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

APPELLANT
(Respondent)

-and-

PARDEEP SINGH CHOUHAN

RESPONDENT
(Appellant)

-and-

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PART I: OVERVIEW

1. The intervener Debbie Baptiste ("Intervener") is the mother of the late Colten Boushie, a twenty-two year old Nehiyaw Napew man who was shot in the back of the head and killed by Gerald Stanley on Mr. Stanley's rural property near Biggar, Saskatchewan on August 9, 2016.

2. Mr. Stanley was charged with the second-degree murder of Mr. Boushie and was tried in Battleford, Saskatchewan. During the jury selection process, counsel for Mr. Stanley exercised his peremptory challenges to exclude each of the five visibly Indigenous persons from serving on the jury.[1]

3. On February 9, 2018, the jury acquitted Mr. Stanley. Following the verdict there was a "public outcry of such force and fury that it immediately dominated national discourse."[2]

4. Parliament thereafter reviewed the jury selection process. The impetus for the review was concern that peremptory challenges were used in *R v Stanley* to challenge all potential jurors who were Indigenous.[3]

5. On September 19, 2019 Bill C-75 came into force and eliminated peremptory challenges through amendments to the *Criminal Code of Canada* ("*Code*").[4]

6. In the case at bar, the appellant on the cross-appeal, Pardeep Singh Chouhan ("Cross-Appellant") applied at his trial for an order declaring that the amendments to the *Code* under Bill C-75 were inconsistent with the *Charter of Rights and Freedoms* ("*Charter*"). The Cross-Appellant's evidence on the application consisted of, *inter alia*, affidavits of two prominent defence counsel, which said, *inter alia*, the following:

> If my client is a racialized individual, I try to exercise peremptory challenges to enable me to choose some jurors who are similarly racialized so that my clients believe that their jury is representative. In my experience, it is not unusual for the first twelve potential jurors presented

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[1] Roach, Kent, "Juries, Miscarriages of Justice and the Bill C-75 Reforms", forthcoming, (2020) 98(1) *Canadian Bar Review*.
[2] Factum of the Respondent on Appeal, at para. 39.
[3] *R v Chouhan*, 2019 ONSC 5512, at paras. 75-76 [*Chouhan ONSC*].
[4] *An Act to amend the Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, S.C. 2019, c. 25 [*Bill C-75*].

> to include no non-white individuals at all.
>
> My racialized clients consider a representative jury to be one in which the jury has some members who are like they are.
>
> …
>
> The peremptory challenge is one mechanism during the jury selection process that allows me to have a jury that is not entirely racially dissimilar to my client.[5]

And

> If my client is a racialized individual, I try to choose some prospective jury members who are similarly racialized individuals so that my client believes that their jury is representative. Other times, I have rejected prospective jury members who my client may feel are representative of their backgrounds as a result of my personal knowledge of the facts and circumstances of a particular case. Without a full knowledge of the facts and circumstances of a case the presiding judge would not be able to make the same choices as I or my client.[6]

7. The Cross-Appellant's evidence on his *Charter* application demonstrates that defence counsel sometimes use peremptory challenges to exclude potential jurors based solely on the potential jurors' race.

PART II: STATEMENT OF POSITION

8. Peremptory challenges are used by the Crown and the defence to discriminate against potential jurors based solely on race. From the perspective of Indigenous people who have been historically targeted and victimized, the existence of peremptory challenges as mechanisms for discrimination does not support the perception of a fair trial or an impartial jury.

9. Using peremptory challenges to exclude presumptively impartial jurors based on race is an overt example of race-based discrimination that has no place in a modern democracy. The state cannot sanction, enable, and participate in a process that permits participants in the justice system to be discriminated against based solely on the

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[5] Affidavit of David Bayliss, August 28, 2019, at paras. 16, 17 and 19: Appellant's Appeal Book at the Court of Appeal for Ontario.

[6] Affidavit of Liam O'Connor, August 29, 2019, at para. 11: Appellant's Appeal Book at the Court of Appeal for Ontario.

participants' race.

