

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT
(Respondent)

- and -

PARDEEP SINGH CHOUHAN

RESPONDENT
(Appellant)

- and -

ATTORNEY GENERAL OF CANADA
ATTORNEY GENERAL OF MANITOBA
ATTORNEY GENERAL OF BRITISH COLUMBIA
ATTORNEY GENERAL OF ALBERTA

INTERVENERS

MOTION FOR INTERVENTION

(The Advocates' Society)

(Pursuant to Rules 47, 55 and 56 of the *Rules of the Supreme Court of Canada*)

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TAB 1

S.C.C. FILE NO. 39062

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

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- and -

ATTORNEY GENERAL OF CANADA
ATTORNEY GENERAL OF MANITOBA
ATTORNEY GENERAL OF BRITISH COLUMBIA
ATTORNEY GENERAL OF ALBERTA

INTERVENERS

NOTICE OF MOTION FOR INTERVENTION
(The Advocates' Society)
(Pursuant to Rules 47, 55 and 56 of the *Rules of the Supreme Court of Canada*)

TAKE NOTICE that The Advocates' Society hereby applies to a Judge of this Honourable Court, pursuant to Rules 47, 55 and 56 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156, *as amended*, for an order:

1. granting The Advocates' Society leave to intervene in this appeal and cross-appeal, on a without costs basis;
2. permitting The Advocates' Society to file a factum of not more than 10 pages;
3. permitting The Advocates' Society to make oral submissions at the hearing of the appeal and cross-appeal; and

4. such further or other orders as the Court may deem appropriate.

AND FURTHER TAKE NOTICE that the Motion shall be made on the following grounds:

1. The Advocates' Society has a direct interest in these appeals, and will leverage its expertise to provide useful submissions different from those of the other parties to the appeals;
 - (i) The Advocates' Society is a professional association for trial and appellate lawyers across Canada representing approximately 6,000 advocates with extensive on-the-ground experience in the justice system, representing a broad cross-section of clients involved in that system, including many from different equity-seeking and racialized communities;
 - (ii) The Advocates' Society's mandate includes advocacy education, legal reform, the protection of the rights of litigants, and the promotion of access to, and improvement of, the administration of justice;
 - (iii) The issues raised by this appeal have implications that extend beyond those of the immediate parties. The Advocates' Society has a special interest in these broader implications. Its members, and especially the litigants they represent, will be directly and significantly affected by the outcome of these appeals;
 - (iv) This Court has previously recognized The Advocates' Society's ability to assist as intervener in cases that involve issues affecting the legal profession and, in particular, affecting advocates and the rights of litigants in Canada's court system. It is also regularly called upon by elected officials and public servants for advice and input into virtually every area of litigation and court reform;

- (v) The Advocates' Society has experience with issues similar to those raised by this appeal, having been granted leave to intervene in *R. v. Kokopenace*, 2015 SCC 28, in relation to the scope of the right to a representative jury;

2. If granted leave to intervene, The Advocates' Society will submit as follows:

- (i) The repeal of peremptory challenges infringes s. 11(f) of the *Charter* and cannot be upheld as a reasonable limit under s. 1 of the *Charter*;
- (ii) The right to “the benefit of trial by jury” guaranteed by s. 11(f) of the *Charter* should be interpreted by this Court to include a broader right to impartiality than that guaranteed by s. 11(d);
- (iii) To comply with s. 11(f), the in-court jury selection procedures must be sufficient not only to ensure impartiality in fact, but also to promote the acceptance of the jury's verdict as legitimate by the accused and by the community;
- (iv) The right of the accused to participate directly in the jury selection process through peremptory challenges is essential to fulfilling this core function of trial by jury;
- (v) The right to meaningful participation in jury selection is particularly important for racialized accused whose communities are over-represented in the criminal justice system and under-represented on juries, and for whom long-standing systemic discrimination may have produced a distrust of state actors;
- (vi) Peremptory challenges are a means by which racialized accused can increase the representativeness of the trial jury, thereby ameliorating the appearance of

systemic exclusion which may result from random selection, and enhancing the perception of fairness;

