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 ON CROSS-APPEAL
(Respondent)

AND:

PARDEEP SINGH CHOUHAN

RESPONDENT/APPELLANT ON CROSS-APPEAL
(Appellant)

FACTUM OF THE INTERVENER, THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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TABLE OF CONTENTS

PART I – OVERVIEW AND STATEMENT OF FACTS **1**

PART II – QUESTION IN ISSUE **3**

PART III – ARGUMENT **3**

A. Diversity: Given Weak Jury Diversity Measures, Peremptory Challenges are Required to Meet the Constitutional Minimum for Jury Impartiality 3

1. Jury Diversity is a Critical Safeguard for Jury Impartiality 3

2. In the Existing Scheme, Peremptory Challenges are Required to Meet the Constitutional Minimum for Jury Impartiality 6

3. Alternate Adequate Reforms to Improve Jury Diversity Would Deprive Peremptory Challenges of their Constitutional Status 8

B. Asymmetry: Peremptory Challenges are only Constitutionally Required for the Accused 9

PART IV – SUBMISSION ON COSTS **10**

PART V – ORDER SOUGHT **10**

PART VI – TABLE OF AUTHORITIES **11**

PART I – OVERVIEW AND STATEMENT OF FACTS

1. "Any person charged with an offence" is guaranteed the constitutional right to an "impartial tribunal."[1] Absolute impartiality is, of course, a fiction—we cannot guarantee that every juror, or even every judge, completely lacks bias. But the "right" to an impartial tribunal must have meaning. The absence of any obligation to effectively provide for jury diversity in the jury roll (*Kokopenace*),[2] paired with abolishing the last remaining tool for an accused to address concerns of diversity and implicit bias in the trial jury (Bill C-75),[3] leaves s. 11(d) hollow. For this reason, the British Columbia Civil Liberties Association ("BCCLA") urges this Court to hold the abolition of peremptory challenges unconstitutional.

2. The BCCLA acknowledges the complex balance raised in this appeal. Peremptory challenges can be used in a discriminatory fashion. But, more often, they are used to promote substantive equality,[4] a fact supported and unchallenged at the trial below.[5] Indeed, "the criminal defence bar overwhelmingly believes that the peremptory challenge is a vital tool in protecting the fair trial rights of an accused person, particularly where that person is Indigenous or a person of colour."[6] To be clear, the BCCLA's position is not that peremptory challenges are the only

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[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 11(*d*) [*Charter*].
[2] *R v Kokopenace*, 2015 SCC 28 at paras 2 (majority) and 259 (Cromwell J., dissenting).
[3] *Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, SC 2019, c 25, s 269.
[4] See e.g. Canadian Bar Association, "Bill C-75, Criminal Code and Youth Criminal Justice Act amendments" submitted to the Senate Committee on Legal and Constitutional Affairs (September 2018) at 7; Michael A Johnston, "Bill C-75 & Jury Selection: Recommendations on Jury Selection and for Greater Representativeness" submitted to the Senate Committee on Legal and Constitutional Affairs (September 2018) at 9; "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", House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 42nd Parl, 1st Sess, No 106 (19 September 2018) at 29-30 (Mr. Brian Grover) [Advocates' Society Submissions]; "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", House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 42nd Parl, 1st Sess, No 105 (18 September 2018) at 3-4 (Mr. Michael Lacy), 23-24 and 26-27 (Mr. Soloman Friedman); Nader R Hasan, "Eliminating peremptory challenges make trials less fair", *The Star* (10 April 2018); Michael Spratt, "Why the new justice reform bill, C-75, is anything but just", *Ottawa Citizen* (2 April 2018).
[5] *R v Chouhan*, 2019 ONSC 5512 at paras 14-21.
[6] Advocates' Society Submissions, *supra* note 4 at 1940 (Mr. Brian Grover).

constitutional option available to the state with respect to jury impartiality. But the right to an impartial tribunal must have meaning. With that in mind, the BCCLA's intervention notes the many options constitutionally available to governments striving to balance the conflicting interests at stake, which can include abolishing peremptory challenges, but only where alternate and adequate measures for jury impartiality are put in place. Otherwise, peremptory challenges will, in the existing scheme, be necessary to meet the constitutional minimum.

