File Number: 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 on the Cross-Appeal

and

PARDEEP SINGH CHOUHAN

Respondent / Appellant on the Cross-Appeal

and

ATTORNEY GENERAL OF MANITOBA and ATTORNEY GENERAL OF ALBERTA and ATTORNEY GENERAL OF BRITISH COLUMBIA and ATTORNEY GENERAL OF CANADA and CANADIAN MUSLIM LAWYERS ASSOCIATION and FEDERATION OF ASIAN CANADIAN LAWYERS and ABORIGINAL LEGAL SERVICES and GAVIN MACMILLAN and ASSOCIATION QUÉBÉCOISE DES AVOCATS ET AVOCATES DE LA DÉFENSE and DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS and CANADIAN ASSOCIATION OF BLACK LAWYERS and SOUTH ASIAN BAR ASSOCIATION OF TORONTO and ADVOCATES' SOCIETY and DEFENCE COUNSEL ASSOCIATION OF OTTAWA and CRIMINAL LAWYERS' ASSOCIATION (ONTARIO) and DEBIE BAPTISTE and BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

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PART I - OVERVIEW

1. The Canadian Muslim Lawyers Association (the "CMLA") and the Federation of Asian Canadian Lawyers ("FACL") (collectively, the "Coalition") intervene in support of the cross-appeal brought by Pardeep Singh Chouhan concerning the constitutionality of the abolition of peremptory challenges in the jury selection process in Bill C-75.[1]

2. The peremptory challenge is a necessary tool for promoting jury diversity and for empanelling an impartial jury. Paradoxically, Parliament claims to have abolished peremptory challenges to guard *against* discrimination. While we do not doubt that the peremptory challenge can be misused in discriminatory ways, the proper remedy was for Parliament to *regulate* the use of the peremptory challenge, rather than to abolish it altogether.

3. Depriving accused persons of the ability to peremptorily challenge potential jurors undermines the representativeness, independence, and impartiality of the jury. Racialized accused and their counsel routinely use peremptory challenges during jury selection to attempt to empanel a jury that includes at least *some* members who share the accused's racial or ethnic background or is otherwise representative of the racial or cultural diversity of the broader community. Contrary to Parliament's intention in enacting Bill C-75, abolishing the peremptory challenge undermines jury diversity.

4. Parliament's outright abolition of peremptory challenges is overbroad and unnecessarily impairing of the rights guaranteed by ss. 11(d) and 11(f) of the *Canadian Charter of Rights and Freedoms*. More narrowly targeted and less impairing means were available to Parliament to meet its objective: rather than eliminating peremptory challenges altogether, Parliament could have empowered judges to ensure that peremptory challenges are not used in discriminatory ways. Drawing on the experience of Canadian courts and commentators and on jurisprudence from other jurisdictions, the Coalition provides an example of one approach Parliament could have taken to end the problematic uses of peremptory challenges that *decrease* the racial diversity of Canadian juries, while preserving the peremptory challenge as means of promoting diversity and ensuring that the jury can fulfil its fair trial function.

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[1] *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 ("Bill C-75"), s. 269.

PART II - STATEMENT OF FACTS

5. The Coalition accepts the facts as set out in the parties' facta. The Coalition takes no position on disputed facts.

PART III - STATEMENT OF ARGUMENT

A. REPRESENTATIVE JURIES ARE NECESSARY FOR FAIR TRIALS

6. Representativeness and impartiality are features of a jury necessary for a fair trial and public confidence in the trial process. This Court has affirmed that the jury acts as the "conscience of the community" and that the right to a trial by jury is meaningless "without some guarantee that [the jury] will perform its duties impartially and represent, as far as is possible and appropriate in the circumstances, the larger community."[2] This Court has held that "the right to a representative jury is an entitlement held by the accused that promotes the fairness of his or her trial, in appearance and in reality."[3]