- (vii) The impugned legislation serves a pressing and substantial objective — preventing the discriminatory use of peremptory challenges — and is rationally connected to that objective. But the wholesale repeal of peremptory challenges is not minimally impairing of the rights of the accused; nor is there proportionality between the measure chosen and the limitation it imposes on the right;
- (viii) An alternative and reasonable means of achieving this objective was available: a statutory process which would empower trial judges to ensure that peremptory challenges are not abused, as outlined by the prospective intervener the coalition of the Canadian Muslim Lawyers Association and FACL;
- (ix) Section 11(f) does not protect the discriminatory use of peremptory challenges. A statutory process for challenging the discriminatory exercise of peremptory challenges, without eliminating peremptory challenges, would not impair the *Charter* rights of the accused, but instead would promote the values of impartiality and representativeness guaranteed by s. 11(f);
- (x) The impugned legislation therefore cannot be considered minimally impairing of the rights of the accused;
- (xi) The deleterious effects of the legislation are disproportionate to its objective, because while the appearance of fairness may be enhanced by preventing the abuse of peremptory challenges, it is undermined by barring completely the accused's constitutional right to meaningful participation in jury selection;

(xii) The legislation therefore cannot be justified as a reasonable limit under s. 1 of the *Charter*; and

3. Such further and other grounds as counsel may advise and this Court may permit.

AND FURTHER TAKE NOTICE that the following documentary evidence will be relied upon in support of this motion:

1. the affidavit of Guy J. Pratte, President of The Advocates' Society, affirmed August 3rd, 2020; and
2. the Applicant's Memorandum of Argument in support of the proposed intervention.

DATED at Toronto, Ontario this 4th day of August, 2020.

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TO: **REGISTRAR OF THIS HONOURABLE COURT**

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NOTICE TO THE RESPONDENT TO THE MOTION: A respondent to the motion may serve and file a response to this motion within 10 days after service of the motion. If no response is filed within that time, the motion will be submitted for consideration to a judge or the Registrar, as the case may be.

If the motion is served and filed with the supporting documents of the application for leave to appeal, then the Respondent may serve and file the response to the motion together with the response to the application for leave.

TAB 2

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

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APPELLANT
(Respondent)

- and -

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- and -

THE ADVOCATES' SOCIETY

PROPOSED INTERVENER

AFFIDAVIT OF GUY J. PRATTE

I, **Guy J. Pratte**, of the City of Toronto, in the Province of Ontario, AFFIRM AS FOLLOWS:

1. I am President of The Advocates' Society ["the Society"] and as such I have personal knowledge of the matters set out below. I believe that all of the information in this affidavit is true.

2. I am a Partner at Borden Ladner Gervais LLP in Toronto. I was called to the Bar of Ontario in 1984, and to the Bar of Quebec in 2002. I have been a member of the Society for approximately 30 years and have served on its Executive Committee for the past three years. I have served as President since June 11, 2020.

3. This affidavit is filed in support of the Society's motion for leave to intervene in this appeal and cross-appeal.

The Advocates' Society

4. The Society was established in 1963 as a professional association for trial and appellate lawyers in Ontario. Over more than 50 years, the Society has steadily grown its membership and now represents approximately 6,000 advocates across Canada. The Society has members in the territories and in every province of Canada. The Society's Board includes Directors from Quebec, British Columbia, Alberta, Ontario, and Nova Scotia. The Society is incorporated federally pursuant to the *Canada Not-for-Profit Corporations Act*, S.C. 2009, c. 23.

5. The Society's mandate includes advocacy education, legal reform, protection of the rights of litigants, protection of the public's right to representation by an independent bar, and the promotion of access to, and improvement of, the administration of justice. The Society has established a respected presence within the legal profession and the judiciary. As such, it is regularly called upon by elected officials and public servants for advice and input into virtually every area of litigation and court reform. Through regular submissions of papers and briefs, the Society presents its views and initiates needed reforms to the legal system.

