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| cid:image001.jpg@01D72252.19B69DE0  **SUPREME COURT OF CANADA** | | | |
| **Citation:** R. *v.* Chouhan, 2021 SCC 26, [2021] 2 S.C.R. 136 | |  | **Appeal Heard and Judgment Rendered:** October 7, 2020  **Reasons for Judgment:** June 25, 2021  **Docket:** 39062 |
| **Between:**  **Her Majesty The Queen**  Appellant/Respondent on cross-appeal  and  **Pardeep Singh Chouhan**  Respondent/Appellant on cross-appeal  - and -  **Attorney General of Canada, Attorney General of Manitoba, Attorney General of British Columbia, Attorney General of Alberta, Aboriginal Legal Services Inc., Association québécoise des avocats et avocates de la défense, David Asper Centre for Constitutional Rights, Canadian Association of Black Lawyers, Canadian Muslim Lawyers Association, Federation of Asian Canadian Lawyers, South Asian Bar Association of Toronto, Advocates’ Society, Defence Counsel Association of Ottawa, Criminal Lawyers’ Association (Ontario), Debbie Baptiste and British Columbia Civil Liberties Association**  Interveners  **Coram:** Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ. | | | |
| **Joint Reasons for Judgment:**  (paras. 1 to 104) | Moldaver and Brown JJ. (Wagner C.J. concurring) | | |
| **Concurring Reasons:**  (paras. 105 to 123) | Martin J. (Karakatsanis and Kasirer JJ. concurring) | | |
| **Concurring Reasons:**  (paras. 124 to 147) | Rowe J. | | |
| **Reasons Dissenting in Part:**  (paras. 148 to 220) | Abella J. | | |
| **Dissenting Reasons:**  (paras. 221 to 317) | Côté J. | | |

Her Majesty The Queen Appellant/Respondent on cross-appeal

v.

Pardeep Singh Chouhan Respondent/Appellant on cross-appeal

and

**Attorney General of Canada,**

**Attorney General of Manitoba,**

**Attorney General of British Columbia,**

**Attorney General of Alberta,**

**Aboriginal Legal Services Inc.,**

**Association québécoise des avocats et avocates de la défense,**

**David Asper Centre for Constitutional Rights,**

**Canadian Association of Black Lawyers,**

**Canadian Muslim Lawyers Association,**

**Federation of Asian Canadian Lawyers,**

**South Asian Bar Association of Toronto,**

**Advocates’ Society,**

**Defence Counsel Association of Ottawa,**

**Criminal Lawyers’ Association (Ontario),**

**Debbie Baptiste and**

British Columbia Civil Liberties Association Interveners

**Indexed as:** R. ***v.*** Chouhan

2021 SCC 26

File No.: 39062.

Hearing and judgment: October 7, 2020.

Reasons delivered: June 25, 2021.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

on appeal from the court of appeal for ontario

*Constitutional law* — *Charter of Rights — Right to fair hearing — Right to trial by jury — Jurors — Selection —* *Peremptory challenges —* *Whether amendments to Criminal Code* *abolishing accused’s peremptory challenges during jury selection violate right to fair hearing or right to benefit of trial by jury — If not, whether abolition of peremptory challenges applies to accused awaiting trial on date amendments came into force — Canadian Charter of Rights and Freedoms, ss. 11(d), (f) — 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., 2019, c. 25, ss. 269, 271, 272 — Criminal Code, R.S.C. 1985, c. C-46, ss. 633, 638.*

In 2019, Parliament modified how juries are selected in Canada. Sections 269, 271 and 272 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*, abolished accused persons’ peremptory challenges of jurors, modified challenges for cause, and vested trial judges with the power to stand aside prospective jurors to maintain public confidence in the administration of justice. These amendments came into force on the same day that jury selection in C’s trial for first degree murder was scheduled to begin, depriving C of the right to remove a limited number of prospective jurors from the jury without providing a reason for doing so. C challenged the constitutionality of the abolition of peremptory challenges on the basis that it infringed his right to a fair and public hearing before an independent and impartial jury under s. 11(d) of the *Charter* and his right to the benefit of trial by jury guaranteed by s. 11(f) of the *Charter.* C also argued that as the amending Act lacked any transitional provisions, the amendments operated only prospectively and therefore did not apply to his trial.

The trial judge dismissed C’s constitutional challenge and determined that the amendments applied to C’s trial. Jury selection proceeded without peremptory challenges. C was convicted of first degree murder and appealed from his conviction. The Court of Appeal overturned C’s conviction and ordered a new trial. It held that the abolition of peremptory challenges was constitutional, but that since the amendments affected an accused’s substantive right to participate in the selection of the jury, they operated only prospectively and did not apply to C’s trial. The Crown appeals to the Court on the issue of the temporal scope of the abolition of peremptory challenges. C cross‑appeals on the constitutionality of the amendments abolishing peremptory challenges.

*Held* (Abella J. dissenting in part and Côté J. dissenting): The appeal should be allowed and C’s conviction restored, and the cross-appeal should be dismissed.

*Per* Wagner C.J., Moldaver and Brown JJ.: The statutory amendments abolishing peremptory challenges are constitutional and purely procedural, and therefore have retrospective application. They apply to all jury selection processes commencing on or after September 19, 2019, the date of the abolition’s coming into force as part of Bill C‑75.

Since Canada’s earliest days, peremptory challenges have formed part of a dynamic in‑court jury selection process that also includes challenges for cause and the power of the trial judge to excuse or stand aside prospective jurors. Peremptory challenges played a distinct but limited role in the broader context of jury selection and, according to Sir William Blackstone, served two purposes: that an accused person ought not to be tried by any one against whom he has conceived a prejudice and that an accused ought to have an opportunity to remove jurors who may become resentful after an unsuccessful challenge for cause. Peremptory challenges heightened the accused’s perception that he or she had had the benefit of a fairly selected tribunal. Accused persons routinely used peremptory challenges based on the way prospective jurors looked at them during the selection process, and there was some evidence that racialized accused used them to make room for jurors with diverse backgrounds.

Although peremptory challenges had value from the subjective view of accused persons, the true value of this “benefit” was doubtful. It is not possible to trace the impact of peremptory challenges on the verdict. More critically, peremptory challenges sat uneasily with other aspects of jury selection. They undermined the randomness of jury selection, a significant guarantor of jury independence and impartiality, and they did not displace the principle that the accused has no right to select a partial or favourable jury. They also had a darker side which allowed for practices born of prejudice and stereotypes, which had palpable and well‑documented effects on the composition of juries. Indigenous communities, in particular, have witnessed their disturbing effects. Faced with mounting criticisms, Parliament abolished them and bolstered the role of the trial judge in supervising the jury selection process.

The abolition of peremptory challenges does not infringe the s. 11(d) *Charter* rights of accused persons. Section 11(d) does not entitle the accused to any particular procedure. In determining whether s. 11(d) is breached, the question is not whether a new process chosen by Parliament is less advantageous to the accused, but rather whether a reasonable person, fully informed of the circumstances, would consider that the new jury selection process gives rise to a reasonable apprehension of bias so as to deprive accused persons of a fair trial before an independent and impartial tribunal. The constitutionality of the jury selection process must be considered as a whole. The jury selection regime since Parliament enacted Bill C-75 continues to provide the independent and impartial jury that each accused is owed under s. 11(d) of the *Charter*: representative jury rolls provide a fair opportunity for a broad cross‑section of society to serve as jurors, randomness in the jury selection process bolsters independence and impartiality, and challenges for cause and the trial judge’s power to excuse prospective jurors provide mechanisms for removing prospective jurors whose impartiality is in question.

The abolition of peremptory challenges comes at a time of heightened public awareness of the role of racial prejudice in the criminal justice system. Before the Court, various interveners submitted that diversity is fundamental to achieving a jury that is impartial to the accused and free from discrimination toward jurors and victims. As a constitutional matter, however, the jurisprudence has never interpreted jury representativeness and impartiality as requiring diversity among members of the petit jury, nor has the concept of impartiality ever rested on the accused’s subjective confidence in each individual juror or jurors sharing an aspect of a characteristic of their identity with the accused or the victim. Fair trial rights do not depend on the subjective perceptions of the accused, and absolute diversity on a jury is unattainable, as no group of 12 could ever represent the innumerable characteristics existing within our diverse and multicultural society.

Other opportunities remain for the parties in criminal trials to raise and address concerns about juror partiality and bias. Trial judges should consider crafting jury charges and mid‑trial instructions that caution against the risk that bias will taint the jury’s deliberations. Jurors legitimately bring their life experiences to their deliberations but this cannot interfere with their responsibility to approach the case with an open mind. Jury instructions can expose biases, prejudices, and stereotypes that lurk beneath the surface. General instructions on biases and stereotypes ought to highlight that jurors may be aware of some biases while being unaware of others and should exhort jurors to approach their task with self‑consciousness and introspection. Instructions on specific biases and stereotypes that arise on the facts of the case should consider context and the harmful nature of stereotypical assumptions or myths, for example, the effects of colonization and systemic racism on Indigenous peoples or myth‑based reasoning in sexual assault prosecutions.

The challenge for cause provisions under s. 638 of the *Criminal Code* also provide a robust mechanism to raise concerns about partiality. Challenges for cause are unlimited and not readily susceptible to abuse because their focus is on transparency and openness. A wide range of characteristics are the proper subject of a challenge for cause. The trial judge enjoys significant discretion to determine how far the parties may go in the questions that are asked. Questions ought to explore the juror’s willingness to identify unconscious bias and to strive to cast it aside. Appropriate questions may relate to aspects of the case such as race, addiction, religion, occupation, sexual orientation or gender expression. Questions should balance the accused’s right to an impartial jury andthe privacy interests of prospective jurors.

The amended power to direct jurors to stand by to maintain public confidence in the administration of justice under s. 633 of the *Criminal Code* provides a means to exclude a juror who might be partial but who survived a challenge for cause. The “maintaining public confidence in the administration of justice” standard provides an effective analytical yardstick to address a variety of residual concerns in the jury selection process. The contours of the trial judge’s discretion to stand aside jurors will be determined on a case‑by‑case basis, but it cannot be used to actively promote jury diversity or to achieve a jury that approximates the diversity of Canadian society. An approach which calls upon the trial judge to enhance diversity on the petit jury raises a host of practical problems, some of which could involve constitutional issues. As a constitutional matter, diverse juries depend on diverse jury panels achieved through the randomness of the jury selection process. The reasonable, informed observer would lose confidence in a jury selection process that requires trial judges to sacrifice randomness for diversity. Parliament and the provincial legislatures may, within constitutional bounds, pursue further legislative reform designed to better promote or enhance the diversity of the petit jury.

The abolition of peremptory challenges also does not infringe C’s right to a jury trial under s. 11(f) of the *Charter*. Section 11(f) offers no greater protection of impartiality than s. 11(d). The right to a representative jury does not entitle the accused to proportionate representation at any stage of the jury selection process. Section 11(f)’s guarantee of representativeness requires the state to provide a fair opportunity for a broad cross-section of society to participate in the jury process, by compiling a jury roll that draws from a broadly inclusive source list and delivering jury notices to those who have been selected. These aspects of jury selection are not affected by the abolition of peremptory challenges.

The amending legislation did not include transitional provisions that set out whether and how the amendments apply to prosecutions pending in the system. 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. Procedural legislation designed to govern only the manner in which rights are asserted or enforced is presumed to apply immediately. However, procedural provisions that affect substantive rights in their application are not purely procedural and do not apply immediately. The substantive right at issue in this case is the *Charter* right to a fair trial by an independent and impartial jury. Jury selection procedures only serve those rights and a modification in procedure does not affect their fulfilment, absent a constitutionalinfringement. The presence or absence of peremptory challenges therefore does not affect substantive rights, namely those codified in ss. 11(d) and 11(f) of the *Charter*. Even accepting the existence of a substantive right to participate in the selection of one’s jury, the amendments affect only the way in which that right was exercised. There is no basis for construing the amendments as anything but procedural. Accordingly, the abolition of peremptory challenges applies immediately to all jury selection processes beginning on or after the date the amendments took effect, including C’s trial.

*Per* Karakatsanis, Martin and Kasirer JJ.: There is agreement that the amendments abolishing peremptory challenges are constitutional and purely procedural and therefore apply immediately to ongoing proceedings. Parliament was entitled to act on persistent concerns about the discriminatory use of peremptory challenges by abolishing them. There also is agreement that jury instructions on bias play a vital role in spurring juror introspection, self-consciousness and accountability. Courts must take active steps to ensure decision-making is free of prejudice, myths and stereotypes, through a contextualized approach that looks beyond overt and intentional discrimination to structural and unconscious bias that may undermine trial fairness, juror impartiality and equality for accused persons and victims.

However, there is disagreement with Moldaver and Brown JJ. with respect to how they would approach the enhanced stand-aside power under s. 633 of the *Criminal Code* and the scope of questioning on challenges for cause. These issues are complex, multifaceted and immaterial to the outcome of the appeal. It is preferable not to address them given the lack of direct assistance from the parties and scant jurisprudence from lower courts on this matter. With respect to the interpretation of s. 633, undue weight should not be placed on the principle of random selection. Randomness is neither an end in itself nor a freestanding constitutional imperative. In an unequal society, randomness may produce discriminatory outcomes. Many systemic factors lead to underrepresentation of certain groups at all stages of jury selection. It is open to Parliament to legislate to address these problems, including by taking steps to deliberately include underrepresented groups. Although departing from randomness by using the stand-aside power to enhance diversity may give rise to practical challenges, those problems should not be overstated. Section 633 does not impose rigid requirements respecting the precise composition of the jury, but rather confers a broad and flexible discretion that can be tailored to the circumstances in which it is exercised.

With respect to challenges for cause, trial judges are afforded latitude to depart from the formula set out in *R. v. Parks* (1993), 15 O.R. (3d) 324,where appropriate to ensure juror impartiality. Trial judges must permit prejudices to be examined through this process. It is true that the privacy interests of prospective jurors must be respected. However, privacy is just one interest to be weighed against others. The Court has also warned against setting a threshold for challenges for cause that would catch only the grossest forms of racial prejudice. It has been questioned whether the *Parks* formula catches anything beyond the grossest forms of prejudice. Ultimately, courts must be allowed to exercise their discretion in accordance with the wording and purpose of s. 638(1)(b) of the *Criminal Code*, the right to a fair and impartial tribunal, and *Charter* values, including substantive equality.

The Court should not use this case to circumscribe how judges may apply these recently-amended procedures. The preferable process would be for the Court to wait and see how the interlocking pieces of the new statutory regime work together in practice before weighing in with limits on how they may be used. A cautious approach is advisable to allow the new regime to develop organically and as intended.

*Per* Rowe J.: There is agreement that the abolition of peremptory challenges is constitutionally valid and that the legislative change is purely procedural and has retrospective application. However, it is necessary to address the risk that constitutionalizing statutory provisions through the jurisprudence poses. Sections 11(d) and 11(f) of the *Charter* give an accused the right to benefit from a fair trial by an independent and impartial jury but they do not guarantee the most favourable procedures imaginable or mandate specific procedural mechanisms. Statutory provisions that give effect to ss. 11(d) and 11(f) are not themselves constitutionally protected and beyond repeal. Constitutionalizing specific statutory provisions by which Parliament gives effect to constitutional rights is misguided. It is not for the courts to substitute their policy preferences for those of the legislature; rather courts should limit themselves to deciding whether constitutional protections have been infringed. Adopting, amending or repealing jury selection procedures raises no constitutional issue unless thereby trials by jury fall short of the constitutional guarantee to a fair trial.

A structural analysis of the principles underlying the Constitution can inform and assist in the proper interpretation of constitutional provisions. In the present case, separation of powers and parliamentary sovereignty shed light on the issue of *Charter* compliance. Constitutionalizing statutory provisions is contrary to the separation of powers between the legislature and the judiciary. The legislative and judicial branches have distinct roles and institutional capacities and each should show proper deference for the legitimate sphere of activity of the other. With respect to the *Charter*, the role of the courts is to protect against incursions on fundamental values, not to second guess a legislature’s policy decisions. Constitutionalizing statutory provisions elides and curtails the role of legislatures. Removing legislatures’ ability to repeal or modify statutory provisions is inconsistent with the dialogic partnership between legislatures and courts. Courts should not overstep their role when assessing whether statutory regimes comply with the *Charter*.

The principle of parliamentary sovereignty means that Parliament has the right to make or unmake any law. This principle is qualified by our federal structure, the *Charter* and Aboriginal and treaty rights; however, subject to limits imposed by the Constitution, the legislature can legislate as it chooses. This encompasses the capacity to repeal legislation. Constitutionalizing statutory provisions undermines the democratic principle whereby citizens participate in making laws through public institutions accountable to the public through electoral processes. Preventing Parliament from repealing a statutory provision, and in effect incorporating its content into the *Charter*, would undermine Parliamentary sovereignty. The repeal or modification of statutory provisions can raise issues of *Charter* compliance if it gives rise to unconstitutional effects but nothing of that nature has been shown in this case.

*Per* Abella J. (dissenting in part): Both the appeal and the cross-appeal should be dismissed. The repeal of peremptory challenges is constitutionally compliant. Parliament has introduced a regime that addresses the goals of peremptory challenges and that empowers trial judges to protect the impartiality of the jury and counteract the reality of discrimination. However, the repeal of peremptory challenges was not a purely procedural change. It affected the substantive rights of accused persons and, absent transitional provisions, it should not have applied retrospectively to C’s trial.

The right to be tried by a jury of one’s peers is one of the cornerstones of our criminal justice system and is enshrined in ss. 11(d) and 11(f) the *Charter*. The purpose of the reforms to jury selection in Bill C‑75 was to make room for a more diverse jury that will in turn promote confidence in the administration of justice. Parliament not only abolished peremptory challenges, but it gave trial judges the power to decide challenges for cause and created a new stand-aside power to direct trial judges to fulfill the role of ensuring jury impartiality and representativeness. In order to avoid bias and discrimination, the new jury selection system entrusts trial judges to vigorously exercise their authority in accordance with the *Charter* to ensure that Canadian juries are, and are perceived to be, impartial and representative.

The new robust challenge for cause process will require more probing questions than have traditionally been asked to properly screen for subconscious stereotypes and assumptions. The new stand-aside power was intended to empower trial judges to ensure impartiality and to make room for a more diverse jury, in order to maintain public confidence in the administration of justice. It is based on an understanding of representativeness which looks to the actual composition of the jury, as opposed to the randomness of the selection process. It seeks to counteract systemic discrimination in jury selection. Trial judges can use these tools to actively promote jury diversity on a case by case basis. The goal is the selection of a representative cross-section of society, honestly and fairly chosen. Actively promoting jury diversity is not reverse discrimination, it is reversing discrimination.

Abolishing peremptory challenges diminished the right of accused persons to meaningfully participate in jury selection and to influence the ultimate composition of the jury. Their abolition affected the substantive rights of an accused to participate in the selection of an impartial and representative jury, as guaranteed by ss. 11(d) and (f) of the *Charter*. When legislation is enacted without transitional provisions, the law presumes that it only applies prospectively. While the jurisprudence carves out a narrow exception for purely procedural changes, the exception does not apply to new rules of procedure that affect or impinge on substantive rights. Procedural laws that have an impact on *Charter* rights have been considered to have substantive effects since constitutional rights are necessarily substantive. Since there is no doubt that an accused’s fair trial rights are necessarily substantive, the legislation abolishing peremptory challenges affected substantive rights and could only have prospective effect.

For centuries, the common law included a right of the accused to exercise peremptory challenges and this right was codified in the *Criminal Code*. The Court has repeatedly asserted the importance of peremptory challenges in safeguarding the rights of accused persons in the jury system and enhancing their perception of trial fairness. While they did not guarantee any particular composition of the jury, peremptory challenges gave accused persons a meaningful opportunity to have their own subjective views about the impartiality of the jury respected.

It is not only an accused’s confidence in trial fairness that is at stake, but the public’s confidence that the jury is impartial. That impartiality is not possible without acknowledging the reality of discrimination in the public from which the jury is selected. Peremptory challenges were a tool to weed out this potential bias.

Systemic factors disproportionately exclude marginalized prospective jurors at every step of the selection process, resulting in a system in which Indigenous and racialized persons are overrepresented as accused persons and victims, and underrepresented as jurors. Peremptory challenges were an important trial safeguard to try to secure representativeness from what can be unrepresentative random selections. Representativeness is an important guarantor of impartiality. It matters not because a juror’s personal characteristics are indicative of how he or she will decide the case, but because if the right to be tried by a jury of one’s peers means anything, it means that members of a jury must be, and be seen to be, open-minded, regardless of their own or the accused’s race, religion, sex, gender identity, sexual orientation, political affiliations, age or economic status. Peremptory challenges enabled accused persons to attempt to secure representativeness, safeguarding their substantive right to meaningfully participate in the selection of an impartial and representative jury. Abolishing them, therefore, affected substantive rights.

The trial judge’s error in denying C the right to use peremptory challenges cannot be cured by the curative proviso in s. 686(1)(b)(iv) of the *Criminal Code.* The proviso only applies if the accused suffered no prejudice. C’s case was not so overwhelming that any trier of fact would inevitably convict. Nor was the error minor or harmless. C was denied the ability to peremptorily challenge the people he felt would not judge him fairly. To him, this meant that he did not have an impartial jury. This is a prejudicial impact without a cure.

*Per* Côté J. (dissenting): The appeal should be dismissed and the cross-appeal should be allowed. The amendments abolishing peremptory challenges infringe s. 11(f) of the *Charter* and they are not a reasonable limit that can be demonstrably justified in a free and democratic society. Section 269 of the amending Act should be declared of no force or effect to the extent that it abolishes peremptory challenges. Further, there is agreement with Abella J. that the abolition of peremptory challenges clearly affects substantive rights and can apply only prospectively. C should receive a new trial including jury selection with peremptory challenges.

Parliament failed to understand why peremptory challenges have accompanied jury trials for over 700 years. It ignored the voices of racialized and other marginalized persons calling out for a chance to maintain the benefit of trial by jury. Peremptory challenges permit accused persons to strike at hidden, subtle and unconscious biases that are undoubtedly present in the jury array and that go unaddressed by challenges for cause. Parliament saw peremptory challenges as an arbitrary tool used to perpetuate systemic racism and discrimination. The reality is, as defence advocates representing a wide spectrum of organizations implored the Court to understand, peremptory challenges are far from arbitrary. For accused persons who are racialized or otherwise marginalized, they are a lifeline to combat unconscious biases and discrimination. They give the accused a sense of ownership in the trial and they teach the litigant and the community that the jury is a good and proper mode for deciding matters.

In order for s. 11(f) of the *Charter* to be meaningful, there must be some set of core irreducible attributes that a tribunal must possess for it to be considered a jury. A jury must possess all of the characteristics necessary to provide the accused with the benefit that the framers of the *Charter* sought to protect. The purpose of s. 11(f) is to guarantee an underlying benefit that comes from jury trials. The benefit of trial by jury is formed by four elements, which are the four advantages of jury trials in comparison to judge‑alone trials. First, the jury is an excellent fact finder because of the cumulative abilities of its members and the diversity of their experiences. Second, a jury represents the conscience of the community: it is best placed to determine whether applying the law would be inequitable or would accord with society’s values. Third, the jury is a bulwark of individual liberty, protecting against oppressive laws or oppressive enforcement of the law. Fourth, the jury serves the broader social interests of public education and legitimization of the justice system. In order for an accused to receive the benefit of trial by jury, the jury must have certain characteristics. A jury must be the ultimate arbiter of guilt, and it must be impartial, representative and competent. The ability of the accused to meaningfully participate in selecting their triers may be another core, irreducible attribute of a jury trial.

Peremptory challenges play a unique role in a jury trial. They enable an accused person to meaningfully participate in selecting their triers, something that is absent in a trial by judge alone. This process of a participating in jury selection gives the accused a sense of ownership in the trial. Peremptory challenges also confer a substantial benefit in the subjective minds of accused persons: by removing jurors that cause them fear or discomfort, an accused will be more likely to feel that they are being tried by jurors whom they consider peers, which increases their confidence that the trial and the verdict are fair. This increased confidence in the fairness of the trial is especially important to offset the absence of reasons in a jury trial.

Peremptory challenges are also critical to the empanelling of impartial, representative and competent juries. First, peremptory challenges facilitate the selection of an impartial jury. Accused persons exercise them to remove potential jurors who are biased against them. Randomness in the jury selection process has traditionally been thought to guard against partiality, but in recent years, the administration of justice has faced up to the fact that racial prejudice and discrimination are intractable features of our society and must be squarely addressed in the selection of jurors. Challenges for cause, which were established to work alongside peremptory challenges, rely upon overt manifestations of bias and are not likely to identify unconscious preconceptions and beliefs, racial or otherwise. Such deeply buried beliefs also are resistant to judicial instructions. Peremptory challenges enable an accused to apply their own life experiences to determine whether potential jurors exhibit signs of prejudice against them. Racialized or marginalized persons cannot rely on a judge to excuse or stand aside a potential juror because they may struggle to articulate why they perceive bias. Therefore, peremptory challenges are essential to have an impartial jury and their abolition negatively affects racialized and other marginalized persons. Challenges for cause, anti-bias instructions, and stand asides cannot fill the void.

Second, the jury must be a representative cross-section of society, honestly and fairly chosen, in order to serve as the conscience of the community and to promote public trust in the justice system. Processes established to deliver a representative jury do not guarantee that a jury roll’s composition will be proportionate to the general population. In practice, jury rolls are under‑representative of racialized and other marginalized persons. In-court selection processes can enhance representativeness, especially where an array does not truly represent the diversity of the area. The abolition of peremptory challenges removes a tool often used by racialized and other marginalized persons to improve the representativeness of juries.

Third, peremptory challenges are critical to ensuring that a jury is competent. Competence in relation to understanding the evidence means willingness and capacity to understand it. A juror whose life experience has not embraced the area of the dispute is likely to have a blind spot of which he is quite unconscious and which may prevent him from getting the point of testimony or argument. The benefit of trial by jury is partly a product of the jury applying common sense, and common sense itself is the product of personal experience. Only accused persons know what experiences may be necessary to fully appreciate their evidence. Peremptory challenges are the only tool available to accused persons to address issues of competence. As it stands, the amended s. 633 of the *Criminal Code* is not an adequate replacement for peremptory challenges. Section 633 cannot be used to promote or enhance the diversity of the petit jury.

The abolition of peremptory challenges is not a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society. The impugned provision of the amending Act is clearly prescribed by law. Reducing discrimination and increasing diversity on juries represents a pressing and substantial objective. However, the means chosen is not rationally connected to this objective. Removing peremptory challenges altogether has the effect of furthering discrimination against racialized and other marginalized persons, and potentially reducing jury diversity. The abolition of peremptory challenges also is not minimally impairing of the right to the benefit of trial by jury. Parliament could have empowered judges to regulate the use of peremptory challenges, altered juror qualifications or grounds of challenge for cause, or modified the challenge for cause process to create a meaningful system for identifying biased jurors. Given that peremptory challenges provide a great benefit to many accused persons and that their elimination perpetuates discrimination against racialized and other marginalized people, the deleterious effects outweigh the salutary effects of the legislation.

Alternatively, the amendments can apply only prospectively. Peremptory challenges are substantive. Their abolition is not beneficial for all: it is entirely detrimental to the accused, and its immediate application creates unfairness for those who have relied upon the existence of such challenges to make decisions. It changes the legal character or consequences of an accused’s prior actions, such as electing to be tried by jury or seeking an adjournment of an earlier trial. Therefore, the abolition of peremptory challenges is an amendment affecting a substantive right. The abolition of peremptory challenges also affects other substantive rights. It affects ss. 11(d) and 11(f) by diminishing the accused’s ability to meaningfully participate in jury selection. It affects the right to a fair trial by an impartial tribunal. Since peremptory challenges are themselves substantive and also affect other substantive rights, the amending provisions should not have applied to C’s trial. This is not a case where it would be appropriate to apply the curative proviso. The error was not harmless or minor. C would likely have been tried by a differently composed jury and the case against him was not so overwhelming that any other verdict would have been impossible to obtain.

