
CANADA / JUDGMENT

R. v. Subramaniam

2019 BCSC 1601

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Supreme Court of British Columbia

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2019 BCSC 1601 R. v. Subramaniam

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Subramaniam,

2019 BCSC 1601

Date: 20190920

Docket: X080597

Registry: New Westminster

Regina

v.

Rajkumar Subramaniam

Corrected Judgment: The text of this judgment was corrected at paragraph 42 on September 24, 2019.

Before: The Honourable Mr. Justice A. Saunders

Ruling re: Jury Selection Procedure (Application of Bill C-75, s. 269)

Counsel for the Crown:

S. Paulson

Counsel for the Accused:

P.M. Bolton, Q.C.

A. Sehmbi

Place and Date of Hearing:

Vancouver, B.C.

September 10, 2019

Written Submissions of the Crown Received:

September 12 and 18, 2019

Written Submissions of the Accused Received:

September 17 and 19, 2019

Place and Date of Judgment:

New Westminster, B.C.

September 20, 2019

- [1] This ruling addresses the question of whether certain amendments to the provisions of the Criminal Code, R.S.C. 1985, c. C-66 [Code] governing the process for selection of jury members, that came into force on September 19, 2019, will govern the upcoming jury selection in this matter, scheduled for September 24.
- [2] A previously scheduled pretrial conference was held on September 10. In advance of that pretrial conference, I circulated a memorandum to counsel asking them to be prepared to state their positions and make submissions on this question. Counsel provided brief submissions at that time, which were then supplemented by written submissions emailed to the Court. I thank counsel for the thoroughness of their submissions, in particular given the limited time available.
- [3] 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, S.C. 2019 c. 25, passed Third Reading in the House of Commons on December 3, 2018, and following passage in the Senate attained royal assent on June 21, 2019.
- [4] Section 269 of Bill C-75 repeals ss. 633 and 634 of the Code, and replaces them with a new s. 633. This has two effects. The first is the expansion of the powers of the judge superintending the jury selection process, under s. 633 of the Code, to direct a juror - that is, a potential member of the petit jury of 12 who will hear the case - to stand by, by adding to the relevant considerations the maintenance of public confidence in the administration of justice. The second effect is the elimination of the right of an accused to challenge a juror peremptorily, formerly set out in s. 634.

- [5] (Other amendments that relate to the process of jury selection include amendments consequential to the repeal of s. 634, and modernization of the language used in the Code. There are also very substantive changes to the process of challenges for cause; Mr. Subramaniam has not, however, given notice of an intention to challenge for cause on the ground of prejudice, and I therefore make no comment on those amendments.)
- [6] Mr. Subramaniam has been charged with unlawful importation and possession of a controlled substance, under the Controlled Drugs and Substances Act, S.C. 1996, c. 19. The offences are alleged to have been committed in July 2014. Charges were sworn in April 2015. On July 7, 2015, Mr. Subramaniam elected trial by provincial court judge, and trial dates were set for May 2016. He then changed counsel, and new dates were scheduled to accommodate counsel's schedule. Mr. Subramaniam's new counsel, Ms. Dance, died in December 2016. His present counsel, Mr. Bolton Q.C., was then retained, and further new trial dates were scheduled.
- [7] On January 24, 2018, Mr. Subramaniam gave notice of his intention to re-elect to trial by judge and jury. He underwent a preliminary hearing in Provincial Court in February 2018, and was ordered to stand trial. Trial in this Court, before a judge and jury, was initially scheduled to commence December 10, 2018, and a jury was selected on November 27, 2018. On December 7, 2018, I adjourned the trial to allow the accused to proceed with an application for disclosure, and discharged the jury.
- [8] The trial is now scheduled to commence Monday September 30, 2019, with jury selection on September 24.
- [9] The Coming into Force provisions of Bill C-75 provided, under s. 406, that s. 269 would come into force on the ninetieth day after royal assent. That date, September 19, 2019, has now passed.
- [10] The question before me, as stated above, is whether those s. 269 amendments, which are now in force, will apply to the upcoming jury selection.
- [11] The legal framework governing this issue may be summarized as follows. If a clear intent to have an amendment take effect immediately can be discerned from the wording of the legislation, then that intent will govern, and any principle of interpretation to the contrary will yield. In the present case, no such intent is stated or implied in Bill C-75. Other rules and principles of statutory interpretation are therefore engaged. Generally, the governing interpretive principle as to whether an amendment to legislation has immediate effect and applies to cases already underway at the date the amendment comes into force is whether the amendment affects substantive or vested rights, or whether it is purely procedural: *R. v. Dineley*, 2012 SCC 58 [Dineley]; *Application under s. 83.28 of the Criminal Code*, 2004 SCC 42; *Canada (Attorney General) v. Almalki*, 2016 FCA 195.