7. Jury representativeness and impartiality are constitutional requirements under ss. 11(d) and 11(f) of the *Charter*. The Coalition adopts the submissions of the intervener the British Columbia Civil Liberties Association (the "BCCLA") that jury diversity is a safeguard for jury impartiality and the submissions of The Advocates' Society, the South Asian Bar Association, the Canadian Association of Black Lawyers, and the BCCLA regarding the importance of inclusion of Indigenous, Black, and racialized people on Canadian juries for trial fairness and public confidence in the trial process. The Coalition agrees with these interveners and the appellant on cross-appeal that the peremptory challenge is a constitutionally necessary safeguard of jury impartiality in the context of the current Canadian jury selection process and that its elimination is contrary to ss. 11(d) and 11(f) of the *Charter*.

8. Muslims and Asian Canadians are disproportionately victims of hatred and violence and experience discrimination and exclusion in numerous ways. Muslims are a religious minority group; persons of Asian descent and many Muslims are racialized individuals in Canada; and both

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[2] *R. v. Sherratt*, [1991] 1 S.C.R. 509, at pp. 523-25; see also *R. v. Kokopenace*, 2015 SCC 28, at paras. 1, 55-57, *R. v. Stillman*, 2019 SCC 40, at para. 26.
[3] *Kokopenace*, at para. 1.

the Muslim and Asian Canadian communities in Canada represent persons of diverse ethnicities and cultures. These groups' appearance, cultures, religions, and values are often misunderstood.

9. Muslim and Asian Canadian accused persons have a legitimate interest in being tried by a jury that is representative of the broader community. This ensures that persons with a diversity of lived experiences, who may thereby better understand the experiences of Muslim or Asian Canadian accused, are serving on juries that determine the fate of those accused.

10. At the same time, lived experiences common to some but not all Muslim and Asian Canadians thwart their equal participation on juries. For example, the Muslim and Asian Canadian communities in Canada include refugee and migrant communities, whose members lack citizenship status and would thus be excluded from serving on a jury. They also include individuals who, though they may be citizens, lack proficiency in an official language of Canada, and would be precluded from serving on a jury on that basis. Asian and Muslim Canadians are also represented in immigrant or low-income neighborhoods that are subject to heightened state surveillance and policing, leading to members of these communities being more likely to be among criminally accused persons but also more likely to be excused from serving on a jury because of economic hardship. Cumulatively, these factors result in the disproportionate exclusion of Asian and Muslim Canadians from juries and heighten their interest in preserving peremptory challenges as the only viable means to a diverse jury.

B. DESPITE PARLIAMENT'S INTENTION, BILL C-75 UNDERMINES JURY DIVERSITY AND REPRESENTATIVENESS

11. In enacting Bill C-75, Parliament recognized the importance of representation of Indigenous and racialized persons on juries both for the jury's proper functioning and for maintaining the confidence of the accused and the public in the fairness of the administration of justice. The abolition of peremptory challenges in Bill C-75 was spurred by the *R. v. Stanley* case, in which Gerald Stanley, a white man, was tried for the second degree murder of Colten Boushie, a Cree man, and in which the defence was perceived to have used peremptory challenges to prevent the empanelling of any visibly Indigenous jury members. The *Stanley* case, and more broadly, the potential for peremptory challenges to be misused in a discriminatory manner, figured prominently in Parliamentary debates about the proposed abolition of peremptory challenges in Bill C-75. The Parliamentary record is clear and this Court should recognize, as other courts have, that

Parliament's objective in eliminating peremptory challenges was to guard against their discriminatory use to decrease racial diversity on juries.[4]

12. Parliament's goal of combating discrimination is laudable. But the means Parliament chose are overbroad and, indeed, in many cases, will undermine Parliament's objective.