3. If the abolition of peremptory challenges is upheld as constitutional, the Court will effectively hold that the state can do next to nothing to promote jury diversity, and yet, meet its constitutional duty to provide jury impartiality. The BCCLA urges this Court to hold the state accountable to its constitutional obligation of jury impartiality. Relatedly, the BCCLA urges this Court to recognize the material consequence of jury homogeneity—that is, two fundamentally distinct justice systems, where white accused are "tried by their peers" and non-white accused are not. Indeed, Indigenous and Black accused are particularly disadvantaged by non-diverse criminal juries. They are simultaneously overrepresented as accused, but perversely, underrepresented as jurors.[7] The Canadian justice system thus remains, in the words of the Marshall Inquiry, "a hostile White world" for marginalized accused.[8]

4. Diversity is no guarantee of impartiality. But race is—like gender, language, and province-of-origin—demonstrably linked to worldview. That is precisely why this Court has repeatedly recognized that jury diversity is "essential"[9]—indeed, it is what makes a jury "desirable in the first place."[10] The instant appeal represents a critical opportunity for this Court

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[7] See e.g. Public Safety Canada, *Corrections and Conditional Release: Statistical Overview* (August 2019) at 49; Statistics Canada, *Aboriginal peoples in Canada: Key results from the 2016 Census* (25 October 2017) at 1; Statistics Canada, *Diversity of the Black population in Canada: An overview* (Ottawa: Statistics Canada, 2019) at 4; 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) at para 133 [Iacobucci Report]; Ebyan Abdigir et al, "How a broken jury list makes Ontario justice whiter, richer and less like your community", *The Star* (16 February 2018).
[8] Nova Scotia, Royal Commission on the Donald Marshall, Jr., Prosecution, *Volume 4*: *Discrimination Against Blacks in Nova Scotia, A Research Study* (Halifax, 1989) at 54, [*Discrimination Against Blacks in Nova Scotia, A Research Study*].
[9] *R v Find*, 2001 SCC 32 at para 43; *R v Spence*, 2005 SCC 71 at para 25.
[10] *R v Sherratt*, [1991] 1 SCR 509 at 525.

to reaffirm that jury diversity is essential, and in turn, to fortify our justice system against racial bias, both real and perceived.

PART II – QUESTION IN ISSUE

5. Does abolishing peremptory challenges infringe the right to an impartial tribunal?

PART III – ARGUMENT

6. The BCCLA advances two core submissions: (1) that given weak jury diversity measures, peremptory challenges are required to meet the constitutional minimum for jury impartiality; and (2) that peremptory challenges are only constitutionally required for the accused.

A. Diversity: Given Weak Jury Diversity Measures, Peremptory Challenges are Required to Meet the Constitutional Minimum for Jury Impartiality

1. Jury Diversity is a Critical Safeguard for Jury Impartiality

7. Racial bias is prevalent in Canada. In *R v Spence*, this Court unanimously held that "racial prejudice and discrimination are intractable features of our society and must be squarely addressed in the selection of jurors."[11] And in *R v Parks*, Justice Doherty—writing for a unanimous Ontario Court of Appeal—described racism's ubiquity: "[r]acism, and in particular anti-black racism, is part of our community's psyche" and "infect[s] our society as a whole."[12] But jurors—drawn from our biased society—nevertheless benefit from a strong presumption of impartiality.[13] This seeming contradiction—i.e., a biased society that somehow feeds into an unbiased jury—can only be sustained if the process for selecting jurors addresses bias.

8. Failing to address bias with diversity measures has devastating consequences for our jury system. As this Court has acknowledged, racial bias can "predispose the juror to the Crown, perceived as representative of the 'white' majority against the minority-member accused" and "risk a verdict that reflects, not the evidence and the law, but juror preconceptions and prejudices."[14] Further, legal scholarship confirms the relationship between lack of diversity and jury bias. The impact of jury racial composition on verdicts is "straightforward and striking",

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[11] *R v Spence*, 2005 SCC 71 at para 1.
[12] *R v Parks*, 15 OR (3d) 324 (CA), [1993] OJ No 2157 at para 54, Book of Authorities [BOA], Tab 6.
[13] *R v Kokopenace*, 2015 SCC 28 at para 53.
[14] *R v Williams*, [1998] 1 SCR 1128 at para 11.

including "a significant gap in conviction rates for black versus white defendants."[15] Most dramatically, this impact was revealed by leading scholar Professor Paul Butler's examination of the six serial verdicts of Curtis Flowers, a Black man:[16]

