"*We have centuries of work undone by a few bone-heads*": A Review of Jury History, a Present Snapshot of Crown and Defence Counsel Perspectives on Bill C-75's Elimination of Peremptory Challenges, and Representativeness Issues

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ABSTRACT

In the fall of 2019, peremptory challenges were abolished in Canadian jury trials, much to the chagrin of many criminal law practitioners. Ostensibly, Bill C-75 was passed partially in response to the fallout

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stemming from the controversial *R v Stanley* verdict, a case in which peremptory challenges were allegedly used to remove any and all jurors who appeared to be Indigenous. Bill C-75 has not been without its own controversy, however. Commentary by both legal professionals and scholars indicates that Bill C-75 – though well intentioned – may ultimately do more harm than good for the very communities it purports to serve. Numerous criminal law practitioners were quick to criticize Bill C-75 as being knee-jerk, reactionary, and, ultimately, a highly political move that would do little to address the systemic issues plaguing the criminal justice system in Canada, particularly for racialized and marginalized communities. The paper below endeavours to give voice to these perspectives. Following an extensive review of the history of peremptory challenges and a general history of jury work, we share the results of our survey in which Canadian Crown and defence counsel were asked to share their opinions on the removal of peremptory challenges. The responses indicate that, overall, surveyed Crown and defence counsel are concerned that the elimination of peremptory challenges will have a negative impact on jury trials in Canada. We explore the reasons for these fears in reviewing their responses to the survey.

SETTING THE STAGE – THE ONTARIO CHALLENGES AND OUR PURPOSE IN THIS STUDY

Peremptory challenges to jurors have recently become a contentious issue in Canadian criminal law practice. Peremptory challenges allow the accused or the Crown to object to a person's membership on the jury array without any cause. In first-degree murder trials, both the accused and Crown were allowed 20 peremptory challenges. While tracing the history and current practice of peremptory challenges is the main focus of our paper, it is a practice that should be contrasted with the continuing ability of counsel to engage in challenges for cause, which permit counsel to challenge prospective jurors for stated reasons related to the ability to serve. The former section 638 of the *Criminal Code* permitted accused persons and the Crown to an unlimited number of challenges for cause based on a list of specified grounds.[1] Under this iteration, section 640 of the *Code* permitted the validity of

1 *Criminal Code*, RSC 1985, c C-46, s 638, as it appeared on 18 September 2019 [*Code*].

challenges for cause to be determined by lay triers who were members of the jury.[2]

On September 19, 2019, Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, came into force and, in part, eliminated peremptory challenges (s. 634) and furnished judges with oversight for challenges of cause (s. 640).[3] The new Bill was passed, seemingly, as an attempt to placate recent allegations regarding under-representation of Indigenous jurors in the high-profile case, *R v Stanley*, in 2018 (a matter we will discuss *infra*).[4]

Upon passage of the Bill, controversy arose over the retroactive or prospective application of the ban on peremptory challenges, and cases across multiple jurisdictions saw competing philosophies and results. Ultimately, the matter will soon be settled by the Supreme Court of Canada in the appeal from an Ontario case, *R v Chouhan*, where leave to appeal was granted on May 7, 2020.[5] The *Chouhan* case at the Ontario Superior Court considered peremptory challenges to be procedural in nature, and therefore held that retrospective effect could be given to the Bill.[6] However, in another Ontario Superior Court case, *R v King*, the trial judge found that the challenges could be seen as substantive and an important protection for disadvantaged accused persons by ensuring an unbiased jury, protecting the section 11(d) *Charter* right to a fair trial.[7] The Ontario Court of Appeal was therefore called upon to settle this divergence.

On Appeal in *Chouhan*, the accused argued that eliminating peremptory challenges infringed section 11(d)'s guarantee of a right to a fair trial and impartial tribunal and argued that widespread racism rebuts

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2 *Ibid*, s 640, as it appeared on 18 September 2019.

3 *Ibid*, ss 634, 640, as amended by Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, 1st Sess, 42nd Parl, (assented to 21 June 2019), SC 2019, c 25.

4 *R v Stanley*, 2018 SKQB 27 [*Stanley*].

5 *R v Chouhan*, 2020 ONCA 40, leave to appeal to SCC granted, 39062 (7 May 2020) [*Chouhan* SCC].

6 *R v Chouhan*, 2019 ONSC 5512 [*Chouhan* Sup Ct].

7 *R v King*, 2019 ONSC 6386.

the presumption of juror impartiality. The Crown retorted that jury shaping (and jury shopping) was antithetical to Canadian jury law and "safeguards in the jury selection process, when considered cumulatively, would lead a reasonable person, fully informed of these safeguards, to conclude that the process was fair and likely to ensure an impartial jury."[8]

The Court of Appeal accepted the Crown's position and, relying on representativeness jurisprudence in cases such as the Supreme Court Decision in *R v Kokopenace*, found that in respect of the right to 11(d) trial fairness, "reasonable apprehension of bias has never... [meant] a jury that proportionally represents the various groups."[9] Nor did the section 11(f) *Charter* right to a jury trial benefit the accused because section 11(f) provided no more representativeness-based protection than section 11(d); fairness is achieved by sampling a broad segment of society and giving them the opportunity to participate in jury service. Finding peremptory challenges to be substantive in nature, the Court of Appeal agreed with the Crown on the issue of fairness but determined that the new processes would apply prospectively to cases where the right to a trial by judge and jury was determined on or after September 19, 2019.[10]

Though similar controversies played out in other provinces[11], the Ontario cases have paved the way to the forthcoming Supreme Court decision. The peremptory challenge cases across Canada lay bare the tension between different momentums in the system. The system must balance the timely administration of justice with the accused's constitutional rights in a fair and unbiased fashion. Juries must be impartial and representative, and jury trials must preserve the rights of the accused and dispense equality-based justice.

Yet jury systems have a long and storied history which has been shaped by values that perhaps have not been considered in the recent legislative changes. Similarly, legal actors may have specific and vital observations about the changes that may reveal weaknesses and strengths as to the new peremptory challenges regime that are not given effect in the legal debate.

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8 *R v Chouhan*, 2020 ONCA 40 at para 43 [*Chouhan* CA].

9 *Ibid* at para 62.

10 *Ibid* at paras 162, 210.

11 See our discussion of the Manitoba developments *infra*.

In this paper, we give voice to these perspectives by outlining some of the historical antecedents of modern jury work and the development of peremptory challenges. Following a review of this history, we move to the results of our survey of legal professionals involved in jury trials (Crown and defence counsel) which illustrate widespread professional dissatisfaction with the new regime established in Bill C-75. Ultimately, our goal is to set the stage for any upcoming Supreme Court decision on peremptory challenges and the academic commentary that will undoubtedly follow.

This paper will be divided into three main sections. Part one considers the broad history of juries leading to a discussion of the Canadian jury context. Though not exhaustive, this historical discussion aids the reader in understanding the peremptory challenge debate and the views of legal professionals on this emotive subject. Part two considers the history of peremptory challenges more specifically, providing important context for the legislative changes that have taken effect in Canada. In part three, we discuss the results of our study in which we asked Crown and defence counsel involved in jury trials to express their own views on the elimination of peremptory challenges; a discussion which illuminates widespread distrust of the new regime within the profession. We hope this discussion provides a cohesive history of the Canadian narrative of jury work and peremptory challenges up to the recent legislative changes and legal challenges, and that this captured history of the deep practice of jury work and of its recent assessment by criminal law practitioners provides additional context for the legal debates as they develop and unfold in the immediate future and years to come.

PART 1: A BRIEF HISTORY OF JURIES

There are many diverging views put forward by historians and academics about how and where our modern system of trial by jury originated. Many academics believe it came from the Anglo-Saxon or Norman period of conquest in English history.[12] However, similarities from systems dating

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[12] Robert Von Moschzisker, *Trial by Jury: A Brief Review of Its Origin, Development and Merits and Practical Discussions on Actual Conduct of Jury Trials* (Philadelphia: GT Bisel, 1922) at 6–11 [Moschzisker, *Trial by Jury*].

even further back than England can be found.[13] While similar philosophically, these ancient methods of trial would be inadequate for modern society's complex legal system.[14]

Ancient Jury Systems

Evidence of the existence of juries can be found in many historical records. For instance, the Greek tribunal consisted of assessing members and their abilities to serve as triers of the case at hand.[15] These tribunals consisted of panels of Athenians selected to hear a case that would be tried, and ultimately, they would act as judges of both law and fact.[16] Greek tribunals were also presided over by a magistrate who would state to the panel the questions that were at issue and the results of that magistrate's preliminary examination of these issues.[17] The statement of the issues and preliminary examination would be followed by statements from the parties and witnesses.[18]

The main distinguishing feature of the Greek system was that the members of the tribunal, Dikasts, were judges of both law and fact unlike the modern Jury system in Canada where jurors adjudicate only facts.[19] Although there are intriguing similarities to our modern system in the ancient Greek tribunal, no direct historical connection has been made between Greek Dikasteries and the modern Canadian Jury.[20]

Turning to the Roman tribunal system, similarities can be seen between Roman Comita, their judicial council, and the modern-day jury.[21] However, historians distinguish the Roman legal system from modern systems based on the fact that:

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13 *Ibid* at 11–12.

14 Robert Von Moschzisker, "The Historic Origin of Trial by Jury" (1921) 70:1 U Pa L Rev and Am L Reg 1 at 1 [Moschzisker, "Historic Origin"].

15 Moschzisker, *Trial by Jury*, *supra* note 12 at 11.

16 *Ibid* at 11–12; Moschzisker, "Historic Origin", *supra* note 14 at 6.

17 Moschzisker, *Trial by Jury*, *supra* note 12 at 11.

18 *Ibid* at 11–12.

19 *Ibid* at 12.

20 *Ibid.*

21 Moschzisker, "Historic Origin", *supra* note 14 at 6.

> The principal and characteristic circumstances in which the trial by a Roman differed from that of a modern jury, consisted in that in the former case neither the praetor [magistrate] nor any other officer distinct from the jury presided over the trial, to determine as to the competency of witnesses, the admissibility of evidence, or to expound the law as connecting to the facts with the allegations to be proved on the record.[22]

In order to make up for this lack of presiding authority on the law, the Roman jury system generally included one or more men who possessed proper legal knowledge (not lawyers in the modern sense of the word), so that they could gain such knowledge of the law as was necessary from their own members to make a proper determination of both law and fact.[23] The Roman tribunal selected its members from the community in a similar fashion to that of ancient Athens, however it also had a method of objecting to specific members chosen to try a particular case, reminiscent of our modern day jury challenge procedure.[24] As we discuss the results of our survey below, it is worth considering that some of the modern passionate responses concerning peremptory challenges in the Canadian context stem from the conception that the pillars of jury work have stood since ancient times and that these values are deeply embedded in advocacy culture. These are systems that were ensconced in the ancient justice histories of broader Europe as well.

