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. This is a case where Mr. Chouhan, a person of colour was denied all ability to directly participate in selecting the jurors who would decide his fate. Instead, the trial judge — a Caucasian man — effectively selected the jury entirely by himself. The trial judge decided the challenge for cause and possessed sole discretion to remove prospective jurors. On four occasions Mr. Chouhan, through his lawyer, told the trial judge that he was uncomfortable with a prospective juror — that they had made a rude gesture toward him, or looked at him in a way that raised questions in his mind about their ability to try him fairly. The trial judge acquiesced on one of these occasions and exercised his discretion to remove the juror but disagreed when it came to the other three. This meant that three of Mr. Chouhan's jurors were ones who he felt would not try his case impartially.

2. The South Asian Bar Association of Toronto ("SABA") has a strong interest in this appeal. Mr. Chouhan is South Asian. As South Asian lawyers, our members understand what it feels like to enter Canadian courtrooms today as people of colour. The reality is that systemic racism exists, even in the courts. It is not uncommon for our members and their clients to be the only people of colour in the courtroom. We know what it feels like to be an outsider who experiences systemic discrimination and who worries about whether they are receiving fair treatment in court — we worry for ourselves, and most of all, we worry for our clients. This is why SABA intervenes on the cross-appeal concerning the constitutionality of the elimination of peremptory challenges.

3. SABA makes two points on the cross-appeal. First, this Court's narrow definition of "representativeness" in *R. v. Kokopenace*[1] is inadequate to ensure juror impartiality as required by section 11(d) of the *Charter of Rights and Freedoms* ("*Charter*"). Peremptory challenges were an important tool for persons of colour and the elimination of these peremptory challenges means juror impartiality is at risk in Canada. Second, we should be wary of relying on the fact that other jurisdictions have abolished peremptory challenges.

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[1] *R. v. Kokopenace*, 2015 SCC 28 ["*Kokopenace*"].

A close review shows that the jury systems in countries that have eliminated peremptory challenges are wildly different than the one we have in Canada, fall below clear constitutional standards this Court has set, and offer no useful comparison.

PART II: POSITION ON ISSUES IN QUESTION

4. While SABA takes no position on the outcome of this appeal, it submits that the Court of Appeal for Ontario erred in finding that the elimination of peremptory challenges in Bill C-75 did not violate sections 7, 11(d) and 11(f) of the *Charter*.

PART III: ARGUMENT

A. This Court's Narrow Definition of "Representativeness" is Inadequate to Ensure Juror Impartiality

5. In *Kokopenace*, a majority of this Court held that accused people have no right to juries that look like them. Kokopenace was an indigenous man from the Grassy Narrows First Nation reserve in Kenora, Ontario.[2] At the time of his trial, between 21.5% and 31.8% of Kenora district's adult population was indigenous, residing on reserves. The on-reserve population, however, constituted only 4.1% of Kenora's jury roll.[3] Kokopenace argued that the jury roll was not representative of his community as a result.

6. A majority of the Supreme Court disagreed. It held that under the *Charter*, all representativeness requires is that the government provide a fair opportunity for a broad cross-section of society to participate in the jury process. There is no right to a jury roll of a certain composition, nor to one that proportionately represents the diverse groups in Canadian society.[4] The majority held that the government met its constitutional obligation by making reasonable efforts to obtain jury lists of on-reserve residents. Although the Court recognized that the rate of response among this group was low, the majority held that this

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[2] *Kokopenace*, *supra* note 1 at para. 4.
[3] *Ibid* at para. 138.
[4] *Ibid* at para. 39.

was caused not by the selection process, but by the deeper problem of the negative image the criminal justice system has earned through its treatment of First Nations people.[5]

7. This is a narrow definition of representativeness. Accused people are not entitled to juries that look like them. To put it in stark terms, under the majority's definition of "representativeness", it is perfectly acceptable for a black person charged with sexually assaulting a white woman to be tried by an all-white jury. It is also perfectly acceptable for a woman charged with killing her abusive husband to be tried by an all-male jury. Both juries would be "representative".

8. Under *Kokopenace*, jury representativeness extends only to the mailbox, and not the courtroom. The *process* the government uses to constitute the jury roll matters, but not who shows up at the courthouse for jury duty, or who ends up on the jury. Focusing on *how* jury notices are sent out rather than on *who* shows up for jury duty means juries will not reflect the diverse backgrounds of accused people. Jury lists that are constituted through records of property ownership — which has been a common practice in Canada — exclude many groups where people of colour are overrepresented, including renters and those who can't afford to buy homes. Even when other means are used to identify prospective jurors, like health care information, those who actually respond to the letter and come to court and those who are able to serve on a jury are not random samples of Canadian society. Many people of colour are unable to ignore the significant costs of serving in a system that pays jurors less than minimum wage and does not cover expenses like childcare. Those who are able to serve end up being older, more affluent, retired, or people who work rare unionized jobs that actually pay employees who are chosen for jury duty.