13. Racialized accused and their counsel routinely use peremptory challenges during jury selection to attempt to empanel a jury that has at least *some* members who share the accused's racial or ethnic background.[5] As this Court acknowledged in *Sherratt*, such uses of peremptory challenges not only produce a more representative jury, but also "serve to heighten an accused's perception that he/she has had the benefit of a fairly selected tribunal."[6] Accused persons must also often resort to the use of peremptory challenges to attempt to secure a jury that is, at least to some degree, representative of the racial or cultural diversity of the broader community, even if no jury members share the accused's particular racial or cultural identity.

14. Theoretically, one could design a process for ensuring a fair, transparent and representative jury that would not rely on the peremptory challenge. But this case exists in the real world — not a hypothetical utopia where people from all walks of life, socio-economic levels, and ethnic groups are equally likely to show up to the courthouse for jury selection.

15. It is well-documented that Indigenous and racialized persons are systematically excluded at multiple stages of the jury selection process before empanelling the trial jury in Canada. At the first stage of jury selection, individuals from the community are selected to be placed on the jury

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[4] See House of Commons Debates, 42nd Parl., 1st Sess., *Bill C-75, An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, Standing Committee on Justice and Human Rights Meeting 103 (June 19, 2018) at 1610 (Hon. Jody Wilson-Raybould) and Chamber Sitting 354 (November 28, 2018) at 1610 (Mr. Arif Virani), see also Standing Committee on Justice and Human Rights Meetings 104-109; see *R. v. King*, 2019 ONSC 6386, at paras. 200-212.

[5] See Affidavit of David Bayliss sworn August 28, 2019 ("Bayliss Affidavit"), at paras. 4, 15-19 [Appellant's Record ("AR"), Tab 12, pp. 368-70]; Affidavit of Liam O'Connor sworn August 29, 2019 ("O'Connor Affidavit"), at paras. 9-15 [AR, Tab 13, pp. 372-74]; *R. v. Chouhan*, Transcript of Proceedings dated September 16, 2019, at pp. 15, 20-21 (evidence of Liam O'Connor) and at pp. 35, 41-42, 45-46 (evidence of David Bayliss) [AR, Tab 9, pp. 169, 174-75 and pp. 189, 195-96, 199-200].

[6] *Sherratt*, at p. 533; see also Bayliss Affidavit, at paras. 11-14, 18-20 [AR, Tab 12, pp. 369-70]; O'Connor Affidavit, at paras. 12-15 [AR, Tab 13, p. 373].

roll, from which jury panels (or arrays) of potential jurors, and ultimately, the trial jury (or petit jury) will be drawn. Although the preparation of jury rolls is a matter within the purview of the provinces, underrepresentation of Indigenous persons on jury rolls is a serious and long-standing concern in a number of Canadian jurisdictions.[7] The methods used to compile jury rolls — such as selecting names primarily from municipal assessment rolls — also lead predictably to the exclusion of members of other racialized and marginalized groups.[8]

16. Further exclusion of racialized and other marginalized individuals occurs at subsequent stages of the jury selection process. Indigenous and racialized persons may fail to respond to jury notices where they view the Canadian justice system as hostile, discriminatory, or culturally irrelevant; lower-income individuals, small business owners, and those living in remote areas are likely to be excused from serving on the jury due to hardship; and individuals who do not understand an official language of Canada well enough to serve on a jury will be excused on that basis.[9] Combined with the requirement that prospective jurors be Canadian citizens,[10] the result is systemic exclusion of racialized persons from the pool of prospective jurors.

17. The consequence of these features of the jury selection process is that racialized accused persons, even in multicultural, urban centres, often find themselves facing a jury panel of which few members share their cultural or racial identity. Likewise, an Indigenous accused person may be faced with a jury panel with few or zero Indigenous people — even in a region where Indigenous people represent a significant proportion of the broader community.