- [12] This general principle is reflected in the provisions of the Interpretation Act, R.S.C. 1985 c. I-21, that govern the effect of the repeal of legislation. (By operation of s. 2 of the Interpretation Act, the replacement of ss. 633 and 634 of the Code with a new s. 633 is a "repeal".)
43. Where an enactment is repealed in whole or in part, the repeal does not
- (c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed .
44. Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,
- (c) every proceeding taken under the former enactment shall be taken up and continued under and in conformity with the new enactment in so far as it may be done consistently with the new enactment;
- (d) the procedure established by the new enactment shall be followed as far as it can be adapted thereto
- (ii) in the enforcement of rights, existing or accruing under the former enactment, and
- (iii) in a proceeding in relation to matters that have happened before the repeal .
- [13] For the reasons set out herein, I have determined that the Bill C-75 s. 269 amendments to the Code are not purely procedural, but affect a right Mr. Subramaniam had previously acquired. The amendments will not apply to the September 24, 2019 jury selection.

Positions of the Parties

- [14] I summarize the positions of the parties as follows. I acknowledge that the brevity of these summaries does not fully reflect all the nuances of counsel's written submissions.
- [15] The Crown submits that an accused has a right, guaranteed by the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [Charter] to an impartial jury, but no vested right in any particular means by which that jury is chosen. There are, it is submitted, no stand-alone rights to peremptory challenges, to a perfectly favourable jury, nor to a perfectly representative jury. The Code's provisions for excusing jurors and challenging for cause, and the enhanced power to stand by jurors during selection, provide adequate protection of an accused's right to a fair trial by an impartial, independent tribunal. Therefore, the Crown says, s. 44 of the Interpretation Act applies, and the amendments take immediate effect upon coming into force, applying to all jury selections made after that date.
- [16] The defence submits that while the elimination of peremptory challenges may be aimed at eliminating discrimination in the jury process, the right to those challenges is of particular importance to Mr. Subramaniam, a person of Sri Lankan origin and a person of colour, in

ensuring a jury that is diverse, fair, and balanced, from his perspective. In the absence of prior notice of the jury list, the rights to challenge the array and challenge individual jurors for cause do not provide a meaningful vehicle for the accused's participation in the selection process to avoid any perceived racial bias on the part of jurors. Constitution of the tribunal and the means by which it is constituted have always, it is submitted, been deemed fundamental to a fair trial, and it is unfair and prejudicial to Mr. Subramaniam's position as an accused to subject him to an entirely new regime of jury selection.

Peremptory Challenges

- [17] The time constraints at work in making this ruling have not allowed for the preparation of a comprehensive survey of the role of peremptory challenges in Canadian criminal law. I am able, however, to refer to a few points pertinent to the issue at hand.
- [18] First, the right to a trial by an independent and impartial tribunal is guaranteed by s. 11(d) of the Charter. Section 11(f) of the Charter guarantees the right to a trial by jury, except for military trials, where the maximum punishment for the offence is imprisonment for five years or a more severe punishment. The right to a trial by jury not only engages the Charter guarantee of an impartial tribunal, but also implies that the jury, as trier of fact, will be representative of the community. As stated by Madam Justice L'Heureux-Dubé in *R. v. Sherratt*, [1991] 1 S.C.R. 509 at p. 525:

Indeed, without the two characteristics of impartiality and representativeness, a jury would be unable to perform properly many of the functions that make its existence desirable in the first place .

[T]he in-court selection procedure, set out in the Criminal Code, can impact on the representativeness of the jury in some situations .

- [19] The right to a jury trial is secured through the accused making an election. The election of the mode of trial is intimately linked with an accused's right to evaluate evidence and make strategic choices, in furtherance of their Charter right to make full answer and defence. This linkage is implicitly acknowledged in the Government's "Legislative Background" to Bill C-75 (Canada, Department of Justice, Legislative Background: An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts, as enacted (Bill C-75 in the 42nd Parliament) (Ottawa: Department of Justice Canada, 2018)) (the "Legislative Background"). Commenting on the Bill's s. 254(1), which loosens the timeframes respecting an accused's right of re-election, the Legislative Background states:

This period (i.e., before the 15th day following the completion of the preliminary inquiry) is considered too restrictive and limits the accused's opportunity to fully assess the numerous issues related to their re-election. The period of time during which an accused can re-elect as of right must be sufficient to allow them to take the necessary steps to make an informed decision on re-election, but should not unnecessarily prolong the period so as to impact the effectiveness of the criminal justice system.

