

**CHALLENGING WHITENESS:
The Role for Law Societies and Critical Race Theory in Addressing Unrepresentative
Juries in Canada**

Julianne Stevenson

Prof Wildeman
General Jurisprudence
April 2018

TABLE OF CONTENTS

Introduction.....	1
1. The Role of Law Societies.....	3
1.1 Protection of Public Interest.....	4
1.2 Jury Challenges as a Competency Issue	9
1.3 Meaningful Fulfilment of Regulatory Goals	13
2. A Role for Critical Race Theory.....	16
2.1 What is Critical Race Theory?.....	16
2.2 Critical Race Theory and Jury Selection: Deconstruction	17
2.3 Critical Race Theory and Jury Selection: Reconstruction	19
2.3.1 Sentencing and <i>R v Gladue</i>	21
2.3.2 The Reasonable Person: <i>RDS</i>	23
2.3.3 Challenges for Cause: <i>Parks</i> and <i>Williams</i>	24
3. Application: Critical Race Theory in the Jury Selection Process	28
3.1 Preemptory Challenges	29
3.2 Challenges for Cause	33
Conclusion	38
Bibliography	39

INTRODUCTION

The lack of Indigenous representation on juries is a decades-old problem in Canada.¹ Jury representation has been considered at length by commentators,² through government reports,³ and by the Supreme Court of Canada (SCC).⁴ However, the recent acquittal of Gerald Stanley (a white Saskatchewan farmer) in the case concerning the shooting death of Colten Boushie (a 22-year-old Cree man from the Red Pheasant First Nation) by an all-white jury has brought the problem squarely into the public consciousness—and has deeply shaken the public’s faith in the jury process, the Crown, and the administration of justice as a whole.

This crisis of unrepresentative juries in Canada “demonstrates the difficulties that can come with challenging a process left to the discretion of the lawyers involved in a case.”⁵ While there are significant systemic problems with the jury array process,⁶ individual lawyers play an important role in determining the ultimate make-up of petit juries through peremptory challenges and challenges for cause. Absent explicit guidance and cultural competency training, peremptory challenges may be subject to abuse by both the defence and the Crown, and challenges for cause may not be used to their full potential—or may not be used at all.

¹ Kent Roach, “Colten Boushie’s family should be upset: Our jury selection procedure is not fair”, *The Globe and Mail* (31 January 2018) [Roach, “Our jury selection procedure is not fair”]; Rosemary Cairns Way, “An Opportunity for Equality: Kokopenace and Nur at the Supreme Court of Canada” (2014) 61 *Crim LQ* 465.

² Cynthia Petersen, “Institutionalized Racism: the Need for Reform of the Criminal Jury Selection Process” (1993) 38 *McGill LJ* 147; Way, *supra* note 1; Misha Boutilier, “Optional By-Products or Constitutionally-Protected Purposes? Societal Interests in Representativeness, the s.11(f) Right to Trial by Jury, and the Kokopenace Decision” (2018) 65 *Crim LQ* 458.

³ Ontario, *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by the Honourable Frank Iacobucci* (Toronto: Ministry of the Attorney General, 2013) [“Iacobucci Report”]; Manitoba, The Aboriginal Justice Implementation Commission, *Report of the Aboriginal Justice Inquiry of Manitoba* (1991) vol 1 [“The Manitoba Aboriginal Justice Inquiry”]; Nova Scotia, *Royal Commission on the Donald Marshall, Jr, Prosecution: Digest of Findings and Recommendations* (Nova Scotia: 1989) [“The Royal Commission on the Donald Marshall, Jr Prosecution”].

⁴ *R v Kokopenace*, 2015 SCC 28, [2018] 2 SCR 398.

⁵ Sunny Dhillon, “Court case highlights concerns about Indigenous representation on juries”, *The Globe and Mail* (27 February 2018).

⁶ Iacobucci Report, *supra* note 3 at Part IV 1(b).

Therefore, this paper argues that law societies such as the Nova Scotia Barristers' Society (NSBS) should adopt an explicit critical race litigation strategy with respect to representation in jury selection processes. Law societies should provide education and clear guidance to lawyers in jury trials where either the accused or victim is Indigenous on how to challenge potential jurors for cause, as a means of reducing or eliminating racial bias in juries. In addition, law societies should adopt explicit guidance emphasizing the duty of the Crown to exercise its own challenges with an awareness of the history of systemic racism in NS, the lasting impacts of colonialism, and of its duty to ensure trial fairness—rather than to seek conviction.

