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)

- and -

PARDEEP SINGH CHOUHAN

RESPONDENT
(Appellant)

- and –

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INTERVENERS

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# FACTUM OF THE INTERVENER
# THE ADVOCATES' SOCIETY

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

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## PART I — STATEMENT OF THE CASE

1. The Intervener, The Advocates' Society ("TAS") is a national professional association for trial and appellate lawyers representing approximately 6,000 advocates. TAS' mandate includes advocacy education, legal reform, the protection of the rights of litigants, and the improvement of the administration of justice. TAS was granted leave to intervene in this appeal and cross-appeal in order to assist the Court in determining whether the repeal of peremptory challenges infringes s. 11(f) of the *Charter* and, if so, whether it can be saved by s. 1 of the *Charter*.

2. TAS recognizes the importance of the parliamentary objective of curtailing discriminatory uses of peremptory challenges. Such improper uses have the potential to undermine public confidence in the administration of justice. However, TAS submits that the means chosen by Parliament to effect its objective, the wholesale repeal of peremptory challenges, infringes the right to impartiality and representativeness guaranteed by s. 11(f), and could equally undermine public confidence in the administration of justice.

3. TAS further submits that the repeal of peremptory challenges is not minimally impairing of the rights of accused persons; nor are the deleterious effects of the legislation proportional to its salutary effects.

## PART II — POSITION ON QUESTIONS IN ISSUE

4. With respect to Question (a) on the cross-appeal, TAS submits that the repeal of peremptory challenges infringes s. 11(f) of the *Charter*, and is not saved by s. 1 of the *Charter*.

## PART III — ARGUMENT

### A. The Repeal of Peremptory Challenges Infringes s. 11(f) of the *Charter*

#### (i) Overview

5. TAS takes the position that: (1) the constitutional guarantee of impartiality under s. 11(f) is broader than that guaranteed by s. 11(d), and comprehends not only the absence of bias but

also the appearance of fairness and impartiality; (2) the ability of the accused to directly participate in selecting their triers of fact through peremptory challenges is essential to the appearance of fairness and impartiality, and promotes the legitimacy of the verdict; and (3) peremptory challenges promote the right to a representative jury under s. 11(f).

**(ii) The Scope of the Impartiality Guarantee under s. 11(f) of the *Charter***

6. Section 11(f) guarantees the right to "the benefit of trial by jury" where the offence carries a maximum punishment of five years or more. The scope of this right has not yet been fully interpreted by this Court, although some principles have emerged.

7. In *R. v. Sherratt*, this Court held that the key characteristics of a jury include 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," rendering the right to a jury trial meaningless.[1]

8. This Court addressed the representativeness right in *R. v. Kokopenace*.[2] Representativeness is guaranteed by both the right to "a fair and public hearing by an independent and impartial tribunal" under s. 11(d) of the *Charter*, and by the right to "the benefit of trial by jury" under s. 11(f). *Kokopenace* determined that representativeness under s. 11(d) is restricted to its impact on the jury's impartiality; a problem with representativeness will only violate s. 11(d) where it creates an appearance of bias.[3] But representativeness under s. 11(f) is broader: it "not only promotes impartiality, it also legitimizes the jury's role as the 'conscience of the community'" and promotes public trust in the criminal justice system. In order to fulfill this right, the state must offer "a fair opportunity for a broad cross-section of society to participate in the jury process."[4]

9. The right to impartiality under s. 11(d) is also somewhat circumscribed. It is the same as the test for reasonable apprehension of bias: would a reasonable person, fully apprised of the

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[1] *R. v. Sherratt*, [1991] 1 S.C.R. 509 at 525 [*Sherratt*]
[2] *R. v. Kokopenace*, 2015 SCC 28 [*Kokopenace*]
[3] *Kokopenace, supra* note 2 at para. 54
[4] *Kokopence, supra* note 2 at para. 44, 51; *Sherratt, supra* note 1 at 523-525

circumstances, have an apprehension of bias?[5] This Court has not yet interpreted the right to impartiality under s. 11(f). In this case, the Court of Appeal treated the impartiality right under s. 11(f) as coextensive with the impartiality right under s. 11(d). Its conclusion that peremptory challenges were not required by s. 11(d) was therefore dispositive of the impartiality argument under s. 11(f).[6] TAS submits that the Court of Appeal erred in taking a restrictive approach to impartiality under s. 11(f). Instead, just as this Court has recognized a broader right to representativeness under s. 11(f) than under s. 11(d), TAS submits that it should also find that the right to impartiality guaranteed by s. 11(f) is broader.

