Court File No. 39062

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT
(Respondent)

AND:

PARDEEP SINGH CHOUHAN

RESPONDENT
(Appellant)

AND:

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

INTERVENERS

FACTUM OF THE INTERVENER
DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS

Kent Roach
David Asper Centre for Constitutional Rights
University of Toronto
78 Queen's Park Crescent
Toronto, ON M5S 2C3
Tel: 416-978-0092/Fax: 416-978-8894
kent.roach@utoronto.ca

Counsel for the Intervener

Matthew J. Halpin
Norton Rose Fulbright Canada LLP
45 O'Connor Street, Suite 1500
Ottawa, ON K1P 1A4
Tel: 613-780-8654/Fax: 613-230-5459
matthew.halpin@nortonrosefulbright.com

Agent for the Intervener

ORIGINAL TO: THE REGISTRAR OF THIS COURT

COPIES TO:

MINISTRY OF THE ATTORNEY GENERAL
Crown Law Office – Criminal
10th Floor, 720 Bay Street
Toronto, ON M7A 2S9

Andreea Baiasu
Michael Perlin
Rebecca Law
Tel: (416) 326-4600
Fax: (416) 326-4656
Email: andreea.baiasu@ontario.ca
michael.perlin@ontario.ca
rebecca.law@ontario.ca

Of Counsel for the Appellant, Attorney General of Ontario

NADIA EFFENDI
Borden Ladner Gervais LLP
World Exchange Plaza
1300 - 100 Queen Street
Ottawa, ON K1P 1J9
Tel: 613-787-3562
Fax: 613-230-8842
Email: neffendi@blg.com

Agent for the Appellant, Attorney General of Ontario

DIRK DERSTINE
TANIA BARITEAU
Derstine Penman Criminal Lawyers
302-559 College Street
Toronto, ON M6G 1A9100
Tel: (416) 304-1414
Fax: (416) 304-1345
Email: derstine@derstinepenman.com
bariteau@derstinepenman.com

Counsel for the Respondent

MARIE-FRANCE MAJOR
Supreme Advocacy LLP
340 Gilmour Street, Suite 100
Ottawa, Ontario K2P 0R3
Tel: (613) 695-8855
Fax: (613) 685-8580
Email: mfmajor@supremeadvocacy.ca

Agent for the Respondent

JEFFREY JOHNSTON
Department of Justice Canada
Civil Litigation Section
50 O'Connor Street, Suite 500
Ottawa, ON K1A 0H8
Tell: (613) 608-5913
Fax: (613) 954-1920
Email: jeffrey.johnston@justice.gc.ca

Counsel for the Intervener, Attorney General of Canada

ROBERT FRATER, Q.C.
Department of Justice Canada
Civil Litigation Section
50 O'Connor Street, Suite 500
Ottawa, ON K1A 0H8
Tel: (613) 670-6289
Fax: (613) 954-1920
Email: robert.frater@justice.gc.ca

Agent for the Intervener, Attorney General of Canada

CHARLES MURRAY
Department of Justice
405 Broadway, 5th Floor
Winnipeg, Manitoba R3C 3L6
Tel: (204) 945-2852
Fax: (204) 945-1260
Email: charles.murray@gov.mb.ca

Counsel for the Intervener
Attorney General Of Manitoba

D. LYNNE WATT
Gowling WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario K1P 1C3
Tel: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Agent for the Intervener
Attorney General Of Manitoba

LARA VIZSOLYI
Ministry of Justice
3rd Floor - 940 Blanchard Street
Victoria, British Columbia V8W 3E6
Tel: (250) 387-0150
Fax: (250) 387-4262
Email: lara.vizsolyi@gov.bc.ca

Counsel for the Intervener
Attorney General of British Columbia

ROBERT E. HOUSTON, Q.C.
Gowling WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario K1P 1C3
Tel: (613) 783-8817
Fax: (613) 788-3500
Email: robert.houston@gowlingwlg.com

Agent for the Intervener
Attorney General of British Columbia

ANDREW BARG
Justice and Solicitor General
Appeals Unit
300 Centrium Place, 332-6 Avenue SW
Calgary, Alberta T2P 0B2
Tel: (403) 297-6005
Fax: (403) 297-3453
Email: andrew.barg@gov.ab.ca

Counsel for the Intervener
Attorney General Of Alberta

D. LYNNE WATT
Gowling WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario K1P 1C3
Tel: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Agent for the Intervener
Attorney General of Alberta

CAITLYN E. KASPER
JONATHAN RUDIN
Aboriginal Legal Services
211 Yonge Street, Suite 500
Toronto, Ontario M5B 1M4
Tel: (416) 408-4041 ext. 229
Fax: (416) 408-1568
Email: kasperc@lao.on.ca