Additionally, evidence of ancient juries can be found in northern Europe. For example, in Scandinavia, historians studying the trial by jury are unclear on how far back the ancient jury system may stretch, suggesting that "their origin lies beyond the age of clear history."[25] Definitively, they can "trace the undoubted existence of juries as far back as one thousand years; before that period, ... we must not expect to find authentic records respecting juries where all other records fail."[26]

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22 Moschzisker, *Trial by Jury*, *supra* note 12 at 12.

23 *Ibid* at 13.

24 *Ibid*.

25 *Ibid* at 13–14.

26 *Ibid* at 14.

Sweden had an ancient tribunal consisting of twelve men quite similar to the modern jury.[27] This tribunal of men were "sworn to investigate and ascertain the truth in any case, before whom witnesses appeared."[28] Much like other ancient systems mentioned, this tribunal judged both fact and law.[29] Only seven of the twelve men were required to return on a verdict.[30] Furthermore, similarities to the modern jury system can also be found in historical accounts of the legal systems of Norway, Denmark, Iceland, Jutland, Normandy, and Germany.[31] Denmark also extensively used a system known as the wager of law in which "the defendant denied, on oath, the act of which he was accused, and this oath was confirmed by his conjurators, usually twelve … who declared themselves satisfied that the defendant told the truth."[32] Unlike the ancient trial by jury, where the majority determined the case, this wager of law required unanimity much like the modern jury trials of law in Canada.[33]

The Development of the Jury System in England

These early systems of jury trials used by other civilizations most likely played a role in influencing the jury system as it developed over a period of centuries in England. After the Norman conquest of England in the eleventh century, the accused in criminal cases were subjected to a trial by ordeal, compurgation, and combat.[34] The accuser was required, for example, to support their charge by personal combat, leading to few

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27 *Ibid* at 15; Some argue that the numbers of triers were based on mirroring Jesus and the 12 apostles. See the section on 'The reasoning behind the use of twelve jurors' in Richard A Hofstra, "Trial By Jury: The Constitutional Right to a Jury of Twelve in Civil Trials" (1993) 22:1 Hofstra L Rev 1, online: <scholarlycommons.law.hofstra.edu> [perma.cc/Z88G-6EUE].

28 *Ibid* at 15; Moschzisker, "Historic Origin", *supra* note 14 at 8.

29 Moschzisker, *Trial by Jury*, *supra* note 12 at 15.

30 *Ibid*.

31 *Ibid* at 1–27.

32 Moschzisker, "Historic Origin", *supra* note 14 at 9.

33 *Ibid* at 10.

34 John Proffatt, *Treatise on Trial by Jury, including Questions of Law and Fact: With an Introductory Chapter on the Origin and History of Jury Trial* (San Francisco: S Whitney, 1877) at 41.

accusations of wrongdoing.[35] This method of law was replaced by the Constitutions of Clarendon in 1164, a set of legislative procedures passed by Henry II of England.[36] These Constitutions declared:

> [W]here a party was suspected whom no one dared openly to accuse, the sheriff on the requisition of the bishop should swear twelve lawful men of the neighborhood…in the presence of the bishop, and these were 'to declare the truth thereof according to their conscience.'[37]

This appears to be the beginning of a body of jurors present in a criminal case after the Norman conquest of England. In these cases, the jurors were also considered the witnesses, their verdict given based on their own knowledge of the issue.[38] The jury was not permitted to "weigh circumstantial evidence under legal rules to investigate the facts, or the charge against the accused."[39] Therefore, if there were no witnesses to the crime, there would be no trial by jury prior to the rule of King Edward I in 1272.[40] In such circumstances, the accused and the accuser would be required to determine the case with a trial by combat.[41]

The Magna Carta, dated 1215, "established the belief of a right to a trial by one's peers."[42] Though this was etched in the Magna Carta, the jury did not evolve into a recognizable form of trial by jury until more than a century after it was created.[43] The only jury system that existed contemporaneously with the Magna Carta was a "jury of presentment that did not determine guilt or innocence."[44] At the beginning of the development of the jury system under English law, the accused was required to consent to be tried by a jury.[45] If the accused refused to

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35 *Ibid.*

36 *Ibid.*

37 *Ibid.*

38 *Ibid* at 43.

39 *Ibid.*

40 *Ibid.*

41 *Ibid.*

42 Thornton M Hinkle, "Magna Charta" (1899) 8:6 Yale LJ 262 at 262, 265.

43 Allen Shoenberger, "Magna Carta, the Charter of the Forest, and the Origin of the Jury System" (2015) 24 Nottingham LJ 156 at 159.

44 *Ibid.*

45 *Ibid.*

consent to the trial by jury, coercive methods could be implemented, including:

> [T]he loading of heavy stones onto the accused's chest. Many chose to die by this method rather than be tried by jury since one consequence of a guilty verdict was confiscation of the entire estate. If there was no trial there would be no forfeiture.[46]

Over time, the jury system moved from one where the jurymen were witnesses, and therefore had a working knowledge of the facts themselves, to one where they relied only on the evidence and statements provided to them.[47] The jury system in its present form became fully established by the beginning of the Tudor period, which occurred between 1485 and 1603, and certainly, more generally, the use of layperson triers are a well-established modern English phenomenon.[48]

From England to Canada

Canada received British law in the eighteenth and nineteenth centuries when it was established as a colony of Britain. In 1792 the Parliament of Upper Canada met and passed eight bills, which included the edict that the British trial by jury would be established and that the British rules of evidence would be observed.[49] The effect of this Constitutional Act was "to make Upper Canada a British Province, with English laws, English

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46 *Ibid.*

47 Proffatt, *supra* note 34 at 51.

48 *Ibid* at 52; It should be noted that in modern day England lay magistrates sit in judgment in the Magistrates' Court. This tradition goes back centuries and once again, highlights the desirability of having lay persons decide criminal cases. The concept of non-legally trained actors presiding over cases is a deeply ingrained facet of many modern criminal justice systems throughout the world. In this light it is easy to see why so many of the criminal lawyers surveyed for this article are seemingly passionate about preserving this tradition through the mechanisms of jury trials – For a discussion of the history of lay Magistrates in the Magistrates' Court in England see *The Secret Barrister: Stories of the Law and How It's Broken* (London: Picador, 2018) at 50-55.

49 Albert Richard Hassard, *Canadian Constitutional History and Law* (Toronto: Carswell, 1900) at 43.

institutions, and with all lands held on freehold tenure."[50] This lasted for less than half a century.[51]

In 1867, the British Parliament passed the *British North American Act*, which was later renamed the *Constitution Act of 1867*.[52] At this time, Canada was still a colony under British law and, as such, there was no rule for amending legislation, no Parliamentary privileges, and no Supreme Court. In 1982, British Parliament created another Constitutional Act in order to terminate the UK Parliament's authority over Canadian law, leaving Canada to amend legislations by its own authority.[53]

Today, Canadian jury selection in criminal proceedings is governed by both federal and provincial legislation. Subsection 91(27) of the *Constitution Act, 1867* confers upon the Canadian Parliament jurisdiction over "[t]he Criminal Law ... including the Procedure in Criminal Matters."[54] Subsection 92(14) of the same Act grants jurisdiction over "[t]he Administration of Justice" to the provincial legislatures.[55] Consequently, the in-court process for selecting jurors for criminal trials is established by the provisions of the *Criminal Code*, but the eligibility criteria for potential jurors are established by provincial and territorial statutes. Jurisdictional conflict is avoided by subsection 626(1) of the *Criminal Code*, which recognizes that persons are qualified to serve as jurors in a criminal proceeding if they meet the requirements established by the law of the province where the trial is to be conducted.[56]

In addition to establishing eligibility criteria, provincial and territorial laws govern the initial stages of the jury selection process. These statutes authorize the annual preparation of a jury roll by an official (usually the sheriff) in each judicial district. The roll is a list of potential jurors for all

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50 *Ibid*.

51 *Ibid*.

52 *Ibid* at 68.

53 *Constitution Act, 1982*, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

54 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(27), reprinted in RSC 1985, Appendix II, No 5.

55 *Ibid*, s 91(14).

56 Cynthia Petersen, "Institutionalized Racism: The Need for Reform of the Criminal Jury Selection Process" (1993) 38 McGill LJ 147 at 150. See also *Criminal Code*, RSC 1985, c C-46, s 626(1).

of the trials to be held during the ensuing year. The names which appear on the roll are generated in a random fashion from other pre-existing lists.[57]

What becomes clear in the forgoing discussion is the deeply rooted tradition of juries composed of lay people deciding cases. This is far from a modern invention of justice and the reverence for this deep and long tradition helps to explain some of the findings of our survey below. The professionals who operate our criminal justice system may believe strongly in, or have become accultured to the sanctity of the jury and political interreference in the jury system is met with scepticism and, at times, derision.

While there is evidence of the use of juries in various forms found in countries throughout the world, modern Canadian juries are constituted with their own particular set of challenges. Canadian juries may reflect many aspects of these ancient juries as well as, more directly, the jury systems of modern nations such as England. However, Canada's laws and the division of powers found in the Canadian Constitution reflect the jury systems of the past but establish a jury system that endeavours to be capable of operating in modern society's complex legal system. One area of acute modern challenge has been the recent abolition of peremptory challenges. In the next section, we discuss the history of peremptory challenges leading to their current context.

PART 2: CONSIDERING PEREMPTORY CHALLENGES

Various common law jurisdictions, including England, the United States, and Canada (among others), have all historically employed some variation of peremptory challenges within their jury selection process.[58] Relative to literature from the United States and England, there appears to be a dearth of comprehensive information on the history of peremptory challenges in Canada.[59] Although the current paper seeks to explore the

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57 *Ibid* at 151.

58 Judith Heinz, "Peremptory Challenges in Criminal Cases: A Comparison of Regulation in the United States, England, and Canada" (1993) 16:1 Loy LA Intl & Comp LJ 201 at 205.

59 R Blake Brown, "Challenges for Cause, Stand-Asides, and Peremptory Challenges in the Nineteenth Century" (2000) 38:3 Osgoode Hall LJ 453 at 455.

history of Canada's peremptories, to truly understand their basis in Canadian law, it is important to first document the history of peremptories in England.

History of Peremptory Challenges in England

Although their precise origin is not fully clear, it is generally accepted that juries were being used within the English court system by the twelfth century.[60] More specifically, peremptory challenges are thought to have originated within the English jury system in the Middle Ages.[61] In its earliest form, the Crown alone was allotted an unlimited number of peremptory challenges.[62] There was, however, justification for this uneven distribution. Namely, it was due to the composition of juries at that time which were expected to be composed of community members who possessed some personal awareness of the facts of the alleged crime.[63] It was the Crown who was tasked with achieving this particular form of jury.[64]

As Heinz (1993) notes, however, the makeup of the ideal jury changed over time from being one comprised of 'fact knowers' to one of 'fact finders.'[65] As the role of the juror changed, there was a greater impetus for achieving neutrality or impartiality among the jury pool.[66] As this shift occurred, so too did the Crown's role in the selection of juries, and by 1305 Parliament abolished the Crown's unlimited peremptory challenges.[67] Evidently, having a jury comprised almost exclusively of Crown-selected jurors would be antithetical to the drive toward neutrality.[68]

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60 *Ibid* at 458.