[20] Under English common law, an accused electing trial by jury was provided the opportunity to shape the jury through excluding summoned jurors, by means of challenges. These included challenges to the "array" - the entire panel of jurors summoned - and to the "poll" or the individual jurors. Challenges to the poll, in turn, were "peremptory", and "for cause". The practice in English courts, dating back at least to the early 19th c., was that an accused would be advised of their right of challenge during the arraignment, a practice that has continued in Canada up to the present day. (See *R. v. Morin* (1890), 18 S.C.R. 407 at p. 411; and Joseph Chitty, *A Practical Treatise on the Criminal Law* (Riley's Edition, Philadelphia, 1819, p. 533.)

[21] Blackstone's Commentaries on the Laws of England (Lewis ed., vol. 4, No. 353, at p. 1738) sets out the historical rationales for 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. I. As every one 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.

[22] The Law Reform Commission of Canada summarized the importance of peremptory challenges in more modern language, in its Working Paper 27: *The Jury in Criminal Trials* (Ottawa: Minister of Supply and Services Canada, 1980) at 54:

the peremptory challenge has been attacked and praised. Its importance lies in the fact that justice must be seen to be done. The peremptory challenge is one tool by which the accused can feel that he or she has some minimal control over the make up of the jury and can eliminate persons for whatever reason, no matter how illogical or irrational, he or she does not wish to try the case.

- [23] Under English common law an accused charged with a felony was permitted 35 peremptory challenges. As the criminal law evolved in the British North American colonies through the 19th century, legislators followed American practice, lowering the number of peremptory challenges allowed in felony cases, while even extending a limited number to those accused of misdemeanours; and, in Nova Scotia and New Brunswick, providing peremptory challenges to the Crown. (See R. Blake Brown, "Challenges for Cause, Stand-Asides, and Peremptory Challenges in the Nineteenth Century", *Osgoode Hall Law Journal* 38.3 (2000): 453-494). At least since the consolidation and codification of Canadian criminal law and procedure in the Bill Respecting Criminal Law of 1892, 55-56 Vict., c. 29, the number of peremptory challenges allowed to an accused who has the right to a trial by jury has remained constant: 20 in cases of high treason or first degree murder; 12 for an offence for which the accused may be sentenced to more than five years imprisonment; and four in all other cases.
- [24] In English and Canadian criminal law, any denial to the accused of the right to make their full number of peremptory challenges would result in the trial verdict being nullified on application by the accused. Pratte J., writing for the majority in *Cloutier v. The Queen*, [1979] 2 S.C.R. 709 [Cloutier], confirmed this rule:

The accused, who is erroneously denied a peremptory challenge, is entitled to ask that the trial and the guilty verdict returned by an irregularly empanelled jury be annulled; it is not necessary for him to prove a prejudice; there is a "préjudice de droit"; as to this no doubt exists: *R. v. Churton* (1919), 31 C.C.C. 188 (B.C.C.A.); *R. v. Henry Williams* (1925), 19 Cr. App. R. 67 (C.A.); *R. v. Page*, [1965] Crim. L.R. 444.

In *King v. Edmonds* (1821), 4 B. & Ald. 471, at p. 473, Abbott C.J. said:

It must further be observed, that the disallowing of a challenge is a ground not for a new trial, but for what is strictly and technically a *venire de novo*. The party complaining thereof applies to the Court, not for the exercise of the sound and legal discretion of the judges, but for the benefit of an imperative rule of law, and the improper granting, or the improper refusing of a challenge, is alike the foundation for a writ of error.

- [25] One of the issues on appeal in *Cloutier* was whether, following an acquittal, the Crown could apply for nullification of the verdict on the basis that the trial judge had denied the accused the right to challenge a juror peremptorily after that juror had been found impartial in a challenge for cause. Deciding that issue against the appellant Crown, Pratte J. quoted the above passage from Blackstone's Commentaries, and wrote (pp. 720-721):

The very basis of the right to peremptory challenges, therefore, is not objective but purely subjective. The existence of the right does not rest on facts that have to be proven, but rather on the mere belief by a party in the existence of a certain state of mind in the juror. The fact that a juror is objectively impartial does not mean that he is believed to be impartial by the accused or the prosecution; Parliament, when allowing each party a number of peremptory challenges, clearly intended that each party have the right to remove from the jury a number of individuals

whom he does not believe to be impartial, though he could not provide evidence in support of such belief. The very nature of the right to peremptory challenges and the objectives underlying it require that its exercise be entirely discretionary and not subject to any condition. There is no logical connection between the challenge for cause and the peremptory challenge, and I do not see any reason why the unsuccessful exercise of the right to challenge for cause would have an effect on the right to a peremptory challenge. Only a clear legislative provision could negate the right to a peremptory challenge in circumstances where, because of its very purpose, such a right should be available.