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APPEAL and CROSS-APPEAL from a judgment of the Ontario Court of Appeal (Doherty, Watt and Tulloch JJ.A.), 2020 ONCA 40, 149 O.R. (3d) 365, 60 C.R. (7th) 1, 384 C.C.C. (3d) 215, [2020] O.J. No. 241 (QL), 2020 CarswellOnt 543 (WL Can.), setting aside the conviction for first degree murder entered by McMahon J., 2019 ONSC 5512, 443 C.R.R. (2d) 326, 148 O.R. (3d) 53, 380 C.C.C. (3d) 390, 57 C.R. (7th) 62, [2019] O.J. No. 4797 (QL), 2019 CarswellOnt 14975 (WL Can.), and ordering a new trial. Appeal allowed and cross-appeal dismissed, Abella J. dissenting in part and Côté J. dissenting.

Andreea Baiasu and Michael Perlin, for the appellant/respondent on cross-appeal.

Dirk Derstine and Tania Bariteau, for the respondent/appellant on cross-appeal.

Jeffrey G. Johnston, for the intervener the Attorney General of Canada.

Charles Murray, for the intervener the Attorney General of Manitoba.

Lara Vizsolyi, for the intervener the Attorney General of British Columbia.

Andrew Barg, for the intervener the Attorney General of Alberta.

Caitlyn E. Kasper, for the intervener the Aboriginal Legal Services Inc.

Jean-Guillaume Blanchette, for the intervener Association québécoise des avocats et avocates de la défense.

Kent Roach, for the intervener the David Asper Centre for Constitutional Rights.

Peter Thorning, for the intervener the Canadian Association of Black Lawyers.

Nader Hasan, for the interveners the Canadian Muslim Lawyers Association and the Federation of Asian Canadian Lawyers.

Janani Shanmuganathan, for the intervener the South Asian Bar Association of Toronto.

Jill R. Presser, for the intervener the Advocates’ Society.

Michael A. Johnston, for the intervener the Defence Counsel Association of Ottawa.

Nathan Gorham, for the intervener the Criminal Lawyers’ Association (Ontario).

Christopher R. Murphy, for the intervener Debbie Baptiste.

Joshua Sealy-Harrington, for the intervener the British Columbia Civil Liberties Association.

The reasons for judgment of Wagner C.J. and Moldaver and Brown JJ. were delivered by

1. Moldaver and Brown JJ. — Jury selection in Pardeep Singh Chouhan’s trial for first degree murder was scheduled to begin on September 19, 2019. That day, amendments to the *Criminal Code*, R.S.C. 1985, c. C-46, came into force which abolished peremptory challenges, depriving Mr. Chouhan of the right to remove a limited number of prospective jurors from the jury without providing a reason for doing so. This appeal focuses on the constitutionality and temporal scope of these amendments.
2. Although peremptory challenges were a long‑standing example of what Blackstone described as the “tenderness and humanity to prisoners, for which our English laws are justly famous”, they have drawn significant controversy in recent decades (*Commentaries on the Laws of England* (16th ed. 1825), Book IV, at p. 353). While peremptory challenges permitted the Crown and the accused to exclude prospective jurors for suspected bias, they also had a darker side — a side which allowed for the arbitrary exclusion of jurors, as well as discriminatory practices born of prejudice and stereotypes, deployed by one side or the other to secure *not* an *impartial* jury, but a *favourable* jury. This quiet discrimination had palpable and well‑documented effects on the composition of juries.
3. Before his trial began, Mr. Chouhan challenged the constitutionality of the *Criminal Code* amendments abolishing peremptory challenges on the basis that they infringed his right to an independent and impartial jury trial under ss. 7, 11(d), and 11(f) of the *Canadian Charter of Rights and Freedoms*. In the alternative, he argued that those amendments, which lack any transitional provisions, operated only prospectively and therefore did not apply to his trial.
4. The trial judge rejected both arguments (2019 ONSC 5512, 148 O.R. (3d) 53). He identified the following range of procedural safeguards which, in his view, continued to protect the independence and impartiality of the jury, even in the absence of peremptory challenges: the roster of prospective jurors is randomly selected and representative of the community; jurors are drawn from that roster through a randomized process; the accused can remove a juror for one of several reasons enumerated in the challenge for cause provision under s. 638 of the *Criminal Code*; and the trial judge retains the discretion to excuse or stand aside prospective jurors for reasons enumerated in ss. 632 and 633 of the *Code*, such as hardship, obvious partiality, or other reasonable causes. Finding no violation of ss. 7, 11(d), or 11(f), the trial judge went on to determine that the impugned amendments were purely procedural in nature and thus applied immediately to all jury trials scheduled to begin on or after their coming into force.
5. The selection of Mr. Chouhan’s jury proceeded without peremptory challenges and Mr. Chouhan was ultimately convicted of first degree murder. Days after the jury rendered its verdict and before he was sentenced, Mr. Chouhan appealed from his conviction to the Court of Appeal for Ontario (2020 ONCA 40, 149 O.R. (3d) 365). He raised no substantive arguments about the conduct of the trial, but instead impugned the trial judge’s ruling that the abolition of peremptory challenges was constitutional and that it applied to his trial.
6. On appeal, Mr. Chouhan succeeded in having his conviction overturned and a new trial ordered. Writing for a unanimous court, Watt J.A. agreed with the trial judge that the amendments to the *Criminal Code* were constitutional, but he disagreed on their temporal scope. In his opinion, the abolition of peremptory challenges could not apply to accused persons whose right to a jury trial had vested by the time the amendments were proclaimed into force on September 19, 2019. This was the case for Mr. Chouhan, as his first degree murder charge pre‑dated September 19, 2019. Accordingly, he was deprived of his substantive right to peremptory challenges under the former rules and a new trial was required.
7. The Crown appealed to this Court on the issue of the temporal scope of the abolition of peremptory challenges; in turn, Mr. Chouhan cross‑appealed on the constitutionality of the amendments abolishing them. At the conclusion of the hearing, a majority of the Court restored Mr. Chouhan’s conviction, with reasons to follow. These are those reasons.
8. Issues
9. Mr. Chouhan does not pursue his arguments under s. 7 of the *Charter* in this Court. Accordingly, two issues arise on this appeal:
   * + - 1. Does the abolition of peremptory challenges violate the rights of accused persons under ss. 11(d) and 11(f) of the *Charter*?
         2. If not, does the abolition of peremptory challenges apply to accused persons who were awaiting trial on September 19, 2019?
10. Legislative Context
11. Before addressing the merits of this appeal, some context is necessary, as Parliament did not decide to abolish peremptory challenges within a historical or social vacuum.
    1. Peremptory Challenges in Canada
12. Peremptory challenges have formed part of the jury selection process in Canada since the country’s earliest days. Although the number of challenges available to the Crown and the accused has varied across time, the legislative scheme that Parliament abolished, which forms the subject of this appeal, set a fixed number of challenges for each party based on the seriousness of the underlying criminal charges. The Crown and the accused could each exercise 20 peremptory challenges where the accused was charged with high treason or first degree murder, 12 where the accused was charged with an offence that attracted a maximum sentence of more than five years’ imprisonment (but excluding high treason and first degree murder), and 4 for all other offences.
13. Peremptory challenges formed part of a dynamic in‑court process governing the selection of jurors from an array of prospective jurors selected at random for jury duty. This process included, and still includes: the ability of accused persons and the Crown to request the removal of a given juror on a challenge for cause for reasons including partiality (*Criminal Code*, s. 638); the power of the trial judge to excuse prospective jurors for reasons of obvious partiality, personal hardship, or any other reasonable cause (s. 632); and the power of trial judges to stand aside prospective jurors (s. 633). This stand‑aside power allows the trial judge to direct that a prospective juror will not sit on the jury unless there are too few other jurors fit to serve.
14. These in‑court procedures emerged in their modern forms in the 16th and 17th centuries in England (*R. v. Sherratt*, [1991] 1 S.C.R. 509, at p. 523). As L’Heureux‑Dubé J. explained in *Sherratt*, their development was “neither fortuitous nor arbitrary” but rather emerged gradually over hundreds of years to support the purposes of the institution of the jury (p. 523). By fostering the independence, impartiality, and representativeness of the jury, the selection process ensures that the jury remains “an excellent fact finder”, that it acts as “the conscience of the community” and as a “final bulwark against oppressive laws or their enforcement”, and that it increases public trust in the administration of justice (pp. 523‑24).
15. Peremptory challenges played a distinct, albeit limited role within this broader context. While the other features of jury selection permit the removal of a juror only for specific reasons, peremptory challenges were “entirely discretionary and not subject to any condition” (*Cloutier v. The Queen*, [1979] 2 S.C.R. 709, at p. 721). The accused could remove a juror because of “a mere belief, more often a hunch, . . . that within the prospective juror resides a state of mind at odds with impartiality” (*R. v. Yumnu*, 2010 ONCA 637, 260 C.C.C. (3d) 421, at para. 123). Blackstone offered two justifications for this virtually unfettered discretion: first, that an accused person ought not to be tried by “any one man against whom he has conceived a prejudice”, and secondly, that accused persons ought to have an opportunity to remove jurors who may become resentful after an unsuccessful challenge for cause (p. 353, as cited in *Cloutier*, at p. 720). In short, peremptory challenges heightened the accused’s perception that he or she “has had the benefit of a fairly selected tribunal” (*Sherratt*, at pp. 532‑33).
16. While, as our colleague Côté J. recounts, commentators since (and including) Blackstone have celebrated the peremptory challenge for its subjective importance to the accused, this must be understood in light of the context surrounding its origin and later evolution. As to its origin, it really is this simple: the juror being objected to was not, in any sense, the juror of the modern day criminal trial. This is because, when peremptory challenges were first made available at common law to the accused, the role of the juror was markedly different. Jurors acted *not* as *independent and impartial* fact‑finders, but as fact‑knowers with *first‑hand knowledge* of the allegations against the accused (J. Heinz, “Peremptory Challenges in Criminal Cases: A Comparison of Regulation in the United States, England, and Canada” (1993), 16 *Loy. L.A. Int’l & Comp. L. Rev.* 201, at pp. 207‑8). Peremptory challenges thus emerged in a context in which the jurors, the accused, and the victims each knew one another. In our respectful view, the constitutionality of the abolition of peremptory challenges in 21st century Canada cannot usefully be informed by such a provenance.
17. Further, after the jury had become an impartial fact‑finding body, challenges for cause and peremptory challenges were generally exercised in narrow and objectively determinable circumstances, such as where a prospective juror failed to meet residential or property requirements, or had a relationship with the accused (R. Blake Brown, “Challenges for Cause, Stand‑Asides, and Peremptory Challenges in the Nineteenth Century” (2000), 38 *Osgoode Hall L.J.* 453, at p. 458). And even after the practice became that an accused person could derive subjective comfort from being able to object to any juror for any reason, that form of challenge (and indeed all forms of challenge) were “uncommon in English courtrooms” before the 19th century (p. 459). This is unsurprising, given the summary nature of criminal trials at the time — trials would take as little as 30 minutes, the role of counsel was minimal, and the accused was not given advance notice of the names of prospective jurors (p. 460). And because jurors were generally of a higher social status than the accused, few accused would challenge prospective jurors for fear of offending the remaining jurors — a fear that was all the more palpable because the accused had to *personally* challenge each juror, even where the accused was represented by counsel (p. 461; see also J. H. Langbein, “The Historical Origins of the Privilege Against Self‑Incrimination at Common Law” (1994), 92 *Mich. L. Rev.* 1047, at p. 1058). Given all this, one commentator concludes that the accused’s “nominal challenge rights were of little use” for much of their history (Langbein, at fn. 51). In short, peremptory challenges, while available, were not such a common feature as to make it possible to say, as our colleague says, that they gave the accused “a sense of ownership in the trial” (Côté J.’s reasons, at para. 235).
18. It *is*, however, fair to say that accused persons could use peremptory challenges to their advantage — for instance, during political prosecutions in the 17th century, when Parliament “recognized that peremptory challenges were one of the accused’s most important tools in securing an impartial jury” (Côté J.’s reasons, at para. 234). But again, context is vital to understanding the significance of this observation to the question before us in this appeal. At that time, the trial process retained a marked power imbalance as between the Crown and the accused (J. Profatt, *A Treatise on Trial By Jury*, *Including Questions of Law and Fact* (1877), at pp. 211‑13). While Parliament had abolished the Crown’s peremptory challenges in 1305, courts had recognized a Crown right to *stand aside* an *unlimited* number of jurors (Heinz, at p. 208; J. M. Van Dyke, *Jury Selection Procedures: Our Uncertain Commitment to Representative Panels* (1977), at p. 154; Brown, at p. 464, citing *R. v. O’Coigly*, [1798] 26 Howell’s State Trials 1191; Heinz, at p. 208). It is therefore not surprising — especially given the experience of turmoil and injustice in 17th century England, and of Parliament’s consequent desire to confine the Crown to the rule of law — that Parliament acted as it did to secure a place for peremptory challenges.
19. We do not, however, see such considerations as especially germane in present circumstances. More generally, and while the peremptory challenge is, as our colleague says, “over seven hundred years old” (Côté J.’s reasons, at para. 232), the historical context from which it emerged and in which it developed, more fully understood, does not support the narrative of undiluted accused protections that our colleague describes. More to the point, however, it tells us little if anything about the current significance of the peremptory challenge to the modern criminal trial. Of greater significance on that point, in our view, is the evidence of two experienced defence counsel, qualified as experts at trial, who attested to their clients’ perceptions of the value of peremptory challenges. They testified that accused persons routinely use peremptory challenges based on the way prospective jurors look at them during the selection process. Additionally, they suggested that racialized accused routinely use peremptory challenges to remove non‑racialized prospective jurors and make room for jurors who represent diverse backgrounds, thereby increasing the accused’s confidence in the impartiality of the jury.
    1. Mounting Criticism of Peremptory Challenges
20. While we do not deny the value of peremptory challenges from the subjective view of accused persons, the *true* value of this “benefit” was doubtful. Peremptory challenges are *exclusive* rather than *inclusive* in nature: they enabled accused persons to *exclude* a limited number of prospective jurors. They did not, however, allow the accused to hand‑pick the eventual jurors, since the accused’s ability to exclude some jurors was balanced by the Crown’s equal right to exclude others. At most, peremptory challenges provided the parties with a limited ability to determine who would ultimately serve on the jury.
21. Moreover, once the jury was empaneled, it became impossible to trace the impact of peremptory challenges on the verdict, given the insurmountable difficulty in ascertaining how a differently constituted jury would have ruled on the same case. As aptly recognized by the Court of Appeal, peremptory challenges were “by nature arbitrary and subjective,” requiring the accused and counsel to rely on “guess work and uncertain mythologies” to predict the prospective juror’s beliefs and attitudes (paras. 54 and 57). The Court of Appeal rightly acknowledged the difficulties inherent in speculating — let alone accurately predicting — how jurors would react to the case based solely on characteristics like “race, gender, age, ethnic origin, demeanour, or manner of dress” (para. 54).
22. More critically, peremptory challenges sit uneasily with various other aspects of jury selection. To begin, peremptory challenges did not displace the principle that the accused has no right to select a partial or favourable jury (*Sherratt*, at p. 532; *R. v. Barrow*, [1987] 2 S.C.R. 694, at p. 720; *R. v. Yumnu*, 2012 SCC 73, [2012] 3 S.C.R. 777, at para. 71). As this Court explained in *Yumnu*, at para. 71, that principle is fundamental:

. . . jury selection is not a game and it should not be approached as though it were. Winning and losing are concepts that ought not to be associated with it. The process is not governed by the strictures of the adversarial model, nor should it be . . . . The idea at the end of the day is not to obtain a jury that is partial to one side or the other. We are looking for jurors who are eligible, impartial, representative and competent. The jury does not belong to the parties; it belongs to the people.

1. Similarly, over 30 years ago, Professor Mewett noted that peremptory challenges and Crown stand asides, the functional equivalent of a peremptory challenge, undermined the randomness of jury selection, a significant guarantor of jury independence and impartiality:

. . . we must reconsider the entire basis for the legislation [governing peremptory challenges and Crown stand‑asides]. It is no longer sufficient to accept it merely because it has developed over the past 700 years. I am not entirely convinced that peremptory challenges for either side make all that much sense, given the checks and balances that exist in the initial selection process . . . .

. . . The essence of our selection process is its random nature — both the Crown and the accused literally take the luck of the draw, both as to who gets onto the panel in the first place and then as to the order in which they are called to take their places on the jury.

(“The Jury Stand‑By” (1988), 30 *Crim. L.Q.* 385, at p. 386)

1. Commentators have also recognized that peremptory challenges could be used in such a way as to facilitate quiet, but deliberate, discrimination. Indigenous communities, in particular, have witnessed the disturbing effects of peremptory challenges in excluding their members from juries. The 1991 Manitoba Public Inquiry into the Administration of Justice and Aboriginal People noted that “both prosecutors and defence attorneys have used their peremptory challenges and stand asides to screen Aboriginal people out of the jury system” (*Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1, *The Justice System and Aboriginal People* (1991), at p. 382). When the Honourable Frank Iacobucci examined the problem of Indigenous under‑representation on Ontario’s provincial jury rolls, he found that the continued existence of peremptory challenges undermined even the most successful attempts by the province to ensure that Indigenous people are represented on jury rolls (*First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by the Honourable Frank Iacobucci* (2013), at para. 376). The Iacobucci Report noted particularly stark examples of the use of peremptory challenges to exclude Indigenous jurors:

The examples they provide are compelling. In the Helen Betty Osborne case in The Pas, the jury had no Aboriginal members, in spite of the fact that it was in an area of Manitoba where Aboriginal people comprise over 50% of the population. All six Aboriginal people called forward were the subjects of peremptory challenges from the defence. Similarly, on one day of the Thompson assizes, 35 of 41 Aboriginal people called to serve on three juries were rejected through peremptory challenges and stand‑asides. “In one case, the Crown rejected 16 Aboriginal jurors; in another, the defence rejected two and the Crown rejected 10; in the third and final case, the defence accepted all the proposed Aboriginal jurors, while the Crown rejected nine. Two jurors were rejected twice.” [Footnotes omitted; para. 155.]

1. Allegations that a party has used peremptory challenges in a discriminatory manner have appeared before the courts in recent decades, with mixed results. For instance, in *R. v. Pizzacalla* (1991), 5 O.R. (3d) 783 (C.A.), the court ordered a new trial because the prosecutor admitted to using peremptory challenges and stand asides to achieve a jury composed only of women to try the male accused of sexual assault. Beyond that case, in which the prosecutor gave a “candid statement of his purpose” (at p. 784), courts have been unwilling to remedy the discriminatory use of peremptory challenges in the absence of a clear evidentiary record establishing that a party systematically excluded any given subset of the population from the jury (see *R. v. Gayle* (2001), 54 O.R. (3d) 36 (C.A.); *R. v. Cornell*, 2017 YKCA 12, 353 C.C.C. (3d) 431; *Gardner c. R.*, 2019 QCCA 726; *R. v. Amos*, 2007 ONCA 672, 161 C.R.R. (2d) 363; *R. v. Lines*, [1993] O.J. No. 3284 (QL) (C.J. (Gen. Div.))). Based on this case law, one commentator has concluded that Canadian courts have simply “been unable to control the discriminatory use of peremptory challenges” (K. Roach, “The Urgent Need to Reform Jury Selection after the Gerald Stanley and Colten Boushie Case” (2018), 65 *Crim. L.Q.* 271). Attempts by U.S. courts to supervise peremptory challenges have faced similar difficulties (see K. J. Melilli, “*Batson* in Practice: What We Have Learned About *Batson* and Peremptory Challenges” (1996), 71 *Notre Dame L. Rev.* 447, at pp 460‑64; K. Taylor‑Thompson, “Empty Votes in Jury Deliberations” (2000), 113 *Harv. L. Rev.* 1261, at p. 1262; H. Weddell, “A Jury of Whose Peers?: Eliminating Racial Discrimination in Jury Selection Procedures” (2013), 33 *B.C. J.L. & Soc. Just.* 453, at pp. 484‑85).
2. In sum, while acknowledging the subjective benefit of peremptory challenges to accused persons, courts and commentators have rightly pointed out that public confidence in the administration of justice suffers when the parties use their challenges to exclude any subset of the population, or when they appear to do so. This abuse has largely escaped judicial oversight and undermines efforts by the provinces to compile representative rosters from which potential jurors are summoned to courthouses for jury duty, as acknowledged by the Iacobucci Report.
   1. The Abolition of Peremptory Challenges
3. Faced with mounting criticisms about the use and value of peremptory challenges, Parliament chose to act. A number of entities and individuals, many of whom have intervened in this appeal, variously urged Parliament to abolish peremptory challenges, to leave them unchanged, or to regulate them. These policy alternatives are represented in various reports that have considered peremptory challenges over the years. For example, the 1991 Manitoba Public Inquiry recommended an outright abolition, while the Iacobucci Report recommended an amendment to the *Criminal Code* that would prevent the use of peremptory challenges to discriminate against First Nations people serving on juries, potentially through judicial supervision.
4. Parliament chose outright abolition. When the Minister of Justice introduced the legislation that would ultimately do away with peremptory challenges (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., 2019), she emphasized that the bill sought to address discrimination in the jury selection regime:

Reforms in this area are long overdue. Peremptory challenges give the accused and the [C]rown the ability to exclude jurors without providing a reason. In practice, this can and has led to their use in a discriminatory manner to ensure a jury of a particular composition.

(*House of Commons Debates*, vol. 148, No. 300, 1st Sess., 42nd Parl., May 24, 2018, at p. 19605)

1. In crafting the new legislation, Parliament bolstered the role of the trial judge in supervising the jury selection process. First, Bill C‑75 relies on the trial judge to adjudicate challenges for cause, while the previous legislation relied on lay triers. Second, Bill C‑75 enhances the power of trial judges to stand aside jurors pursuant to s. 633 of the *Criminal Code*. While trial judges could previously stand aside prospective jurors “for reasons of personal hardship or any other reasonable cause”, the amended provision also allows trial judges to stand aside jurors in order to “maintai[n] public confidence in the administration of justice”. The Justice Minister explained that these amendments aimed to promote “fairness and transparency” in the jury selection process (*House of Commons Debates*, at p. 19605). She also stated that the amended stand‑aside power would enable judges to “make room for a more diverse jury”.
2. During committee proceedings, Parliament considered submissions both supporting and opposing the proposed reforms. Legislators ultimately decided that the abolition of peremptory challenges would promote fairness in the jury selection process, due in part to the enhancement of the trial judge’s stand‑aside power.
3. Analysis
4. We now turn to the merits of this appeal. We begin with Mr. Chouhan’s cross‑appeal challenging the constitutionality of the amendments before addressing the Crown’s appeal on the temporal scope of the legislation.
   1. The Constitutional Issues
5. Before this Court, Mr. Chouhan submits that the *Criminal Code* amendments infringe his rights under ss. 11(d) and 11(f) of the *Charter*.
   * 1. Section 11(d): The Right to an Independent and Impartial Tribunal
6. Whenever Parliament alters some aspect of the jury selection regime, it must ensure that the new jury selection process continues to guarantee the right of each accused to a fair trial before an independent and impartial jury, as promised by s. 11(d) of the *Charter*. But s. 11(d) does not entitle the accused to any particular procedure. The question is not whether a new process chosen by Parliament is less advantageous to the accused (*R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554, at para. 47; *United States of America v. Ferras*, 2006 SCC 33, [2006] 2 S.C.R. 77, at para. 14). Rather, the question is whether a reasonable person, fully informed of the circumstances, would consider that the new jury selection process gives rise to a reasonable apprehension of bias so as to deprive accused persons of a fair trial before an independent and impartial tribunal (*Valente v. The Queen*, [1985] 2 S.C.R. 673, at p. 689; *R. v. Bain*, [1992] 1 S.C.R. 91, at pp. 101, 111, and 147; *R. v. Kokopenace*, 2015 SCC 28, [2015] 2 S.C.R. 398, at para. 49).
7. While the focus of the Court’s attention in this case is necessarily on the abolition of peremptory challenges, we are asked to consider the constitutionality of the jury selection process as a whole, including those aspects of it that survived Bill C‑75 and those that Parliament modified in tandem with the abolition of peremptory challenges. In our view, the jury selection regime since Parliament enacted Bill C‑75 continues to provide the independent and impartial jury that each accused is owed under s. 11(d) of the *Charter*.
8. Both the trial judge and the Court of Appeal properly acknowledged that the features of the jury selection regime that survived the Bill C‑75 amendments go far to ensure that juries are both independent and impartial. Those protections begin long before the day on which the accused appears in court to select the jury. Provincial authorities are constantly at work, compiling a representative jury roll of eligible jurors, as part of a process that provides a fair opportunity for a broad cross‑section of society to serve as a juror (*Kokopenace*, at para. 61).
9. When prospective jurors are randomly selected from the roll and invited to appear for jury duty, their names are again randomly drawn from among a collection of cards “thoroughly shaken together” in order to serve on the jury that will ultimately try the accused (*Criminal Code*, s. 631(1) and (2)). The randomness of these processes bolsters the independence and impartiality of the jury (*Sherratt*, at pp. 520 and 525).
10. As prospective jurors are drawn one by one in court, the *Criminal Code* provides for robust participation by both the trial judge and the parties in ensuring the impartiality of those who ultimately serve on the jury, even in the absence of peremptory challenges. In this regard, the Court of Appeal rightly emphasized the continued availability of an unlimited number of challenges for cause under s. 638(1)(b), which allow the accused to request the removal of a juror on the basis that the juror “is not impartial” after limited questioning. The Court of Appeal noted, too, that s. 632(c) permits trial judges to excuse jurors for reasons of “personal hardship or any other reasonable cause that, in the opinion of the judge, warrants that the juror be excused”. While the power to excuse jurors is not a substitute for a challenge for cause (*Sherratt*, at pp. 533‑34), trial judges routinely excuse jurors at the outset of jury selection for a number of reasons. For instance, jurors who would find it “too difficult” to serve given the nature of the offences at issue in the trial are often excused (see *R. v. B.(A.)* (1997), 33 O.R. (3d) 321 (C.A.), at p. 443), as are jurors who are “obviously partial” because they know a party in the trial or a witness who will testify (*R. v. Hubbert* (1975), 11 O.R. (2d) 464 (C.A.), at pp. 292‑93; *Barrow*, at p. 709).
11. These procedures are important. They provide a mechanism for removing jurors whose impartiality is or may be in question, for any number of reasons, including that the jurors are unable to set aside a racial or other bias against the accused or complainant or they feel unable to sit through a trial involving the crimes at issue. In so doing, the procedures collectively ensure that each accused receives a fair trial before an independent and impartial jury, as required by s. 11(d) of the *Charter*. The abolition of peremptory challenges does not infringe this right.
12. Nevertheless, we acknowledge that the abolition of peremptory challenges comes at a time of heightened public awareness of the role of racial prejudice in the criminal justice system. It is in these circumstances that the interveners before this Court spoke of the impact that the abolition of peremptory challenges would have on the diversity of the jury, and on the public’s confidence in the integrity of its deliberations. Despite differences in their ultimate stance on peremptory challenges, each intervener came before this Court to advance the same core submission: diversity is fundamental to achieving a jury that is impartial to the accused and free from discrimination toward jurors and victims.
13. As a constitutional matter, the jurisprudence has consistently declined to interpret the imperatives of jury representativeness and impartiality as requiring diversity among members of the jury (see *R. v. Biddle*, [1995] 1 S.C.R. 761, at paras. 56‑58, per McLachlin J. (as she then was); *Kokopenace*, at para. 42; *R. v. Brown* (2006), 215 C.C.C. (3d) 330 (Ont. C.A.), at para. 22; *R. v. Church of Scientology* (1997), 33 O.R. (3d) 65 (C.A.), at pp. 120‑21; *R. v. Laws* (1998), 41 O.R. (3d) 499 (C.A.), at pp. 517‑18). Nor has the concept of impartiality ever rested on the accused’s subjective confidence in each individual juror or on jurors sharing an aspect of their identity — including visible and non‑visible characteristics — with the accused or victim (*Gayle*, at p. 38; *Biddle*, at para. 60, per McLachlin J. (as she then was)).
14. To the extent our colleagues Abella and Côté JJ. maintain that the fair trial rights of an accused depend on the subjective perceptions of the accused (see Abella J.’s reasons, at paras. 205-6; Côté J.’s reasons, at paras. 310-11), we respectfully disagree. Each cites cases in which this Court has considered trial fairness from the perspective of the accused, but all of those cases explain that fairness also depends on the perspectives of the Crown and the broader community. In *R. v.* *Harrer*, [1995] 3 S.C.R. 562, for instance, the accused undoubtedly saw it as unfair to be prosecuted on the basis of statements she gave in the United States that would have been excluded under the *Charter* had they been given in Canada. But her subjective perception of unfairness yielded to the objective view that, when she entered the U.S., she attorned to that country’s laws which are “generally considered to be fair by standards in the free and democratic world” (para. 52). Conversely, in *Barrow*, it was unfair for the trial judge to have private, hushed conversations with prospective jurors concerning their requests to be excused on the basis of partiality — not just because the accused saw the secret procedure as unfair, but because any objective view of that procedure deprived the parties and the community of “the right to know that the jury is as impartial as is humanly possible” (para. 47). Likewise, in *Bain*, the Crown’s exclusive power to stand aside an unlimited number of jurors rendered the trial unfair, not because the accused thought so, but because the “pervasive air of unfairness” of the stand asides would be apparent to “a reasonable person” (pp. 101 and 103). Contrary to the views of our colleagues, these cases demonstrate that the subjective perceptions of the accused alone have never driven the *Charter* analysis under s. 11(d).
15. Respectfully, we cannot endorse a view of jury selection which measures a juror’s impartiality by whether that juror shares a characteristic of their identity with the accused or the victim. We also observe that absolute diversity on a jury is unattainable, as no group of 12 could ever represent the “innumerable characteristics existing within our diverse and multicultural society” (*Kokopenace*, at para. 43; see also *Biddle*, at para. 58, per McLachlin J.).
16. In any event, the abolition of peremptory challenges will go far to minimizing the occurrence of homogenous juries. The in‑court jury selection process, and in particular the peremptory challenge, has long undermined the provincial governments’ efforts to compile jury rosters that bring together a “representative cross‑section of society, honestly and fairly chosen” (*Sherratt*, at p. 524; see also *Kokopenace*, at paras. 39‑40). An example of this is presented by the trial which prompted Parliament to abolish peremptory challenges — the trial of Gerald Stanley, who was charged with the murder of Colten Boushie, a young Indigenous man. During the jury selection process, Mr. Stanley used peremptory challenges to exclude five Indigenous prospective jurors from the jury. Absent peremptory challenges, that trial almost certainly would have had a more racially diverse jury, since Mr. Stanley could not have objected peremptorily to the five Indigenous persons who were drawn from the jury panel.
17. On this point, the Iacobucci Report is instructive. By way of explanation, it made extensive recommendations for improving Indigenous representation on jury rolls in Ontario. For example, the province could draw the names of eligible jurors from comprehensive databases such as those kept by the ministries of health and transportation; it could simplify the language on jury questionnaires; it could provide opportunities for citizens to volunteer to serve as jurors; and it could provide translation services to jurors at trial. But the Report also spoke of the potential deleterious impact of peremptory challenges on such efforts, concluding that even if *every recommendation* were “implemented to its fullest”, Indigenous representation on juries “could still be significantly undermined through discriminatory use of peremptory challenges” (para. 376).
18. It follows, then, that Parliament, in abolishing peremptory challenges, sought to give greater effect to provincial initiatives to increase jury representativeness, which in turn should enhance the diversity of jury composition. To that end, the provinces are free and even encouraged to act to increase the diversity of those who appear for jury duty, including by pursuing the measures identified in the Iacobucci Report (see also *Kokopenace*, at paras. 126‑27). In all cases, however, the provinces’ constitutional obligation requires them to make “reasonable efforts to: (1) compile the jury roll using random selection from lists that draw from a broad cross‑section of society, and (2) deliver jury notices to those who have been randomly selected” (*Kokopenace*, at para. 61 (emphasis added)). As we will explain, it is these structural measures, and not the isolated discretionary decisions of trial judges, that should be relied upon to preserve and enhance the representativeness of juries in Canada, or to address any ill effects thereon arising from societal inequalities.
19. We pause here to remark upon the analysis of our colleague, Abella J., as it relates to the constitutionality of the amendments abolishing peremptory challenges. While our colleague concludes that the amendments are constitutional, the substance of her reasons actually supports the opposite conclusion. This is borne out by the inestimable value she ascribes to peremptory challenges, treating them as an integral component of an accused person’s right, under s. 11(d) of the *Charter*, to a fair trial by an independent and impartial jury. She says, for example:

Abolishing peremptory challenges, therefore, diminished the right of accused persons to meaningfully participate in jury selection and to influence the ultimate composition of the jury. Their abolition affected the substantive rights of an accused to participate in the selection of an impartial and representative jury, as guaranteed in ss. 11(d) and 11(f) of the *Charter*. It is hard to think of anything that has a more direct impact on an accused’s fair trial rights than the perception that he or she has been tried by a fairly chosen, impartial and representative jury.

. . .

Peremptory challenges were one of the core safeguards that ensured the impartiality of the jury. [Emphasis added; paras. 206 and 211.]

1. Our colleague’s observations effectively, if not explicitly, state the conclusion that peremptory challenges cannot be abolished without infringing the s. 11(d) right of accused persons. We acknowledge that our colleague then seeks to cushion this by suggesting that the other Bill C‑75 amendments — empowering trial judges to adjudicate challenges for cause and to stand aside prospective jurors for reasons of “maintaining public confidence in the administration of justice” — compensate for the lost ability of accused persons to veto prospective jurors, *so long as* these new powers are exercised “vigorously” by trial judges. In other words, the constitutionality of the scheme hinges on the exercise of discretion. We make no comment on whether the constitutionality of legislation could depend on how the discretion it confers is ultimately exercised. But, were this even possible, it would (on our colleague’s understanding) require the trial judge to exercise these new powers in a manner which restores the accused’s subjective perception that he or she has been tried by a fairly chosen, impartial and representative jury, thereby effectively giving accused persons the veto power that has been taken away from them.
2. In our respectful view, our colleague has very much overstated the value of peremptory challenges. In doing so, she all but overlooks the substantial body of scholarly commentary which places considerable responsibility on peremptory challenges for undermining the diversity of juries. For instance, our colleague relies on an article by Professor Roach, who in fact advocates for the abolition of peremptory challenges. As Professor Roach concludes, “[e]quality cuts both ways” and the accused “does not have a Charterright to peremptory challenges or racist uses of them” (pp. 274‑75 (emphasis added)).
3. Finally, before proceeding to the s. 11(f) issue, and given the parties’ and interveners’ extensive submissions on these matters, we wish to highlight the opportunities that the parties in criminal trials have to raise and address concerns about juror partiality and bias. First, in appropriate cases, trial judges should consider crafting jury charges and mid‑trial instructions that caution against the risk that bias, racial or otherwise, will taint the integrity of the jury’s deliberations. Second, the challenge for cause provisions under s. 638 of the *Criminal Code* continue to provide a robust mechanism for accused persons to raise concerns about a potential juror’s partiality. Third, the amended stand‑aside power under s. 633 of the *Criminal Code* further accounts for any gap that may have been left by the abolition of peremptory challenges. We discuss each of these in turn, but emphasize that, contrary to the views expressed by our colleague Martin J., our reasons on these matters do not constitute unnecessary *obiter dicta*. In light of our colleague Abella J.’s conclusion — echoing the submissions of many interveners — that the constitutionality of the abolition of peremptory challenges depends upon the trial judge’s “vigorou[s] exercise” of challenges for cause and the stand‑aside power, we find it necessary to explain the limits of these powers. We must also respectfully emphasize, however, that, contrary to the views of Côté J. (para. 231), Mr. Chouhan’s s. 11(d) rights were not prejudiced because his trial proceeded without the guidance we provide below.
   * + 1. Jury Instructions
4. Although our jury system depends on the impartiality of each juror, it does not demand that jurors be neutral. This Court explained the distinction between impartiality and neutrality in *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, at para. 43:

Impartiality does not require that the juror’s mind be a blank slate. Nor does it require jurors to jettison all opinions, beliefs, knowledge and other accumulations of life experience as they step into the jury box. Jurors are human beings, whose life experiences inform their deliberations.

But the life experiences that jurors may legitimately bring to their deliberations cannot interfere with their responsibility to approach the case with “an open mind, one that is free from bias, prejudice, or sympathy” (*R. v. Barton*,2019 SCC 33, [2019] 2 S.C.R. 579, at para. 195).

1. In our view, jury instructions have a critical role to play in ensuring that jurors approach their deliberations free from bias. Jury instructions can respond to a significant danger of biased reasoning, which is that many biases are unconscious: individuals often do not recognize they hold a particular bias and would likely, and honestly, deny having it if asked (M. L. Breger, “Making the Invisible Visible: Exploring Implicit Bias, Judicial Diversity, and the Bench Trial” (2019), 53 *U. Rich. L. Rev.* 1039, at p. 1044). And jurors must be made aware of their own unconscious biases if the influence of biased reasoning is to be eliminated (p. 1057; C. R. Lawrence III, “The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism” (1987), 39 *Stan. L. Rev.* 317, at p. 331; F. E. Marouf, “Implicit Bias and Immigration Courts” (2011), 45 *New Eng. L. Rev.* 417, at pp. 447‑48; A. Su, “A Proposal to Properly Address Implicit Bias in the Jury” (2020), 31 *Hastings Women’s L.J.* 79, at p. 90). In appropriate cases, therefore, trial judges should consider providing the jury with instructions that will “expose biases, prejudices, and stereotypes that lurk beneath the surface, thereby allowing all justice system participants to address them head‑on — openly, honestly, and without fear” (*Barton*,at para. 197). Such instructions can add a measure of self‑consciousness and introspection that fosters objectivity and fairness over the course of the jury’s deliberations (Su,at p. 90).
2. Anti‑bias instructions will be appropriate wherever “specific biases, prejudices, and stereotypes . . . may reasonably be expected to arise in the particular case” (*Barton*, at para. 203). This is not because of some freestanding notion or interpretive principle of “substantive equality”, as our colleague Martin J. suggests (at para. 110), but because impartiality is inherently attuned to the concept of bias. As our understanding of the nature of bias evolves, so will our understanding of what a trial judge must do to foster impartiality among members of the jury. Informed by recent case law and a modern understanding of impartiality, trial judges may therefore draw on their own professional experiences and good sense in deciding whether anti‑bias instructions are required, and the submissions of counsel will be helpful in identifying appropriate cases for such instructions. The reality is that context matters: no trial “take[s] place in a historical, cultural, or social vacuum” (*Barton*, at para. 198). Participants in the justice system must remain vigilant in identifying and addressing the unconscious biases that might taint the integrity of jury deliberations.
3. As to the content of anti‑bias instructions, the basic principles that this Court enunciated in *Barton* bear repeating:

. . . there is no magic formula. In my view, trial judges should be given discretion to tailor the instruction to the particular circumstances, preferably after having consulted with the Crown and the defence . . . .

. . .

With regard to trial fairness, it is worth emphasizing that any instruction given must not privilege the rights of the complainant over those of the accused. The objective would instead be to identify specific biases, prejudices, and stereotypes that may reasonably be expected to arise in the particular case and attempt to remove them from the jury’s deliberative process in a fair, balanced way, without prejudicing the accused.

[Emphasis added, paras. 201 and 203.]

1. With these principles in mind, we suggest two types of jury instructions that can address the risk of bias in appropriate cases: (i) general instructions on biases and stereotypes; and (ii) instructions on specific biases and stereotypes that arise on the facts of the case.
   * + - 1. General Anti‑Bias Instructions
2. Where anti‑bias instructions are required, they ought to come early, before the presentation of evidence, and at any other time that the trial judge deems appropriate, including when the panel of prospective jurors is assembled in the courtroom at the outset of jury selection. We suggest that trial judges begin by pointing out that as members of society, each juror brings a variety of beliefs, assumptions, and perceptions to the court room. These assumptions will often be based on characteristics such as gender, race, ethnicity, sexual orientation, or employment status. Trial judges ought to highlight that jurors may be aware of some of their biases while being unaware of others. These unconscious biases may be based on implicit attitudes, namely “feelings that one has about a particular group”, or stereotypes, namely “traits that one associates with a particular group” (A. Roberts, “(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias” (2012), 44 *Conn. L. Rev.* 827, at p. 833).
3. Trial judges should exhort jurors to approach their weighty task with a heavy dose of self‑consciousness and introspection. Jurors must identify and set aside prejudices or stereotypes when considering the evidence of any given witness and when reaching a verdict (see, generally, G. A. Ferguson and M. R. Dambrot, *CRIMJI: Canadian Criminal Jury Instructions* (4th ed. (loose‑leaf)), vol. 1, at pp. 1.02A‑1 to 1.02A‑7; M. K. Thompson, “Bias on Trial: Towards an Open Discussion of Racial Stereotypes in the Courtroom” (2018), 5 *Mich. St. L. Rev.* 1243, at pp. 1301‑6).
4. We offer these suggestions by way of example but stress that refinement will be necessary, in particular to meet the submissions by Crown and defence counsel in each individual case.
   * + - 1. Instructions on Specific Biases and Stereotypes
5. Any number of specific biases or stereotypes could arise in a given case. These biases or stereotypes may pose a significant challenge to the public interest in truth‑finding that characterizes all criminal prosecutions in this country (Ferguson and Dambrot, at p. 1.02A‑2; *R. v. O’Connor*, [1995] 4 S.C.R. 411, at para. 109; *R. v. Seaboyer*, [1991] 2 S.C.R. 577). When tailoring bias instructions to a specific trial, trial judges and counsel should consider the relevance of context and the harmful nature of stereotypical assumptions or myths.
6. It is impossible to highlight every bias that could conceivably affect a jury trial. By way of example, this Court identified some specific biases that arose on the facts of *Barton*, which involved the killing of an Indigenous sex worker:

In a case like the present, the trial judge might consider explaining to the jury that Indigenous people in Canada — and in particular Indigenous women and girls — have been subjected to a long history of colonization and systemic racism, the effects of which continue to be felt. The trial judge might also dispel a number of troubling stereotypical assumptions about Indigenous women who perform sex work, including that such persons:

* are not entitled to the same protections the criminal justice system promises other Canadians;
* are not deserving of respect, humanity, and dignity;
* are sexual objects for male gratification;
* need not give consent to sexual activity and are “available for the taking”;
* assume the risk of any harm that befalls them because they engage in a dangerous form of work; and
* are less credible than other people. [para. 201]

This Court has also recognized other examples of impermissible myth‑based reasoning in the context of sexual assault prosecutions (see *Seaboyer*, at p. 612; *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275, at para. 63; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at paras. 82 and 95, per L’Heureux‑Dubé J., and at para. 103, per McLachlin J.).

1. The trial judge must be alive to the particularities of each individual trial that might present the danger of a juror being influenced by unconscious bias. Recognizing that there is no “magic formula”, trial judges should identify the characteristics of the parties or the witnesses that give rise to the risk of unconscious bias, dispel common stereotypes, and direct the jurors to decide the case with an open mind based on the evidence before them (Ferguson and Dambrot, at p. 1.02A‑7). The submissions of counsel will be integral to this process.
2. Such instructions should not be taken as criticizing past or future jurors. They merely recognize that the benefit of human experience which the jury brings to the criminal process can also be tainted by prejudices and stereotypes. Indeed, this Court has recognized that “[w]hen jurors are sworn and empanelled, Canadian society tasks them with a weighty responsibility: deciding whether, on the evidence put before them, the accused is guilty or not. This task is not easy — it requires patience, judgment, and careful analysis” (*Barton*,at para. 195). These instructions continue to emphasize the disposition of self‑consciousness and introspection that jurors must maintain in discharging their duties.
   * + 1. The Challenge for Cause Procedure
3. Concerns about the impartiality of a given juror may be better addressed through the challenge for cause process than through the exercise of peremptory challenges (see Canada, Department of Justice, *Charter Statement — Bill C‑75 : An Act to Amend the Criminal Code, Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts* (March 2018) (online); Roach; A. Page, “*Batson*’s Blind‑Spot: Unconscious Stereotyping and the Peremptory Challenge” (2005), 85 *B.U.L. Rev.* 155, atp. 262). Challenges for cause, unlike peremptory challenges, are unlimited. More importantly, they are not readily susceptible to abuse, as their focus is on transparency and openness, rather than hidden assumptions about a juror’s attitudes (C. Petersen, “Institutionalized Racism: The Need for Reform of the Criminal Jury Selection Process” (1993), 38 *McGill L.J.* 147, at p. 175).
4. Accordingly, this case presents an opportunity to comment on the procedure for challenges for cause given our growing knowledge of the ways in which unconscious bias can affect the impartiality of a juror. This Court has “faced up to” the fact that racial prejudice and discrimination are present in society and must be directly addressed in the selection of jurors (*R. v. Spence*,2005 SCC 71, [2005] 3 S.C.R. 458, at para. 1). We therefore 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.
5. 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. The trial judge necessarily enjoys significant discretion to determine how and under what circumstances the presumption of impartiality will be displaced, and how far the parties may go in the questions that are asked on a challenge for cause (*Spence*,at para. 24; *R. v. Williams*, [1998] 1 S.C.R. 1128, at para. 55; *Find*, at para. 45).
6. In our view, the challenge for cause procedure is itself a vehicle for promoting active self‑consciousness and introspection that militate against unconscious biases. The prospective juror, who, when empanelled, steps into an adjudicative role must bring to bear a degree of impartiality similar to that of judges. Impartiality requires active and conscientious work. It is not a passive state or inherent personality trait. It requires jurors to be aware of their own personal beliefs and experiences, and to be “equally open to, and conside[r] the views of, all parties before them” (*R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at para. 40). Given these principles, the questioning on a challenge for cause ought to be able to explore the juror’s willingness to identify unconscious bias and strive to cast it aside when serving on the jury (*Find*, at para. 40).
7. Appropriate questions on a challenge for cause will ask prospective jurors for their opinion as it relates to salient aspects of the case. For instance, counsel may point to characteristics of the accused, complainant or victim, such as race, addiction, religion, occupation, sexual orientation or gender expression, and ask prospective jurors whether, in light of such characteristics, they would have difficulty judging the case solely on the evidence and the trial judge’s instructions, because they hold an opinion about such characteristics that on careful reflection, they do not believe they could put aside. Before posing that question to jurors, trial judges ought to call each individual juror’s attention to the possibility of unconscious bias and impartiality. It should be stressed that the mischief is not in acknowledging a difficulty setting aside unconscious bias, but in failing to acknowledge such a difficulty where one exists.
8. The facts of *Barton* provide a useful example of background information that could prompt this kind of questioning.[[1]](#footnote-1) There, the victim, as both an Indigenous woman and a sex worker, had characteristics and personal circumstances that gave rise to a risk of bias and discrimination in the minds of jurors. On that basis, the Crown could have requested a challenge for cause to alert the prospective jurors to the presence of these characteristics and circumstances, and to encourage active identification of personally held beliefs and opinions. In such or similar circumstances, before questioning individual jurors, the trial judge could consider providing an explanation of the process in the following terms:

The victim in this case was an Indigenous woman who was also a sex worker. Her death occurred while she was engaged in her work as a sex worker. As a prospective juror, you bring with you experiences, beliefs, and opinions, some of which may be unconscious. The issue before us today is not whether these beliefs are correct or proper, but whether you can set them aside and judge the evidence presented at trial fairly without bias, prejudice, or partiality. We will now ask you some questions about this issue. Think carefully before answering.

1. Our colleague Abella J. suggests 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” and will necessitate “a more sophisticated manner of questioning” (paras. 160-61). While we agree that the *Parks* question was never intended to be *the only* question available on a challenge for cause (*R. v. Parks* (1993), 15 O.R. (3d) 324 (C.A.)), we caution that trial judges who permit questions beyond the *Parks* formulation must be mindful of the fundamental principle of respect for jurors’ privacy upon which our system of jury selection has “long been based” (*Kokopenace*,at para. 74, perMoldaver J.; at para. 155, perKarakatsanis J.; and at para. 227, perCromwell J. (dissenting but not on this point)). The *Parks* question itself permits only limited incursions into juror privacy, and further developments in the challenge for cause process must continue to balance “the accused’s right to a fair trial by an impartial jury, while also protecting the privacy interests of prospective jurors” (*Williams*,at para. 53 (emphasis added); *Spence*,at para. 24; *R. v. Davey*,2012 SCC 75, [2012] 3 S.C.R. 828, at para. 30). It is for this reason that the jurisprudence has long resisted the temptation to move the Canadian law regarding juror privacy closer to that of the U.S. system. In concluding that it is “unclear that the [U.S.] system produces better juries than the Canadian system”, this Court has pointed to the high degree of protection of and respect for juror privacy, and our concern to prevent “abuse by counsel seeking to secure a favourable jury, or to indoctrinate jurors to their views of the case” (*Find*,at para. 27; see also, *R. v. G. (R.M.)*,[1996] 3 S.C.R. 362). Any future developments should account for these precedents.
2. We raise two final points regarding challenges for cause. First, Bill C‑75 directs that the trial judge, rather than a layperson, will be the arbiter of the challenge for cause (*Criminal Code*,s. 640(1)). As such, in our view, it would be appropriate for the trial judge — as an impartial person adjudicating impartiality — to put the challenge for cause questions to the prospective juror. Counsel should, of course, be consulted on the content of such questions before they are posed. Secondly, in trials involving challenges for cause, trial judges should as a rule exercise their power to exclude jurors from the court room during the selection process, pursuant to s. 640(2) of the *Criminal Code*. Jurors would be understandably reluctant to acknowledge a bias or prejudice publicly, and therefore, the risk of empanelling a biased juror increases where exclusion orders are not made (R. A. Schuller et al., “Challenge for Cause: Bias Screening Procedures and Their Application in a Canadian Courtroom” (2015), 21 *Psychol. Pub. Pol’y & L*. 407, at p. 417). After all, the purpose of this expanded procedure is not to expose potential jurors as “racists” or to single them out publicly for their biases, but rather to foster candid reflection on their part about their ability to consider the evidence impartially. This approach will target both explicit racism and more subtle forms of racial prejudice (see Martin J.’s reasons, at para. 121).
   * + 1. The Stand‑Aside Power Under Section 633 of the Criminal Code
3. The final aspect of the jury selection process on which we wish to comment is the stand‑aside power under s. 633 of the *Criminal Code*. By amending the stand‑aside provision to permit trial judges to direct jurors to “stand by for reasons of . . . maintaining public confidence in the administration of justice”, Parliament effectively amended the purview of the stand‑aside power.
4. In doing so, Parliament borrowed language that figures prominently in the jurisprudence on s. 11(d) and elsewhere in the criminal law. The concept of “maintaining public confidence in the administration of justice” comes from *Valente*, in which Le Dain J. held that independence and impartiality “are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice” (p. 689). Justice Le Dain held further that without public confidence, “the system cannot command the respect and acceptance that are essential to its effective operation” (p. 689). Writing in the context of the accused’s right to be present for the selection of the jury, Dickson C.J. held that “[t]he accused, the Crown, and the public at large all have the right to be sure that the jury is impartial and the trial fair; on this depends public confidence in the administration of justice” (*Barrow*, at p. 710 (emphasis added)).
5. We are of the view that the “maintaining public confidence in the administration of justice” standard provides an effective analytical yardstick to address a variety of residual concerns in the jury selection process. In particular, the stand‑aside power can provide a means to exclude jurors whom the judge, the accused, or the Crown believe might be partial but who have nevertheless survived a challenge for cause. In this respect, the amended provision builds upon the case law that has recognized that the stand‑aside power provides an “element of flexibility” to the jury selection process by allowing trial judges to exclude jurors who *might* be partial (*R. v. Krugel* (2000), 143 C.C.C. (3d) 367 (Ont. C.A.), at paras. 63‑64).
6. It will be for trial courts and courts of appeal to determine, on a case‑by‑case basis, the contours of the trial judge’s discretion to stand aside jurors to “maintain[n] public confidence in the administration of justice”, but we wish to make it clear what this amended power *cannot* be used for.
7. First, in all cases, the trial judge must maintain a resolute focus on the language that Parliament chose in amending the stand aside provision: trial judges can stand aside jurors only where necessary to “maintai[n] public confidence in the administration of justice”. Public confidence is assessed from the perspective of a reasonable and informed person (*R. v. St‑Cloud*, 2015 SCC 27, [2015] 2 S.C.R. 328, at para. 87), who, in the context of jury selection, will know of the many safeguards that go to ensuring the independence and impartiality of the jury and the fairness of the trial, including: the dedicated provincial efforts to create representative jury rolls, the vital principle of randomness that undergirds all aspects of jury selection, the challenge for cause process that removes potential jurors for partiality, the trial judge’s instructions targeting implicit and unconscious bias, and the rigours of the trial process itself. Given these and other safeguards, which we have canvassed at length above, public confidence will not easily be lost in the jury selection process.
8. Indeed, the jurisprudence of this Court demonstrates that generally, public confidence will be lost only where something egregious has occurred in the justice system that society at large finds unacceptable and simply will not tolerate. These circumstances are not mere deviations from established procedures. They cut to the very heart of the public’s entitlement to know that the jurors who decide the guilt of each accused are independent, impartial, and fairly selected. For instance, in *Barrow*, the jury selection procedure that unfolded through hushed conversations with individual jurors, out of earshot of the accused, undermined public confidence in the administration of justice because it impaired the right of all participants in the justice system to “be sure that the jury is impartial and the trial fair” (para. 25). Likewise, in *Bain*, the Crown’s ability to stand aside a disproportionate number of jurors resulted in a trial process that was “tainted with the appearance of obvious and overwhelming unfairness” and so manifestly stacked against the accused that “[m]embers of the community [would] be left in doubt as to the merits of” the trial (p. 102). These cases illustrate the central role that a fairly and transparently selected jury plays in ensuring public confidence in the administration of justice. They also illustrate the tenor and magnitude of the circumstances that will occasion a loss of public confidence.
9. It follows that we respectfully reject our colleague Abella J.’s suggestion that trial judges use the stand‑aside power to “actively promote jury diversity” and to approximate “Canada’s kaleidoscope of human diversity” (para. 164). Parliament did *not* write into law that the stand‑aside power is to be used to bolster jury diversity as our colleague has conceived of it, but, again, for “maintaining public confidence in the administration of justice”. As a matter of law, we cannot accept that public confidence in the administration of justice depends on achieving a jury that approximates the diversity of Canadian society.
10. Nor do we find our colleague’s abstract conception of diversity to offer meaningful guidance for trial judges. Indeed, we fear that our colleague’s conception of the role trial judges are to play in the jury selection process raises more questions than answers. Are trial judges to habitually stand aside whole groups of jurors in order to make room for jurors of other backgrounds? And bearing in mind that each part of Canada is diverse in its own way, what does the phrase “Canada’s kaleidoscope of human diversity” signify? Not all communities in Canada are diverse in the same way, nor is there one single Canadian standard of “diversity”. A representative jury in Corner Brook, N.L. will not be “diverse” in the same way that a jury in Rankin Inlet, N.T. or in Prince Rupert, B.C., or in Trois‑Rivières, Que., would be “diverse”. Must trial judges strive for a national ideal of Canadian diversity, as our colleague’s statement suggests, irrespective of the particular diversity of the local community?
11. Notably, most of the interveners in this Court were not concerned with ensuring that “Canada’s kaleidoscope of human diversity” finds its way onto every jury, but rather with ensuring that juries include someone bearing relevant characteristics of the accused or victim. For instance, the Advocates’ Society explained that “peremptory challenges offer all accused persons a fair opportunity to select for some of the characteristics most important *to them*” (I.F., at para. 23 (emphasis added; italics in original)). Similarly, the British Columbia Civil Liberties Association explained that homogenous juries often mean that white accused are “tried by their peers” while Black and Indigenous accused are not (I.F., at para. 3 (emphasis added)). If this is so, is diversity meant to correspond to relevant characteristics of the accused, or the victim, or both? What are trial judges to do in cases involving multiple co‑accused of different races, and racially diverse groups of victims? Is it not conceivable that the trial judge might in such circumstances be tasked with hand‑picking all 12 jurors? And would this not give rise to a serious constitutional concern? This raises the obvious question: how *specific* is the imperative of diversity? Does it require, for example, in a case where the victim or accused is Indigenous, that there be at least one Indigenous juror? Or, are more required? And, if more, how many more? And must such jurors be from the same First Nation as the accused or the victim?
12. These are the sorts of difficult questions with which trial judges would have to grapple if they were empowered to shape the diversity of the petit jury. If nothing else, the different approaches to enhancing diversity contemplated by our colleague and these interveners raise a host of practical problems, some of which could involve constitutional issues — a problem not lost on the trial judges who have been asked to apply the stand‑aside power as our colleague proposes (see, e.g., *R. v. Campbell*, 2019 ONSC 6285; *R. v. Josipovic*, 2020 ONSC 6300).
13. Likewise, if trial judges were to use the stand‑aside power as suggested by our colleague and urged upon us by some of the interveners, we see no principled reason for allowing a trial judge, in the quest for a diverse petit jury, to stop at *visible* identity characteristics. If a Black or Indigenous accused or complainant can ask the trial judge to ensure Black or Indigenous representation on the jury, there would be no principled reason why an accused or complainant who is LGBTQ or a member of a religious minority should not also have the right to see themselves “represented” on the jury. Non‑visible features of one’s identity, such as sexual orientation or religion, could then be explored with prospective jurors, compelling them to reveal their sexual orientation or religious faith — which would depart substantially from traditional Canadian practice and juror privacy, as discussed above.
14. We raise these questions to highlight that what our colleague Abella J. and some interveners propose would alter in a fundamental way the nature and practice of jury selection in this country. This Court has, with good reason, declined to interpret the imperatives of jury representativeness and impartiality as requiring diversity among the members of the petit jury. As a constitutional matter, diverse juries depend *not* on gerrymandered juries, but on diverse jury panels. And diverse jury panels are preserved *not* by the use of stand asides to remove jurors by reason of their particular background, but by rules that do not undermine their diversity.
15. This last point — the crucial importance of diverse jury panels to secure diverse juries — merits special emphasis. Here lies the prime importance ascribed by this Court in *Kokopenace* to *randomness*, since that equal chance to be selected for the jury depends fundamentally on the *randomness* of the jury selection process. We endorse the explanation of one commentator for why, as a matter of logic, any departure from randomness will necessarily lead to *lesser, not greater*, representativeness on the jury:

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.