Counsel for the Intervener
Aboriginal Legal Services

NADIA EFFENDI
Borden Ladner Gervais LLP
World Exchange Plaza
1300 - 100 Queen Street
Ottawa, ON K1P 1J9
Tel: 613-787-3562
Fax: 613-230-8842
Email: neffendi@blg.com

Agent for the Intervener
Aboriginal Legal Services

JILL PRESSER
Presser Barristers
116 Simcoe Street, Suite 100
Toronto, Ontairo M5H 4E2
Tel: (416) 586-0330
Fax: (416) 596-2597
Email: presser@presserlaw.ca

CATE MARTELL
116 Simcoe Street, Suite 100
Toronto, ON M5H 4E2
Tel: (647) 378-8838
Fax: (416) 596-2597
Email: martell@martelldefence.com

Counsel for the Intervener
The Advocates' Society

MATTHEW J. HALPIN
Norton Rose Fullbright Canada LLP
45 O'Conner Street, Suite 1500
Ottawa, ON K1P 1A4
Tel: (613) 780-8654
Fax: (613) 230-5459
Email:
matthew.halpin@nortonrosefullbright.com

Agent for the Intervener
The Advocates' Society

CHRISTOPHER MURPHY
ELEANORE SUNCHILD
MICHAEL SEED
Murphys
2900 – 161 Bay Street
Toronto, ON M5J 2S1
Tel: (416) 306-2956
Fax: (416) 362-8410
Email: crm@murphyslegal.ca

Counsel for the Intervener
Debbie Baptiste

NADIA EFFENDI
Borden Ladner Gervais LLP
World Exchange Plaza
1300 - 100 Queen Street
Ottawa, ON K1P 1J9
Tel: 613-787-3562
Fax: 613-230-8842
Email: neffendi@blg.com

Agent for the Intervener
Debbie Baptiste

JOSHUA SEALY-HARRINGTON
JENNIFER KLINCK
Power Law/Juristes Power
401 West Georgia Street, Suite 1660
Vancouver, BC V6B 5A1
Tel: (520) 509-2446
Fax: (520) 509-2446
Email: jsealyharrington@powerlaw.ca

Counsel for the Intervener
The British Columbia Civil Liberties Association

MAXINE VINCELETTE
Power Law/Juristes Power
130 Alberts Street, Suite 1103
Ottawa, ON K1P 5G4
Tel: (613) 702-5573
Fax: (613) 702-5573
Email: mvincelette@powerlaw.ca

Agent for the Intervener
The British Columbia Civil Liberties Association

PETER THORNING
Brauti Thorning LLP
2900-161 Bay Street
Toronto, ON M5J 2S1
Tel: (416) 304-6521
Fax: (416) 868-0673
Email: pthorning@btlegal.ca

MARIE FRANCE MAJOR
Supreme Advocacy LLP
340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3
Tel: (613) 695-8855
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

ATRISHA LEWIS
SANDRA A. LANGE
McCarthy Tétrault LLP
5300 – 66 Wellington Street West
Toronto, ON M5K 1E6
Tel: (416) 601-7859
Fax: (416) 868-0673
Email: alewis@mccarthy.ca
slange@mccarthy.ca

Counsel for the Intervener
Canadian Association of Black Lawyers

Agent for the Intervener
Canadian Association of Black Lawyers

NADER R. HASAN
DRAGANA RAKIC
Stockwoods LLP
TD North Tower
77 King Street West, Suite 4130
Toronto, ON M5K 1H1
Tel: (416) 593-1668
Fax: (416) 593-9345
Email: NaderH@stockwoods.ca
DraganaR@stockwoods.ca

MAXINE VINCELETTE
Power Law/Juristes Power
130 Alberts Street, Suite 1103
Ottawa, ON K1P 5G4
Tel: (613) 702-5573
Fax: (613) 702-5573
Email: mvincelette@powerlaw.ca

EMILY LAM
VINIDHRA VAITHEESWARAN
Kastner Lam LLP
55 University Avenue, Suite 1800
Toronto, ON M5J 2H7
Tel: (416) 655-3044 ext.2
Fax: (416) 655-3044
Email: Elam@kastnerlam.com
VVaitheeswaran@kastnerlam.com

Counsel for the Interveners
Canadian Muslim Lawyers Association and Federation of Asian Canadian Lawyers

Agent for the Interveners
Canadian Muslim Lawyers Association and Federation of Asian Canadian Lawyers

NATHAN GORHAM
Gorham Vandebeek LLP
36 Lombard Street
Toronto, ON M5C 2X3
Tel: (416) 410-4814
Fax: (416) 598-3384
Email: gorham@gvlaw.ca

MATTHEW ESTABROOKS
Gowling WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario K1P 1C3
Tel: (613) 786-0211
Fax: (613) 788-3573
Email: matthew.estabrooks@gowlingwlg.com

MINDY CATERINA
Barrister and Solictor
2601-180 Dundas Street West
Toronto, ON M5G 1Z8
P.O. Box 466, Stn. A
Tel: (416) 859-3005
Fax: (416) 599-1307
Email: mindy@mindycaterina.com

