



**CRIMINAL JURY TRIALS: CHALLENGE FOR CAUSE
PROCEDURES
REPORT ON CONSULTATION MEMORANDUM 12.20**

(To be published as part of a composite report
from the Criminal Rules Working Committee)

July 2009

PREFACE

This final report is a precursor to what is hoped will be new criminal rules dealing with challenge for cause procedures in the context of criminal jury trials. The report represents the final policy positions of the criminal rules working committee following consideration of comments on the published report titled *Criminal Jury Trials: Challenge for Cause Procedures*, Consultation Memorandum No. 12.20.

The criminal rules working committee will proceed with the final subject areas in accordance with its mandate under the Rules of Court Project, but we thought it important to make the legal community aware of the settled policy positions in connection with challenge for cause proceedings even though it may take some time for the positions to be implemented in rule form.

We thank the working committee for its work and deliberations and look forward to further proposals in connection with criminal procedure. We also acknowledge the efforts of research student Jessica Bortnick who assisted with the preparation of this final report. The members of the Criminal Rules Committee are:

The Honourable Justice Ronald L. Berger, Court of Appeal of Alberta

The Honourable Justice Elizabeth A. Hughes, Court of Queen's Bench of Alberta

The Honourable Judge Michael G. Allen, Provincial Court of Alberta

The Honourable John D. Bascom, Provincial Court of Alberta

The Honourable Judge Donna R. Valgardson, Provincial Court of Alberta

Josh Hawkes, Q.C., Alberta Justice

Cheryl Hunter Loewen, Alberta Law Reform Institute

Lyndon Irwin, Q.C., Alberta Law Reform Institute

Peter J.M. Lown, Q.C., Alberta Law Reform Institute

Sandra Petersson, Alberta Law Reform Institute

Peter J. Royal, Q.C., Royal Teskey

Laura K. Stevens, Q.C., Dawson Stevens & Shaigec

Geneviève Tremblay-McCaig, Alberta Law Reform Institute

Wayne N. Renke, Faculty of Law, University of Alberta

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Criminal Jury Trials: Challenge for Cause Procedures

Report on Consultation Memorandum 12.20

[1] The Criminal Rules Working Committee (Committee) considered comments received from the bench and bar on the proposals set out in *Criminal Jury Trials: Challenge for Cause Procedures*, Consultation Memorandum No. 12.20.¹ Following discussion, the Committee decided to maintain most proposals and supplement a few. The Committee offers this final report as a summary of its proposals and as a foundation for future drafting instructions for the challenge for cause procedural rules that would be appropriate for criminal jury trials. This report does not reproduce the detailed discussions of proposals found in CM 12.20.

[2] The proposals in CM 12.20 did not attract many individual or group comments. This said, the insights and suggestions provided by the Honourable Mr. Justice Frans F. Slatter and the Criminal Practice Advisory Committee of the Law Society of Alberta [CPAC] contributed to the understanding of the practical underpinnings of many issues and helped refine the proposals.

[3] Shortly after CM 12.20 was published, the Court of Queen's Bench of Alberta issued Criminal Practice Note "5" - Challenge for Cause which provides as follows:²

Where the prosecutor or the accused wishes to challenge jurors pursuant to section 638(1)(b) of the Criminal Code, for example a challenge based on the personal characteristics of the accused or the accused's witnesses, prejudice about the nature of the crime, or prejudice arising from pre-trial publicity, the following procedure will be followed:

1. Notification of such a challenge will be given to the prosecutor or the accused and to the Trial Coordinator in the Judicial District where the trial is scheduled to take

¹ Alberta Law Reform Institute, *Criminal Jury Trials: Challenge for Cause Procedures*, Consultation Memorandum No. 12.20 (2007) [CM 12.20].

² Court of Queen's Bench of Alberta, Q.B. Criminal Practice Note "5" - Challenge for Cause (2007), online: <<http://www.albertacourts.ab.ca/qb/practicenotes/criminalPN5.pdf>> [Practice Note 5].

place at least 60 days prior to the scheduled jury selection or, such shorter interval that the trial judge may allow in the interests of justice;

2. Notification must be in writing setting out the basis for the proposed challenge (See s.639 and Form 41 of the Criminal Code);

3. Upon receipt of the written notification, the Trial Coordinator in the Judicial District where the trial is scheduled will schedule a pre-trial conference with the trial judge, the prosecutor and the accused to resolve issues raised by the application.