PART III: STATEMENT OF ARGUMENT

A. The Purpose of Bill C-75

10. Jurors are participants in the justice system. They must be both protected from discrimination and be respected.

11. In *Yumnu*, Moldaver J. made the following comments in the context of protecting the privacy of jurors:

> [41] … Jurors give up much to perform their civic duty. In some instances, serving on a jury can be a difficult and draining experience. Long trials in particular can take a toll on an individual's personal and professional life.
>
> [42] Jury duty is precisely that — a duty. People are not asked to volunteer; they are selected at random and required to serve unless they are otherwise exempted or excused….
>
> [43] Jurors deserve to be treated with respect….[7]

12. Indigenous persons have been systematically excluded from participation on juries for most of Canada's history. Indeed, the first time "Indians" served on a Canadian jury may have been in 1972.[8]

13. Once Indigenous people were permitted to report for jury duty, they were not consistently treated with respect in the Canadian justice system. Indeed, Indigenous people continued to be excluded from serving on juries. In "First Nations Representation on Ontario Juries", the Honourable Frank Iacobucci said the following:

> At the jury selection stage, the [Public] Inquiry [into the Administration of Justice and Aboriginal People] found that "it is common practice for some Crown attorneys and defence counsel to exclude Aboriginal jurors through the use of stand-asides and peremptory challenges." The examples they provide are compelling. In the Helen Betty Osborne case in The Pas, the jury had no Aboriginal members, in spite of the fact that it was in an area of Manitoba where Aboriginal people comprise over 50% of the population. All six Aboriginal people called forward were the subjects of

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[7] *R v Yumnu*, 2012 SCC 73, at paras. 41-43 [*Yumnu*].
[8] Peterson, Cynthia, "Institutionalized Racism: The Need for Reform of the Criminal Jury Selection Process," (1993) 38 MLJ 147-79, at p. 151 [*Peterson*].

> peremptory challenges from the defence. Similarly, on one day of the Thompson assizes, 35 of 41 Aboriginal people called to serve on three juries were rejected through peremptory challenges and stand-asides. "In one case, the Crown rejected 16 Aboriginal jurors; in another, the defence rejected two and the Crown rejected 10; in the third and final case, the defence accepted all the proposed Aboriginal jurors, while the Crown rejected nine. Two jurors were rejected twice."[9]

14. The Intervener submits that, in the examples cited by the Honourable Iacobucci, the exercise of the peremptory challenges would likely have been a source of "frustration and humiliation" for the Indigenous jurors.[10]

15. In *R v Stanley*, all five of the Indigenous persons who were randomly selected from the jury panel to perform their civic duty were peremptorily challenged by the defence.

16. The Intervener submits that a reasonable person fully informed of the circumstances of *R v Stanley* and viewing the matter realistically and practically, would have concluded that the five potential jurors were challenged solely because they were Indigenous. The reasonable person would further have concluded that the peremptory challenges were used in a discriminatory manner, and in a fashion that did not treat the potential jurors with the respect they deserved.

17. The reasonable person, aware of the existence of racial biases and prejudices against Indigenous people, especially in rural Saskatchewan, may also have concluded that the defence's objective of challenging the five Indigenous people was not to empanel an impartial jury, but rather to craft a more favourable jury for the Caucasian accused.

18. Following *R v Stanley*, Parliament acted quickly and decisively to preserve the public's confidence in the administration of justice. The Minister of Justice described the purpose behind the jury selection amendments in Bill C-75 to be, *inter alia*, as follows:

> Reforms in this area are long overdue. Peremptory challenges give the accused and the crown the ability to exclude jurors without providing a reason. In practice, this can and has led to their use in a discriminatory manner to ensure a jury of a particular composition….
>
> I am confident that the reforms will make the jury selection process more

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[9] The Honourable Iacobucci, Frank, First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by" (February 2013), at p. 39 [*Iacobucci*].
[10] *R v Chouhan*, 2020 ONCA 40, at para. 55 [*Chouhan ONCA*].

> transparent, promote fairness and impartiality, improve the overall efficiency of our jury trials, and foster public confidence in the criminal justice system.[11]

19. In the case at bar, the trial judge found the following regarding the purpose of Bill C-75:

> It would appear to me that one of the key purposes of the legislation is to make the criminal jury selection process more open and transparent. It simply eliminates the ability to remove prospective jurors because of their physical appearance, or on a hunch or gut instinct. Counsel need articulable reasons as to why a juror would not be impartial or why they need to be excluded to maintain public confidence in the administration of justice.[12]

20. The Intervener submits that the use of peremptory challenges to exclude members of a particular group, especially those who have been historically excluded from serving on juries, indelibly erodes public confidence in the administration of justice. Parliament's purpose and objective behind Bill C-75 – to eliminate the discriminatory use of peremptory challenges – was therefore a pressing and substantial one.

