SCC File No. 39062

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N :

HER MAJESTY THE QUEEN

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- and -

PARDEEP SINGH CHOUHAN

RESPONDENT

- and -

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PART I — OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The complete abolition of peremptory challenges has drastically different outcomes for Black accused persons. Eliminating peremptory challenges means putting further restrictions on the ability of Black accused persons to participate in the justice system. Courts are still predominantly presided over by non-Black people, including the police, lawyers, judge, and jury. "All Canadians should be able to see themselves reflected in their justice system. Justice should not make a person feel like an outsider or an 'other' when they confront it."[1]

2. Historically, the primary rationale underlying the use of peremptory challenges was that it allowed the accused person to participate in the selection of his or her trier of fact, thereby adding a sense of legitimacy to the jury. Peremptory challenges contributed to the appearance of and actual fairness of the trial from the perspective of the accused. It attempted to ensure the accused person had a favourable opinion of the jury, and confidence in the administration of justice. This goal is even more critical with Black accused persons, who are overrepresented in the Canadian justice system.[2]

3. Parliament failed to give proper consideration to the impact of the abolition of peremptory challenges on Black accused, the result of which is the exacerbation of the very issue that it claimed to fix: systemic racism.

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[1] CBC News, *Supreme Court's Chief Justice calls for more diversity in Canada's legal system* (June 18, 2020), online: <https://www.cbc.ca/news/politics/supreme-court-wagner-racism-courts-1.5617681>.

[2] The Annual Report from the Office of the Correctional Investigator (2012-2013) showed that the number of federally incarcerated Black inmates increased by 80% over the last 10 years. While making up 2.9% of Canada's general population, Black inmates accounted for 9.8% of the total prison population. The Black inmate population increased from 7% in 2008-09 to 10% in 2015-16. These trends have not substantially improved. Black inmates represented 8% of the total in-custody population in 2018-19. See Office of the Correctional Investigator, *Annual Report 2012-2013* (Ottawa: OCI, 28 June 2013) at 3-4,6-7,9; Office of the Correctional Investigator, *Annual Report 2013-2014* Ottawa: OCl, 27 June, 2014) at 2; Office of the Correctional Investigator, *Annual Report 2018-2019* (Ottawa: OCI, 25 June 2019) at 79.

4. This Honourable Court and others have recognized that discrimination against the Black community can and should be the subject of judicial notice.[3] Just as courts take care to recognize systemic racism, they should make special efforts to consider the perspective of a Black accused and anti-Black racism in determining an accused's right to be tried in a fair and public hearing by an independent and impartial jury. A modified-objective test is required. The framework used to assess whether there has been an infringement of s. 11(d) and by implication, s. 7 of the *Charter,* must be robust enough to consider the unique circumstances of Black accused persons. The Canadian Association of Black Lawyers ("**CABL**") intervenes to propose how such an approach ought to apply in this appeal. The existing 'safeguards' are simply not sufficient to protect Black accused persons against systemic racism, racial bias and discrimination.

5. CABL does not take the position that peremptory challenges are sacrosanct, and removing them can never be constitutional. Instead, CABL intervenes to propose that given the current state of the other 'safeguards', eliminating peremptory challenges for defendants infringes on sections 7 and 11(d) of the *Charter.* CABL notes that the elimination of Crown peremptory challenges is not an issue before this Honourable Court.

B. Statement of Facts

6. CABL takes no position with respect to the facts as advanced by the parties and defers to the parties on the factual record.

7. Of note for the purposes of CABL's submissions, the Trial Judge found the evidence of two highly respected and experienced criminal defence lawyers, who submitted their racialized clients critically needed peremptory challenges, to be "credible and compelling."[4] However, the Trial Judge relied on the existence of five safeguards to ensure a jury is independent and impartial, and held that a reasonable person, fully informed of these safeguards, could not conclude that an accused person's right to an independent and impartial jury would be violated by the elimination of the peremptory challenge.[5]

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[3] *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484; *R v. Golden,* 2001 SCC 83 [*Golden*]; *R. v. Spence*, 2005 SCC 71 [*Spence*]; *R. v. Grant*, 2009 SCC 32; *R v. Parks*, 15 OR (3d) 324, [1993] OJ No 2157 (CA) [*Parks*]; *R. v. Brown*, 64 OR (3d) 161, [2003] OJ No 1251 (CA); *R. v. Borde*, 63 OR (3d) 417, [2003] OJ No 354 (CA) [*Borde*]

[4] *R. v. Chouhan,* 2019 ONSC 5512 (CanLII) [**Trial Judge's Reasons**], ¶¶14-21

[5] Trial Judge's Reasons, *supra* note 4, ¶¶43, 59.