. . .

. . . It is a basic statistical concept that a sample of the population is only “representative” if it is randomly selected. The degree to which a sample is not randomly chosen is referred to as a “selection bias”. While this may seem like arcane statistrivia, 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. [Footnotes omitted.]

(B. Kettles, “Impartiality, Representativeness and Jury Selection in Canada” (2012), 59 *Crim. L.Q.* 462, at pp. 482‑83)

1. For all of these reasons, we must conclude that the judicial stand‑aside power, as amended, cannot be used in the manner that our colleague Abella J. and various interveners suggest. To the contrary, the reasonable, informed observer would lose confidence in a jury selection process that requires trial judges to sacrifice the vital principle of randomness on the altar of diversity and select individual jurors merely on the basis of their race or other aspects of their identity. Reductionist premises, racial or otherwise, have no place in jury selection. This, in turn, calls into question the statement of the then‑Minister of Justice that the amended stand‑aside power would enable judges to “make room for a more diverse jury”.
2. To be sure, the abolition of peremptory challenges will go a long way to augment the diversity of juries, for the reasons we have given. And, as the reasons of Rowe J. make clear, Parliament and the provincial legislatures may, within constitutional bounds, pursue further legislative reform designed to better promote or enhance the diversity of the petit jury. But this amendment to the stand‑aside power, as we have explained, does not do so.
   * + 1. Conclusion on Section 11(d)
3. In summary, we are of the view that the abolition of peremptory challenges does not infringe the s. 11(d) rights of accused persons. The existing protections of the independence and impartiality of the jury, which we have canvassed above, continue to protect against an infringement of the s. 11(d) right. In appropriate cases, we also highlight the ongoing role of robust and targeted jury instructions, challenges for cause, and judicial stand asides in protecting the integrity of the jury process.
4. Additionally, we emphasize that nothing in these reasons should be read as constitutionalizing this, or any other, statutory scheme for jury selection. The role of the courts in the *Charter* analysis “is to protect against incursions on fundamental values, not to second guess policy decisions”, because when “struggling with questions of social policy and attempting to deal with conflicting [social] pressures ‘a legislature must be given reasonable room to manoeuvre’” (*Andrews* *v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 194, per La Forest J. (concurring); *Black v.* *Law Society of Alberta*, [1989] 1 S.C.R. 591, at p. 627). An accused person has the constitutional right to a fair trial before an independent and impartial jury — nothing less, but also nothing more. Parliament gives expression to these constitutional rights through various statutory provisions. These provisions are subject to review and change by Parliament as it sees fit to keep pace with societal changes, expectations, and developments. As with the abolition of peremptory challenges and substitution of the trial judge as adjudicator of challenges for cause, it is well within Parliament’s constitutional bounds to determine that features of the jury selection system are more discriminatory than facilitative. Courts may intervene only when impugned schemes infringe fundamental rights, not when they disagree with a Parliament’s policy decisions. The relevant inquiry remains whether the process as a whole results in an independent and impartial jury.
   * 1. Section 11(f): The Right to Trial by Jury
5. Mr. Chouhan argues that the abolition of peremptory challenges infringes his right to a jury trial under s. 11(f) of the *Charter* by depriving him of an impartial jury and a representative jury. In our view, these arguments must fail. Section 11(f) offers no greater protection of impartiality than the specific guarantee of impartiality enshrined in s. 11(d). With respect to representativeness, the jurisprudence of this Court is clear that the right to a representative jury does not entitle the accused to proportionate representation at any stage of the jury selection process, including the final stage of selecting jurors to serve on the trial jury (*Kokopenace*, at para. 70). Section 11(f)’s guarantee of representativeness requires the state to provide a fair opportunity for a broad cross‑section of society to participate in the jury process, by compiling a jury roll that draws from a broadly inclusive source list and by delivering jury notices to those who have been selected (*Kokopenace*, at para. 61). These aspects of jury selection are not affected by the abolition of peremptory challenges.
   1. Temporal Application of the Amendments
6. When Parliament abolished peremptory challenges in Bill C‑75, it indicated that the abolition would come into force on September 19, 2019. Regrettably, and contrary to Parliament’s own legislative drafting guidelines, the legislation did not include transitional provisions that set out whether and how the amendments would apply to criminal prosecutions pending in the system (Canada, Privy Council Office, *Guide to Making Federal Acts and Regulations* (2nd ed. 2001), at p. 91).
7. It thus fell to the courts to sort out the temporal application of the abolition of peremptory challenges. As is generally the case when Parliament fails to include transitional provisions in a legislative amendment, the temporal application of these amendments divided trial courts across the country. The debate centered on principles of statutory interpretation, namely the presumptions that procedural laws apply immediately in all cases, while laws that affect substantive rights can only apply prospectively to cases in which the relevant rights have not yet vested.
8. Courts in Ontario generally found the amendments to be purely procedural and therefore immediate in their application, meaning that they would govern the jury selection processes for all trials beginning on or after the amendments’ proclamation into force (see *R. v. Johnson*, 2019 ONSC 6754, 451 C.R.R. (2d) 167; *R. v. Muse*, 2019 ONSC 6119, 448 C.R.R. (2d) 266; *R. v. Lako*, 2019 ONSC 5362; *R. v. Khan*, 2019 ONSC 5646; *R. v. McMillan*, 2019 ONSC 5616; *R. v. Daniel*, 2019 ONSC 6920). The trial judge in this proceeding came to the same conclusion, as did some courts in other jurisdictions (see *R. v. Cumberland*, 2019 NSSC 307; *R. v. Stewart*, 2019 MBQB 171). Conversely, several courts concluded that the amendments affect substantive rights and therefore cannot apply to pending jury trials, but nevertheless divided on when the amendments applied in a particular case (see *R. v. Dorion*, 2019 SKQB 266; *R. v. Raymond (Ruling #4)*, 2019 NBQB 203, 379 C.C.C. (3d) 75; *R. v. LeBlanc*, 2019 NBQB 241, 447 C.R.R. (2d) 227; *R. v. S.B.*, 2019 ABQB 836, 447 C.R.R. (2d) 63; *R. v. Bragg*, 2019 NLSC 235; *R. v. Simard*, 2019 QCCS 4394; *R. v. Kebede*, 2019 ABQB 858, 448 C.R.R. (2d) 102; *R. v. Subramaniam*, 2019 BCSC 1601, 445 C.R.R. (2d) 49; *R. v. Bebawi*, 2019 QCCS 4393; *R. v. Ismail*, 2019 MBQB 150, 447 C.R.R. (2d) 150; *R. v. Lindor*, 2019 QCCS 4232; *R. v. Nazarek*, 2019 BCSC 1798).
9. The decision on appeal is the only decision of an appellate court to have considered this issue. The Court of Appeal overturned the trial judge and determined that the abolition of peremptory challenges affects the substantive right to a jury trial, as provided for in the *Criminal Code*. The abolition therefore could not apply if, before September 19, 2019, the accused was charged with an offence within the exclusive jurisdiction of the Superior Court, was directly indicted, or elected trial by jury.
10. Respectfully, we disagree with the Court of Appeal. The abolition of peremptory challenges is purely procedural and therefore applies immediately to all jury selection processes beginning on or after September 19, 2019.
    * 1. General Principles
11. Most recently in *R. v. Dineley*, 2012 SCC 58, [2012] 3 S.C.R. 272, this Court set out the principles governing the temporal application of new legislation. Justice Deschamps, writing for the majority, summarized the rules of interpretation as follows, at paras. 10-11:

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] 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] 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).

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.

1. Dissenting, but not on this point, Cromwell J. elaborated on the distinction between legislation which is purely procedural and legislation that is substantive or encroaches on substantive rights (paras. 52‑66). From his summary we draw some general guidance. Broadly speaking, procedural amendments depend on litigation to become operable: they alter the method by which a litigant conducts an action or establishes a defence or asserts a right. Conversely, substantive amendments operate independently of litigation: they may have direct implications on an individual’s legal jeopardy by attaching new consequences to past acts or by changing the substantive content of a defence; they may change the content or existence of a right, defence, or cause of action; and they can render previously neutral conduct criminal.
   * 1. The Procedural Right to Peremptory Challenges
2. We begin our analysis bearing in mind our conclusions on the constitutional issues: the abolition of peremptory challenges does not infringe the accused’s right to an independent and impartial tribunal or to a jury, under ss. 11(d) and 11(f) of the *Charter*. Constitutional rights are substantive rights, and legislation which affects substantive rights only applies prospectively absent legislative intent to the contrary (*Dineley*,at para. 21). Accordingly, the question on this appeal is whether, notwithstanding the lack of a constitutional violation, the abolition of peremptory challenges affected the accused persons’ rights under ss. 11(d) and 11(f) of the *Charter* (*Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248, at para. 57; *Dineley*, at para. 11).
3. While acknowledging that the abolition of peremptory challenges was constitutional, the Court of Appeal held that the abolition could only apply prospectively because it “significantly diminishes an accused’s ability to affect the ultimate composition of the jury chosen to try the accused” and therefore “impacts on the accused’s statutory right to trial by jury” as it existed before September 19, 2019 (para. 210). With respect, we disagree with this framing. Substantive law “creates rights and obligations and is concerned with the ends which the administration of justice seeks to attain, whereas procedural law is the vehicle providing the means and instruments by which those ends are attained” (*Sutt v. Sutt*,[1969] 1 O.R. 169 (C.A.), at p. 175). The substantive right at issue, and the end which the administration of justice seeks to attain, is the *Charter*‑protected right to a fair trial by an independent and impartial jury. The jury selection procedures in the *Criminal Code* exist only to serve those rights. They do not create a parallel right to a set of procedures, distinct from what the Constitution requires. Nor does a modification in procedure affect the fulfilment of the right, absent a constitutional infringement.
4. Before this Court, Mr. Chouhan equates the loss of a perceived procedural advantage with a negative impact on a substantive right. We disagree.
5. While the subjective importance of the peremptory challenge to the accused is undeniable, the mere fact that a procedure was important or advantageous to one party does not, without more, render the procedure substantive. The Court of Appeal for Ontario has held, correctly in our view, that even where a procedure operates more favourably to the accused than its replacement, there is no vested interest, and by extension, no substantive right to a specific procedure (*Peel (Police) v. Ontario (Special Investigations Unit)*, 2012 ONCA 292, 110 O.R. (3d) 536, at para. 72). The ancient character of peremptory challenges does not displace this principle.
6. The jurisprudence demonstrates conclusively that legislation can confer a significant benefit on the accused or the Crown but nevertheless remain procedural. For instance, in *Wildman v. The Queen*, [1984] 2 S.C.R. 311, this Court determined that amendments to the *Canada Evidence Act*, R.S.C. 1985, c. C‑5,which made the accused’s spouse a compellable witness, were procedural. Although the new evidentiary rules significantly bolstered the Crown’s case against the accused, those rules remained procedural, as Lamer J. (as he then was) held that spouses do not have a substantive right to one another’s confidentiality. Similarly, in *R. v. Bickford* (1989), 51 C.C.C. (3d) 181 (Ont. C.A.), Parliament abolished the corroboration requirement that previously limited the admissibility of a child’s evidence before the accused’s trial on a charge of sexual assault involving a child, but after he was arraigned. The Court of Appeal determined that the amendment was purely procedural.
7. We highlight these examples to demonstrate that procedural rights are often no less important than substantive rights from the perspective of the accused person. In both *Wildman* and *Bickford*, the accused no doubt each expected and hoped that their trials would proceed under the old evidentiary rules, and the change in law may have paved the way for their convictions. Nevertheless, changing those rules of evidence merely altered the manner in which accused persons conducted their defence and did not deprive them of a defence, which would have affected a substantive right, as was the case in *Dineley*. In this respect, we do not share the views of our colleague, Abella J., at para. 181, that a procedural rule becomes substantive merely because a misapplication of the rule at trial could constitute a reversible error on appeal. Indeed, the *Criminal Code* expressly contemplates that “procedural irregularities” at trial *do* constitute such error, since it empowers courts of appeal to *cure* such errors where the appellant suffered no prejudice thereby (s. 686(1)(b)(iv)). Nor does the jurisprudence lend any support to this broad and unwarranted expansion of the concept of substantive rights.
8. The crux of Mr. Chouhan’s argument is that the loss of peremptory challenges erodes the right of the accused to participate in the selection of the jury, which Mr. Chouhan characterizes as a substantive right (R.F., at para. 68). Indeed, in *Dineley*, this Court acknowledged that a law’s effect on the “content or existence of a defence [or right, obligation, or whatever else is the subject of the legislation]” is “an indication that substantive rights are affected” (paras. 15‑16). However, even accepting the existence of a substantive right to participate in the selection of one’s jury, the amendments at issue in this case affected only *the way* in which that substantive right was exercised. Moreover, even without peremptory challenges, a robust inventory of procedures continues to allow the accused to assert this right. As discussed, the abolition of peremptory challenges leaves untouched the power of the accused to challenge jurors for cause, and it comes with an expansion of the trial judge’s power to stand aside jurors at the request of the accused. In these circumstances, we are not persuaded that the loss of the accused’s ability to exclude a limited number of prospective jurors without providing a reason undermined the accused’s participation in the selection process. Further, we respectfully disagree with our colleague Côté J., who suggests (at para. 301) that the accused’s reliance on a given procedure creates a vested right in that procedure. The jurisprudence has long been clear that there is no vested right in procedure (*Wildman*, at p. 331; *Wright v. Hale* (1860), 6 H. & N. 227, 158 E.R. 94; at pp. 95‑96; R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 802).
9. Moreover, when the focus remains squarely on the substantive rights actually at stake in this case, namely the ss. 11(d) and 11(f) *Charter* rights, it is clear that the presence or absence of peremptory challenges does not affect those rights. Accused persons were entitled to a variable number of peremptory challenges across history, and immediately before the abolition, the number of challenges varied based on the seriousness of the offence. For instance, under the previous jury selection regime, an accused person charged with first degree murder could exercise 20 peremptory challenges while an accused person indicted on assault charges had only four challenges. But each of these accused persons was entitled to, and received, an equally fair trial. In these circumstances, the argument that the abolition of peremptory challenges affected the substantive rights at stake must fail.
10. We are fortified in this conclusion by the views of our colleague, Abella J., at paras. 159 to 166 of her reasons. If, as she says, all that has changed since the amendments’ enactment is that discretion has shifted from that of the parties (in the exercise of peremptory challenges) to the judge (in the “vigorous exercise” of the stand‑aside power), this tends to affirm the amendments’ procedural quality. As *Dineley* makes clear, “new procedural legislation designed to govern only the manner in which rights are asserted or enforced does not affect the substance of those rights” (para. 10 (emphasis added)). On our colleague’s account, this is precisely what has occurred here: the substantive content of the right to a fair trial is unchanged, but the procedure by which it is delivered has changed. There is, consequently, no basis for construing these amendments as anything but procedural.
11. Finally, the Court of Appeal placed great emphasis on the fact that a jury empanelled with peremptory challenges will necessarily be different than a jury empanelled without them. We accept this observation, which is not disputed by the parties. However, we see no basis to conclude that the mere fact that juries will necessarily be differently constituted in a world without peremptory challenges affects any of the accused’s substantive rights to a fair trial, to an independent and impartial tribunal, or to a jury. To the contrary, this Court has expressly held that the accused has no right to a jury of a particular composition (*Kokopenace*,at para. 70).
12. Accordingly, the amendments abolishing peremptory challenges are purely procedural and apply immediately to all jury selection processes commencing on or after September 19, 2019. They do not affect any of the accused’s relevant substantive rights, namely the right to a fair trial, to an independent and impartial tribunal, or to a jury.
13. Disposition
14. We would allow the Crown’s appeal, set aside the Court of Appeal’s decision, and restore Mr. Chouhan’s conviction. The abolition of peremptory challenges is purely procedural and therefore has retrospective application. It applies to all jury selection processes commencing on or after September 19, 2019, the date of the abolition’s coming into force as part of Bill C‑75. The statutory change is constitutional and we would dismiss Mr. Chouhan’s cross‑appeal challenging the constitutionality of the abolition of peremptory challenges.

The reasons of Karakatsanis, Martin and Kasirer JJ. were delivered by

1. Martin J. — For the reasons of my colleagues Justices Moldaver and Brown, I agree that the Crown’s appeal should be allowed, the cross-appeal dismissed and Mr. Chouhan’s conviction restored. With respect, I part ways with my colleagues to the extent they suggest limits on how stand asides and challenges for cause may be developed under the new jury selection regime, particularly since we heard no submissions on those limits in the appeal. At this early stage in the development of the regime, and given that the proper use of these tools is not relevant to the outcome of the appeal, I would refrain from deciding their scope.
2. As my colleagues explain, on 19 September 2019, a suite of reforms to the jury selection process in the *Criminal Code*, R.S.C. 1985, c. C-46,came into force (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., 2019). The changes sought to “make the jury selection process more transparent, promote fairness and impartiality, improve the overall efficiency of our jury trials, and foster public confidence in the criminal justice system” (*House of Commons Debates*,vol. 148, No. 300, 1st Sess., 42nd Parl., May 24, 2018, at p. 19605).
3. The reforms effected a significant and multi-pronged recalibration of the jury selection regime. At issue in this appeal is whether one of the changes — the elimination of peremptory challenges under s. 634 of the *Criminal Code* — is constitutionally valid. Bill C-75 made two further changes to the jury selection scheme: first, the trial judge’s stand-aside power under s. 633 of the *Criminal Code* was expanded to allow jurors to be stood by to maintain “public confidence in the administration of justice”; and, second, the role of trying challenges for cause was put into the hands of the trial judge rather than lay triers, with the option left open of excusing or standing aside a juror even after they are found acceptable on the challenge for cause (ss. 632, 633 and 640).
4. During the legislative process, the Minister of Justice and her parliamentary secretary said Bill C-75 sought to enhance jury diversity (House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, No. 103, 1st Sess., 42nd Parl., June 19, 2018, at pp. 2 and 8; *House of Commons Debates*, vol. 148, No. 360, 1st Sess., 42nd Parl., November 28, 2018, at p. 24108). On the stand-aside power specifically, the Minister of Justice stated in the House of Commons that “[t]he legislation will strengthen the power of judges to stand aside some jurors in order to make room for a more diverse jury that will in turn promote confidence in the administration of justice” (*House of Commons Debates*,vol. 148, No. 300, at p. 19605).
5. I agree with my colleagues, Moldaver and Brown JJ., that Parliament was entitled to act on persistent concerns about the discriminatory use of peremptory challenges by abolishing them. For the reasons they give, the removal of peremptory challenges is constitutional. I also agree that the changes made by Bill C-75 were procedural in nature and apply immediately to ongoing proceedings.
6. I further endorse the guidance Moldaver and Brown JJ. provide on the need for jury instructions on bias and the vital role such initiatives play in spurring juror introspection, self-consciousness and accountability. They rightly acknowledge that courts must take active steps throughout the proceedings to ensure decision-making is free of prejudice, myths and stereotypes. These aspects of my colleagues’ reasons are consistent with substantive equality and the principles established by this Court in *R. v. Williams*, [1998] 1 S.C.R. 1128, *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, and *R. v. Gladue*, [1999] 1 S.C.R. 688. Their guidance on these pointsreflects a contextualized approach that looks beyond overt and intentional discrimination to structural and unconscious bias that may undermine trial fairness, juror impartiality and equality for accused persons and victims.
7. However, I part company with my colleagues in respect of their decision to go further and outline how they would approach the enhanced stand-aside power in s. 633 and the scope of questioning on challenges for cause. My colleagues reject the use of the stand-aside power to increase the likelihood that jurors from certain marginalized groups will be chosen to sit on the petit jury. They do so on the basis of “constitutional concerns” and practical problems they fear will arise if s. 633 is used in this way. They also caution against expanding the scope of questioning on challenges for cause.
8. 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. However, given that my colleagues have provided their views, I will comment briefly on some of the considerations that are relevant in interpreting the scope of stand asides and challenges for cause.
9. With respect to the stand-aside power, I would caution against placing undue weight on the principle of random selection. Randomness plays a key role in the selection of juries (*R. v. Sherratt*, [1991] 1 S.C.R. 509, at p. 525) and can be a means to advance jury representativeness and impartiality. However, randomness is neither an end in itself (*R. v. Bain*, [1992] 1 S.C.R. 91, at p. 114, perGonthier J. (dissenting); *R. v. Brown* (2006), 219 O.A.C. 26, at para. 25) nor a freestanding constitutional imperative. The jury selection system is not and has never been one of pure random selection: challenges for cause, the Crown’s former stand by power, and peremptory challenges each involve a departure from random selection.
10. Further, in an unequal society, randomness may prevent deliberate exclusion while nonetheless producing discriminatory outcomes. This Court has recognized that “racial prejudice and discrimination are intractable features of our society” (*R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458, atpara. 1). Many systemic factors distort the composition of the roll, the composition of those who show up for jury duty, and the composition of those ultimately selected for the petit jury, leading to underrepresentation of certain groups at all stages (see, e.g., K. Roach, “Juries, Miscarriages of Justice and the Bill C-75 Reforms” (2020), 98 *Can. Bar Rev*. 1; F. Iacobucci, *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by The Honourable Frank Iacobucci* (2013); see also G. T. Roccamo, *Report to the Canadian Judicial Council on Jury Selection in Ontario* (June 2018) (online), at p. 11).
11. It is open to Parliament to legislate to address these problems. 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.
12. Here, the words Parliament used to communicate its intention were “public confidence in the administration of justice”. In interpreting this phrase, courts must take the perspective of “reasonable, well-informed members of the community, but not legal experts with in-depth knowledge of our criminal justice system” (*R. v. St-Cloud*, 2015 SCC 27, [2015] 2 S.C.R. 328, at para. 5). It is true that the reasonable person will know of other safeguards in the jury selection process that seek to advance the independence and impartiality of the jury. However, an informed observer is also “taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community” (*R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, atpara. 111, per Cory J.). Moreover, a reasonable observer is taken to be “properly informed about ‘the philosophy of the legislative provisions’” and *Charter* values (*R. v. Hall*, 2002 SCC 64, [2002] 3 S.C.R. 309, atpara. 41, citing *R. v. Nguyen* (1997), 97 B.C.A.C. 86, at para. 18; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 68; *St-Cloud*, at para. 79). Included among those values is substantive equality, “the animating norm of s. 15 of the *Charter*” (*Barton*, at para. 202).The reasonable observer would be aware that the amendments in Bill C-75 respond to long-standing concerns about inadequate Indigenous representation on juries and the resulting impacts on public confidence. Those concerns were articulated by the Manitoba Aboriginal Justice Inquiry in 1991 in relation to the case of Helen Betty Osbourne (Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 2, *The Deaths of Helen Betty Osborne and John Joseph Harper* (1991), at pp. 85-88) and carry through to the present day (Roach (2020), at p. 13).
13. I acknowledge that departing from randomness by using the stand-aside power to enhance diversity may give rise to practical challenges. However, those problems should not be overstated. The mischief targeted by Parliament was the all-too-common incidence of all-white juries in trials involving Indigenous and racialized accused persons or victims *in spite of* the diversity of the local community. It is obvious that Parliament had no intention of requiring judges to guarantee that every jury represents a “national ideal of Canadian diversity . . . irrespective of the particular diversity of the local community” (reasons of Moldaver and Brown JJ., at para. 75). Section 633 does not impose rigid requirements respecting the precise composition of the jury, but rather confers a broad and flexible discretion that can be tailored to the circumstances in which it is exercised.
14. In my respectful view, the question of whether and to what extent the stand-aside power can be used to enhance jury diversity should be left to another day when it is squarely before us. My colleagues’ resolution of the main issue on this appeal — whether the elimination of peremptory challenges is constitutional — does not require them to impose limits on the stand-aside power. We heard no argument on the practical challenges of using stand asides in this way, and it has not been clearly shown that those challenges are constitutional in nature or insurmountable in practice. Determining the standard to maintain “public confidence in the administration of justice” raises complexities not fully aired here and it is inappropriate to decide them in this appeal.
15. With respect to challenges for cause, I agree with my colleagues Moldaver and Brown JJ. that *R. v. Parks* (1993), 15 O.R. (3d) 324 (C.A.), does not describe the only questions available on a challenge for cause. Indeed, trial judges are afforded the latitude to depart from the *Parks*-style formula where appropriate to ensure juror impartiality. This Court has encouraged trial judges to “err on the side of caution and permit prejudices to be examined” through the challenge for cause process (*Williams*, at para. 22; see also *Parks*,at p. 335, and *R. v. Find*,2001 SCC 32, [2001] 1 S.C.R. 863, at para. 45).
16. It is true that when questioning prospective jurors on their biases, the privacy interests of those persons must be respected (*Kokopenace*,at para. 74, perMoldaver J.; at para. 156, perKarakatsanis J.; and at para. 227, perCromwell J. (dissenting but not on this point)). 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 (V. MacDonnell, “The Right to a Representative Jury: Beyond Kokopenace” (2017), 64 *Crim. L.Q.* 334, at p. 346).
17. This Court has also warned against setting a threshold for accessing challenges for cause that “would catch only the grossest forms of racial prejudice” (*Williams*, at para. 39). Indeed, some scholars question whether the *Parks* formula captures anything beyond “the grossest forms of racial prejudice”, and whether it fosters the kind of introspection and self-consciousness it should (see K. Roach, *Canadian Justice, Indigenous Justice: The Gerald Stanley and Colten Boushie Case* (2019), at p. 92; D. M. Tanovich, “The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System” (2008), 40 *S.C.L.R.* (2d) 656, at p. 683). Ultimately, in deciding whether to allow challenges for cause and in settling on the form of permissible questioning, courts must be allowed to exercise their discretion in accordance with the wording and purpose of s. 638(1)(b), the accused’s right to a fair and impartial tribunal, and *Charter* values, including substantive equality (*Williams*, at para. 49).
18. In my view, the Court should not use this case to circumscribe how judges may apply these recently-amended procedures. For the purpose of disposing of the constitutional issue before us, it is unnecessary to prescribe limits on how stand asides and challenges for cause may be used. Nor did we have the benefit of full submissions on whether those limits are appropriate. In the absence of argument on these issues, this Court should not make a ruling on them, especially one which might have the effect of foreclosing the use of the new stand-aside power for purposes that were contemplated by Parliament.
19. Any premature determination is fraught with risks, but those risks are magnified when, as here, Parliament has chosen to depart from long-standing past practice to significantly alter how juries are chosen. The knock-on effects of these changes cannot currently be foreseen. As such, given that issues around the proper use of s. 633 and the scope of questioning on challenges for cause have not been directly raised, the preferable process would be for this Court to wait and see how the interlocking pieces of this new statutory regime work together in practice before weighing in with limits on how they may be used. In my respectful view, a cautious approach is advisable to allow the new regime to develop organically and as intended, rather than dictating restrictive rules that hedge in the further development of safeguards designed to enhance fairness and impartiality.