> In the first trial, with an all-white jury, Mr. Flowers was convicted. In the second trial, with a jury of eleven whites and one black, Mr. Flowers was convicted.
>
> In the third trial, which also had a jury of eleven whites and one black, Mr. Flowers was convicted.
>
> In the fourth trial, with a jury of seven whites and five blacks, a mistrial was declared, because the jurors could not agree on a verdict.
>
> In the fifth trial, with a jury of nine whites and three blacks, another mistrial was declared, because the jury was unable to reach a verdict.
>
> In the six trial, with a jury of eleven whites and one black, Mr. Flowers was convicted.
>
> *The race of the jurors thus determined the outcome of each trial*.

9. Addressing racial bias is complicated by the fact that it is pervasive yet subtle. As this Court has recognized: "[r]acial prejudice and its effects are as invasive and elusive as they are corrosive" because such prejudices have an "insidious nature" and are "buried deep in the human psyche."[17] The trial judge overlooked this nature; he demanded "transparent" jury diversity measures.[18] But since implicit bias is, by definition, opaque, requiring complete transparency perversely disregards the majority of bias in society.[19] The Court of Appeal also overlooked the nature of bias; it identified a supposed "paradox", where subjective means (peremptory challenges) pursue an objective end (impartiality).[20] However, the real paradox is the Court's assumption that the remaining "objective" and highly circumscribed anti-bias measures could possibly lead to impartial juries. Implicit bias, by its very nature, cannot be identified by judicial

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[15] Shamena Anwar, Patrick Bayer and Randi Hjalmarsson, "The Impact of Jury Race in Criminal Trials" (2012) 127:2 Quarterly Journal of Economics 1017 at 1019.
[16] Paul Butler, "Mississippi Goddamn: Flowers v Mississippi's Cheap Racial Justice" (2019) Supreme Court Review 73 at 75 [emphasis added].
[17] *R v Williams*, [1998] 1 SCR 1128 at para 21; See also Anthony G Greenwald & Linda Hamilton Krieger, "Implicit Bias: Scientific Foundations" (2006) 94 Cal L Rev 945 at 951-956, BOA, Tab 1.
[18] *R v Chouhan*, 2019 ONSC 5512 at para 58.
[19] *Peel Law Association v Pieters*, 2013 ONCA 396 at paras 111 and 113; *R v Parks*, 15 OR (3d) 324 (CA), [1993] OJ No 2157 at para 54, BOA, Tab 6.
[20] *R v Chouhan*, 2020 ONCA 40 at para 87.

stand bys or challenges for cause. These courts have turned the subtlety of bias into its immunity.

10. Despite the prevalence of racial bias, it can be mitigated with greater diversity. Just as gender diversity influences deliberative processes,[21] racial diversity does, too. More racially diverse juries deliberate longer, while all-white juries enter deliberations with a much higher predisposition toward convicting Black defendants,[22] who are overrepresented in the Canadian criminal justice system.[23] It follows that jury diversity is a critical safeguard for a fair jury system. In this Court's words: "representativeness is an important guarantor of impartiality."[24] And as the Ontario Court of Appeal has explained, "[t]he essential quality that the representativeness requirement brings to the jury function is the possibility of different perspectives from a diverse group of persons."[25] Insufficient diversity undermines impartiality.

11. Ultimately, the legal test for jury impartiality turns on the perspective of the "reasonable person."[26] And homogenous juries are reasonably viewed with suspicion in terms of impartiality. Gender is a useful analogy here. For example, as legal scholar Russell Robinson explains, when confronted with identical facts, women and men, given their "disparate experiences with respect to the threat of sexual violence", interpret the presence of sexual harassment through different lenses.[27] Race similarly influences our perceptions.[28]

12. Simply put, different groups see the world differently—they experience, in this Court's words, "diverse realities" with "distinct experiences and particular knowledge."[29] And those experiences unavoidably inform how these groups engage with facts, evidence, and legal processes. With respect to judges, McLachlin and L'Heureux-Dubé JJ. noted how it is "inevitable and appropriate that the differing experiences of judges assist them in their decision-

