SCC File No. 39062

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

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT
(Respondent)

– and –

PARDEEP SINGH CHOUHAN

RESPONDENT
(Appellant)

– and –

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. Every jury which tries a criminal case is "a little parliament".[1] Just as Parliament plays a constitutional role in ensuring democratic, responsible government, the jury provides legitimacy to criminal verdicts in the most serious cases. And, just as the selection of legislators is subject to constitutional constraints and conventions, the right to a trial by jury requires certain safeguards and processes to ensure its proper independent functioning.

2. Peremptory challenges, and rotating or static lay triers, are akin to the individual's right to vote on the constitution of that little parliament. The impugned legislative amendments seek to disenfranchise those voices.

3. Trial by jury is constitutionally entrenched in our criminal justice system. But it is more than a lay fact-finding body. It is a political and legal institution with an amalgam of principles, procedures, rules, and powers.

4. The right to trial by jury is so important to contemporary Canada that it was constitutionally entrenched in 1982. Section 11 (f) of the *Charter* promises that those charged with an offence carrying a maximum punishment of five years imprisonment or more are guaranteed "the benefit of trial by jury". The criminal jury trial, which includes jury selection,[2] was thus placed beyond the reach of ordinary legislative repeal.

5. This appeal provides this Honourable Court with the first opportunity to define the essential qualities of "trial by jury", within the meaning of s. 11 (f).

6. In other words, what are the features of that "benefit of trial by jury" that are constitutional in nature? What is the line between mere procedure and essential qualities of the right as defined by s. 11 (f)?

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[1] Lord Devlin, Trial by Jury, Hamlyn Lecture (1956), pg. 164: "Each jury is a little parliament. The jury sense is the parliamentary sense. I cannot see the one dying and the other surviving. The first object of any tyrant in Whitehall would be to make parliament utterly subservient to his will; and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject's freedom in the hands of 12 of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution; it is the lamp that shows that freedom lives."

[2] *R v Barrow*, [1987] 2 S.C.R. 694 at paras. 14-15.

7. And if the impugned amendments infringe upon a constitutionally guaranteed right, are any such violations justified under s. 1 of the *Charter*?

PART II – THE DCAO'S POSITION ON THE ISSUE

8. The Defence Counsel Association of Ottawa ("DCAO") respectfully submits that a purposive constitutional analysis of s. 11(f) can lead to only one conclusion: the "trial by jury" promised by the *Charter* includes the requisite elements of independence, constitution and representativeness as guaranteed by the use of peremptory challenges, and the hearing of challenges for cause by lay triers.

9. In the criminal trial's "little parliament", the peremptory challenge and lay triers, are analogous to the individual's right to vote on the constitution of the jury. The impugned legislative amendments will silence these voices, and simultaneously empower the government-appointed official, in violation of the *Charter* guarantee to the "benefit of trial by jury".

PART III – ARGUMENT

10. The Ontario Court of Appeal's decision in *R v Chouhan*, held that the elimination of peremptory challenges and lay triers, did not violate ss. 7, 11(d) or 11(f) of the *Charter of Rights and Freedoms*.[3] However, the *Charter* analysis focused predominantly on s. 11(d). The Court of Appeal also considered the legislation's temporal applicability, and held that the elimination of peremptory challenges should apply prospectively but that the elimination of lay triers was purely procedural, and therefore ought to apply retrospectively. On that basis, the Court allowed the appeal, and ordered a new trial.

11. The Court of Appeal was correct to hold that the repeal of peremptory challenges applies prospectively, as their elimination significantly diminished an accused person's ability to

[3] *R v Chouhan*, [2020] O.J. No. 241 at paras. 21, 136, 160, 16.

affect the ultimate composition of the petit-jury, and as such, negatively impacted "the accused statutory right to trial by jury as it existed prior to the amendment."[4]

The elimination of rotating triers infringes a substantive right

12. The Court of Appeal's distinction between the elimination of rotating triers and the abolishment of peremptory challenges cannot be sustained.