The following are the reasons delivered by

1. Rowe J. — I agree with my colleagues Moldaver and Brown JJ. that the abolition of peremptory challenges is constitutionally valid and that the legislative change is purely procedural and has retrospective application. I would adopt their reasons. However, I am compelled to write separately on the risk that constitutionalizing statutory provisions through the jurisprudence poses. I am in agreement with my colleagues on their explanation of the role of courts with respect to policy decisions made by Parliament in the context of an analysis under the *Canadian Charter of Rights and Freedoms* (Moldaver and Brown JJ.’s reasons, at para. 84). My wish here is to expand on this issue.
2. Section 11(d) of the *Charter* protects the right of an accused “to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal”. Section 11(f) of the *Charter* constitutionalizes “the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment”. These provisions give an accused the right to benefit from a fair trial by an independent and impartial jury (*R. v.* *Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, at para. 28; *R. v.* *O’Connor*, [1995] 4 S.C.R. 411, at para. 193, per McLachlin J. (as she then was); *R. v. Turpin*, [1989] 1 S.C.R. 1296, at pp. 1313-1314). However, one must bear in mind that “a fair trial does not, however, guarantee the most favourable procedures imaginable” (*R. v.* *Goldfinch*, 2019 SCC 38, [2019] 3 S.C.R. 3, at para. 30; see also *R. v.* *Lyons*, [1987] 2 S.C.R. 309, at p. 362; *R. v.* *Harrer*, [1995] 3 S.C.R. 562, at para. 14; *R. v. Crosby*, [1995] 2 S.C.R. 912, at p. 921; *R. v. R.V.*, 2019 SCC 41, [2019] 3 S.C.R. 237, at para. 67).
3. These *Charter* provisions protect the fundamental rights of an accused, but do not mandate *specific* procedural mechanisms to give effect to them. The contrary view, expressed indirectly by various parties, is that statutory provisions adopted by Parliament to give effect to these rights are themselves constitutionally protected, such that it is beyond the competence of Parliament to repeal them. Constitutionalizing the specific statutory provisions by which Parliament gives effect to constitutional rights is misguided. It is not for the courts to substitute their policy preferences for those of the legislature; rather courts should limit themselves to deciding whether in the result constitutional protections have been infringed.
4. Peremptory challenges are one way in which the right to trial by jury is operationalized. Having judges decide challenges for cause rather than lay triers is another. Adopting, amending or repealing such procedures raises no constitutional issue unless thereby trials by jury become unfair and fall short of the constitutional guarantee to a fair trial. The *Criminal Code*, R.S.C. 1985, c. C-46, incorporates such mechanisms to give operational effect to these rights. But such mechanisms are not, themselves, constitutionally protected; rather, they are merely modalities, chosen among various others. As the Attorney General of Manitoba pointed out in its factum, the *Charter* does not “crystallise any . . . procedure . . . [n]or . . . freeze in time the jury trial, along with its procedural trappings . . . as they existed in 1982” (I.F., para. 28). As the Crown argued:

While the exercise of peremptory challenges may have had subjective value for the accused by enhancing his or her perception of fairness, there is a crucial distinction between that concept and the essential characteristics of the jury system that are constitutionally protected. Even if peremptory challenges had some benefits, such benefits are not guaranteed under the *Charter*.

(R.F., at para. 37)

For the reasons that follow, I will explain why courts should not constitutionalize statutory provisions.

1. Analysis
2. Our Constitution is written and unwritten (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 32; *Reference re Remuneration of Judges of the Provincial Court Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 92). A structural analysis of the underlying principles of our Constitution can inform and assist in the proper interpretation of constitutional provisions (*Re Secession*, at paras. 49-54, see also M. Rowe and N. Déplanche, “Canada’s Unwritten Constitutional Order: Conventions and Structural Analysis” (2020), 98 *Can. Bar Rev.* 431, at p. 437). In the present case, two of these principles can shed light on the issue of *Charter* compliance: first, the separation of powers, and second, parliamentary sovereignty, an expression of the fundamental principle of democracy.
   1. Separation of Powers: the Courts and the Legislature
3. Constitutionalizing statutory provisions is contrary to the separation of powers between the legislature and the judiciary. The separation of powers has been described by this Court as the “backbone of our constitutional system” (*Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, at para. 3).
4. While the legislature “chooses the appropriate response to social problems, makes policy decisions and enacts legislation”, the judiciary “interprets and applies the law, . . . acts as judicial arbiters” and ensures that laws and government action conform to constitutional norms (G. Régimbald and D. Newman, *The Law of the Canadian Constitution* (2nd ed. 2017), p. 105, § 3.131, referring to *RJR-MacDonald Inc. v.* *Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 136; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, at p. 389; *Ontario v. Criminal Lawyers’ Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 28; *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, at para. 39). The legislative and judicial branches have distinct roles and institutional capacities (*Criminal Lawyers’* *Association*, at para. 29). Accordingly, as McLachlin J. (as she then was) explained in *New Brunswick Broadcasting Co*.:

Our democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other. [Emphasis added; p. 389.]

1. This is so because courts are “not fitted” to get “involved in a review of legislative policy” (*Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 392*,* per Le Dain J.). In a similar vein, McIntyre J., dissenting in *R. v.* *Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045, said a judge cannot strike down legislation merely because the legislature’s decision is bad policy: “Parliament has the necessary resources and facilities to make a detailed inquiry [and] has the capacity to make a much more extensive inquiry into matters concerning social policy than has the Court” (p. 1101). As McIntyre J. held in *R. v.* *Schwartz*, [1988] 2 S.C.R. 443, at p. 493, “it is not for the Court . . . to postulate some alternative which in its view would offer a better solution to the problem, for to do so is to enter the legislative field” (see also *R. v.* *Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at pp. 796 and 801, per La Forest J., concurring).
2. Therefore, with respect to the *Charter*, the role of the courts “is to protect against incursions on fundamental values, not to second guess policy decisions” (*Andrews v.* *Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 194, per La Forest J., concurring, see also *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, at p. 1199, per Lamer J. (as he then was); *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at para. 136).
3. When “struggling with questions of social policy and attempting to deal with conflicting [social] pressures, ‘a legislature must be given reasonable room to manoeuvre’” (*Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591, at p. 627, citing *Edwards Books*, at p. 795, see also H. Brun, G. Tremblay et E. Brouillet, *Droit constitutionnel* (6th ed. 2014), at p. 825, para. X.54). Parliament has better knowledge of social problems and is better equipped to deal with such problems through legislation (*Watkins* *v. Olafson*, [1989] 2 S.C.R. 750, at pp. 760-61). Therefore, democratically elected legislatures are in a better position to weigh competing interests and evaluate policy options for complex social issues (*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 993). In our constitutional democracy, legislatures must have the means to respond to societal changes through ordinary statutes (W. R. Lederman, “Democratic Parliaments, Independent Courts, and the Canadian Charter of Rights and Freedoms” (1985), 11 *Queen’s L.J.* 1, at p. 2).
4. Constitutionalizing statutory provisions elides and curtails the role of legislatures in the operationalization of the *Charter*. While it is for the courts to serve as final arbiters in the interpretation of the *Charter*, they “do not hold a monopoly on the protection and promotion of rights and freedoms” (*R. v. Mills*, [1999] 3 S.C.R. 668, at para. 58). Legislatures are indispensable to secure, protect and promote *Charter* rights (G. Webber et al., *Legislated Rights: Securing Human Rights through Legislation* (2018), at p. 25). While the adoption of the *Charter* affected the relationship and powers of the legislature and the courts, they remain “partners and not rivals in the total process of delivering justice under the rule of law to the people” (Lederman, at p. 24). This is why the relation between courts and legislatures has been described as one of dialogue among branches, in which legislatures can respond to the courts (*Vriend*, at para. 138). Removing legislatures’ ability to repeal or modify statutory provisions is inconsistent with this dialogic partnership.
5. The different institutional roles and capacities of the judicial and legislative branches have an impact on the remedies courts can order upon finding that a law is unconstitutional. In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, this Court held that

[w]hile the courts are guardians of the Constitution and of individuals’ rights under it, it is the legislature’s responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution’s requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional. [p. 169]

Recently, in *Ontario (A.G.) v. G*, 2020 SCC 38, [2020] 3 S.C.R. 629, Karakatsanis J., writing for the majority, stated at para. 114:

. . . if granted in the wrong circumstances, tailored remedies can intrude on the legislative sphere. *Schachter* cautioned that tailored remedies should only be granted where it can be fairly assumed that “the legislature would have passed the constitutionally sound part of the scheme without the unsound part” and where it is possible to precisely define the unconstitutional aspect of the law (p. 697, citing *Attorney‑General for Alberta v. Attorney‑General for Canada*, [1947] A.C. 503 (P.C.), at p. 518). If it appears unlikely that the legislature would have enacted the tailored version of the statute, tailoring the remedy would not conform to its policy choice and would therefore undermine parliamentary sovereignty (*Schachter* [*v. Canada*, [1992] 2 S.C.R. 679], at pp. 705‑6; *Hunter* at p. 169).

1. Being mindful of the separation of powers, this Court recognized in *Eldridge v.* *British Columbia (Attorney General*), [1997] 3 S.C.R. 624, at para. 96, that when “there are myriad options available to the government that may rectify the unconstitutionality of [a] current system, [i]t is not this Court’s role to dictate how this is to be accomplished” (see also: *Mahe* *v. Alberta*, [1990] 1 S.C.R. 342, at pp. 392-93; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 34;K. Roach, *Constitutional Remedies in Canada* (2nd ed. loose-leaf), ¶3.740). Thus, even if repealing a legislative scheme produces unconstitutional effects, this does not mean that Parliament is “constitutionally required to keep [it] on the books” (*Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, [2018] 1 S.C.R. 464, at para. 33). Rather, Parliament has latitude to select the means to correct this constitutional defect.
2. In sum, courts should not overstep their role when assessing whether statutory regimes comply with the requirements of the *Charter*: “While it is the role of the courts to specify [constitutional] standards, there may be a range of permissible regimes that can meet these standards” (*Mills*, at para. 59). Consequently, constitutionalizing statutory regimes, thereby preventing legislatures from modifying or repealing them, would be contrary to the separation of powers.
   1. Parliamentary Sovereignty and Democracy
3. Constitutionalizing statutory provisions would also be in conflict with the principle of parliamentary sovereignty, a cornerstone of our Constitution (Régimbald and Newman, at p. 73, § 3.60). This unwritten principle has been defined in the English context as follows:

The principle of Parliamentary Sovereignty means neither more nor less than this, namely that Parliament thus defined has, under the English Constitution, the right to make or unmake any law whatever; and, further that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.

(*Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189, at para. 54, citing A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed. 1959), at pp. 39-40 and 55)

1. This principle is not absolute. It is qualified by our federal structure, by the rights and freedoms protected by the *Charter* and by Aboriginal and treaty rights affirmed by s. 35(1) of the *Constitution Act, 1982* (*Reference re Pan-Canadian Securities Regulation*, at paras. 56- 57, see also *Canada (Auditor General) v.* *Canada* *(Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49, at p. 91; Régimbald and Newman,at p. 70, § 3.64).
2. Parliamentary sovereignty entails the rule that “neither Parliament nor the legislatures can, by ordinary legislation, fetter themselves against some future legislative action” (*Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837, at para. 119, referring to P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp. (loose-leaf)), vol. 1, at pp. 12-8 et seq., see also *Quebec (Attorney General) v.* *Canada (Attorney General)*,2015 SCC 14, [2015] 1 S.C.R. 693, at para. 25). Thus, subject to limits imposed by the Constitution, the legislature can legislate as it so chooses. Accordingly, Parliament’s capacity to enact legislation also encompasses the capacity to repeal it. This feature of the Constitution means that “in a democratic society important public policy choices should be made in the elected legislative assemblies” (Hogg, at p. 12-7).
3. Parliamentary sovereignty is an expression of a more fundamental principle: democracy. Constitutionalizing statutory provisions undermines the democratic principle, whereby citizens participate in making laws through public institutions created under the Constitution (*Reference re Secession*, at paras. 61-69). The wisdom of political choices should be left to such institutions that are accountable to the public through electoral processes (Lederman, at pp. 10-11). As Harding and Knopff explain, “the democratic side of a ‘constitutional democracy’ can persist only if some publicly important issues lie beyond the reach of the legal Constitution — only, that is, if we do not constitutionalize everything” (M. S. Harding and R. Knopff, “Constitutionalizing Everything: The Role of ‘*Charter* Values’” (2013), 18 *Rev. Const. Stud.* 141, at p. 143).
4. The concept that once certain statutory provisions are enacted, Parliament is constitutionally prevented from repealing them, is flawed. As the Ontario Court of Appeal stated in *Ferrel v.* *Ontario*, [1998] 42 O.R. (3d) 97, “[i]t would be ironic . . . if legislative initiatives . . ., once enacted, become frozen into provincial law and susceptible only of augmentation and immune from curtailing amendment or outright repeal without s. 1 justification” (p. 110). Preventing Parliament from repealing a statutory provision, and (in effect) incorporating its content into the *Charter* would undermine Parliamentary sovereignty.
5. While a right to a fair and public jury trial, as a practical matter, calls for certain positive measures by Parliament, this is different from the proposition that every significant statutory provision with respect to jury trials is elevated to constitutional status. The *Charter* protects the right of the accused to a fair trial by a jury; it does not enshrine particular procedures chosen by Parliament.
6. Addressing this problem, Lederman wrote:

The general standards of an entrenched *Charter of Rights and Freedoms* are frequently heavily dependent on detailed implementation by ordinary statutes and regulations, and, at this latter ordinary level, legitimate alternatives and exceptions may appear and require dealing with. Often, the specific reforms people want are available by ordinary statutory actions at either the provincial or federal level and are not basic constitutional issues at all, or at least should not be. The point is that if we characterize too many things as constitutional, we put too much of potential legal change to meet societal needs beyond the reach of the flexible statutory means of change. It is at times difficult enough to get an ordinary statute through in response to some urgent need for new legal measures. For those who would change or add to superior constitutional law, the problem of limiting what is to be considered “constitutional” in this sense is very real. The limits have to be severe. You cannot constitutionalize the whole legal system. One cannot turn every legal issue into a specially entrenched Charter issue or a specially entrenched issue of the federal division of legislative powers. [Emphasis added, pp. 118-19.]

(“Charter Influences on Future Constitutional Reform”, in D. E. Smith, P. MacKinnon and J. C. Courtney, eds., *After Lake Meech, Lessons for the Future* (1991), 115, at pp. 118-119)

1. As my colleagues explain, their reasons should not “be read as constitutionalizing [the current], or any other, statutory scheme for jury selection” (Moldaver and Brown JJ.’s reasons, at para. 84). Peremptory challenges and the other rules of jury selection should not be constitutionalized under s. 11(d) and (f) of the *Charter*. Of course, repeal or modification of statutory provisions can raise issues of *Charter* compliance. But, that is not because the statutory provisions themselves are constitutionally protected. Rather it is because their repeal or modification gives rise to unconstitutional effects. As Watt J.A. expressed in the Ontario Court of Appeal’s decision in this case:

The legislative history in this case reveals that both houses of Parliament and their respective legislative committees were well aware of both sides of the debate about the value of peremptory challenges as a mechanism to promote the empanelment of an impartial jury and ensure the fair trial rights of the accused. The committees of both houses received evidence and submissions from practitioners and scholars arguing for and against the elimination of peremptory challenges. In the end, Parliament determined that their potential for abuse outweighed their benefits as part of a selection process designed to ensure a fair trial and the empanelment of an impartial jury. This cost-benefit analysis was for Parliament to undertake. Parliament made its decision. That decision must be respected by the court unless the statutory result is unconstitutional. [Emphasis added; para. 58.]

1. Nothing of that nature has been shown in this case. Parliament can repeal these procedures or enact new ones, and in future cases courts may assess whether the new regime remains compliant with the *Charter*.
2. Disposition
3. For the reasons of Justices Moldaver and Brown, as well as for the foregoing reasons, I would allow the Crown’s appeal and restore Mr. Chouhan’s conviction. I would also dismiss Mr. Chouhan’s cross-appeal.

The following are the reasons delivered by

1. Abella J. (dissenting in part) — On September 19, 2019, Pardeep Singh Chouhan was scheduled to select a jury for his first degree murder trial. His right to a jury trial included the right to exercise up to 20 peremptory challenges during his jury selection. That same day, 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., 2019, abolished peremptory challenges. No transitional provisions were included in the legislation.
2. Mr. Chouhan brought a constitutional challenge, arguing in part that the abolition of peremptory challenges infringed his rights under ss. 7, 11(d) and 11(f) of the *Canadian Charter of Rights and Freedoms*.In the alternative, he argued that the repeal should not apply to his case since, while purely procedural legislative changes apply immediately to all cases including ongoing or pending proceedings, changes that affect substantive rights only apply prospectively.
3. Mr. Chouhan’s arguments that the repeal was unconstitutional and affected his substantive rights were dismissed. As a result, his jury was selected without peremptory challenges.
4. The jury convicted Mr. Chouhan of first degree murder (2019 ONSC 5512, 148 O.R. (3d) 53). He appealed his conviction, in part on the basis that the trial judge erred in ruling that the abolition of peremptory challenges was constitutional and that it applied retrospectively to his case.
5. At the Court of Appeal, Watt J.A., writing for a unanimous court, concluded that the abolition of peremptory challenges was constitutional, but because it affected an accused’s substantive rights, it only applied prospectively (2020 ONCA 40, 149 O.R. (3d) 365). He allowed the appeal, set aside the conviction and ordered a new trial.
6. I agree that the repeal of peremptory challenges is constitutionally compliant. Parliament has, in my respectful view, introduced a regime to replace peremptory challenges that addresses the goals of those challenges and minimizes their frailties by empowering trial judges to protect the impartiality of the jury and counteract the reality of discrimination.
7. But, as discussed later in these reasons, I agree with Watt J.A. that the repeal affected Mr. Chouhan’s substantive rights and, as a result, should not have applied to his trial.

Analysis

1. In *R. v. Kokopenace*,[2015] 2 S.C.R. 398, Moldaver J. begins with this truism:

The right to be tried by a jury of one’s peers is one of the cornerstones of our criminal justice system. It is enshrined in two provisions of the *Canadian Charter of Rights and Freedoms* — the s. 11(*d*) right to a fair trial by an impartial tribunal and the s. 11(*f*) right to a trial by jury. [para. 1]

But this begs the question, who are one’s peers and how can the system enhance the possibility of their selection?

1. That is the underlying question behind the reforms to jury selectionin Bill C‑75. When introducing the legislation in Parliament, the Minister of Justice, the Hon. Jody Wilson-Raybould, described its purpose as follows:

To bring more fairness and transparency to the process, the legislation would also *empower a judge to decide* whether to *exclude jurors challenged for cause* by either the defence or prosecution. The legislation will *strengthen* the power of judges to *stand aside some jurors* in order *to make room for a more diverse jury* that will in turn *promote confidence in the administration of justice*. Courts are already familiar with the concept of exercising their powers for this purpose. [Emphasis added.]

(*House of Commons Debates*, vol. 148, No. 300, 1st Sess., 42nd Parl., May 24, 2018, at p. 19605)

1. Parliament not only abolished peremptory challenges, it overhauled the jury selection system, changing “virtually all of the rules of jury selection which affected how the jury is chosen from the jury panel” (S. Coughlan, *Criminal Procedure* (4th ed. 2020), at p. 457). It gave trial judges the power to decide challenges for cause and created a new stand-aside power in s. 633 of the *Criminal Code*, R.S.C. 1985, c. C‑46, to direct trial judges to fulfill the role of ensuring jury impartiality and representativeness.
2. Anti-bias instructions will continue to be important, but they are not a panacea. As McLachlin J. cautioned in *R. v. Williams*,[1998] 1 S.C.R. 1128, “[w]e should not assume that instructions from the judge or other safeguards will eliminate biases that may be deeply ingrained in the subconscious psyches of jurors” (para. 22).
3. In order to avoid bias and discrimination, the new jury selection system entrusts trial judges to vigorously exercise their authority in accordance with the *Charter* to ensure that Canadian juries are, and are perceived to be, impartial and representative.
4. The new robust challenge for cause process will require more probing questions than have traditionally been asked to properly screen for subconscious stereotypes and assumptions (K. Roach, “Juries, Miscarriages of Justice and the Bill C‑75 Reforms” (2020), 98 *Can. Bar Rev.* 315, at pp. 350-53; K. Roach, “The Urgent Need to Reform Jury Selection after the Gerald Stanley and Colton Boushie Case” (2018), 65 *Crim. L.Q.* 271, at p. 276; R. Schuller and N. Vidmar, “The Canadian Criminal Jury” (2011), 86 *Chicago-Kent L. Rev.* 497; R. Ruparelia, “Erring on the Side of Ignorance: Challenges for Cause Twenty Years after *Parks*” (2013), 92 *Can. Bar Rev.* 267; M. Henry and F. Henry, “A Challenge to Discriminatory Justice: The *Parks* Decision in Perspective” (1996), 38 *Crim. L.Q.* 333).
5. A robust challenge for cause process will mean “a more sophisticated manner of questioning” (D. M. Tanovich, “The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System” (2008), 40 *S.C.L.R.* (2d) 655, at p. 683). It will require alternatives and modifications to the question proposed in *R. v. Parks* (1993), 15 O.R. (3d) 324 (C.A.), new questions, and new formats, with trial judges asking questions that they believe, based on their common sense and judicial experience, will assist in rooting out biases. The need for this new emphasis on judicial intervention is explained by the Canadian Association of Black Lawyers in its factum as follows:

The commonly permissible challenge questions considered in only minutes fail to respect the importance of the task and cannot scratch the surface of attitudes or beliefs that are “elusive” and deeply ingrained in the subconscious. [para. 32]

1. The legislative intent behind the new stand-aside power was to empower trial judges to ensure impartiality and “tomake room for a more diverse jury”, in order to maintain public confidence in the administration of justice (*House of Commons Debates*, at p. 19605). Its purpose is to “provide an opportunity for a judge to consider whether a jury appears to [be] sufficiently representative or appropriately empanelled to promote a just outcome, perhaps even considering whether racial bias could be a factor” (Library of Parliament, *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*, Legislative Summary 42-1-C75-E, by Laura Barnett et al., revised July 25, 2019). It is based on an understanding of representativeness which looks to the actual composition of the jury, as opposed to the randomness of the selection process (Coughlan, at p. 466; see also V. MacDonnell, “The Right to a Representative Jury: Beyond Kokopenace” (2017), 64 *Crim. L.Q.* 334; B. Kettles, “Impartiality, Representativeness and Jury Selection in Canada” (2013), 59 *Crim. L.Q.* 462).
2. The enhanced stand-aside mechanism in s. 633 seeks to counteract systemic discrimination in jury selection and recognizes that public confidence in the administration of justice is undermined when random selection routinely results in all-white juries. It gives trial judges the discretion “to make room for a more diverse jury” (*House of Commons Debates*, at p. 19605).
3. While Canada’s kaleidoscope of human diversity cannot realisticallybe mirrored on every jury, trial judges can use the legislative tools that they have been given in Bill C-75 to actively promote jury diversity on a case by case basis. The goal is the selection of a “representative cross-section of society, honestly and fairly chosen” (*R. v.* *Sherratt*,[1991] 1 S.C.R. 509, at p. 524). Actively promoting jury diversity is not reverse discrimination, it is *reversing* discrimination. As Blackmun J. famously observed in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), at p. 407,“to get beyond racism, we must first take account of race”.
4. But while I agree with the majority that the safeguards in the jury selection system after Bill C-75 make the repeal of peremptory challenges constitutional, I do not, with respect, agree that the repeal represents a purely procedural change. The repeal affects the substantive rights of accused persons, and, as a result, absent transitional provisions, should not have applied retrospectively to Mr. Chouhan’s trial.
5. For centuries, the common law tradition of trial by jury has included a right of the accused to exercise peremptory challenges. It was a defence tool to screen out those who could potentially be unsympathetic to the accused, and sometimes to influence the racial or gender composition of the jury. This right was codified in s. 634 of the *Criminal Code*.
6. There is no doubt that the use of peremptory challenges has generated controversy, particularly in cases where the public has perceived that a jury has reached a perverse verdict. But debating the merits of peremptory challenges does not change their character as a significant trial mechanism for accused persons to meaningfully participate in the selection of the individuals who would judge their case.
7. As the Law Reform Commission of Canada in 1980 pointed out:

The peremptory challenge has been attacked and praised. Its importance lies in the fact that justice must be seen to be done. The peremptory challenge is one tool by which the accused can feel that he or she has some minimal control over the make-up of the jury and can eliminate persons for whatever reason, no matter how illogical or irrational, he or she does not wish to try the case.