[Emphasis added.]

[26] I conclude this brief historical review of peremptory challenges in Canadian law with another quote from Sherratt. In her majority judgment, at pp. 532-533, L'Heureux-Dubé J. said:

This, [the right of every accused to a fair trial, which necessarily included the empanelling of an impartial jury], however, does not mean that an accused has the right to a favourable jury nor that the selection procedure can be used to thwart the representativeness that is essential to the proper functioning of a jury. While it may be, in some instances, that the peremptory challenges allocated to the accused and the Crown, and the Crown's additional right to stand aside, will be used by the parties to alter somewhat the degree to which the jury represents the community, peremptory challenges are justified on a number of grounds. The accused may, for example, not have sufficient information to challenge for cause a member of the panel he/she feels should be excluded. Peremptory challenges can also, in certain circumstances, produce a more representative jury depending upon both the nature of the community and the accused. Challenges of this nature also serve to heighten an accused's perception that he/she has had the benefit of a fairly selected tribunal.

[Emphasis added.]

Bill C-75

[27] Bill C-75 has eliminated entirely the rights of both the accused and the Crown to make peremptory challenges. The rationale for this amendment is said to lie in the potential, long identified by critics of the process, for peremptory challenges to be used to discriminate. As stated in the Legislative Background:

Discrimination in the jury selection process in Canada has been well documented. Retired Supreme Court Justice Frank Iacobucci discussed how peremptory challenges could be used in a discriminatory manner. The Report recommended further consideration of this issue with a view to possible Criminal Code amendments to prevent the discriminatory use of peremptory challenges. Senator Murray Sinclair also documented the discriminatory use of peremptory challenges and recommended that they be abolished. Similar calls for reform have been made by legal experts and advocacy groups, such as the Aboriginal Legal Services of Toronto.

The Act abolishes peremptory challenges. This approach is consistent with other common law countries laws, such as England, Scotland and Northern Ireland. Abolishing peremptory challenges addresses the concern that this aspect of the jury selection process may be used to discriminate unfairly against potential jurors and will strengthen public confidence in the jury selection process. The amendments signal that discrimination of any kind has no meaningful role in promoting fairness and impartiality in the criminal justice process.

[Footnotes omitted.]

[28] Substantially the same reasons were given by the Bill's sponsor in the House of Commons, the Minister of Justice and Attorney General of Canada, the Hon. Jody Wilson-Raybould in her speech to the Commons on May 24, 2018. Similar sentiments were expressed by the Bill's Senate sponsor, the Hon. Murray Sinclair, in his speech to the Senate of February 19, 2019.

[29] I note, however, that the Charter Statement (Canada, Department of Justice, Charter Statement - Bill C-75: An Act to Amend the Criminal Code, Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts, (Ottawa: Department of Justice Canada, 2018)) (the "Charter Statement") respecting the Bill prepared by the Minister of Justice and tabled in the House of Commons on March 29, 2018 acknowledged concern that the repeal of the peremptory challenge provisions of the Code might impact the Charter rights of accuseds:

The elimination of peremptory challenges from the Criminal Code may engage the fair trial rights of the accused as protected by sections 11(d) and 11(f) of the Charter.

The lone consideration offered by the Charter Statement as weighing in favour of consistency with the Charter was the continuing availability of challenges for cause:

The following considerations support the consistency of this measure with the Charter.

The Charter requires trial by an independent and impartial decision-maker and protects the right to an impartial and representative jury. The Supreme Court has held that challenges for cause are an essential safeguard of the accused's right to a fair and impartial jury. As an unlimited number of challenges for cause remain to eliminate potential jurors who are not capable of acting impartially in a given case, the accused's fair trial rights are protected.

[30] Finally, s. 269 of Bill C-75 amended the stand-by powers of a judge during the selection process. Formerly, s. 633 of the Code read:

633. The judge may direct a juror who has been called pursuant to subsection 631(3) or (3.1) to stand by for reasons of personal hardship or any other reasonable cause.

