# Written Brief Regarding Bill C-75:

## *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and the make consequential amendments to other Acts*

*Prepared by:*

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*Prepared for:*

**House of Commons Standing Committee on Justice and Human Rights**

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## Introduction

I am grateful for the opportunity to provide a submission to the House of Commons Standing Committee on Justice and Human Rights (the "Committee") as part of its hearings on *Bill C-75: An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and the make consequential amendments to other Acts* ("Bill C-75"). I make this submission in my personal, and not professional capacity. The views expressed in this Brief are my own and do not reflect the views of the Government of Ontario or the Attorney General of Ontario.

My submission will focus on s. 271 of Bill C-75: the proposed amendment to eliminate peremptory challenges from jury selection under the *Criminal Code*. In brief, I support the amendment. In my view, peremptory challenges have operated to reduce the representativeness and impartiality of Canadian criminal juries and have reduced public confidence in the administration of justice. The elimination of peremptory challenges will not undermine the fair trial rights of accused persons. Rather, it will improve the representative nature of Canadian criminal juries, ensure fairness for prospective jurors, and prevent mischief that can arise when either Crown or defence counsel are allowed to challenge jurors in the absence of a valid cause for the challenge.

## Jury Selection – The Importance of Representativeness and Impartiality

The right to a trial by jury is both an important procedural protection for the accused as well as an affirmation of the public interest in upholding community standards of behaviour. Three central considerations govern the selection process: jurors must be impartial; jurors must be competent; and jurors must be representative.[1] These factors are designed to ensure fairness to the

[1] David Tanovich, *Jury Selection in Criminal Trials: Skills, Science and the Law*, (Toronto: Irwin Law, 1997) at pp. 13-21. The question of the competence of jurors is not at issue in Bill C-75 and is not discussed further in this Brief.

accused in that no juror has prejudged their case. However, juries do not exist exclusively for the benefit of the accused. Jurors also represent the community and must be competent in order to understand and apply the law as it exists. These factors represent a balance between the twin goals of ensuring procedural fairness to the accused and the imposition of criminal sanctions for conduct unacceptable to the community.[2] As a practical matter, impartiality and representativeness are thought to be preserved by the random selection of jurors from the general population coupled with the rigour of a *voir dire* before a judge.

The goals of impartiality and representativeness do not exist in perfect harmony. Jury selection involves a balancing between different and sometimes competing interests. The leading case on balancing these interests is *R. v. Sherratt*. In that case, the trial judge refused to permit defence counsel to question each individual juror regarding possible exposure to pre-trial publicity. In dismissing the appeal, L'Heureux-Dubé J. held:

> The perceived importance of the jury and the *Charter* right to jury trial is meaningless without some guarantee that it will perform its duties impartially and represent, as far as is possible and appropriate in the circumstances, the larger community. Indeed, without the two characteristics of impartiality and representativeness, a jury would be unable to perform properly many of the functions that make its existence desirable in the first place. Provincial legislation guarantees representativeness, at least in the initial array. The random selection process, coupled with the sources from which this selection is made, ensures the representativeness of Canadian criminal juries.[3]

These comments emphasize the importance of representativeness, but also the way in which the representative nature of the jury reinforces and assures a degree of impartiality that would otherwise be absent. A number of Canadian cases have come to similar conclusions.[4]

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[2] *Sherratt*, [1991] 1 S.C.R. 509, at paras 30-38. See also, *R. v. Bain*, [1992] 1 S.C.R. 91 ("*Bain*").
[3] *Sherratt*, *supra*, at paras. 38, 58-59.
[4] *R. v. Church of Scientology* (1997), 33 O.R. (3d) 65 (C.A.) ("*Church of Scientology*") at paras. 143-166; *R. v. Parks* (1993), 15 O.R. (3d) 324 (C.A.) ("*Parks*") at paras. 35, 54-56 and 92; *Nishnawbe Aski Nation v. Eden*, 2011 ONCA 281, at paras. 29 and 51

**Peremptory Challenges Undermine Both Impartiality and Representativeness**

Peremptory challenges in criminal cases allow either the Crown or the accused to challenge a prospective juror for any reason and without any obligation to justify or explain the basis for the challenge. In my view, such challenges necessarily undermine both the impartial and representative nature of juries because:

1. Peremptory challenges are often based on little or no information and are often exercised on the basis of stereotypes and assumptions about a prospective juror and how they will behave.
2. Peremptory challenges represent an attempt to secure not just an impartial jury, but a favourable one. A peremptory challenge serves no legitimate purpose beyond the attempt to secure a strategic advantage for one of the parties to which they are not entitled.

Peremptory challenges are often exercised on the basis of little or no information about a prospective juror and on the basis of stereotypes or assumptions about how they might behave as jurors.[5] The application of the basest stereotypes relating to race, sex, profession, whether intentionally or unintentionally, are destructive both to the judicial process and to public confidence in it. They have no part to play in the selection of a jury.[6]

In this way, the exclusion of jurors, often on the basis of stereotypical assumptions, can undermine the representative nature of the jury. Given this, exclusion of jurors on the bases of stereotype and assumption can only have the effect of reducing the representativeness of juries and

[5] This is in part because of how provincial Juries Acts restrict the information available to the parties about potential jurors – *Sherratt, supra*. See also *R. v. Gayle* (2001), 145 O.A.C. 115 (C.A.) at paras. 64-65 for an example of how, in that case, anti-black stereotypes were employed in peremptory challenges.
[6] I am paraphrasing the Court's language in *R. v. Brown*, [1999] O.J. No. 4867 (Div. Ct.) at para. 11

may therefore affect their impartiality. It is a basic statistical concept that a sample of the population is only "representative" if it is randomly selected.[7] The degree to which a sample is not randomly chosen is referred to as a "selection bias". The principles underlying good research and fair juries are the same. A sample can only describe the general population, its attitudes and values, if it has been selected randomly. The degree to which certain segments of society are excluded from jury rolls or challenged has the effect of biasing the jury in subtle ways, such that it cannot be said to speak for the community or its values.[8] One achieves impartiality not only by exclusion, but by ensuring the representativeness of different viewpoints and perspectives. In this way, the representativeness of the jury ensures its impartiality.