8. The Court of Appeal also applied the "reasonable person test" in determining whether the amendments were constitutional.[6] While the Honourable Justice Watt acknowledged that the "fully informed person must appreciate the existence of racism in society", he held that "the application of this standard does not depend on the subjective views of the accused."[7]

PART II — GROUNDS OF APPEAL

A. Abolition of Peremptory Challenges Fails to Recognize Existing Special Circumstances for Black Accused Persons

i. The Objective Framework is Insufficient

9. It is respectfully submitted that this Honourable Court consider the special circumstances of Black accused persons when deciding the impact of eliminating peremptory challenges on a defendant's s. 7 and 11(d) *Charter* rights. This can be done by moving away from the 'objective' test to a modified-objective test. This appeal affords an opportunity to revisit the framework for assessing these *Charter* violations in light of previous findings of this Court and others:

10. In *R. v. Williams* and Spence, this Honourable Court has taken judicial notice of racial prejudice as a social fact not capable of reasonable dispute.[8]

11. Most recently, in *Le,* this Court held that "Evidence about race relations… can be derived from 'social fact' or the taking of judicial notice."[9]

12. In *Spence,* this Honourable Court acknowledged the widespread existence of anti-Black racism, and the likelihood that anti-Black racism is aggravated when the alleged victim is white:[10]

> [32] […] First, what we are dealing with, at root, and fundamentally, is anti-Black racism. While it is obviously true that every visible minority community experiences the indignities and wounds of systemic discrimination throughout Southern Ontario, it is the Black community which is the focus. It is Blacks who are being shot, it is Black youth that is unemployed in excessive numbers, it is Black students who are being inappropriately streamed in schools, it is Black kids who are disproportionately dropping-out, it is housing communities with large concentrations of Black residents where the sense of vulnerability and disadvantage is most acute, it is Black employees,

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[6] *R. v. Chouhan,* 2020 ONCA 40 (CanLII) [**Court of Appeal's Reasons**], ¶62-63
[7] Court of Appeal's Reasons, *supra* note 6, ¶91.
[8] *R. v. Williams,* [1998] 1 S.C.R. 1128 [*Williams*]; *Spence* (S.C.C. 2005), *supra* note 3, ¶5.
[9] *R. v. Le,* 2019 SCC 34, [2019] S.C.J. No. 34, ¶71 [*Le*].
[10] *Spence* (S.C.C. 2005), *supra* note 3, ¶52.

> professional and non-professional, on whom the doors of upward equity slam shut. Just as the soothing balm of "multiculturalism" cannot mask racism, so racism cannot mask its primary target.[11]

13. In *R. v. Koh*, the Court found that 45 percent of Canadians identify visible minorities, particularly Blacks and Vietnamese, with crime.[12]

14. In *R. v. Parks*, the Ontario Court of Appeal found that anti-Black racism is pervasive and results in discriminatory outcomes in criminal justice:

> [54] Racism, and in particular anti-Black racism, is a part of our community's psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes. These elements combine to infect our society as a whole with the evil of racism. Blacks are among the primary victims of that evil.[13]

15. In *R. v. Golden*, as Iacobucci and Arbour JJ. described: "African Canadians represent a disproportionate number of individuals in the criminal justice system and are more prone to be the recipients of mistreatment."[14]

16. In *R. v. Samuels*, Nakatsuru J balanced various factors in his ruling, including the fact that the accused person was Black[15]:

> [90] […] Mr. Samuels is Afro-Canadian. It is his community that the Supreme Court of Canada was acutely concerned about in ensuring that a framework be established to prevent strip searches from occurring. While little time was spent on this issue in the presentation of the case, it is not something I am entirely at liberty to ignore. Counsel for Mr. Samuels stressed the serious prejudice that could be caused in the relationship between the police and the community should the charge not be stayed. I do not consider the outcome of this single case to have that type of lasting effect. The relationship of trust built up between the police and the communities they protect is not so fragile that it cannot withstand instances when the police overstep their proper legal authority… From the perspective of individuals like Mr. Samuels, they may well feel that their race has something to do with being subjected unnecessarily to this humiliating procedure. **There may be no objective basis for this feeling, but such a feeling, given what was expressed by the Supreme Court of Canada, is not without some validity from a systemic viewpoint.** [Emphasis added]