This paper is in three main parts. First, it examines the role of law societies in Canada and argues that law societies must take immediate action to ameliorate racial representation on juries in order to uphold the public's faith in the administration of justice, and to facilitate access to justice for racial minorities. Second, this paper analyzes the potential of Critical Race Theory (CRT) as a mechanism through which courtrooms may be made more racially representative, and racial biases may be directly confronted. A review of relevant critical race litigation jurisprudence demonstrates the potential that a CRT approach, adopted and endorsed by law societies, may effect systemic change in the way juries are selected. Finally, this paper examines the potential application of critical race litigation strategy in jury selection processes, through peremptory challenges and challenges for cause.

A Note on Critical Race Theory

This paper advocates for the adoption of an explicit Critical Race Theory (CRT) approach by lawyers and law societies, as a means of deconstructing and reconstructing the legal frameworks that allow for the exclusion of Indigenous peoples from Canadian juries. CRT has given rise to several subgroups, including a Latino-critical movement, critical race feminism, and Critical

Aboriginal Theory.⁷ This paper employs the broader umbrella theory of CRT as a lens through which the problem of jury representation can be assessed and addressed on the basis that “[CRT] and its methods provide a medium to express divergent experiences, to search for and bring out the meaning of ‘race’ and racism in the law and to provide a critical understanding of law.”⁸

In doing so, this paper analyzes some jurisprudence and commentary that considers jury representation and racial biases primarily with respect to black Canadians, as many of the concepts and analyses in those sources are informative and overlapping in the Indigenous context. However, it is important to note that the history of colonialism and the fiduciary relationship between the Crown and Indigenous peoples in Canada means that the problem of Indigenous unrepresentativeness on juries requires uniquely urgent redress. This paper, therefore, calls upon both the Crown and law societies to recognize the power they hold to reframe legal structures to address the lasting impacts of colonialism in the courtroom, and to engage in the CRT methodology of breaking down those frameworks and reconstructing jury selection in a manner that ensures colonial structures are not perpetuated through the continued exclusion of Indigenous peoples from juries—a fundamental fixture of the Canadian justice system.

1. THE ROLE OF LAW SOCIETIES

Law societies in Canada must act to guide and educate their lawyers on the jury selection process, on three main bases. First, law societies must provide enhanced guidance on jury challenge procedures as a means of protecting the public interest in the practice of law. Second, such guidance from the law societies is appropriate, because significant competency issues are

⁷ Richard Delgado and Jean Stefancic, *Critical Race Theory: an Introduction* (New York: New York University Press 2001) at 6; Carol A Aylward, *Canadian Critical Race Theory: Racism and the Law* (Halifax: Fernwood Publishing 1999) at 30.

⁸ Aylward, *supra* note 7 at 30.

implicated when lawyers fail to challenge for cause, or when challenges are misused. Finally, law societies must enhance lawyers' duties with respect to challenge procedures, because, in this critical moment in Canadian legal history, to fail to guide lawyers on jury selection processes risks rendering regulatory goals respecting cultural competence merely symbolic.

1.1 Protection of the Public Interest

Law societies, such as the Nova Scotia Barristers' Society (NSBS), exist to protect the interests of the public and uphold the public's faith in the administration of justice.⁹ However, the jury's acquittal of Gerald Stanley in the shooting death of Colten Boushie has led many members of the public to question whether, given the lack of Indigenous representation on the jury, the Canadian justice system is capable of achieving any kind of justice for Indigenous peoples at all.¹⁰

The Stanley case has divided the country on the issue of firearms rights and brought racial tensions between Indigenous and non-Indigenous peoples in Saskatchewan to a boiling point.¹¹ The events of the case occurred on August 9, 2016, when Colten Boushie and four other Indigenous young people drove onto the property of Gerald Stanley, because their vehicle had a flat tire.¹² A confrontation occurred between the Indigenous youth and Stanley, and Stanley shot and killed Boushie.¹³ Stanley was charged with second-degree murder of Boushie on August 11, 2016.¹⁴ In the following weeks, public opinion sharply divided on the right to defend one's property and racial tensions in the Saskatchewan communities surrounding the event escalated to the point that Saskatchewan Premier Brad Wall made a public statement calling on people in Saskatchewan "to

⁹ NSBS, "Nova Scotia Barristers' Society Vision & Values" (17 June 2016).

¹⁰ Naomi Metallic, "I am a Mi'kmaq lawyer, and I despair over Colten Boushie", *The Conversation* (18 March 2018).

¹¹ Ian Austen, "A Murder Trial Stirs Emotions About Canada's Relations With Indigenous Population", *The New York Times* (9 February 2018).

¹² Andrea Hill, "Colten Boushie shooting: A timeline", *Saskatoon StarPhoenix* (8 August 2017).

¹³ Austen, *supra* note 11.