The amendment inserts, after the words "personal hardship", the phrase "maintaining public confidence in the administration of justice". The Legislative Background describes the intention that the expanded power be used by judges to ensure, among other things, an impartial jury:

The Act amends section 633 to permit a judge to stand aside a juror to maintain public confidence in the administration of justice. This tool helps to ensure that potential jurors are impartial and capable of performing their duties, if selected. The concept of maintaining public confidence in the administration of justice is already used in other parts of the Criminal Code and has been interpreted by the SCC in *St-Cloud* (2015) [2015 2 S.C.R. 328] in the context of bail. In this context, decisions are made on a case by case basis and are based on all relevant circumstances, including the importance of ensuring that the jury is impartial, competent and representative. The amendment recognizes and enhances the role of judges in promoting an impartial, representative and competent jury.

Discussion

- [31] It seems clear that peremptory challenges have always been a fixture of Canadian jury trials, and are regarded as a right of the accused. But rights may be substantive, or procedural. Are the Bill C-75 s. 269 amendments properly regarded as dealing strictly with procedural matters, such that they take effect immediately? I summarized above the relevant test as an inquiry into whether the amendments affect substantive or vested rights, or whether they are "purely" procedural. Different approaches to this inquiry are described in the majority and minority judgements in *Dineley*.
- [32] Before turning to a discussion of *Dineley*, I address a key aspect of the Crown's submission. The Crown submits that the amendment does not impact a Charter right. I noted above the Government's Charter Statement, which explicitly acknowledged at least the potential for an accused's Charter rights to be "engaged" through the elimination of peremptory challenges. At present, Charter Statements, which set out the Government's view of the consistency of proposed legislation with the Charter, are not required as a matter of law; they are issued by the Minister of Justice, and tabled, as a matter of policy. Bill C-51, which was introduced on June 6, 2017 and which received royal assent on December 13, 2018, amended the Department of Justice Act, R.S.C. c. J-2, to create a legal requirement that the Minister table a statement respecting all new legislation that sets out potential effects on Charter rights. Those amendments will not come into force until the first anniversary of royal assent, i.e. December 13, 2019. However, given that Bill C-51 had been introduced prior to the enactment of C-75, Parliament may be taken to have then understood the significance of a Charter Statement. The C-75 Charter Statement may therefore be taken as some evidence that Parliament - rightly or wrongly - would have understood s. 269 as a engaging a substantive Charter right, and therefore intended that s. 269 would not have retrospective effect.
- [33] Ultimately, however, my reasons do not rest on this point. Even if I were to conclude otherwise with respect to Parliament's knowledge and intent, and if I were to accept the Crown's submission and conclude as a matter of law that the amendment does not impact a Charter right, that cannot be the end of the story. This is because the law regarding the effective date of new legislation prevents the immediate application of all new laws that

affect substantive rights - all new laws other than those that are purely procedural - regardless of whether a particular Charter right is engaged.

The Decision in Dineley

[34] In Dineley the accused had been acquitted of charges of impaired driving and driving with his blood alcohol level over .08. The offence was alleged to have taken place in July 2007. Trial in provincial court began on June 19, 2008 and continued on July 15, 2008. In the interim, on July 2, 2008, amendments to the Code had come into effect that created a presumption of accuracy of breathalyzer tests, and that limited the types of evidence that could be called by the defence to rebut the presumption. The retrospective effect of those amendments was one of the issues raised on appeal. Some of the content of those amendments was struck down as unjustifiably infringing s. 11(d) of the Charter, in *R. v. St-Onge Lamoureux*, 2012 SCC 57. In respect of amendments that were rescued by s. 1 of the Charter, one of the issues that remained in Dineley was whether the amendments affected substantive rights; or whether they were merely procedural, in which case they would have taken immediate effect and impacted the type of evidence the accused had been allowed to tender on continuation of his trial.

[35] The majority, in reasons delivered by Deschamps J., summarized at para. 10 the test for determining whether new legislation takes immediate effect:

Because of the need for certainty as to the legal consequences that attach to past facts and conduct, courts have long recognized that the cases in which legislation has retrospective effect must be exceptional. More specifically, where legislative provisions affect either vested or substantive rights, retrospectivity has been found to be undesirable. New legislation that affects substantive rights will be presumed to have only prospective effect unless it is possible to discern a clear legislative intent that it is to apply retrospectively.