6. The Society's mandate extends to intervening in court proceedings that involve issues affecting the legal profession and, in particular, affecting advocates and the rights of litigants in Canada's court system. The Society has, for more than 30 years, reviewed cases before the courts and identified cases in which it believes it should seek intervener status with respect to matters of

substantive law or procedure, based on the importance of the case to the profession and to the public.

7. Guided by these principles, the Society has previously sought and obtained intervener status in cases at all levels of court, including:

- a. *Crowder and TLABC v. British Columbia (Attorney General)*, 2019 BCSC 1824 (validity of provisions of British Columbia's *Supreme Court Civil Rules* purporting to limit the number of experts a party may tender at trial on the issue of damages arising from personal injury or death);
- b. *Kapoor v. Kuzmanovski*, 2018 ONSC 4770 (juror bias in motor vehicle accident cases) – the Court invited the Society to make submissions as *amicus curiae*;
- c. *Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33 (discretion of provincial regulator to accredit law school which imposes discriminatory requirements on its students); the Society also intervened in the proceedings before the Court of Appeal for Ontario (2016 ONCA 518) and the Ontario Divisional Court ((2015), 126 O.R. (3d) 1, 2015 ONSC 4250);
- d. *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 (discretion of provincial regulator to accredit law school which imposes discriminatory requirements on its students); the Society also intervened in the proceeding before the Court of Appeal for British Columbia (2016 BCCA 423);
- e. *Law Society of Upper Canada v. Joseph Peter Paul Groia*, 2018 SCC 27 (professionalism and civility in the courtroom); the Society also intervened in the

proceedings before the Court of Appeal for Ontario (2016 ONCA 471), the Ontario Divisional Court ((2015), 124 O.R. (3d) 1, 2015 ONSC 686), and the Law Society Appeal Panel (2013 ONLSAP 41); the Court of Appeal, Divisional Court and Appeal Panel all referenced the Society's *Principles of Civility for Advocates* in their respective reasons;

- f. *Alberta v. Suncor Energy Inc.*, 2017 ABCA 221 (protection of solicitor-client privilege in the face of statutory disclosure obligations);
- g. *Lizotte v. Aviva Insurance Company of Canada*, [2016] 2 S.C.R. 571, 2016 SCC 52 (protection of litigation privilege in the face of statutory disclosure obligations);
- h. *Nova Scotia Barristers' Society v. Trinity Western University*, 2016 NSCA 59 (discretion of provincial regulator to accredit law school which imposes discriminatory requirements on its students);
- i. *Canada (Attorney General) v. Chambre des notaires du Québec*, [2016] 1 S.C.R. 336, 2016 SCC 20 (constitutionality of provisions of the *Income Tax Act* that require the production of potentially privileged documents);
- j. *R. v. Kokopenace*, [2015] 2 S.C.R. 398 (the meaning and interpretation of "representativeness" in jury trials, according to ss. 11(d) and 11(f) of the *Charter*);
- k. *Moore v. Getahun et al.* (2015), 124 O.R. (3d) 321, 2015 ONCA 55 (practice of counsel reviewing draft reports with experts; the Society's *Principles Governing Communications with Testifying Experts* were referred to favourably in the Court's reasons and appended thereto);