B. Peremptory Challenges cannot be used by the Crown to Discriminate against Potential Jurors

21. Prior to Bill C-75, there was an equal endowment of peremptory challenges between the Crown and defence, which "merely equalize[d] the discriminatory power inherent in peremptory challenges".[13]

22. The role of the prosecutor excludes any notion of winning or losing.[14] Further, the Crown's unique role prevents the Crown from securing a "favourable jury, rather than simply an impartial one".[15]

23. The Crown is not permitted to use peremptory challenges in a manner that removes certain types or classes of people. In *Yumnu*, Moldaver J. wrote the following:

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[11] *Chouhan* ONSC, *supra* note 3, at para. 77, emphasis added.
[12] *Ibid*, at para. 78, emphasis added.
[13] *Iacobucci*, *supra* note 9, at para. 40.
[14] *Boucher v The Queen*, [1955] SCR 16, [1954] ACS no 54, at p. 24.
[15] *R v Pizzacalla*, 5 OR (3d) 783, 69 CCC (3d) 115 (ONCA).

> Appearances count. And regardless of the Crown's good intentions, aligning itself with the police and using their vast resources to investigate potential jurors could be seen by some as incompatible with the Crown's responsibility, as an officer of the court, to ensure that every accused receives a fair trial. Randomness and representativeness are two qualities we look for in juries. Widespread checking could give rise to a suggestion of stereotyping and arbitrariness in the selection process, particularly if it could be shown that peremptory challenges were being used to remove certain types or classes of people who would otherwise be eligible to serve as jurors.[16]

24. Because it is a "sociological fact" that "racial stereotyping will usually be the result of subtle unconscious beliefs, biases and prejudices"[17], a Crown with good intentions may belong to the large segment of the community that subconsciously operates on the basis of negative racial stereotypes.[18] It is likely that, in exercising their peremptory challenges, Crown Attorneys often discriminate against the racialized participants in the justice system without knowing it. As such, even the Crown's good-faith exercise of peremptory challenges in cases where one or more of the participants are racialized could give rise to a suggestion of stereotyping.

25. However, there will also be cases where Crown Attorneys will consciously abuse their use of peremptory challenges. In *R v Bain*, Cory J. identified that the Crown Attorney "plays a very responsible and respected role in the criminal justice system and particularly in the conduct of criminal trials"[19]. However, Cory J. also recognized that Crown Attorneys are "subject to human frailties and occasional lapses"[20], and said the following:

> Unfortunately it would seem that whenever the Crown is granted statutory power that can be used abusively then, on occasion, it will indeed be used abusively. The protection of basic rights should not be dependent upon a reliance on the continuous exemplary conduct of the Crown, something that is impossible to monitor or control. Rather the offending statutory provision should be removed.[21]

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[16] *Yumnu*, *supra* note 7, at para. 40, emphasis added.
[17] *Peel Law Association v Pieters*, 2013 ONCA 396, at paras. 111 and 113.
[18] *R v Parks*, 15 OR (3d) 324, 84 CCC (3d) 353 (ONCA), at para. 54; *R v S.(R.D.)*, [1997] 3 SCR 484, 151 DLR (4th) 193, at para. 46.
[19] *R v Bain*, [1992] 1 SCR 91, 87 DLR (4th) 449, at paras. 101-102.
[20] *Ibid.*
[21] *Ibid.*

26. By enacting Bill C-75, Parliament removed the offending statutory condition that permitted Crown Attorneys – and the defence – to discriminate against potential jurors on the basis of race.

C. An Accused has no Right to Discriminate against Potential Jurors on the Basis of Race

27. The Intervener submits that, as a participant in the justice system, an accused does not have the right to discriminate against potential jurors on the basis of race.