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[11] *Spence* (S.C.C. 2005), *supra* note 3, ¶32 [emphasis added].
[12] *R. v. Koh* (1998), 131 CCC (3d) 257, 1998 CanLII 6117 (ONCA), ¶¶9 and 22 [*Koh*].
[13] *Parks*, *supra* note 3, ¶54.
[14] *Golden* (S.C.C. 2001), *supra* note 3, ¶83.
[15] *R. v. Samuels,* 2008 ONCJ 85, [2008] OJ No 786.

17. In *R. v. Elvira,* the Honourable Justice Schreck of the Ontario Superior Court of Justice held[16]:

> [22] One does not have to spend much time working in the criminal justice system to realize that African-Canadians are overrepresented among those accused of crimes. I do not need evidence to draw this conclusion…
>
> [23] I am also prepared to take judicial notice of the existence of anti-Black racism, as many courts have done: *Jackson,* at para 87. No reasonable person can dispute its existence.

18. As outlined above, several courts have consistently and correctly acknowledged systemic racism and anti-Black racism in the Canadian justice system. In this case, Justice Watt also rightly recognized that a "fully informed person must appreciate the existence of racism in society."[17] It remains unclear how a court can appreciate the impact of racism, without factoring in the unique circumstances and experiences of the accused. It simply cannot.

ii. The Court Should Employ a Modified Objective Test

19. It is time for the Supreme Court to direct that the reliance on the 'objective' test in determining whether a jury is impartial is not appropriate. A modified-objective test is required.

20. Before determining the constitutionality of state action that has the potential to affect Black accused persons, who are over-represented in the criminal justice system, the court must employ a modified-objective test. Other accused persons will also benefit from a constitutional ruling that is protective of these interests.

21. To this end, the reasonable person must bear in mind that anti-black racism, both on an individual and institutional level, is a reality in the community. Further, a reasonable person must appreciate both explicit and institutional racism. Judges should be required to consider the following factors:

(a) the history of colonialism, enslavement, segregation and the resultant anti-Black racism in society;

(b) the broad systemic and background factors affecting Black people;

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[16] *R. v. Elvira,* 2018 ONSC 7008, [2018] OJ No 6185, ¶¶22-23.
[17] Court of Appeal's Reasons, *supra* note 6, ¶91.

(c) the unique systemic or background factors that may have played a part in bringing this Black accused persons before the courts; and

(d) the recognition that the criminal justice system has targeted Black people through the creation of crimes; targeting of Black people for enforcement, policing, and surveillance; disproportionately jailing Black accused persons and denying them bail; as well as denying Black offenders parole and early release.

22. This modified-objective test can be adopted at several stages of the criminal justice system. To some extent, this Court and others have already accepted the need for a modified-objective test that factors in an individual's particular circumstances and perception in the context of detention,[18] and/or systemic and background factors in the sentencing context.[19]

23. The perception and reality that Black accused persons are treated differently by the punitive arm of the state justifies an explicit mandate by this Honourable Court that in determining the constitutionality of a law or the particular reach of a Charter guarantee that has the potential to affect Black accused persons, a Court must consider the unique perspective of the Black accused person.

B. Eliminating Peremptory Challenges is Unconstitutional When the Safeguards are Insufficient in Ensuring an Independent and Impartial Jury

24. The Honourable Justices McMahon and Watt relied on the five safeguards as the relevant circumstances in assessing whether a reasonable person, fully informed of the circumstances, would have a reasonable apprehension of bias. However, four out of the five safeguards, in light of the jurisprudence of this Court and others, are insufficient to ensure an independent and impartial jury. The deficiency associated with each safeguard is described below.

i. The Current Definition of Jury Representativeness is Insufficient

25. The first safeguard, the representativeness of the jury panel, is an important constitutional principle. However, given the current definition of representativeness, its meaning has been circumscribed to the point of making it an inefficient safeguard to ensure an independent and impartial jury for Black accused persons.

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[18] *R v. Grant,* 2009 SCC 32 (CanLII), ¶32.
[19] *Borde, supra* note 3, ¶¶1, 2, 22, 30-32.

