



September 26, 2018

Standing Committee on Justice and Human Rights
Sixth Floor, 131 Queen Street
House of Commons
Ottawa ON K1A 0A6
Via Email: JUST@parl.gc.ca

Re: Bill C-75, Clause 271 Abolishment of Peremptory Challenges

Dear Standing Committee Members,

The Federation of Asian Canadian Lawyers - Ontario Chapter ("FACL") is a diverse coalition of pan-Asian Canadian legal professionals committed to promoting equity, justice and opportunities for Asian Canadian legal professionals and the broader community.

FACL acknowledges that the criminal justice system is in dire need of reform. Marginalized and racialized communities are over-represented in the criminal justice system. These communities are especially vulnerable to institutionalized racism and bias. The Federal Government's initiatives to enhance procedural fairness and non-discriminatory outcomes in the criminal law are laudable.

However, the Federal Government's proposal to eliminate peremptory challenges in Bill C-75 will not further equality in the criminal law, rather, it will hinder substantive equality. FACL agrees with the position of the Criminal Lawyers' Association ("CLA") that eliminating peremptory challenges, without fundamental changes to how jury pools are selected, will create more barriers for marginalized and racialized populations.

The primary rationale for peremptory challenges is to help ensure that juries are impartial and representative. Juries function "as a fact finder, as the conscience of the community, as the ultimate protection against oppressive laws and oppressive law enforcement and as an educative institution through which members of the public directly participate in an important judicial process."¹ To fulfill these functions, a jury must be representative of its community.

A representative jury is especially important when racial prejudice is at issue. Racial prejudice is "insidious." The Supreme Court has recognized that racial prejudice is "invasive and elusive" as well as "corrosive."² Juries that are representative of their

¹ *R v Kokopenace*, 2015 SCC 28 at para 190.

² *R v Williams*, [1998] 1 SCR 1128 at para 22, 159 DLR (4th) 493.

communities are more likely to avoid the corrosive effects of racial bias and protect the fair trial rights of an accused.

Marginalized and racialized communities are over-represented in the criminal justice system, yet they are systemically under-represented in juries. Indeed, public perceptions of the criminal justice system are less favourable among racialized populations who are over-represented in the system.³ The Federal Government needs to address systemic racism in order to maintain public confidence in the administration of justice.

However, the Federal Government has not provided any proposals to address systemic racism or increase diversity on jury panels. The current jury selection process in Ontario inherently excludes marginalized and racialized communities. Bill C-75 aims to eliminate peremptory challenges, without addressing the core issues that would increase diversity on jury panels: increased participation and increased funding.

FACL supports CLA's position that increased funding to the criminal justice system and jury selection reform would be more appropriate. The current selection process in Ontario excludes members of the community who do not have access to stable housing⁴, many of whom belong to marginalized or racialized populations. Many potential jurors choose not to serve on juries, as they cannot afford to leave their jobs for the abysmal stipend that the provincial government provides.⁵ Marginalized and racialized members of the community who do not fit into a certain socioeconomic status are barred from participating in the criminal justice system. Without serious fundamental reforms, marginalized and racialized communities will continue to be excluded from participating in juries, perpetuating inequality and increasing the potential for unjust outcomes.

FACL supports CLA's recommendations to increase diversity and eliminate prejudice in juries. Specifically, FACL agrees that instead of eliminating peremptory challenges, the Federal Government should:

- 1) Provide for an evidence-based and robust challenge for cause process to screen for potential juror bias;

³ Charles Reasons et al, "Race and Criminal Justice in Canada" (2016) 11:2 Intl J Crim Justice Sciences 75 at 79.

⁴ *Juries Act*, RSO 1990 c J 3, ss 17- 18 (the jury selection process relies on municipal rolls and notices are sent to registered places of residence, which excludes community members who rely on rental housing or whose housing situation is transient).

⁵ Ontario Ministry of the Attorney General, *General Information about Jury Duty*: https://www.attorneygeneral.jus.gov.on.ca/english/courts/jury/general_jury_duty_info.php (jurors are paid \$100.00 a day at most for trials lasting 50 days or more, however jurors serving on shorter trials either receive no stipend or only \$40.00 per day).



- 2) Amend Section 629 of the *Criminal Code* to allow defence and Crown counsel to challenge juries for not being representative; and
- 3) Provide appropriate and adequate compensation for jurors through provincial transfer payments.

By eliminating peremptory challenges, the Federal Government will remove an important procedural protection that marginalized and racialized communities rely on. The peremptory challenges are one of the few tools that both the Crown and defence counsel have to ensure that juries are impartial and representative. Bill C-75 proposes to remove an imperfect procedural protection without providing adequate solutions for racialized communities vulnerable to systemic bias. Simply eliminating peremptory challenges, without concomitant fundamental jury reform, will not have any benefit to marginalized and racialized communities.

FACL asks that the Standing Committee reconsider Clause 271 of Bill C-75 in light of its potential detrimental effects on racialized and marginalized communities.

Respectfully,

Jennifer Ho

On behalf of the FACL Advocacy and Policy Committee

Cc: Emily Lam
Advocacy and Policy Co-Chair

Gerald Chan
VP External Public

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President