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[21] Bertha Wilson, "Will Women Judges Really Make a Difference?" (1990) 28:3 Osgoode Hall LJ 507 at 515.
[22] Samuel R Sommers, "On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations" (2006) 90:4 J Personality and Social Psychology 597 at 603-605.
[23] *Supra* note 7.
[24] *R v Kokopenace*, 2015 SCC 28 at para 50.
[25] *R v Church of Scientology*, 33 OR (3d) 65 (CA), [1997] OJ No 1548 at para 151, BOA, Tab 5.
[26] *R v Kokopenace*, 2015 SCC 28 at para 49.
[27] Russell K Robinson, "Perceptual Segregation" (2008) 108:5 Colum L Rev 1093 at 1137.
[28] Russell K Robinson, "Perceptual Segregation" (2008) 108:5 Colum L Rev 1093 at 1106.
[29] *R v Le*, 2019 SCC 34 at para 73.

making process."[30] Likewise, for juries, the consequence of distinct lived experience is undeniable, as the serial Flowers' verdicts excerpted above demonstrate. Indeed, the Marshall Inquiry specifically noted how "[c]onsiderations of demeanor in court, dress, and expressions of regret are likely to be affected by the different class and subcultural backgrounds of court officials (including juries) and defendants."[31] With the above in mind, and without greater upstream diversity measures, peremptory challenges are indispensable for jury impartiality.

13. Lastly, s. 11 is concerned not only with actual bias, but its perception. Even if each individual member of a homogenous jury was absolutely impartial, the appearance of impartiality is fundamental to individual and public confidence in the administration of justice.[32] Homogenous juries have long undermined the public's perception of impartiality in Canadian criminal justice. Decades ago, studies observed a "widespread perception" that "predominantly white juries" create a system that "serves the exclusive interests of white victims and white defendants."[33] This has not changed.[34] We are numb to unrepresentative juries in Canada.

2. In the Existing Scheme, Peremptory Challenges are Required to Meet the Constitutional Minimum for Jury Impartiality

14. Jury impartiality must be adequately preserved when the upstream (jury roll) and downstream (trial jury) selection processes are viewed globally. Upstream protections for jury impartiality are, as this court has recently noted, "narrow."[35] This does not ensure diversity. Indeed, the outcome in *Kokopenace* is illustrative: a constitutionally adequate selection process left Mr. Kokopenace's with a jury that had 0% on-reserve representation, despite 21-32% of the adult population in his district living on reserve.[36] *Kokopenace* has been subject to sustained critique, from the bar, academia, and Indigenous organizations.[37] And this sustained critique

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[30] *R v S (RD)*, [1997] 3 SCR 484 at para 29.
[31] *Discrimination Against Blacks in Nova Scotia: A Research Study*, *supra* note 8 at 54.
[32] *Valente v The Queen*, [1985] 2 SCR 673 at 689.
[33] Cynthia Petersen, "Institutionalized Racism: The Need for Reform of the Criminal Jury Selection Process" (1993) 38 McGill LJ 147 at 149 [Petersen]; *Discrimination Against Blacks in Nova Scotia, A Research Study*, *supra* note 8 at 54-55.
[34] *Supra* note 7.
[35] *R v Kokopenace*, 2015 SCC 28 at para 51.
[36] *R v Kokopenace*, 2015 SCC 28 at paras 17, 28.
[37] Criminal Lawyers' Association, "Submissions on Behalf of the Criminal Lawyers' Association (Ontario) to the House of Commons' Standing Committee on Justice and Human Rights Studying Bill C-75" (2018) at 5 and 7; Julian Falconer, "The Kokopenace Judgment: A Case of

speaks to how close the existing scheme is—even with peremptory challenges—to falling below the constitutional minimum for jury impartiality.

15. In light of the importance of jury diversity for jury impartiality, the weak upstream jury processes addressed in *Kokopenace* must be counterbalanced with strong downstream jury processes in *Chouhan*. Specifically, peremptory challenges are a vital last resort for safeguarding the jury impartiality to which an accused is constitutionally entitled. This argument does not insist on "proportionality" between society and the trial jury in question, nor does it insist on a "particular racial or ethnic composition of the jury."[38] Rather, it simply posits that, because the weak upstream protections for jury impartiality often result in homogenous jury panels, stronger downstream protections, like peremptory challenges, must be maintained.

