1876 to eight in 1928 to six in 1993 (p. 24). The Law Reform Commission recommended that the number of peremptory challenges for each separately represented party be reduced to two (p. 58).

[72] On December 25, 2008, New Zealand reduced the number of peremptory challenges from six to four in matters involving a single accused. Eight peremptory challenged are awarded to each of the Crown and the accused where there is more than one accused (*Juries Amendment Act 2008* (New Zealand), s. 20).

[73] In March 2010, the Law Reform Commission of Ireland published a comprehensive consultation paper entitled "Jury Service". At the time, Ireland's *Juries Act 1976* granted the prosecution and the accused seven

peremptory challenges each in a criminal jury trial. The Law Reform Commission provisionally recommended that the number of peremptory challenges remain at seven but invited submissions as to whether that number should be reduced (pp. 167 and 215). The number has not been reduced, to date.

[74] The peremptory challenge process in the United States includes sometimes extensive *voir dires* where jurors are questioned. It has resulted in problems which have been addressed through the US Constitution, in landmark constitutional cases such as *Batson v Kentucky*, 476 US 79 (1986), where a majority of the US Supreme Court found that, once the defendant raises a *prima facie* case of racial discrimination with respect to peremptory challenges, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. Similar procedures are in place where peremptory challenges are used to address concerns over discrimination on the basis of gender (*JEB v Alabama ex rel. T. B.*, 511 U.S. 127 (1994)).

[75] In Canada, prior to Bill C-75, the number of peremptory challenges depended on the offence. Section 634 of the *Criminal Code* confirmed that there were:

1. Twenty peremptory challenges granted to an accused charged with high treason or murder;

2. Twelve peremptory challenges for offences where the accused faced imprisonment of a term more than five years; and

3. Four peremptory challenges for all other offences.

[76] The number of peremptory offences identified above assumes a jury of 12. The number increases by 1 if the jury size is increased to 13 jurors; and by 2 if the jury size is increased to 14 (s. 634(2.01), *Criminal Code*)

[77] The number of peremptory challenges available to the accused has remained unchanged in Canada since at least 1953 (*Criminal Code*, S.C. 1953-1954, Ch. 51, s. 542). By contrast, the Crown historically exercised stand by powers. In 1992, the right of the Crown to stand by jurors was abolished. At the same time, the Crown was granted the same number of peremptory challenges awarded to the accused, thus ensuring equality in the jury selection process.

[78] I conclude this section with the following summary observations:

1. Peremptory challenges have been in use for centuries. Jurisprudential comments regarding peremptory rights are enriched by these deep historical roots. At the same time, those roots trace back to a bygone age that, for example, predates the *Canadian Charter of Rights and Freedom*;

2. Peremptory challenges were historically extolled as representing the "tenderness and humanity" of the common law jury selection process due to their being "an arbitrary and capricious species" which might exclude a juror "without showing any cause at all". This same "arbitrary and capricious" quality gave rise to problems when peremptory challenges were used to discriminate on the basis of race or gender. No common law jurisdiction has expanded the availability of peremptory challenges. All common law jurisdictions have progressively limited the use of peremptory challenges in some fashion. Some have abolished the peremptory challenge altogether;

3. Prior to Bill C-75, the number of peremptory challenges available in Canada was significantly higher than in the United Kingdom, Australia, New Zealand and Ireland. There are potentially more peremptory challenges available in the United States although the manner in which the jury selection process has evolved in the United States is so different from other common law jurisdictions that meaningful comparison is somewhat difficult. That said, the United States has also attempted to reform and remediate perceived abuses with peremptory challenges.

Analysis: Are Peremptory Challenges Substantive or Purely Procedural?

[79] These are obviously complicated issues but, with respect to those who hold a contrary view, I have concluded that the elimination of peremptory challenges in section 269 of Bill C-75 is purely procedural and applied immediately upon the statute coming into force. My reasons are:

1. Section 269 of Bill C-75 neither amends the offences which Mr. Cumberland is alleged to have committed nor takes away any of his defences. All those vested rights remain the same and will govern the jury trial;

2. Section 269 of Bill C-75 removes the entitlement to peremptory challenges when selecting a jury, but that relates to the process of choosing the trier of fact (i.e. the jury). Mr. Cumberland has the right to be tried by an independent and impartial jury. The amendments do not remove that right. Mr. Cumberland is not being deprived of a jury. Section 269 of Bill C-75 simply modifies the process by which that jury will be selected. On its face, Section 269 simply modifies the procedural requirements around how jury selection is to occur and it relates to the conduct of that process alone. To the extent Section 269 modifies the way in which the jury operates, the change is exclusively procedural (*Chaudhary*);

3. Mr. Cumberland will be tried by a jury constituted in accordance with the provisions of the *Criminal Code.* There is nothing to suggest that the process is somehow unfair – or that the jury lacks independence, representativeness or impartiality;