61 Heinz, *supra* note 58 at 207.

62 *Ibid.*

63 *Ibid.*

64 *Ibid* at 208.

65 *Ibid.*

66 *Ibid.*

67 *Ibid.*

68 *Ibid.*

In lieu of peremptory challenges, the Crown instead began to rely on what were known as 'stand-asides' or 'standbys' well into the nineteenth century.[69] Though Parliament had ostensibly attempted to 'democratize' the jury system by removing the Crown's unlimited peremptory challenges, jurists soon began to use standbys as a workaround, which effectively supplanted the old regime and allotted an analogous power to the Crown.[70] The Crown was able to use their standby to ensure that a prospective juror was temporarily exempted from consideration; in theory, the juror was to be challenged for cause at a later time by the prosecution.[71] At the time of the standby, however, the Crown did not need to explain nor justify their decision.[72]

In reality, most of the jurors who were put on standby were never called back for any challenge for cause as this task occurred toward the end of the selection process and, by that time, would have typically been complete.[73] In removing the Crown's unlimited peremptory challenges, the legislation of 1305 may have inadvertently given the Crown "a more powerful method of excluding jurors than the peremptory challenge."[74]

Despite this early removal of peremptory challenges for the Crown, the defence retained their ability to excuse jurors without cause.[75] Primarily, this was done to bolster trial fairness for the accused.[76] In the late 1400s, an accused charged with a felony was permitted thirty-five peremptory challenges, although in the 1540s that number was decreased to twenty; in 1555, the number was increased to thirty-five, but only for those accused of treason.[77]

It appears that, for a myriad of reasons, jury challenges of all forms were rare in early English criminal jury trials.[78] One such reason was that

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69 Brown, *supra* note 59 at 457.

70 Heinz, *supra* note 58 at 209.

71 *Ibid.*

72 *Ibid.*

73 *Ibid.*

74 Brown, *supra* note 59 at 459.

75 *Ibid* at 457.

76 Heinz, *supra* note 58 at 211.

77 Brown, *supra* note 59 at 458–459.

78 *Ibid* at 459.

the early courts required that an accused bear the burden of challenging jurors personally; this was the case up until, at least, the 1720s and was so even when an accused had counsel.[79] Regarding procedure, the eighteenth century courts appeared to rely on several general rules of practice. For example, an accused was permitted to bring either a peremptory challenge or a challenge for cause against a prospective juror; however, if the accused were to be unsuccessful in bringing a challenge for cause, they could instead utilize the peremptory challenge.[80]

By the late eighteenth and early nineteenth centuries, despite "increased lawyerization" and the "the emergence of criminal trial lawyers", accused persons in England saw their ability to challenge for cause narrowed by the courts.[81] Conversely, the Crown at this time continued to make gains in their use of standbys due to increasingly large jury pools.[82] The notion that standbys had, in effect, replaced the Crown's peremptory challenges did not go unnoticed by defendants and several early cases attempted to rectify this apparent imbalance, without success.[83]

In one such case, *R v O'Coigly* (1798), the court essentially closed the door to further arguments against the Crown's use of standbys, with one Justice noting that this area of the law was "as firmly and as fully settled on this point, as any one question that can arise on the law of England."[84] The Crown's generous use of standbys was thus left unchanged (though not unchallenged)[85] throughout the nineteenth century.[86]

During the nineteenth century, defendants continued to experience setbacks regarding their ability to challenge jurors. While the courts

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79 *Ibid* at 460.

80 *Ibid* at 461.

81 *Ibid* at 463.

82 *Ibid*.

83 *Ibid* at 464 (See also Trial of Christopher Layer [1722]; Trial of John Home Tooke [1794]; [1798] 26 Howell's State Trials 1191).

84 *Ibid* at 464.

85 *Ibid* ("[f]or example, a defendant unsuccessfully raised the issue of jury pool size in 1817, and in 1839 Frederick Pollock unsuccessfully argued against the Crown's right to stand-aside jurors in *R. v. John Frost*, despite a panel consisting of over three hundred potential jurors. In the 1857 case *Mansell v. R.*, the English judiciary was again unwilling to consider the problematic expansion of jury pools" at 465).

86 *Ibid* at 464.

continued to limit what defendants could challenge for cause, they retained their peremptory challenges; however, due to the Crown's ability to assign jurors to standby, defence efforts to secure an impartial jury would have been arduous.[87] As a result, challenges were never fully realized in the early English courts.[88]

After the passing of the *Criminal Justice Act* of 1988, defendants in England lost their right to peremptory challenges entirely and, at the same time, the "Crown's use of the standby was severely curtailed."[89] The justification for the removal of peremptory challenges was due to government claims that defendants had a tendency to abuse their peremptories in order to remove any jurors sympathetic to the Crown, resulting in fewer convictions. The claim, however, was not backed up by any empirical evidence, instead, the "Government's case for the abolition of peremptory challenges was based on 'logic and common sense' rather than on statistical evidence."[90]

History of Peremptory Challenges in Canada

Up until the nineteenth century, the progression of the Canadian jury system was virtually analogous to that of England.[91] Perhaps not surprisingly, however, throughout the nineteenth century, the Canadian system began to adopt legal traditions from both the UK and US.[92] Though historical information relating specifically to the progression of challenges in Canadian courts in the early nineteenth century is somewhat scarce, it does appear that Canada was primarily influenced by the English system, particularly as it related to challenges for cause.[93] Despite this, there were indicators that Upper Canada was at least aware of, if not

87 *Ibid* at 468.

88 *Ibid.*

89 Heinz, *supra* note 58 at 217.

90 *Ibid* at 219.

91 Brown, *supra* note 59 at 479.

92 *Ibid.*

93 *Ibid* at 480.

amenable to, some elements from the US courts, particularly regarding peremptory challenges.[94]

There is some record of the use of peremptory challenges in Canadian jury trials during the mid-eighteenth and nineteenth centuries. Records demonstrate that Nova Scotia courts made use of peremptory challenges in several high-profile cases; in one, (a 1754 murder trial), the accused peremptorily challenged nine jurors and the Crown, two; in another 1814 trial, twelve jurors were peremptorily challenged.[95]

While challenges for cause in Canada continued to follow the English tradition well into the 1900s, peremptory challenges were largely influenced by American jurisprudence and legislation in several important ways. First, unlike in English law, American law permitted peremptory challenges in misdemeanor charges – so too did Canada.[96] Nova Scotia was the first to permit peremptories for misdemeanours in 1838, followed by New Brunswick in 1848, and then Upper Canada in 1850; PEI was the last to follow suit in 1861.[97] Most of these provinces offered three to four challenges for defendants, although these numbers varied.[98]

Outside of misdemeanours, the numbers of peremptory challenges also varied greatly, the *Jury Act of Upper Canada* (1850) allotted twenty for defendants in felony or murder trials, while, as of 1854, New Brunswick permitted twelve for treason or capital offence trials and six for other felonies.[99] Ostensibly, Canadian courts also diverged from the English system by allowing peremptory challenges for the prosecution.[100] Like the US, both Nova Scotia and New Brunswick permitted Crown peremptories, (in 1838 and 1848, respectively); conversely, legislation and case law from Upper Canada demonstrates that they did not permit Crown peremptories until after Confederation, instead, following the English rule permitting standbys.[101]

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94 *Ibid.*

95 *Ibid* at 481.

96 *Ibid* at 483.

97 *Ibid* at 483–484.

98 *Ibid.*

99 *Ibid* at 484.

100 *Ibid.*

101 *Ibid* at 484–486.

In 1869, shortly after Confederation, the various acts of the provinces were consolidated into one piece of legislation which adopted the peremptory challenge allotments of Upper Canada.[102] Where the charges were treason or capital felonies, defendants were permitted twenty peremptories; for other felonies, twelve; and in misdemeanours, four peremptories were allotted to the defendants.[103] Interestingly, the 1869 legislation also provided the Crown with four peremptories, ostensibly following Nova Scotia and New Brunswick.

This distribution of peremptory challenges remained largely unchanged until 1892 when Canada's first *Criminal Code* slightly altered the legislation by reducing the number of defence peremptories for 'other felonies' from twelve to four, unless conviction could result in five years or more of imprisonment.[104] Interestingly, the *Criminal Code* of 1892 retained the four Crown peremptories (as per Nova Scotia and New Brunswick) while also maintaining the Crown's unlimited standbys (as per Upper Canada).[105] It was not until 1917 that the Crown saw their number of standbys reduced to forty-eight.[106]

Peremptory Challenges in the Twentieth Century

By 1993, both the defence and the Crown in Canada were awarded equal peremptory challenges.[107] Shortly before this, however, the Crown was permitted four peremptories and forty-eight standbys and, depending on the offence, defendants were permitted twenty, twelve, or four peremptories.[108] It was not until the 1992 case of *Bain v The Queen* that the Supreme Court of Canada "radically curtailed the jury selection power of the Crown prosecutor and commanded the Canadian Parliament to rectify the imbalance between the Crown and the accused."[109]

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102 *Ibid* at 491.

103 *Ibid.*

104 *Ibid* at 491.

105 Heinz, *supra* note 58 at 212.

106 *Ibid.*

107 *Ibid* at 211.

108 *Ibid* at 224.

109 *Ibid* at 225.

In *Bain*, the SCC held that the Crown's ability to standby jurors was, in fact, unconstitutional, thereby striking down the *Criminal Code* provision which allowed it.[110] Specifically, Crown standbys were found to be a breach of s 11(d) of the *Canadian Charter of Rights and Freedoms*, which guarantees the right to a fair trial by an independent and impartial tribunal.[111] Shortly thereafter, legislation was passed by Parliament which abolished Crown standbys in Canada, and instead, afforded an equal number of peremptories to the Crown and defence.[112]

Parliamentary debates which occurred prior to the passing of the legislation demonstrated some of the values underlying the move to distribute equal peremptory challenges among the Crown and defence. On the one hand, it was asserted that the move would bring a greater degree of public trust in the justice system, as the values of impartiality and fairness would be more readily seen by the public.[113] Further still, some argued in favour of the total abolishment of Crown peremptory challenges, claiming that, given the overarching power of the State, accused are already inherently disadvantaged relative to the Crown.[114]

On the other hand, it was pointed out that the Crown is meant to represent the interests of the Canadian people, so to do away with Crown peremptories would be antithetical to this interest.[115] Another line of argument that emerged during the debates related to the risk that peremptory challenges could be used in a way that was discriminatory.[116] Here, several members of the House of Commons argued that the "legislation did not solve the central problem – 'that juries do not reflect the demographics . . . of the communities they should represent.'"[117] The representativeness of juries continued to be an important factor in political and legal debates long after the passing of this legislation.