13. Lay triers were also part of the "statutory right to trial by jury as it existed prior to the amendment".[5] Lay triers involve the community in jury selection. They further engage the accused person's right to have input in the jury's constitution, as the triers rotate. It appears that having a determination of impartiality by a rotating, non-government actor was an important characteristic of ensuring both actual independence and its appearance. The elimination ought to also be understood as affecting a substantive right. Indeed, courts from across the country have found the elimination of peremptory challenges and/or lay triers, engages a substantive right, quite apart from an assessment of constitutionality.[6]

14. In *R v Craig*, Justice Dawe determined that the s. 11(f) *Charter* issue need not be resolved in order to determine if the amendments apply prospectively, or retrospectively:[7]

> In my view, the elimination of peremptory challenges from the jury selection process "has an effect on" the constitutional right to a jury and "makes a difference" to the exercise of this right, even if it does not go so far as to infringe the right. Juries empaneled under the new selection system will often be differently constituted than the juries that would have been selected if the parties had been able to exercise peremptory challenges. In at least some cases this will affect the outcome of the trial. The Bill C-75 amendments importantly change what it means to have a jury trial in a criminal case, whether or not these changes are constitutional.

15. While Justice Dawe did not decide the s. 11(f) Charter issue, he did allude to the constitutional question that is presently before this Court: what are the "…set of core irreducible attributes that a tribunal must possess for it to be considered a "jury" within the

[4] *R v Chouhan*, supra at para. 210.
[5] *Ibid*.
[6] See for example: *R v Dorion*, 2019 SKQB 266 at paras. 43, 52-53; *R v Subramanian*, 2019 BCSC 1601 at para. 58; *R v Raymond*, [2019] N.B.J. No. 271, at paras. 90, 91; *R v Bragg*, 2019 NLSC 235 at para. 18; *R v Levaillant*, [2019] A.J. No. 1447 at para. 34; *R v Ismail*, 2019 MBQB 150 at paras. 10, 33.
[7] *R v Craig,* 2019 ONSC 6732 at para. 54.

meaning of s. 11(f)…"?[8] And, are peremptory challenges and lay triers thereby constitutionalized?

The statutory right to trial by jury vs the constitutional right to the benefit of trial by jury

16. The Court of Appeal's conclusion that the repeal of peremptory challenges affects the statutory right to trial by jury as enjoyed prior to September 19th, 2019, raises the constitutional question – which parts of "trial by jury" were constitutionally entrenched in 1982, for "the benefit" of the accused, and are therefore immune from ordinary legislative amendment?

17. That Parliament was aware that the elimination of rotating/static triers may fundamentally alter the identity of a constitutionally protected institution was evident when the elimination of rotating triers was being contemplated in Committee:[9]

> The feasibility of amending the procedure raises a question in terms of its constitutional validity. The question must be asked whether the involvement of jurors in the empanelling of an impartial jury is a fundamental characteristic of the institution as enshrined in section 11(f) of the *Charter*.

18. The Court of Appeal, in the present case, did not fully engage with this question. Instead of addressing the word "benefit" in s. 11(f), the Court assumed a definition of "trial by jury" that is different from the statutory definition, pre-September 19th, 2019, but failed to articulate it. Without distinguishing between the statutory right to trial by jury and the constitutional right, the Court then found that a substantive amendment to the statutory right has occurred, but failed to consider if those statutory rights had a special, constitutional or even *quasi-constitutional* status.[10]

[8] *Craig* at para. 43.
[9] Steering Committee on Justice Efficiencies and Access to the Justice System, online: https://www.justice.gc.ca/eng/rp-pr/csj-sjc/esc-cde/scje-cdej/p6.html
[10] *R v Chouhan*, at paras. 110, 210. See also for e.g.: *Cadillac Fairview Corp. v Saskatchewan (Human Rights Commission),* [1999] SJ No 217 at spara. 29, 173 DLR (4th) 609 [*Cadillac*]. See also: *Insurance Corporation of British Columbia v Heerspink*, [1982] 2 SCR 145, 137 DLR (3d) 219.

