

Court of Queen's Bench of Alberta

Citation: R v Eserjose, 2022 ABQB 90

Date: 20220201
Docket: 190698787Q1
Registry: Edmonton

Between:

The Queen

Crown

- and -

Daniel Eserjose

Defendant

**Reasons for Decision
of the
Honourable Madam Justice A.B. Inglis**

[1] On Thursday January 27th, 2022 three juries were selected at the Bonaventure Writing Centre in Edmonton Alberta. Despite the fact that three individual Justices had been assigned for trial, Little J. selected all three juries.

[2] Those jurors that responded to their summons to attend were checked in by the clerks who also checked that each prospective juror had a QR code showing that they had received at least two COVID-19 vaccines. Those that did not show proof of at least double-vaccination were excluded from joining the jury pool.

[3] Defence counsel advised this Court that he was not aware that unvaccinated individuals were to be excluded from the jury pool until he attended for jury selection. He discovered this through casual conversation with others. Upon searching, defence counsel found a notice to that

effect on the “Jury Summons Response Form” on the Alberta Queen’s Bench website. There was no notice to Counsel of any kind.

[4] Before jury selection began, defence counsel sought an appearance before the presiding Justice and objected to the process and to the exclusion of jurors who were unable to show proof of at least 2 COVID-19 vaccinations. The presiding Justice continued with the jury selection process after determining that the Accused had a right to be tried by his peers, not his unvaccinated peers. However, the presiding Justice advised counsel that he could renew his objection before the assigned trial Justice.

[5] Defence counsel objects to the jury selection process for two reasons: 1) the jury selection process was tainted by an *ultra vires* exclusion of jurors, and 2) the exclusion of jurors was done without notice to the parties by administrative fiat. As a result, there has been a violation of natural justice and the Accused’s *Charter* rights under sections 7, 11(d) and 11(f).

[6] Defence counsel initially sought a mistrial, however now seeks an adjournment as his remedy.

Argument

[7] Defence counsel provided the recent decision of *R v Aiello*, 2021 ABQB 772. In that case, after inviting counsel to argue, the Court, on its own motion, excluded unvaccinated jurors from the potential pool. Devlin J. relied on s. 632(c) of the *Criminal Code* and, at paras 12 – 17, cited multiple reasons for the exercise of his discretion, ranging from public health concerns to trial fairness. Defence counsel also provided other cases dealing with similar exclusion orders after notice to counsel, including *R v Morales*, 2021 SKQB 269 and *R v Roche Garcia*, 2021 BCSC 1936. Similarly, the Court in *R v James*, 2021 BCSC 1555 followed the procedure of holding argument on a motion before the court but decided not to question the jury pool regarding vaccine status.

[8] Defence counsel asserts that the perfunctory exclusion of those potential jurors who are unable to provide proof of vaccination, as he says is the case here, does not convey such proper exercise of discretion and is therefore not supported by s. 632(c). He cites *R v Smith*, 2021 ONSC 8405 as an example of the dangers of unintentionally affecting the makeup of a jury. In that case, defence counsel asked the Court to use their “stand-by” power to set aside qualified prospective juries in order to ensure that the final member of the jury was black. That decision outlines the history of the development of s. 633 and s. 634, and changes to Ontario’s legislation that were made to remove systemic barriers and ensure representativeness in the jury pool. Broadly, the decision reflects the desire to ensure that the Court’s stand-by power will not be used to improperly defeat those ideals. The Court noted that, potentially, orders requiring COVID-19 vaccination could possibly do such a thing, and, if exercised improperly, judicial discretion could unintentionally affect an Accused’s constitutional right to a fair trial by an independent and impartial jury.

[9] The key issues, defence counsel argues, are the independent exercise of discretion of the Justice to determine whether or not to exclude unvaccinated jurors; and, further, that fundamental justice requires notice to and submissions from counsel to be part of that process.