(Working paper 27, *The Jury in Criminal Trials* (1980), at p. 54)

1. Peremptory challenges have been a part of Canadian criminal procedure from our first *Criminal Code* in 1892 until Bill C-75 (*Criminal Code, 1892*,S.C. 1892, c. 29, s. 668)*.* When legislation is enacted without transitional provisions, our law presumes that it only applies prospectively because “[i]n the absence of an indication that Parliament has considered retrospectivity and the potential for it to have unfair effects, the presumption must be that Parliament did not intend them” (*Tran v. Canada (Public Safety and Emergency Preparedness)*,[2017] 2 S.C.R. 289, at para. 48, perCôté J.). While our jurisprudence carves out a narrow exception for *purely* procedural changes, the exception does not apply to new rules of procedure that affect or impinge on substantive rights (*Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 S.C.R. 248 (“*Application*”), at para. 57, perIacobucci and Arbour JJ.).
2. The issue then is whether the repeal of peremptory challenges represents a *purely* procedural change or one that has an impact on the substantive rights of the accused. If it is purely procedural, it applies immediately to pending or ongoing proceedings; if it affects substantive rights, it can only have prospective effect on future proceedings.
3. Substantive provisions generally define rights, duties and liabilities, while procedural ones govern procedures, pleadings and proof (*Wildman v. The Queen*, [1984] 2 S.C.R. 311, at p. 331, perLamer J., citing *Phipson on Evidence* (13th ed. 1982), at p. 1). Yet the inquiry does not, as the majority suggests, end there. As La Forest J. observed in *Angus v. Sun Alliance Insurance Co.*,[1988] 2 S.C.R. 256:

A provision is substantive or procedural . . . according to whether or not it affects substantive rights. P.‑A. Côté, in *The Interpretation of Legislation in Canada* (1984), has this to say at p. 137:

In dealing with questions of temporal application of statutes, the term “procedural” has an important connotation: to determine if the provision will be applied immediately [i.e. to pending cases], “. . . the question to be considered is not simply whether the enactment is one affecting procedure but whether it affects procedure only and does not affect substantial rights of the parties.” [Quoting *DeRoussy v. Nesbitt* (1920), 53 D.L.R. 514, 516]. [p. 265]

1. Purely procedural laws are a subset of procedural rules which do not create or impinge on substantive rights (*Application*,at para. 57). Examples include laws setting out criteria for costs awards or the number of witnesses that may be called to give opinion evidence (*Wright v. Hale* (1860), 6 H. & N. 227, 158 E.R. 94, perPollock C.B.).Similarly, rules for conducting out-of-court investigations of matters such as suspected terrorist activity or police misconduct have been held to be purely procedural (see, e.g., *Application*; *Peel (Police) v. Ontario (Special Investigations Unit)* (2012), 110 O.R. (3d) 536 (C.A.), perCronk J.A.).
2. But procedural provisions that take away, alter or affect substantive rights are not *purely* procedural. When a rule of procedure impinges on a party’s substantive rights, “its effects are not exclusively procedural and it will not have immediate effect” (*Application*,at para. 57). Procedural changes such as new limitation periods or transfers of jurisdiction between courts have been held to have substantive effects where, in their application, they affected a party’s right to bring an action, to plead a defence or to bring an appeal (see, e.g., *Angus*; *Martin v. Perrie*,[1986] 1 S.C.R. 41, perChouinard J.; *Royal Bank of Canada v. Concrete Column Clamps* *(1961) Ltd.*, [1971] S.C.R. 1038, perPigeon J.). Similarly, changes to procedural provisions that take away substantive rights created by legislation have been held not to be purely procedural (see, e.g., *R. v. R.S.*,2019 ONCA 906, perDoherty J.A.).
3. In *R. v. Dineley,* [2012] 3 S.C.R. 272, at para. 21, this Court found that procedural amendments to rules of evidence for raising a doubt about the reliability of breathalyzer test results, passed constitutional muster. In dissent, which the majority in this case relies on, Cromwell J. held that the amendments were purely procedural because they dealt with factual presumptions and how to rebut them, their operation depended on litigation and they did not change the existence or content of a right or defence.
4. The majority in *Dineley*, however, concluded otherwise. Deschamps J. found that the new provisions did not apply to Mr. Dineley’s pending trial because they affected his substantive rights, including his constitutional right to be presumed innocent:

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. [para. 11]

As she noted, procedural laws that have an impact on *Charter* rights have been considered to have substantive effects since “constitutional rights are necessarily substantive” (*Dineley*,at para. 21).

1. Returning then to whether the abolition of peremptory challenges affected substantive rights. Sir William Blackstone described two rationales for allowing accused persons to challenge jurors peremptorily without having to show any cause:

1. As everyone must be sensible, what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is that a prisoner . . . should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike.

2. Because, upon challenges for cause shewn, if the reasons assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which the prisoner is still at liberty, if he pleases, peremptorily to set him aside. (W. Blackstone, *Commentaries on the Laws of England,* W.D. Lewis, ed., vol. 4, No. 353, at p. 1738).

(*Commentaries on the Laws of England* (16th ed. 1825), Book IV, at p. 353)

1. This Court has adopted these rationales in a number of cases and, throughout our jurisprudence, has repeatedly asserted the importance of peremptory challenges in safeguarding the rights of accused persons in our jury system and enhancing their perception of trial fairness.
2. Since Canada’s first *Criminal Code* in 1892, both the Crown and the accused have had an unlimited power to challenge for cause, allowing both sides to remove any prospective juror on proof of one of the specific enumerated causes such as non-citizenship, certain criminal records or partiality (see, e.g., *Criminal Code, 1892*,s. 668(4)). Peremptory challenges, which could be made without proof of cause, were limited to 4 for the Crown and 4, 12 or 20 for the accused depending on the charge (see, e.g., s. 668(1) to (3) and (9)).
3. In *McLean v. The King*,[1933] S.C.R. 688, the accused challenged several prospective jurors for cause. While three prospective jurors were found to be impartial, the accused removed them by using peremptory challenges. The Court concluded that, even if the trial judge erred in the challenge for cause process, the accused received a fair trial because any prejudice was prevented by his use of peremptory challenges:

. . . in the administration of criminal justice nothing is more important than that the constitution of the jury should be free from all objection and that *the accused should have the full advantage of every safeguard which the law has provided to enable him to secure this right, which is of the very essence of a fair trial*. We, however, think that the accused had a fair trial. . . . By his own act in peremptorily challenging these jurors, he elected to pursue that remedy . . . . [Emphasis added; p. 692.]

1. Decades later, in *Cloutier v. The Queen*,[1979] 2 S.C.R. 709 (“*Cloutier* (SCC)”), Pratte J., for the majority, held that the denial of an accused’s right to peremptorily challenge a prospective juror found to be impartial on a challenge for cause would entitle theaccused to a new trial. Citing Blackstone, he explained the significance of peremptory challenges in permitting the removal of a number of potential jurors *believed* to be partial, even though the belief cannot be proven:

The very basis of the right to peremptory challenges, therefore, is not objective but purely subjective. The existence of the right does not rest on facts that have to be proven, but rather on the mere belief by a party in the existence of a certain state of mind in the juror. The fact that a juror is objectively impartial does not mean that he is believed to be impartial by the accused or the prosecution; *Parliament, when allowing each party a number of peremptory challenges, clearly intended that each party have the right to remove from the jury a number of individuals whom he does not believe to be impartial, though he could not provide evidence in support of such belief*. The very nature of the right to peremptory challenges and the objectives underlying it require that its exercise be entirely discretionary and not subject to any condition. There is no logical connection between the challenge for cause and the peremptory challenge, and I do not see any reason why the unsuccessful exercise of the right to challenge for cause would have an effect on the right to a peremptory challenge. *Only a clear legislative provision could negate the right to a peremptory challenge in circumstances where, because of its very purpose, such a right should be available*. [Emphasis added; pp. 720-21.]

1. If this Court considered that depriving an accused of even one peremptory challenge was such a fundamental error that it was enough to overturn a conviction, it can hardly be denied that the use of peremptory challenges had a substantive impact on the right of accused persons to meaningfully participate in the selection of their jury.
2. L’Heureux-Dubé J. in *Sherratt*,expanded on this theme as follows:

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. . . .

. . .

. . . peremptory challenges are justified on a number of grounds. The accused may, for example, not have sufficient information to challenge for cause a member of the panel he/she feels should be excluded. Peremptory challenges can also, in certain circumstances, produce a more representative jury depending upon both the nature of the community and the accused. Challenges of this nature also serve to heighten an accused’s perception that he/she has had the benefit of a fairly selected tribunal. [pp. 525 and 532-33]

1. In *R. v. Bain*,[1992] 1 S.C.R. 91, this Court found that the Crown’s greater influence over jury selection than the accused through the combination of stand asides and peremptory challenges violated an accused’s s. 11(d) *Charter* right to an impartial jury. In concurring reasons,Stevenson J. held that the numerical disparity existed “not in a mere procedure or rule but in the role each party has in choosing the jury by which the accused will be tried” (p. 148). He emphasized that the basis for peremptory challenges was to enable the accused to act on subjective perceptions of partiality without provable objection. Since the Crown’s stand asides were akin to additional peremptory challenges, the imbalance diminished the accused’s role “in the fundamental activity of choosing the jury” (p. 149).
2. In his dissenting reasons, Gonthier J. too acknowledged the importance of peremptory challenges:

The *Criminal Code* gives the accused a variable number of peremptory challenges, depending on the seriousness of the offence. These peremptory challenges allow the accused to exclude prospective jurors from the jury. The main rationale for these had already been outlined by Blackstone . . . .

. . .

These are still today the main reasons offered to justify peremptory challenges by the accused. Babcock, in “Voir Dire: Preserving ‘Its Wonderful Power’” (1975), 27 *Stan. L. Rev.* 545, names them respectively the “didactic” and “shield” functions of the peremptory challenge at pp. 552-55. Professor Babcock develops the didactic function of the challenge further than Blackstone: not only does it allow the accused to summarily dismiss prospective jurors without specific motives, but *it also* “*teaches the litigant, and through him the community, that the jury is a good and proper mode for deciding matters and that its decision should be followed because in a real sense the jury belongs to the litigant . . .*” (at p. 552). The “shield” function remains accessory. The Law Reform Commission of Canada, in its 1982 report, *The Jury*, also explained peremptory challenges for the accused along the same lines at p. 46. [Emphasis added.]

(*Bain*, at pp. 115-16)

1. While peremptory challenges did not guarantee any particular composition of the jury, the process ensured that accused persons were given a substantive role through having a meaningful opportunity to have their own subjective views about the impartiality of the jury respected.
2. And while out-of-court processes for jury selection contain safeguards that are crucial, extensive research demonstrates that systemic factors disproportionately exclude marginalized prospective jurors at every step of the process, resulting in a system in which Indigenous and racialized persons are overrepresented as accused persons and victims, and underrepresented as jurors (see Roach (2020), at p. 355; G. T. Roccamo, *Report to the Canadian Judicial Council on Jury Selection in Ontario* (June 2018) (online), at pp. 11-12; Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba*,vol. 1, *The Justice System and Aboriginal People* (1991) (“*Aboriginal Justice Inquiry*”), at pp. 377-87; F. Iacobucci, *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by The Honourable Frank Iacobucci* (2013), at pp. 34, 55 and 60-63; M. Israel, “The Underrepresentation of Indigenous Peoples on Canadian Jury Panels” (2003), 25 *Law & Pol’y* 37, at p. 42; C. B. Davison, “The Quest for Representative Juries in the Northwest Territories” (2020), 50 *Northern Review* 195, at pp. 201-3).
3. As many Interveners argued, peremptory challenges were an important trial safeguard for an accused to try to secure representativeness from what can be unrepresentative random selections. As the Intervener the British Columbia Civil Liberties Association argued in its factum:

In light of the importance of jury diversity for jury impartiality, the weak upstream [out-of-court] jury processes addressed in *Kokopenace* must be counterbalanced with strong downstream [in-court] jury processes in *Chouhan*.Specifically, peremptory challenges are a vital last resort for safeguarding the jury impartiality to which an accused is constitutionally entitled. . . . because the weak upstream protections for jury impartiality often result in homogenous jury panels, stronger downstream protections, like peremptory challenges, must be maintained. [Emphasis deleted; para. 15.]

1. This finds resonance in the factum of the Intervener the South Asian Bar Association:

It is often impossible to articulate a specific reason why a juror might not be suitable, and it may come down to an unfriendly glance, a suspicious glare, or an unwillingness to look at the accused at all. Peremptory challenges gave people of colour at least some say in who would make it on to their often all-white juries — even if it provided no guarantee that the people who attended court for jury duty would actually look like them. [para. 12]

1. Peremptory challenges therefore ensured the possibility of selecting a jury that, in the eyes of the accused and based on their own perceptions of potential prejudice, would be fairer. As Stevenson J., concurring, held in *Bain*:

What s. 11(*d*) of the *Charter* requires is that there be, at minimum, a reasonable apprehension that juries generated by the selection process are impartial. *Allowing the accused to have a manifest role in that process confirms that the appearance of fairness and impartiality is maintained*. [Emphasis added; p. 161.]

1. It is not only an accused’s confidence in trial fairness that is at stake, but the public’s confidence that the jury is impartial. As Dickson C.J. wrote in *R. v. Barrow*, [1987] 2 S.C.R. 694:

The selection of an impartial jury is crucial to a fair trial. . . . *The accused, the Crown, and the public at large all have the right to be sure that the jury is impartial and the trial fair; on this depends public confidence in the administration of justice.* Because of the fundamental importance of the selection of the jury and because the *Code* gives the accused the right to participate in the process, the jury selection should be considered part of the trial for the purposes of s. 577(1). [Emphasis added; p. 710.]

That impartiality, as a number of Interveners pointed out, is not possible without acknowledging the reality of the existence of discrimination in the public from which juries are selected.

1. In *Parks*,Doherty J.A. observed that “[r]acism, and in particular anti-black racism, is a part of our community’s psyche” (p. 342). Writing for a unanimous court, he held that a challenge for cause to the entire panel based on widespread racial prejudice should have been allowed, so that the defence could ask each prospective juror in a murder trial whether their ability to judge the evidence without bias, prejudice or partiality would be affected by the fact that the accused was a black Jamaican immigrant and the deceased was a white man. *Parks* was expanded to all black accused in Ontario in *R. v. Wilson* (1996), 29 O.R. (3d) 97 (C.A.),and to all visible minorities in Ontario in *R. v. Koh* (1998), 42 O.R. (3d) 668 (C.A.), at p. 677.
2. This Court endorsed *Parks* in *Williams*. Mr. Williams, an Indigenous man charged with robbery, led evidence of widespread prejudice against Indigenous persons in the community to ground a challenge for cause. Writing for a unanimous Court,McLachlin J. held that “[r]acism against aboriginals includes stereotypes that relate to credibility, worthiness and criminal propensity” and “[t]here is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system” (para. 58). And, regrettably, this systemic discrimination risks wrongful convictions (see Nova Scotia, *Royal Commission on the Donald Marshall, Jr., Prosecution: Digest of Findings and Recommendations* (1989)). As McLachlin J. wrote in *Williams*:

Racial prejudice and its effects are as invasive and elusive as they are corrosive. We should not assume that instructions from the judge or other safeguards will eliminate biases that may be deeply ingrained in the subconscious psyches of jurors. Rather, we should acknowledge the destructive potential of subconscious racial prejudice by recognizing that the post-jury selection safeguards may not suffice. Where doubts are raised, the better policy is to err on the side of caution and permit prejudices to be examined. [para. 22]

1. Or, as Binnie J. noted in *R. v. Spence*, [2005] 3 S.C.R. 458:

The administration of justice has faced up to the fact that racial prejudice and discrimination are intractable features of our society and *must be squarely addressed in the selection of jurors*. [Emphasis added; para. 1.]

1. Peremptory challenges were an imperfect, but significant tool for the accused to try to weed out this potential bias. They served as a safety valve for those who perceived a risk of prejudice but could not successfully bring a challenge for cause because they could not show that the prospective juror “may possess biases that cannot be set aside” (*R. v. Find*,[2001] 1 S.C.R. 863, at para. 26, perMcLachlin C.J.). Any lingering doubt that the prospective juror would decide the case fairly could be remedied by exercising a peremptory challenge (*Cloutier* (SCC),at p. 720). Impartiality, therefore, animated the use of peremptory challenges from the accused’s perspective.
2. The test for impartiality is “what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude” (*Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394, perde Grandpré J.). An informed person would know that, throughout history, peremptory challenges enabled an accused to veto some prospective jurors without proof of cause and to influence the ultimate composition of the jury. An informed person would understand the history of discrimination faced by disadvantaged groups in Canadian society, recognize widespread and systemic racism and account for diverse realities (*R. v. S.* (*R.D.)*,[1997] 3 S.C.R. 484, at pp. 507-9, per L’Heureux-Dubé and McLachlin JJ., and at p. 531, perCory J.; *Peart v. Peel Regional Police Services* (2006),43 C.R. (6th) 175 (Ont. C.A.), perDoherty J.A.; *R. v. Le*,[2019] 2 S.C.R. 692, at para. 73, perBrown and Martin JJ.).
3. An informed person would therefore take into account the perspective of a non-white accused person facing the prospect of trial by an all-white jury. Having thought the matter through, an informed person might reasonably lose confidence in the criminal jury system *unless* there are safeguards that can *guarantee* that Canadian juries will be impartial and representative.
4. Peremptory challenges were such a safeguard, intended to counteract the reality of discrimination and the systemic factors that tended to result in homogenous jury panels and adversely affect the fair trial rights of a non-white accused. Peremptory challenges were used by them to try to make room for a more diverse jury. I simply do not agree with my colleagues that “the *true* value of this ‘benefit’ was doubtful”. The value may be ineffable, but it is no less real to the perception of fairness for a non-white accused. Without a meaningful opportunity to influence the composition of the jury, a non-white accused on trial before an all-white jury may not feel that the jury represents “a representative cross-section of society, honestly and fairly chosen” (*Sherratt*, at p. 524).
5. It is true that there is a “presumption that jurors are capable of setting aside their views and prejudices and acting impartially” (*Find*,at para. 26). It is worth remembering, however, that for hundreds of years, juries composed only of men were accepted as impartial (*R. v. Biddle*, [1995] 1 S.C.R. 761, at para. 56, perMcLachlin J., concurring; *Sherratt*,at p. 524). But we have developed an evolutionary sophistication about what impartiality means, including that fairness must not only be done, it must be seen to be done. A jury that does not look fair to an accused may not, to that accused person, be perceived as fair if he or she is not given the chance to meaningfully participate in its selection by removing a juror who seems to be partial against them.
6. Representativeness “is an important guarantor of impartiality” (*Kokopenace*,at para. 50; *Williams*,at para. 47), and its absence undermines the appearance of fairness and the ability of the jury to perform the functions that make it beneficial in the first place. As Moldaver J. explained in *Kokopenace*:

In contrast to its limited role in s. 11(*d*), the role of representativeness in s. 11(*f*) is broader. Representativeness not only promotes impartiality, it also legitimizes the jury’s role as the “conscience of the community” and promotes public trust in the criminal justice system: *Sherratt*, at pp. 523‑25; *Church of Scientology*, at pp. 118-20. Representativeness is thus a necessary component of an accused’s s. 11(*f*) right to a jury trial.

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Because representativeness is a key characteristic of the jury, its absence will automatically undermine the s. 11(*f*) right to a trial by jury. [paras. 55‑57]

1. Representativeness matters not because a juror’s personal characteristics are indicative of how he or she will decide the case, but because if the right to be tried by a jury of one’s peers means anything, it means that members of a jury must be, and be seen to be, open-minded, regardless of their own or the accused’s race, religion, sex, gender identity, sexual orientation, political affiliations, age or economic status (see M. Minow, “Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors” (1992), 33 *Wm. & Mary L. Rev.* 1201, at p. 1217; D. Ramirez, “Affirmative Jury Selection: A Proposal to Advance Both the Deliberative Ideal and Jury Diversity” (1998), *U. Chicago Legal F.* 161, at pp. 162-66; Kettles, at p. 466). And that means a jury that looks more like Canada.
2. The abolition of peremptory challenges was motivated by the public perception that *homogenous* juries compromise trial fairness and the legitimacy of jury verdicts, as occurred in the trial of Gerald Stanley. The subversion of the use of peremptory challenges on racial grounds, in order to *avoid* a representative jury by excluding visibly Indigenous prospective jurors, resulted in Stanley being tried by an all-white jury for the second-degree murder of a Cree man, Colten Boushie (Roach (2018), at pp. 271-78).
3. Similar abuses occurred in *R. v. Lines*,[1993] O.J. No. 3284 (QL) (C.J. (Gen. Div.)), where a white accused police officer peremptorily challenged black jurors in a case alleging police violence against a black resident of Toronto, and in the trial for the murder of Helen Betty Osborne, a 19-year old Cree girl, where all Indigenous persons were challenged peremptorily, resulting in an all-white jury (*Aboriginal Justice Inquiry*, at pp. 377-87; Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 2, *The Deaths of Helen Betty Osborne and John Joseph Harper* (1991), at pp. 85‑87; *R. v. Gayle* (2001), 54 O.R. (3d) 36 (C.A.)).
4. These abuses can never be justified.
5. But this does not mean that, fairly and properly exercised, using peremptory challenges to create what to the accused is an impartial and representative jury, was any less a substantive part of an accused’s fair trial rights.
6. Peremptory challenges and the right to use them protected the accused’s perception of trial fairness by safeguarding their substantive right to contribute meaningfully to the composition of the jury (*Bain*,at pp. 150-51, perStevenson J., concurring, and at pp. 115-16, perGonthier J., dissenting). They enabled accused persons to directly influence the composition of a “jury of their peers” and attempt to secure representativeness, thereby “heighten[ing] an accused’s perception that he/she has had the benefit of a fairly selected tribunal” (*Sherratt*,at p. 533).
7. Abolishing peremptory challenges, therefore, diminished the right of accused persons to meaningfully participate in jury selection and to influence the ultimate composition of the jury. Their abolition affected the substantive rights of an accused to participate in the selection of an impartial and representative jury, as guaranteed by ss. 11(d) and 11(f) of the *Charter*. It is hard to think of anything that has a more direct impact on an accused’s fair trial rights than the perception that he or she has been tried by a fairly chosen, impartial and representative jury.
8. Even the Minister of Justice recognized the significant potential impact of repealing peremptory challenges on the fair trial rights of the accused:

The elimination of peremptory challenges from the Criminal Code may engage the fair trial rights of the accused as protected by sections 11(d) and 11(f) of the Charter.

(Canada, Department of Justice, *Charter Statement — Bill C-75: An Act to Amend the Criminal Code, Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts* (March 2018) (online))

And before this Court, the Attorney General of Canada acknowledged that the abolition of peremptory challenges affected the substantive rights of accused persons and could only apply prospectively.

1. Since there is no doubt that an accused’s fair trialrights are “necessarily substantive” (*Dineley*,at para. 21), the legislation abolishing peremptory challenges affected substantive rights and could only have prospective effect. The repeal on the day of Mr. Chouhan’s scheduled jury selection should not, as a result, have applied to his trial.
2. The remaining question is whether the trial judge’s error in denying Mr. Chouhan the right to use peremptory challenges can be cured by the proviso in s. 686(1)(b)(iv) of the *Criminal Code.*
3. The proviso only applies if the accused suffered no prejudice, meaning that no substantial wrong or miscarriage of justice occurred (*R. v. Khan*, [2001] 3 S.C.R. 823, at paras. 16-18, perArbour J.). It can only salvage the conviction if the error is minor or harmless, or if the case is overwhelming, so that there is no reasonable possibility that the verdict might have been different (*R. v. Cloutier* (1988), 27 O.A.C. 246 (C.A.) (“*Cloutier* (C.A.)”), at para. 29,perGoodman J.A.; *Khan*,at paras. 16 and 28-31; *R. v. White*,[2011] 1 S.C.R. 433, at paras. 93-94, perRothstein J.).
4. Peremptory challenges were one of the core safeguards that ensured the impartiality of the jury. When an error “interferes with the accused’s use of his peremptory challenges to the extent that there is a reasonable possibility that the jury would have been differently constituted, this safeguard is undermined” (*R. v. Davey*, [2012] 3 S.C.R. 828, at para. 55, perKarakatsanis J.). The Crown must rebut the presumption of prejudice and show that “interference with the accused’s right to meaningfully engage in the peremptory challenge process . . . did not give rise to an appearance of unfairness that would amount to a miscarriage of justice” (*Davey*, at para. 55, fn. 5).
5. Mr. Chouhan’s case was not so overwhelming that any trier of fact would inevitably convict (*Khan*,at para. 16; *Cloutier* (C.A.), at para. 29). The evidence was entirely circumstantial, and Mr. Chouhan testified and denied the allegations. The case, therefore, is not one where “any other verdict but a conviction would be impossible” (*Khan*,at para. 31).
6. Nor was the error minor or harmless. It was one that affected Mr. Chouhan’s substantive right to meaningfully participate in the selection of his jury. As the Crown conceded before this Court, “if trial fairness is negatively affected, then the proviso can’t apply” (transcript, at p. 24). Since the denial of peremptory challenges adversely affected Mr. Chouhan’s substantive fair trial rights, the error was not harmless.
7. Absent the error, Mr. Chouhan could have peremptorily challenged up to 20 prospective jurors. He raised impartiality concerns about four of them, but three were nonetheless selected for the jury. The trial judge found that Mr. Chouhan’s subjective perception of potential prejudice was outweighed by each juror’s negative answer under oath when asked: “Would your ability to judge the evidence in this trial fairly be affected by the fact that Mr. Chouhan is a person of Indian descent?”
8. Because the trial judge failed to invite more probing questions or stand those jurors aside, the prejudice to Mr. Chouhan’s fair trial rights remained. Had Mr. Chouhan been able to use his peremptory challenges, he would not have been judged by three people he believed were biased against him.
9. It is true that the trial judge stood aside one prospective juror, but the juror’s conduct was hardly subtle — Mr. Chouhan informed the court that she made a rude gesture at him with her middle finger.
10. But Mr. Chouhan was denied the ability to rid the jury of three other people he intuitively felt would not judge him fairly, which is the purpose of peremptory challenges. To him, their presence on the jury, despite his request that they be removed for bias, meant that he did not have an impartial jury. This is a prejudicial impact without a cure.
11. And this error is one that has an impact not only on Mr. Chouhan’s confidence in the administration of justice, but the public’s as well. The trial judge’s error in not permitting Mr. Chouhan to use his peremptory challenges was exacerbated by his failure to safeguard, through probing questions or stand asides, the rights of an accused who is a member of a racial minority. This resulted in Mr. Chouhan not being judged by a jury he perceived to be impartial and representative. This adverse impact on his fair trial rights cannot be cured by the proviso.
12. In the companion appeal, *R. v. Esseghaier*, 2021 SCC 9,[2021] 1 S.C.R. 101, at para. 52, Moldaver and Brown JJ. suggest in *obiter* that “a stricter standard might be required under s. 686(1)(b)(iv)”. In my respectful view, under either standard, the proviso cannot apply in this case given the prejudice caused by the error.
13. I would therefore dismiss the Crown’s appeal from the Court of Appeal’s conclusion that the repeal did not apply to Mr. Chouhan’s trial and Mr. Chouhan’s cross-appeal.

