Bill C-75 and its effect on Jury Selection – by K Walker

The right to be tried by a jury of one's peers is a central tenant of any democratic nation. This does not mean on the day of trial sheriffs go and collect the first 12 people they find on the street to be members of a jury. The creation of juries is governed by laws established by the Canadian Parliament. Brought over to Canada from the British common law system, Parliament established the right to a trial by jury as a cornerstone of the Canadian justice system. Until September 19, 2019, Parliament essentially maintained the British common law jury system that was transplanted to Canada in the mid to late 1800s. This jury system was extensively developed during the 16th and 17th centuries in England. However, peremptory challenges, found in the common law jury system, were developed and in effect prior to this extensive development.[1] Specifically, in the 14th century, when an individual was charged with a felony they were allowed 35 peremptory challenges under the common law.[2] "[I]n 1892 Canada incorporated peremptory challenges into its *Criminal Code*."[3] The codified version of Canada's peremptory challenges stayed the same for 127 years, until its repeal in 2019.[4]

During jury selection, a peremptory challenge allows either crown or defence counsel to remove a potential jury member without having to provide a reason for it. Prior to Parliament making changes to the laws on Canada's jury system, peremptory challenges were set out in section 634 in the *Criminal Code*.[5] Section 634 (1) stated: "A juror may be challenged peremptorily

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[1] See Kaitlynd Walker, "Juries: A Canadian Historical Perspective", Robson Crim Legal Blog, 19 December 2019, online: <https://www.robsoncrim.com/post/juries-a-canadian-historical-perspective>.
[2] *R v Ismail et al,* 2019 MBQB 150 at para 12 [*Ismail*].
[3] *Ibid*.
[4] *Ibid*.
[5] *Criminal Code,* RSC 1985, c C-46.

whether or not the juror has been challenged for cause…"[6] Depending on the seriousness of the crime, the number of jurors, and if there were co-accused in the trial, the prosecutor and the accused were previously entitled to between 4 and 20 peremptory challenges to a jury panel.[7]

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. 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. By 2019, other common law countries, such as England, Scotland, and Northern Ireland had already abolished peremptory challenges. Calls for change to the jury selection process were not a new phenomenon. In fact, 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.[8] What motivated Parliament to make these changes was several trials, including the high-profile Gerald Stanley case out of Saskatchewan. The change to Canada's peremptory challenges legislation was introduced in Bill C-75 into Parliament 48 days after the Gerald Stanley decision, following the public outcry over the acquittal of Mr. Stanley and lack of visible Aboriginal jurors in the trial.

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[6] *Ibid*, s 634(1) as it appeared in 2019.
[7] *Ibid*, s 634 (2).
[8] Manitoba, A. C. Hamilton, and C. M. Sinclair. *Report of the Aboriginal Justice Inquiry of Manitoba*. [Winnipeg, Man.]: Public Inquiry into the Administration of Justice and Aboriginal People, 1991, online: <http://www.ajic.mb.ca/volumel/chapter9.html#10>.

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."[9]

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*.[10] The Supreme Court in *Dineley*, discussed the principles of interpretation a court needs to consider when determining if legislation applies retroactively in paragraphs 10 and 11:

> [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).

[9] *Ismail, supra* note 2 at para 2.
[10] *R v Dineley*, 2012 SCC 58.

> [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.[11]

The first Manitoban decision to consider whether the new peremptory legislation applied retroactively was *R v Ismail et al*[12]. The Court in *Ismail* applied the principles laid out by the Supreme Court stating, "The starting point for any analysis is applying principles of statutory interpretation and the test of whether a law affects substantive rights or is only procedural."[13] 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 the whether the new peremptory legislation applied retroactively was *R v Kon and Duke.*[14] 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 determining the peremptory repeal was retrospective shortly before *R v Stewart* was decided.[15] Thus, there is a clear split in the rulings in both Manitoba and across Canada as to whether the new peremptory challenge

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[11] *Ibid* at paras 10, 11.
[12] *Ismail, supra* note 2.
[13] *Ismail, supra* note 2 at para 23.
[14] *Ismail, supra* note 2; *R v Kon and Duke*, 2019 MBQB 161.
[15] *R v Stewart*, 2019 MBQB 171.