¹⁴ Hill, *supra* note 12.

rise above intolerance.”¹⁵ Stanley was released on bail—a privilege, one commentator noted, “that too many Indigenous people have themselves been denied for far lesser crimes.”¹⁶

Prior to trial, 750 potential jurors were summoned to the selection process in Battleford, Saskatchewan.¹⁷ Jury candidates who appeared to be Indigenous were blocked by Stanley’s defence counsel through the use of peremptory challenges.¹⁸

Under s. 634(1) of the *Criminal Code*, both the Crown and the defence have the right to challenge a juror peremptorily.¹⁹ Peremptory challenges “allow the accused or the Crown to dismiss a potential juror without explanation.”²⁰ The number of peremptory challenges allowed in each trial depends on the charge.²¹ Peremptory challenges are one of three ways potential jurors can be challenged. The accused or the prosecutor may also challenge the “array”, meaning a challenge to the panel of jurors assembled on the basis of “partiality, fraud or wilful misconduct on the part of the sheriff or other officer by whom the panel was returned.”²² Finally, both the prosecutor and the accused are entitled to an unlimited number of challenges “for cause.”²³ The possible “causes” on which a juror may be challenged are enumerated in the *Criminal Code*, the most relevant of which is that “a juror is not indifferent between the Queen and the accused.”²⁴ Put

¹⁵ *Ibid.*

¹⁶ Andray Domise, “What the tragedy of Colten Boushie says about racism in Canada”, *Maclean’s* (26 August 2016).

¹⁷ Kyle Edwards, “Saskatchewan officials skipped a step when they formed Gerald Stanley’s jury”, *Maclean’s* (31 March 2018) [Edwards, “Saskatchewan officials skipped a step”].

¹⁸ *Ibid.*

¹⁹ *Criminal Code*, RS C 1985, c C-46, s 634(1).

²⁰ Steve Coughlan, *Criminal Procedure*, 3rd ed (Toronto: Irwin Law 2016) at 364; *Criminal Code*, RS C 1985, c C-46, s 634(1).

²¹ *Criminal Code*, RS C 1985, c C-46, s 634(1); Coughlan, *supra* note 20 at 385.

²² *Criminal Code*, RS C 1985, c C-46, s 629(1).

²³ *Criminal Code*, RS C 1985, c C-46, s 638(1).

²⁴ *Criminal Code*, RS C 1985, c C-46, s 638(1)(b).

simply, “a ‘challenge’ was, and is, a means by which a party to a case could prevent potential jurors from sitting on the jury.”²⁵

In the Stanley case, the defence used the peremptory challenge as a tool to secure an all-white jury, which acquitted Stanley of both second-degree murder and manslaughter on February 9, 2018,²⁶ in a decision that has been described as “shocking.”²⁷ The Province of Saskatchewan decided not to appeal the acquittal.²⁸ Prime Minister Justin Trudeau publicly expressed disappointment following the jury’s decision, commenting that “we have come to this point as a country far too many times.”²⁹ Although Trudeau was criticized for remarking on the decision,³⁰ his comments speak to the level of public scrutiny directed at this rural Saskatchewan trial.

The acquittal of Stanley has threatened public confidence in the role of the Crown and the administration of justice as a whole, as criminal procedure was used to stage all-white optics in a trial that the country watched. Much of the outcry following the verdict has centered around the failure of the Canadian justice system to deliver justice for Indigenous peoples. Naiomi Metallic explained that “the verdict sent the message that [Indigenous] lives are not as important, and that many Canadians saw this as placing defence of property above a human life.”³¹ Moreover, commentators have raised concerns that the verdict “tarnishes efforts toward reconciliation” and

²⁵ R Blake Brown, “Challenges for Cause, Stand-Asides, and Peremptory Challenges in the Nineteenth Century” (2000) 38:3 Osgoode Hall LJ 453 at 456.

²⁶ “Colten Boushie and beyond: A primer on the aftermath of Gerald Stanley’s acquittal”, *The Globe and Mail* (13 February 2018).

²⁷ David M Tanovich, “How racial bias likely impacted the Stanley verdict”, *The Conversation* (5 April 2018) [Tanovich, “How racial bias likely impacted”].

²⁸ Edwards, “Saskatchewan officials skipped a step”, *supra* note 17.

²⁹ Leyland Cecco, “Canada: Indigenous groups urge reform after shock of white farmer’s acquittal”, *The Guardian* (12 February 2018).

³⁰ “The Colten Boushie case: Canadians divided on jury’s verdict, but think Trudeau was wrong to weigh in”, *Angus Reid Institute* (26 February 2018); Lee Berthiaume, “Trudeau’s Comments on Gerald Stanley Acquittal Are Inappropriate, Conservative MPs Say”, *Huffington Post* (11 February 2018); J John Geddes, “Did Trudeau cross a line commenting on the Stanley verdict?”, *Maclean’s* (27 February 2018).

³¹ Metallic, *supra* note 10.