9. The majority in *Kokopenace* recognized that a lack of diversity on jury rolls is "a serious policy concern" but held that it was fundamentally a problem that Parliament had to address.[6] As long as the government compiled the jury roll in a way that provided a fair

[5] *Ibid* at para. 124.
[6] *Ibid* at para. 126.

opportunity to participate in the jury process, those who actually came to court and those who made it on to the jury did not matter to the courts or to the accused's *Charter* rights.

10. The majority's narrow definition of representativeness means a jury roll that meets constitutional standards does not guarantee diversity and may leave an accused who is a person of colour worried about its impartiality. On this point, the majority in *Kokopenace* explicitly noted that the accused still has "numerous safeguards" that can be used to weed out potentially biased individuals and ensure that jurors who are selected will judge the case impartially.[7]

11. Since *Kokopenace*, Parliament has done nothing to address this Court's call for policy change to improve the diversity of those who make up the jury roll and attend for jury duty. Instead, it has actually eliminated one of the key safeguards that accused people used to participate in the selection process and ensure themselves a fair trial — the peremptory challenge.

12. SABA believes that peremptory challenges have been a crucial tool for people of colour who are accused of crime. Peremptory challenges allow accused people to evaluate prospective jurors and to decide if they believe the juror will decide their case fairly. People of colour navigate a society plagued with systemic and often subconscious bias every day. They have a lifetime of experience being treated both fairly and unfairly by the people they meet. It is often impossible to articulate a specific reason why a juror might not be suitable, and it may come down to an unfriendly glance, a suspicious glare, or an unwillingness to look at the accused at all. Peremptory challenges gave people of colour at least some say in who would make it on to their often all-white juries — even if it provided no guarantee that the people who attended court for jury duty would actually look like them.

13. Parliament ostensibly *eliminated* peremptory challenges to *increase* jury diversity — but the change is fundamentally misguided. At the end of the day, Parliament eliminated the peremptory challenge because a white person — who already starts with every relative advantage in the criminal justice system — *abused* the power in order to eliminate a

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[7] *Ibid* at para. 53.

minority group from his jury. In response to that abuse, Parliament stripped every accused person of colour of his or her peremptory challenges. Indigenous people are sadly overrepresented in Canadian courts as accused people, as are other minority groups. It is not uncommon for them to face a courtroom of prospective jurors that are overwhelmingly white. But now, because the power was abused by a white person charged with killing an indigenous man, every person of colour has lost their ability to use peremptory challenges to have some say in who will be on their jury.

14. The safeguards that remain are inadequate to ensure juror impartiality. The accused is now left only with the ability to challenge jurors for cause, or to request that the judge invoke his or her ability to have a juror stand by to "maintain confidence in the administration of justice." The challenge for cause provides almost no comfort to accused people, because it simply permits counsel to ask jurors a yes or no question about whether the accused's race would affect their ability to try the case impartially. The question does not even ask whether the juror is racist, just whether they believe they can be impartial. If a juror simply asserts that he or she can be impartial, the inquiry is over, and the accused has no basis to seek their removal. Even if the juror's answer purports to be truthful, we know that racism is subtle, pernicious, and often an unconscious bias. The challenge for cause in Canada simply does not do enough.

15. Under the judge's discretionary stand-by power, it is true that an accused can ask the judge to have a prospective juror stand by. But this is not a substitute for direct participation in the jury selection process, as it inserts a judge between the accused and the decision over whether a juror should be removed. A judge (who is almost always white) cannot stand in the accused's shoes and understand how the pervasive reality of systemic discrimination influences the accused's feelings toward a particular prospective juror. A judge cannot see and police everything that happens in the courtroom, and there will often not be evidence of the facts that make an accused wish for a juror to be removed. Mr. Chouhan's jury selection provides a perfect example of this:

> MR. DIRKSTINE [sic]: Mr. Chouhan, felt that while the person was in line that we [sic] he was looking at him in kinda of an odd way, and he is not – he would like Your Honour to excuse him.