18. While it is possible to imagine a system of jury selection with stronger, more effective guarantees for inclusion of members of racialized and minority communities on the jury, the role of the peremptory challenge must be considered in the context of the jury selection system as it

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[7] Hon. Frank Iacobucci, *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by The Honourable Frank Iacobucci* (Toronto: Ontario Ministry of the Attorney General, 2013) ("*Iacobucci Report*"), generally and at para. 150; Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1, *The Justice System and Aboriginal People* (Winnipeg: The Inquiry, 1991) ("*Manitoba Justice Inquiry Report*"), at ch. 9.
[8] *Iacobucci Report*, at para. 155; Justice Giovanna Toscano Roccamo, "Report to the Canadian Judicial Council on Jury Selection in Ontario" (2018), at p. 11.
[9] See generally *Kokopenace*, at para. 44; *Iacobucci Report*; *Manitoba Justice Inquiry Report*, at ch. 9.
[10] *Criminal Code*, R.S.C. 1985, c. C-46, s. 638(1)(d).

currently exists. Prior to Bill C-75, the peremptory challenge was a tool — indeed, the only tool — available to an accused person to ensure that the few jury panel members who may share the accused person's background were not left off the petit jury. The unintended effect of Bill C-75 has been to remove this tool for promoting jury representativeness and confidence in the administration of justice from accused persons.

19. The Coalition does not dispute that peremptory challenges could be misused by unscrupulous counsel. However, if the evil that Parliament intended to eliminate with the abolition of peremptory challenges was their *discriminatory* use, then Parliament ought to have chosen a means that targets that evil but preserves the salutary uses of the peremptory challenge. In short, there was no need to throw out the baby with the bathwater. The choice to do so is overbroad and unnecessarily impairing of the rights guaranteed by ss. 11(d) and 11(f) of the *Charter*.

C. A LESS IMPAIRING MEANS: REGULATING THE PEREMPTORY CHALLENGE

20. More narrowly targeted and less impairing means were available to Parliament to meet its objective of preventing the discriminatory use of peremptory challenges. Rather than eliminating peremptory challenges altogether, Parliament could have empowered judges to ensure that peremptory challenges are not abused.

21. There are precedents for such an approach. In *Batson v. Kentucky*, the U.S. Supreme Court held that the prosecution's use of the peremptory challenge to strike Black jurors on the basis of race violated the Equal Protection Clause of the U.S. Constitution,[11] a holding that has since been expanded to apply to bar defence counsel's discriminatory use of the peremptory challenge.[12] Since that time, counsel in the United States have been invited to call out the opposing side for using the peremptory challenge in a discriminatory way and trial judges have been empowered to grant remedies where they find that counsel used a peremptory challenge in a discriminatory manner.

22. Under the *Batson* approach, where one party raises a *prima facie* case that the other party is using peremptory challenges to strike potential jurors on the basis of race — for example, where

[11] *Batson v. Kentucky*, 476 U.S. 79 (1986).
[12] *Georgia v. McCollum*, 505 U.S. 42 (1992).

the accused points to the Crown's exercise of peremptory challenges to strike potential jurors who appear to share the accused's racial identity — the burden shifts to the challenged party to justify the exclusion. The trial judge must then decide whether the explanation is valid. Where the trial judge concludes that it is not, and that the real reason for the use of the peremptory challenge was the prospective juror's race, the judge is empowered to grant a remedy for the violation by seating the prospective juror who has been struck or even striking the entire jury panel.[13] In his report on First Nations representation on Ontario juries, the Honourable Frank Iacobucci pointed to the *Batson* procedure as one means for judges to supervise the exercise of peremptory challenges.[14]

23. There is precedent for a similar approach in Canadian case law. In *R. v. Brown*, the accused brought an application to prevent the Crown from exercising its peremptory challenges in a discriminatory manner against Black people in contravention of ss. 11(d) and 15 of the *Charter*.[15] Justice Trafford held that the power to challenge jurors peremptorily then conferred on the Crown by s. 634 of the *Code* "must be interpreted in light of s. 11(d) and s. 15 of the *Charter*."[16] Accordingly, the court concluded, s. 634 of the *Criminal Code* "does not confer a power on the Crown to discriminate against a black person on the basis of race, by purpose or effect, and to challenge him/her peremptorily."[17] Justice Trafford went on to hold that where such misconduct occurred, the accused could seek relief under s. 24 of the *Charter*.[18]

