PROCEDURE ON CHALLENGE FOR CAUSE: *REGINA* v. *HUBBERT*[1]

When empanelling a jury, the Criminal Code gives counsel the right to challenge the prospective juror for cause.[2] Section 567(1(b) provides that a challenge may be made when "a juror is not indifferent between the Queen and the accused." This section, however, is silent as to the procedure to be followed when making the challenge for cause. Section 568 provides for the form of challenge. *Regina* v. *Hubbert*, a decision of the Ontario Court of Appeal, deals specifically with some of the issues in this unsettled area.

In *Hubbert,* the accused was tried by jury on an indictment for non-capital murder and found guilty. At trial, counsel for the accused proposed to ask the following question:[3]

> Would the fact that evidence is submitted that the accused was detained at the pleasure of the Lieutenant-Governor at Ontario Mental Health Centre . . ., formerly known as the Ontario Hospital for the Criminally Insane, prevent you from keeping an open mind as to guilt or innocence until you have heard the evidence?

Counsel also proposed that a psychiatrist testify as to the probability of bias in members of the public and therefore, presumably, in the prospective jurors, when they knew or became aware of the accused's detention at a mental hospital for the criminally insane. Counsel also argued that the court screen the prospective jurors as to whether they had had any connection with the accused. The judge refused to accede to any of these suggestions.

The *Hubbert* appeal raised three issues. First, when counsel (either defence or prosecution) challenges for cause, must they give particulars? Second, what questions may be asked of a prospective juror when trying the issues? Third, does the right of peremptory challenge still exist after a challenge for cause under section 567(1)(b) has failed?

The English cases such as *Regina* v. *Kray*[4] are very strict as to what questions may be asked and whether particulars should be given. In *Regina* v. *Elliott*,[5] Mr. Justice Haines of the Ontario High Court, also discussed this requirement of English criminal procedure. In England, not only must particulars be given to support the challenge for cause, but extrinsic evidence or a foundation of fact in support of such challenge is required.[6] In the United States (under state law, not federal) counsel are allowed to ask questions as to the prospective juror's history, prejudices, opinions and employment *before* deciding whether to challenge. The United States federal law does not permit such broad questioning. In fact, the judge himself makes the relevant inquiries.

However, in Canada the cases waiver between the two extremes. In *Regina* v. *Lesso and Jackson*,[7] Chief Justice McRuer of the Ontario Supreme Court allowed a mere challenge in the general terms of section 567(1)(b) with no particulars required. In *Regina* v. *Wright, McDermott*

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1. (1976) 29 C.C.C. (2d) 279. For articles in this area see Fradsham, *Challenges for Cause*, (1974) 12 Alta. L. Rev. 327; also, Vannini, n. 17.
2. Criminal Code, R.S.C. 1970, c. C-34, section 567.
3. *Id.* at 284.
4. (1969) 53 Cr. App. R. 412.
5. (1973) 12 C.C.C. (2d) 482.
6. *Supra*, n. 4. For support of this conclusion see *Id.*; also, *Regina* v. *Chandler* (1964) 48 Cr. App. R. 143.
7. (1973) 23 C.R.N.S. 179.

and Feeley,[8] Spence J. of the Ontario Supreme Court said that particulars should be given, but waived this point in the circumstances (there were 140 witnesses). In *Regina* v. *McLure*,[9] the court did not demand any particulars. The same was true for *Regina* v. *Elliott*.[10] In *Elliott* the court found that the sections when interpreted did not necessitate the giving of particulars, even when Form 37 was required. But, notice must be made of *Regina* v. *Heddleston*[11] and *Regina* v. *MacFarlane*,[12] where, in both instances the general terms of section 567 were not sufficient foundation to make a challenge. In the former case, Cromarty J. of the Ontario Supreme Court stated that a specific cause should be given *or* the challenge should be proven independently of calling the challenged juror as a witness. If one of these requirements are met, then the challenge for cause succeeds. In the latter case (Hughes J. of the Ontario High Court presiding) a specific cause for the challenge was needed *unless* the circumstances were special and warranted doing without the specifics. For example,[13]

> . . . if there are special circumstances surrounding the crime of the alleged offence which will make it unlikely for the accused to have a fair trial unless the prevailing bias . . . is unearthed in the case of every juror.

The *Hubbert* court held that no particulars need be given, *but* the judge, in his discretion, may refuse to permit the challenge to go forward unless there are reasons given by the challenging counsel.[14]

> The Code does not require that a challenge, oral or written, be particularized. A challenge in the bald words of Form 37 . . . is sufficient. But counsel must have a reason, even a generalized one: . . . Furthermore, the trial Judge has to know what the reason is, in more than general words.