The following are the reasons delivered by

Côté J. (dissenting) —

1. Overview
2. Edmund Burke once wrote that “however sagacious and observing he may be, it is with infinite caution that any man ought to venture upon pulling down an edifice which has answered in any tolerable degree for ages the common purposes of society” (*Reflections on the Revolution in France* (1790), at p. 90). In Parliament’s haste to respond to an individual case, it committed this very error. It failed to understand why peremptory challenges had accompanied jury trials for over 700 years. It ignored the voices of racialized and other marginalized persons calling out for a chance to maintain the benefit of trial by jury.
3. In *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, S.C. 2019, c. 25 (“*Amending Act*”), Parliament abolished peremptory challenges under the *Criminal Code*, R.S.C. 1985, c. C-46. In doing so, it substantially diminished the benefit of trial by jury for Mr. Chouhan and many other accused persons, particularly racialized and other marginalized persons.
4. Mr. Chouhan’s trial for first degree murder was scheduled to begin on the same day that s. 269 of the *Amending Act* took effect. At jury selection, the trial judge denied Mr. Chouhan the right to peremptorily challenge potential jurors, and thus he was unable to meaningfully participate in selecting the jurors who would try him. On four occasions, he objected to potential jurors based on gestures or actions that made him uncomfortable. The trial judge stood aside one of these potential jurors but allowed the other three to serve.
5. Mr. Chouhan argues that his trial did not comply with ss. 11(d) and 11(f) of the *Canadian* *Charter of Rights and Freedoms*. My colleagues, like the courts below, focus their analysis on s. 11(d)of the *Charter*. In my opinion, the analysis must begin with s. 11(f) of the *Charter* because its guarantee is broader than that of s. 11(d).
6. Section 11(f) guarantees that all persons charged with non-military crimes punishable by a maximum term of imprisonment of five years or more have the right to benefit from trial by jury. In order to provide the benefit of trial by jury, a jury must possess certain core characteristics, including impartiality, representativeness and competence. Each of these three characteristics fosters the benefit of trial by jury. The abolition of peremptory challenges substantially reduces the benefit of jury trials by eroding these three characteristics.
7. Peremptory challenges permit accused persons to strike at hidden, subtle and unconscious biases that are undoubtedly present in the jury array and that go unaddressed by challenges for cause. They also give accused persons the opportunity to try to obtain more representative and diverse juries. Finally, peremptory challenges allow accused persons to strike jurors whose life experiences are so acutely different to their own that they may be unable to deliver the benefit of trial by jury.
8. There is a sad irony to this case. Parliament eliminated peremptory challenges because it saw them as an arbitrary tool used to perpetuate systemic racism and discriminate against jurors who are racialized or other marginalized persons. The reality is, however, that peremptory challenges are far from arbitrary. More particularly, for accused persons who are racialized or otherwise marginalized, they are a lifeline to combat unconscious biases and discrimination. In the words of one of the interveners, the Canadian Association of Black Lawyers:

Parliament failed to give proper consideration to the impact of the abolition of peremptory challenges on Black accused, the result of which is the exacerbation of the very issue that it claimed to fix: systemic racism.

(I.F., at para. 3)

1. That intervener was not alone. Defence advocates representing a wide spectrum of organizations — including a number of racialized communities — implored us to understand and recognize the negative impact that the abolition of peremptory challenges would have on racialized and other marginalized persons. Their position is supported by the evidence before the trial judge.
2. Peremptory challenges are not perfect. I acknowledge that they can be used in a discriminatory way. However, in attempting to combat the difficulties raised by peremptory challenges, Parliament had many options. It did not need to preserve peremptory challenges unchanged, but it did need to consider the interests of accused persons. The proper course of action for Parliament was not to abolish peremptory challenges but to regulate them. Its failure to do so is not minimally impairing. Therefore, s. 269 of the *Amending Act* infringes s. 11(f) of the *Charter*,as it is not a reasonable limit that can be demonstrably justified in a free and democratic society (*Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3, at paras. 120‑21). To the extent that it abolishes peremptory challenges, I would declare s. 269 of the *Amending Act* to be of no force or effect.
3. Since I find that the abolition of peremptory challenges infringes s. 11(f), I need not determine whether it also infringes s. 11(d). However, it is clear that the abolition of peremptory challenges at least affects s. 11(d). Had I not found a constitutional infringement, I would have found, like my colleague Justice Abella, that the abolition of peremptory challenges clearly affects substantive rights and can apply only prospectively.
4. My colleagues Justices Moldaver and Brown find that the abolition of peremptory challenges does not affect any of Mr. Chouhan’s rights. Yet they find it necessary to create new jury selection and trial protections (none of which were provided to Mr. Chouhan). I disagree with this approach. If the regime enacted by Parliament cannot render trials constitutionally compliant, then it must be struck down. If the *Amending Act* does not even affect a *Charter* right, then this Court has no reason to decree its preferred replacement for peremptory challenges into law.
5. History of Peremptory Challenges
6. A peremptory challenge is a discretionary power that may be exercised to prevent a potential juror from entering the jury. The common law right of an accused to peremptorily challenge potential jurors is over seven hundred years old (J. Heinz, “Peremptory Challenges in Criminal Cases: A Comparison of Regulation in the United States, England, and Canada” (1993), 16 *Loy. L.A. Int’l & Comp. L.J.* 201, at pp. 207‑8). By 1488, the common law provided the accused with the right to challenge thirty-five potential jurors (J. Baker, *The* *Oxford History of the Laws of England*, vol. VI, *1483-1558* (2003), at p. 517). Historically, peremptory challenges were one of the few protections that a person charged with a crime enjoyed. Before an accused could be represented by a lawyer, call witnesses on their own behalf, or have hearsay evidence excluded, they had the ability to participate in selecting the jury. In the words of Sir John Baker, “[t]he blessing of trial by jury was favourable to the accused in some respects. He was able to challenge up to thirty-five jurors without giving any reason, and more with cause. The twelve who were selected had to be unanimous before they could convict him. If they acquitted him, however perversely, the verdict was final and unimpeachable” (*An Introduction to English Legal History* (5th ed. 2019), at p. 550).
7. The importance of peremptory challenges rested on their ability to aid both in securing an impartial jury and in comforting the accused in the fairness of the jury and thus the final verdict. Sir Edward Coke recognized the importance of peremptory challenges in securing an impartial jury four hundred years ago when he wrote that “the end of [a peremptory] challenge is to have an indifferent [trial], and which is required by law; and to bar the party indicted of his lawful challenge, is to bar him of a princip[al] matter concerning his [trial]” (*The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes* (1797), at p. 27). In *Mansell v.* *The Queen* (1857), 8 El. & Bl. 54, 120 E.R. 20,Lord Chief Justice Campbellsimilarly observed that without peremptory challenges,

it is quite obvious that justice could not be satisfactorily administered; for it must often happen that a juror is returned on the panel who does not stand indifferent, and who is not fit to serve upon the trial, although no legal evidence could be adduced to prove his unfitness. [p. 27]

1. The Parliament of England agreed. After the outcry following political persecutions in the seventeenth century, it recognized that peremptory challenges were one of the accused’s most important tools in securing an impartial jury. In order to enhance the accused’s ability to use peremptory challenges, it enacted a requirement to provide those charged with treason with a jury list in advance (*Act for regulateing of Tryals in Cases of Treason and Misprision of Treason* (Eng.), 1696, 7 & 8 Gul. 3, c. 3, s. 7; F. W. Maitland, *The Constitutional History of England* (1908), at p. 319; J. H. Langbein, *The Origins of Adversary Criminal Trial* (2005), at p. 95-96).
2. The process of participating in jury selection also gives the accused a sense of ownership in the trial, which increases their confidence in the fairness of the trial. This increased confidence in the fairness of the trial is especially important in jury trials because juries do not provide reasons for their decisions. Sir William Blackstone wrote of the important effect that peremptory challenges have on the attitude of the accused:

But in criminal cases, or at least in capital ones, there is, in *favorem vitae* [from a regard to life], allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without [showing] any cause at all; which is called a *peremptory* challenge; a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous. This is grounded on two reasons. 1. As every one must be sensible, what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is, that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike. 2. Because, upon challenges for cause [shown], if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside. [Emphasis in original; footnote omitted.]

(*Commentaries on the Laws of England* (16th ed. 1825), Book IV, at pp. 352-53)

1. I would disagree only with the characterization of peremptory challenges as arbitrary. They are discretionary, but that does not mean they are arbitrary. That they may be exercised without an express reason does not mean that a reason does not exist. After all, the jury itself does not give reasons for its decision.
2. Peremptory challenges came to Canada with the common law. For instance, the 1792 and 1794 juries acts of Upper Canada expressly received the “[l]aw and [c]ustom of England”, including peremptory challenges (R. B. Brown, “Challenges for Cause, Stand-Asides, and Peremptory Challenges in the Nineteenth Century” (2000), 38 *Osgoode Hall L.J.* 453, at p. 480). Until 1850, the common law regulated the number of peremptory challenges available in Upper Canada. In 1869, Canada adopted the number of peremptory challenges given to defendants in pre-Confederation Upper Canada: twenty for those charged with treason or capital offences, twelve for those charged with other felonies, and four for those charged with misdemeanors (Brown, at pp. 490-91). In 1892, Canada’s first *Criminal Code, 1892*, S.C. 1892, c. 29, s. 668,similarly provided for twenty peremptory challenges for those charged with treason or capital offences, twelve for those charged with offences punishable by imprisonment for more than five years, and four for those charged with offences punishable by less than five years of imprisonment.
3. Like their English counterparts, Canadian courts have recognized the value of peremptory challenges. In *Morin v. The Queen* (1890), 18 S.C.R. 407, Chief Justice Ritchie noted the importance of peremptory challenges in securing a fair trial: “The object of the law certainly is to secure the prisoners a fair trial. How can this be accomplished if he is deprived of the privilege the law gives him in the selection of the jury by whom he is to be tried?” (p. 425). Similarly, in *McLean v. The King*, [1933] S.C.R. 688, the Court stated that “in the administration of criminal justice nothing is more important than that the constitution of the jury should be free from all objection and that the accused should have the full advantage of every safeguard which the law has provided to enable him to secure this right, which is of the very essence of a fair trial” (p. 692).
4. In *Cloutier v. The Queen*, [1979] 2 S.C.R. 709, this Court found that the accused’s right to peremptorily challenge jurors in Quebec dated back to the *Quebec Act,* *1774* (G.B.), 14 Geo. 3, c. 83 (reproduced in R.S.C. 1985, App. II, No. 2), and that the trial judge’s denial of an accused’s peremptory challenge rendered the verdict voidable. Justice Pratte, for the majority, said that the consequences that flow from a legal error by the trial judge must depend on the nature of the rule violated and the importance of the right that the rule is designed to safeguard (p. 715). In recognition of the importance of the rights safeguarded by the accused’s right to peremptorily challenge*,* he found that it could be negated only by a clear legislative provision and that the accused, when erroneously denied a peremptory challenge, was automatically entitled to ask for a new trial without having to prove prejudice, because there was “*préjudice de droit*” (pp. 721 and 724).
5. In *R. v. Sherratt*, [1991] 1 S.C.R. 509, L’Heureux-Dubé J. found that

peremptory challenges are justified on a number of grounds. The accused may, for example, not have sufficient information to challenge for cause a member of the panel he/she feels should be excluded. Peremptory challenges can also, in certain circumstances, produce a more representative jury depending upon both the nature of the community and the accused. Challenges of this nature also serve to heighten an accused’s perception that he/she has had the benefit of a fairly selected tribunal. [pp. 532-33]

1. In *R. v. Bain*, [1992] 1 S.C.R. 91, Gonthier J. (dissenting, albeit not on this point) adopted Blackstone’s justifications for peremptory challenges and added that they also teach the litigant and the community “that the jury is a good and proper mode for deciding matters and that its decision should be followed because in a real sense the jury belongs to the litigant” (p. 116, citing B. Babcock, “Voir Dire: Preserving ‘Its Wonderful Power”’ (1975), 27 *Stan. L. Rev.* 545, at p. 552).
2. Most recently, my colleague Justice Karakatsanis recognized the value of peremptory challenges in *R. v. Davey*, 2012 SCC 75, [2012] 3 S.C.R. 828, when she referred to them as a safeguard to ensure the impartiality of the jury (para. 55).
3. From the preceding analysis, it is clear that judges have long acknowledged that peremptory challenges enhance both impartiality in fact and an accused’s perception of trial fairness. It is also clear that the defence’s right to peremptory challenges was both a common law and a statutory right prior to September 19, 2019, the date on which s. 269 of the *Amending Act* took effect.
4. Section 269 of the *Amending Act* provides that ss. 633 and 634 of the *Code* are replaced by the new s. 633, thereby removing peremptory challenges from the *Code* by implication. The only mention of peremptory challenges in the *Amending Act* is in the summary, which states: “This enactment amends the *Criminal Code* to, among other things, . . . (c) abolish peremptory challenges of jurors . . . .” All parties and interveners proceeded before this Court on the basis that this language abolished all peremptory challenges. I too will proceed on that basis, but I note parenthetically that if the common law right lay dormant under the statutory right (for instance, in a manner similar to prerogative powers in abeyance (see *Attorney-General v. De Keyser’s Royal Hotel*, [1920] A.C. 508 (H.L.)), then its continued existence would depend on the interpretation of the *Amending Act*. As Lord Chief Justice Tindal emphasized:

. . . if the question, whether his right to the peremptory challenge has or has not been taken away, remains open to any doubt, it appears to me, that in accordance with the general principle of decision applied to criminal cases, *tutius erratur in mitiori sensu*, the decision of such question is to be given in favour of the prisoner, who is not to be deprived, by implication of a right of so much importance to him, given by the common law, and enjoyed for many centuries, unless such implication is absolutely necessary for the interpretation of the statute.

(*Gray v. Reg.* (1844), 11 Cl. & F. 427, 8 E.R. 1164 (H.L.), at p. 1183)

1. Section 11(f) of the *Charter*
2. Section 11(f) of the *Charter* provides:

**11.** Any person charged with an offence has the right

. . .

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

**11.** Tout inculpé a le droit

. . .

f) sauf s’il s’agit d’une infraction relevant de la justice militaire, de bénéficier d’un procès avec jury lorsque la peine maximale prévue pour l’infraction dont il est accusé est un emprisonnement de cinq ans ou une peine plus grave.

1. This Court has never defined the meaning of “trial by jury”. In order for s. 11(f) to be meaningful, there “must be some set of core irreducible attributes that a tribunal must possess for it to be considered a ‘jury’” (*R. v. Craig*, 2019 ONSC 6732, 449 C.R.R. (2d) 1, at para. 43). In my view, a jury must possess all of the characteristics necessary to provide the accused with the benefit that the framers of the *Charter* sought to protect. This understanding of s. 11(f) is consistent with its wording and context, as well as with the history of juries and the jurisprudence of this Court.
2. This Court has repeatedly found that the core purpose of s. 11(f), like the other paragraphs of s. 11, is to protect the accused (*R. v. Turpin*, [1989] 1 S.C.R. 1296, at pp. 1310-11; *R. v. Lee*, [1989] 2 S.C.R. 1384, at p. 1400; *R. v. Stillman*, 2019 SCC 40, [2019] 3 S.C.R. 144, at para. 28). In light of this purpose, and reading the French and English texts together, Wilson J. held that s. 11(f) “should be read as giving the accused the right to benefit from a trial by jury” (*Turpin*, at p. 1314 (emphasis in original)). She found that the intent of the framers was “to guarantee an accused the benefit of a jury trial where a jury trial is in fact from his or her perspective a benefit” (*Turpin*,at p. 1313). Similarly, in *Stillman*, my colleagues Moldaver and Brown JJ. found that s. 11(f) was meant to protect the accused “by giving him or her the benefit of trial by his or her peers” (para. 28).
3. It is thus clear that the purpose of s. 11(f) is to guarantee an underlying benefit that comes from jury trials. The first step in deciding this appeal is to determine the nature of this benefit that jury trials provide and that the framers of the *Charter* sought to protect by enshrining s. 11(f). The second step is to determine what characteristics a jury trial must have to secure this benefit. The ultimate question is whether the abolition of peremptory challenges deprives Mr. Chouhan of the benefit of trial by jury.
   1. Nature of the Benefit of Trial by Jury
4. The jurisprudence of this Court has recognized four core advantages of jury trials in comparison to judge‑alone trials. Together, these four advantages are the four elements of the benefit of trial by jury.
5. The first element of the benefit of trial by jury that has been recognized is that the jury is an excellent fact finder (*Sherratt*, at p. 523). In the words of Lord du Parcq, “when questions of fact have to be decided, . . . there is no tribunal to equal a jury” (*Aspects of the Law* (1948), at p. 10). The jury’s superior fact‑finding ability comes from both the cumulative abilities of its members and the diversity of their experiences. The evaluation of evidence often requires making judgments about human behaviour. Triers of fact must rely on their common sense and personal experiences to determine whether witnesses are sincere, accurate and credible. Each juror brings their own personal experience to this assessment, and thus the cumulative experience of the jury is greater than that of any one individual, or of any group of individuals who have largely shared similar life experiences. The group size also means that a jury benefits from the collective recall of all jurors. Whereas one decision maker may forget a particular aspect of the evidence, it is less likely that the jury will miss something because the twelve jurors deliberate as a group. Finally, the deliberative nature of the jury also contributes to better fact finding because each detail is discussed and scrutinized by the group (Law Reform Commission of Canada, Working Paper 27, *The Jury in Criminal Trials* (1980), at pp. 6-7).
6. The second element of the benefit of trial by jury is that a jury represents the conscience of the community (*Turpin*,at pp. 1309-10; *Sherratt*, at p. 523; *R. v. Kokopenace*, 2015 SCC 28, [2015] 2 S.C.R. 398, at para. 55; *Stillman*, at para. 28). The Law Reform Commission of Canada explained that given the generality of the law, cases will arise in which a rigid application of the law will lead to an inequitable result. The jury, composed of a representative cross-section of society, is best placed to determine whether applying the law to a particular set of facts would be inequitable or would accord with society’s values. Indeed, many jurists argue that “in serious cases it is the jury who must retain the ultimate responsibility for dispensing equity” (Law Reform Commission, at p. 9).
7. Closely related to the jury’s role as the conscience of the community is its role as “a bulwark of individual liberty” protecting against oppressive laws or oppressive enforcement of the law (*Turpin*, at p. 1309; see also *Sherratt*, at pp. 523‑24). Since a jury makes the final determination of guilt or innocence, it may refuse to apply a law that does not conform to the morality of the community or that is being used in an oppressive fashion. Although this role has been controversial, it is “well established that under the system of justice we have inherited from England juries are not entitled as a matter of right to refuse to apply the law — but they do have the power to do so when their consciences permit of no other course” (*R. v. Krieger*, 2006 SCC 47, [2006] 2 S.C.R. 501, at para. 27 (emphasis deleted)).
8. The jury also serves the broader social interests of public education and legitimization of the justice system (*Turpin*,at pp. 1309-10; *Sherratt*, at p. 523; *Stillman*, at para. 28). By allowing members of the public to participate directly in judging, it teaches them about the criminal justice system, decreasing its mysteriousness and increasing its acceptability. It also allows members of the public to see for themselves that decisions are fair, just, and in accordance with community values. This has the effect of increasing the legitimacy of the justice system.
9. All four of these elements — superior fact finding, conscience of the community, bulwark of liberty, and educative and legitimizing effect — form the benefit of trial by jury. It is also important to remember that although some of these elements benefit both the accused and society, the purpose of s. 11(f) is to protect the interests of the accused, so the focus must be on the elements that serve this purpose (*Turpin*, at pp. 1310-11; *Lee*, at p. 1400; *Stillman*, at para. 28).
   1. Conditions Precedent to the Benefit of Trial by Jury
10. In order for an accused to receive the benefit of trial by jury, the jury must have certain characteristics. Again here, our jurisprudence has established some essential characteristics of a jury. For instance, in order to deliver equity and exercise its superior fact‑finding ability, a jury must be the ultimate arbiter of guilt (*Krieger*, at paras. 17, 22 and 29). Our case law has also determined that the jury must be impartial, representative and competent (*Davey*, at para. 30; *Sherratt*, at p. 525; *Bain*, at p. 114).
11. The ability of the accused to meaningfully participate in selecting their triers may be another one of these core, irreducible attributes of a jury trial. For the entire existence of jury trials in Canada, the accused has had the right to peremptorily challenge potential jurors. Until September 19, 2019, peremptory challenges were part and parcel of jury trials. As we will see, peremptory challenges have important effects on impartiality, representativeness and competence. However, they also play a unique role in a jury trial. Peremptory challenges recognize that accused persons are worthy of agency and dignity. They enable an accused person to meaningfully participate in selecting their triers, something that is absent in a trial by judge alone. This process of participating in jury selection gives the accused a sense of ownership in the trial. As Gonthier J. acknowledged in *Bain*, this furthers the benefit of trial by jury as it “teaches the litigant, and through him the community, that the jury is a good and proper mode for deciding matters and that its decision should be followed because in a real sense the jury belongs to the litigant” (p. 116, citing Babcock, at p. 552).
12. As emphasized by my colleagues Moldaver and Brown JJ., peremptory challenges also confer a substantial benefit in the subjective minds of accused persons (paras. 18, 24 and 96). By removing jurors that cause them fear or discomfort, an accused will be more likely to feel that they are being tried by jurors whom they consider peers, which increases their confidence that the trial and the verdict are fair (A.R., vol. II, at pp. 192-94). In the words of Sharpe J.A.:

By offering each side a limited number of peremptory challenges, the law allows the parties to eliminate unprovable but perceived concerns about the propensities of jurors and thereby enhance confidence in the impartiality of the jury and the fairness of the trial.

(*R. v. Gayle* (2001), 54 O.R. (3d) 36 (C.A.), at para. 60)

1. This increased confidence in the fairness of the trial is especially important to offset the absence of reasons in a jury trial. As this Court has emphasized, reasons justifying and explaining the result are important both for the dignity of the losing party and for the public to know that justice has been done (*R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at para. 24).
2. Peremptory challenges are also critical to the empanelling of impartial, representative and competent juries.
   * 1. Impartiality
3. For hundreds of years, courts have acknowledged that peremptory challenges facilitate the selection of an impartial jury. Accused persons can and do exercise their peremptory challenges to remove potential jurors who are biased against them. Although there are other mechanisms for preventing partial juries, those mechanisms were designed to work alongside peremptory challenges. For instance, courts have found peremptory challenges important because they allow an accused to remove a partial juror even where the evidence of partiality might not be admissible or the accused’s reasons are difficult to articulate. The abolition of peremptory challenges thus leaves a hole in an accused’s protection from a partial jury. To understand this, we must look at the other protections in the jury selection process.
4. The starting point in Canada is that all potential jurors are presumed to be impartial (*R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458, at para. 21). Randomness in selecting jurors has traditionally been thought to guard against partiality. But in recent years, “[t]he administration of justice has faced up to the fact that racial prejudice and discrimination are intractable features of our society and must be squarely addressed in the selection of jurors” (*Spence*, at para. 1). Where a party demonstrates a realistic potential for partiality, the judge must permit limited questions to jurors during a challenge for cause (*Sherratt*, at p. 536). In the case of racialized accused, “courts have acknowledged that racial prejudice against visible minorities is so notorious and indisputable that its existence will be admitted without any need of evidence” (*Spence*, at para. 5).
5. However, the challenge for cause regime was established to work alongside peremptory challenges. Challenges for cause rely upon overt manifestations of bias, introduced either through specific evidence or by a potential juror’s answer to a single “yes” or “no” question (*Kokopenace*, at para. 85). For example, a common challenge for cause question is as follows: “The accused is a member of a visible minority. Would your ability to judge the evidence in this trial without bias, prejudice or partiality, be affected by the fact that the person charged is a member of a visible minority?” The weakness in this approach is readily apparent to anyone familiar with racial prejudice. In *R. v. Williams*, [1998] 1 S.C.R. 1128, McLachlin J. explained that racial prejudice “rests on preconceptions and unchallenged assumptions that unconsciously shape the daily behaviour of individuals. Buried deep in the human psyche, these preconceptions cannot be easily and effectively identified and set aside, even if one wishes to do so” (para. 21 (emphasis added)). A person holding deeply buried, unconscious beliefs (racial or otherwise) will not likely be able to identify those beliefs in a challenge for cause. In the words of my colleague Moldaver J., the challenge for cause process “does [not] have a significant impact on the jury selection process” (*Kokopenace*, at para. 85).
6. Further, since such beliefs are buried deep in the human psyche and cannot be easily identified, it is unlikely that a juror holding them will benefit from instructions by the trial judge. As McLachlin J. observed in *Williams*, these biases are resistant to judicial instructions:

We should not assume that instructions from the judge or other safeguards will eliminate biases that may be deeply ingrained in the subconscious psyches of jurors. Rather, we should acknowledge the destructive potential of subconscious racial prejudice by recognizing that the post-jury selection safeguards may not suffice. [para. 22]

