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## Opening Comments to the Jury Panel—CRIMJI 1.00

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### I. OPENING REMARKS [§1.1]

User Notes: (1) Bill C-75 (*An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*), which received Royal Assent on June 21, 2019, modified the jury selection procedure by expanding the power of the judge to stand aside jurors who have been called in court not only “for reasons of personal hardship” or “any other reasonable cause” but also for “maintaining public confidence in the administration of justice” (*Criminal Code*, s. 633), eliminating peremptory challenges (s. 635(1)), updating the grounds for a challenge of cause (s. 638(1)(b) to (d)), requiring the judge to determine any challenge for cause rather than triers (s. 640(1)), and authorizing the judge to exclude all jurors, sworn and unsworn, from the courtroom during the challenge for cause process (s. 640(2)). In *R. v. Chouhan*, 2021 SCC 26, the Supreme Court of Canada concluded that these changes to the jury selection process were constitutional, purely procedural, and retrospective.

(2) Counsel have the right to ask the trial judge to stand a prospective juror aside under s. 633, but whether a trial judge who is deciding whether to stand a juror aside or who is determining a challenge for cause should invite counsel to make submissions or is obliged to give reasons are issues that remain to be decided.

(3) The circumstances in which the power to stand a juror aside should be used were extensively discussed in *Chouhan* in the reasons for judgment of Wagner C.J. and Moldaver and Brown JJ., with which Rowe

J. concurred (“the plurality”), at paras. 68 to 82. The plurality stood firmly against the use of the stand-aside power to “actively promote jury diversity” (paras. 74 to 82), while Abella J. thought otherwise, and Karakatsanis, Martin, and Kasirer JJ. believed the issue could not be determined at that time. While there has been some difference of opinion about whether or not the plurality view was binding in the subsequent cases, in *R. v. Azzi*, 2022 ONCA 366, 414 C.C.C. (3d) 252, the court was firmly of the view that the opinion of Wagner C.J. and Moldaver and Brown JJ. that the judicial stand aside power cannot be used to actively promote jury diversity is binding.

1. Good morning members of the jury panel and welcome to the *[insert name of court]*. Let me begin by introducing myself. My name is *[insert your name]*. I am a judge of this court, and I am about to start a criminal trial. I will be presiding over the trial of *[insert the name(s) of the accused]*. The first step in this trial will be the entering of a plea to the charges by *[name of the accused]*.
2. (Registrar/clerk), will you arraign *[name(s) of the accused]*, please.
3. As you have just seen, *[name(s) of the accused]* (has/have) entered (a plea/pleas) to the charge(s) against them. The next step in the trial will be the selection of the jury that will be responsible for determining whether, upon the evidence introduced in this courtroom, the guilt of *[name(s) of the accused]* has been proven. You are here because you have been selected to be the jury panel for this criminal trial. That obviously doesn’t mean that all of you present today will actually serve on the jury that hears this case. I’m sure that you all know that in a criminal case generally twelve people are on the jury. You form the pool from which our jury will be drawn. We will be selecting twelve of you to be the jury that will actually hear this case.

User Note: Read paragraph 4 if you order the empanelment of one or two alternate jurors under ss. 631(2.1) and 642.1(1) of the *Criminal Code*.

4. We will also be selecting (one/two) alternate jurors who will become jurors in this case if any of the first twelve jurors who are selected cannot serve as jurors at the commencement of the trial. If the alternate juror(s) (is/are) not needed, they will be excused when the trial begins.
5. As we begin the process of selecting a jury, it will be helpful for you to understand a bit about the role of a juror. That is what I am going to talk about next. I will then explain the procedure that we will be following to select the jury for this case, and we will then begin the selection process.
6. The role of a juror is one of the most important responsibilities that you can be called upon to perform as a citizen of Canada. Our justice system is envied around the world. Trial by jury stands as one of its pillars. It is one of the institutions that mark Canada as a free and democratic country. An important part of our freedom is the right of any person charged with a serious criminal offence to have twelve citizens like you who live in the same community and come from all walks of life determine whether or not they are guilty.
7. But this remarkable system comes at a price. Citizens must be prepared to serve as jurors when called upon to do so. It is not often that the state calls upon its citizens to stand in service of our country. It, of course, happens in times of war but it also happens on occasions such as today, when citizens like you are asked to drop what you are doing in your everyday lives and attend court for jury duty.
8. It is an important task to serve as a juror. It is both a privilege and a responsibility. It almost always involves some personal hardship and inconvenience, but that is to be expected when anyone is asked to discharge such an important civic duty. Some people talk about the burden of doing jury duty and try to find ways to

avoid it. I know that serving on a jury can be inconvenient and disruptive to your life. The twelve of you who are selected to serve on this jury will, I am sure, experience some amount of inconvenience and disruption. But, at the same time, those twelve people will have a challenging and rewarding experience, one that they will never forget. For the vast majority of you, on the other hand, the demands that we will place on your time will be modest. I ask that you be patient as the process unfolds.

## II. JURY SELECTION—NO CHALLENGE PURSUANT TO S. 638 OF THE CRIMINAL CODE [§1.2]

### A. INTRODUCTION [§1.3]

User Note: Read paragraphs 9 to 23 if jurors will not be challenged for cause pursuant to s. 638 of the *Criminal Code*. Proceed to paragraph 24 if jurors will be challenged for cause.

9. In a few moments, we will begin selecting the twelve jurors who will hear this case. However, before we do, I would like to explain to you how this process will work.