Quite obviously, this is a safe course between the two extremes normally taken on this issue. The writer submits that this will tend to force counsel to prepare properly and think carefully before issuing a challenge, or, as the court said, "act responsibly." In effect, the Ontario Court of Appeal has made new law in this specific area since it has not followed previous cases strictly.

The second issue—what questions may be asked—when the issue of indifference is being tried is more settled than the first issue. In *Regina* v. *McLean*[15] an Alberta case on appeal to the Supreme Court of Canada, it was found unnecessary to make a decision as to whether a question could be asked on the nature of a prospective juror's opinion. However, in *Regina* v. *Lesso and Jackson*[16] the court permitted the challenging counsel to ask questions as to the nature of the opinion held. The judge, however, expressed his misgivings about the propriety of such questions:[17]

> It is a question that is very doubtful as to whether it should be permitted, but I do not want to restrict counsel. On the other hand, I do not want to embarrass jurors in a way that they ought not to be embarrassed.

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8. (1961) 23 C.R.N.S. 75.
9. (1969) 23 C.R.N.S. 19.
10. *Supra*, n. 5.
11. (1974) 27 C.R.N.S. 113. See *infra*, n. 22, *Makow* case.
12. (1974) 17 C.C.C. 389.
13. *Id.* at 392.
14. *Supra*, n. 1 at 263.
15. [1933] S.C.R. 688.
16. *Supra*, n. 7.
17. *Id.* It should here be noted that District Court Judge I. A. Vannini of Ontario discusses this issue as to questions in 23 C.R.N.S. 57.

Regina v. *McAuslane et al.*[18] refused to allow "fishing expeditions" in general unless the circumstances warranted it. In that case the nature of the alleged offence, i.e. an obscenity charge, did so warrant such questions.

In *Hubbert* the court followed *Lesso and Jackson*. That is, they would allow questions as to the prospective juror's employment, whether they had read about and discussed the killing, and whether an opinion had been formed and what that opinion was, if so formed. Again, it seems as if the courts are struggling to find a position, although certainly not as much as was discussed in the first issue. The weight of authority could now be said to be on the side of *Lesso and Jackson*.

As to the third issue, i.e. whether after a challenge for cause has failed a challenging counsel can use his peremptory challenge, Canadian courts have gone in both directions. In *Regina* v. *Ward*[19] the court said it was permissible to use one's peremptory challenge after the challenge for cause failed. But in *Regina* v. *Paul Rose*[20] the later peremptory challenge was not allowed.

In *Hubbert* the court allowed the peremptory challenge. Its reasoning was based on the fact that section 563(1) does not limit such use, nor does section 567.[21] This would appear to be better interpretation of the relevant sections. Certainly, there are no prohibitions against such use.

This lack of prohibitions as mentioned above is an important part of the court's reasoning in deciding the issues as it did. One other very important consideration also seemed to intervene. As stated in *Regina* v. *Makow*, by Seaton J.A. of the British Columbia Court of Appeal:[22]

> In selecting jurors we do not guarantee that they will have any particular attributes. We take 12 people from the street, with their virtues and their blemishes. . . . Will we get better jurors if they are cross-examined to ensure that they have no views on the subject and have not heard about the matter? I think not.
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> The suggestion that a juror might have read about the case seems to me quite unimportant. If knowledge is a step towards a finding of lack of indifference it is a very short step indeed.

In *Hubbert* the court stressed the fact that the juror may have information about a case, may even hold "a tentative opinion about it, but this does not make partial a juror sworn to render a true verdict according to the evidence."[23]

The *Hubbert* case was appealed to the Supreme Court of Canada. Judgment was delivered by Chief Justice Laskin who agreed with the Court of Appeal on all issues.

—STEPHEN R. STACKHOUSE*

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18. (1973) 23 C.R.N.S. 6.
19. (1972) 8 C.C.C. (2d) 515.
20. The court used *Regina* v. *Ward*, *supra*, n. 19 as authority.
21. (1973) 12 C.C.C. (2d) 273.
22. (1974) 20 C.C.C. (2d) 513 at 518. This is the appeal decision. The trial is unreported. In the *Makow* case the court decided that more than mere quotation of the Code is needed. A *prima facie* case of lack of indifference must be made by adducing extrinsic evidence. Depending on the ground of challenge and the circumstances of the case this evidence may be by counsel's statement, the filing of material or the calling of witnesses.
23. *Supra*, n. 1 at 291.

* Graduating Class of 1977, Faculty of Law, University of Alberta, presently articling with Owen-Flood Cox and Turnaham, Victoria, B.C.