10. In TAS' submission, this Court's recognition of a more robust guarantee of representativeness under s. 11(f) reflects the broader function that s. 11(f) serves. Section 11(f) safeguards one of the core functions of trial by jury: to promote the acceptance of the verdict as legitimate by the accused and by the community.[7] This distinct purpose served by s. 11(f) requires a more generous conception of impartiality than that captured by s. 11(d). The section guarantees more than simply a tribunal untainted by the apprehension of bias, which may be equally obtained by judge-alone trial. To deliver the full benefit of trial by jury, TAS submits that the in-court selection process must be sufficient not only to ensure an unbiased tribunal, but also to promote the *appearance* of fairness and impartiality.

### (iii) The Accused's Participation in Jury Selection is an Essential Component of Trial by Jury

11. TAS submits that peremptory challenges can be essential to ensuring the appearance of a fair trial, even if not essential to fairness and impartiality in fact. One of the key components of "the benefit of trial by jury" is the accused's ability to directly participate in choosing their triers of fact through the exercise of peremptory challenges. This direct participation plays a critical role in enhancing the accused's perception of the jury's impartiality, and in turn promotes the legitimacy of the verdict. This is especially so for accused who are Black, Indigenous or People of Colour, who start from a position of systemic disadvantage in the criminal justice system, as

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[5] *R. v. Bain*, [1992] 1 S.C.R. 91 at 101; see also 111, per Gonthier J. in dissent [*Bain*]; *R. v. Valente*, [1985] 2 S.C.R. 673 at 684-689; *R. v. Lippé*, [1991] 2 S.C.R. 114 at 136-138, 1990 CanLII 18 at paras. 41, 43-44
[6] *R. v. Chouhan*, 2020 ONCA 40 at para. 108 [*Chouhan* (Ont. C.A.)]
[7] *Kokopenace, supra* note 2 at para. 220, per Cromwell J., dissenting

well as for other accused persons who may be subject to discrimination by virtue of their membership in a minority group.

12. Although the jury trial's defining feature is that the accused is tried by representatives of their community instead of by a representative of the state, much of the process by which the jury panel is drawn and the petit jury selected is either directed by or mediated by state-actors. Random selection produces the jury panel and determines which members of the panel are sworn.[8] The trial judge excuses potential jurors who are ineligible or unable to serve.[9] The trial judge decides whether the accused will be permitted to challenge prospective jurors for cause and vets the questions to be put to them.[10] Under the former s. 640 of the *Criminal Code*, lay triers decided the truth of challenges for cause, but following the amendments to s. 640 made by Bill C-75, this responsibility now belongs to the trial judge. In practice, the peremptory challenge is the accused's only means of directly participating in the selection of their triers of fact.

13. The accused's participation in choosing their triers of fact is important 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."[11] This statement was adopted by this Court in *R. v. Cloutier*, recognizing that, "The fact that a juror is impartial does not mean that he is believed to be impartial by the accused or the prosecution."[12] In *R. v. Yumnu*, Watt J.A. wrote for the

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[8] *Jury Act*, RSA 2000, c J-3, ss. 8(2), 11(1); *Jury Act*, CCSM c J30, ss. 6(1); *Jury Act*, SNB 1980, C J-3.1, ss. 13(2), 13.6(1); *Jury Act*, *1991,* SNL 1991, c 16, s. 20(3); *Jury Regulations*, NWT Reg 034-99, as amended, s. 6(1); *Juries Act*, SNS 1998, c 16, ss. 7(1), 10(1); *Juries Act*, RSO 1990, c J.3, ss. 6(2), 18(1); *Jury Act*, RSPEI 1988, c J-5.1, ss. 8, 16(3); *Jurors Act,* CQLR, c J-2, ss.18-19; *The Jury Act*, *1981*, SS 1980-81, c J-4.1, s. 6(2)-(3); *Jury Act*, RSY 2002, c 129**,** s. 17, 18(1); *Criminal Code*, RSC, 1985, c C-46, s. 631 [*Criminal Code*]

