CHALLENGES FOR CAUSE

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Although the art of challenging for cause is well-developed in the United States, it is not so fully-developed in Canada. In this paper, what Canadian law there is in the area is examined. The purpose is to show the practitioner what pitfalls to avoid and what procedures to follow. With the increase in the use of jury trials in Alberta, this subject will become more important, not only in the practice of criminal law but, as well, in the civil law field.

I. INTRODUCTION

The purpose of this paper is to examine the practice of challenging for cause when empanelling a jury. The practice is one which has not been closely scrutinized in Canada. In *Whelan* v. *The Queen*[1], Hagarty, C.J.C.P. stated:[2]

> In this country we have had but little if any experience in such matters. I have no recollection, during a connection of nearly thirty years with the Canadian Courts, of any questions concerning a challenge of jurors in criminal cases having arisen.

His Lordship's observation is still valid today.

In the United States, the challenge for cause as a method of "de-prejudicing" juries has come under severe criticism. However, in Canada, the Canadian Bar has yet to fully examine the practice.

First, the practicing lawyer must thoroughly understand the procedures—the "in's and out's" of challenging for cause. In *R.* v. *Luparello,*[3] Cameron J.A. stated:[4]

> But, further, there is nothing before us from which we can draw the conclusion that any substantial wrong or miscarriage was occasioned by the presence of the eight jurors, who had been sworn the first day, on the jury who convicted.
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> We can presume nothing of the kind. *On the contrary, our presumption must be, on the wording of the case submitted, that everything was properly done with due regard to the interests of the accused* . . . moreover the prisoner had, at the trial, the unimpaired right to challenge for cause . . . (emphasis added).

Surely, with presumptions such as these, counsel must know his law on the subject. Many other cases substantiate this contention, but *The King* v. *Pilgar*[5] seems to be conclusive. Counsel, upon making a premature request to question the jury as to their eligibility to sit, was told by the learned trial judge: "We will see when the question arises."[6] The implication, taken by counsel, was that the court would later pose the necessary questions. The jury was sworn, and when counsel renewed his request to question the jury members, it was ruled that the time to do so had passed. On appeal, it was held that no denial of the right to challenge had occurred.[7]

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[1] [1868] 28 U.C.Q.B. 108.

[2] *Id.* at 143.

[3] 22 D.L.R. 344 (Man. C.A.).

[4] *Id.* at 346-347.

[5] (1912) 20 C.C.C. 507 (Ont. C.A.).

[6] *Id.* at 508.

[7] *Supra*, n. 5.

Hopefully, examinations, such as the one provided by this paper, of challenging for cause will prevent such events re-occurring.

First, it is necessary to examine the Jury Act.[8] This examination will be brief and is designed only to determine who may qualify for jury duty. Secondly, the challenge for cause will be traced through its procedural life cycle. Chronological order will be followed as closely as practicable, however, certain diversions will be necessary. Finally, Canadian cases will be cited to supplement the issue under discussion, and English cases will be noted where they might possibly aid the Canadian practitioner. Relevant articles will also be referred to.

The Jury Act outlines those qualifications which must be met in order to sit on a jury in this province. Two sections of interest are sections 5 and 7. Section 5 lists certain persons who are exempt from serving on juries, and section 7 states that certain listed persons are disqualified to sit on a jury. The question arises whether or not there is a difference—especially with relation to a challenge for cause. A reference case, *Re Alberta Jury Act*,[9] which was later appealed to the Supreme Court of Canada,[10] sheds some light on the matter. The courts seemed to imply that all exemptions were absolute and that an exempted person was a disqualified person. For example, the Alberta Supreme Court held that:[11]

> When an unqualified person has been called and the discovery is made before he is sworn, the presiding judge has the authority and duty, when his attention is called to the fact, to order the name to be struck from the jury list. If the discovery is made after he has been sworn and objection is taken before verdict by any party to the cause, the jury should be discharged and the trial begun anew before a properly qualified jury. If the discovery is not made until after verdict the lack of qualification is not a ground for questioning the validity of the verdict.

An English case, *Mulcahy* v. *The Queen*,[12] dealt with the Irish Jury Act.[13] In the Act, a clear distinction was made between exemption and disqualification. One exemption was an age of sixty or more years. The House of Lords held:[14]

> . . . that fact only operated in his favour as an exemption, but was not a ground for challenge as a personal disqualification.

The Court seemed to be implying that exemptions were something to be effected at the request of the prospective juror. It is doubted that this approach would be followed in Canada, but it is an interesting point to remember. While having a juror rejected, due to an exemption or disqualification, is not technically a challenge for cause, it is closely enough related to justify its inclusion in this paper.

Challenging for cause can be applied either to the array, or to the individual. Challenging the array is outlined in the Criminal Code.[15] The basis of the challenge is that the sheriff has not impartially chosen the members of the panel. The challenge must be in writing.[16]

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[8] R.S.A. 1970, c. 194.

[9] (1946) 2 C.R. 94 (Alta. A.D.).

[10] In *The Matter of a Reference as to the Interpretation of the Jury Act of Alberta* [1947] S.C.R. 213.

[11] *Supra*, n. 9, Headnote.

[12] (1868) L.R. 3 H.L. 306.