28. Further, because defence counsel have a professional obligation not to discriminate, the Intervener submits that defence counsel – like the Crown – should not be permitted to employ discriminatory tactics while empaneling a jury

29. In *R v Barton*, Moldaver J. said the following:

> [I] my view, our criminal justice system and all participants within it should take reasonable steps to address systemic biases, prejudices, and stereotypes against Indigenous persons – and in particular Indigenous women and sex workers – head-on. Turning a blind eye to these biases, prejudices, and stereotypes is not an answer [emphasis added].[22]

30. Defence counsel have a special responsibility on matters relating to discrimination. The Law Society of Ontario's Rules of Professional Conduct state the following:

> **6.3.1-1** A lawyer has a special responsibility to respect the requirements of human rights laws in force in Ontario and, specifically, to honour the obligation not to discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences (as defined in the Ontario Human Rights Code), marital status, family status, or disability with respect to professional employment of other lawyers, articled students, or any other person or in professional dealings with other licensees or any other person.[23]

31. In the case at bar, the Cross-Appellant's factum submits that "[p]eremptory challenges can push in the other direction and permit a racialized accused to have some

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[22] *R v Barton*, 2019 SCC 33, at para. 200.
[23] Law Society of Ontario, *Rules of Professional Conduct* (amendments current to 24 October 2019)

ability to see faces like hers on the jury."[24]

32. The Intervener acknowledges the good intentions of defence counsel who attempt to get racialized individuals on a jury when a jury is mainly white.[25]

33. However, the Intervener respectfully submits that – regardless of the creditable intentions of defence counsel – the practice of excluding potential jurors based solely on race erodes the principle of trial fairness.

34. In *R v Bjelland*, the Court said the following regarding trial fairness:

> While the accused must receive a fair trial, the trial must be fair from both the perspective of the accused and of society more broadly. In *R. v. Harrer*,… McLachlin J. (as she then was) provided guidance on what is meant by trial fairness. She stated…that:
>
> > At base, a fair trial is a trial that appears fair, both from the perspective of the accused and the perspective of the community. A fair trial must not be confused with the most advantageous trial possible from the accused's point of view: *R. v. Lyons*…. Nor must it be conflated with the perfect trial; in the real world, perfection is seldom attained. A fair trial is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness for the accused.[26]

35. The Intervener submits that the public interest at getting at the truth can never be enhanced by the defence's discriminatory use of peremptory challenges.

36. In *R v Stanley*, the truth-seeking function of the trial process was *not* enhanced when each of the five Indigenous jurors were peremptorily challenged. Indeed, the Intervener submits that, from the perspective of the public, the defence's use of peremptory challenges likely had the effect of discrediting the trueness of the jury's verdict.

37. The Intervener submits that the public's perspective on the fairness of a trial would be equally compromised in circumstances where counsel for a racialized accused exercises their peremptory challenges in a manner that excludes jurors who do not match the race of

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[24] Appellant's Factum on Cross-Appeal, at para. 46.
[25] Appellant's Factum on Cross-Appeal, at para. 10.
[26] *R v Bjelland*, 2009 SCC 38, at para. 22, citations omitted, emphasis added in *R v Bjelland*.

the accused.

38. Further, as a result of their subtle unconscious beliefs, biases and prejudices, defence counsel are not immune from engaging in racial stereotyping. Indeed, a defence counsel's belief that the trial of a racialized accused would be fairer if a juror of the same race were empaneled could very well be the result of negative racial stereotyping.

D. The Expanded Stand By Authority must be Liberally Construed

39. The Intervener agrees with the Cross-Appellant that racialized people are highly sensitive to those who would discriminate against them, that their perception is real, and that their perceptions may well be correct.[27]

40. In the case at bar, Watt J. recognized that the stand by authority of the judge presiding over jury selection has been expanded by Bill C-75, and said the following:

> This stand by authority is available after a prospective juror has been called… and thus is available before or after a challenge for cause has been heard and its truth determined…. <u>But the language "maintaining public confidence in the administration of justice" is new and, as a matter of statutory construction, covers different ground.</u> In this case, for example, the trial judge used it to direct a prospective juror, who had been found impartial on the challenge for cause, to stand by. The basis for its exercise was the appellant's belief, communicated to the trial judge through counsel, that a rude gesture had been made by the prospective juror when asked to face the appellant.[28]

41. The Intervener submits that the expanded stand by authority should be liberally construed by judges who preside over jury selection. If defence counsel articulates a reason why a prospective juror is not impartial, the judge should assume the submission to be true. If a reasonable person could conclude that there was a realistic potential or possibility that the prospective juror would not be impartial, the trial judge should stand the juror down.