Reference will be made to Practice Note 5 in connection with the Committee's proposals.

ISSUE No. 1

Is procedural reform respecting challenges for cause necessary or desirable?

[4] Committee's Proposal: Procedural reform respecting challenges for cause in criminal jury trials is necessary and desirable [*not modified*].

[5] Both sets of substantive comments support the Committee's proposal that standardized procedures be developed.

[6] CPAC comments that although the *Criminal Code* outlines procedures once a challenge for cause is underway, there is a need to identify steps to be taken prior to starting the challenge for cause process.³

[7] To a degree, Practice Note 5 attenuates the need for reform. However, it is a practice note (and not a rule), and - while helpful - could be usefully supplemented by the Committee's proposals.

[8] Mr. Justice Slatter comments that the current process is complex, time consuming and can result in excellent candidates being rejected by the triers for no apparent reason.

³ See The Law Society of Alberta Criminal Practice Advisory Committee: Sub-committee Report upon Law Reform Institute Report and Recommendations Concerning Jury Challenge for Cause Procedures dated June 29, 2007 [CPAC Letter].

He identifies an additional complication not discussed in CM 12.20 – even after the triers approve a prospective juror, counsel can peremptorily challenge that prospective juror.⁴

[9] In Mr. Justice Slatter’s opinion, the process can be streamlined without jeopardizing fairness or impartiality of the jury. He suggests two basic requirements. First, the trial judge rather than two other triers should decide whether a prospective juror is impartial.⁵ Second, he proposes a requirement that if counsel chooses to exercise the peremptory right to challenge a particular juror, they must do so before embarking on the challenge for cause process.⁶

[10] The current provisions of the *Criminal Code*, as Mr. Justice Slatter also acknowledges, preclude development of rules that would have the judge decide the question of juror impartiality in the challenge for cause proceeding.⁷ Reform of this nature would require amendment of the federal statute and is beyond the Committee’s mandate.

ISSUE No. 2

May any current difficulties relating to challenges for cause procedures be resolved without procedural reform, through (in particular) pre-trial conferences or otherwise through the management of criminal litigation?

[11] Committee’s Proposal: Case management and pre-trial conferences will likely not solve all challenge for cause difficulties. Leaving the regulation of challenge for cause processes to case management and pre-trial conferences would leave that regulation too dependent on individual counsel and judges [*not modified*].

⁴ See letter from The Honourable Mr. Justice Frans F. Slatter dated September 4, 2007.

⁵ Mr. Justice Slatter observes that challenge for cause proceedings would benefit by relying on the experience of trial judges at this stage as judges regularly decide questions of bias in other areas of the law.

⁶ In Mr. Justice Slatter’s opinion, reversing the order of the challenges would not undermine trial fairness. He finds support for his view that the two types of challenges are distinct and that the peremptory challenge should go first in *R. v. Find*, [2001] 1 S.C.R. 863; *R. v. Sherratt*, [1991] 1 S.C.R. 509 at 538-9; and *R. v. Hubbert* (1975), 29 C.C.C. (2d) 279 (Ont. C.A.).

⁷ *Criminal Code*, R.S.C. 1985, c. C-46, ss. 640(2), (2.2), (3) and (4) [*Criminal Code*].

[12] No comments opposed this proposal.

[13] Practice Note 5 does stipulate a notice requirement, but leaves other issues to be resolved at the pre-trial conference.

ISSUE No. 3

If procedural reform respecting challenges for cause is necessary or desirable, should the reforms be made through the medium of statute, rules of court, or practice notes/notices to the profession?

[14] Committee's Proposal: Rules of court are the appropriate mode of procedural regulation [*not modified*].

[15] Mr. Justice Slatter acknowledged that the major reforms he proposed would require statutory amendment. CPAC agreed that rules of court are the appropriate reform vehicle.