24. In *R. v. Gayle*, the Court of Appeal for Ontario cited *Brown* with approval in holding that the Crown's exercise of discretion in relation to peremptory challenges is not immune from judicial scrutiny.[19] Where the Crown exercises its peremptory challenges in a discriminatory manner, contrary to "the quasi-judicial nature of the Crown's duty" and "the basic rights and freedoms guaranteed by the *Charter*, a court can and should intervene."[20]

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[13] See *Batson*, at pp. 93-99; Jonathan Abel, "Batson's Appellate Appeal and Trial Tribulations" (2018) 118 Colum. L. Rev. 713, at p. 724.
[14] *Iacobucci Report*, at para. 376 (recommendation 15).
[15] *R. v. Brown*, [1999] O.J. No. 4867 (Gen. Div.).
[16] *Brown*, at para. 5.
[17] *Brown*, at para. 5.
[18] *Brown*, at para. 8.
[19] *R. v. Gayle*, 2001 CanLII 4447 (Ont. C.A.), at para. 64.
[20] *Gayle*, at para. 66.

25. There are valid criticisms that have been levelled at the approach set out in *Batson*. For example, the *Batson* doctrine's focus on "purposeful or deliberate" discrimination against potential jurors, as well as its concern with the sincerity of counsel's stated reason for disqualifying a juror to the exclusion of any consideration of the stated reason's logic or plausibility, has been criticized as undermining the doctrine's effectiveness.[21] It is also contrary to Canadian law's understanding of the harms of racial discrimination even where it is systemic or implicit — and our recognition that such systemic discrimination is, unfortunately, a feature of our criminal justice system.[22] Thus, Justice Trafford in *Brown*, the Canadian precedent for a process for precluding discriminatory uses of peremptory challenges, recognized that s. 15 of the *Charter* prevents the Crown from discriminating on the basis of race either in purpose *or* effect.[23]

26. In Canada, however, and despite *Brown* and *Gayle*, challenges to allegedly discriminatory uses of peremptory challenges have been rare. Notwithstanding the significant public concern about discriminatory jury selection in cases such as *Stanley*, the courts will be unwilling to address the issue unless it is raised by a party. In the absence of a developed jurisprudence, robust appellate court guidance, or directions from Parliament, the recent judicial decisions that address the issue reveal confusion among litigants about the appropriate procedures or grounds upon which to challenge allegedly discriminatory jury selection practices.[24]

27. In considering the best approach to address the discriminatory use of peremptory challenges, Parliament was not required to adopt, wholesale, any particular approach developed in Canadian courts or other jurisdictions. Neither was Parliament bound by the same strictures that apply to courts in developing the common law and interpreting legislation. Thus, for example, Parliament was free to adopt a legislative scheme permitting parties to challenge allegedly discriminatory uses of the peremptory challenge that would short-circuit potentially thorny issues such as an accused's standing to do so under the *Charter* or the non-application of the *Charter* to the defence that have complicated the development of the common law in this area. Parliament

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[21] See, e.g., Abel (2018).
[22] See, e.g., *R. v. Gladue*, [1999] 1 S.C.R. 688, and cases that have followed it; *R. v. Parks*, 1993 CanLII 3383 (Ont. C.A.); *R. v. Morris*, 2018 ONSC 5186.
[23] *Brown*, at para. 5.
[24] See *Gardner c. R.*, 2019 QCCA 726, at paras. 5-6, 8-16, leave to appeal ref'd 2019 CanLII 96502 (SCC); *R. v. Cornell*, 2017 YKCA 12, at paras. 16-20, leave to appeal ref'd 2018 CanLII 51170 (SCC).

had (and continues to have) the advantage of being able to draw on the experience of Canadian courts and commentators, and to the extent it is useful, jurisprudence from other jurisdictions, to fashion a uniquely Canadian approach to the evil against which its legislative efforts were aimed — namely, the potential for peremptory challenges to be used in a discriminatory way to exclude racialized individuals from the petit jury.