- l. *Bruno Appliance and Furniture, Inc. v. Hryniak*, [2014] 1 S.C.R. 126, 2014 SCC 8 (appeal of *Combined Air v. Flesch*; the Society's submissions on access to justice and the traditional trial process are expressly referred to in the Supreme Court's reasons in the companion appeal of *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, 2014 SCC 7);
- m. *R. v. Nedelcu*, [2012] 3 S.C.R. 311, 2012 SCC 59 (whether s. 13 of the *Charter* precludes the use of civil discovery evidence to impeach the credibility of an accused who chooses to testify at their criminal trial);
- n. *Combined Air Mechanical Services Inc. v. Flesch* (2011), 108 O.R. (3d) 1, 2011 ONCA 764 (the Court of Appeal for Ontario requested the Society appear as *amicus curiae* in the omnibus hearing of five appeals under the new rule governing Summary Judgment in the *Rules of Civil Procedure*);
- o. *Children's Lawyer for Ontario v. Goodis* (2005), 75 O.R. (3d) 309 (C.A.) (scope of standing to be accorded by the Court to an administrative tribunal whose decision is attacked by way of judicial review); and
- p. *Essa (Township) v. Guergis* (1993), 15 O.R. (3d) 573 (Div. Ct.) (judicial policy regarding whether counsel could appear on an application where an associate gave affidavit evidence or is likely to appear as a trial witness).

The Society's Proposed Issues for Intervention

8. The Society takes no position on the underlying facts relevant to the merits of the dispute between the Appellant and the Respondent. The Society does not intend to file any additional

evidence or to seek any findings of fact in this case. Rather, the Society proposes to assist the Court on the following issues:

Whether the repeal of peremptory challenges infringes s. 11(f) of the *Charter*, and if so, whether it can be upheld as a reasonable limit under s. 1 of the *Charter*.

9. The Society will avoid duplication of the parties' submissions in addressing that issue, as well as those of any of the other proposed interveners.

The Society's Interest in the Proceeding

10. The Society has a clear interest in these appeals. The Society's members represent a broad cross-section of defendants, including many from different equity-seeking and racialized groups. The Court's decision will have ramifications far beyond these particular appeals, potentially affecting every jury trial in Canada. The Society's members and especially the defendants they represent will therefore be directly and significantly affected by the outcome.

11. The Society has a strong record of contributions on matters related to the administration of justice. It also has experience with issues similar to those raised by this appeal, having been granted leave to intervene in *R. v. Kokopenace, supra* in relation to the scope of the right to a representative jury. This places the Society in a position to speak knowledgeably on the underlying principles governing the operation of the jury and the content of the "benefit of trial by jury" guaranteed by s. 11(f).

The Society’s Distinct Perspective


12. It is my understanding that other prospective interveners will seek leave to intervene in order to present the perspectives of particular racialized communities. As an association with a mandate to promote the fair and equitable administration of justice, the Society offers a unique and independent perspective on the importance of peremptory challenges to public perception of the fairness and the legitimacy of the jury process in Canada.

13. The Society’s submissions would focus on the right to an impartial jury guaranteed by s. 11(f) of the *Charter*, an issue which I understand no other prospective intervener plans to address in depth. I understand that although the Respondent (Appellant on the cross-appeal), Pardeep Singh Chouhan, will advance the position that the repeal of peremptory challenges infringes s. 11(f), his submissions will focus primarily on the impugned legislation’s infringement of s. 11(d).

No Prejudice to the Parties to the Motion

14. There will be no prejudice to any party if the Society is granted leave to intervene. The Society will work to avoid duplication between its submissions and those of the parties or any other interveners. The Society will not enlarge the record before the Court. The Society will not seek any costs and asks that none be awarded against it.

AFFIRMED before me by video)
at the City of Toronto)
in the Province of Ontario, this)
3rd day of August, 2020)

)
A Commissioner for taking Affidavits)

Cate Martell
LSO #65620C


Guy J. Pratte (Aug 3, 2020 09:38 EDT)
GUY J. PRATTE

TAB 3

PART I: OVERVIEW AND FACTS

A. OVERVIEW

1. The Advocates' Society seeks an Order granting it leave to intervene in this appeal and cross-appeal.

2. The Advocates' Society recognizes the importance of the parliamentary objective of addressing discriminatory uses of preemptory challenges. Such improper uses have the potential to undermine public confidence in the administration of justice. However, if granted leave to intervene, The Advocates' Society will argue that the means chosen by Parliament to effect its objective, the wholesale repeal of preemptory challenges, is unconstitutional and could equally undermine public confidence in the administration of justice.