[16] Since the Committee is not proposing fundamental reforms along the lines suggested by Justice Slatter, the Committee maintains its view – expressed in other Consultation Memoranda and Reports – that rules of court are the appropriate reform vehicle.

ISSUE No. 4

Should written notice that challenges for cause will be pursued be provided at the stage of the pre-hearing conference?

[17] Committee's Proposal: Some form of notice of intention to challenge for cause be provided at the pre-hearing conference stage. The nature of the notice provided at this stage would depend on whether formal written notice had already been filed and served [*not modified*].

[18] CPAC did not take issue with the notion of providing a form of notice or discussing planned challenges for cause processes at the pre-hearing conference stage. It did draw attention to timing issues relating to pre-hearing conferences and trial dates. The timing issues are addressed at Issue No. 7 below.

[19] Practice Note 5 expressly contemplates that notice be provided prior to the pre-trial conference; issues raised by the application are to be resolved at this conference.

ISSUE No. 5

Should written notice of the intention to challenge for cause be required to be provided before trial, if the discretion of the judge not to dispense with written notice is preserved?

[20] Committee's Proposal: Rules should require the filing and service of a form to give notice of a challenge for cause pursuant to s. 638(1)(b) of the *Criminal Code*, subject to the retention of a judicial dispensing power to be exercised in extraordinary cases, when justice so requires. The Committee makes a specific proposal respecting the dispensing power in connection with Issue 12 [*not modified*].

[21] No comments opposed this proposal. CPAC agreed with the principle that early written notice should be required. Early written notice is also required by Practice Note 5, although it does not expressly refer to a dispensing power (doubtless on the theory that if the interests of justice were to so require, a judge could waive compliance with the dictates of a practice note).

ISSUE No. 6

May a written notice of the intention to challenge for cause contain information in addition to that required by Form 41? If so, what additional information should be conveyed in the notice?

[22] Committee's Proposal: In the Committee's view, since s. 639(2) of the *Criminal Code* allows the content of Form 41 to be expanded by a rule, and in light of the purposes of providing notice, rules should provide more information than expressly required by Form 41.

[23] The Committee proposes that a form of notice of intention to challenge for cause under s. 683(1)(b) be developed, setting out the following matters (as elaborated in greater detail in the Consultation Memorandum):⁸

- (a) particulars of the lack of impartiality; and
- (b) a brief description of the types or sources of materials or evidence to be relied on in the application, which may include:
 - (i) affidavit evidence,
 - (ii) citations of any learned publications or governmental reports to be relied on, and
 - (iii) case references (headnotes and extracts; if there is access to electronic databases, a case list with pinpoint citations).

Furthermore, the requirements of s. 657.3(3) should be satisfied if expert evidence will be relied on [*not modified*].

[24] CPAC responded that a notice of motion in the usual form and with the usual content – as contemplated by the present rules of court – be employed to convey the information generally identified by the Committee. However, CPAC expressly disagrees with the proposals concerning case information, since notice of authorities would be provided later and separately in written briefs.

[25] The Committee agrees that notice forms should be simple and standardized. The Committee, though, did not intend to select a specific notice form. The form would be developed as part of the drafting process. It may turn out to be the same as or nearly the same as the notice of motion form contemplated by the rules of court.

[26] The Committee must also acknowledge that authorities will be provided later and separately in written briefs. However, a reason for requiring notice is to give notice of pending legal arguments. Since counsel has determined that the challenge for cause is warranted in the particular evidential and legal circumstances, counsel must have reviewed the applicable authorities. Including them in the notice would not be an undue burden for counsel, and notice of the legal issues will ensure that opposing counsel and the judge can deal with the legal issues in an expeditious and effective way. The case

⁸ CM 12.20 at paras. 73-74, 77.

reference requirement described in Issue 6 tracks the case reference requirement described in Issue 7 of the Committee’s earlier proposal for *Charter* applications in criminal cases.⁹ Efficiency and consistency lead the Committee to maintain this aspect of its proposal.