> THE COURT: Because of the way he looked at him in the ….
>
> MR. DIRKSTINE [sic]: … while he was in line.
>
> THE COURT: As opposed in court answering the question. Which is fine. I just want to make sure I understand it. Okay. In the circumstances of whether I should excuse this gentleman as not being impartial based upon Mr. Chouhan's subjective belief that he didn't like the way the person looked at him when they were lining up, I don't find is a sufficient reason to find the person unacceptable based upon the answer he gave under a solemn affirmation. As such, I'm not prepared to excuse the gentleman, and I will bring him back in and make him our next juror. Sir, I want to thank you for that, and you are going to be our next juror.[8]

16. The stand-by power also leaves trial judges in an impossible position. The reality is that an accused person of colour will often want someone on their jury who isn't white. They may seek to use their peremptory challenges selectively to try and prevent the jury from filling up with the first 12 white jurors who pass through the challenge for cause. But if the accused voiced this concern to the judge without peremptory challenges, how could that judge be expected to use the stand-by power against prospective white jurors to try and increase the diversity of the jury? What if the Crown objected to the judge doing so? Given this Court's decision in *Kokopenace*, on what basis *could* a trial judge invoke the power in this way?

17. *Kokopenace* sets a definition of representativeness that demands a sad bare minimum of Parliament and provincial legislatures. Parliament and the provinces have done little to begin fixing the problem by improving the lack of diversity on juries. Given this reality, SABA submits that Parliament's choice to eliminate peremptory challenges offends section 11(d) of the *Charter*.

B. Canada Should not Model Itself on Jurisdictions that have Abolished Peremptory Challenges

18. The Court of Appeal's decision in this case pointed approvingly to the fact that peremptory challenges have been abolished in some other common law jurisdictions.[9] The

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[8] *R. v. Chouhan*, Transcript of Proceedings dated October 3, 2019 at pp. 54 – 55.
[9] *R. v. Chouhan*, 2020 ONCA 40 at para. 59.

Court of Appeal referred to Northern Ireland, whose courts have held that the abolition of peremptory challenges does not violate an accused's right to a fair trial under article 6 of the *European Convention on Human Rights*, because peremptory challenges were not indispensable to the fair trial right.[10] The Court of Appeal essentially reasoned that the repeal of peremptory challenges in another country provides some support for the finding that their repeal here does not violate our *Charter*.

19. Peremptory challenges have also been abolished in England and Scotland.

20. This Court should not rely on the fact that these other countries have eliminated peremptory challenges in determining the scope of what our *Charter* right to a fair and impartial jury means. These other countries have jury systems remarkably different from ours, and that would not pass constitutional muster here.

i) Northern Ireland

21. Northern Ireland's jury system falls far short of what our *Charter* requires. In Northern Ireland, the prosecution has the power to "stand by" jurors. The accused has none. Indeed, in the same case that upheld the abolition of peremptory challenges, the High Court of Justice in Northern Ireland held that the prosecution's ability to stand by jurors did not deprive an accused of a fair trial. A defendant is entitled only to "a reasonable opportunity of presenting his case to the court under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent."[11] The court held that the proper application of the impugned statutory provisions coupled with the "scrupulous discharge" of the prosecutor's duty as a minister of justice conferred no material advantage on the prosecutor and did not subject a defendant in a criminal trial to any corresponding disadvantage.[12]

22. This Court confronted the exact same issue in *R. v. Bain*[13] and rightly came to the exact opposite conclusion. At the time of *Bain*, the *Criminal Code* provided the Crown

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[10] *Ibid.*
[11] *McParland, Re Judicial Review*, [2008] N.I.Q.B. 1, at para. 49.
[12] *Ibid.*
[13] *R. v. Bain*, [1992] 1 SCR 91 ["*Bain*"].

with the ability to stand by 48 prospective jurors and to peremptorily challenge 4 jurors. The accused was only allowed 12 peremptory challenges. The Court held that this discrepancy gave an appearance of unfairness or bias against the accused, violating section 11(d) of the *Charter*. It did not matter to this Court that the Crown was an officer of the court. Providing the Crown with "the ability to select a jury that appears to be favourable to it, the whole trial process will be tainted with the appearance of obvious and overwhelming unfairness."[14]

23. This Court's conclusion nearly two decades ago in *Bain* shows that Canada and Northern Ireland have radically different ideas about what a fair trial by jury requires.

ii) England

24. England also abolished peremptory challenges, but England has no written constitution, there is no constitutional right to a jury trial, and the prosecution has the power to stand aside jurors (albeit a more limited one).[15] England also does not require unanimous verdicts, and an accused can be convicted by a vote of 10 on a jury composed of 12 members. England claims that its system "prevents the odd crank or possibly biased juror insisting on a disagreement and thereby frustrating the process."[16]