[10] Absent this specific application of s. 632(c), Defence counsel argues that there is no other authority for the broad exclusion of potential jurors who are unvaccinated. Defence counsel relies on section 5 of the *Jury Act*, RSA 2000, c. J-3:

Exemption from jury service

5(1) The following persons may be exempted from serving as jurors:

- (a) a person whose conscience or religious vows preclude the person from serving on a jury;
- (b) a person who has served on a jury within the 2 years preceding the person's summons to serve on a jury;
- (c) a person for whom service on a jury will cause severe hardship in respect of the person's health or livelihood or in respect of any legal or moral obligations the person may have to others;
- (d) a person who does not reside within a reasonable distance of the place where the proceedings are to be tried;
- (e) a person who suffers from a physical, mental or other infirmity that is incompatible with the discharge of the duties of a juror;
- (f) a person who is unable to understand, speak or read the language in which the trial is to be conducted;
- (g) a person whose service on a jury would be contrary to the public interest by reason of that person's performance of urgent and essential services of public importance that cannot reasonably be rescheduled or performed by another during that person's absence;
- (h) a person 65 years of age or over.

(2) On application in the prescribed manner, if a sheriff is satisfied that a person is eligible for exemption under subsection (1), the sheriff shall exempt the person from jury service.

(3) If the sheriff refuses to exempt a person, that person may either

- (a) on application, prior to the date on which the person has been summoned to attend for the selection of the jury, appeal to any judge, or
- (b) at the time of the selection of the jury, appeal to the judge that is presiding at the jury selection.

[11] Defence counsel argues that this section does not give the sheriff discretion to exclude anyone based on the sheriff's initiative, nor does the section allow the Court as an administration to do so. Defence counsel argues that this section permits only the individual juror to make an application to be excluded. As such, the only authority for a presiding judge to exercise discretion to exclude is section 632 of the *Criminal Code*. Since potential jurors who could not

provide proof of at least two vaccinations were dismissed by the clerk, the jury chosen to hear this trial was improperly constituted and, as such, there is no jurisdiction for a trial before them. Defence counsel cites *Morin v The Queen*, 1890 CanLII 38 (SCC) to support this position.

[12] Defence counsel also argues that this Court's failure to give proper notice to counsel about this change in policy breaches principles of natural justice. He argues that if a jury selection process does not comply with statute or provide counsel with a fair opportunity to respond to proposed changes to ensure a fair and transparent jury selection process, s. 11(d) of the *Charter* is breached, and the only remedy is a mistrial. In this case, as the application was made before the Accused was arraigned, an adjournment is sought.

Responding argument

[13] The Crown argues that, however late in the day, fair and accurate notice was given to defence counsel of the plan to exclude unvaccinated jurors. The Crown urged the Court to consider the context of the ongoing global pandemic. Following a suggestion by this court, the Crown argues that, in order to provide a factual background for the jury selection that occurred in this case, judicial notice can be taken of the current state of the pandemic in Alberta, drawn from the Alberta Government's website. In the context of the ever-changing state of the pandemic, extensive notice to the profession is not reasonable.

[14] In the alternative, the Crown argues that if there was insufficient notice to Defence counsel of the Court's decision to exclude unvaccinated jurors, curative provisos of the *Criminal Code* can be applied. Citing *R v Esseghaier*, 2021 SCC 9, where the Supreme Court of Canada held that the curative provisos of the *Criminal Code* can be applied by the Court of Appeal to remediate when a jury has been improperly constituted. The proviso was held to be applicable unless the trial court was not empowered by statute to try the particular offence, or if the Accused had suffered prejudice. The Crown points out that neither of those latter two barriers exist here.

[15] The Crown argues that there is no evidence to suggest that the jury pool was not representative after potential jurors who could not provide proof of vaccination were exempted. The Crown relies on the reasoning in *R v Thornhill*, October 20, 2021, Ontario, Docket No. CR-20-00000278-0000, Superior Court of Justice (unreported). In that case, defence counsel objected to the application of a policy-based exclusion of unvaccinated jurors as a result of a formal order of the Chief Justice that was issued three weeks before jury selection for the three Accused. Counsel for the Accused only discovered the order four days before jury selection. Counsel for one Accused sought an order declaring the Chief Justice's order unconstitutional on the basis that it "exclude[d] a significant cross-section of Ontario's society and limit[d] the process of jury selection in Ontario, thereby infringing the *Charter*." Citing *Roche Garcia, R. v. Barac* 2021 ONSC 6605 (*Barac*), and *Aiello*, the Court summarily dismissed defence counsel's application.

Analysis

[16] *Barac* and *Thornhill* were released 17 days apart in October 2021. In both cases, as in this case, defence counsel asserted that they did not know of the policy to exclude unvaccinated jurors until a very short time before jury selection, and alleged *Charter* breaches were caused by eliminating a portion of the jury pool.