Further, the use of peremptory challenges is necessarily an attempt to secure a strategic advantage in the selection of jurors. Unlike challenges for cause, which require a justification for why a juror is unqualified or not impartial, peremptory challenges require no justification and can be exercised for any reason. A challenge that can be exercised for any reason at all can have no proper purpose aside from an attempt to "win" by obtaining a favourable jury.

The role of the jury is to represent the community in the finding of facts. As noted above, efforts to exclude jurors in the absence of any legitimate basis detracts from this ideal. This is especially so given that the goal is impartiality, not advantage. Neither the Crown nor an accused is entitled to a favourable jury.[9] The jury is not meant to be a tool in the hands of either party. A jury selection tool that invites efforts to obtain advantage can only have the effect of distorting the representative and impartial nature of the jury and will thereby undermine public confidence in it.

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[7] Gary King, Robert Keohane and Sidney Verba, *Designing Social Inquiry*, (Princeton: Princeton University Press, 1994) at pp. 94-138.
[8] *R. v. Biddle*, [1995] 1 S.C.R. 761 ("*Biddle*") at paras. 53-58
[9] *Sherratt*, *supra*, at paras. 38, 58-59

**Peremptory Challenges Undermine the Rights of Prospective Jurors and Invite Mischief**

Jury duty is often described as a civic duty. However, less well recognized is that the ability to be called and serve on a jury is also an important civic right.[10] The exclusion of jurors without justification and on the basis of stereotypical assumptions about their preferences and behaviours is discriminatory and undermines the confidence of both those jurors who are excluded from the judicial process as well as the public.

In addition, the ability to exercise peremptory challenges in the absence of a legitimate basis for a challenge for cause can create an incentive for both defence and Crown counsel to "vet" jurors by making efforts to find out private, personal information about them in order to divine their attitudes and preferences. Jury vetting[11] has long been frowned upon by courts for its ramifications on both impartiality and representativeness.

Following a string of cases where allegations of improper jury vetting was alleged, Ontario's Privacy Commissioner launched an investigation and ultimately filed a report finding that obtaining personal information about prospective jurors beyond that provided for in legislation is an invasion of their privacy and can contravene privacy legislation. In the investigation at issue in that report, the Commissioner ultimately ordered the government to cease requesting any information beyond whether a prospective juror had been convicted of an indictable offence for which they had not received a pardon.[12] Ontario accepted the report and issued a policy to effect it.[13]

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[10] *Juries Act (Ontario) s. 39 Contempt Inquiry, Re*, 2011 ONSC 1105 at para. 20
[11] Generally speaking, this term refers to the process of screening out jurors based on one or more personal characteristics, See *R. v. Latimer*, [1997] 1 S.C.R. 217 at para. 43.
[12] Office of the Privacy Commissioner of Ontario, *Excessive Background Checks Conducted on Prospective Jurors: A Special Investigation Report*, (Toronto: Office of the Privacy Commissioner of Ontario, October 5, 2009).
[13] Ministry of the Attorney General, *Re: Juror Background Checks Direction and Reminder*, (Toronto: Ministry of the Attorney General, May 26, 2009).

Although having policies in place to protect the personal information of prospective jurors is beneficial, it would be better still to remove the structural incentives that lead parties to attempt to obtain their personal information in the first place. The existence of peremptory challenges provides an incentive for the mischief such vetting can create by creating the legal mechanism to put the fruits of such vetting to work.[14]

**Conclusion**

Neither the Crown, nor an accused is entitled to a jury that represents a particular socio-demographic or ethno-cultural characteristics. Nor are they even necessarily entitled to a jury or even a jury roll that precisely mirrors the statistical makeup of society.[15] However, it remains a basic tenet of our jury selection system that the random selection of jurors from a relatively representative cross-section of the population ensures impartiality by eliminating systemic bias against certain classes of accuseds. It also ensures a diversity of viewpoints and prevents the exclusion of particular groups from jury service.[16] By contrast, the systematic exclusion of particular groups from jury service can only undermine this representativeness and thereby reduce not only the fairness of the jury process, but public confidence in it.

Fairness to accused persons is preserved under the proposal in Bill C-75. Accused persons can still challenge prospective jurors for cause on enumerated grounds, including for partiality. Further, the ability of the trial judge to stand aside jurors in the interests of justice are enhanced under the proposal. Finally, there remains the obligation on Crown counsel to act fairly in its own conduct of jury selection.[17]

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[14] *Hobbs, supra,* at paras. 2-9; *Yumnu, supra*
[15] *Church of Scientology, supra*.
[16] *Parks, supra*.
[17] *Boucher v. The Queen,* [1955] S.C.R. 16 at para. 26

The proposal to eliminate peremptory challenges contained in Bill C-75 eliminates a contentious and unsupportable element of Canada's jury selection system which will increase public confidence in the administration of justice by reinforcing the representative and impartial nature of juries.

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