[27] Practice Note 5 refers to a notice “in writing setting out the basis for the proposed challenge (See s. 639 and Form 41 of the *Criminal Code*).” Practice Note 5 does not limit notice contents to the minimal Form 41 contents; a more detailed notice of the sort proposed by the Committee would not be inconsistent with Practice Note 5.

ISSUE No. 7

How many days before the date set for jury selection should the notice of intention to challenge for cause be provided?

[28] Committee’s Proposal: Notice of intention to challenge for case should be filed and served at least 60 days before the date set for jury selection [*not modified*].

[29] This marks a point of significant difference between the views of the Committee and CPAC. Essentially, the view of CPAC is that 60 days is not long enough, particularly if there are any issues involving expert evidence. Under s 657.3(3), the *Criminal Code* imposes its own 30 day minimum notice period on parties intending to call experts. CPAC states:¹⁰

Assuming this provision would apply in the case of an expert being called during the challenge for cause application, it would appear unlikely that the various time limits and deadlines would be satisfied and met if notice of the challenge for cause application itself is not given until 60 days before the date set for jury selection.

[30] Prior to issuing the Consultation Memorandum, the Committee discussed this issue – considering notice periods longer and shorter than the 60 days eventually proposed. Competing interests must be balanced. On the one hand, enough notice must be provided

⁹ See Alberta Law Reform Institute, *Charter Applications Procedures in Criminal Cases*, Report on Consultation Memorandum 12.19 (February 2007) at paras. 22-24 [Report CM 12.19].

¹⁰ CPAC letter.

so that all involved have enough time to address the issues accordingly; on the other hand, given workloads and the need to balance other commitments, counsel cannot be expected to work out their positions fully too far in advance of jury selection. Sixty days is the time that the Committee considered to be a good compromise. This notice period has the virtue of being consistent with the 60 day notice requirement proposed in the Consultation Memorandum respecting notices of *Charter* applications.¹¹

[31] The Committee freely concedes that determining the right notice period is difficult. However, a specific notice period must be established. So long as the trial judge has the discretion to expand or contract the notice period as circumstances and justice require, any difficulties with the usual length of notice period can be avoided. The Committee therefore maintains its 60 day recommendation.

[32] CPAC also pointed out that the date of the pre-trial conference cannot be used as a reference point for the giving of the challenge for cause notice, since the practice respecting the timing of the conferences varies between Edmonton (two to three months before trial) and Calgary (six to eight weeks before trial). The Committee, though, did not intend pre-trial conferences to serve as a reference point for notice timing; the proposal made under Issue 4 was only that the challenge for cause issue should be on the agenda for the pre-trial conference. The Committee agrees that the timing of filing and service of that notice should be set independently of the pre-trial conference.

[33] Practice Note 5 agrees with the Committee's proposal: "Notification of such a challenge will be given to the prosecutor or the accused and to the Trial Coordinator ... at least 60 days prior to the scheduled jury selection or, such shorter interval that the trial judge may allow in the interests of justice."

¹¹ See CM 12.20 at paras. 80-82 and Report CM 12.19.

ISSUE No. 8

If the entitlement to challenge for cause is contested, should the other party be required to provide notice of opposition to the applicant?

[34] Committee's Proposal: If a party opposes an application to challenge for cause, it should provide a notice of opposition within 10 days from the date of service of the notice of application. The initial notice should be in writing and may be very brief. The particularization of the opposition should be provided at least 30 days before the date of the argument on the application to challenge for cause [*modified – change underlined*].

[35] CPAC agrees that a party opposing an application concerning challenge for cause should provide notice of opposition within the proposed 10 days and agrees that the notice of objection does not need to include legal research, precedents or citations, which would presumably be provided at a later date. Since the legal issues will have been raised in the notice to challenge and since the respondent is operating under a short time-line, freeing the respondent from an obligation to provide case information in the initial notice of opposition is reasonable.

[36] CPAC is right to point out that the Committee's original proposal - having the respondent's "particularization" deadline set as at least 30 days before trial - could result in insufficient notice being provided to applicant counsel and the judge. A better reference for the 30-day minimum notice period for particularization is – as CPAC suggested – at least 30 days before the date of the argument on the application to challenge for cause.

[37] Practice Note 5 does not deal with this issue.