4. There are various justifications offered for peremptory rights. They typically include or relate to providing the accused some measure of control over the jury selection process; or avoiding having to potentially alienate potential jurors if forced to challenge their qualifications for cause. However, at their core, these justifications are all related in that they seek to engage a certain understanding of what may be required for a fair trial and impartial juror. There is no question that the accused is entitled to a fair trial and impartial jury. But these are issues which directly engage the *Charter*. They clearly and almost exclusively speak to notions of fair trials and independent juries which is the subject matter of Sections 11(d) and 11(f) of the *Charter*;

5. I respectfully disagree with the proposition that the peremptory challenge is so historically entrenched in the criminal law that they "must be regarded, standing on its own, as a substantive right." (*Subramaniam,* para 44). I similarly and respectfully disagree that peremptory challenges have attained the "status of a substantive and fundamental right with respect to the application of the rights to peremptory challenges by the Code's statutory procedures" (*Matthew Raymond (Ruling #4),* para 55). If peremptory rights constitute vested substantive rights, they would be subsumed within the *Charter* guarantees – and should properly be subject to a *Charter* challenge. Peremptory rights are undoubtedly ancient and deeply rooted in the

criminal law. However, peremptory challenges should not be elevated to the status of vested, substantive rights because of their age and lineage alone. The reforms which have occurred in numerous common law jurisdictions regarding peremptory challenges also suggest that peremptory challenges are capable of abuse;

6. In *R v Ward*, [1972] 3 O.R. 664, 8 C.C.C. (2d) 515 (Ont. C.A.) ("***Ward***") the accused unsuccessfully challenged a juror for cause. After failing the challenge, the accused sought to use a peremptory challenge to exclude the juror in any event. The trial judge refused, and the juror was empanelled. The Ontario Court of Appeal described the issue as "an important procedural one which affects the fundamental rights of an accused person to be tried by tribunal properly constituted" (para 2). However, *Ward* simply confirms the substantial and fundamental right to be tried by a tribunal properly constituted in accordance with the provisions of the *Criminal Code*. Respectfully, *Ward* does not appear to go beyond the substantial and fundamental right to have jury selection occur in accordance with the *Criminal Code* – which is much different from characterizing peremptory challenges as a substantial and fundamental right;

7. I also respectfully disagree that procedural rights are substantive in nature if they only might (or might not) "affect" *Charter* rights. An argument under the *Charter* should be made, with evidence. Otherwise, in my view, claims of *Charter* violations should not masquerade as issues of statutory interpretation. In this case, there is no *Charter* challenge. Without evidence or a proper *Charter* challenge, I am not prepared to simply assume, for example, that the loss of peremptory challenges in the jury selection process is "substantive" in nature because it is somehow inextricably linked to the right of the accused under Section 11(d) of the *Charter* "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal". The Supreme Court of Canada has previously cautioned against leaping to these sorts of conclusions without supporting evidence or research (see, for example, *R v Find*, 2001 SCC 32, at para 59). Respectfully, framing the issue around whether the abolition of peremptory rights may "affect" or "engage" the *Charter* could blur the distinction between those amendments which have the effect of impinging upon vested, substantive rights and those which are purely procedural in

effect. And, in doing so, could unduly expand or confuse the scope of those amendments which are, in fact, purely procedural in nature. On this issue, and while those recent decisions which post-date my original "bottom decision" on September 5, 2019 obviously had no impact upon my decision, I do note that *Chouhan* actually involved a *Charter* challenge and the Court concluded that Section 269 of Bill C-75 is both procedural in nature (para 111) and did not violate the *Charter* (para 103);

8. In *Subramaniam*, the election to be tried by judge and jury was characterized as a "transaction" (para 45). At that point in time, the accused's "legal situation was tangible and concrete, and became sufficiently constituted" and it "entailed a specific set of expectations as to how he would participate in the jury selection process." (para 51) I respectfully disagree that the act of electing trial by judge and jury constituted a "transaction" which entitled the parties to peremptory challenges regardless of whatever procedural amendments were enacted before the trial began. The concept that a "transaction" gives rise to vested rights (or enforceable expectations) originated with *Howard Smith Paper*. In *Howard Smith Paper*, the accused corporations were charged jointly and found guilty of combining to unduly prevent or lessen competition in the fine paper industry in violation of the *Criminal Code*. After charges were laid, Parliament amended the governing provisions of the *Criminal Code*. The Supreme Court of Canada determined that amendments were purely procedural in nature. However, in the course of making that decision, Cartwright, J (Locke, J, concurring) wrote:

> But where the effect would be to alter a transaction already entered into, where it would be to make that valid which was previously invalid — to make an instrument which had no effect at all, and from which the party was at liberty to depart as long as he pleased, binding — I think the *prima facie* construction of the Act is that it is not to be retrospective, and it would require strong reasons to shew that is not the case….While s. 41 makes a revolutionary change in the law of evidence, it creates no offence, it takes away no defence, it does not render criminal any course of conduct which was not already so declared before its enactment, it does not alter the character or legal effect of any transaction already entered into; it deals with a matter of evidence only and, in my opinion, the learned trial judge was right in holding that it applied to the trial of the charge before him." [Emphasis added.] (paras 72 to 73)