42. However, when deciding whether to stand by a juror, a judge can never rely upon reasons that resort to racial stereotypes.[29]

43. Had the jury in *R v Stanley* been selected in accordance with the amendments found

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[27] Appellant's Factum on Cross-Appeal, at para. 40.
[28] *Chouhan* ONCA, *supra* note 10 at para. 70, emphasis added.
[29] *Ibid*, at para. 116.

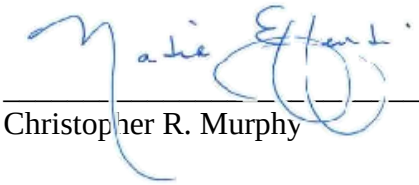
in Bill C-75, at least one Indigenous person would likely have sat on Mr. Stanley's jury. From the perspective of the Intervener, and the Canadian community to which she and her family belong, the presence of an Indigenous juror would have enhanced the appearance of fairness. The assured absence of race-based discrimination would have solidified it.

PART IV: COSTS

44. The Intervener seeks no costs and asks that no costs be ordered against her.

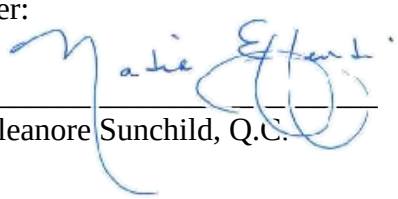
All of which is respectfully submitted this 14th day of September 2020.

Per:



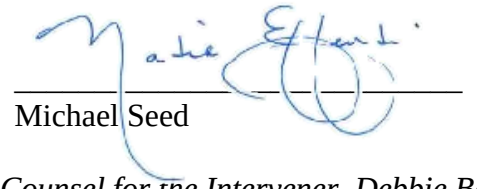
Christopher R. Murphy

Per:



Eleanore Sunchild, Q.C.

Per:



Michael Seed

Counsel for the Intervener, Debbie Baptiste

PART VII: TABLE AUTHORITIES

Case Law	**Para**
Boucher v The Queen, [1955] SCR 16, [1954] ACS no 54	22
Peel Law Association v Pieters, 2013 ONCA 396,	24
R v Bain, [1992] 1 SCR 91, 87 DLR (4th) 449	25
R v Barton, 2019 SCC 33	29
R v Bjelland, 2009 SCC 38	34
R v Chouhan, 2019 ONSC 5512	4, 18, 19
R v Chouhan, 2020 ONCA 40	14, 28, 42
R v Parks, 15 OR (3d) 324, 84 CCC (3d) 353 (ONCA)	24
R v Pizzacalla, 5 OR (3d) 783, 69 CCC (3d) 115 (ONCA)	22
R v S.(R.D.), [1997] 3 SCR 484, 151 DLR (4th) 193	24
R v Yumnu, 2012 SCC 73	11, 23

Legislation	**Para**
An Act to amend the Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts, S.C. 2019, c. 25.	5

Secondary Sources	**Para**
Peterson, Cynthia, "Institutionalized Racism: The Need for Reform of the Criminal Jury Selection Process," (1993) 38 MLJ 147-79.	12
The Honourable Iacobucci, Frank, First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by" (February 2013).	13, 21
Law Society of Ontario, *Rules of Professional Conduct* (amendments current to 24 October 2019)	30

Roach, Kent, "Juries, Miscarriages of Justice and the Bill C-75 Reforms", forthcoming, (2020) 98(1) *Canadian Bar Review*.	2

***An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, S.C. 2019, c. 25, s. 269**	***Loi modifiant le Code criminel, la Loi sur le système de justice pénale pour les adolescents et d'autres lois et apportant des modifications corrélatives à certaines lois*, LC 2019, c 25, s. 269**
269 Sections 633 and 634 of the Act are replaced by the following: **Stand by** **633** The judge may direct a juror who has been called under subsection 631(3) or (3.1) to stand by for reasons of personal hardship, maintaining public confidence in the administration of justice or any other reasonable cause. 1992, c. 41, s. 2	**269 Les articles 633 et 634 de la même loi sont remplacés par ce qui suit :** **Mise à l'écart** **633** Le juge peut ordonner qu'un juré dont le nom ou le numéro a été tiré en application des paragraphes 631(3) ou (3.1) se tienne à l'écart pour toute raison valable, y compris un inconvénient personnel sérieux pour le juré ou le maintien de la confiance du public envers l'administration de la justice. 1992, ch. 41, art. 2