16. Existing alternatives to peremptory challenges, such as the current form of challenges for cause and the judicial stand-by power, cannot fill the role of peremptory challenges—indeed, such challenges overlook how bias is difficult to detect by both outsiders (judges) and those who are biased (jurors). With respect to stand bys, racialized people, on average, perceive racial bias through a "fundamentally different framework" than white people.[39] As such, accused (often racialized) and judges (majority white) will often identify different individuals as potentially biased. With respect to challenges for cause, people are poor judges of their own bias[40]—indeed, "implicit biases often contradict what people explicitly report."[41] Worse, "people who believe themselves to be wholly objective tend to act on their implicit biases more than those who believe themselves to be partial in some way."[42] This makes challenges for cause—which rely on

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Mistaken Identity" (2015) For the Defence 36:2 18 at 20; Tim Quigley, "Kokopenace: Charter Rights to Jury Representation for Aboriginal Accused are Obliterated for Expediency" (2015) Criminal Reports (Articles) 99, BOA, Tab 8; Vanessa MacDonnell, "The Right to a Representative Jury: Beyond Kokopenace" (2017) 64 Crim LQ 334, BOA, Tab 9; "Indigenous Bar Association Calls for the Inclusion of First Nations on the Jury Rolls in Ontario", Nation Talk (16 June 2015); Amar Bhatia et al, "Reconciliation and the Constitution: A Transcript of the Roundtable" (2017) 81 SCLR 273 at 298-299.

[38] *R v Chouhan,* 2020 ONCA 40 at paras 62, 74, 94.

[39] Russell K Robinson, "Perceptual Segregation" (2008) 108:5 Colum L Rev 1093 at 1104.

[40] Regina A Schuller et al, "The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom" (2009) 33 Law and Human Behaviour 320 at 325-326, BOA, Tab 7.

[41] Khiara M Bridges, *Critical Race Theory: A Primer* (St Paul, MN: Foundation Press, 2019) at 159, BOA, Tab 3.

[42] *Ibid* at 166.

juror's self-assessment[43]—an inappropriate surrogate for peremptory challenges. Further, challenges for cause almost always fail absent intentional discrimination.[44] As explicit discrimination, by definition, overlooks implicit bias, most bias evades challenges for cause.

3. Alternate Adequate Reforms to Improve Jury Diversity Would Deprive Peremptory Challenges of their Constitutional Status

17. As noted above, the BCCLA's position is not that the constitutional status of peremptory challenges is intrinsic to their character. Rather, its position is that, without the implementation of other adequate reforms to improve jury diversity, the isolated abolition of peremptory challenges will bring the current balance for accused persons below the constitutional minimum.

18. In this respect, the BCCLA acknowledges that peremptory challenges are not perfect. As Aboriginal Legal Services notes, peremptory challenges risk discrimination by both the Crown and defence. The BCCLA's response is three-fold. First, the BCCLA's argument concerning asymmetry (below) illustrates how the state has the constitutional capacity to abolish Crown discrimination without abolishing peremptory challenges. Second, the BCCLA concedes the risk of defense discrimination, of which the Gerald Stanley trial is emblematic. But the BCCLA maintains that peremptory challenges are more helpful than harmful, given the disproportionate criminalization of Indigenous and Black people. As such, "the focus ought to be on reform rather than abolition",[45] which could include prohibiting discriminatory peremptory challenges, i.e., Recommendation 15 of the Iacobucci Report.[46] Third, focusing on intentional discrimination (i.e., by Crown and defence counsel) overlooks how systemic discrimination (i.e., predominantly white jury rolls) is the central flaw of juries—as Mary Eberts and Kim Stanton note: it is "deeply problematic" to individualize the "systemic issue"[47] of jury homogeneity. Exacerbating systemic discrimination to limit intentional discrimination is an irrational and disproportionate response.

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[43] *R v Parks*, 15 OR (3d) 324 (CA), [1993] OJ No 2157 at paras 16, 25, BOA, Tab 6, and 90; *R v Spence*, 2005 SCC 71 at para 1.
[44] Kent Roach, "The Urgent Need to Reform Jury Selection after the Gerald Stanley and Colten Boushie Case" (28 February, 2018) University of Toronto Faculty of Law Blog.
[45] The Advocates' Society, "Re: 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" submitted to the Standing Committee on Justice and Human Rights (6 September 2018) at 4.
[46] Iacobucci Report, *supra* note 7 at para 44.
[47] Mary Eberts & Kim Stanton, "The Disappearance of the Four Equality Rights and Systemic Discrimination from Canadian Equality Jurisprudence" (2018) 38 Nat J Const L 89 at 110, BOA, Tab 4.