Counsel for the Intervener
Criminal Lawyers Association

Agent for the Intervener
Criminal Lawyers Association

MICHAEL A. JOHNSON
Shore Johnston Hyslop Day LLP
200-800 Elgin Street
Ottawa, ON K2P 1L5
Tel: (613) 233-7747
Fax: (613) 233-2374
Email: mj@sjhdlaw.ca

JAMES P. COULTER
Coulter Law
200 Elgin Street, Suite 800
Ottawa, Ontario K2P 1L5
Tel: (613) 371-3884
Fax: (613) 233-2374
Email: james@jcoulterlaw.ca

Counsel for the Intervener
The Defence Counsel Association of Ottawa

Agent for the Intervener
Defence Counsel Association of Ottawa

JANANI SHANMUGANATHAN
Goddard Nasseri LLP
55 University Ave, Suite 1100
Toronto, ON M5J 2H7
Tel: 9647) 351-7944
Fax: (647) 846-7733
Email: janani@gnllp.ca

THOMAS SLADE
Supreme Advocacy LLP
340 Gilmour St., Suite 100
Ottawa, ON K2P 0R3
Tel: (613) 695-8855
Fax: (613) 695-8580
Email: tslade@supremeadvocacy.ca

Counsel for the Intervener
South Asian Bar Association of Toronto

Agent for the Intervener
South Asian Bar Association of Toronto

JEAN-GUILLAUME BLANCHETTE
Fréchette Blanchette Dingman
85 Belvédère Nord, bureau 20
Sherbrooke, PC J1H 4A7
Tel: (819) 822-3434
Fax: (819) 822-3220
Email: jgblanchette@fbavocats.com

PAUL CHARLEBOIS
Charlebois, Swanston, Gagnon, Avocats
166 rue Wellington
Gatineau, PC J8X 2J4
Tel: (819) 770-4888 ext 105
Fax: (819) 770 0712
Email: pcharlebois@csgavocats.com

GABRIEL BABINEAU
Desjardins Côté, s.n.a.
500 Place d"Armes, bureau 2830
Montréal PC H2Y 2W2
Tel: (514) 284-2351
Fax: (514) 284-2354
Email: gbabineau@desjardinscote.com

Counsel for the Intervener
Québécoise des Advocats et Advocates de la Défense

Agent for the Intervener
Association Québecoise des Avocats et Avocates de la Défense

TABLE OF CONTENTS

PART I – OVERVIEW

1. The David Asper Centre for Constitutional Rights (AC) intervenes in this case in respect of the cross-appeal on the constitutionality of the elimination of the peremptory challenges under s.634 of the *Criminal Code*, pursuant to Bill C-75, SC 2019, c.25.

PART II – STATEMENT OF POSITION

2. Because of their subjective nature, peremptory challenges are an invitation to intentional or unintentional discrimination. The elimination of peremptory challenges for both the accused and the prosecutor does not violate the accused's rights ss.11(d) and (f) (or even under s.7) of the Charter when the entire jury selection process is considered. Parliament was justified based on Canada's prior experience and those of comparative countries to eliminate peremptory challenges as a fair and efficient means to prevent their use in a discriminatory manner.

PART III – LEGAL ARGUMENT

The Subjective Nature of Peremptory Challenges Allows Discrimination

3. Peremptory challenges are based solely on the subjective views of the parties. This allows for both implicit (unconscious) and conscious bias based on stereotypical assumptions with respect to race.[1] William Blackstone described peremptory challenges as based on "unaccountable prejudices" and being exercised against "any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike."[2] This Court has stated:

> The very basis of the right to peremptory challenges, therefore, is not objective but purely subjective. The existence of the right does not rest on facts that have to be proven, but rather on the mere belief by a party in the existence of a certain state of mind in the juror. The fact that a juror is objectively impartial does not mean that he is believed to be impartial by the accused or the prosecution; Parliament... clearly intended that each party have the right to remove from the jury a number of individuals whom he does not believe to be impartial, though he could not provide evidence in support of such belief. [3]

---

[1] Antony Page, "Batson's Blind-Spot: Unconscious Stereotyping and the PeremptoryChallenge" (2005) 85:1 BUL Rev 155; Samuel Sommers and Michael Norton "Race-Based Judgments, Race-Neutral Explanations" (2007) 31 Law Hum Behav 261.

[2] Blackstone (*Commentaries on the Laws of England*, Lewis ed., vol. 4, No. 353, at p. 1738) quoted in *Cloutier v The Queen,* [1979] 2 SCR 709 at 720 [*Cloutier*].

[3] *Cloutier, ibid* at p 720- 721.