[13] 3 & 4 Will. 4, c. 96.

[14] *Supra*, n. 12 at 315.

[15] R.S.C. 1970, c. C-34, ss. 557-559. S. 557 does not apply in Alberta because there are no grand juries here.

[16] Usually, Form 36 is used—*See* Appendix A.

The judge then tries the matter, and should he find there is a good challenge, a new panel is returned.

The Queen v. *Milne*[17] was a case of principal challenge to the array. Counsel challenged the array on the ground that:[18]

> an action was pending by the prisoner's husband against the sheriff for *inter alia*, an assault on the prisoner.

The trial judge overruled the challenge and convicted the accused, such conviction being quashed upon the appeal court finding the challenge to be sound. *Brown* v. *Maltby*[19] clarifies a certain technical matter related to challenging the array. In that case, Palmer J. stated:[20]

> What I understand by a challenge to the favour, as distinguished from a principal cause of challenge, is this; a principal cause of challenge alleges that facts exist with reference to the sheriff which, in point of law, disqualify him from summoning the jury; in which case, all that the party challenging has to do, is to allege such facts, and conclude his challenge with a verification and prayer for judgment; because the unindifferency of the sheriff is a conclusion of law from the fact stated. On the other hand, a challenge for favour is, when facts exist with reference to the sheriff, which, of themselves, would not disqualify him from summoning the jury, and might, or might not, render him partial. If he remained impartial, notwithstanding the existence of these facts, he would be the proper person to summon the jury; if not, then the venire should issue to the coroner.
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> If this is the correct view of the matter, it follows, that according to the rules of pleading, a challenge for favour should, in addition to the facts relied on, contain an allegation that the sheriff was not impartial; so that if that was traversed, it, with the other facts, would be determined by the triers, and the challenge allowed or overruled, according to the finding of the issue.

Should the array be unsuccessfully challenged, or not challenged at all, counsel may challenge the individual members of the panel. According to s. 563(3) of the Criminal Code:[21]

> The accused may be called upon to declare whether he challenges a juror peremptorily or for cause *before* the prosecutor is called upon to declare whether he requires the juror to stand by, or challenges him peremptorily or for cause (emphasis added).

The Criminal Code does not state who shall so direct the accused, but it can be assumed that such a request by the Crown would not be refused by the court.

Section 567(1) of the Criminal Code[22] outlines the grounds upon which a challenge for cause may be based. They are:

> (a) . . . the name of a juror does not appear on the panel . . .
> (b) a juror is not indifferent between the Queen and the accused.
> (c) a juror has been convicted of an offence for which he was sentenced to death or to a term of imprisonment exceeding twelve months.

Section 567(2) states that no challenge for cause shall be allowed on a ground not mentioned in s. 567(1).

It should be noted, at this point, that the burden of proving the challenge is on the party that makes it: *R.* v. *Russell*;[23] *Richard* v. *The Queen*.[24]

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[17] (1880) 20 N.B.R. 394 (N.B. A.D.).

[18] *Id.* at 394.

[19] (1880) 20 N.B.R. 92 (N.B. A.D.).

[20] *Id.* at 93.

[21] *Supra*, n. 15.

[22] *Id.*

[23] [1920] 1 W.W.R. 624 (Man. C.A.).

[24] (1960) 31 C.R. 340 (N.B. A.D.).

Whether or not a prospective juror can be challenged, because of his insufficient grasp of the English language, is in doubt. There are two cases on this point. In *R.* v. *Earl*,[25] Bain J. stated:[26]

> It is possible to surmise that the prisoner may have been prejudiced by the juror's want of familiarity with English; and this is the only ground on which it can be contended that there was a mistrial. But I know of no case in which for any reason like this a trial has been held to have been a nullity . . . a mere possibility of prejudice cannot vitiate a trial.
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> [P]ersons speaking only one of the two languages, English and French, have a right to be, and may be, on the jury; and it is easy to ascertain whether all the jurors speak the language that is to be used at the trial or not.
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> If, however, it is taken for granted that all the jurors understand the language that happens to be used, it cannot be allowed, either to the Crown in the case of acquittal, or to the prisoner in case of conviction, to say after the trial is over, that it was a mistrial because it has been found that one of the jurors was not familiar with the language that was used.

It would appear, from that judgment, that counsel cannot make a formal challenge on the matter. However, there may be other ways of removing the juror, though that is not certain. For example, Bain J. also stated that:[27]

> [T]he juror [the one not proficient in English] was qualified and had a right to sit on the jury; and if he were not challenged [presumably his Lordship was referring to the peremptory challenge] either by the Crown or by the defence, I doubt if the presiding Judge would have had power to reject him, or order him to stand aside as a person unfit to serve on the jury. *But had it been brought to the notice of the Court that the juror was not familiar with the language that was being used at the trial, it would have been his duty to have what was said translated.* (emphasis added).

However, in *Richard* v. *The Queen*,[28] McNair C.J.N.B., in reviewing the empanelling process used at trial, notes that:[29]

> [A]t the trial the names of 77 petit of whom two were absent were called by the clerk of the Court. Each of the remaining 75 were, as called to the book, challenged for cause by the defence on the ground that he was not indifferent between the Queen and the accused. *Of these, 7 were excused by Court as not having sufficient knowledge of the English language or on physical grounds.* The issue, raised by the defence challenges with respect to the other 68 jurors, was determined by triers in accordance with the provisions of s. 549 of the Code (emphasis added).