19. Further, the government is not simply limited to either maintaining or abolishing peremptory challenges. Indeed, one can see the many options open to governments in the very same documents calling for the abolition of peremptory challenges. Such calls are routinely accompanied by various other proposals for change to the jury selection process, including: (1) amending s. 629 of the *Criminal Code* to allow for representativeness-based challenges to jury panels; (2) allowing individuals with criminal records to serve on juries; (3) allowing permanent residents to serve on juries; (4) allowing Indigenous language speakers to serve on juries with interpretation services; (5) permitting volunteer jurors from underrepresented communities to supplement the jury roll; (6) meaningfully expanding challenges for cause; and (7) amending s. 633 of the *Criminal Code* to allow judges to use their stand-by power to correct underrepresentation. All of these reform proposals were left out of Bill C-75.

20. Further, in partnership with provincial governments, many other proposals emerge, including: (1) replacing exempted jurors from underrepresented communities with someone from the same community; (2) requiring jurors to be drawn from within 40 kilometres of the community in which the trial is held; (3) drawing juries from the neighbourhoods in which the victims and accused reside; (4) translating jury questionnaires into First Nations languages; and (5) reasonably compensating jurors. None of these proposals have been adequately implemented.

21. It is the BCCLA's position that, rather than improve diversity, "[i]n the absence of these changes, the elimination of peremptory challenges may reinforce the over-representation of white people on juries."[48] The existing jury selection scheme consistently favours "white, higher income earners, property owners, reporting English as their mother tongue."[49] This is antithetical to impartiality. And the government has, as the lists above show, myriad options available to it.

B. Asymmetry: Peremptory Challenges are only Constitutionally Required for the Accused

22. The constitutional status of peremptory challenges is asymmetric, further illustrating the flexibility open to governments concerning jury reform. Section 11(d) rights "are held by the accused"[50], i.e., they are given to "[a]ny person charged with an offence."[51] This aligns with the

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[48] Petersen, *supra* note 33 at 175, n 169.
[49] Justice Giovanna Toscano Roccamo, *Report to the Canadian Judicial Council on Jury Selection in Ontario* (June 2018) at 11.
[50] *R v Kokopenace*, 2015 SCC 28 at para 1.
[51] *Charter*, *supra* note 1 s 11.

history of peremptory challenges, which were often asymmetrically distributed between Crown and defence.[52] But, most importantly, a substantive equality lens—which properly guides the analysis of s. 11(d)[53]—reinforces the capacity to treat peremptory challenges with asymmetry. At times, substantive equality requires disparate treatment "to achieve equality of results."[54] We need more Indigenous and Black jurors. Any so-called "inequality" that promotes jury diversity is therefore warranted. Further, substantive equality calls for "a critical re-examination of taken for granted norms and practices in an attempt to ensure that they do not perpetuate existing marginalization."[55] We have a strong presumption of jury impartiality in Canada.[56] But this taken for granted norm demands critical engagement. In the context of jury diversity, and the known pervasiveness of bias in Canadian society, substantive equality requires reckoning with our homogenous jury system, in a manner that is conscious of how jury selection processes disparately impact racialized communities. This balance is complex. But it is foundational to equitable criminal justice—to everyone's right, no matter their race, to impartial justice.

PART IV – SUBMISSION ON COSTS

23. The BCCLA does not seek costs and ask that costs not be awarded against it.

PART V – ORDER SOUGHT

24. The BCCLA does not request any orders.

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[52] *R v Chouhan*, 2020 ONCA 40 at paras 22-27.
[53] *Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 at paras 80-81.
[54] Jonnette Watson Hamilton and Jennifer Koshan, "Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination under Section 15 of the Charter" (2015) 19:2 Review of Constitutional Studies 191 at 194-195, BOA, Tab 2; *Ewert v Canada*, 2018 SCC 30 at para 54.
[55] Rosemary Cairns Way, "An Opportunity for Equality: Kokopenace and Nur at the Supreme Court of Canada" (2014) 61:4 Crim LQ 465 at 476.
[56] *R v Kokopenace*, 2015 SCC 28 at para 53.

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