[9] *Criminal Code*, s. 632

[10] *R. v. Parks*, [1993] O.J. No. 2157 (C.A.) at paras. 29-30

[11] W. Blackstone, *Commentaries on the Laws of England*, Lewis, ed. (Philadelphia: R. Welsh & Co., 1898), vol. 4, No. 353, at 1738, cited in *R. v. Cloutier*, [1979] 2 S.C.R. 709 at 720 [*Cloutier*]

[12] *Cloutier, supra* note 11 at 720

Ontario Court of Appeal: "The availability of peremptory challenges fosters confidence in the adjudicative fairness of the criminal jury trial."[13]

14. Research suggests that people are more likely to accept an outcome as legitimate, even when unfavourable, when "delivered through procedures viewed as fair."[14] Research has also demonstrated the positive effect of participation on individuals' perception of fairness in legal processes.[15] This suggests that the opportunity to directly participate in jury selection may be 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 should be followed **because in a real sense the jury belongs to the litigant**. [Emphasis added]"[16]

15. The peremptory challenge recognizes that the accused's perception of fairness is often influenced by subjective factors idiosyncratic to the individual. As Sharpe J.A. held, 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.[17] 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.[18]

16. The accused's unverifiable and subjective fear of bias cannot be dismissed as unworthy of constitutional recognition, as it was by the Court of Appeal in this case.[19] To do so would ignore this Court's recognition of the important role peremptory challenges play in ensuring the

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[13] *R. v. Yumnu*, 2010 ONCA 637 at para. 124, aff'd 2012 SCC 73 [*Yumnu*]
[14] Tom R. Tyler, *Why People Obey the Law* (Michigan: Yale University, 1990) at 107; Ric Simmons, "Big Data and Procedural Justice: Legitimizing Algorithms in the Criminal Justice System" (2020) Ohio State J. Criminal Law 15:573 at 574-575
[15] Tom R. Tyler, "Citizen Discontent with Legal Procedures" (1997) 45:4 OUP 871 at 887-889; Simmons, *supra* note 14 at 576
[16] Barbara Babcock, "Voir Dire: Preserving Its Wonderful Power" (1975), 27 Stan. L. Rev. 545 at 552, cited in *Bain, supra* note 5 at 116, per Gonthier J., dissenting
[17] *R. v. Gayle*, (2001), 54 O.R. (3d) 36 at paras. 59-60 [*Gayle*]
[18] *R. v. Chouhan,* 2019 ONSC 5512 at para. 20 [*Chouhan* (Ont. S.C.J.)]
[19] *Chouhan* (Ont. C.A.), *supra* note 6 at para. 54

accused's subjective perception of fairness.[20] Peremptory challenges, as Watt J.A. pointed out, cannot solve for *all* perceived juror bias because of their limited number, but a process need not be perfect to be necessary.[21] Peremptory challenges offer accused persons a reasonable and meaningful opportunity to enhance the appearance of fairness by excluding those potential jurors who most disconcert them. TAS submits that this is the minimum required to fulfil the right to impartiality guaranteed by s. 11(f).

**(iv) Peremptory Challenges Promote the s. 11(f) Right to a Representative Jury**

17. TAS asks this Court to build upon its decision in *Kokopenace* to find that peremptory challenges are necessary to give effect to the right to a representative jury guaranteed by s. 11(f). The repeal of peremptory challenges infringes this right because it deprives the accused of a critical tool for enhancing representativeness. Although, following *Kokopenace*, there is no entitlement to a petit jury of any particular composition, TAS submits that accused persons are entitled to a *process* that provides a meaningful opportunity for a representative petit jury to be empanelled, and that does not frustrate their ability to empanel a representative jury.[22]

18. This Court held in *Kokopenace* that the right to a representative jury is a procedural one; it refers to the process by which the jury roll is produced by the province and not to the ultimate composition of the jury roll or of the petit jury. What is required is that the state provide a fair opportunity for a broad cross-section of society to participate in the jury process, by compiling the jury roll from a broad-based list. A jury panel drawn by random selection from a properly-composed jury roll derives its representative character from the representativeness of the jury roll.[23]