3. If successful in its motion for leave to intervene, The Advocates' Society hopes to assist the Court in its consideration of the issues before it by offering a perspective that is different from those of the parties, yet central to the value of a trial by jury. In particular, The Advocates' Society proposes to address the issue of whether the repeal of preemptory challenges infringes s. 11(f) of the *Charter*, and if so, whether it can be upheld as a reasonable limit under s. 1 of the *Charter*. The answer to these questions involves interpreting the scope of s. 11(f) and the effect of the impugned legislation on the accused's right to a fair and impartial tribunal.

4. In providing its submissions, The Advocates' Society will draw on the unique knowledge and expertise it has developed as an organization that represents approximately 6,000 advocates with extensive on-the-ground experience in the justice system, representing a broad cross-section

of clients involved in that system, including from many different equity-seeking and racialized communities.

B. THE PROPOSED INTERVENER, THE ADVOCATES' SOCIETY, AND ITS INTEREST IN THE PROCEEDINGS

5. The Advocates' Society is a national professional association for trial and appellate lawyers representing approximately 6,000 advocates, including both civil and criminal litigators in government and private practice. The Advocates' Society's mandate includes advocacy education, legal reform, the protection of the rights of litigants, and the promotion of access to, and improvement of, the administration of justice. The Advocates' Society has an interest in these proceedings. Its members, and the litigants they represent, will be directly and significantly affected by the outcome of these appeals.¹

6. This Court has previously recognized The Advocates' Society's ability to assist as intervener in cases that involve issues affecting the legal profession and, in particular, affecting advocates and the rights of litigants in Canada's court systems. The Advocates' Society has been granted intervener status in a number of cases. It is also regularly called upon by elected officials and public servants for advice and input into virtually every area of litigation and court reform.²

PART II: QUESTIONS IN ISSUE

7. The only issue for determination on this motion is whether The Advocates' Society should be granted leave to intervene in this appeal and cross-appeal.

¹ Affidavit of Guy J. Pratte at paras. 4-5

² Affidavit of Guy J. Pratte at paras. 5, 7

PART III: ARGUMENT

A. THE TEST FOR GRANTING LEAVE TO INTERVENE

8. An applicant seeking leave to intervene before this Court under section 55 of the *Rules of the Supreme Court of Canada* must address two issues, as set out in the case law and codified in section 57(2):

- (a) whether the applicant has an interest in the issues raised by the parties to the appeal; and
- (b) whether the applicant's submissions will be useful to the Court and different from those of the other parties.³

9. The Advocates' Society has an interest in the issues raised by these appeals and proposes to make submissions that will be useful to the Court and different from those of the parties and other interveners.

B. THE ADVOCATES' SOCIETY'S INTEREST IN THIS APPEAL and CROSS-APPEAL

10. The requirement that a proposed intervener have an interest in the appeal is flexible. Any interest is sufficient, subject always to the exercise of discretion.⁴ The Court's decision in this case will determine whether accused persons facing trial by jury will retain the ability to exclude potential jurors whom they fear, for reasons that cannot be proved, will not decide the case fairly. This raises a special concern for racialized accused, for whom the peremptory challenge may play a significant role in obtaining a jury they perceive as representative and impartial. The Advocates' Society's members and especially the defendants they represent will therefore be directly and significantly affected by the outcome of these appeals.

³ *Rules of the Supreme Court of Canada*, SOR/2002-156, Rule 57(2)(b); *Reference re Workers' Compensation Act*, 1983 (NFLD.) (Application to Intervene), [1989] 2 S.C.R. 335 at 339 [*Reference re Workers' Compensation Act*]; *R. v. Finta*, [1993] 1 S.C.R. 1138 at 1142

⁴ *Reference re Workers' Compensation Act*, *supra* note 3 at 339

(i) The Advocates' Society's Unique Perspective would be Useful and Different

11. The Advocates' Society understands that several prospective interveners will seek leave to intervene in order to present the perspectives of particular racialized communities. The Advocates' Society's members have extensive experience representing a broad cross-section of defendants, including many from different equity-seeking and racialized groups. As an organization with a mandate to promote the fair and equitable administration of justice, The Advocates' Society offers a unique and independent perspective on the importance of peremptory challenges to public perception of the fairness and the legitimacy of the jury process in Canada.