Two things should be noted in his Lordship's statement: (1) it would appear that the Court can dismiss jurors for want of knowledge of the language, and (2) it is not a matter dealt with by formal challenge for cause.

The grounds for challenge, under the rule that the juror must be indifferent between the Queen and the accused, are many and varied. They may vary from a relationship between one of the parties and the juror,[30] to jurors having previously heard Crown evidence at a mistrial.[31]

One ground for challenge does require special attention—statements made by the juror about the accused. It would logically seem that such

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[25] (1894) 10 Man. R. 303.

[26] *Id.* at 316.

[27] *Id.* at 316.

[28] *Supra*, n. 24.

[29] *Id.* at 341.

[30] *See R.* v. *Rasmussen* (1934) 62 C.C.C. 217 (N.B. A.D.).

[31] *See R.* v. *Vescio* (1948) 6 C.R. 208 (Man. C.A.).

statements, either good or bad, would be a good ground for challenge. However, in *Richard* v. *The Queen*,[32] the Court referred to Abbot C. J. in *R.* v. *Edmunds et al.*:[33]

> . . . [T]he declaration of a juryman will not be a good cause of challenge, unless it be made in terms or under circumstances denoting an ill intention towards the party challenging. A knowledge of certain facts, and an opinion that those facts constitute a crime, are certainly no grounds of challenge, for it is clearly settled, that a juryman cannot be challenged by reason of his having pronounced a verdict of guilty against another charged by the same indictment . . . . Expressions used by a juryman are not a cause of challenge unless they are to be referred to something of personal ill-will towards the party challenging . . . .

In other words, counsel must prove that the juror will not be able to consider the matter impartially, and previous impartial statements towards the accused, made by the juror will not be sufficient in all cases. Furthermore, it is important to note that a challenge for cause, which would be successful when properly forwarded, will not, if it goes unstated, serve as a grounds for a new trial unless obvious injustice has been done.[34] In other words, a ground for challenge should not be confused with a ground for mistrial.

The importance of the procedures followed in empanelling the jury, and hence challenges, is noted in two English decisions. The procedures are so important that a record of their proceedings must be kept. In *R.* v. *Olivo*,[35] Tucker J. stated:[36]

> We also desire to draw attention to the form of the shorthand note of the proceedings in this case in which it is said 'the jury were duly sworn and charged'. All proceedings including all the formalities leading up to the actual evidence should be set out *verbatim* in the shorthand note so that the court can see what was done and how the men were put in charge.

The same emphasis on the importance of the matter is illustrated in *The Mayor etc. of Carmarthen* v. *Evans*.[37]

The philosophy of the challenge for cause is an important point to note. It is the basis for much of the law on the subject and is a good rule of thumb when trying to determine what can and cannot be done in a challenge. A good summary of this philosophy was given in *The Queen* v. *Lalonde*[38] by Wurtele J.:[39]

> It must not be forgotten that the right of challenge is a right merely to reject, and it should not be converted from such a right to reject into the right to select. The right to say who shall not try the case is all that the privilege of challenging confers. It enables the prisoner to say who shall not, but not who shall, try him.

The procedure followed in the empanelling of a jury is well-stated in *Morin* v. *The Queen*.[40] In that case, Ritchie C.J. quotes from Archbold's *Pleading & Evidence in Criminal Cases*:[41]

> Where a sufficient number of prisoners have pleaded and put themselves upon the country, the clerk of the arraigns addresses the prisoner thus: 'Prisoners, these good

[32] *Supra*, n. 24.
[33] (1821) 4 B & Ald. 470, 106 E.R. 1009.
[34] *See R.* v. *Rasmussen*, *supra*, n. 30.
[35] [1942] 2 All E.R. 494 (C. of C.A.).
[36] *Id.* at 495.
[37] (1842) 152 E.R. 473.
[38] (1898) 2 C.C.C. 188 (Que. Q.B.).
[39] *Id.* at 189.
[40] [1891] S.C.R. 407 (S.C.C.).
[41] 169 (20th ed.).

> men that you shall now hear called are the jurors who are to pass between our sovereign lady the Queen and you upon your respective trials; (or in a capital case, upon your life and death); if, therefore, you or any of you will challenge them or any of them you must challenge them as they come to the book to be sworn, and before they are sworn, you shall be heard.' The officer then proceeds to call twelve jurors from the panel, calling each juror by name and address. Hereupon, and after a full jury has appeared the proper time occurs for the defendant to exercise his right of challenge, or exception to the jurors returned to pass upon his trial.

Another case which sets out the procedure is *Richard* v. *The Queen.*[42] This case is later examined with reference to the triers part in the challenge process.