4. Judges have recognized that peremptory challenges may be used because a party may be suspicious of the views of a particular juror because of his or her age, occupation, appearance, place of residence, dress, nationality, race, religion and numerous other reasons."[4] This Court has recognized " [t]he existence and extent of [matters such as] racial bias are not issues which can be established in the manner normally associated with the proof of adjudicative facts" contrary to some suggestions by the Appellant on the Cross appeal.[5]

Discriminatory Stereotypes Affecting Jury Selection

5. Given their subjective nature peremptory challenges have been used in a discriminatory manner reflecting racist and other stereotypes directed against Indigenous and Black people. Such people are under-represented among decision-makers in the administration of justice but over-represented among both accused and crime victims. Peremptory challenges have been influenced by stereotypical beliefs that despite their oath as jurors, people who appear to be Indigenous or Black will reflexively side with an accused or complainant with the same visible characteristics.

Failed Canadian Attempts to Control Discriminatory Use of Peremptories

6. Over 30 years of *Charter* jurisprudence has failed to control the discriminatory use of peremptory challenges. The Ontario Court of Appeal in *R v Gayle* recognized that discriminatory use of peremptory challenges by the Crown would theoretically be reviewable, but the reported attempts by accused to establish such abuses have consistently failed.[6]

R. v. Lines and Anti-Black Racism and Stereotypes

7. In *R v Lines*, the prosecutor sought to prevent a white accused police officer from using

---

[4] *R v Piraino,* 1982 CanLII 3135 (ON SC) at 8; Case on Appeal at para 56.

[5] *R v Williams,* [1998] 1 SCR 1128 at para 35; Appellants Factum on the Cross-Appeal at paras 5 and 42

[6] *R v Gayle,* 2001 CanLII 4447, 54 O.R. (3d) 36 (ON CA) at para 61. See also *R v Cornell,* 2017 YKCA 12 (CanLII), leave to appeal dismissed; *R v Cornell,* [2018] SCCA No 96, [2018] CSCR no 96; *Gardner c R,* 2019 QCCA 726. (CanLII) at 16, leave to appeal dismissed SCC Oct 17, 2019; *R v Amos,* 2007 ONCA 672 (CanLII). See also Cynthia Petersen, "Institutionalized Racism: The Need for Reform of the Criminal Jury Selection Process" (1993) 38:1 McGill LJ 147 at 174-176; Regina Schuller et al "Challenge for Cause: Bias Screening Procedures and their Application in a Canadian Courtroom" (2015) 21 Psych Pub Pol & Law 407 at 417.

peremptory challenges to challenge prospective jurors who were Black in a case where the victim was also Black.[7] The trial judge noted "as anyone who lives in the Metropolitan Toronto area well knows, there have been a number of incidents in recent years in which white police officers have shot usually-young black males, which has caused understandable concern in Toronto's Black community."[8] Nevertheless, the judge decided that the accused's use of peremptory challenges was not subject to the equality rights guarantee of s. 15 of the *Charter*. Consistent with Blackstone's rationale that peremptory challenges were an adversarial advantage based on the accused's subjective and unaccountable prejudices, the judge concluded: "in a criminal trial the accused is pitted against the state. In my opinion it is fanciful to suggest that in the selection of a jury he doffs his adversarial role and joins with the Crown in some sort of joint and concerted effort to empanel an independent and impartial tribunal."[9] The accused police officer was acquitted by a jury of 11 white people and one Asian person after at least one Black person was peremptorily challenged after being found to be impartial on a challenge for cause.[10]

Helen Betty Osborne, Colten Boushie and Anti-Indigenous Racism and Stereotypes

8. The Manitoba Aboriginal Justice Inquiry found that "[a]ll the Aboriginal persons who were called for jury duty were challenged peremptorily" in the trial for the murder of a 19 year old Cree high school student, Helen Betty Osborne. The use of only six challenges produced a jury with no Indigenous people even though 24% of jury notices were sent to Aboriginal people and 18% of the actual jury panel in the Pas was Aboriginal.[11]

9. Five peremptory challenges directed at visibly Indigenous persons resulted in a jury without a visibly Indigenous person that acquitted Gerald Stanley in 2018 of both murder and manslaughter for killing another young Cree person, Colton Boushie. In this case, the judicial

---

[7] *R v Lines,* [1993] OJ No 3284, 1 PLR 1, [*Lines*].
[8] *Ibid* at para 8.
[9] *Ibid* at para 26.
[10] David Tanovich, "The Charter of Whiteness" (2008) 40 SCLR(2d) 655 at 668.
[11] Manitoba Aboriginal Justice Inquiry, The Deaths of Helen Betty Osborne and John Joseph Harper (Winnipeg: Queens Printer, 1991) (Online: http://www.ajic.mb.ca/volumell/toc.html) at 85-87.

district had an estimated adult population of just under 30%. Statistical analysis[12] - and common sense - undermine arguments that peremptory challenges will ensure juries that represent vulnerable minorities in most cases.