26. In *Kokopenace*, this Court found that with regards to a jury, "representativeness focuses on the process used to compile the jury roll, not its ultimate composition. Consequently, the state satisfies an accused person's right to a representative jury by providing a fair opportunity for a broad cross-section of society to participate in the jury process."[20] Therefore, there are no guarantees that the jury panel, let alone the *petit* jury, is representative.

27. The dissenting opinion of McLachlin C.J. and Cromwell J.J. in *Kokopenance*, highlights the challenge with the majority's view of 'representativeness':

> [259] This case concerns a situation in which, by anyone's reckoning, ***the jury roll was not representative*** because its composition was a substantial departure from what random selection among all potentially eligible jurors in the district would produce. In the particular and exceptional facts of this case, we know this because (i) on-reserve residents are overwhelmingly Aboriginal people; (ii) on-reserve residents constitute about 30 percent of the adult population of the judicial district; and (iii) on-reserve residents constitute about 4 percent of the jury roll. Thus we have a substantially different jury roll than would be produced by a proper process of random selection because of the under-representation of Aboriginal on-reserve residents on the jury roll. If that does not constitute a failure to assemble a representative jury roll, I have difficulty understanding what would.[21] [Emphasis added]

28. Representativeness, in its current form, is mostly dependent on the jury roll. However, the jury roll itself fails to ensure a representative process. For example, Black accused persons, who are overrepresented as convicted persons in the justice system, have criminal records and are excluded from jury duty. Permanent residents are also excluded from jury duty. A substantial proportion of permanent residents are immigrants from minority groups. Such exclusions from the jury roll do not provide a fair opportunity for a broad cross-section of society to participate in the jury process. The "safeguard" of a representative jury is simply an insufficient one to protect the rights of Black accused persons.

29. Notwithstanding that an accused person is not entitled to a particular jury composition, peremptory challenges historically have served as an essential safeguard for racialized accused persons to attempt to create a ***more diverse*** and representative jury.

30. Finally, the current definition of representativeness also relies on questionable presumptions that are no longer justified. In *Kokopenace,* this Court held that every juror or

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[20] *R. v. Kokopenace*, 2015 SCC 28, ¶2 [***Kokopenace***].
[21] *Kokopenace*, *supra* note 20*,* ¶259.

prospective juror is presumed to be impartial.[22] Widespread anti-Black racism in Canada rebuts this presumption where the accused person is racialized. Representativeness and randomness do not necessarily weed out bias; instead, they ensure that some prospective jurors will have racist beliefs and become involved in the selection process.[23]

ii. Canadian Courts Should Expand the Challenge for Cause Procedure

31. The second safeguard, the challenge for cause, has been applied too narrowly and not uniformly to provide a Black defendant with a constitutionally sufficient mechanism to remove partial jurors. The challenge process and questions are: "complex", final, privacy infringing, and not permitting explication.[24]

32. The commonly permissible challenge questions considered in only minutes fail to respect the importance of the task and cannot scratch the surface of attitudes or beliefs that are "elusive" and deeply ingrained in the subconscious.[25] To address these concerns, some courts have approved of questions being provided in advance. In contrast, other courts believe unvarnished spontaneous answers are to be preferred and do not accept advanced questionnaires to jurors.[26]

33. Notwithstanding that *Parks* was decided more than 15 years ago, some courts are still not satisfied that wide-spread racism exists in major urban areas, which is of significant concern[27]:

> [25] However, with respect, I believe that the underlying premise to the applicants' argument is faulty**. First, there is no evidence before me to substantiate the applicants' assertions that there is wide-spread systemic anti-black and visible minority racism in London, Ontario, and due to the nature of this widespread prejudice, some jurors may be influenced by those prejudices in their deliberations. There is no substantiation to the assertion that there is reason to suppose that the jury pool may contain people who are prejudiced and whose prejudice might not be capable of being set aside on directions from this Court**. [Emphasis added]

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[22] *Kokopenace*, *supra* note 20, ¶53.
[23] Salhany, *Canadian Criminal Procedure*, 6th ed, 6.2885-6.2900 [Book of Authorities, Tab 1]
[24] See *R. v. Douse* (2009), CanLII 34990 [*Douse*]; *R. v. Ahmad et al*., 2010 ONSC 256 (CanLII); *HMQ v. Johnson*, 2010 ONSC 5190 (CanLII) at ¶15 [*Johnson*].
[25] *Douse*, *supra* note 24 at ¶190; *R. v. Valentine*, 2009 CanLII 81001 (ONSC).
[26] *Johnson, supra* note 24; *R. v. Barnes*, 2012 ONSC 7184 (CanLII); *R. v. Suarez-Noa*, 2018 ONSC 6749 (CanLII); *R. v. Damion Stewart*, 2011 ONSC 1949 (CanLII); *R. v Brooks*, 2015 ONSC 6299 (CanLII); *R. v. Borden*, 2014 ONSC 5751 (CanLII).
[27] *R. v. O'Hara-Salmon and Phillips*, 2014 ONSC 5880 (CanLII)