There is some debate as to when the juror must be challenged. The commonly held view is that the challenge must be made before the juror is sworn. For the time being, it shall be assumed that this is the case.[43] Usually there is no right to question a juror before challenging him. In other words, one cannot question the juror in order to determine who should be challenged.[44] Riddell J. in *R.* v. *Harri*[45] stated:[46]

> Counsel for the prisoner desiring to question a juryman before he was sworn, I rule that that is not permissible in our practice. . . . We have never introduced into this Province the practice which seems to be common in the United States: we have followed the English practice.
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> Very many, particularly of the younger barristers, seem to imagine that we have introduced what is to me an exceedingly objectionable practice. I may say that I have seen the questioning of a juryman only once in our Courts. . . . In that particular instance it was allowed; but I think the practice should not be permitted to spread.

In an English case, *R.* v. *Kray,*[47] counsel was allowed to examine the juror. However, Lawton J. was quick to point out the Court's view of the matter:[48]

> It would, in my judgment, be regrettable if our courts got into the position of the courts in some countries where every time a juror comes to the jury box to be sworn he is likely to be cross-examined at length about his views and beliefs. Such a practice would be foreign to the spirit of the administration of justice in this country. No one must leave this court thinking that my judgment on this point amounts to a license for counsel to examine and cross-examine prospective jurors as to what they believe or do not believe. Indeed, I want to stress—and I cannot stress too strongly—that the combination of facts which have brought about the situation with which I have had to deal in this case, is, in my view, wholly exceptional.

The system, to which both learned justices referred, is the one used in the United States.

A good summary of the American practice is to be found in Rhine, *Prejudice in the Jury:*[49]

> Prospective jurors are then subjected to a *voir dire* examination, which is intended to eliminate from the jury any who have preconceptions which will affect or prevent an unbiased judgment of the particular facts of the case. During the *voir dire,* a prospective juror may be challenged by the court or by counsel, and thereby excused.

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[42] *Supra,* n. 24.

[43] Note, however, the following statement in *R.* v. *Elliot* (1973) 22 C.R.N.S. 142 at 144 (Ont. S.C.) where Haines J. stated:

> Counsel need only challenge the juror for cause in the words of the Criminal Code, s. 567(1)(b), on the grounds that the juror was not indifferent between the Queen and the accused. If Parliament intended that the particulars or pleading were necessary, it would have said so.

[44] Such is not the case in some other *forums,* e.g., some states of the United States.

[45] (1922) 36 C.C.C. 305 (Ont. S.C.).

[46] *Id.* at 306.

[47] (1969) 53 Cr. App. R. 412.

[48] *Id.* at 416.

[49] (1969) 20 Hast. L. J. 1417.

> Challenges for cause may be made on the grounds either of implied bias—where an inference of bias is drawn from the existence of a relationship or other connection between the juror and an element of the case such as a party—or of actual bias—where the juror admits to a state of mind which would prevent him from being impartial. The fact that the prospective juror admits to prejudice or bias is not necessarily sufficient to sustain a challenge for cause: If he asserts convincingly that he can overcome his feelings and judge the case with an open mind, the challenge is not allowed.

The author goes on to complain that the system is wrong. She states that "at the heart of the problem is the virtual impossibility of getting people to state their biases in the public *voir dire*".[50] That is some indication that in the United States, jurors are thoroughly grilled even before challenge. Recently, however, there has been a drift towards the American system of questioning prospective jurors in an effort to disclose a bias. It must be remembered that the Canadian position, to date, has been to allow counsel to question a prospective juror only *after* first producing extrinsic evidence on the issue of bias.

In *R.* v. *Elliot*,[51] Haines J. states that:[52]

> [P]eremptory challenges and challenges for cause are merely rejection devices. Their intelligent use is dependent on the prior knowledge of the potential juror and what may be learned from him under oath when challenged for cause.

He goes on to say that the Crown has "extensive information collecting facilities" whereas the "accused has none".[53] The learned trial judge states that an accused, attempting to ascertain such information, runs the grave risk of being in contempt and interfering with the administration of justice.[54] Haines J. concludes with these words:[55]

> It is my considered opinion that it would be not only contrary to the provisions of the Code, but contrary to a sense of fairness to require an accused person as a condition precedent to challenging for cause to plead facts which he cannot afford to obtain, even if he were willing to incur the risk mentioned in *Caldough*, and establish a *prima facie* case of bias before being allowed to question the juror who can provide the very answers he is seeking. Much more in keeping with the realities of the situation is to allow the accused, through his counsel, to ask such relevant questions in open courts as to the partiality and fitness of the juror under the watchful eye of the judge who will in the exercise of his discretion protect the interests of the Crown and the accused as well as the administration of justice. In this manner, the tribunal itself is enhanced in the eyes of the public. Lay triers have found the juror fair and impartial. Justice is at its highest when its administration is shared by our citizens.

This approach was followed and endorsed by Galligan J. in *R.* v. *Jones; R.* v. *Daley (No. 2)*.[56] It may well be adopted in other provinces.

By virtue of s. 568,[57] a challenge for cause of an individual may have to be put in writing. This is at the discretion of the Court, and Form 37 may be used.[58] Section 569(1)(a)[59] states that should the grounds of the challenge be that the name of the juror is not on the panel, the judge shall determine the matter on a *voir dire*. The judge

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[50] *Id.* at 1429.

[51] *Supra*, n. 43.

[52] *Id.* at 152.

[53] *Id.*

[54] *See R.* v. *Caldough* (1961) 36 C.R. 248, 36 W.W.R. 46, 131 C.C.C. 336.