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110 Brown, *supra* note 59 at 445.

111 Heinz, *supra* note 58 at 225.

112 *Ibid* at 227.

113 *Ibid* at 228.

114 *Ibid*.

115 *Ibid*.

116 *Ibid*.

117 *Ibid* at 229.

Representativeness and the potential for racialized bias has preoccupied legal debate since at least the late twentieth century.[118] In *R v Sherratt* (1991), the SCC took the opportunity to comment on the important role that peremptory challenges had in upholding the ideals of an impartial and representative jury, however, the court also acknowledged that peremptories can be exploited by parties if being used "merely to 'over- or under represent a certain class in society.'"[119]

Furthermore, throughout the early 1990s, Canadian courts continued to move towards US-style challenges for cause by permitting that jurors be asked about their racial bias toward Black and Indigenous accused, in *R v Parks* and *R v Williams*, respectively.[120] Despite this, race-based peremptories were never prohibited by Canadian courts; in the US, both the prosecution and the defence are barred from using peremptory challenges in a "racially discriminatory manner."[121]

Peremptory Challenges in the Twenty-First Century

On March 29, 2018, the Government introduced Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*. On June 21, 2019 it received Royal Assent. Bill C-75 brought sweeping changes to the Canadian *Criminal Code*, specifically in areas related to jury selection, preliminary hearings, and bail provisions. At the time of writing, there are no longer peremptory challenges in Canada.[122] As of September 2019, when Bill C-75 came into effect, peremptory challenges were eliminated.[123] Prior to this, section 634 of the *Criminal Code of Canada* stipulated the amount of

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118 *Ibid* at 230.

119 Canada, Library of Parliament, *Legislative Summary of Bill C-75: An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, by Laura Barnett et al (Legislative Summary - Publication No 42-1-C75-E) (Ottawa, 2018) at 16, online (pdf): *Library of Parliament* <https://lop.parl.ca> [perma.cc/GZN7-QJEH].

120 Brown, *supra* note 59 at 445.

121 Heinz, *supra* note 58 at 237.

122 Barnett et al, *supra* note 119 at 17.

123 *Ibid* at 16.

peremptories permitted for each side, and that number varied depending on the charge(s).[124]

What prompted Parliament to make these sweeping changes was the growing concern that peremptory challenges were being used to promote discrimination and create juries which did not reflect the Canadian population. Calls for change to the jury selection process were not a new phenomenon. In fact, Canadian Parliament had been lobbied for decades to make amendments to the jury process. For example, the removal of peremptory challenges was recommended in the 1991 report of Manitoba's Aboriginal Justice Inquiry and by 2019, other common law countries, such as England, Scotland, and Northern Ireland had already abolished peremptory challenges.[125]

Bill C-75 was tabled following the controversy that swept across Canada after the acquittal of Gerald Stanley (a white man) for the killing of Colten Boushie (a young Indigenous man).[126] The accused in *R v Stanley* (2018) was acquitted by an all-white jury after the defence challenged all five jurors who had an "Indigenous appearance."[127] The change to Canada's peremptory challenges legislation was introduced in Bill C-75 into Parliament forty-eight days after the Gerald Stanley decision. Suffice to say, while the *Stanley* verdict certainly played a role in the abolition of peremptories, there had, in fact, long been calls for the reform or abolition of peremptory challenges in Canada.[128]

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124 *Ibid.*

125 AC Hamilton & CM Sinclair, "Report of the Aboriginal Justice Inquiry of Manitoba" (1991), online: *The Aboriginal Justice Implementation Commission (AJIC)* <www.ajic.mb.ca/volumel/chapter9.html#10> [perma.cc/S2PE-MW3T]; It should be noted that there was a steady downward trajectory of peremptory challenges in England over a period of hundreds of years until their eventual demise in 1988. While reasons for this may have included a difficulty in procuring sufficient jurors, the final decision to ban peremptory challenges in England seems to have been perceived defence manipulations of the petit jury, see Raymond J Broderick "Why the Peremptory Challenge Should be Abolished" (1992) 65 Temple L Rev 369 at 373. This is similar to the current Canadian experience regarding Bill C-75.

126 Barnett et al, *supra* note 119 at 16.

127 *Ibid.*

128 Christopher Salahub, *Seen to be Done: A Graphical Investigation of Peremptory Challenge* (Master Thesis, Swiss Federal Institute of Technology - Department of Mathematics, 2019) [unpublished] at 8, online (pdf): <www.uwaterloo.ca> [perma.cc/3FNY-WAJE].

For example, Salahub (2018) argues that there is an abundance of social science research that demonstrates that peremptory challenges tend to be used by counsel to stack the jury in their favour, which inexorably produces "juries which are biased towards conviction or acquittal and may include a higher proportion of extremely biased members of the population."[129]

Despite this, according to the Canadian Bar Association's *National* magazine, some defence counsel view the move to quash peremptories as a knee-jerk reaction that may inadvertently make issues of diversity, fairness, and representativeness worse-off.[130] Though, in Canada, peremptories could be used to remove jurors based on factors such as gender or race, some lawyers argue that such factors do not normally inform their peremptory challenges; alternatively, those who represent accused persons from racialized minority groups or marginalized communities assert that their clients have a right to a jury that shares their identity characteristics.[131] Indeed, some argue that the way in which peremptories were used in *Stanley* represent the exception, rather than the rule, regarding the normal usage of peremptory challenges in Canada.[132]

Anecdotally, defence counsel indicate that they have experienced these scenarios first-hand. In a 2018 *CBA National* article, lawyer Allison Craig wrote about a case in which she was representing a Black accused in a small Ontario town.[133] When Craig and her client walked into the courtroom for jury selection, she recalls seeing "199 white faces staring back" at her, just one of the two-hundred potential jurors was Black.[134] Craig's client was "understandably petrified," but, at the very least, Craig was able to use her peremptory challenges to ensure that her client was not tried by an all-white jury.[135]

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129 *Ibid* at 9.

130 Justin Ling, "Trial and error: criminal justice reform" (24 May 2018) at paras 3–5, 15, 33, online: *CBA The National* <www.nationalmagazine.ca> [perma.cc/2QQA-WLQ2].

131 *Ibid* at paras 24, 29–30.

132 Dale Smith, "The retrospectivity of ending peremptory challenges" (21 May 2019) at para 9, online: *CBA The National* <www.nationalmagazine.ca> [perma.cc/ATX9-MXJN].

133 Ling, *supra* note 130 at para 32.

134 *Ibid.*

135 *Ibid.*

In the same vein, while lawyers acknowledge that the defence in the *Stanley* case may have used their peremptories to suit their own ends, they argue that the *Stanley* verdict is not indicative of how peremptory challenges are used more broadly; instead, they form an important tool "used in the vast majority of cases by the very marginalized and racialized groups the changes seek to support."[136] Indeed, while Bill C-75 may have arisen out of a notion that peremptory challenges made juries unrepresentative, some defence counsel maintain that they were, in fact, used to make juries *more* representative.[137]

As an aside, if obtaining a more representative jury is one of the motivations for the removal of peremptory challenges, then some lawyers contend that there are more pressing and contentious areas for reform. Counsel have argued that their clients have not received impartial nor representative juries, not due to peremptories, however, but rather due to the jurisdiction's method of obtaining their jury rolls.[138]

The SCC, in *R v Kokopenace*, held that, when considering representativeness in the context of juries, Canadians have "no right to a jury roll of a particular composition, nor to one that proportionately represents all the diverse groups in Canadian society. Courts have consistently rejected the idea that an accused is entitled to a particular number of individuals of his or her race on either the jury roll or petit jury."[139]

Following the enactment of Bill C-75, the decision as to whether peremptory challenges would apply retrospectively or prospectively was a heavily debated issue. As the Court in *R v Ismail* pointed out, "[d]espite being readily foreseeable that the repeal would be contentious, and challenged in court, Parliament did not clarify by express wording whether the repeal of peremptory challenges was to apply retrospectively to all jury cases in the system, or prospectively only to charges filed after September 19, 2019."[140]

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136 *Ibid* at para 33.

137 Smith, *supra* note 132 at para 18.

138 *Ibid* at paras 15–16.

139 *R v Kokopenace*, 2015 SCC 28 at para 39 [*Kokopenace*].

140 *R v Ismail et al*, 2019 MBQB 150 at para 2 [*Ismail*].

The Manitoba Court of Queen's Bench released four decisions regarding whether the peremptory challenge legislation should apply prospectively or retrospectively shortly after the issue came before the courts. The pivotal case outlining the principles required to make this determination is *R v Dineley*.[141] The Supreme Court in *Dineley* discussed in paragraphs 10 and 11 the principles of interpretation a court needs to consider when determining if legislation applies retroactively:

> [10] There are a number of rules of interpretation that can be helpful in identifying the situations to which new legislation applies. Because of the need for certainty as to the legal consequences that attach to past facts and conduct, courts have long recognized that the cases in which legislation has retrospective effect must be exceptional. More specifically, where legislative provisions affect either vested or substantive rights, retrospectivity has been found to be undesirable. New legislation that affects substantive rights will be presumed to have only prospective effect unless it is possible to discern a clear legislative intent that it is to apply retrospectively (*Angus v. Sun Alliance Insurance Co.*, 1988 CanLII 5 (SCC), [1988] 2 S.C.R. 256, at pp. 266-67; *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248, at para. 57; *Wildman v. The Queen*, 1984 CanLII 82 (SCC), [1984] 2 S.C.R. 311, at pp. 331-32). However, new procedural legislation designed to govern only the manner in which rights are asserted or enforced does not affect the substance of those rights. Such legislation is presumed to apply immediately to both pending and future cases (*Application under s. 83.28 of the Criminal Code (Re)*, at paras. 57 and 62; *Wildman*, at p. 331).
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> [11] Not all provisions dealing with procedure will have retrospective effect. Procedural provisions may, in their application, affect substantive rights. If they do, they are not purely procedural and do not apply immediately (P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at p. 191). Thus, the key task in determining the temporal application of the Amendments at issue in the instant case lies not in labelling the provisions "procedural" or "substantive", but in discerning whether they affect substantive rights.[142]

The first Manitoban decision to consider whether the new peremptory legislation applied retroactively was *R v Ismail et al.*[143] The Court in *Ismail* applied the principles laid out by the Supreme Court stating, "[t]he starting point for any analysis is applying principles of statutory

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141 *R v Dineley*, 2012 SCC 58 at paras 10–11 [*Dineley*].