12. The Advocates' Society has a strong record of contributions on matters related to the administration of justice, having been granted leave to intervene by this Court in numerous cases. It also has experience with issues similar to those raised by this appeal, having been granted leave to intervene in *R. v. Kokopenace* in relation to the scope of the right to a representative jury.⁵

13. The Advocates' Society's proposed submissions do not raise any concerns that have traditionally led this Court to refuse intervention. It does not intend to expand the issues under appeal beyond those raised by the parties or speak to the facts or merits of the particular case, and its participation will not cause prejudice to the parties.

⁵ *R. v. Kokopenace*, 2015 SCC 28; Affidavit of Guy J. Pratte at paras. 7, 11

14. Finally, The Advocates' Society's submissions would focus on the right to an impartial jury guaranteed by s. 11(f) of the *Charter*, an issue which no other prospective intervener plans to address in depth. Further, although the Respondent (Appellant on the cross-appeal), Pardeep Singh Chouhan, will advance the position that the repeal of peremptory challenges infringes s. 11(f), his submissions are expected to focus primarily on the impugned legislation's infringement of s. 11(d). The Advocates' Society will work with the parties and other interveners to ensure that its submissions are not duplicative.⁶

C. THE ADVOCATES' SOCIETY'S PROPOSED USEFUL AND DIFFERENT SUBMISSIONS

15. If granted leave to intervene, The Advocates' Society will expand on the arguments set forth below.

(i) The Scope of Section 11(f)

16. The scope of the right to "the benefit of trial by jury" guaranteed by s. 11(f) of the *Charter* has not yet been fully interpreted by this Court. The Advocates' Society proposes to argue that the right of the accused to participate in the jury selection process through peremptory challenges is essential to one of the jury's core functions: to enhance the perception of trial fairness, and thereby promote the legitimacy of the jury's verdict in the eyes of the accused and of the community. For these reasons, the repeal of peremptory challenges infringes s. 11(f) of the *Charter*.

⁶ *Finta*, *supra* note 3 at 1144; Affidavit of Guy J. Pratte at paras. 9, 12-14

17. This Court has held that the key characteristics of a jury include, at least, impartiality and representativeness. Without these, “a jury would be unable to perform many of the functions that make its existence desirable in the first place.”⁷

18. Representativeness, following *Kokopenace*, includes the process by which the jury roll is produced by the province. Impartiality of the trial jury is guaranteed by the representativeness of the jury roll, the use of random selection in deriving the jury panel, and adequate in-court selection procedures.⁸

19. In *Kokopenace*, this Court held that the right to a representative jury under s. 11(f) is broader than that guaranteed by s. 11(d). Section 11(f) recognizes that representativeness “not only promotes impartiality, it also legitimizes the jury’s role as the ‘conscience of the community.’ As such, it promotes public trust in the criminal justice system”.⁹

20. The Advocates’ Society proposes to argue that this Court should also recognize a broader right to *impartiality* under s. 11(f) than under s. 11(d). To comply with s. 11(f), The Advocates’ Society will argue, the in-court selection procedures must be sufficient not only to ensure impartiality in fact, but also to promote the acceptance of the jury’s verdict as legitimate by the accused and by the community.

⁷ *R. v. Sherratt*, [1991] 1 S.C.R. 509 at 525

⁸ *Kokopenace supra* note 5 at paras. 51, 54

⁹ *Kokopenace, supra* note 5 at paras. 50, 54-55

(ii) The Accused's Participation in Jury Selection is an Essential Component of the Benefit of Trial by Jury

21. The jury trial's defining feature is that the accused is tried by members of their community, instead of by a representative of the state. However, much of the process by which the trial jury is empanelled is either directed or mediated by state-actors. The peremptory challenge is the accused's only means of directly participating in the selection of their triers of fact.