The Unworkable Logistics of Challenging Discriminatory Peremptory Challenges

10. Canadian law has failed to prevent the discriminatory use of peremptory challenges by the accused in part because of conclusions that equality rights do not apply and the accused's right to silence prevents requiring accused to explain their use of a peremptory challenge.[13]

11. Even challenging discriminatory use of Crown exercise of peremptory challenges would be complicated by concerns about the ambit of the Crown's disclosure obligations and interfering with prosecutorial discretion.[14] The accused would not have public interest standing to raise the equality rights of excluded Indigenous or other racialized jurors.[15] Intervention by excluded jurors as third parties in the trial would delay criminal trials and perhaps generate interlocutory appeals.[16]

12. Another complicating issue would be the relevant standard to establish that either the Crown or the accused had engaged in discrimination. A standard of intentional discrimination is used in the United States. A recent decision rejecting a challenge to the Crown's use of peremptory challenges also suggests that intentional discrimination must be proved.[17]

13. Although perhaps supported by the Court's decision in *Kokopenace*,[18] it would be difficult to prove intentional discrimination. Battles over whether lawyers or their clients engaged in intentional discrimination would generate acrimonious and time consuming disputes. Moreover, a requirement for proof of intentional discrimination would be in tension with long-

---

[12] Christian A Miller "Peremptory Challenges During Jury Selection as Institutional Racism" (2019) 67 CLQ 215 at 225; See also Roger Allan Ford, "Modeling the Effects of Peremptory Challenges on Jury Selection and Jury Verdicts" (2010) 17:2 Geo Mason L Rev 377 at 413.
[13] *Lines*, *supra* note 7; *R v Brown [Application to prohibit Crown discrimination in peremptory challenges]*, [1999] OJ No 4867 416 at paras 6-11.
[14] *R. v. Davey* 2012 SCC 75 at 32 noting Crown used them on subjective grounds but as Ministers of Justice.
[15] *R v Kokopenance,* 2015 SCC 28 at 128.
[16] *Dagenais v. Canadian Broadcasting Corp.,* [1994] 3 SCR 835.
[17] As suggested in *Gardner c R*, *supra* note 6 at 13.
[18] *Supra* note 15.

established Canadian equality law [19] that takes a results based approach that is triggered by discriminatory impact or effects and does not require discriminatory intent.

14. Control of discriminatory use of peremptory challenges would be a procedural and substantive quagmire. It would lengthen jury selection and generate much litigation. As in the United States, it would be ineffective in stopping discrimination or commanding public confidence that the law was not enabling prosecutors and the accused to engage in discrimination. In such a context, Parliament was justified in deciding that the best course of action was abolition.

American Attempts to Control Discriminatory Use of Peremptories Have Failed

15. Canada can learn from the struggles that American courts have faced in their attempt to control the discriminatory use of peremptory challenges. In 1986, the United States Supreme Court attempted to control discrimination by the prosecution.[20] In 1992, it extended this to discrimination by the accused.[21] The latter consideration is important. As in the US, Black and Indigenous people are over-represented among crime victims and among victims of police violence in Canada.

16. The American jurisprudence is complex. There have been disputes about: which groups are protected (including gender, sexual orientation, language, religion and disability); questions of standing; whether litigation privileges applies[22]; what evidence is admissible (including statistical and historical evidence[23]); and whether errors are harmless. A recent case examined four categories of evidence on the sixth murder trial of a Black accused with a number of previous trials being overturned because of jury selection disputes.[24]

---

[19] *Ont Human Rights Comm v Simpsons-Sears,* [1985] 2 SCR 536; *Andrews v Law Society of British Columbia* [1989] 1 SCR 143. On the importance of examining issues of systemic and colonial discrimination against Indigenous people from an effects based equality perspective see Jonathan Rudin "Tell it Like it Is: An Argument for the Use of Section 15 over Section 8 to Challenge Discriminatory Criminal Legislation" (2017) 64 CLQ 317; *R v Sharma,* 2020 ONCA 478 (CanLII) at paras 62-132.

[20] *Batson v Kentucky,* 476 U.S. 79, 106 S. Ct. 1712 (1986).

[21] *Georgia v McCollum,* 505 U.S. 42, 112 S. Ct. 2348 (1992).

[22] Jonathan Abel "Batson's Appellate Appeal and Trial Tribulations" (2018) 118:3 Colum L Rev 713.

[23] *Snyder v Louisiana,* 552 U.S. 472, 128 S. Ct. 1203 (2008); *Miller-El v Dretke,* 545 U.S. 231, 125 S. Ct. 2317 (2005).

[24] *Flowers v Mississippi,* 139 S. Ct. 2228 (2019).