142 *Ibid.*

143 *Ismail, supra* note 140.

interpretation and the test of whether a law affects substantive rights or is only procedural."[144]

Ultimately, the Court in *Ismail* chose to follow recent decisions made in the courts of New Brunswick and British Columbia, which found that the amendments would be a prospective change to legislation and only apply to future cases. The next Manitoba case to consider whether the new peremptory legislation applied retroactively was *R v Kon and Duke.*[145] In that case, the Manitoba Court of Queen's Bench applied the doctrine of judicial comity and followed the decision from *Ismail*. Ignoring the precedent set in Manitoba in these two cases, the Manitoba Court of Queen's Bench in *R v Stewart* departed from these decisions and determined that the peremptory repeal was retrospective and would apply to all cases currently in the judicial system. This decision was influenced by the courts in Ontario and Nova Scotia which had determined that the peremptory repeal was retrospective shortly before *R v Stewart* was decided.[146]

Thus, there is a clear split in the rulings in both Manitoba and across Canada as to whether the new peremptory challenge legislation applies retroactively or prospectively. Canadian Courts across the country all purport to be following the process laid out by Supreme Court in *Dineley,* yet they are coming to different conclusions. This national division requires the Supreme Court to make a final ruling as to the application of the new peremptory challenge legislation.

The question of whether the new legislation applies retroactively or prospectively, however, is not the only legal issue arising from the removal of peremptory challenges in Canada. Specifically, does the removal of peremptory challenges adhere to the accused's "right to be tried by an impartial panel of peers" who are required to judge the matter "fairly and impartially"?[147] Or, does having the option to remove jurors set up an opportunity for the accused to attempt to produce a more favourable jury by creating a lack of representativeness?

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144 *Ibid* at para 23.

145 *R v Kon and Duke*, 2019 MBQB 161.

146 *R v Stewart*, 2019 MBQB 171 [*Stewart*].

147 *R v Find*, 2001 SCC 32 at paras 1–2; cited in *Stewart*, *supra* note 146 at paras 84–88.

The Court in *R v Khan*, an Ontario decision which was endorsed by *R v Stewart* out of Manitoba, determined that, "[t]he amendments that will now govern how a criminal jury is selected do not change in any way the fundamental right of an accused to an independent and impartial jury. What the amendments will do is affect the manner in which a jury is selected."[148] Other common law countries, such as England, Scotland, and Northern Ireland, may have already abolished peremptory challenges, however, Canada differs in the fact that the *Charter of Rights and Freedoms* is part of its constitution.[149] The *Charter* provides Canadian citizens fundamental rights which the repeal of the peremptory challenges may potentially violate.

The most significant development regarding peremptory challenges thus far comes from a decision out of the Ontario Court of Appeal which settled whether the removal of peremptories was to apply prospectively or retrospectively.[150] In *R v Chouhan*, the Court of Appeal ruled that the accused, having elected to be tried by a jury prior to the abolition of peremptories, had been entitled to use peremptory challenges; as such, the court ordered a new trial for Chouhan and in doing so, affirmed that these changes were meant to apply prospectively.[151]

The issue of whether peremptory challenges represent a substantive right of the accused and thus any changes to the legislation should apply only prospectively, or are simply procedural in nature and thus would be presumed to apply retrospectively to all cases in the system, is an important one. Legislation that affects substantive rights will rarely be applied retrospectively due to the significant impact such changes could have on an accused. A determination by the Supreme Court of Canada that abolishing peremptory challenges was a substantive change would therefore be likely to engage a robust *Charter* analysis.

While most cases so far have dealt with peremptory challenges as a prospective or retrospective legislation, the Ontario Court of Appeal in

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148 *R v Khan*, 2019 ONSC 5646 at paras 28, 29, cited in *Stewart*, *supra* note 146 at para 89.

149 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

150 Smith, *supra* note 132 at para 1.

151 *Ibid.*

Chouhan also addressed "whether [the] repeal of s. 634 of *Criminal Code* and amendments to s. 640 of *Code* were of no force and effect under s. 52(1) of *Constitution Act, 1982* on basis of violation of s. 11(d), s. 11(f) and s. 7 of *Canadian Charter of Rights and Freedoms*."[152] The Court found there was not a violation of section 11(d) of the *Charter* stating:

> [85] [...] A fair hearing by an impartial jury is the constitutional requirement. Neither component guarantees a particular process or that peremptory challenges are a part of that process. Nor does s. 11(d) guarantee that the process be the most advantageous to an accused or perfect in the eyes of an accused. What is required is a prevailing system of jury selection, consisting of the sum of its various components, that results in a fair trial. What remains after the abolition of peremptory challenges does so.[153]

The Court also found there was not a violation of section 11(f) of the *Charter* because there was no violation of s. 11(d) and the only broader protection offered by s. 11(f) was to a "trial by jury" and such a protection was not impacted by the abolition of peremptory challenges.[154]

Finally, the Court also found there was not a violation of section 7 of the *Charter* holding that the appellant could not establish a causal connection between the abolition of peremptory challenges and his right to liberty and security of the person. The court also noted that the rejection of the s. 11(d) claim was dispositive of any subsequent s. 7 claim.[155]

Inevitably, as discussed in our introduction, the decision in *Chouhan* spurred competing decisions and cases arguing for retroactive or prospective application of the law would ultimately proliferate further confusion.[156] Undoubtedly, these disparate practices likely contributed to the decision on May 7, 2020, of the Supreme Court of Canada that granted leave to appeal the *Chouhan* decision out of the Ontario Court of Appeal; the Court also granted leave to a cross-appeal by Chouhan which

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152 *Chouhan* CA, *supra* note 8 at para 17.

153 *Ibid* at para 85.

154 *Ibid* at paras 107–110.

155 *Ibid* at paras 12–136.

156 Smith, *supra* note 132 at para 11.

challenges the elimination of peremptory challenges as a matter of constitutional principle.[157]

The hasty repeal of peremptory challenges in Canada thus brings to prominence two broad legal issues. The first, whether the effect of the legislation is retroactive or prospective remains unresolved nationally and even intra-provincially. The Supreme Court will need to make a final determination on this issue. The second, is whether the repeal of peremptory challenges in Canada violates the *Charter*, particularly, issues pertaining to sections 11(d) and 11(f) of the *Charter* are in play.

Although the above makes it clear that peremptory challenges can be highly problematic in jury trials, some question whether the wholesale abolishment of peremptories was the correct response; there are certainly some within the legal community who feel that Parliament neglected to fully consider the input of "on the ground" stakeholders when drafting Bill C-75.[158]

The Criminal Justice Section of the Canadian Bar Association, in a 2018 submission, acknowledged that "[t]he Stanley verdict has sparked an important conversation" but further noted that "the conversation should not end with a knee-jerk legislative response. Instead, it should signal the beginning of a detailed examination of how best to improve Canada's jury system."[159]

The decision of the SCC in the *Chouhan* appeal – and thereby the future of peremptory challenges in Canada – remains to be seen, but hopefully the Supreme Court will bring some closure and clarity to this area of the law.

A comprehensive understanding of the current regime is incomplete without understanding the views of legal professionals. In the following sections, we discuss the results of our survey of this population and demarcate limitations in the new peremptory regime that they delineated. Below, we describe the nature of the study and then we describe our results. The discussion demonstrates deep dissatisfaction with the new peremptory regime amongst Crown and defence counsel.

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157 *Ibid* at para 2.

158 *Ibid* at para 13.

159 *Ibid* at para 7.

PART 3: METHOD AND RESULTS OF SURVEY

In order to more fully understand how the removal of peremptory challenges was perceived by legal professionals, we sought the opinions of those who would be expected to navigate these changes – Canadian Crown and defence counsel practicing in the area of criminal law. Broadly speaking, our questions solicited opinions regarding whether counsel thought that the removal of peremptory challenges would have an overall positive or negative impact on jury trials and what those impacts were, and whether they had any concerns with how or why the federal government had made the decision to remove peremptory challenges.[160]

We conducted an online survey with 59 Canadian Crown and defence counsel practicing in the area of criminal law between October 10 and December 13, 2019. The Canadian Crown counsel comprised thirty of our respondents while twenty-nine identified as defence counsel.[161] Thus, we had almost equal numbers of Crown and defence counsel complete our survey, ensuring that we have a balanced sample in terms of the opinions from both 'sides' being equally represented.

We will now briefly discuss the demographics of our respondents so that readers are confident a variety of opinions are represented in our survey. The respondents represented a range of levels of experience as lawyers, though most were called to the bar within the last twenty years.[162] Respondents primarily self-identified as male (n = 37) or female (n = 21), with one respondent indicating they preferred not to provide their gender.[163] While we do have representation from persons of colour,

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160 In order to ensure participants felt confident that they would not be identified through their participation in this survey, we specified within our ethics approval protocol, and to our respondents, that we would only provide aggregate information and compare responses at the national level. We also indicated we would omit any potentially identifying information from analyses and write-ups.

161 Although we attempted to recruit judges to complete our survey, none did so. Reasons for declination, when provided, indicated that as our questions pertained to an ongoing matter in the courts, they felt it was inappropriate for judges to comment.

162 Where 'n' is used, this is shorthand to indicate a subset of our sample. Responding counsel were varied in their years called to the bar: 1970 – 1979 (n = 2); 1980 – 1989 (n = 7); 1990 – 1999 (n = 11); 2000 – 2009 (n = 17); and 2010 – 2019 (n = 22).

163 We did provide respondents other non-binary options for gender, but none chose those options.

approximately three-quarters of our sample identified as white.[164] Importantly, we had responses from counsel across Canada: eight different provinces and one territory.[165]

Notes on Sample Size and Representativeness

Though our sample size of fifty-nine may be considered small by typical survey standards, our population of interest was Crown and defence counsel who had been counsel on a criminal jury trial. Given that relatively small number of criminal jury trials occur in Canada each year, the prospective pool of lawyers who are involved in criminal jury trials is likely also small. For example, in Manitoba during the 2018/19 fiscal year, only twenty-one jury trials took place.[166] Based on Manitoba's population of 1,364,400 at that time, this works out to approximately 1.54 jury trials per 100,000 residents.[167] We were unable to obtain similar exact information for other provinces, but we arrived at an estimate for the total number of jury trials in Canada by assuming the same number of jury trials per 100,000 residents in each province as we found in Manitoba. This extrapolation resulted in an estimate of 576 jury trials in Canada for the 2018/19 fiscal year. This means that the pool of Crown and defence counsel who have experience as counsel on a jury trial are likely to be small relative to the total number of counsel practicing in the area of criminal law (for example, the Federation of Law Societies of Canada lists 66519 members in 2017 for total amount of lawyers in Canada, and the Criminal Lawyers Association only has 1500 active members as of 2020).

In addition, though we do not have respondents from every province and territory, our respondents represent all five major regions in Canada:

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164 Respondents identified their ethnic ancestry as European (i.e., white) (n = 43), Mixed Ancestry (n = 4), South Asian (n = 1), Indigenous (n = 1), and Middle Eastern (n = 1), while several preferred not to say (n = 9).