“deepens Indigenous peoples’ distrust in the justice system.”³² The jury’s decision sends the message that the Canadian justice system does not work the same way for Indigenous peoples, and this message is relayed most definitively through the way in which the legal tool of the peremptory challenge was used to eliminate all potential Indigenous jurors. David Tanovich explains:

[The exclusion of all potential Indigenous jurors] would have sent a powerful message to the jurors who witnessed this and who were selected to serve that Indigenous perspectives were irrelevant or could not be trusted. The ‘us’ versus ‘them’ racial dynamics of the case and any other pre-existing racial bias would have been reinforced by this exclusionary process.³³

The Crown in this case did not object to the defence’s use of peremptory challenges, nor did it challenge any potential jurors for cause in an attempt to assess and eliminate racial biases.³⁴ Although there is no right in Canada to be tried by a jury “whose members share the same personal characteristics as the accused,”³⁵ the modern jury “was envisioned as a representative cross-section of society, honestly and fairly chosen.”³⁶ Justice L’Heureux-Dubé described the modern conception of the jury in *R. v. Sherratt* in 1991:

The jury, through its collective decision making, is an excellent fact finder; due to its representative character, it acts as the conscience of the community; the jury can act as the final bulwark against oppressive laws or their enforcement; it provides a means whereby the public increases its knowledge of the criminal justice system and it increases, **through the involvement of the public, societal trust in the system as a whole** [emphasis added].³⁷

In this context, L’Heureux-Dubé’s comments highlight the ways in which the exclusion of Indigenous jurors creates a rift of mistrust in the justice system, regardless of the verdict.

³² Kyle Edwards, “The Gerald Stanley verdict is a blow to reconciliation—and a terrifying one at that”, *Maclean’s* (10 February 2018) [Edwards, “A blow to reconciliation”].

³³Tanovich, “How racial bias likely impacted”, *supra* note 27.

³⁴ David Tanovich, “Boushie’s family—and our justice system—deserves answers. So why no appeal?”, *The Globe and Mail* (8 March 2018) [Tanovich, “Why no appeal?”].

³⁵ Boutilier, *supra* note 2; *R v Biddle*, [1995] 1 SCR 761, 22 OR (3d) 128 at para 57.

³⁶ *R v Sherratt*, [1991] 1 SCR 509, 1991 CanLII 86 (SCC) at para 31.

³⁷ *Ibid* at para 30.

The exclusion of Indigenous and racialized minorities from juries is a longstanding, historical problem. Several commentators have drawn comparisons between the Stanley case and another event in Battleford, in 1885, in which an all-white jury convicted six Cree and two Assinboine men to death by hanging, without counsel or translators.³⁸ Kent Roach extended this historical comparison to Nova Scotia:

There is a straight line from 1885 to the present. It includes the wrongful conviction of 19-year-old Mi'kmaq man Donald Marshall Jr. by an all white Nova Scotia jury in 1971. No Indigenous person had ever served on a jury in Nova Scotia reflecting in part the use of property tax and voter rolls that have excluded Indigenous persons.³⁹

This history, David Milward argues, has “given rise to a perception that when it is an Indigenous person who is a crime victim, the justice system will not take it as seriously as in cases of non-Indigenous victims.”⁴⁰

With the public’s interest in the justice system so clearly and widely shaken, it is imperative for law societies to act. The stated purpose of the NSBS is “to uphold and protect the public interest in the practice of law”⁴¹ by establishing standards of professional responsibility and competence, and by seeking to improve the administration of justice in Nova Scotia.⁴² Indeed, calls for action on the part of law societies to deal with the problem of jury representation are not new. In his 2013 report on First Nations jury representation in Ontario, The Honourable Frank Iacobucci recommended that “Ontario should sponsor a Continuing Professional Development course certified by the Law Society of Upper Canada that addresses the representation issue.”⁴³ Similarly,

³⁸ Kent Roach, “The Urgent Need to Reform Jury Selection after the Gerald Stanley and Colten Boushie Case” (2018) 65 Crim LQ 271 [Roach, “The Urgent Need to Reform”].

³⁹ *Ibid.*

⁴⁰ David Milward, “What could reform look like, after the fury over the Stanley acquittal?”, *Maclean’s* (14 February 2018).

⁴¹ *Legal Profession Act*, SNS 2004, c 28, s 4(1).

⁴² *Legal Profession Act*, *supra* note 41 at s 4(2).

⁴³ Iacobucci Report, *supra* note 3 at 99.

the 1989 findings by the Royal Commission on the Donald Marshall, Jr., Prosecution recommended that “the Nova Scotia Barristers Society develop a continuing liaison program with Native people and educate its members regarding the special needs of Native clients” and that “a study be done concerning proportional representation of visible minorities on juries.”⁴⁴ At this moment in Canadian history, the Stanley trial has become “an intense lightning rod for the feelings of resentment by Indigenous peoples towards the justice system”⁴⁵ requiring immediate ameliorative action on the part of law societies who purport to defend the public interest in the administration of justice.