28. As an example of one solution to this problem that was open to Parliament, the Coalition sets out the following approach to curbing the discriminatory use of peremptory challenges. This approach, drawing on aspects of both *Brown* and *Batson*, would be effective in the Canadian context in ensuring that peremptory challenges are not used for a discriminatory purpose:

1. Where defence or Crown counsel believes, in good faith, that the opposing party has struck a juror for discriminatory reasons or that there has been a pattern of using the peremptory challenge to eliminate racialized jurors, counsel should raise the issue at the earliest opportunity to permit the court to engage in a fair and expeditious adjudication of the issue in the course of jury selection.[25]

2. Opposing counsel should then be given an opportunity to respond to the concern raised by explaining why the potential juror was struck. The explanation need only be brief but must be with reference to concerns about the potential juror's impartiality or other values the jury is meant to embody, including representativeness.

3. The court should then make a determination as to whether the peremptory challenge should be maintained by considering not just whether it was motivated by a discriminatory purpose but whether the removal of the juror or the pattern of removal of jurors gives rise to an appearance of unfairness. In making that determination, the Court must be mindful of the fact that the defence cannot be *required* to provide an explanation for their use of the peremptory challenge and must not draw an adverse inference from the failure to provide an explanation. The court must also be mindful of the fact that striking members of the majority group in order to ensure a more diverse jury is a proper, non-discriminatory, use of the peremptory challenge.

4. Where the judge finds that a challenge was motivated by a discriminatory purpose or would give rise to an appearance of unfairness, the juror should be seated.

5. A party can renew the challenge at any point during jury selection as the selection process unfolds, as long as it does so in good faith.

[25] See similarly, *Brown*, at para. 11.

29. For an objection to a peremptory challenge to succeed on this approach, it would not be necessary to show that the Crown was motivated by a discriminatory purpose, as is required under the *Batson* doctrine. Consistent with the Canadian constitutional framework, and cases such as *Brown*, a discriminatory effect or an appearance of unfairness ought to be sufficient to raise concerns about a party's use of peremptory challenges and is a reasonable limit on their use.[26]

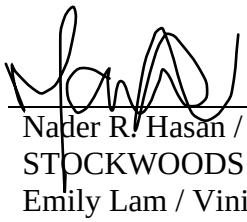
30. In determining what constitutes an appearance of unfairness, the judge may consider the entire context of the proceeding. The race or ethnicity of the accused, the victim, witnesses, and the demographics of the community in which they live may all be relevant factors. The judge should not prohibit the use of peremptory challenges aimed at *increasing* the racial diversity of a jury — for example, where a racialized accused person strikes white jurors with the aim that at least some racialized persons are included on the petit jury — as such a use seeks to further substantive equality and therefore does not constitute discriminatory conduct under this Court's equality jurisprudence.[27]

31. The above is just one example of an approach that would have been open to Parliament and that would have met Bill C-75's laudable objectives while respecting both the *Charter*'s limits on overbroad laws and its guarantee of the right to the benefit of a fair and impartial jury. Other means were also open to Parliament. But the outright abolition of the peremptory challenge — the only tool available to racialized accused persons to promote the diversity and representativeness of the jury — was not a constitutionally available option.

PART IV - COSTS

32. The Coalition seeks no costs and requests that none be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 14TH DAY OF SEPTEMBER, 2020



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[26] *Brown*, at para. 5; see generally *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, at paras. 19-20.
[27] See *R. v. Kapp*, 2008 SCC 41, at paras. 27-28, 31, 37; see also P. W. Hogg, *Constitutional Law of Canada*, 5th ed. supp. (loose-leaf) (Toronto: Thomson Reuters Canada/ Carswell, 2019) at § 55.13.

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