[55] *R.* v. *Elliot, supra*, n. 43 at 152.

[56] (1973) 22 C.R.N.S. 156 (Ont. S.C.).

[57] The Criminal Code, *supra*, n. 15.

[58] *See* Appendix B.

[59] The Criminal Code, *supra*, n. 15.

will consider such evidence as he thinks fit. Should the ground of challenge be of some other nature, s. 569(2)[60] provides that "the two jurors who were last sworn, or if no jurors have then been sworn, two persons present whom the court may appoint for the purpose, shall be sworn to determine whether the ground of challenge is true". Section 569(4)[61] allows the court to replace the triers should they be unable to reach a decision.

In *Morin* v. *The Queen,*[62] Ritchie C. J. confirms what is to be left to the triers by again quoting Archbold:[63]

> In the case of a principal challenge to the polls, if the partiality be made apparent to the satisfaction of the court, the challenge is at once allowed and the juror set aside. But in the case of a challenge to the favour, it is left to the discretion of two triers who are sworn and charged to try whether the juror challenged stands indifferent between the parties.

The oath is then administered to the triers, of whom no challenge is admissible. The oath given by Archbold is referred to in Morin:[64]

> The form of oath to a trier, to try whether a juror challenge stands indifferent or not, is as follows: 'You shall well and truly try whether A.B., one of the jurors, stands indifferently to try the prisoner at the bar, and a true verdict give according to the evidence. So help you God.'

Richard v. *The Queen*[65] gives an interesting example of a judge's instruction to the triers. The original instruction of the learned trial judge was basically that they were to determine whether or not the juror was indifferent. However, later his Lordship stated that:[66]

> Almost everybody who has read or heard about this case has some opinion. That is not a disqualification entirely, if you feel the man can give an honest verdict according to the evidence which he hears this week. Everybody has an idea, you know. Do not get it into your heads that because somebody has an impression one way or the other that is going to make him a poor juryman.

The appeal court approved this direction, and it is submitted, with respect, that it does properly summarize the function of a juror and, hence, the proper view for a trier to hold of a juror. That view is that a juror may have an opinion and still render a verdict based on the trial evidence.

Once the triers are sworn and instructed, counsel will wish to prove his case. When trying to establish a good challenge for favour, counsel will usually wish to question the juror. In *R.* v. *Cook,*[67] Ritchie J. authorized this. However certain questions cannot be put to the juror. The first principle to be kept in mind, when questioning a juror, is that:[68]

> he is not . . . to be interrogated as to matters which tend to his own discredit. He is not to be asked on the *voir dire* any question the answer to which would tend to incriminate or disgrace him, *R.* v. *Cook* (1696) 13 St. Tr. 311 334; *R.* v. *Edmonds* (1821), 1 St. Tr. N.S. 785, 4 B & Ald. 471; *Reg.* v. *John Martin* (1848) 6 St. Tr. N.S. 925.

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[60] *Id.*
[61] *Id.*
[62] *Supra,* n. 40.
[63] *Id.* at 416.
[64] *Id.* at 416.
[65] *Supra,* n. 24.
[66] *Id.* at 341.
[67] (1973) 22 C.C.C. 241 (N.S.S.C.).
[68] *See* annotation 31 C.C.C. 197.

The questioning in *Richard* v. *The Queen*[69] shows that even if defence counsel can get the juror to admit a bias, that will not substantiate the challenge if the Crown can convince the triers that, even so, the juror will render a verdict based on the evidence given at trial.

The Court in *R.* v. *Kray*[70] quotes the Lord Chief Justice in *Chandler*[71] as follows:[72]

> . . . before any right to cross examine the juror arose, the appellant would have to lay a foundation of fact in support of his ground to challenge. It is no good his saying, 'I think this man is antagonistic' or calling somebody to say, 'I don't think he likes processions. He thinks they are unreasonable'. *There must be a foundation of fact creating a prima facie case before the man can be cross examined* (emphasis added).

There is one case that tends to dispute this right of counsel to ever question the juror as to his biases.[73] Perdue C.J.M. stated that "if the ground of the challenge is that the juryman is not indifferent, he is not in general to be questioned as to the fact. It must be proved by extrinsic evidence."[74] His Lordship's words ought now to be liberally read so as to concur with those given by the Lord Chief Justice in *Chandler*.

Counsel, trying to establish challenge for cause, may call witnesses for the purpose. In *McLean* v. *The King*,[75] it was held that it is "the duty of the accused, as the challenging party, to see that the witnesses he called to support the challenge are properly sworn".[76]

Ritchie C. J., in *Morin* v. *The Queen*,[77] set out the oath for such a witness:[78]

> The form of oath to be administered to a witness sworn to give evidence before the triers is as follows:
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> 'The evidence which you shall give to the court and triers upon this inquest shall be the truth, the whole truth, and nothing but the truth, so help you God.'

The decision of the triers is final. Wurtele J. stated in *The King* v. *Carlin (No. 1)*[79] that "triers are the judges of the facts, and their finding as to the fact of competency is conclusive and final, and from their finding there is no appeal."[80]

McNair C.J.N.B., in *Richard* v. *The Queen*,[81] quoted the decision in *Bureau* v. *The King*[82] which case held that:[83]

> It was for the triers to decide whether a juror was or was not partial; it was a question of fact, not of law, *and in the absence of any proof that the triers decided wrongly, corruptly, were hostile to accused, or acted upon a wrong principle,* their decision was final (emphasis added).