1.2 Jury Challenges as a Competency Issue

It is appropriate and necessary for law societies to provide enhanced guidance on jury challenges and juror representation to the lawyers they regulate, because significant competency issues are implicated when lawyers fail to challenge for cause, or when challenges are misused.

In its 2011 decision in *R v Fraser*, the Nova Scotia Court of Appeal (NSCA) considered the failure of defence counsel to advise a client as to the statutory right to challenge for cause.⁴⁶ In particular, the NSCA considered defence counsel’s failure to instruct his client on the possibility of a race-based challenge for cause, following the 1993 ONCA decision of *R v Parks*.⁴⁷

R v Parks was an appeal from a trial judge’s decision not to allow a challenge for cause to potential jurors based on racial prejudice. Parks was a black drug dealer and the deceased was a white cocaine user.⁴⁸ The accused sought to question potential jurors on whether they would be able to judge the case “without bias, prejudice or partiality” given “that the person charged [was]

⁴⁴ The Royal Commission on the Donald Marshall, Jr Prosecution, *supra* note 3 at 12.

⁴⁵ Milward, *supra* note 40.

⁴⁶ *R v Fraser*, 2011 NSCA 70, 273 CCC (3d) 276.

⁴⁷ *R v Parks*, 15 OR (3d) 324, 24 CR (4th) 81.

⁴⁸ *Ibid* at para 2.

a black Jamaican immigrant and the deceased is a white man?”⁴⁹ At the ONCA, Justice Doherty quashed the conviction and ordered a new trial on the basis that “the appellant was denied his statutory right to challenge for cause.”⁵⁰ Justice Doherty emphasized that the “significance of the challenge process to both the appearance of fairness, and fairness itself, must not be underestimated.”^{51,52} It is against the backdrop of *R v Parks* that the NSCA approached its analysis in *R v Fraser*.⁵³

Fraser, a black high school teacher, was accused of sexually touching a 15-year-old white female student. Following jury selection, Fraser indicated to his counsel that he was concerned that the jury was all-white. In response, Fraser’s counsel advised him that nothing could be done, and that he had “gotten lots of black guys off before with all white juries.”⁵⁴ The NSCA allowed the appeal and ordered a new trial on the basis of ineffective assistance of trial counsel.

Justice Saunders held that trial counsel’s “failure to provide advice to the appellant in response to his client’s explicit and perfectly reasonable inquiries, effectively denied him his statutory right to challenge potential jurors for cause.”⁵⁵ Justice Saunders emphasized that this failing “in and of itself would justify a new trial.”⁵⁶ These comments from the NSCA in *R v Fraser* indicate that an understanding of and ability to advise one’s client on race-based challenges for cause is a basic competency required by defence counsel.

Devlin and Layton argue that Fraser’s counsel’s failure to advise his client of the possibility of race-based challenges for cause may be read as an example of “cultural incompetence,” which

⁴⁹ *Ibid* at para 16.

⁵⁰ *Ibid* at para 93.

⁵¹ *Ibid* at para 28.

⁵² *R v Parks* has been approved by the SCC in *R v Williams*, 1998 CanLII 782 (SCC), [1998] 1 SCR 1128 and *R v Spence*, 2005 SCC 71, [2005] 3 SCR 458.

⁵³ *R v Fraser*, *supra* note 46 at para 65.

⁵⁴ *Ibid* at para 69.

⁵⁵ *Ibid* at para 76.

⁵⁶ *Ibid* at para 78.

they describe as “a situation where a lawyer lacks the knowledge, skills and attitude to relate to the social context of his or her client, and is thereby incapable of appropriately advancing the client’s rights and legitimate interests at trial.”⁵⁷ In *Fraser*, trial counsel lacked the “knowledge, skills and attitude to properly appreciate and address his client’s concerns in facing an all-white jury in Nova Scotia, a province with a disturbing history of race relations.”⁵⁸ The case, they contend, can “serve as a catalyst” for further inquiry into what law societies are doing to ensure that the lawyers they regulate are culturally competent.⁵⁹

While law societies such as the NSBS provide regular cultural competency training,⁶⁰ the only NSBS Code of Professional Conduct (“the Code”) provision specific to juror challenges is Rule 5.5-1, which states that a lawyer “may investigate a prospective juror to ascertain any basis for challenge.”⁶¹ However, a duty to challenge jurors in the interests of eliminating racial prejudices may be grounded in Rule 5.1-1 of the Code, which pertains to the lawyer’s role in adversarial proceedings. Commentary to the Rule explains:

In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client’s case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer’s duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties’ right to a fair hearing in which justice can be done.⁶²

⁵⁷ Richard Devlin and David Layton, “Culturally Incompetent Counsel and the Trial Level Judge: A Legal and Ethical Analysis” (2014) 60 Crim LQ 361.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ Emma Halpern, “Community engagement and commitment to social justice: A keynote addresses by the Society’s Equity & Access Officer”, *The Society Record* (2015); NSBS, “Equity & Access: Resources for lawyers and law students”, online: <http://nsbs.org/resources-lawyers-and-law-students>; Jill Perry, “Call to Action #27: The cultural competence imperative”, *The Society Record* (2015).