ISSUE No. 9

Should any rules be established respecting the hearing before the trial judge to determine whether the challenge for cause will be permitted?

[38] Committee's Proposal: The approach of rules 92(2), 93(1) and 93(3) of the North West Territories Rules of Court is approved.¹² More specifically, the application shall be heard by the trial judge in the absence of the jury panel; if the application is granted then the judge specifies both the form of each question to be put to each prospective juror and who shall ask the questions; and the judge may permit counsel to make submissions to the triers [*not modified*].

[39] No comments opposed this recommendation. CPAC commented that it is impossible to fashion a single question rule that would be the best tool for all circumstances. The determination of the identity of the questioner is best left to the judge's discretion. Practice Note 5 does not speak to this issue.

ISSUE No. 10

Should any rules be established respecting procedure in challenges for cause before the triers?

[40] Section 640 of the *Criminal Code* was recently amended.¹³ Subsections 640(2.1) and (2.2) now provide as follows:

(2.1) If the challenge is for cause and if the ground of the challenge is one that is not mentioned in subsection (1), on the application of the accused, the court may order the exclusion of all jurors – sworn and unsworn – from the court room until it is determined whether the ground of challenge is true, if the court is of the opinion that such an order is necessary to preserve the impartiality of the jurors.

(2.2) If an order is made under subsection (2.1), two unsworn jurors, who are then exempt from the order, or two persons present who are appointed by the court for that purpose, shall be sworn to determine whether the ground of challenge is true. Those persons so appointed shall exercise their duties until twelve jurors and any alternate jurors are sworn.

Subsection (2.1) confirms the judge's discretion to exclude sworn and unsworn jurors. Subsection (2.2) entails that the two appointed triers are to hear all of the challenges for cause - if an order is made under (2.1). The triers under s. (2.2) will either already have

¹² *Criminal Procedure Rules of the Supreme Court of the Northwest Territories*, SI/98-78.

¹³ S.C. 2008, c. 18, s. 26, in force 1 October 2008.

been through the challenge for cause procedure themselves or not. If they have not themselves undergone that procedure, it appears that their role in the trial will be complete once twelve jurors and any alternates have been selected. Hence, there will be no need for these triers to be approved as potential jurors.

[41] Committee's Proposals: In light of the statutory changes, the Committee's proposals are modified as follows. If an order is not made under s. (2.1), the judge retains a discretion respecting the manner of appointment of the triers and rules may determine whether the first two triers need be tried themselves; two adjoining courtrooms should be booked for challenge for cause procedures; and triers are entitled to leave the courtroom to deliberate in a separate room and the judge should remind triers of this option.

[42] No comments opposed these proposals. Practice Note 5 does not speak to this issue.

ISSUE No. 11

Should the Sheriff be instructed to constitute a special jury panel if there are to be challenges for cause?

[43] Committee's Proposal: A special panel should be summonsed once challenges for cause are underway since the process is always time-consuming [*not modified*].

[44] No comments opposed this proposal. Practice Note 5 does not speak to this issue.

ISSUE No. 12

Should standard for instructions to be delivered by the trial judge to the panel and to triers be developed?

[45] Committee's Proposal: In light of the work that has already been done by the Canadian Judicial Council (and others), there is no need to develop new and additional standard form instructions [*not modified*].

[46] No comments opposed this proposal. Practice Note 5 does not speak to this issue.

ISSUE No. 13

Should judicial discretion respecting challenge for cause processes be preserved?

[47] Committee's Proposal: Judicial discretion respecting challenge for cause processes should be preserved [*not modified*].

[48] CPAC agreed judicial discretion should be preserved to ensure a smooth and effective process in any particular situation or circumstance.

[49] Practice Note 5 expressly preserves a dispensing power in relation to the number of days notice of the application. The Note does not - and would not - purport to constrain the exercise of a judge's discretion relating to other relevant matters.

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Alberta Law Reform Institute

402 Law Centre
University of Alberta
Edmonton, Alberta T6G 2H5
reform@alri.ualberta.ca
www.law.ualberta.ca/alri/
t: (780) 492-5291
f: (780) 492-1790