

## R. v. Chouhan: Signs of Seismic Shift in Jury Selection

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*Chouhan* is a challenging decision, but understandably so, given the challenging issues it poses. The Court indicated the *result* in the case on the date they heard the appeal. This was appropriate, since both issues in the case – whether the abolition of peremptory challenges violated the *Charter*, and even if did not whether that change applied retrospectively – were something of a time bomb ticking away in the heart of the jury system. It was another eight months before the reasons for that result were issued, and those reasons show some fundamental divides in the Court. At the most basic level this is reflected in the presence of five different sets of reasons among the nine judges deciding.

This division is also understandable, given the context. The jury system has long been based on certain presuppositions about impartiality and representativeness: the changes to the *Criminal Code* of which the abolition of peremptory challenges were a part are in many ways at odds with those presuppositions. We are at a stage of flux, not only in the actual legislation, but in the underlying understandings and assumptions to be applied to that legislation. The divided result in *Chouhan* suggests that we are on the verge of a seismic shift which could result in a very different jury selection process in future.

Given the fractured nature of the result in *Chouhan*, and particularly the fact that no individual judgement has more than three signatories, it is important to be clear from the start as to exactly what views constitute the majority opinion, and which do not. The *hub* of all the decisions is that of Justices Moldaver and Brown, since the other judgments all situate themselves in relation to it. However, it is not straightforwardly the case that that judgement is the majority one: it is on some issues, but not on others.

First, there is a clear majority that the abolition of peremptory challenges does not, at a bottom line level, violate either section 11(d) or section 11(f). Justices Moldaver and Brown reach that conclusion in reasons written for themselves and Chief Justice Wagner. Justice Rowe adopts those reasons but adds additional observations of his own. Those “hub” reasons therefore have, in their entirety, the support of four of the nine judges deciding. Four other judges agree with the *conclusion* that there are no section 11(d) or 11(f) violations: Justice Martin writes for herself and Justices Karakatsanis and Kasirer, while Justice Abella writes sole reasons, but both those judgments adopt the hub reasons on that point. The official reporter describes Justice Martin’s reasons as “concurring” ones, which is accurate to a point, though as we will see below there is an extremely important caveat. Justice Abella independently (and briefly) concludes that the legislation is “constitutionally compliant” (para 153), though Justices Moldaver and Brown note that “the substance of her reasons actually supports the opposite conclusion” (para 44).

There is also a clear majority that the abolition of peremptory challenges had retrospective effect: without caveat, seven judges ascribe to Justices Moldaver and Brown’s reasons in that regard. Justices Abella and Côté dissent on that point, for separate but not unrelated reasons.

There is also a majority opinion on *some* of the reasons that there is no section 11(d) or 11(f) violation. Indeed, it is easy to argue that the nine judges are unanimous on one point: that judges in jury trials need to do *more* to combat unconscious biases and discrimination and to protect

impartiality and representativeness. It is only because of disagreement over how *much* more, and whether that is sufficient, that the need for different sets of reasons arises.

Justices Moldaver and Brown's reason largely depend on the presence of other mechanisms to achieve those goals, concluding that they are sufficient, even in the absence of peremptory challenges, to protect impartiality. These include instructions to juries about unconscious bias, both in general and as they arise from the specifics of the case, so that jurors can avoid acting on unconscious assumptions. Justice Martin's cohort specifically supports that part of the reasoning, so it has unambiguous majority support.

However, Justices Moldaver and Brown also support their conclusion that the absence of peremptory challenges is not fatal based on two other mechanisms in the jury selection process: challenges for cause, and the amendment to the stand-aside power allowing it to be used for the purpose of maintaining public confidence in the administration of justice. On the one hand we could look at the pure numbers here. Justice Martin's cohort, at para 112, explicitly declines to decide based on the use of those powers:

These issues are complex, multifaceted and immaterial to the outcome of this appeal. In my view, it is preferable not to address them here given the lack of direct assistance from the parties and scant jurisprudence from the lower courts on this matter.

Justice Côté, of course, dissents from the conclusion of Justices Moldaver and Brown, while Justice Abella writes her own reasons (which Justices Moldaver and Brown felt supported the opposite side), so it would be tempting to conclude that the hub decision has the support of only four out of nine judges. In a sense that is correct, but not for the reason that that sounds like: the real point is that five of the nine judges seem inclined to go *further* than Justices Moldaver and Brown in expanding the use of challenge for cause and stand-asides.

This is especially noteworthy given that Justice Moldaver and Brown would already be expanding the power of challenge for cause from its current state, and give a relatively expansive reading to the amended stand-aside power. We shall look at each separately.

With regard to challenge for cause, Justices Moldaver and Brown both explicitly and implicitly expand the power. Noting that the ability to challenge for cause had already been broadened in the cases of bias based on race, and pointing to “growing knowledge of the ways in which unconscious bias can affect the impartiality of a juror”, they acknowledge that “a wide range of characteristics — not just race — can create a risk of prejudice and discrimination, and are the proper subject of questioning on a challenge for cause” (para 61). That is an explicit expansion of the power, but they also talk about the power as one more easily available than might have been thought. They say:

[62] While widespread bias cannot be presumed in all cases, the parties do not face an onerous burden for raising a challenge for cause. The accused person or the Crown must merely demonstrate a reasonable possibility that bias or prejudicial attitudes exist in the community, with respect to relevant characteristics of the accused or victim, and could taint the impartiality of the jurors. In most cases, expert evidence will not be necessary: challenges for cause must be available wherever the experience of the trial judge, in consultation with counsel, dictates that, in the case before them, a realistic potential for partiality arises.