⁶¹ Nova Scotia Barristers’ Society, *Code of Professional Conduct*, Halifax: NSBS, 2011, ch 5.5-1 [“Code of Conduct”].

⁶² *Ibid* at ch 5.1-1[1].

Lawyers must be educated on the *Parks* decision and its potential extension in Indigenous contexts through the SCC's decision in *R v Williams*, which addressed challenges in the jury selection process in the case of an Indigenous accused.⁶³ By providing additional, explicit guidance on the duties of defence counsel to raise challenges for cause in the interests of racially representative and unbiased juries, law societies may set baseline expectations for cultural competency requirements in the lawyers they regulate during jury selection processes.

Moreover, while the issue did not arise in the Stanley case, commentators have questioned the Crown's frequent use of peremptory challenges to remove potential Indigenous jurors when prosecuting Indigenous defendants.⁶⁴ The Code of Conduct should be amended to provide further guidance to the prosecution on fair and equitable use of peremptory challenges, consistent with the Crown's existing duty to "act for the public and the administration of justice resolutely and honourably."⁶⁵ Commentary on Rule 5.1-3 states:

When engaged as a prosecutor, the lawyer's primary duty is **not to seek to convict but to see that justice is done through a fair trial on the merits**. The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately [emphasis added].⁶⁶

Prosecutors must, therefore, be educated on the systemic and lasting effects of colonialism on Indigenous peoples in the justice system and guided on how to exercise peremptory challenges in a way that ensures trial fairness—rather than merely ensuring convictions.

In the Stanley case, the Crown did not exercise any challenges for cause, and did not object to defence counsel's use of peremptory challenges.⁶⁷ Given the interracial nature of the crime in this case and the history of racial tension in Battleford, several commentators have argued that

⁶³ *R v Williams*, 1998 CanLII 782 (SCC), [1998] 1 SCR 1128.

⁶⁴ The Manitoba Aboriginal Justice Inquiry, *supra* note 3 at Appendix I: Juries.

⁶⁵ Code of Conduct, *supra* note 60, ch 5.1-3.

⁶⁶ *Ibid*, ch 5.1-3[1].

⁶⁷ Tanovich, "Why no appeal?", *supra* note 34.

there was a “heightened need for such a challenge.”⁶⁸ The proverbial stakes are high: challenges for cause are “necessary to ensure the accused’s constitutional right to be tried by an impartial jury under s.11(d) of the Charter, and [are] also justified as an anti-discrimination measure pursuant to s.15 of the Charter.”⁶⁹

As a result, it is important that lawyers receive adequate training on how to appropriately advise and exercise challenges for cause. However, lawyers lack significant training to be able to competently engage in such challenges. *Fraser* provides a striking—if particularly egregious—example of such a failure in cultural competency.⁷⁰ Miriam Henry and Frances Henry explain:

[L]awyers are not sufficiently trained in issues of race prejudice. Since few law schools include such issues in their curriculum, lawyers are often unfamiliar with how social policy issues relate to the law.⁷¹

Given the knowledge and skill required to competently exercise juror challenges, race-based challenges for cause are most appropriately characterized as an area of competency that law societies can and should regulate.

1.3 Meaningful Fulfilment of Regulatory Goals

In order to meaningfully fulfill current regulatory objectives regarding equality and access to justice, law societies must take action to articulate and affirm the ethical duties of lawyers in the jury selection process. The current Regulatory Objectives of the NSBS are as follows:

1. Protect those who use legal services.
2. Promote the rule of law and the public interest in the justice system.
3. Promote access to legal services and the justice system.
4. Establish required standards for professional responsibility and competence in the delivery of legal services.

⁶⁸ *Ibid.*

⁶⁹ Devlin & Layton, *supra* note 57.

⁷⁰ *Fraser*, *supra* note 52.

⁷¹ Miriam Henry and Frances Henry, “A Challenge to Discriminatory Justice: the Parks Decision in Perspective” (1996) 38 Crim LQ 333.

5. Promote diversity, inclusion, substantive equality and freedom from discrimination in the delivery of legal services and the justice system.
6. Regulate a manner that is proactive, principled and proportionate.⁷²

These Regulatory Objectives demonstrate the NSBS's goal to produce lawyers that are culturally-competent in their practice. By failing to explicitly and proactively guide lawyers on juror selection procedures, the NSBS risks rendering such objectives merely symbolic.