[36] The majority then stated that because procedural provisions may affect substantive rights, it is only "purely" procedural provisions, which have no such impact, that apply immediately (para. 11). The key task therefore is not to label a provision as substantive or procedural, but to determine if a substantive right has been affected. Drawing on the decision of La Forest J. in *Angus v. Sun Alliance Insurance Co.*, [1988] 2 S.C.R. 256, the majority drew a distinction between new legislation that affects the existence or the content of a right, obligation, or defence, and that which affects only the manner in which it is enforced, used, or presented (para. 15). As the new breathalyzer evidence legislation affected the content of evidence the accused was able to tender, the majority held that the legislation could only be prospective.

[37] The dissenting judgment delivered by Cromwell J. began by stating that there are three principles of statutory interpretation that apply in the absence of clear statutory language to the contrary. The first two are that the legislature is presumed not to have intended (1) to change the legal character or consequences of prior actions, nor (2) to interfere with vested rights. These two presumptions, though they share "similar motivating concerns," in

particular that of protecting a parties' reliance on the law as it was at the time of acting, are considered distinct (para. 46). Beyond that, the minority did not find it necessary to explore the distinctions, because of the third principle: that exclusively procedural enactments, which the minority says have been established by a long line of precedent to include matters of evidence, are intended to take immediate effect.

- [38] The minority then characterized the amendments under consideration as involving rules of evidence. Changes to the rules of evidence that make admissible evidence that was previously inadmissible, or that change the conditions under which evidence may be admitted, are, the minority would have held, procedural. The amendment in question did not "attach new consequences to past acts" and did not "change the existence or content of a right" (para. 69).
- [39] This analysis, it was said, was consistent with the Court's prior ruling in *Howard Smith Paper Mills Ltd. v. The Queen*, [1957] S.C.R. 403 [Howard Smith Paper], in which it had been held that a change in the law of admissibility of evidence in combines prosecutions did not "alter the character or legal effect of any transaction already entered into" (cited in Dineley, para. 60). It remained open to the accused, the minority said, "to point to evidence raising a reasonable doubt about the existence" of the elements of the offence (para. 69). The amendments only restricted the accused's ability to tender a particular type of evidence (para. 70).
- [40] Whereas the majority held that the amendment had eliminated or neutered a defence, the minority disagreed, finding that characterization inconsistent with the Court's jurisprudence. The minority therefore would have given the amendments immediate effect.
- [41] It seems, on the Dineley minority's analysis, that the accused in that case had not taken any step, or engaged in any "transaction", in his defence that had been premised on particular rules of admissibility of evidence.

Matters of 'Pure Procedure'

- [42] Under the analytical frameworks set out in Dineley, is the extinguishment of the right to peremptory challenges best understood as being purely procedural, involving only - to invoke the test applied by the majority in Dineley - the manner in which an existing right is enforced, used, or presented? Examples of such laws, regarded as merely procedural, are given by Pollock C.B. in *Wright v. Hale* (1860), 6 H.&N. 227, 158 E.R. 94, 30 L.J. (Ex.) 40:

I have always understood that there is a considerable difference between laws which affect the vested rights and interests of parties and those laws which merely affect the proceedings of Courts, as for instance, declaring what shall be deemed good service, what shall be the criterion of the right to costs, how much costs shall be asked, the manner in which witnesses shall be paid or what witnesses the party shall be entitled to, and so on (L.J., p.42).

Further examples are given in Pierre-Andre Côté, *The Interpretation of Legislation in Canada* (4th ed., 2011) ("Côté"), at p. 182:

Statutes in the following areas have been held, in the given circumstances, to produce purely procedural effects: the means of claiming a debt or of summoning witnesses, trial procedure or modifying the conditions for a closed hearing, rules on peremption of suits and execution of judgments, and the date from which interest accrues following a judgment, the amount of guarantee or security that a receiver must provide, provisional measures relating to contestation of an assessment.

[Footnotes omitted.]