It is this very concept of the finality of the triers' decision which has led to another area of dispute. Recently, two courts have had to decide

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[69] *Supra*, n. 24.
[70] *Supra*, n. 47.
[71] (1964) 48 Cr. App. R. 143.
[72] *R.* v. *Kray*, *supra*, n. 47 at 416.
[73] *See R.* v. *Russel*, *supra*, n. 23.
[74] *Id.* at 627-628.
[75] [1933] S.C.R. 688 (S.C.C.).
[76] *Id.* at 693.
[77] *Supra*, n. 40.
[78] *Id.* at 416.
[79] (1903) 6 C.C.C. 365 (Que. K.B.).
[80] *Id.* at 392.
[81] *Supra*, n. 24.
[82] (1931) 52 Que. K.B. 15.
[83] *Richard* v. *The Queen*, *supra*, n. 24 at 345.

the following problem: The accused challenges for cause a prospective juror. The triers find that the prospective juror is "indifferent". The accused, still having a peremptory challenge left, wishes to use it to exclude the prospective juror. Can he do so? According to *R.* v. *Ward,*[84] the answer is in the affirmative. The learned trial judge had found that the peremptory challenge could not be exercised because s. 569(3) of the Criminal Code[85] states that "where the finding . . . is that the ground of challenge is not true, the juror *shall* be sworn . . ." (emphasis added). Schroeder J. A. of the Court of Appeal did not agree that the section was to be so narrowly interpreted. He held that:[86]

> The words 'the juror shall be sworn' surely mean no more than that the juror shall be sworn provided that in exercising their rights under these other specific provisions of the Criminal Code, Crown counsel has not directed the juror to stand aside, or has not challenged him peremptorily, or counsel for the accused has not made a peremptory challenge of the particular juror.

His Lordship pointed out that if "the accused were to be tried before a jury, every member of which had been unsuccessfully challenged for cause, his position would be an unenviable one".[87]

The Quebec Court of Appeal, in *Rose* v. *The Queen,*[88] reached the opposite conclusion. In a 3-2 decision, the court held that the accused was not entitled to exercise a peremptory challenge to remove a prospective juror after an unsuccessful challenge for cause. Rinfret J. A. and Montgomery J. A. both held that the word "shall" was imperative and the accused's common law right to use a peremptory challenge after an unsuccessful challenge for cause had been abrogated by the Criminal Code. Deschenes J. A. agreed with this, but further stated:[89]

> When the law allows the accused alternatively two means of challenging, he is wrong in claiming to use one in service of the other, and, having been unsuccessful in challenging for cause, changing his mind and challenging peremptorily. The examination resulting from the challenge for cause is not a means to be put at the disposal of the accused to allow him a peremptory challenge after failing to convince the triers of the merits of his challenge for cause.

A challenge, peremptory or for cause, cannot be withdrawn after it is successful made. Similarly, a peremptory challenge, once made, cannot be withdrawn and replaced with one for cause (even if the cause was unknown at the time of the peremptory challenge).[90]

Section 563(2) of the Criminal Code allows the Crown to direct jurors to stand by. *Chandler's* case[91] held that the accused does not have the right to stand by jurors, however, "in an exceptional case, whether of felony, or misdemeanour, as a matter purely of discretion, the judge may himself stand by a juror or allow a defendant to do so".[92] Wurtele J., in *Lalonde,* says of them:[93]

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[84] [1972] 3 O.R. 665 (Ont. C.A.).
[85] *Supra,* n. 15.
[86] *R.* v. *Ward, supra,* n. 84 at 668.
[87] *Id.* at 668.
[88] (1973) 22 C.R.N.S. 46.
[89] *Id.* at 140.
[90] *The Queen* v. *Lalonde, supra,* n. 38.
[91] *Supra,* n. 71.
[92] *Id.* at 152.
[93] *Supra,* n. 38 at 188.

> To order a juror to 'stand by' is virtually to challenge him for cause, postponing however the consideration of the challenge till it has been seen whether a full jury can be formed without him.

Whereas the stand-by is a deferred challenge for cause, the Crown may peremptorily challenge such a juror if the Crown still has any peremptory challenges left if and when those jurors who have been told to stand-by, are called again.[94] Of course, the accused may challenge for cause or, if still able to, peremptorily challenge any such recalled jurors.

Many problems arise if the challenge is not made *before* the juror is sworn. If this situation arises, counsel will have many difficulties pressing his objection to a juror. *R.* v. *Earl*[95] held that "it is too late to challenge a juror after he has been sworn, even if the ground for challenge was not known at the time." As noted above, *The King* v. *Pilgar*[96] illustrates the disaster that can befall counsel who fails to challenge before the swearing of the jurors. In that case, the judge unintentionally misled counsel who then failed to press his challenge until it was too late. No mistrial was allowed for it was held that no denial of the right to challenge had occurred. The most interesting case in this area is that of *The King* v. *Mah Hung*.[97] In that case, a juror, after being sworn, uttered a prejudiced statement. The trial court did not discharge the juror, and this action was approved of on appeal. Irving J. A. stated:[98]

> A juryman has no business to volunteer a statement of the kind. Jurymen, after they are sworn, are expected to live up to the oath they have taken. A juror is not at liberty to be asked questions in order to found a challenge before he is sworn. And after he is sworn he speaks through the foreman.[99]

His Lordship gave the further reason:[100] "it was too late. A prisoner could not be in any better position than if he had endeavoured to challenge the man".