22. The accused's direct participation in jury selection is essential to the perception that they have been judged by a fair and impartial tribunal. The importance of the accused's ability to exclude, at their discretion, certain jurors without showing cause has often been cited by judges and legal commentators. Blackstone wrote that it is necessary that the accused "should have a good opinion of his jury, the want of which might totally disconcert him, the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for his dislike." These words were adopted by this Court in *R. v. Cloutier*.¹⁰

23. The peremptory challenge is particularly important for racialized accused whose communities are over-represented in the criminal justice system and under-represented on juries, and for whom long-standing systemic discrimination may have produced a distrust of state actors. For such accused, the opportunity to directly participate in jury selection is critical to fulfilling the most fundamental function of the jury trial: to "teach...the litigant, and through him the community, that the jury is a good and proper mode for deciding matters and that its decision

¹⁰ Blackstone, *Commentaries on the Laws of England*, Lewis, ed., vol. 4, No. 353, at p. 1738, as cited in *R. v. Cloutier*, [1979] 2 S.C.R. 709 at 720

should be followed **because in a real sense the jury belongs to the litigant** [emphasis added].”¹¹

24. Because of the practical challenges that this Court recognized in *Kokopenace* in producing a jury roll that accurately reflects the racial composition of the community, random selection may produce a jury panel that appears starkly unrepresentative and gives to the layperson the impression of systemic exclusion. Peremptory challenges are a means by which the accused can ameliorate this effect and thereby enhance the perception of fairness.¹²

25. The perception of fairness by an accused person is often influenced by subjective factors idiosyncratic to the individual. As Justice Sharpe recognized, writing for the Ontario Court of Appeal in *R. v. Gayle*, accused persons may harbour a “lingering doubt” about a juror’s partiality, the truth of which cannot be proved, which taints their perception of a fair trial.¹³ The experienced defence lawyers who provided affidavit evidence and testified before the trial judge in the present case described how “having a juror the client is uncomfortable with continues to be a source of worry throughout the trial” if the juror is not excluded.¹⁴

26. The accused’s subjective fear of bias cannot be merely dismissed as unworthy of constitutional recognition; neither of course can the accused be guaranteed a procedure that eliminates all such concerns. But peremptory challenges offer the accused a reasonable and

¹¹ Babcock, “Voiur Dire: Preserving Its Wonderful Power” (1975), 27 *Stan. L. Rev.* 545 at 552, cited in *R. v. Bain*, [1992] 1 S.C.R. 91 at 116, per Gonthier J., in dissent

¹² *Sherratt*, *supra* note 7 at 532-533; *Bain*, *supra* note 11 at 114, per Gonthier J., in dissent

¹³ *R. v. Gayle*, (2001), 54 O.R. (3d) 36 at para. 59

¹⁴ *R. v. Chouhan*, 2019 ONSC 5512 at para. 20

meaningful opportunity to enhance the appearance of fairness by excluding those potential jurors who most disconcert him. The Advocates' Society will argue that this is the minimum required to fulfil the right to impartiality guaranteed by s. 11(f).

(iii) Section 1 of the *Charter*

27. The Advocates' Society will argue that the abolition of peremptory challenges is not a reasonable limit on the rights guaranteed by s. 11(f), because although the impugned legislation does serve a pressing and substantial objective — to prevent the discriminatory use of peremptory challenges — and is rationally connected to that objective, it is not minimally impairing of the *Charter* rights of the accused; nor is there proportionality between the measure chosen and the limitation it imposes on the right.¹⁵