34. In *R. v. King*, the Honourable Justice Goodman accurately noted the elimination of peremptory challenges is "overbroad" as the law uproots significant benefits of peremptory challenges, without expanding other safeguards through the challenge for cause.[28] The amendments bear on conduct outside their intended purpose, and core benefits of peremptory challenges are lost. Therefore, Justice Goodman found that the decision in *Chouhan* was "plainly wrong."[29]

35. One articulated benefit of a peremptory challenge is it permits a litigant to remove a juror that survives a challenge for cause. The race-neutral use of peremptory challenges provides a critical safety valve for the accused.

36. The fact that peremptory challenges can be used to undermine representativeness, should not justify their removal from the *Criminal Code* when counsel's use of the peremptory can be scrutinized by the trial court to ensure its constitutional use.[30]

37. CABL recognizes that a judicial review of the use of the peremptory challenge, informed by *Batson v. Kentucky,*[31] and as outlined by the Canadian Muslim Lawyers Association and Federation of Asian Canadian Lawyers is a forward step. Further, if there is an abuse is by the Crown, the *Charter* may also preclude prosecutors from using peremptory challenges in a discriminatory fashion.[32] However, CABL does not view the ability to review a peremptory challenge as a panacea or free of legitimate criticism.

iii. Judicial Oversight without Peremptory Challenges is Insufficient

38. The third and fourth safeguards, the trial judge's discretion to excuse prospective jurors and stand aside jurors, are also insufficient. Trial judges do not have the same information about a case and its dynamics as the defendant. Black people are also significantly underrepresented in the judiciary. As such, providing discretion to trial judges does not give an accused person comfort that the trial judge's discretion will be exercised in a way that is mindful of racial bias. Moreover, trial judges are not exempt from harbouring potential biases towards Black people.

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[28] *R. v. King,* 2019 ONSC 6386, ¶232 [*King*].
[29] *King, supra* note 28, ¶307.
[30] *R. v. Gayle*, 2001 CanLII 4447 (ONCA), 201 DLR (4th) 540, ¶66 [*Gayle*].
[31] *Batson v. Kentucky,* 476 U.S. 79 (1986).
[32] *Gayle*, *supra* note 30, ¶¶64-66.

39. The concerns associated with peremptory challenges, as identified by the parties, are not removed if it is the trial judge who has the exclusive power to exercise a peremptory challenge. Shifting the decision to a trial judge effectively mutes the value of peremptory challenges. As noted by this Court in *Williams*, "we should not assume that instructions from the judge or other safeguards will eliminate biases that may be deeply ingrained in the subconscious psyches of jurors."[33] Instead, we need to acknowledge the destructive potential of subconscious racial prejudice, and it is better to risk allowing what are, in fact, unnecessary challenges, than to risk prohibiting challenges which are necessary.

40. Given the deficiencies of the purported safeguards, peremptory challenges are required to protect the constitutional rights of Black accused persons. As the Court of Appeal found in *Gayle*, peremptory challenges allow the Defence "to eliminate unprovable but perceived concerns about the propensities of jurors and thereby enhance confidence in the impartiality of the jury and the fairness of the trial."[34] It is respectfully submitted this Honourable Court recognize as much in deciding this appeal.

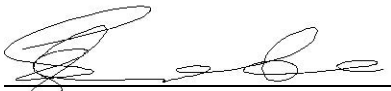
PART III — SUBMISSIONS CONCERNING COSTS

41. CABL does not seek costs and requests that no costs be awarded against it.

PART IV — ORDER SOUGHT

42. CABL takes no position on the outcome of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of September, 2020.



Peter Thorning / Atrisha Lewis / Sandra Aigbinode Lange

[33] *Williams* (S.C.C 1998), *supra* note 8, ¶22.
[34] *Gayle*, *supra* note 30, ¶60.

PART V — TABLE OF AUTHORITIES

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