Regulating the use of jury challenges may be the subject of criticism, on the basis that such an approach inappropriately dictates lawyers' trial strategy. Indeed, a great degree of deference is paid by courts to the individual discretion and strategic choices of lawyers. In ineffective assistance appeals, for example, courts will not scrutinize individual lawyers' trial strategies absent a *prima facie* case of prejudice to the appellant.⁷³ The recent controversy surrounding the mandated adoption of individual Statements of Principles by the Law Society of Ontario provides an interesting counterpoint to any argument for an enhanced role for law societies with respect to substantive equality.

In response to the 2016 release of a report on challenges faced by racialized licensees in Ontario, "Working Together for Change: Strategies to Address Issues of Systemic Racism in the Legal Professions," the Law Society of Ontario (LSO) sought to implement one of the report's recommendations by requiring all licensees to "create and abide by an individual statement of principles that acknowledges their obligation to promote equality, diversity and inclusion generally and in their behaviour toward colleagues, employees, clients and the public."⁷⁴ Although suggested templates are provided, lawyers are free (and encouraged) to draft their own statements, provided that those statements acknowledge their individual obligations as members of the legal profession

⁷² NSBS, "NSBS Regulatory Objectives," online: <http://nsbs.org/nsbs-regulatory-objectives>.

⁷³ *R v GDB*, [2000] 1 SCR 520, 2000 SCC 22 (CanLII) at para 29.

⁷⁴ Fernando Garcia, "Statement of Principles critics: Stop fighting against us", *Canadian Lawyer Magazine* (18 December 2017).

to promote equality, diversity and inclusion.⁷⁵ The proposed Statement of Principles has been criticized for compelling speech,⁷⁶ and for seeking to enforce a new, positive duty on lawyers without legal basis.⁷⁷

An enhanced regulatory role with respect to jury challenges can be distinguished from the LSO Statement of Principles controversy in two key respects. First, enhanced guidance on jury selection practices is action-based and has no bearing on the individual beliefs of prosecution or defence counsel. Secondly, enhanced guidance on jury selection practices serves to elaborate upon *existing* duties of the lawyer as an advocate under Rule 5.1 of the Model Code. Carol Aylward argues: “Raising a live and relevant issue such as race is not only an advocate’s duty; disregarding that duty may perpetuate the role that race plays in law.”⁷⁸ Action from law societies on juror challenges would add substance to aspirational Regulatory Objectives by providing a means through which lawyers may be proactively trained and, where necessary, responsively disciplined for failing to practice in a culturally competent manner.

Furthermore, guidance respecting jury selection processes would be an important element of the NSBS’s current shift toward a proactive model of regulation. The NSBS is currently moving from a traditional model of regulation—that is “primarily a reactive-complaints-driven process”—to a proactive model.⁷⁹ Proactive regulation is compliance-based; regulators identify and set goals

⁷⁵ Law Society of Ontario, “Statement of Principles – Templates”, online: <https://www.lsuc.on.ca/with.aspx?id=2147504074>.

⁷⁶ Alex Robinson, “Professor challenges statement of principles in court”, *Canadian Lawyer Magazine* (7 November 2017); Christie Blatchford, “It’s 1984 all over again for Ontario lawyers arguing against compelled speech”, *National Post* (8 November 2017); Arthur J Cockfield, “Limiting Lawyer Liberty: How the Statement of Principles Coerces Speech” (2018) Queen’s Law Research Paper Series; Jacques Gallant, “Lawyers challenging part of Law Society of Upper Canada plan to address racism”, *The Toronto Star* (23 October 2017).

⁷⁷ Gabrielle Giroday, “Online campaign questions LSO statement of principles”, *Canadian Lawyer Magazine* (12 February 2018).

⁷⁸ Aylward, *supra* note 7 at 138.

⁷⁹ Ross Earnshaw, “Promoting Better Practices—a Proactive Approach to Lawyer and Paralegal Regulation”, *Slaw* (12 February 2016); NSBS, “Legal Services Regulation”, online: <http://nsbs.org/legal-services-regulation>.

and expectations, and lawyers “report on their compliance with these expectations, and have autonomy in deciding how to meet them.”⁸⁰ Rather than disciplining trial counsel in *Fraser*, for example, a proactive regulatory model would seek to avoid such need for disciplinary action by setting clear expectations and educational outcomes for lawyers to challenges for cause on racial grounds, and other cultural competency concerns (in addition to discipline, as appropriate, where lawyers’ conduct fails to meet the required standard.)

Therefore, in order to meaningfully meet its Regulatory Objectives, law societies can and should provide explicit professional and ethical guidance on the jury selection process to the lawyers they regulate.