[17] In *Barac*, the Court found that there was no evidence that as a group, unvaccinated people shared any common thread or experience that would not be brought to the jury process by only vaccinated people. The Court ultimately focused on the issue of whether the exclusion of unvaccinated people from the jury pool could be characterized as exclusion of a particular group of people, and whether their exclusion breached the Accused's s. 11 *Charter* rights. Drawing from previous challenges to exclusions of non-citizens, the Court found unvaccinated people and non-citizen people to be analogous. The Court was unable to find characteristics unique to a group of unvaccinated people that was relevant to jury duty, and as such, the order excluding those people during an ongoing pandemic was not a *Charter* breach.

[18] *Thornhill* follows *Barac*, but also attends to other considerations. The presiding Justice held that she would have exercised her jurisdiction to exclude unvaccinated jurors in the same manner as described by the order of the Chief Justice of Ontario. She explicitly found as a fact that Ontario was still coping with the COVID-19 pandemic and many restrictions were still broadly in place. Notably, she commented that "the situation continues to evolve." She further commented that while screening, mask wearing, physical distancing, hand sanitizing, and other measures had been part of the efforts to address the public health needs caused by the ongoing pandemic, vaccination was regarded as a more recently available safety precaution.

[19] The Court in *Thornhill* relied on Section 17(3) of Ontario's *Juries Act*, R.S.O. 1990, c.J.3. (*Juries Act*) and the authority in s. 632(c) of the *Criminal Code* to support the application of the Court's discretion. Section 17(3) of the *Juries Act* reads:

17(3) A judge or the local sheriff of the court may defer the service of any person summoned for a jury sitting on the ground of illness or that serving as a juror may cause serious hardships or loss to the person or others.

[20] Also citing *Roche Garcia* and *Aiello*, *Thornhill* summarily dismissed the application of defence counsel.

[21] Each of these four decisions (and others) focus on the reasons for and effect of exclusion pursuant to s. 632(c) of the *Criminal Code* as well as the ultimate impact upon the *Charter* rights of the Accused. However, none contemplate the jurisdictional issue raised here. Even though the Ontario cases were decided in the face of province-wide order of the Chief Justice, the jurisdiction of the Chief Justice to issue such an order was not contemplated.

[22] Given the timing between jury selection and this application, no transcript of the proceedings is available. With the permission of the presiding Justice, the recording of the portion of the court proceedings relevant to the jury selection was provided to this Court and Counsel.

[23] It is accepted that prior to court opening, jurors were screened for proof of vaccination and those that did not provide it were released from jury selection.

[24] After roll call of the remaining jurors, defence counsel raised his objection to the procedure in the absence of the pool. Having little notice, defence counsel did not explicitly argue the issue of the presiding Justice's discretion as he has in the application before this Court. Yet he did articulate his position that, given the screening that took place, there was no jurisdiction of that court to select a jury at that point in time.

[25] The presiding Justice made the following ruling in response (*unofficial transcription*):

The Court has an obligation to protect the public, including those that are called for jury duty. The Court has made a decision to ensure the vaccination status of the people who are here so that everybody is protected. A decision that's made by other institutions and businesses.... In my view it is a reasonable restriction on your client's right to be tried by a jury of his peers; a right to be tried by a jury of his vaccinated peers which happens to be a larger portion of the population in any event.

[26] The presiding Justice then immediately attended to jury selection, and in his initial address to the pool said the following (*unofficial transcription*):

Nothing would be complete without reference to COVID-19 and the extent to which we are making efforts to protect you. You know that one of the protocols this morning was that you were screened for a QR code or some sort of proof of vaccination. So, you can take some comfort in knowing that the people you are sitting with have been vaccinated.

[27] The first quote expresses the presiding Justice's determination on the issue of whether or not he personally held that unvaccinated jurors' exclusion breached the Accused's rights. The second quote, while also very brief, describes a reasonable basis for that exclusion that is possibly less detailed, but nonetheless similar to *Aiello*, *Thornhill* and *Barac*. These statements were made by the presiding Justice, with no reference to any direction by the Chief, other Justices, or broad policy.

[28] Counsel is likely correct that the exclusion of jurors based on their vaccination status must be made in exercise of the presiding Justice's discretion. Our *Jury Act* is different than the one in Ontario, and the powers to exclude are not as broad here. The *Alberta Act* includes the following provisions:

Sections 3 & 4 described the required qualifications of jurors and lists those that are excluded.