The Supreme Court jurisprudence on s. 11 (f) of the *Charter*

19. In *R v Turpin*, *R v Lee*, and *R v Stillman*, this Court has provided a legal framework for assessing legislative amendments to s. 11(f) of the *Charter*.[11] For example, in *R v Turpin*, Wilson J. wrote for the Court:[12]

> In my view, this latter interpretation of the s. 11 (f) right is more in tune with the purpose of the provision if that purpose is correctly perceived as being to protect the interests of the accused. The accused's interests would seem to be better served by construing s. 11 (f) as conferring a "benefit" on the accused which can be waived by him if it seems to be in his best interests to do so. To compel an accused to accept a jury trial when he or she considers a jury trial a burden rather than a benefit would appear, in Frankfurter J.'s words, "to imprison a man in his privileges and call it the Constitution": see *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942), at p. 280. I fully recognize that a right to waive a jury trial is not specifically spelled out in s. 11 (f); it has to be implied. Nevertheless, it seems to me that this is the only approach to the interpretation of s. 11 (f) which attaches real significance to the presence of the word "benefit" in the section and at the same time provides the individual with the full measure of the protection which it appears the accused was intended to receive under the section: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295.

20. The following principles can be distilled from the Court's jurisprudence on the right to trial by jury:[13]

   a. "Benefit" must be purposively interpreted in a broad and generous manner;
   b. "Benefit" is defined subjectively – from the perspective of an accused person – and, a jury trial is guaranteed in situations for accused persons where they are viewed as a benefit, but the benefit can be waived if the benefit is not subjectively perceived;
   c. "11(f) is designed to protect the interests of those charged with criminal offences **and to place corresponding duties on the state to respect such interests**."; and
   d. "The state can legitimately advance its interests in jury trials through legislation, e.g. impugned provisions of the Criminal Code, **but those are interests not embraced in a section of the Charter designed to protect the individual**.";

21. In *R. v Sherratt*, this Court held:[14]

> Most of the early rationales for the use of the jury are as compelling today as they were centuries ago while other, more modern, rationales have developed.
> The rationales continue to "inform the development of the jury and our interpretation of legislation governing the selection of individual jurors."

[11] *R v Turpin*, [1989] 1 SCR 1296. *R v Lee*, [1989] 2 S.C.R. 1384. *R v Stillman*, [2019] S.C.J No 40.
[12] *Turpin* at para. 17.
[13] See *R v Turpin*, *supra* at paras. 14, 17, 19 and *R v Stillman, supra* at paras. 21, 28 and 115-140.
[14] *R v Sherratt*, [1991] 1 S.C.R. 509 at para. 30.

22. One enduring rationale is that trial by jury serves as a final bulwark against oppressive laws or their enforcement, and that "it provides a means whereby the public increases its knowledge of the criminal justice system and it increases, through the involvement of the public, societal trust in the system as a whole."[15] Lay triers are an obvious example of such public involvement.

23. The place of the jury as a check against unjust laws should not be minimized. For example, juries refused to enforce Parliament's law limiting a woman's right to have an abortion, which resulted in Dr. Morgentaler's acquittals. The acquittals and their impact on access to reproductive health services should cannot be understated.[16]

Trial by jury and history

24. One cannot infuse meaning into the constitutional guarantee to a "trial by jury" without a consideration of the history of that right. As Justice Dawe held in *R v Craig*:[17]

> …Section 11(*f*) guarantees defendants the "benefit of trial by jury" but does not define what the word "jury" should be understood to mean in this context. However, as Blair J.A. noted in *R. v. Bryant*, [1984] O.J. 3404 at para. 16 (Ont. C.A.), "the true significance of the right of trial by jury can only be understood by reference to its history". It follows that ascertaining the meaning of the term "jury" in s. 11(f) will to a significant extent be a historical exercise.