Suggesting that there is not an “onerous burden” in challenge for cause seems to indicate an implicit shift in attitude. Justices Moldaver and Brown cite *R. v. Spence*, 2005 SCC 71, *R. v. Williams*, [1998] 1 S.C.R. 1128, and *R. v. Find*, 2001 SCC 32 for this view, but one could easily argue that the opposite attitude is more reflected in those decisions. In *Spence*, for example, the Court seemed far less open to the view that a trial judge’s experience should be sufficient:

[6]...The eventual logic of the defence argument, it seems, is that courts should take judicial notice of a “realistic possibility” of racial partiality in every case where the jurors, accused, complainant and witnesses are not all of the same race. Might this race-centred view of the jury system be pushed into other areas of discrimination? Do Catholics or Hindus more readily believe witnesses who are disclosed to be of the same faith? Do male jurors “empathize” more with male complainants than with female complainants? Does this empathy translate into real (or reasonably perceived) bias? Is race a more powerful motivator than these other sources of potential bias? Our traditional belief was that the diversity of 12 jurors would iron out and diffuse such individual variations.

[7] In my view, with respect, the majority judgment of the Ontario Court of Appeal in this case pushed judicial notice beyond its proper limits. The respondent’s argument proceeded on the basis of questions to which neither evidence, nor judicial notice properly taken, supplied answers.

Similarly *Williams* seemed more concerned, outside the context of racial prejudice, with the trial judge’s role as a gatekeeper:

[13]...The judge has a wide discretion in controlling the challenge process, to prevent its abuse, to ensure it is fair to the prospective juror as well as the accused, and to prevent the trial from being unnecessarily delayed by unfounded challenges for cause.

Like *Williams*, *Find* also contrasted the more open challenge for process in the United States with that in Canada. Noting the presumption of impartiality in Canada, the Court held:

[26]...This presumption is displaced only where potential bias is either clear and obvious (addressed by judicial pre-screening), or where the accused or prosecution shows reason to suspect that members of the jury array may possess biases that cannot be set aside (addressed by the challenge for cause process).

So the decision of Justices Moldaver and Brown, setting the minimum, see challenge for cause as much more readily available than in the past when dealing with unconscious bias, even when based on factors other than race. Although there were statutory changes to the challenge for cause process – most notably that the trier of the challenge is now the trial judge personally – those changes did not necessitate this shift: it is a change in attitude.

The change to the stand-aside power, on the other hand, was explicitly motivated by the new wording in section 633: the power to have potential jurors stand aside for the purpose of “maintaining public confidence in the administration of justice”. Justices Moldaver and Brown note that one possible use for this new power would be to exclude a juror who survived a challenge for cause but whom the judge, accused, or Crown nonetheless believe might be partial. Beyond that, they say that the contours of the power should be worked out on a case-by-case basis. Most importantly – and this is where it matters most that this portion of their judgment

does not have majority support – they offer observations about what the power should *not* be used for: “we cannot accept that public confidence in the administration of justice depends on achieving a jury that approximates the diversity of Canadian society” (para 74).

In adopting that view, Justices Moldaver and Brown are simply stating the current orthodoxy. The view espoused in many prior decisions is that in, for example, *R. v. Kokopenace*, 2015 SCC 28, that “[c]ourts 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” (para 39) or “representativeness is not about targeting particular groups for inclusion on the jury roll” (para 61). Perhaps the key thing to recognize in *Chouhan* is the possibility that that orthodoxy is crumbling.

Justice Martin’s cohort, for example, declined to adopt the hub decision’s approach to challenge for cause or to the stand-aside power on the basis that the issues did not need to be decided. They did offer some preliminary thoughts on the issue, however, which expressed concern that Justice Moldaver and Brown were too *limited* in their approach. With regard to using the stand-aside power to achieve representativeness, for example, they held:

[115]...Random selection from broad-based lists was established as a constitutional minimum in *R. v. Kokopenace*, 2015 SCC 28, [2015] 2 S.C.R. 398. However, that case did not address whether Parliament could implement further measures for assuring representativeness and impartiality, including measures to deliberately *include* underrepresented groups. As long as such measures comply with the Constitution, the only question is what Parliament intended.

With regard to challenge for cause, Justice Martin notes that:

120 ... With good reason, this Court has explicitly declined to adopt the kind of highly intrusive questioning for challenges for cause that can be seen in the United States (*Find*, at para. 27). Yet privacy is just one interest to be weighed against others...

Similarly Justice Abella would go further than the hub decision. She puts forward the view that “[t]he new robust challenge for cause process will require more probing questions than have traditionally been asked to properly screen for subconscious stereotypes and assumptions” (para 160) and that judges should ask “questions that they believe, based on their common sense and judicial experience, will assist in rooting out biases” (para 161). She also finds that the amended stand-aside power “gives trial judges the discretion ‘to make room for a more diverse jury’” (para 163).

Justice Côté, of course, dissented on whether the abolition of peremptory challenges violated section 11(f), and her reasons for doing so puts her squarely in the camp of Justices Martin and Abella on how “representativeness” should be understood:

[274] ...The uncontested evidence before the trial judge in the present case indicated that peremptory challenges were used by racialized persons to attempt to empanel more diverse juries .... The abolition of peremptory challenges therefore removes a tool often used by racialized and other marginalized persons to improve the representativeness of juries, in support of at least two elements of the benefit of trial by jury: the jury’s role as the conscience of the community and public trust in the justice system.