- [43] In the criminal law context, there are also of course sections of the Code that are purely procedural, specifying a fixed process or deeming an act to fall within a prescribed category. For example, there is the provision for the appearance of the prosecutor or designated counsel by technological means (s. 650.02); and, the provision for determining the specific means by which a jury of more than 12 jurors is to be reduced to 12 before retiring to consider the verdict (s. 652.1). In the specific context of jury selection, further examples are the detailed process for selecting jurors for empanelment by lot (s. 631); and, the process for the selection of a juror to replace a juror who, before the jury has begun to hear evidence, is discharged by reason of illness (s. 644(1.1)). None of these provisions of the Code touch upon an established right.
- [44] The same cannot be said of Bill C-75 in respect of peremptory challenges. Mr. Subramaniam is not invoking a right to a particular mode or method by which his peremptory challenges are to be exercised. The amendment is not limited to the enforcement, use or presentation of a right. Its subject matter is the negation of a right. The amendment eliminates peremptory challenges entirely. What has historically been regarded as a right so fundamental to the process of jury selection that even depriving an accused of a single peremptory challenge is sufficient grounds to set aside a guilty verdict and order a new trial, is being done away with. The peremptory challenges provisions of the Code are procedural, in the sense that they prescribe a method to be followed to secure an accused their Charter right to a jury trial. But the right to peremptory challenges itself has been so fundamental to Canadian criminal law, and is so deeply entrenched, that it must be regarded, standing on its own, as a substantive right.

Effect of the Amendment on Prior Actions

- [45] In contrast to *Dineley*, in the present case the amendment clearly does engage what the minority in *Dineley* described as the presumption that a legislature does not intend to change the legal character or consequences of prior actions. Mr. Subramaniam has engaged in a "transaction": he elected to be tried by a judge and jury. And he has in fact previously selected a jury, whose members were then discharged upon Mr. Subramaniam's successful application for adjournment of the trial.

[46] Is it right that having taken those steps, Mr. Subramaniam should now have recourse in jury selection only to his right to challenge for cause? As discussed by L'Heureux-Dubé J. in Sherratt, quoted above, an accused may not have sufficient information about individual jurors during the selection process to meaningfully exercise the right to challenge for cause. In such circumstances, the right of peremptory challenge might very well provide Mr. Subramaniam with the only effective means of participation in the jury selection process. The "legal character or consequences" of both his election decision, and his decision to seek adjournment of the earlier trial so that a new jury would eventually have to be empanelled, must be taken to include his expectation that in taking these steps he would not lose or forfeit, through a change in legislation, the centuries-old right of an accused to exclude jurors peremptorily.

Vested Rights

[47] I reach the same conclusion by viewing the right to peremptory challenges through the lens of vested rights, the second, separate principle of statutory interpretation cited by the minority in Dineley. I note the caution as to the appropriateness of vested rights analysis in the criminal law context, expressed in Côté, p. 165. However, Canadian case law consistently utilizes the formula "substantive or vested rights" in cases involving the applicability of new legislation, in both the civil and criminal law. In addition, a long line of Supreme Court of Canada decisions, leading up to R. v. Puskas, [1998] 1 S.C.R. 1207, has analyzed rights to criminal appeal in terms of them being "vested" as of the dates of various amendments to the Code. I find no bar in the case law to the vested rights form of analysis as regards criminal law legislation.

[48] I also acknowledge the conventional 'rule' of statutory interpretation that there is "no vested right in procedure" (see Côté, p.186), but I must regard it as applying only to matters of "pure" procedure. To apply that 'rule' more broadly would be to presume a bright line exists between matters of procedure and substance. Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, an early decision on the scope of s. 7 Charter rights, warned against this approach in interpreting the scope of substantive rights. In the majority decision Lamer J. wrote (para. 18) that the substantial/procedural dichotomy in analysis of rights issues:

creates its own set of difficulties by the attempt to distinguish between two concepts whose outer boundaries are not always clear and often tend to overlap. Such difficulties can and should, when possible, be avoided.

I therefore view "vested" rights as potentially including both substantive rights and procedural rights that are not "purely procedural". Even if the right to peremptory challenges were seen as more procedural than substantive, it would still be a right that may possibly vest.

- [49] In *Scott v College of Physicians and Surgeons of Saskatchewan* (1992), 95 DLR (4th) 706 (Sask. C.A.), Vancise J.A., in the majority judgement, laid out two tests for determining whether a right had vested, accrued or been acquired: whether the right was particular as opposed to abstract, and whether the right had been sufficiently exercised. In respect of the latter, he said, "[w]hat is clear is that some step must have been taken or some event must have occurred toward the realization of the right before the repeal of the enactment" (at p. 716).
- [50] In *Dikranian v. Quebec (Attorney General)*, 2005 SCC 73 [Dikranian], the majority judgment delivered by Bastarache J. adopted from Côté a similar two-pronged test to determine whether a party has a vested right: "(1) the individual's legal (juridical) situation must be tangible and concrete rather than general and abstract; and (2) this legal situation must have been sufficiently constituted at the time of the new statute's commencement" (para. 37).
- [51] Mr. Subramaniam's circumstances meet both of the criteria set out in *Dikranian*. He is not merely facing the abstract possibility of criminal prosecution; he is under indictment. His legal situation was tangible and concrete, and became sufficiently constituted, I find, when he made his election to trial by judge and jury. That decision, as I have said, entailed a specific set of expectations as to how he would participate in the jury selection process. Alternatively his rights crystallized when, having elected trial by jury and having undergone jury selection, he applied to have the trial adjourned to pursue disclosure, which application, when successful, necessitated the jury's discharge.
- [52] The repeal of s. 634 of the Code has affected a right that had previously been acquired by Mr. Subramaniam under the Code. Section 43 of the Interpretation Act therefore applies, and the repeal of s. 634 will be of no force or effect in Mr. Subramaniam's upcoming jury selection.