25. In Canada, by contrast, no verdict in a criminal trial has ever been considered valid unless it was agreed to by everyone on the jury at the close of the case.[17] Jury unanimity is one of the defining characteristics of our criminal jury system. The Law Reform Commission of Canada held that requiring jury unanimity improves decision making and ensures that minority views are given a voice:

> [T]he deliberative process in which [jurors] engage encourages a give-and-take by which ideas and arguments are tested, refined, confirmed or rejected. The

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[14] *Ibid* at p. 103.
[15] Criminal Courts Review: Lord Justice Auld's Review of the Criminal Courts ("The Auld Report"), Sept. 2001, Chapter 5 at para. 74: https://www.criminal-courts-review.org.uk/chpt5.pdf
[16] *Ibid* at para. 75.
[17] Peter Sankoff, Majority Jury Verdicts and the Charter of Rights and Freedoms, 39 U.B.C. L. Rev. 333 (2006) at p. 335.

> unanimity requirement would appear to be necessary to ensure that these attributes of jury decision-making are present. **Empirical research relating to the jury's deliberative process suggests: first, that minority views are more likely to be expressed and considered under the unanimity rule; and second, that the quality of discussion is superior. From these findings, the greater likelihood of an accurate decision under the unanimity rule can be inferred.**[18]

iii) Scotland

26. Scotland no longer has peremptory challenges, but it also lacks other basic jury rights that our *Charter* requires. In Scotland, there is no right to a jury trial, and the *prosecution*, not the accused, is imbued with the power to choose between a trial by jury or judge alone.[19]

27. The Scottish system also forbids any general questioning of potential jurors by the judge or the parties. In *M. v. H.M. Advocate* (1976), a case involving terrorist offences which had spilled over from Ireland to Scotland, potential jurors were asked by the judge whether they had lost relatives in the religious and political disturbances in Northern Ireland which might affect their ability to give unbiased consideration to the issues involved. None of the jurors were in this position. Although the case was appealed on other grounds, the Appeal Court went out of its way to reprimand this sort of questioning of jurors:

> [T]here should be no general questioning ... of persons cited for possible jury service to ascertain whether any of them could or should be excused from jury service in a particular trial .... The essence of the system of trial by jury is that it consists of fifteen individuals chosen at random from amongst those who are cited for possible service.[20]

28. Denying an accused person a right to question jurors on issues of potential bias would be unconstitutional in Canada, and directly contradicts nearly three decades of Canadian jurisprudence. As Justice Doherty held in *Parks*:

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[18] *Ibid* at p. 355 [emphasis added].
[19] Peter Duff, The Scottish Criminal Jury: A Very Peculiar Institution, 62 Law and Contemp. Probs. 173 (1999) at p. 176. Scotland also gives its juries three different options for a verdict: guilty, not guilty and not proven.
[20] *Ibid* at p. 181.

> The ever-developing awareness of the nature and extent of racism, and in particular anti-black racism in Metropolitan Toronto, suggests that the insights provided by the American material, and the conclusions of Canadian commentators, have at least some application to juries selected from among the residents of Metropolitan Toronto. **I am satisfied that in at least some cases involving a black accused there is a realistic possibility that one or more jurors will discriminate against that accused because of his or her colour. In my view, a trial judge, in the proper exercise of his or her discretion, could permit counsel to put the question posed in this case, in any trial held in Metropolitan Toronto involving a black accused. I would go further and hold that it would be the better course to permit that question in all such cases where the accused requests the inquiry.**[21]

29. Scotland has chosen to bury its head in the sand. There, the accused and the prosecutor must simply accept the jurors who emerge randomly from the selection process. They believe that the prejudices and biases of the people on the jury will assume little significance in the dynamic of group decision making, where they also permit decisions based on majority votes.

30. Canada has long rejected this approach. As Justice Doherty carefully explained in *Parks*, we know that racism exists and that it can infect our juries, and we give accused people at least some tools to try and address it. Scotland gives accused people none of these tools, and its abolition of peremptory challenges doesn't teach us anything about what our *Charter* requires.

PART IV: COSTS AND ORDER SOUGHT

31. SABA does not seek costs and asks that no award of costs be made against it. SABA takes no position on the disposition of this appeal and cross-appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 13th day of September, 2020

Janani Shanmuganathan — Annie (Qurrat-ul-ain) Tayyab

Counsel for the Intervener, South Asian Bar Association of Toronto

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[21] *R. v. Parks*, [1993] O.J. No. 2157 (C.A.) [emphasis added].

PART VI: TABLE OF AUTHORITIES

Caselaw

Secondary Sources