165 Alberta (n = 13), British Columbia (n = 10), Manitoba (n = 14), New Brunswick (n = 3), Newfoundland and Labrador (n = 2), Northwest Territories (n =4), Nova Scotia, (n = 3), Ontario (n = 8), and Saskatchewan (n = 2).

166 Jamie Krilyk, Department of Justice, Government of Manitoba (personal communication, 29 January 2020).

167 "Table 17-10-0009-01 Population estimates, quarterly" (last modified 22 June 2020), online: *Statistics Canada* <www150.statcan.gc.ca> [perma.cc/4PWC-RZGE].

Atlantic, Central, Prairie, West Coast, and North.[168] This provides confidence that our findings represent the opinions of counsel across Canada, and not just those from a particular region.

Recruitment and Procedure

We attempted to recruit widely across Canada. All recruitment took place electronically with initial contacts being made through email.[169] The recruitment email contained the link to the survey and a brief outline of the research. Some individuals and organizations requested a copy of all survey questions to review prior to sending it to their membership. When so requested, we provided the questions for review and answered any questions.

Upon clicking on the survey link, all respondents answered an initial screening question to determine their eligibility for the survey.[170] Prior to being asked any questions, respondents read a letter of information and consent which detailed the types of questions we would be asking, how their answers would be used, and the steps we were taking to maintain confidentiality of their identities. Respondents then either indicated their consent to participate, or that they wished to exit the survey.

All those who consented to participate in this survey were asked the same questions, regardless of their role in the criminal justice system (e.g.,

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168 "Discover Canada - Canada's Regions" (last modified 1 July 2012), online: *Government of Canada* <www.canada.ca> [perma.cc/BU2G-84BA].

169 We found email addresses in two ways: through personal contacts of two co-authors who are legal scholars, and through an internet search for Canadian organizations and associations who had practicing lawyers as members. In total, approximately twenty emails were sent to personal contacts who were practicing lawyers with a request to distribute the survey to the contacts' network. An additional 160 'cold' emails were sent to the Canadian organizations and associations found through the internet search. Although we did not ask these organizations to reply to our email, twenty-three informed us that they would distribute the survey to their membership while ten others declined to do so. The remaining organizations did not respond in any way, so we do not know whether they did, or did not, distribute the survey to their membership.

170 Anyone who indicated they were not currently a Canadian Crown Counsel, defence counsel, or judge, in the area of criminal law was redirected to a page thanking them for their interest and letting them know they were not eligible for the survey. All respondents who met the stated criteria were able to continue through to the survey.

Crown counsel or defence counsel).[171] After completing the survey, each respondent was given the opportunity to enter to win one of three Amazon Fire HD 8" 32 GB tablets.[172]

Results and Discussion

We now describe responses from the survey questions pertaining to peremptory challenges. We asked participants both closed- and open-ended questions regarding whether they thought eliminating peremptory challenges would have a positive or negative impact on jury trials, and whether they had any concerns about how or why the government made the decision to eliminate peremptory challenges.

Will Removal of Peremptory Challenges Have a Positive or Negative Impact on Jury Trials?

We first asked respondents to rate what type of impact they believed the elimination of peremptory challenges would have on jury trials using five options ranging from 'Very Negative' to 'Very Positive' (see Table 1 below for results).

Table 1. Percentage of respondents' choices when asked to rate what type of impact they believed the elimination of peremptory challenges would have on jury trials[173]

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171 Although the full survey comprised several topics, here we only focus on the questions relevant to peremptory challenges.

172 In order to prevent their responses being associated with their contact information, a separate link/database was created specifically for the collection of prize draw information. Respondents were automatically redirected to this link at the end of the survey. Winners were chosen by random selection and prizes were mailed to the winners in February, 2020.

173 Note that respondents had the option to decline to answer questions, so the totals do not equal the full sample size. Percentages are presented to provide an equivalent basis of comparison given the unequal numbers of respondents between Crown and defence counsel.

	Very negative	Somewhat negative	Neither positive nor negative	Somewhat positive	Very positive
Crown (n = 27)	14.81	55.56	14.81	7.41	7.41
Defence (n = 29)	68.97	24.14	3.45	3.45	0.00

First and foremost, it is important to note that Crown and defence counsel were by and large united in their opinions that removing peremptory challenges would overwhelmingly have a negative impact on jury selection and jury trials in Canada. Fully 70.37% of responding Crown and 93.10% of defence counsel indicated they thought this change would have a 'very negative' or 'somewhat negative' impact on jury trials. Very few respondents, regardless of whether they were Crown or defence, thought the elimination of peremptory challenges would have a positive impact.

Of note, though, is that defence counsel were more negative in their assessments than Crown counsel. A greater percentage of defence (68.97%) than Crown (14.81%) thought the elimination of peremptory challenges would have a 'very negative' impact; fewer defence (24.14%) than Crown (55.56%) thought the change would have a 'somewhat negative' impact.

To the previous point, and conversely, Crown counsel respondents indicated more ambivalence regarding the impact on jury trials with the elimination of peremptory challenges, and also more positive perceptions of this impact, with 14.82% indicating that it would have a 'somewhat' or 'very' positive impact on jury trials. To note, though, this latter percentage represents only four respondents. No defence counsel indicated they thought this change would have a 'very positive' impact, and only 3.45% (i.e., one respondent) thought it would have a 'somewhat positive' impact.

Regardless of how they answered the question, all respondents received the same two follow-up questions:

> 1) What **positive** impacts, if any, do you believe the elimination of peremptory challenges will have on jury trials?
> 2) What **negative** impacts, if any, do you believe the elimination of peremptory challenges will have on jury trials?

Both questions were open-ended questions and presented on the same page (i.e., respondents saw both questions at the same time). Our results are delineated in Tables 2 and 3.[174]

Table 2. Themes identified regarding the perceived positive impacts of the elimination of peremptory challenges[175]

There are no positive impacts in eliminating peremptory challenges	Administrative efficiency will be increased	Subjective jury composition issues will be positively impacted	Fairness/ Administration of Justice in jury selection - positive impact	Other response
37.1% (13)	20.0% (7)	25.7% (9)	34.3% (12)	2.9% (1)

Table 3. Themes identified regarding the perceived negative impacts of the elimination of peremptory challenges[176]

174 We note that only thirty-five respondents provided a written response to the question about the positive impacts and only thirty-eight provided a written response regarding the negative impacts. To analyze this data, one of the authors first read through all responses for each question to identify common themes in the answers respondents provided. The generated themes were discussed with and refined in conjunction with another author. After finalizing these themes, two other authors independently coded each individual response to determine whether the responses did or did not align with one or more themes. Any disagreements in coding were resolved through discussion between these two coders. As per our ethical approval, respondents had to be free to decline to answer any questions. As such, not all respondents will have answered all questions presented in this paper.

175 The numbers in brackets indicate the number of respondents who gave that response. Percentages were calculated based on the number of respondents whose answers fell into a particular category out of the thirty-five who provided a written response. Note that percentages do not equal 100% because respondents' answers could fall into more than one category.

176 The numbers in brackets indicate the number of respondents who gave that response. Percentages were calculated based on the number of respondents whose answers fell into a particular category out of the thirty-eight who provided a written response. Note that percentages do not equal 100% because respondents' answers could fall into more than one category.

There are no negative impacts of eliminating peremptory challenges	Administrative efficiency will be decreased	Subjective jury composition issues will be negatively impacted	Fairness/ Administration of Justice in jury selection - negative impact	Negative impacts specific to the accused	Other response
2.6% (1)	23.7% (9)	65.8% (25)	44.7% (17)	36.8% (14)	5.3% (2)

We will now discuss the themes identified in Tables 2 and 3 – the perceived positive and negative impacts of eliminating peremptory challenges – in conjunction with each other because three broad categories of findings emerged when looking at the results in this manner. First, in some cases, respondents made opposite predictions regarding the impact that eliminating peremptory challenges would have. Second, in other instances, the same issue was identified as being both a positive and a negative depending on the respondents' viewpoints. Third, there were predicted negative impacts unique to accused persons. We will now discuss each of these broad findings in more detail.

Predicting Opposite Impacts

In several instances, respondents made opposite predictions regarding the impact of eliminating peremptory challenges. The most frequent response from 37.1% of respondents who answered the question was that they did not think there were any positive impacts. Many simply wrote the word '*None*' in response. In the words of one respondent who provided further elaboration: "*None. This was a terrible decision, made in response to a single high profile case. An appalling way to approach public policy.*" Another indicated: "*I can't think of any positive which isn't matched by a worse down.*" On the other hand, one respondent predicted the opposite, indicating they did not foresee any negative impacts by simply stating, "*None*" in response to the question, though this was the only respondent who stated they did not perceive there to be any negatives. Thus, though respondents made opposite predictions in this regard, far more thought there would be no positive impacts resulting from the change than vice versa.

Aspects of administrative efficiency were predicted both to be positively and negatively impacted by 20.0% and 23.7% of answering respondents, respectively. For example, some respondents predicted a positive impact in that elimination of peremptory challenges would decrease the time needed for jury selection through needing to summon

fewer citizens for jury selection. Those who thought administrative efficiency would be negatively impacted thought that the time needed for jury selection would actually increase. Reasons for this prediction included that there would be more challenges for cause and an increase in the usage of applications to stand aside jurors.

Subjective jury composition issues were also thought to be both positively and negatively impacted by 25.7% and 65.8% of answering respondents, respectively. For example, some predicted that one positive impact would be increased diversity in juries because there would be less chances to exclude marginalized persons from jury service, and specifically that race-related reasons for usage of peremptory challenges – whether intentional or not – could now not as easily play a part in jury selection. In the words of one respondent: "*It may inhibit overtly racist jury selection practices.*" However, other respondents predicted the exact opposite effect – that juries would now be less diverse without peremptory challenges. Those who thought that the change would result in less diverse juries thought that given ongoing issues with the representativeness of jury rolls, and because populations in many areas are majority white, statistically speaking, a person of colour would have less chance of being randomly selected for jury service. Related to this issue of anticipating less diverse juries was the prediction that juries would be less impartial and more biased.