The Decision in *R. v. Thomas Lako and William McDonald*

- [53] I have had the opportunity to read and consider a ruling on this issue rendered by Regional Senior Justice Thomas on September 17, 2019, in *R. v. Thomas Lako and William McDonald*, 2019 ONSC 5362. His ruling, with which I respectfully disagree, is that the amendment of s. 634 to remove the right of peremptory challenge is purely procedural, and takes immediate effect. I will simply note two aspects of that decision where Thomas R.S.J. and I differ.
- [54] First, the ruling does not address the consequences of an accused having made an election in the mode of trial. "Expectations", Thomas R.S.J. says, "do not create rights" (para. 34). But expectations may create rights where they are reasonably relied upon in taking a course of action. That is the essence of protection of vested rights.
- [55] Second, the ruling cites as instructive seven examples of changes in the criminal law that have been deemed to be procedural (para. 31). Of those seven examples, three are matters of changes in the law of evidence. The minority in *Dineley* clearly regarded rules of evidence that do not impact substantive rights as a particular subset of procedural law, due to such precedents as *Howard Smith Paper* and *R. v. E. (A.W.)*, [1993] 3 S.C.R. 155. But there is a serious difference between the majority and minority in *Dineley* over what it means for a

substantive right to be affected by a change in rules of admissibility. Whether that line of earlier authorities has been implicitly overruled by, or whether it now has any broad application in light of Dineley would seem to be an open question. Thomas R.S.J. further cites as an example of a procedural rule the changing of a straight-indictable offence into a hybrid offence, leading to an accused losing his right to a trial by jury, as at issue in *R. v. Hafeez* (1996), 27 O.R. (3d) 799 (C.A.). But the ratio of that decision was that the accused had not lost a right, because through the Crown's election he was no longer in jeopardy of a punishment of five years or more, and was therefore no longer in a class of accuseds to whom the right of jury trial attached. With respect, I cannot see any analogy between this example of a procedural amendment, and the loss of the right of peremptory challenge.

The Stand-By Powers

- [56] This leaves for consideration the additional amendment effected by s. 269 of Bill C-75, the expansion of the judge's s. 633 stand-by powers to include considering the maintenance of public confidence in the administration of justice. Standing in isolation, this amendment to the Code does not so clearly affect a substantive right. A judge's exercise of the power to stand by jurors is not a personal right of the accused. It is a means, or a method, of selecting an impartial jury. Aside from the historical rights of challenge, an accused has no right to any particular method of selection. The judge's power to stand aside, and the criteria by which the judge exercises that power, may be seen as purely procedural. It is true that Parliament has provided no explicit guidelines as to how, when, under what criteria, or in what circumstances that power is to be exercised, but that uncertainty does not affect the character of the amendment.
- [57] Having said that, I cannot ignore the implicit connection between the two amendments effected by s. 269 that arises from them being achieved through that single section. It was open to Parliament to institute these two amendments through separate provisions of the Bill. The fact that this was not done strongly implies a conceptual linkage: that the expanded stand-by power was intended to ameliorate any negative effects potentially resulting from jury composition no longer being shaped through peremptory challenges.
- [58] It would not be reasonable to infer that Parliament, having effected two amendments through the same repeal, intended the amendments to take effect at different times, due to one of the amendments being of a more procedural nature. The Interpretation Act does not contemplate such a consequence of a single repeal.

Conclusion

- [59] I therefore find that Bill C-75 s. 269 in full has no retrospective effect on this matter.
- [60] The jury selection scheduled for September 24, 2019, will be conducted under ss. 633 and 634 of the Criminal Code as they were worded at the time of Mr. Subramaniam's election, and the amendment and repeal of those sections through s. 269 of Bill C-75 will not apply.

"A. Saunders J."

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