### B. OUTLINE OF SELECTION PROCESS [§1.4]

User Notes: Paragraphs 9 to 23 assume that prospective jurors will not be excused from jury duty until after they are grouped and called forward individually. Some judges prefer to excuse jurors for some or all of the reasons listed below at an earlier stage. For example, some judges ask members of the panel at large to step forward before they are grouped if they have a personal relationship with any of the participants in the trial and deal with the excusal at that time. This charge will have to be modified slightly in such cases.

10. As you can see, there is a (drum/box) sitting in front of the (registrar/clerk). The (drum/box) contains a card for each one of you. Your card lists your name, your juror number, and your occupation. In a few moments, I will ask the (registrar/clerk) to begin drawing cards, one at a time, from the drum. As the (registrar/clerk) draws each card, the (registrar/clerk) will read out the juror number of the individual juror. While it may seem somewhat impersonal, the reason for using your juror number as opposed to your name is to protect your privacy. This has nothing to do with this particular trial. We do it this way in all criminal trials because that is what our rules of criminal procedure provide. The (registrar/clerk) will also read out your occupation as listed on the card. If, as sometimes happens, your occupation is not listed on the card or you are listed as simply retired, I will ask you what your occupation is or was.

User Note: Paragraphs 11 and 12 are written in a manner that assumes that the sworn and unsworn jurors remain in the courtroom during the selection process. Some judges may prefer to exclude the sworn and unsworn jurors, exercising the common law discretion to order the exclusion of jurors recognized in *R. v. Grant and Vivian*, 2016 ONCA 639, 342 C.C.C. (3d) 514 and subsequent cases to facilitate the exercise of the stand-aside power without risking the tainting of other jurors. In such a case, the panel will have to be grouped as is done where jurors are being challenged, and paragraphs 11 and 12 will have to be modified.

11. If your number is called, please step forward to a designated place in the courtroom and stand in a line in the order in which your number was called. The court officials will tell you where to stand. When [twelve or another number] of you have been called, the (registrar/clerk) will then ask you, one at a time, to

come to the front of the courtroom to speak to me so that I can determine if you will be a member of the jury that will decide this case.<sup>1</sup>

User Notes: (1) Read the references to alternate jurors in paragraph 12 and thereafter if an order was made that alternate jurors be empanelled.

(2) Substitute “additional” for “alternate” if one or two “additional” jurors, as distinct from “alternate” jurors, are being sworn pursuant to s. 631(2.2) of the *Criminal Code*. The distinction is that additional jurors remain throughout the trial, whereas alternate jurors are discharged if 12 jurors are available to serve at the commencement of the trial.

12. Despite the importance of jury duty, I recognize that some of you will not be able to serve on this jury for perfectly legitimate reasons. Sometimes there are considerations that make it difficult or impossible for some people to perform the task of a juror in a particular case. For that reason, when the (registrar/clerk) calls a member of the panel forward from their group of *[twelve or another number]* to speak to me, I will decide if there is any reason that they will not be able to serve on this jury. There are several reasons why some of you might not be able to sit on this jury. In a few moments, I will tell you what they are. If it turns out that some of the persons who were called forward in the first group cannot serve on the jury, and as a result we have less than twelve jurors *([if applicable:] and (one/two) alternate juror(s))* from this first group, we will continue calling additional groups forward and repeat the same process until twelve of you *([if applicable:] and (one/two) alternate juror(s))* have been selected. Let me next tell you the reasons that some of you will not be able to sit on this jury.

### C. LEGAL REQUIREMENTS FOR JURY DUTY [§ 1.5]

User Notes: (1) Paragraphs 13 to 21 are written in a manner that assumes that potential jurors who wish to raise concerns about the issues discussed in these paragraphs will be given the opportunity to do so after they are grouped when they are called forward one at a time. However, some judges prefer to invite jurors to step forward to explain their situation before any jurors are grouped and excuse them immediately, where appropriate. In those cases, the instructions will need to be modified. In addition, some judges employ a juror questionnaire, particularly in longer cases, to obtain the answers to these questions so that the juror can have the opportunity to articulate their answers clearly and will not need to give embarrassing answers orally when they are called forward.

(2) Some of the grounds for excusing jurors covered by paragraphs 13 to 21 relate to qualifications for jury duty in a provincial *Jury Act*. Others relate to the discretionary grounds for excusing jurors in s. 632 of the *Criminal Code*.<sup>2</sup>

(3) In addition to the grounds listed below, some judges also ask jurors, particularly in sexual assault cases, whether they or someone with whom they have a close relationship has ever been the victim of such an offence or been accused of such an offence. An affirmative answer does not disqualify the prospective juror, but the judge might then explore with the juror whether it would affect their ability to judge the case impartially or make it too difficult for the juror to sit on the jury. In *R. v. Chouhan*, 2021 SCC 26 at para. 35, the plurality noted with approval that trial judges routinely excuse jurors who would find it too difficult to serve given the nature of the offences at issue in the trial.

(4) In some jurisdictions, potential jurors who would be excluded for obvious bias are excused from the panel before the selection process commences, a practice that appears to be contemplated in *R. v. Douglas*, 2002 CanLII 38799 (ON CA). In British Columbia, the practice is not to excuse until the panellist's name has been called. In addition, in some provinces, the sheriff is permitted to excuse members from the panel before the selection date pursuant to a provincial *Jury Act*.

13. To begin, there are a number of legal requirements for serving on a jury. The first of these is that you must be a Canadian citizen to serve on a jury. Please let me