Section 5, as cited above, lists those that "may" be exempted from serving as jurors, specifically empowering a sheriff of the court to exempt that person. If the sheriff refuses to do so, that decision can be appealed to the Justice that is presiding at the jury selection.

[29] Regarding a Justice's discretion, section 10 of the *Jury Act* states:

10 At the time of the selection of the jury, the judge may

- (a) conduct any inquiries that the judge considers necessary regarding the qualification or exclusion of any person on the jury panel,
- (b) direct the discharge from the jury panel of any person who the judge is satisfied is not qualified or is excluded, and
- (c) on the application or appeal of any person for an exemption, grant the exemption on being satisfied that the person who has applied is eligible for an exemption. (emphasis added)

[30] This section is similar to s. 632 of the *Criminal Code*:

632. Excusing jurors

The judge may, at any time before the commencement of a trial, order that any juror be excused from jury service, whether or not the juror has been called pursuant to subsection 631(3) or (3.1) or any challenge has been made in relation to the juror, for reasons of

- (a) personal interest in the matter to be tried;
- (b) relationship with the judge presiding over the jury selection process, the judge before whom the accused is to be tried, the prosecutor, the accused, the counsel for the accused or a prospective witness; or
- (c) personal hardship or any other reasonable cause that, in the opinion of the judge, warrants that the juror be excused. (emphasis added)

[31] Relying on these sections, the presiding Justice had the discretion to exclude from the juror pool those who, in his opinion, should be excluded for reasonable cause. Doing so aligns with *Aiello*, released months ago in this same jurisdiction, as well as *Thornhill* and *Barac*.

Conclusion

[32] Regardless of any policy of the court, the presiding Justice in this instance clearly exercised his statutory discretion and excluded unvaccinated jurors for reasons of public safety, with consideration, albeit brief, of the Accused's rights to be tried by a representative jury of his peers. This was done with extremely limited notice to counsel.

[33] One must consider the context of this jury selection to understand whether this process was reasonable or not. This court has responded to the COVID-19 pandemic throughout the last 22 months in various ways, such as those practices noted in *Thornhill*. There have been multiple master orders of the Chief Justice adjourning proceedings, starting on March 16, 2020. These orders have attempted to respond to the ever-changing state of this ongoing pandemic.

[34] Master Order #6 was issued on January 4, 2022, during the rise of the "fifth wave" of the pandemic in Alberta, wherein the public concern was focused on the fast-spreading Omicron variant. In it, the Court noted

AND UPON the COURT determining that, in light of increasing COVID-19 case counts, the rise in variants, the ongoing risk to all Justice participants and the increased difficulty in having counsel, parties and witnesses attend in Court, it must continue to alter its operations, policies and procedures in exercising its statutory, regulatory or inherent jurisdiction, and must take reasonable steps to protect the health and safety of persons working in or attending the Court in balance with maintaining, as much as possible, access to justice within the Court, under the rule of law.

[35] Effectively, Master Order #6 adjourned all in-person appearances, except for criminal trials of persons in custody, until January 21, 2022. Due to a court conference, few matters were scheduled the week of January 24. This jury selection on January 27, 2022 was the first jury selection in Edmonton after Master Order #6, while the province is still experiencing the fifth wave of the pandemic in Alberta. Timely decisions had to be made.

[36] This jury selection was therefore not without jurisdiction. In the context of the above, and considering the competing interests at hand, there was no breach of the Accused's *Charter* rights

by the manner of the jury selection and the exercise of the presiding justice's discretion. If the issue of limited notice to the Accused of the Court's intention was in fact a breach of the Accused's *Charter* rights, no remedy is warranted as no prejudice occurred. A procedural irregularity does not in and of itself create prejudice. No evidence has been offered and no argument made regarding prejudice as a result of the exclusion of unvaccinated jurors, or as a result of the limited notice of the decision of the court.

[37] The application of defence counsel is dismissed. The jury will be sworn in, the Accused then arraigned, and then he will be placed in the charge of this jury.

Heard on the 31st day of January, 2022.

Dated at the City of Edmonton, Alberta this 1st day of February, 2022.

A.B. Inglis
J.C.Q.B.A.

Appearances:

Aisling Ryan
for the Crown

Rory Ziv
for the Accused