25. And as the Ontario Court of Appeal put it in *Bryant*:[18]

> This history demonstrates that the right of trial by jury is not only an essential part of our criminal justice system but also is an important constitutional guarantee of the rights of the individual in our democratic society. In all common law countries it has, for this reason, been treated as almost sacrosanct and has been interfered with only to a minimal extent. Counsel for the Crown conceded, for example, that there is no provision comparable to s. 526.1 in any other common law jurisdiction. **Now that the right of jury trial is entrenched in our Constitution it is preserved both from open attack or subtle erosion. [emphasis added]**

[15] *Ibid*.
[16] See for example. *R v Morgentaler*, [1988] 1 SCR 30, *R v Lee*, [1989] 2 S.C.R. 1384, at paras. 29, 30 (dissenting opinion).
[17] *R v Craig*, *supra*, at para. 41.
[18] *R v Bryant*, [1984] O.J. 3404 at para. 31.

26. Trial by jury is a political and jurisprudential institution – an amalgam of principles, procedures, and rules, which have evolved at different times for different reasons. The essentials of a jury trial arguably relate to its constitution (representativeness, independence, competence, randomness, presumed impartiality, peremptory challenges and lay triers), instruction (trial judge instructs on law, may opine on facts, may declare a mistrial), deliberation (secrecy and sequestration), and powers (to disagree, to nullify, to question witnesses, to view exhibits, to take notes).[19]

27. The Supreme Court of the United States, and the High Court of Australia, have interpreted the term "trial by jury". For example, The Supreme Court considered a proceeding with less than 12 jurors in *Patton v United States*:[20]

> The phrase "trial by jury," as used in the Federal Constitution (Art. III, § 2, and the Sixth Amendment) means a trial by jury as understood and applied at common law, and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted…

28. And, earlier this year, in *Ramos v Louisiana*:[21]

> The Constitution's text and structure clearly indicate that the Sixth Amendment term "trial by an impartial jury" carries with it some meaning about the content and requirements of a jury trial. One such requirement is that a jury must reach a unanimous verdict in order to convict.

29. In *Cheatle v The Queen,* the High Court of Australia interpreted the meaning of "trial by jury", to determine if unanimity was an essential feature when the term was entrenched:[22]

> It follows from what has been said above that the history of criminal trial by jury in England and in this country up until the time of Federation establishes that, in 1900, it was an essential feature of the institution that an accused person could not be convicted otherwise than by the agreement or consensus of all the jurors. It is well settled that the interpretation of a constitution such as ours is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of the common law's history…

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[19] *R v Pan*; *R v Sawyer*, 2001 SCC 42 at para. 102. *R v Krieger*, [2006] 2 S.C.R. 501 at paras. 27, 29. *R v Kokopenace*, [2015] 2 S.C.R. 398 at para. 159
[20] *Patton v United States*, 281 U.S. 276 (1930).
[21] *Ramos v Louisiana*, 590 U. S. ____ (2020).
[22] *Cheatle v The Queen* [1993] HCA 44.

30. Juries have historically suffered direct influences/threats from the trial judge, from the deprivation or denial of “meat, drink, fire and tobacco" to entice a quick verdict, to imprisonment for the wrong verdict, as per writs of attainder.[23] Independence in the context of a jury trial, ought to be understood as including independence from the government, which could include the trial judge.

31. As Thomas Jefferson wrote on the jury and the judiciary:[24]

> It is left... to the juries, if they think the permanent judges are under any bias whatever in any cause, to take on themselves to judge the law as well as the fact. They never exercise this power but when they suspect partiality in the judges; and by the exercise of this power they have been the firmest bulwarks of English liberty.

32. In Upper Canada, “political reformers in Upper Canada often criticized government officials for packing juries.”[25] The institution developed procedures for ensuring its own independence.

33. The Americans had also experienced *jurymandering* prior to the Revolution, and a robust challenge for cause procedures was employed to guard against its reoccurrence. There was no presumption of impartiality. Every potential juror was questioned, and as the issues/tests defining partiality became convoluted, a judge became better suited than lay triers. In contrast “…Canadian legislators and courts likely followed English precedents regarding challenges for cause and stand-asides out of a desire to increase the state’s control over the criminal justice system.”[26]

34. The historical circumstances, which lead to a limited *voir dire*, are what make the peremptory challenge that much more essential in Canadian jury selection. As the presumption of impartiality can makes challenges for cause difficult to establish, the peremptory challenge is often the only power an accused person wields.