1. Peremptory challenges, on the other hand, enable an accused to strike at these hidden, subtle and unconscious biases that challenges for cause miss. As a potential juror comes before them, an accused person is able to assess their partiality by applying the common sense they have developed through their own life experiences to determine whether the potential juror exhibits signs of prejudice against them. For accused persons who are racialized or marginalized persons, their experiences and thus assessments may be quite different from the trial judge’s. This is confirmed by the evidence in this case. Mr. Chouhan called two experienced defence counsel to testify about their experience using peremptory challenges. Both witnesses testified that racialized persons are attuned to racist cues that others who have not experienced the same types of prejudice miss (A.R., vol. II, at p. 197). The Crown did not challenge this evidence.
2. Unfortunately, an accused cannot rely on a judge to excuse or stand aside a potential juror who exhibits signs of bias against them, because accused persons often struggle to clearly articulate why they perceive bias in a juror (A.R., vol. II, at pp. 172‑73). This is to be expected. Explaining one’s assessment of another individual’s character is very difficult, even for judges. This Court has acknowledged that “[i]t is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses”, such that “[w]here findings of credibility must be made, it must be recognized that it may be very difficult for the trial judge to put into words the process by which the decision is arrived at” (*R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621, at para. 20; *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 100; see also *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at para. 49).
3. Therefore, it is clear that peremptory challenges are essential to have an impartial jury. The remaining mechanisms to protect against bias, particularly in the form of racial prejudice, are inadequate. Simply put, in order to remove people holding these hidden prejudices, an accused person needs peremptory challenges. The abolition of peremptory challenges therefore undermines the impartiality of juries and negatively affects racialized and other marginalized persons.
   * + 1. Proposed Modifications to Enhance Impartiality
4. My colleagues Moldaver and Brown JJ. make three recommendations to improve the impartiality of juries: altering challenges for cause, adding anti-bias instructions for jurors, and using stand asides to deal with partial jurors. The fact that my colleagues feel the need to create these new protections demonstrates my very point: the abolition of peremptory challenges leaves a void in accused persons’ protections against partial juries.
5. I also dispute my colleagues’ suggestion that biased jurors who survive the challenge for cause process can be dealt with by a judge under the stand-by power (para. 70). Under the former s. 633 of the *Code*, judges were empowered to order jurors to stand by for reasons of personal hardship or any other reasonable cause. The *Amending Act* added a third ground — maintaining public confidence in the administration of justice.
6. I do not agree with my colleagues that the stand-by provision is an appropriate way to deal with jurors who give rise to a reasonable apprehension of bias. A stand-by does not prevent a juror from serving on the jury. The juror is simply returned to the array, standing by to serve if the remaining potential jurors are exhausted. If a juror or group of jurors gives rise to a reasonable apprehension of bias, why would they be returned to the array? This is an unacceptable risk and in direct contrast with how the *Code* deals with biased jurors. Section 632 deals with biased jurors, such as those who have a personal interest in the case or who are related to the parties or other participants in the trial. It empowers judges to excuse jurors, wholly removing the possibility that they will serve on the petit jury. Parliament’s deliberate choice to amend s. 633 rather than s. 632 indicates that it did not intend s. 633 to deal with biased jurors.
   * 1. Representativeness
7. In order for the jury to serve as the conscience of the community and promote public trust in the justice system, it must be representative (*Kokopenace*,at para. 56). This means that it should be a “representative cross-section of society, honestly and fairly chosen” (*Sherratt*, at p. 524).
8. In *Kokopenace*, my colleague Moldaver J. discussed the minimum level of representativeness that is necessary to meet the requirements of ss. 11(d) and 11(f). He recognized that the benefit of trial by jury requires that representativeness play a broader role under s. 11(f) than under s. 11(d) (*Kokopenace*, at para. 55). But even under s. 11(f), the state satisfies its constitutional obligation of representativeness by providing a fair opportunity for a broad cross-section of society to participate in the jury process (paras. 2 and 61). The constitutional minimum standard of representativeness thus focuses on the process used to compile the jury roll, not on the ultimate composition of the jury roll or the petit jury (paras. 2 and 59).
9. Although the processes established in compliance with *Kokopenace* aim to deliver a representative jury, they are not results‑focused and do not guarantee that a jury roll’s composition will be in any way proportionate to that of the general population (para. 39). In practice, this leads to jury rolls that are under‑representative of racialized and other marginalized persons. There are several reasons for this. First, some marginalized groups are under‑represented on the lists from which provincial governments draw jury rolls. For instance, selecting names primarily from municipal assessment rolls excludes many Indigenous persons (Hon. F. Iacobucci, *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by The Honourable Frank Iacobucci* (2013) (“Iacobucci Report”), generally and at para. 150; Manitoba,Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1, *The Justice System and Aboriginal People* (1991), at pp. 377-87). Second, persons convicted of certain offences are prevented from serving on a jury under the various provincial statutes and the *Code* (s. 638(1)(c)). A disproportionate number of Black and Indigenous persons are in custody or possess criminal records (*R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 61; *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679, at para. 83; *R. v. Zora*, 2020 SCC 14, [2020] 2 S.C.R. 3, at para. 79; *R. v. Myers*, 2019 SCC 18, [2019] 2 S.C.R. 105, at para. 26). Third, the jury statutes and the *Code* similarly prevent non-Canadian citizens from serving as jurors (s. 638(1)(d)). Permanent residents are disproportionately members of marginalized groups. Fourth, some marginalized persons may be prevented from serving because they do not speak the official language of the accused (*Code*,s. 638(1)(f)). Other marginalized persons may fail to respond to jury notices because they view the Canadian justice system with suspicion. Finally, in most provinces, the sheriff has the power to exempt individuals from jury service if it poses a hardship. This typically results in the exclusion of persons living in remote areas and low-income individuals (*Kokopenace*, at para. 44).
10. While I accept that *Kokopenace* set the constitutional minimum required for representativeness, it did not exhaustively define representativeness. The core of representativeness remains a “representative cross-section of society, honestly and fairly chosen” (para. 39, citing *Sherratt*, at p. 524). The in-court selection processes can enhance representativeness and thus further the benefit of trial by jury, especially where the randomized jury roll has failed to result in an array that truly represents the diversity of the area.
11. In *Sherratt*,this Court confirmed the ability of peremptory challenges to further representativeness: “Peremptory challenges can also, in certain circumstances, produce a more representative jury depending upon both the nature of the community and the accused” (pp. 532-33). 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 (Bayliss Affidavit, at paras. 4 and 15-19; O’Connor Affidavit, at paras. 9-15; A.R., Supp., at pp. 15, 20-21, 35, 41-42 and 45‑46). 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.
    * 1. Competence
12. Peremptory challenges are also critical to ensuring that a jury is competent. Without peremptory challenges, the only specific procedure in the *Code* related to juror competence is to challenge for cause on the ground that a juror does not speak the same official language as the accused. This is inadequate, as competence extends far beyond the ability of jurors to speak the same official language as the accused: “they should also be able to understand the trial, their role in the trial, the evidence that is presented, the principles they have to apply, among other things” (*Bain*, at p. 114).
13. On the surface, competence in relation to understanding the evidence means that a juror must have the willingness and capacity to understand it. Problems of capacity may arise in cases involving voluminous or complex evidence, such as financial, medical or scientific evidence. However, in the context of the benefit of trial by jury, there is another source of inability to understand evidence: life experience. A juror whose “experience of life has not embraced the area of the dispute” is likely to have a “blind spot of which he is quite unconscious” and which “may prevent him from getting the point of testimony or argument” (L. L. Fuller, “The Forms and Limits of Adjudication” (1978), 92 *Harv. L. Rev.* 353, at p. 391).
14. This second source of incompetence has detrimental effects on the benefit of trial by jury. The benefit of trial by jury is partly a product of the jury applying common sense, and common sense itself is the product of personal experience (Law Reform Commission of British Columbia, *Report on Peremptory Challenges in Civil Jury Trials* (1983), ch. 2, section C). If a jury is composed entirely of members whose life experiences are fundamentally different from those of the accused, then the jury may not have the common sense necessary to be a superior fact finder. Recall that the jury’s superior fact‑finding ability comes from the diversity of its collective experience. Since assessments of evidence and especially credibility are based almost entirely on our own experiences interacting with people, jurors who have never interacted with people like the accused or the accused’s witnesses will be poor judges of credibility. Similarly, if a jury is unable to empathize with the accused, then the possibility of jury equity is equally lost.
15. This is not a novel idea. This Court has already recognized the importance of having jurors who share the experiences of the accused. In *Stillman*, a majority of this Court recognized the importance of a separate military justice system, not only for military‑specific offences, but even where the underlying offence is an ordinary civil offence contained in the *Criminal Code*. Trial by a panel of five other military members — rather than a jury of twelve civilians — fosters morale by ensuring that the accused’s guilt “will be assessed by those whose familiarity with the challenges and circumstances of military life is the product of personal experience” (para. 70, citing J. Walker, “A Farewell Salute to the Military Nexus Doctrine” (1993), 2 *N.J.C.L.* 366, at p. 372).
16. Just as the members of military panels bring military experience and the values of the military community to their decisions, jurors bring their own life experience and community values to their decisions. Only accused persons know what evidence they will call and what experiences may be necessary to fully appreciate that evidence. Peremptory challenges are the only tool available to accused persons to address these issues of competence.
    1. Conclusion on Section 11(f)
17. As the previous sections demonstrated, the abolition of peremptory challenges negatively affects the core jury characteristics of impartiality, representativeness and competence. The ultimate question is whether these effects are so significant as to deprive Mr. Chouhan of the benefit of trial by jury. I am of the view that they are.
18. The evidence in Mr. Chouhan’s case was entirely circumstantial and dependent upon witness testimony, including the testimony of Mr. Chouhan himself. It is in the analysis of such evidence that the benefits of the jury’s superior fact‑finding ability and role as the conscience of the community are essential. A jury composed of jurors whose life experiences were totally divorced from those of Mr. Chouhan could not be said to deliver these benefits.
19. It has been said that “[a] jury that may do for a particular defendant in a particular case may be unsuitable for a different defendant in a different case” (J. J. Gobert, “The Peremptory Challenge — an Obituary” (1989), *Crim. L. Rev.* 528, at p. 533). Mr. Chouhan needed an opportunity to empanel a jury capable of providing him with the benefit of trial by jury. Without peremptory challenges, there was a significantly increased risk that his jury would contain biased jurors. Similarly, he was unable to remove jurors who were not competent to assess the specific evidence he presented. Peremptory challenges could have furthered the diversity of the jury as well.
20. When combined, the eroded protections of impartiality, representativeness and competence were not enough to provide Mr. Chouhan with the benefit of trial by jury because they rendered the elements of the benefit uncertain. A jury trial cannot be considered a benefit when the benefit is uncertain.
21. Before assessing whether this limit can be justified, I note that many of the same considerations apply to s. 11(d). Section 11(d) guarantees an accused the right to a fair trial by an impartial tribunal. The same concerns that animate the impartiality problems under s. 11(f) also apply to s. 11(d). And while I will discuss s. 11(d) further in the section on the temporal application of s. 269 of the *Amending* *Act*, I do not wish to be taken as deciding this case under s. 11(f) because s. 11(d) is not applicable. It very well may be applicable.
22. Section 1 of the *Charter*
23. Section 1 of the *Charter* provides:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

1. In order to determine whether this limit on s. 11(f) constitutes a *Charter* infringement, I must determine whether it may be justified as a reasonable limit prescribed by law. The impugned provision of the *Amending Act* is clearly prescribed by law (*R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 135). In order for it to constitute a reasonable limit that is demonstrably justified in a free democratic society, Parliament must have been pursuing a pressing and substantial objective, the means chosen to implement that objective must be rationally connected to it and must minimally impair the *Charter* right, and there must be proportionality between the effects of the measure and the objective identified at the first step (p. 139).
2. From the debates surrounding the *Amending Act*, it is clear that Parliament’s objective in abolishing peremptory challenges was to reduce discrimination and increase diversity on juries. When introducing the bill, the Minister of Justice spoke of these concerns:

Peremptory challenges give the accused and the crown the ability to exclude jurors without providing a reason. In practice, this can and has led to their use in a discriminatory manner to ensure a jury of a particular composition.

(*House of Commons Debates*, vol. 148, No. 300, 1st Sess., 42nd Parl., May 24, 2018, at p. 19605)

At third reading, the Parliamentary Secretary to the Minister of Justice referred to similar objectives:

The under-representation of indigenous peoples and visible minorities on juries is a major concern. This problem has been well-documented for years. We believe that eliminating peremptory challenges will significantly improve the diversity of juries.

(*House of Commons Debates*, vol. 148, No. 360, 1st Sess., 42nd Parl., November 28, 2018, at p. 24108)

1. Reducing discrimination and empanelling more diverse juries represents a pressing and substantial objective. However, the means chosen — abolishing peremptory challenges — is not rationally connected to this objective. Removing peremptory challenges altogether has the effect of preventing any possible discrimination against potential jurors. However, it also has the effect of furthering discrimination against racialized and other marginalized persons, and potentially reducing jury diversity. The evidence before the trial judge indicated that peremptory challenges are used by racialized and other marginalized persons to attempt to empanel more diverse juries (Bayliss Affidavit, at paras. 4 and 15-19; O’Connor Affidavit, at paras. 9-15; trial transcripts, A.R., Supp., at pp. 15, 20‑21, 35, 41-42 and 45-46).
2. In *R. v. King*,2019 ONSC 6386, 148 O.R. (3d) 618, Goodman J. found the abolition of peremptory challenges overbroad (para. 232). For similar reasons, the abolition of peremptory challenges is not minimally impairing of the right to the benefit of trial by jury. The most obvious alternative was to empower judges to regulate the use of peremptory challenges and ensure that they are not used in a discriminatory way. The interveners the Canadian Muslim Lawyers Association and the Federation of Asian Canadian Lawyers point out that one possible approach to regulating the use of peremptory challenges was raised in the Iacobucci Report (Recommendation 15, at p. 106). That approach originated in *Batson v. Kentucky*, 476 U.S. 79 (1986), where the Supreme Court of the United States established that a party only needs to raise a *prima facie* case that the other is using a peremptory challenge for a discriminatory purpose. If they do, then the party exercising the challenge has the burden of demonstrating that they were not doing so for a discriminatory purpose. If the party is unable to justify their challenge, then the judge may seat the struck juror.
3. The *Batson* approach is just one of many possible approaches to limiting the discriminatory uses of peremptory challenges. Courts in Canada have also discussed limits on the exercise of peremptory challenges to ensure that they are not exercised in a discriminatory manner (*R. v. Brown* (1999), 73 C.R.R. (2d) 318 (Ont. C.J. (Gen. Div.)); *Gayle*). There are also many other ways that Parliament could further diversity on juries. It is well documented that the problems of exclusion of racialized and other marginalized persons happen throughout all stages of empanelling a jury. Parliament could have altered the *Code*’s juror qualifications or grounds of challenge for cause. It could also have modified the challenge for cause process to create a meaningful system for identifying biased jurors, such as allowing more extensive questioning or questionnaires.
4. Given that peremptory challenges provide a great benefit to many accused persons and that their elimination perpetuates discrimination against racialized and other marginalized persons, the deleterious effects outweigh the salutary effects of the legislation.
5. Since the abolition of peremptory challenges limits s. 11(f) and is not a reasonable limit prescribed by law, s. 269 of the *Amending Act* should be struck down to the extent that it repeals s. 634 of the *Code*.
6. Temporal Application
7. Had I not found that s. 269 of the *Amending Act* should be struck down in part, I would have found that it should not have been applied to Mr. Chouhan’s trial. Indeed, I agree with my colleague Abella J. that the abolition of peremptory challenges affects the accused’s substantive rights and can apply only prospectively.
8. The *Amending Act* contains no transitional provision setting out Parliament’s intention as to whether s. 269 should apply to criminal prosecutions pending in the system. There is an ancient canon of construction — expressed in the maxims *lex prospicit non respicit* and *nova constitutio futuris formam imponere debet, non praeteritis*— whereby courts presume that legislation will have only prospective effect (*Shoile’s Case* (1608), Jenk. 284, 145 E.R. 205; E. Coke, *The Second Part of the Institutes of the Laws of England: Containing the Exposition of Many Ancient and Other Statutes* (1797), at p. 292; *L’Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co. Ltd.*, [1994] 1 A.C. 486 (H.L.), at p. 494; *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, [2017] 2 S.C.R. 289, at paras. 43-45). This canon does not apply to changes to legislation that are purely procedural. Purely procedural changes are presumed to apply retrospectively. In order to qualify as purely procedural, a change cannot affect a substantive right: “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” (*R. v. Dineley*, 2012 SCC 58, [2012] 3 S.C.R. 272, at para. 10; see also *Angus v. Sun Alliance Insurance Co.*, [1988] 2 S.C.R. 256, at p. 265). Similar language is used in the *Interpretation Act*, R.S.C. 1985, c. I-21:

**43** Where an enactment is repealed in whole or in part, the repeal does not

. . .

**(c)** affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed.

1. The abolition of peremptory challenges will apply only prospectively if the right to peremptory challenges is a substantive right or if the abolition of peremptory challenges affects a substantive right.
   * 1. Is the Right to Peremptory Challenges a Substantive Right?
2. The respondent argues that the right to peremptory challenges is itself a substantive right (R.F., at para. 78). Some judges have agreed with this position (*R. v. Dorion*, 2019 SKQB 266, at para. 46 (CanLII); *R. v. Subramaniam*, 2019 BCSC 1601, 445 C.R.R. (2d) 49, at para. 44; *R. v. Matthew Raymond (Ruling #4)*, 2019 NBQB 203, 57 C.R. (7th) 1, at paras. 109-10). In the words of Saunders J.:

The peremptory challenges provisions of the Code are procedural, in the sense that they prescribe a method to be followed to secure an accused their Charter right to a jury trial. But the right to peremptory challenges itself has been so fundamental to Canadian criminal law, and is so deeply entrenched, that it must be regarded, standing on its own, as a substantive right.

(*Subramaniam*, at para. 44)

1. I agree with Saunders J. that although peremptory challenges may be procedural in form, this does not mean that they are procedural for the purpose of determining the temporal application of the amendments. A court must consider the function and effect of peremptory challenges, not merely their form (*Dineley*, at para. 55). In my view, this must be done in light of the principles underlying the courts’ reluctance to interpret provisions as applying retrospectively. In *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at paras. 23-25, Justice Karakatsanis explained these principles:

This constitutional aversion to retrospective criminal laws is in part motivated by the desire to safeguard the rule of law. As Lord Diplock put it, “acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it” (*Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.*, [1975] A.C. 591 (H.L.), at p. 638). . . .

Retrospective laws threaten the rule of law in another way, by undercutting the integrity of laws currently in effect, “since it puts them under the threat of retrospective change” (L. L. Fuller, *The Morality of Law* (rev. ed. 1969), at p. 39).

Relatedly, retrospective laws implicate fairness. “It is unfair to establish rules, invite people to rely on them, then change them in mid-stream, especially if the change results in negative consequences” (R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 754).

1. The doctrine of legitimate expectations demonstrates that these principles can be engaged by rules that are procedural in form. These principles have animated the doctrine of legitimate expectations to protect expectations created by a government official’s representations that a particular administrative procedure will be followed (*Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504, at para. 68; *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 S.C.R. 281, at paras. 22-38; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, at pp. 1203-4; D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action* *in Canada* (loose-leaf), at para. 7:1720).
2. In contrast, the justifications proffered by courts for excluding purely procedural legislation from the presumption against retrospectivity are that there is no vested right in procedure and that procedural changes benefit all (*Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248, at para. 62). In the words of Mellish L.J. in *Republic of Costa Rica v. Erlanger*, [1876] 3 Ch. D. 62 (C.A.), at p. 69, “[n]o suitor has any vested interest in the course of procedure, nor any right to complain if during the litigation the procedure is changed, provided, of course, that no injustice is done” (cited in *Dineley*, at para. 54). It is the last part of this statement that the majority overlook. Purely procedural legislation is excluded from the presumption against retrospectivity because courts assume that changes to procedures do not cause the same level of unfairness as changes to substantive rights.
3. It is quite paradoxical for my colleagues to acknowledge that peremptory challenges are important to the accused but then say that this does not affect their classification as procedural or substantive: “Procedural rights are often no less important than substantive rights from the perspective of the accused person” (para. 98). The principle that procedural changes are presumed to apply retrospectively is premised on the idea that purely procedural changes tend to have neutral or positive effects. The presumption that substantive changes should apply prospectively is premised on the idea that changing substantive rules is unfair, “especially if the change results in negative consequences”. My colleagues’ strict definition of substantive changes arbitrarily protects some rights whilst simultaneously abandoning others that are of equal importance to the accused. Why would the law make such a distinction?
4. When assessed against these underlying principles, peremptory challenges are substantive. The abolition of peremptory challenges is not beneficial for all. It is entirely detrimental to the accused, and its immediate application creates unfairness for those who have relied upon the existence of such challenges to make decisions. The abolition of peremptory challenges changes the legal character or consequences of an accused’s prior actions, such as electing to be tried by jury or seeking an adjournment of an earlier trial (*Subramaniam*, at para. 45). Therefore, the abolition of peremptory challenges is an amendment affecting a substantive right.
   * 1. If the Right to Peremptory Challenges Is Not a Substantive Right, Does the Abolition of Peremptory Challenges Affect a Substantive Right?
5. The second way in which the abolition will apply only prospectively is if it affects a substantive right. My colleagues do not define what it means for an amendment to affect a substantive right. In *Dineley*, Deschamps J. said that affecting a substantive right includes altering the content or existence of the right, but not merely changing the manner in which the right is asserted or enforced (paras. 10 and 16). Of course, this definition was not intended to be and cannot be exhaustive. Legislation cannot alter the content or existence of a *Charter* right, but *Charter* rights are substantive rights (para. 21).
6. In *Application under s. 83.28 of the Criminal Code (Re)*, Iacobucci and Arbour JJ. used the phrase “creates or impinges upon substantive or vested rights” (para. 57). “Impinges” must mean something short of infringement, because the canon would be of no use if it applied only where the *Charter* was infringed. In *Craig*, Justice Dawe determined that the word “affect” should be understood in its ordinary and grammatical sense: “One thing is ordinarily said to ‘affect’ something else if it ‘has an effect on’ or ‘makes a difference’ to the second thing” (para. 54 (footnote omitted)). In the case of *Charter* rights, I agree. “Affect” must be understood in its ordinary and grammatical sense.
7. In determining whether the abolition of peremptory challenges affects substantive rights, our starting point should be the Attorney General of Canada’s admission that it does and that it should apply only prospectively:

The elimination of peremptory challenges goes beyond altering the manner or mode in which peremptory challenges are exercised and abolishes this procedure entirely. This change is substantive in its affects [sic], not by virtue of eliminating this procedure, but because of its substantive impact on the right to trial by jury.

(I.F., at para. 79)

1. In her *Charter* Statement on the *Amending Act*,the Attorney General repeated similar concerns: “The elimination of peremptory challenges from the *Criminal Code* may engage the fair trial rights of the accused as protected by sections 11(d) and 11(f) of the Charter” (Canada, Department of Justice, *Charter Statement — Bill C-75: An Act to Amend the Criminal Code, Youth Criminal Justice Act* *and other Acts and to make consequential amendments to other Acts* (online)). The Attorney General’s view is not binding on us, but it is nonetheless telling.
2. The Attorney General’s view echoes this Court’s view of the important effects that peremptory challenges have on rights in *Cloutier*. There, Justice Pratte said that the consequences that flow from a legal error by the trial judge must depend on the nature of the rule violated and the importance of the right that the rule is designed to safeguard (p. 715). He went on to say that, in the jury selection process, some rules

are purely procedural, others are designed to protect the personal interests of one or other of the parties, and others have an even more fundamental importance in that they seek to ensure the integrity of the [system] that establishes, as between the parties, a predetermined state of balance. [p. 715]

Recognizing the important rights safeguarded by the accused’s right to peremptorily challenge*,* he found that the legal error of denying an accused even a single peremptory challenge automatically entitles the accused to a new trial because there is “*préjudice de droit*” (pp. 721 and 724).

1. As my colleague Abella J. explains in her reasons, abolishing peremptory challenges affects ss. 11(d) and 11(f) of the *Charter* by diminishing the accused’s ability to meaningfully participate in jury selection. It should be clear from my above analysis that the abolition of peremptory challenges affects the accused’s s. 11(f) right (see also *R. v. Lindor*, 2019 QCCS 4232, at paras. 132, 134, 136-37 and 143-44 (CanLII)). However, I wish to explain why it also affects the right to a fair trial by an impartial tribunal.
2. Section 11(d) requires both a fair trial and an impartial tribunal. Impartiality under s. 11(d) considers both actual bias and the appearance of bias and therefore captures the same problems that I discussed in the s. 11(f) impartiality analysis. Peremptory challenges enable the accused to strike jurors who have subtle and unconscious biases. Again, the fact that such challenges are actually effective at reducing bias is supported by the fact that all three of the new jury selection and trial protections analysed by my colleagues Moldaver and Brown JJ. are designed to protect impartiality.
3. The abolition of peremptory challenges also affects the fair trial element of s. 11(d). Peremptory challenges improve an accused’s perception of trial fairness because “[t]he availability of peremptory challenges fosters confidence in the adjudicative fairness of the criminal jury trial” (*R. v. Yumnu*, 2010 ONCA 637, 260 C.C.C. (3d) 421, at para. 124). My colleagues Moldaver and Brown JJ. “do not deny the value of peremptory challenges from the subjective view of accused persons” (para. 18). However, they try to avoid the repercussions of this state of facts by creating a new test for trial fairness that requires a reasonable person analysis (para. 31).
4. This is contrary to this Court’s repeated findings that trial fairness takes into account the perspective of the accused. Chief Justice McLachlin made this clear: “At base, a fair trial is a trial that appears fair, both from the perspective of the accused and the perspective of the community” (*R. v. Harrer*, [1995] 3 S.C.R. 562, at para. 45; see also *R. v. O’Connor*, [1995] 4 S.C.R. 411, at para. 193; *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, at para. 28). So too did Chief Justice Dickson: “The accused, the Crown, and the public at large all have the right to be sure that the jury is impartial and the trial fair” (*R. v. Barrow*, [1987] 2 S.C.R. 694, at p. 710).
5. The subjective perceptions of an accused person are not determinative in the s. 11(d) analysis. However, as the above cases demonstrate, an accused person’s perceptions are an important component that must be taken into account. We all accept that peremptory challenges increase an accused person’s perception of trial fairness. It follows that the abolition of such challenges reduces that perception. Since an accused person’s perception of trial fairness is an important component of s. 11(d), and since the abolition of peremptory challenges diminishes that perception, the abolition of peremptory challenges at least affects s. 11(d). Therefore, based on the established understandings of trial fairness and impartiality, the abolition of peremptory challenges affects the right guaranteed by s. 11(d).
6. Since peremptory challenges are themselves substantive and their abolition also affects other substantive rights, the *Amending Act* should not have applied to Mr. Chouhan’s trial. It was an error of law to have Mr. Chouhan tried by a jury selected without peremptory challenges. This is not a case where it would be appropriate to apply the curative proviso in either s. 686(1)(b)(iii) or s. 686(1)(b)(iv) of the *Code*. For either section to apply, our jurisprudence requires that the Crown demonstrate the legal error caused no prejudice to the accused (*R. v. Arradi*, 2003 SCC 23, [2003] 1 S.C.R. 280, at para. 42). It cannot do so here. First, the failure to provide Mr. Chouhan with peremptory challenges cannot be harmless or minor. This is not only because the denial of peremptory challenges negatively affects *Charter* rights, but also because Mr. Chouhan would likely have been tried by a differently composed jury if he had been given his peremptory challenges. In *Davey*, at para. 55, Karakatsanis J. said that where “there is a reasonable possibility that the jury would have been differently constituted, this safeguard is undermined. It seems to me that in such circumstances, the presumption that the jury is impartial is displaced.” Second, the case against Mr. Chouhan was not so overwhelming that any other verdict would have been impossible to obtain. The evidence against Mr. Chouhan was entirely circumstantial and was contested by him.
7. Had I not found that s. 269 of the *Amending Act* impairs s. 11(f), I would have found that it affects both s. 11(d) and s. 11(f), that it applies only prospectively and that it therefore should not have been applied to Mr. Chouhan’s trial.
8. Conclusion
9. Although my colleagues find that the abolition of peremptory challenges is constitutional, they also implicitly recognize that the abolition of peremptory challenges leaves a hole in protections for the accused that must be closed. However, they cannot agree on how to close it and radically splinter on the interpretation of s. 633 of the *Code*. This division acutely demonstrates the genius of peremptory challenges and the critical role of the accused in jury selection. It bears repeating that this common law institution had survived for *seven hundred years*. Perhaps now we better understand why.
10. While my colleagues try to remedy Parliament’s misstep by implementing new jury selection and trial protections, I believe our role is more limited. Where Parliament substantially diminishes the benefit of trial by jury, it violates s. 11(f). The abolition of peremptory challenges is unconstitutional. If Parliament wants to modify peremptory challenges, then it must do so in a way that does not violate the accused’s right to benefit from trial by jury.
11. As it stands, the amended s. 633 of the *Code* is not an adequate replacement for peremptory challenges because it fails to protect the core jury characteristics of impartiality, representativeness and competence in the same way that peremptory challenges have. I agree with Moldaver and Brown JJ. that crafting guidance to trial judges on how and when they can use stand asides to promote diversity is a difficult task. There are many types of diversity, and diversity means different things to different people. However, promoting diversity is not a task that s. 633 clearly requires. Section 633 provides that a trial judge may direct a juror to stand by for reasons of “maintaining public confidence in the administration of justice”. While the evidence is clear that peremptory challenges were a tool that racialized and other marginalized persons used to improve the representativeness and competence of juries, I cannot read s. 633 as empowering judges to do the same. Nor am I certain that judges are even capable of performing this role. As I have shown above, “[a] jury that may do for a particular defendant in a particular case may be unsuitable for a different defendant in a different case”. Different accused persons will have different views of what a representative jury is and what makes a jury representative. I therefore join Moldaver and Brown JJ., who speak for a majority of the Court in their conclusion that s. 633 cannot be used to promote or enhance the diversity of the petit jury. Again, I would not venture suggestions as to what should replace peremptory challenges. I leave that to Parliament and the provincial assemblies.
12. I would order that s. 269 of the *Amending Act* be struck down to the extent that it repeals s. 634 of the *Code*. I would also order that Mr. Chouhan receive a new trial, including jury selection complete with peremptory challenges.

*Appeal allowed and cross-appeal dismissed,* Abella J. *dissenting in part and* Côté J. *dissenting.*

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1. We refer to this case based on the record that came before this Court on appeal, but we do not mandate any specific jury selection procedure on any retrial of Mr. Barton. [↑](#footnote-ref-1)