17. American courts compare in detail jurors who are struck from those who were not, intruding on juror privacy. They make credibility determinations about the reasons lawyers give to justify their use of peremptories.[25] One trial judge has concluded that the *Batson* cure has become the disease. [26] Another has compiled a list of "handy race-neutral explanations."[27]

18. In the absence of a smoking gun of discriminatory intent,[28] *Batson* challenges rarely succeed. The non- discriminatory justifications need not be "persuasive or even plausible."[29] After *Batson*, studies suggest that Black prospective jurors are still struck at a much higher rate than white jurors.[30] In some cases, peremptory strikes of white jurors by Black accused have been held to be discriminatory.[31] Understandably, the American experience has failed to restore public confidence that peremptory challenges are not being used in a discriminatory manner.

19. Justice Thurgood Marshall was correct when he maintained "[t]he inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system."[32] It would not violate American understandings of a fair trial to abolish peremptory challenges.[33] The abolition of peremptory challenges in the UK has been held to be consistent with fair trial

---

[25] *Foster v Chatman,* 136 S. Ct. 1737 (2016).

[26] Morris Hoffman "Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective" (1997) 64:3 U Chicago L Rev 809 at 864, noting that challenges for cause are sufficient and focus on individual not presumed group biases.

[27] *People v Randall,* 283 Ill. App. 3d 1019, 219 Ill. Dec. 395, 671 N.E.2d 60 (1996) at 65-66.

[28] *Supra* at note 25.

[29] *Purkett v Elem,* 514 U.S. 765, 115 S. Ct. 1769 (1995) at 767-68

[30] Ann Eisenberg,et al. "If Its Walks like Systematic Exclusion and Quacks like Systematic Exclusion: Follow-up on Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997-2014" (2016) 68:3 SCL Rev 373 at 389; Samuel R Gross, "Race, Peremptories, and Capital Jury Deliberations" (2001) 3 U Pa J Const L 283 at 288–90; Melynda J Price, "Performing Discretion or Performing Discrimination: Race, Ritual and Peremptory Challenges in Capital Jury Selection" (2012) 15:1 Mich J of Race & Law 57; Jeffrey Bellin & Junichi P. Semitsu, "Widening Batson's Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney" (2011) 96:5 Cornell L Rev 1075 at 1102.

[31] *State v. Cofield*, 498 N.E. 823, at 830-832 (1998); *State v. Hurd* 784 N.E.2d 528 (2016).

[32] *Batson, supra* note 20 at 107-108. For a recent affirmation of the wisdom of Justice Marshall's approach see Nancy S Marder, "Foster v. Chatman: A Missed Opportunity for Batson and the Peremptory Challenge" (2017) 49:4 Conn L Rev 1137.

[33] *Stilson v United States,* 250 U.S. 583, 40 S. Ct. 28 (1919); *Frazier v United States,* 335 U.S. 497, 69 S. Ct. 201 (1948).

rights.[34] Originally conceived as an advantage to accused often facing the death penalty, they have been abolished or restricted in most common law jurisdictions in part because of concerns about their discriminatory use.[35] Given all this, Parliament was entitled to abolish peremptories.

The Abolition of Peremptory Challenges Does Not Violate the Accused's Section 11 Rights

20. The appellant on the cross appeal raises concerns that the abolition of peremptory challenges will violate the rights of the accused to trial by an impartial and representative jury. It is, however, a mistake to look at only one aspect of jury selection in isolation to others.[36] Peremptory challenges are not the only way that accused participate and contest jury selection.

21. If an accused is concerned that a prospective juror may be biased, the proper course is to bring an application for a challenge for cause. The 2019 reforms now make the judge the trier of the challenge for cause and facilitate the exclusion of jurors from the challenge for cause process. Trial judges will be allowed to decide on a case-by-case the questions that can be asked of prospective jurors. They are required to allow such questions whenever there is a realistic possibility of bias. The challenge for cause is the proper vehicle to deal with the accused's concerns that an individual prospective juror may be biased against the accused.

22. It is possible that peremptory challenges can be used in some cases to obtain a more representative jury. [37] Conversely, they can also "enhance or facilitate discrimination against racialized or marginalized prospective jurors. This is so because the exercise of peremptory challenges can often be based on assumptions, stereotypes, or prejudices. The result is a diminution rather than an enhancement of representativeness in the trial jury."[38]

23. Much depends on the composition of the jury array, the demographics of the community and perhaps most importantly, the luck of the random draw of jurors' cards. Deputizing adversaries to attempt to achieve representativeness through peremptories and the stereotypical reasoning they promote is not the proper way to address pressing concerns about the under-representation of Indigenous and Black people on Canadian juries. Challenges to the array and judges' new powers to stand aside potential jurors on public confidence grounds, as well as

---

[34] *R v McParland,* [2008] NIQB 1.
[35] *R v Cumberland,* 2019 NSSC 307 (CanLII) at 78.
[36] *R v Gordon,* 2019 ONSC 6508 (CanLII) at 34 in reference to the decision in *R v King,* 2019 ONSC 6386 (CanLII).
[37] *R v Sherratt*, [1991] 1 SCR 509 at para 58.
[38] Case on Appeal at para 56.