Six years later, the matter came before the B.C. Court of Appeal again. The facts were similar—a sworn juror expressed a prejudice opinion. The trial court would do nothing about it (save reprimanding the jury). The case was *Howard* v. *B.C. Railway Company*.[101] Martin J. A. stated:[102]

> With every respect I cannot but feel that this vital matter was treated in an inadequate way . . . . In my opinion, it ought to have been pursued to its legitimate conclusion, which is, that whenever, and so soon as it appears, that any juror is actuated by improper motives then it is certain that justice cannot be done by such a tainted tribunal and it ought to be purged of that taint. It is impossible that a Judge of fact or law can do that justice which he is sworn to do between the parties if he declares his bias or prejudice against one of them. Justice in my opinion is not satisfied by a rebuke to the offender but prompt action must be taken to remove him from an office that he has shown himself unfit to fill, and it is the duty of the Court of its own motion, upon the discovery of such gross impropriety, to protect its litigants from the

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[94] *See Morin* v. *The Queen*, *supra*, n. 40; *R.* v. *Brennan* 40 C.R. 329 (P.E.I.S.C.).

[95] *Supra*, n. 25 at 305.

[96] *Supra*, n. 5.

[97] (1912) 20 C.C.C. 40 (B.C.C.A.).

[98] *Id.* at 46.

[99] It is submitted, with respect, that the argument should compel the discharge of the juror in question.

[100] *The King* v. *Mah Hung*, *supra*, n. 98 at 47.

[101] [1918] 3 W.W.R. 409 (B.C.C.A.).

[102] *Id.* at 411.

> baneful results of such a scandal, by then and there discharging the jury and summoning another, just as would have to be done in the case of a juror who was discovered to be insane or had received a bribe. The inevitable consequence here is that there has been a mistrial, in the true and grave sense of that word . . . and *the verdict cannot be allowed to stand as it violates a fundamental principle of justice* (emphasis added).

It is interesting to note that his case did not even mention the *Mah Hung* case. *R.* v. *Rasmussen*[103] would modify the approach of the *Howard* case. In *Rasmussen,* Barry C.J.K.B. stated that the presence on a jury of a prejudiced juror is not a ground for a mistrial *unless* it can be shown that a miscarriage of justice resulted. His Lordship reiterates the position that:[104]

> If a defendant omits to challenge on the ground that the juror entertains a hostile feeling against him, he cannot, after a verdict of guilty, ask on that ground to have the verdict quashed and for a new trial. And the same would be true, I apprehend, where in the case of an acquittal, the Crown is asking for a new trial on the ground of disqualification of one of the jurors. *Challenge to the polls must be made when the juror comes to the book to be sworn, and it comes too late afterwards.* Where a disqualified juror is on the panel and no challenge is made, the presence of the juror does not invalidate the trial. (emphasis added).

Wurtele J. in *The King* v. *Carlin (No. 1)*[105] and upheld by *The King* v. *Carlin (No. 2)*[106] stated:[107]

> The fact that a juror has made remarks indicating a leaning for or against an accused will not of itself furnish ground for a new trial where the verdict does justice, and there is no reason to suppose that the juror's opinion and conclusion was not derived from the evidence, and a new trial should not be ordered where remarks have been unless it be shewn that the juror was so prejudiced as to be unable to give the accused a fair and impartial trial.

The English case of *Brunskill* v. *Giles*[108] offers the same basic thought. Tindal C. J. stated:[109]

> The law has appointed a particular time for taking this objection—when the jury comes to the book to be sworn. The Defendant was not in a condition then to tender his formal challenge. I am not prepared to say that a case may not occur in which, if the party be not aware of the objection at the time, he may not afterwards come and require the assistance of the Court: but upon this affidavit there is nothing to shew that the Defendant was taken by surprise, or that he used due diligence to establish the fact at the trial.

Another English decision, *R.* v. *Flint,*[110] offers a different twist on the subject. The headnote is as follows:[111]

> W. H. Cooke, for the prisoner, having preemptorily challenged one of the jury, another was called from the panel, and took his place and was duly sworn. Immediately afterwards Cook stated that he also objected to the substituted juror, and applied to his lordship to allow another to be challenged.
>
> Platt B. after consulting with the clerk of assize, allowed the challenge to be taken, observing that the jury were sworn to try the prisoners whom they should have in charge, and at present no prisoner was in charge.