19. In the present case, Watt J.A. interpreted this to mean that the representativeness right under s. 11(f) is exhausted once a jury panel has been randomly selected from a properly-composed jury roll.[24] With respect, TAS submits that this reads *Kokopenace* too narrowly. Watt

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[20] *Cloutier, supra* note 12 at 719-721, *Bain, supra* note 5 at 115-116, per Gonthier J., dissenting; *Yumnu supra* note 13 at 123-124; *Sherratt, supra* note 1 at 58
[21] *Chouhan* (Ont. C.A.), *supra* note 6 at 88
[22] *Kokopenace, supra* note 2 at para. 51
[23] *Kokopenace, supra* note 2 at paras. 51, 54, 61, 95
[24] *Chouhan* (Ont. C.A.), *supra* note 6 at paras. 105-106

J.A. was correct to note that *Kokopenace* declined to recognize a right to "proportionate representation at any stage of the jury selection process."[25] However, it does not follow from this that nothing the state does to alter the in-court selection process could ever create a representativeness problem.

20. While *Kokopenace* focused on the composition of the jury roll, nothing in that decision suggests that the in-court selection process is immune from claims that the representativeness right has been compromised. If, for instance, that process systematically and discriminatorily excluded all Black or Indigenous prospective jurors from the panel after they had been randomly selected, then s. 11(f) would be infringed just as surely as if the exclusion took place at the stage of composing the jury roll.[26] Such deliberate exclusion is not the only way that the right to representativeness can be frustrated. TAS submits that the right may also be infringed by interference with the accused's ability to enhance the jury's representativeness.

21. Peremptory challenges can serve an essential ameliorative purpose in the jury selection scheme for accused persons who are Black, Indigenous or People of Colour. These are communities that suffer systemic discrimination which may have produced a distrust of state actors. They are over-represented in the criminal justice system and under-represented on juries.[27] Indigenous accused, in particular, occupy a position of substantive inequality and alienation from the criminal justice system.[28] For such accused, a tribunal that is imposed upon them rather than one they actively participate in choosing may not provide adequate assurance of impartiality and legitimacy.

22. Because of the numerous practical challenges to producing a jury roll that accurately reflects the racial composition of the community, in practice random selection often produces a jury panel that appears starkly unrepresentative and gives to the layperson the impression of systemic exclusion.[29] Homogenous juries may not exhibit bias in fact, but they create an

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[25] *Chouhan* (Ont. C.A.), *supra* note 6 at para. 106
[26] See *Gayle, supra* note 17 at para. 58
[27] *R. v. Golden*, 2001 SCC 83 at para. 83
[28] *R. v. Sharma*, 2020 ONCA 478 at para. 70; *Kokopenace, supra* note 2 at para. 139
[29] *Kokopenace, supra* note 2 at paras. 29, 70-71

appearance of bias that is still harmful to public confidence in the administration of justice. This is particularly so when the accused is from a community that is entirely absent from the jury.[30]

23. Peremptory challenges have long been recognized as a means by which the accused may increase the jury's representativeness and so enhance the accused's perception of fairness.[31] It may be impossible to empanel a jury that all persons would perceive as representative, because representativeness means something different to different people.[32] But peremptory challenges offer all accused persons a fair opportunity to select for some of the characteristics most important *to them*.

24. The in-court jury selection procedures were not challenged in *Kokopenace*. In that case, this Court assumed their adequacy in framing the test it established for representativeness. If the state makes reasonable efforts to compile a representative jury roll, then there will be at least some diversity in the array. *Kokopenace* assumes some ability by the accused to select among the prospective jurors in the array; not that the accused would be tried by the first twelve eligible jurors randomly selected, subject only to challenges for cause. By abolishing peremptory challenges, Parliament has effectively deprived many accused persons of any meaningful opportunity to empanel a jury that they perceive as representative.