needed reforms to provincial procedures, should be used to enhance the representativeness of juries. [39]

The Objective of the Impugned Legislation

24. A starting point for s. 1 (and s.7) analysis is a precise understanding of legislative purpose. The Honourable Jody Wilson-Raybould clearly explained that "discrimination in the selection of juries has been well documented for many years" and that Parliament was acting on the 1991 recommendations of the Manitoba Aboriginal Justice Inquiry both in abolishing peremptory challenges and giving judges new stand aside powers,

> "in order to make room for a more diverse jury that will in turn promote confidence in the administration of justice... I am confident that the reforms will make the jury selection process more transparent, promote fairness and impartiality, improve the overall efficiency of our jury trials, and foster public confidence in the criminal justice system.[40]

Parliament had targeted concerns about discrimination against Indigenous people and others "who belong to a vulnerable population that is overrepresented in the criminal justice system...".[41]

25. When undertaking the s. 7 analysis the question before the court is whether the impugned legislation is arbitrary, overbroad or grossly disproportionate in light of the legislative objective. The wisdom of the reform itself is not the subject of the either ss. 7 or 1 *Charter* review.[42]

Abolition is Neither Arbitrary, Overbroad or Grossly Disproportionate

26. The abolition of peremptory challenges is not arbitrary. It is rationally related to a clearly articulated goal of eliminating discrimination against Indigenous and other racialized groups.[43]

---

[39] *R v Muse,* 2019 ONSC 6119 (CanLII) at 51.

[40] *House of Commons Debates*, 42nd Parliament, 1st Sess, Vol. 148, No. 300 (24 May 2018) at 1530] (Online: https://www.ourcommons.ca/DocumentViewer/en/42-1/house/sitting-300/hansard)

[41] *Criminal Code* RSC 1985 c.46 s.493.2, as amended by S.C. 2019, c.25 s.210.

[42] *R v Moriarity,* 2015 SCC 55 at paras 24 and 30; *R v Safarzadeh-Markhali,* 2016 SCC 14 at para 29.

[43] The legislative intent is focused on Aboriginal and other populations over-represented in the criminal justice system. See *Criminal Code* s.493.2. As such, it does not raise slippery slope concerns about the impossibility of having a jury that is perfectly representative of all forms of human diversity. Cf *R v Brown,* 2006 CanLII 42683 (ON CA) at 22.

Much criminal law is enacted in response to specific cases and controversies. The legislation is controversial and unpopular among much of the legal community. This does not mean it is unconstitutional. It simply reflects a robust free and democratic society that is struggling with colonialism and racism.

27. The elimination of peremptory challenges is not overbroad. As recognized in Parliament debates peremptory challenges in any number have "potential for abuse."[44] It is also not grossly disproportionate given the speculative harms of abolition.

Abolition is Necessary to End Discriminatory Uses of Peremptory Challenges

28. The proper question under s.1 is not whether there were alternatives to abolition, but whether they would be equally as effective in ending discrimination. Providing a procedure to allow objections to the use of peremptory challenges would burden the system. Moreover, it may well be unworkable and ineffective given that past Canadian and American experience has shown that discrimination "in practice, […] is extremely difficult to prove." [45]

Section One in Light of Competing Equality Concerns

29. Parliament should be accorded a wider degree of deference under s.1 in this case. It did not act as the accused's singular antagonist but as a mediator of competing rights including those of prospective jurors who are struck because they are Indigenous or Black and have no effective or practical remedy for such discrimination. As Chief Justice Dickson has stated: "[t]he principles underlying s. 15 of the Charter are thus integral to the s. 1 analysis,"[46] especially in cases where the victims of state condoned discrimination are, as in *Keegstra* not directly represented by the parties.

30. Reasonable Indigenous or Black jurors informed about colonialism and racism would take justified offence at being subject to a peremptory challenge simply because the accused, victim or important wisdom was also Indigenous or Black. The Appellants on the cross appeal focus only on uncertain benefits that some racialized accused may gain without balancing that

---

[44] *House of Commons Debates*, 42nd Parliament, 1st Sess., vol. 148 no. 360 (November 28, 2018), at 16:10 (Arif Virani) (Online: https://www.ourcommons.ca/DocumentViewer/en/42-1/house/sitting-360/hansard)

[45] Schuller *supra* note 6 at 417.

[46] *R v Keegstra,* [1990] 3 SCR 697 at para 79.

with the history of discriminatory use of peremptory challenges by the accused or the effects on Indigenous and Black jurors who have been subject to such challenges.

31. The alternatives of legislating a regime to allow challenges of potentially discriminatory peremptory challenges or reducing the number of peremptory challenges would not be as effective in preventing discriminatory uses of peremptories or reasonable perceptions of such discrimination.