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[103] *Supra,* n. 30.
[104] *Id.* at 228.
[105] *Supra,* n. 79.
[106] (1903) 6 C.C.C. 507 (Que. A.D.).
[107] *The King* v. *Carlin (No. 1), supra,* n. 79, at 371.
[108] (1832) 131 E.R. 519.
[109] *Id.* at 519.
[110] (1848) 3 Cox C.C. 66.
[111] *Id.*

That approach is hinted at in *Morin* v. *The Queen,*[112] where Ritchie C. J. discussed the concept of "jeopardy" with reference to an accused being acquitted upon the discharge of a jury in whose charge he was. His Lordship adopted the following as a definition when jeopardy begins:[113]

> Then on the completing and swearing of the panel the jeopardy of the accused begins and it begins only when the panel is full. Until full, the jeopardy is not perfect. In other words, without a jury set apart and sworn for the particular case, the individual defendant has not been conducted to his period of jeopardy. But when, according to better opinion, the jury being full is sworn, and added to the other branch of the court and all the preliminary things of record are ready for the trial the prisoner has reached the jeopardy from the repetition of which our constitutional rule protects him.

Since jeopardy does not begin until the prisoner is in the charge of the jury, one may be able to argue the right to challenge any time before jeopardy begins.[114] Finally, an English decision, *Tyndal's Case*[115] held that "a challenge not heard till the juror was sworn and marked, cannot be admitted without the consent of the Attorney General". It is not known if that is the only way in Canada to recall a juror, but *R.* v. *Coulter*[116] suggests that it is one way. An interesting note is added by the following annotation:[117]

> It is commonly stated that the challenge must be made before the juror has come to the book to be sworn, but it seems that the mere delivery of bibles into the hands of the jurors preliminary to the stating to them of the jurors' oath will not prevent a challenge if made before the actual commencement of the administration of the oath which consists primarily of the recital by the clerk of the Court of the formula of the oath, and which is followed by the juror's assent to same signified by the kissing of the book. *R.* v. *Brandreth* (1817) 32 St. Tr. 755, 777; Archbold's Cr. Pldg. 1918 ed., 182, and there is Australian authority to the effect that it is not too late to challenge a juror for cause so long as he has not done any act shewing his assent to the taking of the oath. *Reg.* v. *Freeman* (1895) 6 Queensland L.J.R. 281, and where a juror with the book in his hand said he was opposed to capital punishment and the case was a capital case, a challenge for cause was permitted at that stage. *Reg.* v. *Longland* (1896) 7 Queensland L.J. 56.

Should the decision in *Howard* v. *B.C. Electric Railway Company*[118] not be followed, perhaps the only recourse is that suggested by Wurtele J. in *The Queen* v. *Harris:*[119]

> Should a prisoner inadvertently omit to challenge a juror who entertains a hostile feeling against him, his only recourse, after a verdict convicting him, would be an appeal to the Crown for the exercise of the prerogative of mercy, on which, if the Minister of Justice entertains a doubt whether he ought to have been convicted, he may direct a new trial.

It should be noted that ss. 598-599 of the Criminal Code[120] render ineffective many errors of procedure. Those errors which do provide good bases for mistrials are noted in the above cited cases.

There are some miscellaneous points which should be noted:

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[112] *Supra*, n. 40.

[113] *Id.* at 419.

[114] It is submitted that *R.* v. *Flint, supra*, n. 110, is authority for this statement.

[115] (1633) 79 E.R. 855.

[116] 13 U.C.C.P. 299.

[117] (1918) 31 C.C.C. 197 at 199, 200.

[118] *Supra*, n. 101.

[119] (1899) 2 C.C.C. 75 (Que. Q.B.).

[120] *Supra*, n. 15.

(1) The discharge of a jury member does not re-open the right to challenge those already sworn, nor does it necessitate their re-swearing.[121]

(2) Counsel need not exhaust his peremptory challenges before being allowed to challenge for cause.[122]

(3) According to common law, a jury cannot be wholly composed of talesmen, summoned under s. 571.[123]

(4) The manner in which the accused may exercise his right to challenge for cause . . . and the method by which the issue raised by such a challenge ought to be tried . . .[124] go to the jurisdiction of the tribunal and are reviewable by prohibition.

II. CONCLUSION

The challenge for cause is an extremely important tool for counsel involved in empanelling a jury. The make-up of the jury, be it favourable or unfavourable to the client will largely depend upon counsel's skill and knowledge of the statute and common law regulating challenges. The court, it appears, will take little pity upon counsel who advertently or inadvertently abuses the privilege.

APPENDIX A

Form 36

Canada Province of ....., (territorial division)	)	The Queen v. C.D.

The (prosecutor or accused) challenges the array of the panel on the ground that XY (sheriff or deputy sheriff), who returned the panel, was guilty of (partially or fraud or wilful misconduct) on returning it.

Dated this .....day of .....A.D.

.....
Counsel for (prosecutor or accused)

APPENDIX B

Form 37

Canada Province of ....., (territorial division)	)	The Queen v. C.D.

The (prosecutor or accused) challenges G. H. on the ground that (set out ground of challenge in accordance with section 567(1)).

.....
Counsel for (prosecutor or accused)

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[121] *R.* v. *Coulter, supra,* n. 116.

[122] *Whelan* v. *The Queen, supra,* n. 1.

[123] *R.* v. *Solomon* [1957] 3 All E.R. 497. Note that ss. 598-599 would probably cure this irregularity.

[124] *R.* v. *Jones, R.* v. *Daley(No. 2), supra,* n. 56.