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[23] *R v Krieger*, [2006] 2 S.C.R. 501 at para. 26.
[24] Thomas Jefferson to the Abbé Arnoux, 1789.
[25] R. Blake Brown, *Challenges for Cause, Stand-Asides, and Peremptory Challenges in the Nineteenth Century* (2000) 38(3) Osgoode Hall LJ 453 at 455, 492.
[26] R. Blake Brown, supra at 476, 477.

35. The controversial case of *R v Whelan* includes a challenge for cause which was denied by the trial judge (it was alleged that the potential juror had said he would hang Whelan), and Mr. Whelan was therefore forced to employ a peremptory challenge, which frustrated his subsequent effort to issue a peremptory challenge for another potential juror. His appeals were exhausted, and he went to the gallows professing his innocence.[27]

36. In *R v Bain,* Stevenson J. noted that "The Crown does not have as strong a claim to the concept of challenge without cause as does the accused…"[28] Indeed, the right to peremptorily challenge is historically a power for the benefit of the accused person. This is borne out in the history and development of the peremptory challenge.

37. In the UK, the Crown lost the peremptory challenge in 1305 – for its abuses. As a result, the Crown stand by was born. And, while the British eliminated the peremptory challenge in 1988, the Crown still maintained the power of stand by. In Canada, the Crown first received three peremptory challenges in 1838 in Nova Scotia. In 1867, when criminal procedure was consolidated, the Crown received the right to four peremptory challenges, which would be reflected in the first *Criminal Code* in 1892. In 1993, Parliament gave the Crown the same number of peremptory challenges as an accused person. This status quo has existed for 27 years.[29]

38. The concept of "representativeness", while at the centre of many of the arguments in the present case, is but one aspect of the right guaranteed in s. 11 (f). In fact, representativeness is a comparatively new notion for trial by jury. In *R v Sherratt*, decided a decade after s. 11(f) was entrenched, this Court noted: "[a]s Moore, supra, comments, it is only recently that any real representation of society by juries has been achieved in most Western nations."[30] That is, Representativeness is a necessary, but not a sufficient, constitutional condition for "the benefit of trial by jury". While representativeness can be thought of as a branch of s. 11 (f), this Court should not neglect s. 11(f)'s constitutional roots.

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[27] *Whelan v The Queen*, [1869] O.J. No. 64.
[28] *R v Bain*, [1992] 1 SCR 91 at paras. 117, 119, 127.
[29] *The Juries Act*, 1825 (Eng.), 6 Geo. 4, c. 50, s. 29. R. Blake Brown, supra at 484.
[30] *R v Sherratt, supra* at para. 31, 58.

39. An approach which makes an artificial distinction between the peremptory challenge and the lay triers ruling on challenges for cause would indeed ignore the constitutional aspect of the benefit of trial by jury. Each part of the scheme represents a delicate balance to ensure the functioning of this critical democratic check on the criminal justice system. As this Court held in *Barrow*:[31]

> Overall, it is a comprehensive scheme designed to ensure as fair a jury as is possible and to ensure that the parties and the public at large are convinced of its impartiality. Any addition to this process from another source would upset the balance of the carefully defined jury selection process.

40. The impugned amendments upset that carefully crafted balance. They do so in violation of s. 11 (f) of the *Charter*.

PART IV & V & VI — COSTS, ORDER SOUGHT, CASE SENSITIVITY

41. The DCAO does not seeks costs, asks that no costs be awarded against it, and makes no submissions on case sensitivity.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of September, 2020.

Michael Johnston and Solomon Friedman
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Association of Ottawa

[31] *R v* Barrow, *supra* at para. 32.

PART VII — TABLE OF AUTHORITIES

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