32. A new procedure to try to detect discrimination would present their own Charter issues including whether the accused could be required to justify their use of peremptory challenges and whether equality rights applies to their conduct. It might require the accused to disclose reasons for strategic litigation decisions. It would also add burdens to the system that are avoided by the abolition of peremptory challenges.

33. Even greatly reducing the number of peremptory challenges would still allow the discriminatory use of peremptory challenges. This danger is particular acute in communities where Indigenous or Black jurors are a small percentage of the adult population of Canadian citizens and are for good reasons distrustful of the Canadian criminal justice system and less likely to attend for jury duty. The Court should not closely supervise a line drawing exercise including reducing the number of peremptory challenges to zero. Abolition is within the range of measures that legislatures can legitimately take to respond to the under-representation of Indigenous and Black people on Canadian juries.

34. The effectiveness of abolition in eliminating discrimination is much more certain and greater than the speculative benefits that, depending on the luck of the random draw, may or may not allow some accused to use peremptories to make juries more representative.

35. Abolition will definitively end discrimination based simply on the looks of a prospective juror. Any harms of abolition can be countered by allowing the accused to participate in jury selection through increased challenges for cause to find individual as opposed to presumed group bias and to secure more representative jury arrays.

PART IV & V – SUBMISSIONS ON COSTS AND ORDER REQUESTED

36. The Asper Centre seeks no costs and requests that none be awarded against it. The Centre takes no position on the outcome of the appeal but asks that the cross appeal be determined in accordance with the foregoing submissions.

All of which is respectfully submitted, this 10th day of September, 2020.

(agent)

_____

Kent Roach, Counsel for the Asper Centre

PART VI – TABLE OF AUTHORITIES

Secondary Sources	**Para.**
Jonathan Abel "Batson's Appellate Appeal and Trial Tribulations" (2018) 118:3 Colum L Rev 713.	16
Jeffrey Bellin & Junichi P. Semitsu, "Widening Batson's Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney" (2011) 96:5 Cornell L Rev 1075.	18
Ann M Eisenberg, et al, "If It Walks like Systematic Exclusion and Quacks like Systematic Exclusion: Follow-up on Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997-2014" (2017) 68:3 SCL Rev 373.	18
Roger Allan Ford, "Modeling the Effects of Peremptory Challenges on Jury Selection and Jury Verdicts" (2010) 17:2 Geo Mason L Rev 377.	9
Samuel R Gross, "Race, Peremptories, and Capital Jury Deliberations" (2001) 3 U Pa J Const L 283.	18
Morris B Hoffman, "Peremptory Challenges Should be Abolished: A Trial Judge's Perspective" (1997) 64:3 U Chicago L Rev 809.	17
House of Commons Debates, 42nd Parliament, 1st Sess, Vol. 148, No. 300 (24 May 2018) at 1530] (Online: https://www.ourcommons.ca/DocumentViewer/en/42-1/house/sitting-300/hansard)	24
House of Commons Debates, 42nd Parliament, 1st Sess., vol. 148 no. 360 (November 28, 2018), at 16:10 (Arif Virani) (Online: https://www.ourcommons.ca/DocumentViewer/en/42-1/house/sitting-360/hansard)	27
Manitoba Aboriginal Justice Inquiry, The Deaths of Helen Betty Osborne and John Joseph Harper (Winnipeg: Queens Printer, 1991) (Online: http://www.ajic.mb.ca/volumell/toc.html)	8
Nancy S Marder, "Foster v. Chatman: A Missed Opportunity for Batson and the Peremptory Challenge" (2017) 49:4 Conn L Rev 1137.	19
Christian A Miller "Peremptory Challenges During Jury Selection as Institutional Racism: An Investigation Within the Context of the Gerald Stanley Trial (R v Stanley, 2018 SKQB" (2019) 67 CLQ 215.	9
Antony Page, "Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge" (2005) 85:1 BUL Rev 155.	3
Cynthia Petersen, "Institutionalized Racism: The Need for Reform of the Criminal Jury Selection Process" (1993) 38:1 McGill LJ 147.	6
Melynda J Price, "Performing Discretion or Performing Discrimination: Race, Ritual and Peremptory Challenges in Capital Jury Selection" (2012) 15:1 Mich J of Race & Law 57.	18

Jonathan Rudin "Tell it Like it Is: An Argument for the Use of Section 15 over Section 7 to Challenge Discriminatory Criminal Legislation" (2017) 64 CLQ 317.	13
Regina Schuller et al "Challenge for Cause: Bias Screening Procedures and their Application in a Canadian Courtroom" (2015) 21 Psych Pub Pol & Law 407.	6, 28
Samuel R Sommers & Michael I Norton, "Race-Based Judgments, Race-Neutral Explanations" (2007) 31 Law Hum Behav 261.	3
David Tanovich, "The Charter of Whiteness" (2008) 40 SCLR(2d) 655.	7