Thus, the word "transaction" refers to prior acts taken before charges were laid (or claims made) and legislation that seeks to alter the legal consequences of those act. It does not characterize procedural decisions in an existing proceeding as "transactions". I also refer to *R v. Stevens*, [1988] 1 SCR 1153 ("***Stevens***"), which confirms that:

> No person has a vested right in any course of procedure, but only the right of prosecution or defence in the manner prescribed for the time being, by or for the court in which he sues, and if an Act of Parliament alters that mode of procedure, he can only proceed according to the altered mode. "Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be." (*Gardner v. Lucas* (1878) 3 App. Cas. 582, *per* Lord Blackburn at p. 603.)" (*Stevens,* para 27)

9. I respectfully disagree that the rhetorical questions posed by Ferguson, J. at paragraph 105 to106 of *Matthew Raymond (Ruling #4*) constitute a test for assessing whether the effect of the statutory amendment eliminating peremptory rights is substantive. The questions are:

> Firstly, have the changes brought about by C-75 affected: "the comprehensive scheme which was designed to ensure as fair a trial as is possible and ensure that the parties and the public at large are convinced of its impartiality?"
>
> Secondly, do the provisions of C-75 constitute: "…[an] addition to this process from another source [that] would upset the balance of the carefully defined jury selection process?"
>
> Thirdly, do the provisions of C-75 amount to: "…[an] attempt to add to the power of the judge"?

These questions were derived from paragraph 34 of *Barrow*. In *Barrow*, the trial judge took it upon himself to create and conduct a challenge for cause process related to pre-trial publicity out of earshot of all counsel and accused. At the time, challenges for cause were to be determined by a mini-jury of two sworn (or potential) jurors – and not the trial judge. In presuming to assume full control over the challenge for cause process, the trial judge ignored the procedural provisions of the *Criminal Code*. The Crown attempted to justify the

actions of the trial judge by reference to Nova Scotia's *Juries Act*. However, the Supreme Court of Canada concluded that "The province cannot give the judge any power to make decisions as to partiality, and any judge who attempts to participate in such decisions usurps the function of the jurors established by [the *Criminal Code*]" (at para 34). The facts are very different and involve an attempt by the trial judge to usurp the powers and process set out in the *Criminal Code*. Respectfully, *Barrow* is distinguishable and does not address or provide directions for distinguishing legislation impinging upon vested, substantive rights from that which has the effect of impinging upon purely procedural rights. Moreover, in *Barrow* the Supreme Court of Canadas confirmed that the authority of Parliament to establish the process by which juries are selected in criminal trials;

10. Unlike many of the post-*Charter* criminal law cases which address alleged problems with the jury selection process, this was not brought before the Court as a *Charter* challenge. Again, the defence raised an issue of statutory interpretation. There is law to suggest that *Charter* rights are engaged or affected if the jury selection process is structured in such a way as to provide one side with an unfair advantage over another (e.g. *Bain*, where the Crown's peremptory challenges combined with challenges for cause gave it "numerical superiority" over the accused). That is not the case here – even if this were a *Charter* case, which it is not. The Crown and the accused have both lost their right to peremptory challenges. To that extent, no side was given any unfair advantage. Similarly, there is law to suggest that a party may abuse or exploit the jury selection process in a manner which is unfair or inconsistent with the *Charter* (*Gayle*). But, again, that is not the case here. Indeed, as at the date of the *voir dire* jury selection has not yet even begun;

11. By relying exclusively on *Bain*, Mr. Cumberland appears to suggest that peremptory challenges in the context of the jury selection process must be "substantive" in nature because they have previously been considered in the context of successful *Charter* challenges. However, there is no law or evidence before me to suggest that the presence (or absence) of peremptory challenges in the jury selection process is inconsistent with the *Charter*.

12. While the process through which a jury is selected may have changed, a party is not entitled to the most favourable procedures they might

> imagine or believe to be advantageous. Equally, the parties to a criminal proceeding cannot, by agreement, determine which statutory procedures they are prepared to accept. The procedural provisions in the *Criminal Code* reflect the interests not simply of the Crown and the Accused but more broadly reflect Parliament's interest in wider societal concerns (See: *R v Mills*, [1993] 3 SCR 668, at para 7 of Lamer, CJC's dissent and at para 72 of the majority decision written by McLachlin and Iacobucci JJ (L'Heureux-Dubé, Gonthier, Major, Bastarache, Binnie JJ. concurring)). Obviously, the fact that both parties may prefer to have peremptory challenges does not mean that peremptory challenges are inherently preferable – or that the trial would somehow become fundamentally unfair by their absence.

[80] The motion is dismissed.

Keith, J.