25. TAS submits that the ameliorative purpose served by peremptory challenges is a critical tool for enhancing substantive equality in the jury selection process. Substantive equality finds its clearest expression in s. 15(1) of the *Charter,* but this Court has also held it to be one of the core *Charter* values that must guide the interpretation of each section.[33] Interpreting the representativeness right in light of the fundamental value of substantive equality requires this

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[30] Emily Morton, "Two Conceptions of Representativeness in the Canadian Jury" (2003) 61 U.T. Fac. L. Rev 105 at paras. 50, 56; *R. v. Biddle*, [1995] 1 S.C.R. 761 at para. 53 per Gonthier J., concurring; *Chouhan* (Ont. S.C.J.), *supra* note 18 at para. 21

[31] *Sherratt, supra* note 1 at 532-533; *Bain, supra* note 5 at 114, per Gonthier J., dissenting; *Gayle, supra* note 17 at para. 63; *Kokopenace, supra* note 2 at para. 51

[32] It may even be undesirable, as it would impinge unacceptably on prospective jurors' privacy and require a degree of state intervention in assembling the jury panel that would deprive it of the key quality of randomness: see *Kokopenace, supra* note 2 at para. 88; see also para. 227, per Cromwell J., dissenting

[33] *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] SCC 27 at paras. 80-81; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 344; *R. v. Kapp*, 2008 SCC 41 at para. 15; *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para. 35

Court to recognize that the procedural needs of all accused persons are not the same. The impact of abolishing peremptory challenges is greater for accused who are Black, Indigenous or People of Colour, for whom the first twelve randomly selected jurors will often not appear to be representative of the community. It is critical that they retain a process that affords a meaningful opportunity to shape the jury according to their own notion of representativeness and impartiality. TAS submits that this is the minimum required to legitimize the jury's role as the "conscience of the community" and promote public trust in the administration of justice.[34]

## B. The Infringement of s. 11(f) Cannot be Justified under s. 1 of the *Charter*

### (i) Overview

26. TAS submits that the repeal of peremptory challenges is not a reasonable limit on the rights guaranteed by s. 11(f) of the *Charter*. TAS acknowledges that the impugned legislation does serve a pressing and substantial objective, that of preventing the discriminatory use of peremptory challenges, and that it is rationally connected to that objective. However, the legislation 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.[35]

### (ii) Minimal Impairment

27. TAS submits that the wholesale repeal of peremptory challenges is not minimally impairing of the accused's right to participate in choosing what they perceive to be a fair, impartial and representative jury. The Crown has not shown "the absence of less drastic means of achieving the objective in a 'real and substantial manner.'"[36]

28. A reasonable alternative to the wholesale repeal of peremptory challenges was open to Parliament. One 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. A legislated process empowering trial judges to ensure that peremptory challenges are not exercised for

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[34] *Kokopenace, supra* note 2 at 55
[35] *R. v. Safarzadeh-Markhali*, 2016 SCC 14 at para. 58 [*Safarzadeh-Markhali*]; *R. v. Oakes*, [1986] 1 S.C.R. 103 at 138
[36] *Safarzadeh-Markhali, supra* note 35 at para. 63

discriminatory purposes, akin to the process adopted by the Supreme Court of the United States in *Batson v. Kentucky*, would represent a lesser impairment of the right.[37] A legislated *Batson*-style challenge, adapted to the Canadian context, would not offend ss. 11(d), 11(f), or 1 of the *Charter* because it would empower judges to prevent only discriminatory uses of peremptory challenges. Such a challenge would still afford accused persons recourse to the appropriate and constitutionally necessary functions of peremptory challenges, while meeting the legislative objective of eliminating discriminatory uses. TAS adopts the submissions of the coalition of the Canadian Muslim Lawyers Association and Federation of Asian Canadian Lawyers in this regard.

**(iii) Proportionality**

29. Finally, TAS submits that the deleterious effects of the legislation are disproportionate to its objective. The perceived benefit of abolishing peremptory challenges is far outweighed by its deleterious impact on the accused's right to participate in selecting an impartial and representative jury. This deleterious impact is especially severe for Black, Indigenous and People of Colour accused who may depend upon the right to exercise peremptory challenges to enhance representativeness and the perception that they are being tried by a fair and impartial jury. The legislation cannot be saved by s. 1 of the *Charter*.

## PART IV — COSTS AND ORDER SOUGHT

30. TAS does not seek costs, and asks that no award of costs be made against it. TAS takes no position on the disposition of this appeal and cross-appeal.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**, this 10th day of September, 2020

**Jill R. Presser** **Cate Martell**

*Counsel for the Intervener, The Advocates' Society*

[37] *Batson v. Kentucky,* 476 U.S. 79 (1986)

## PART VI: TABLE OF AUTHORITIES

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