Same Issue: Positive for Some and Negative for Others

While the previous section highlighted circumstances where respondents predicted opposite impacts, we also found several instances where the same issue was seen as a positive by some but a negative for others. For example, with respect to our category of 'Fairness and Administration of Justice in Jury Selection,' which 34.3% of answering respondents predicted would be positively impacted, some saw it as a positive that counsel would now not be able to use strategy in jury selection. They provided reasons such as that opposing counsel would not be able to manipulate the jury's composition to their own benefit. Respondents also noted a positive impact that counsels' personal biases could not impact jury selection, particularly with respect to potential jurors of colour – as succinctly stated by one respondent who simply said: "*Decrease impact of racism.*" Conversely, the 44.7% who thought that 'Fairness and

Administration of Justice' aspects would be negatively impacted cited the new inability to use strategy in jury selection as one of those negatives. They cited reasons such that they would now be unable to remove jurors with suspected, but likely unprovable, bias or prejudice (e.g., if the juror sneered at the accused) or someone who clearly did not want to serve as a juror but was not excused by the judge. In the words of one respondent, "*There are other factors that I looked to when picking a jury besides characteristics such as gender or race - such as expressed attitude about wanting to participate. (I tended to not pick people that tried to get excused first).*"

Another aspect of 'Fairness and Administration of Justice' that was viewed as both a positive and negative was that counsel would now have to provide reasons in open court as to why they felt a particular member of the jury pool should not be allowed to serve on the jury. Those who felt it was a positive, stated reasons like one respondent who said: "*It forces a fair and open process which requires an explanation as to why, in counsel's view, a particular potential juror is unsuitable.*" Conversely, those citing having to provide reasons as a negative, described adverse impacts in certain communities, especially small ones, where 'everyone knows everyone.' For example, one respondent said: "*It will also cause unnecessary conflict in small communities when public articulation is necessary to keep someone off a jury. Use of peremptories used to avoid public embarassment [sic] when the issue is something like the potential juror was a school bully at the accused's high school, etc. (These are the things big city lawyers don't realize really happens on a not infrequent basis.)*"

Negative Impacts Unique to the Accused

One of the issues highlighted by many of our respondents was the disproportionate negative impact, and types of impacts, that the removal of peremptory challenges would have on accused persons in the Canadian criminal justice system. As noted by many respondents (and discussed in more detail in the next section), their perception was that the removal of peremptory challenges was enacted in response to the outcry following the acquittal of Gerald Stanley, a white man, for the shooting death of Colten Boushie, an Indigenous man. At issue was the fact that Stanley's defence team used peremptory challenges to remove from jury service the five Indigenous-appearing persons called forward, resulting in Stanley's verdict

being delivered by an all-white jury.[177] Stanley's acquittal was perceived as yet another in a long line of examples of a lack of justice for Indigenous victims in Canada. The removal of peremptory challenges was meant to prevent similar occurrences of Indigenous persons and other Canadians of colour from being struck from jury service for race and ethnicity-based reasons, thus increasing diversity and representation of persons of colour on juries, and positively impacting justice outcomes for accused persons of colour.

It is, unfortunately, well-documented that Indigenous victims in Canada typically do not receive the same types of consideration and justice (however it is defined) as non-Indigenous victims due to a history of systemic racism and discrimination in the criminal justice system.[178] What is also unfortunately well-documented is that Indigenous persons are over-represented as those accused and convicted of crimes in Canada. The substance of several comments from our respondents illustrated that the problem in eliminating peremptory challenges in response to a single case with an Indigenous victim was that it would, unfortunately, have severe and negative consequences for Indigenous accused.

Removing peremptory challenges eliminated one of the only tools an accused had at their disposal in ensuring impartiality and varied ethnic representation in the jury. Our respondents predicted that the change, while well-intentioned, would unfortunately have the exact opposite impact of the one intended: that removing peremptory challenges would ultimately make juries less diverse, lead to more Indigenous accused being tried by largely white juries, and overall, decrease justice for Indigenous accused.

Further, some respondents felt that the relationship between the accused and defence counsel would be worsened. One noted: "*Client relations will be more difficult. A trial is inherently stressful, and many persons on trial develop opinions that they are being persecuted by the system. Peremptory challenges helped to assuage this, by allowing them some control over the jury pool…*"

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177 Barnett et al, *supra* note 119 at 16.

178 "Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Volume 1a" (last visited 22 June 2020) at 111–113, 276, online (pdf): *National Inquiry into Missing and Murdered Indigenous Women and Girls* <www.mmiwg-ffada.ca> [perma.cc/32EE-CF5D].

Respondents' answers also highlighted their perception that the disproportionate power balance between accused persons and the Crown would be exacerbated with the removal of peremptory challenges. The challenges had been one of an accused's limited powers to participate in the creation of a jury, and respondents worried that some accused, many of whom already feel unfairly treated by the justice system, would only feel even more so with the elimination of peremptory challenges. Further, some counsel questioned whether their inability to have any meaningful impact on the jury selection process might cause some accused, worried about potential biases in jurors, to forego their right to a jury trial and instead elect a bench trial or take a plea deal. To note, that accused persons will be disproportionately impacted by the change is not an opinion held solely by defence counsel. One Crown counsel had the following to say: "*People who otherwise might elect a jury trial might be deterred from doing so. (Some might view this as positive, but concern over the make-up of a jury should not be the reason someone opts not to proceed that way.) … I think an accused ought to be able to challenge a prospective juror on the limited basis that was available until the recent amendments. A jury trial is a fundamental right for specified offences, and I don't think we should legislate away a person's right to choose who is trying him or her. It's not as though we had a US-style system with intrusive questions and long selection hearings.*"

Concerns Regarding the Government's Decision to Eliminate Peremptory Challenges

We next asked participants the following question: "Do you have any concerns about how or why the government made the decision to eliminate peremptory challenges?" We provided the options of 'yes' and 'no.' Thirteen respondents chose not to answer this question. Results are in Table 4 below.

Table 4. Percentage of Respondents Who Did or Did Not Have Concerns Regarding How or Why the Government Made the Decision to Eliminate Peremptory Challenges

	Yes	No
Crown (n = 22)	72.7	27.3
Defence (n = 24)	91.7	8.3

Similar to our previous question, a majority of both Crown and defence counsel expressed that they did have concerns regarding how and/or why the Federal Government made the decision to eliminate peremptory challenges, with 72.7% of responding Crown and 91.7% of responding defence counsel answering 'yes.' Also similar to our previous question, a larger percentage of defence than Crown counsel expressed this concern.

Participants then answered a follow-up question that was dependent on whether they said 'yes' or 'no' to the previous question, asking them to explain why they did or did not have concerns.[179] We generated themes in the responses and coded the data using the same strategies described previously for those who answered 'yes' to having concerns.

To provide a broad overview to set the stage for a more detailed discussion of the individual themes, Crown and defence counsel identified several problematic observations with how and/or why the government made the decision to remove peremptory challenges from jury selection procedures. The most frequently cited point of concern, raised by 65.7% of answering respondents, was that the decision appeared to be a reactionary, 'knee-jerk' response to the circumstances surrounding the 2018 Gerald Stanley trial and resultant outcome. In addition to perceiving the decision being a reaction to the *Stanley* trial, the other broad themes were that the decision regarding the removal of peremptory challenges was rushed, either not evidence-based or based on inappropriate evidence, and politically motivated. Several criticized the apparent political interference in the justice system, which is supposed to be independent of government influence.

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179 If they answered 'yes', they were directed to the following open-ended question: "You indicated that you do have concerns regarding how or why the government made the decision to eliminate peremptory challenges. Please describe your concerns." If they answered 'no', they were directed to the following open-ended question: "You indicated that you do not have concerns regarding how or why the government made the decision to eliminate peremptory challenges. Please describe why you do not have concerns."

The decision was also perceived to have been made without consideration of the costs and impacts of the decision, and without appropriate consultation of relevant individuals and professional bodies who could have provided valuable information and nuance – as they did here in our survey – regarding some of the impacts that the government might not have foreseen in their rush to implement these changes. Had the government undertaken more fulsome consultation, they likely would have received responses similar to those we received in our survey, which could have alerted them to issues that needed to be addressed in considering such a massive change to the jury selection process. One of the issues identified by some respondents was a lack of a transitional plan regarding whether cases, already in progress when Bill C-75 came into force, should proceed under the old or new rules. This is an issue that, as of the time of writing, will soon be heard by the Supreme Court of Canada, which, on May 7, 2020 granted leave to appeal in the Ontario case of *R v Chouhan*.[180]

We will now discuss each of the themes identified in Table 5, below, in more detail.[181]

Table 5. Themes Identified Regarding the Concerns About How and Why the Government Decided to Eliminate Peremptory Challenges[182]

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180 *Chouhan* SCC, *supra* note 5.

181 Of the thirty-eight respondents who indicated they did have concerns regarding the government's decision, three chose not to describe why they had these concerns. We did not undertake the process of generating themes and coding for respondents who answered 'no' because only four of the eight who responded 'no' elected to provide written explanation; however, we will describe their answers.

182 The numbers in brackets indicate the number of respondents who gave that response. Percentages were calculated based on the number of respondents whose answers fell into a particular category out of the thirty-five who provided a written response. Note that percentages do not equal 100% because respondents' answers could fall into more than one category.

Not evidence-based and/or knee-jerk/reactionary measure to single (i.e., Stanley) trial	Inappropriate actions and/or political interference in the justice system by the government	No consideration of consequences/costs/ impact of the decision	Negatively impacts/erodes/ eliminates some rights of accused	Negative impact on jury composition issues	Lack of broader consultation	Other Response
65.7% (23)	40.0% (14)	34.3% (12)	22.9% (8)	31.4% (11)	17.1% (6)	6.34% (2)

Not Evidence-Based and/or 'Knee-jerk' or Reactionary Measure

For those who did provide a written response, the most commonly cited reason was that they felt it was either not an evidence-based decision, and/or it was a 'knee-jerk,' reactionary measure undertaken in response to the Gerald Stanley trial – 65.7% of answering respondents provided this answer (and several specifically used the phrase 'knee-jerk'). In the words of one respondent: "*This was a knee jerk reaction to the Saskatchewan experience. It was misguided and reflects a misunderstanding of the limited challenges an accused has in any event.*" Similarly, another respondent stated: "*Although I am aware that this issue has been under consideration for some time, and that other commonwealth countries have implemented similar, it still appears to be a hasty piece of legislation pushed through in reaction to the Stanley case*." Still another respondent indicated: "*The[se] were knee-jerk responses that were not based on empirical data with a complete lack of understanding of the consequences*."