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.

Consequently, a national division as to whether the new peremptory challenge legislation applies retroactively or prospectively 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"?[16] Or does having the option to remove jurors set up an opportunity for the accused to attempt to produce a more favorable jury by creating a lack of representativeness?

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."[17] Other common law countries, such as England, Scotland, and Northern Ireland, may have already abolished peremptory challenges however, Canada is unique in the fact that the *Charter of Rights and Freedoms*[18] is part of it's constitution. The *Charter* provides Canadian citizens fundamental rights which the repeal of the peremptory challenges may potentially violate. While most cases so far have dealt with peremptory challenges as a prospective or retrospective legislation, the Ontario

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[16] *R v Find*, [2001] 1 SCR 863 at paras 1-2; cited in *R v Stewart*, *supra* note 15 at paras 84-88.
[17] *R v Khan*, 2019 ONSC 5646 at paras 28 and 29; cited in *R v Stewart*, *supra* note 15 at para 89.
[18] *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 [*the Charter*].

Court of Appeal in *R v 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*."[19] 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.[20]

The Court also found there was not a violation of section 11(f) of the *Charter* stating:

> [107] The challenge grounded on s. 11(f) of the Charter also fails. I reach this conclusion for three reasons.
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> [108] First, the core of this dispute involves the impact of the abolition of peremptory challenges on the impartiality of the jury selected to try the case and the fairness of the trial. These are interests guaranteed more particularly by s. 11(d) of the Charter. In the absence of any infringement of s. 11(d), there can be no infringement of the right to a trial by jury as guaranteed by s. 11(f).
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> [109] Second, although the role of representativeness is broader under s. 11(f) than under s. 11(d), the obligation imposed on the state remains the same. And that obligation relates to the process used to compile the jury roll, not the in-court selection process or the composition of the trial jury.
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> [110] Finally, what remains is what s. 11(f) guarantees — "trial by jury". The abolition of peremptory challenges does not change this.[21]

Finally, the Court also found there was not a violation of section 7 of the *Charter* stating:

> [132] The appellant did not vigorously pursue his claim of an infringement of s. 7 of the Charter. In any event, I would not give effect to it for two principal reasons.

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[19] *R v Chouhan*, 2020 ONCA 40 at para 17.
[20] *Ibid* at para 85.
[21] *Ibid* at paras 107-110.

> [133] The first is that the appellant cannot establish a causal connection between the abolition of peremptory challenges and the deprivation of his right to liberty or to the security of his person.
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> [134] Where the liberty interest is involved, there must not be any intermediate steps between the operation of the provision — the abolition of peremptory challenges in the selection of the trial jury — and the deprivation of liberty. But there are many such steps here including those essential to proof of guilt. The necessary causal connection is wanting.
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> [135] Where the security of the person interest is invoked, the appellant must show either an interference with bodily integrity and autonomy or serious state-imposed psychological stress as a result of the abolition of peremptory challenges. Neither has been demonstrated.
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> [136] The second reason for dismissing the s. 7 argument has to do with the essence of the appellant's claim focused on trial fairness and an impartial jury. These interests are specifically protected under s. 11(d). Section 7 adds nothing to their content. The rejection of this claim under s. 11(d) for the reasons earlier provided is dispositive of the claim under s. 7.[22]

Thus, in Ontario the court has determined that the repeal of s. 634 did not violate ss. 7, 11(d) or (f) of the *Charter*.[23]

The hasty repeal of peremptory challenges in Canada resulted in two legal issues arising. The first, whether the effect of the legislation is retroactive or not is a hot issue in Canadian courts and has divided the nation with no apparent answer. 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*. While the Court in Ontario has determined that the repeal is not in violation of the Charter, it is possible courts in other provinces will make a different finding. This issue too, may end up before the Supreme Court. In the end one thing is clear, peremptory challenges have been abolished in Canada but their removal will have rippling effects on the Canadian justice system for years to come.

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[22] *Ibid* at paras 12-136.
[23] *Ibid* at para 103.