28. A reasonable alternative to the wholesale repeal of peremptory challenges was open to Parliament, which would achieve the legislative objective of preventing the discriminatory use of peremptory challenges, without abridging the accused's right to participate in choosing what they perceive to be a fair, impartial and representative jury. The Advocates' Society would adopt the submissions of the coalition of the Canadian Muslim Lawyers Association and FACL, which, if granted leave to intervene, will propose a statutory process to empower trial judges to ensure that peremptory challenges are not abused, similar to that established by the Supreme Court of the United States in *Batson v. Kentucky*.¹⁶

¹⁵ *R. v. Safarzadeh-Markhali*, 2016 SCC 14 at para. 58; *R. v. Oakes*, [1986] 1 S.C.R. 103 at 138; for commentary on Parliament's objective in repealing peremptory challenges, see Department of Justice Canada: "Legislative Background: *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, as enacted (Bill C-75 in the 42nd Parliament)" (August 2019) at pp. 38-39

¹⁶ *Batson v. Kentucky*, 476 U.S. 79 (1986)

29. The Advocates' Society will argue that s. 11(f) does not protect the discriminatory use of peremptory challenges. A statutory process for challenging the discriminatory exercise of peremptory challenges would not impair the *Charter* rights of the accused, but instead would promote the values of impartiality and representativeness guaranteed by s. 11(f). The impugned legislation therefore cannot be considered minimally impairing of the rights of the accused.

30. Further, the deleterious effects of the legislation are disproportionate to its objective. While the appearance of fairness may be enhanced by preventing the abuse of peremptory challenges, it is undermined by barring completely the accused's constitutional right to meaningful participation in jury selection.

PART IV: SUBMISSIONS REGARDING COSTS

31. The Advocates' Society will not seek costs in this matter, and asks that no award of costs be made against it in this motion or in the appeal if leave is granted.

PART IV: ORDER SOUGHT

32. The Advocates' Society respectfully requests an order granting it intervener status in these proceedings, including the right to file a factum that will not exceed 10 pages in length, and the right to present oral argument at the hearing of this appeal and cross-appeal, and such further or other Order as deemed appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 4th day of August, 2020



Jill R. Presser

Counsel for the Applicant, The Advocates' Society

Cate Martell

PART VI: TABLE OF AUTHORITIES

Jurisprudence	Paragraph
<i>Batson v. Kentucky</i> , 476 U.S. 79 (1986) https://supreme.justia.com/cases/federal/us/476/79/	28
<i>R. v. Bain</i> , [1992] 1 S.C.R. 91 http://canlii.ca/t/1fsft	23, 24
<i>R. v. Chouhan</i> , 2019 ONSC 5512 http://canlii.ca/t/j2jqk	25
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<i>R. v. Finta</i> , [1993] 1 S.C.R. 1138 http://canlii.ca/t/1fs3t	8, 14
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<i>R. v. Kokopenace</i> , 2015 SCC 28 http://canlii.ca/t/gj1qq	12, 18, 19, 24
<i>R. v. Oakes</i> , [1986] 1 S.C.R. 103 http://canlii.ca/t/1ftv6	27
<i>R. v. Safarzadeh-Markhali</i> , 2016 SCC 14 http://canlii.ca/t/gpg9w	27
<i>R. v. Sherratt</i> , [1991] 1 S.C.R. 509 http://canlii.ca/t/1fslt	17, 24
<i>Reference re Workers' Compensation Act</i> , 1983 (NFLD.) (Application to Intervene), [1989] 2 S.C.R. 335 http://canlii.ca/t/1ft35	8, 10
Legislation	Paragraph
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Secondary Sources	Paragraph
Department of Justice Canada: “Legislative Background: <i>An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts</i> , as enacted (Bill C-75 in the 42 nd Parliament)” (August 2019) https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/c75/index.html	27

Statutory Provisions	
Rules of the Supreme Court of Canada, SOR 2002-156 57 ... (2) A motion for intervention shall ... (b) set out the submissions to be advanced by the person interested in the proceeding with respect to the questions on which they propose to intervene, their relevance to the proceeding and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties.	