Another respondent, echoing issues regarding the evidence used to make the decision, said: "*The decision was reactionary to a single case and then propped up with reference to US data gathered from systems that are not comparable.*" Within the scope of such answers, respondents expressed concern that a single case was the basis for such a large change in jury selection procedures, providing commentary that "*...However laudable, the amendments were clearly in reaction to a single case/incident, which is rarely wise.*" And also that: "*The integrity of the system and principles of fairness matter more than one case.*"

Inappropriate Actions and/or Political Interference in the Justice System by the Government

The next most cited reason for concern, mentioned by 40.0% of answering respondents, was that actions undertaken by the federal

government were inappropriate and/or amounted to political interference in the justice system. Several respondents stated quite clearly that they perceived the decision to be politically motivated based on the results of the *Stanley* trial. In the words of one: "*It seems to be a political decision in response to a single case, rather than an administration of justice decision in response to a wider concern.*" Another indicated that: "*It would appear that this was an action taken for political reasons to 'score points' without actually accomplishing anything positive and in fact making the problems C-75 purported to solve, worse.*" One respondent was quite blunt in stating: "*Completely political decision based on the perceived bias produced in one trial. Unproven and politically correct and motivated. We have centuries of work undone by a few bone-heads influenced by journalist boneheads saying, [t]hey, and they alone have answers.*"

Some respondents pointed specifically to the actions of Prime Minister Justin Trudeau as being problematic and politicized. For example, one respondent said: "*It was a knee-jerk reaction by Prime Minister Trudeau to a single court case. And Trudeau undermined the criminal justice system by his comments and actions about that case.*" Another respondent, in critiquing the Prime Minister's actions, echoed several themes already discussed: "*I am concerned that the government is reacting to a single case and has taken away rights of an accused because they did not like the outcome in one jury trial. The proper remedy was an appeal not to change the law. Politics has no place in the criminal justice system. The politicization of the justice system under Harper has not been remedied by Trudeau...*"

Negatively Impacts Rights of Accused Persons

Several answering respondents – 22.9% – also expressed concern that removing peremptory challenges would have a negative impact on the rights of accused persons in the Canadian criminal justice system. In a general sense, a concern was raised by one respondent that "*This is also an erosion of the rights of an accused person, who is the individual in jeopardy in a criminal matter and entitled to the most protection under the law through the process.*" Similarly, another said: "*This decision eliminated one of the fundamental rights of an accused in choosing a jury.*" Another respondent indicated that this change "*... demonstrates an inability to protect accused. We*

are in a frightening era of legal evolution given the fact there has not been a single piece of legislation in 40 plus years to protect accused."

One respondent specifically pointed to foreseeing potential negative impacts on jury selection for Indigenous accused and other accused who are persons of colour: "*Knee jerk political reaction to R v. Stanley which will have negative effects on picking juries for indigenous clients or other marginalized or minority clients.*"

Two respondents' answers spoke to a perceived generalized negative attitude towards accused persons that could be inferred from the removal of one of the few tools an accused person had in their arsenal: "*It seems fairly typical of the disdain that people have for the rights of others.*" And: "*It appears that seeing justice done is too expensive. It's always very easy to dispose of the rights of others.*"

Negative Impact on Jury Composition Issues

Some respondents noted the variety of ways in which they used peremptory challenges to positively impact jury composition. For example, contrary to what appeared to be the case in the *Stanley* trial, some respondents indicated they actually used their peremptory challenges in order to increase diversity on a jury. Some used their challenges to remove jurors that either displayed subtle indications of bias (e.g., hostile look towards their client) or who clearly were not enamoured with the idea of serving on a jury (e.g., they had already asked the judge to excuse them from jury service). Other respondents noted the differential ways in which peremptory challenges were used in smaller and Northern communities where many potential jurors were likely to know the accused. As noted by one respondent (cited earlier), they would sometimes use peremptory challenges to excuse someone from jury service when the potential juror had a negative relationship with the accused (e.g., high school bully), but providing this reason in open court could cause conflict in the community.

Thus, another common theme, mentioned by 31.4% of answering respondents, was their perception of the negative impacts on jury composition issues they foresaw from the government's decision to eliminate peremptory challenges. Several respondents thought that issues related to jury composition and functioning would be made worse, not better. For example, one respondent said: "*[T]he solution does not address the*

issue with juries - we select them from people who have an address. [T]hat is not solved with these changes." Another stated: "*The jury will consist of the first 12 warm bodies. They may not be equipped, based on life experience, profession, disposition, etc. to give the trial a proper hearing.*"

Some respondents, in saying the change would have the opposite of the effect intended, opined that the racial dynamics at play in the *Stanley* trial were unlikely to be resolved by the elimination of peremptory challenges – and in fact would have the opposite impact given the disproportionate numbers of Indigenous and other persons of colour who are involved with the Canadian criminal justice system as accused persons. One stated: "*... this was a knee jerk reaction to a trial of a white man with an indigenous victim. Generally speaking since the opposite is usually the case, the irony is the outcome had a reverse impact on justice.*" Another stated: "*... It would appear that the impetus to this change in the law was one high-profile case where it was assumed the accused was [acquitted] because the jury was all white and defence counsel used peremptory challenges to exclude Indigenous jurors. However, it is unknown whether this was actually the case and even if it were the solution makes the situation worse not better.*" Touching on several themes, another respondent stated: "*My concern is that the decision was a reactionary and short-sighted response to the Gerald Stanley trial and verdict and that it does nothing to address the actual issue of that trial, which was and still remains the prevalence of conscious and/or sub-conscious racism in the Canadian population.*"

One respondent, in explicitly predicting an impact contrary to the government's intentions, stated: "*... I'm not sure if the elimination of peremptory challenges will make a difference in diversity in juries. It may even have the opposite effect.*" Similarly, another said: "*... Most problematically, it will increase the risk of a racially biased jury, particularly for certain minorities who are more commonly before the Courts. In effect, this Bill will likely have the exact opposite impact of its intent.*"

No Consideration of Consequences/Costs/Impacts

Answering respondents also expressed concern that the government did not appear to have considered the consequences, costs, and/or impacts in making the decision to eliminate peremptory challenges; 34.3% identified such concerns. As noted plainly by one respondent: "*I believe this significant*

policy decision was made in a vacuum, in response to a single case, without any serious thought as to the consequences."

One respondent identified a concern that the government had not considered the impact on the time needed for jury selection: "*Failure to identify that this will not save time in picking a jury.*"

Another respondent pointed to the fact that the government did not provide any type of guidance in how the new rules should be applied, and this created confusion as courts across the country attempted to interpret and apply them (as we discussed in our introduction): "*Quite frankly, the government (both parties) is constantly tinkering with the criminal law for political gain. The cost to the system inherent in changing well-settled rules and procedure is enormous as the actual meaning and effect of the legislation must be judicially construed. Moreover, the government did not even try to come up with a transitional scheme. As a result, court[s] across the country are [left to figure out] when the new rules apply and to whom.*" Or, as another respondent stated (presumably somewhat dryly): "*It would've been quite delightful if they'd included an amendment which address[ed] its temporal application rather than leaving the whole country in chaos trying to figure it out.*"

One respondent identified the government's lack of consideration for the possible unique impacts the change could have in small communities: "*It failed to take into consideration the realities of northern small and remote communities and the adverse effect this might have to accessible jury trials in small communities.*"

Another respondent questioned why peremptory challenges were the issue focused on given numerous other issues on which the government could have focused: "*I wonder what kind of research/thought went into the end result of jury trials and how the jury selection process had an impact (i.e., I'm not sure out of all the changes the government could make in the practice of criminal law that the peremptory challenges were the biggest issue at stake).*"

Lack of Broad Consultation

The final theme, found in 17.1% of answering respondents' comments, was the perception that the government's decision was made without proper diligence in consulting Crown, defence, judges, professional organizations, and/or governmental bodies. Similarly, another noted that

the removal of peremptory challenges was: "*... done in a rushed manner without any consultation of stakeholders in the criminal justice system.*"

Two respondents specifically noted a lack of consultation with lawyers and/or judges, with one stating: "*I do not believe there was sufficient consultation on the proposed legislation, particularly with defence counsel and prosecution services.*" Similarly, another noted: "*This is a significant change to a long-standing system and should have been carefully considered with wide-spread consultation among lawyers and judges. I [do] not recall this taking place.*"

Two respondents specified several organizations that they felt should have been consulted. One identified that the change was: "*Done without consultation with the Committee established by the Criminal bar for consultation.*" Another said: "*Since this change occurred with little consultation, no meaningful DOJ policy input and none from useful entities like CCSO, ULCC or FPT working groups the outcome was predictably ridiculous and transparently politically motivated.*"[183]

No Concerns with the Government's Decision

As described earlier, only four of the eight respondents provided a written response when asked to describe why they did not have any concerns about how and/or why the government chose to eliminate peremptory challenges. Given such few written responses, as noted, we did not undertake a coding process to look for common themes in responses. However, we will provide their responses here, three of which are fairly brief in nature.

One respondent stated: "*No opinion formed as to benefit vs detriment of the practice*" and another indicated: "*I don't think the decision to eliminate peremptory challenges will have that much of an impact.*"

Another respondent, contrary to many respondents in previous sections who thought the public response to the *Stanley* trial was not

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[183] DOJ: Department of Justice; CCSO: Co-ordinating Committee of Senior Officials; ULCC: Uniform Law Conference of Canada; FPT working groups: Federal-Provincial-Territorial working group.

proper impetus for the change, said: "*I believe that the public concern warrants the elimination of peremptory challenges.*"

The fourth respondent provided some elaboration on their thoughts, along with some caveats: "*The legislative summary for the amendment suggests that its objective is at least in part to prevent the use of pre-emptory [sic] challenges to discriminate against First Nations people. Assuming that there is both a connection between the two, and the objective of the amendment, then I have no concerns with the measure. While First Nation people [do] not have a right to a jury of a particular background, they do have a right to an impartial jury. To the extent that pre-emptory [sic] challenges can be abused to deny that right, the objectives of the amendment are laudible [sic].*

CONCLUSION

The legal issues arising from the abolition of peremptory challenges will be sorted in due course and, in particular, the constitutionality of the new regime and its retrospective or prospective effects will be determined finally. The decision will ultimately be determinative of a hundreds-of-years long journey of common law and other systems of law that have relied upon the layperson in the adjudication of wrongful conduct. The interesting historical moment we now find ourselves in involves assessing the question of what does equality mean in the context of justice adjudication; and also asks, how do we balance these equality concerns in the context of a system that constitutionally prizes due process protections for an accused and which wants the timely and efficient, but also fair, administration of justice.

Our review of the history of jury work and, the embeddedness therein of peremptory challenges lays bare the complex and often multivalent reasons for their use and abatement across systems and times. Rigorous explication of professional needs, accused's interests, equality concerns and administration of justice all deserve fuller study before wholesale legislative changes are made. That some of our practitioners believe that abolishing peremptories may create more problems for Indigenous persons – in the context of fair trials by, and representation on, juries – than a system that retains these peremptories provides an ironic counterpoint to the Federal government's justification for the jettisoning of the challenges. Indeed, in *Kokopenace*, the lukewarm protection of jury representativeness given by the Supreme Court's protection of *Charter* rights contained in

sections 11(d) and (f) provides cold comfort for any notion that a jury of one's peers would mirror identity-based issues for an accused, let alone the community at large.

Conceivably, this is a moment where notions of substantive equality under section 15 of the *Charter* could begin to animate conceptions of equal protection for vulnerable community members that find themselves as accused persons in criminal jury trials. Perhaps, similar relief could be sought from the equality guarantee for communities routinely underrepresented in jury work. In any case, the proffered legislative regime does little to grow the proliferation of jury work as a bulwark of due process protections nor does it succeed as a late-modern mechanism that will pacify the criminal justice system's tendency to overrepresent populations that have historically been marginalized and mistreated by the state.