2. A ROLE FOR CRITICAL RACE THEORY

2.1 What is Critical Race Theory?

Critical race theory (CRT) is a legal philosophy premised on a series of key concepts, the most fundamental of which is that racism is present in the everyday experiences of all people.⁸¹ The foundational tenet of CRT can be summarized by Justice Blackmun of the United States Supreme Court his decision in *Regents of the University of California v Bakke*, a 1978 American case on affirmative action in university admissions, in which he stated: “In order to get beyond racism, we must first take account of race. There is no other way.”⁸² CRT requires an active process of deconstructing legal frameworks as a means of challenging “the so-called ‘neutrality’ and ‘objectivity’ of laws that oppress Blacks and other people of colour.”⁸³ It is premised on making race and racism *visible* in legal structures and processes.

⁸⁰ Earnshaw, *supra* note 79.

⁸¹ Delgado & Stefancic, *supra* note 7 at 6-7.

⁸² *Regents of Univ. of California v Bakke*, 438 US 265. (1978) (USSC).

⁸³ Aylward, *supra* note 7 at 34.

In practice, CRT asks two key questions: “(1) whether a rule of law or legal doctrine, practice, or custom subordinates important interests and concerns of racial minorities and (2) if so, how is this problem best remedied?”⁸⁴ This line of inquiry is central to the project of CRT, which builds upon the analytical work of Critical Legal Theory. Critical legal theory seeks to deconstruct (or “trash”) legal frameworks as a means of exposing the ways in which law perpetuates inequality.⁸⁵ CRT takes up the work of deconstruction and builds upon it, to what Aylward refers to as “the next vital stage of ‘reconstruction.’”⁸⁶ Reconstruction focuses on redesigning legal structures and processes to use law as a means of improving the social conditions of people of colour.⁸⁷

Following the Stanley trial, there is a clear role for deconstruction and reconstruction in the Canadian jury selection process. In order to improve racial representation and eliminate racial bias in Canadian juries, the implicit and insidious role of racism in Canadian society must be made visible. By adopting an explicit CRT approach in its education programming and professional guidance to lawyers, law societies can serve a critical role in *calling out* racism in the courtroom, thus pushing jurors, lawyers and judges to critically assess their own biases.

2.2 Critical Race Theory and Jury Selection: Deconstruction

The project of *deconstructing* the jury selection process reveals two key aspects that perpetuate the subordination of people of colour. First, the lack of Indigenous or racialized representation on juries allows the unconscious biases of jurors to remain unchecked. Second, the systemic exclusion of Indigenous peoples from Canadian juries communicates to Indigenous and non-Indigenous

⁸⁴ Dorothy A Brown, *Critical Race Theory: Cases, Materials and Problems* (St Paul: Thomson/West 2007) at 3.

⁸⁵ Aylward, *supra* note 7 at 28.

⁸⁶ *Ibid.*

⁸⁷ *Ibid* at 34.

peoples alike that those perspectives are less valuable than the those of the white individuals that are selected.

Cynthia Petersen explains that white jurors “are most likely to be influenced by racial stereotypes because they tend to have the least awareness about the dynamics of racism and they tend to have the least contact with communities of colour.”⁸⁸ Such stereotypes “affect how evidence is interpreted, remembered and assessed.”⁸⁹ It is, therefore, less likely that all-white juries will be compelled to confront their biases in the jury room, allowing unconscious racism to underlie decision-making. Petersen proposes that juries representing both the victim and defendant’s race “may therefore correct an imbalance of attitudes which might otherwise govern the outcome of the trial.”⁹⁰

Furthermore, Petersen explains that Indigenous defendants and victims “are likely to experience a sense of alienation in this all-white environment.”⁹¹ This problem was starkly borne out in the Stanley trial. Erica Violet Lee, a Cree woman who attended the trial, described:

We looked up at the front of the court room and you could see everyone in charge of our fate was white [...] And above it all, there is a picture of the Queen looking over the court room. We realized this is not a system set up for us: this is not a system set up to keep us safe.⁹²

This sense of alienation impacts on both Indigenous defendants and victims. With respect to defendants, Petersen explains: “The absence of jurors of their own race increases the likelihood that there will be barriers to their ability to convey their version of the facts.”⁹³ Moreover, Miriam Henry and Frances Henry explain that in all-white courtroom situations, even before the jury is

⁸⁸ Petersen, *supra* note 2 at 164.

⁸⁹ Henry & Henry, *supra* note 71.

⁹⁰ Petersen, *supra* note 2 at 164.

⁹¹ *Ibid.*

⁹² Cecco, *supra* note 29.

⁹³ Petersen, *supra* note 2 at 164.

selected, the racialized accused “is aware of racial inequality in the court-room and this results in blacks being more susceptible than other groups to plea bargaining and to other compromises by which the right to a jury trial is waived.”⁹⁴ For victims, Petersen argues that the lack of racial representation on juries “trivializes and condones their victimization.”⁹⁵ As demonstrated by Lee’s reaction to the all-white courtroom during the Stanley trial, the over-representation of white people on juries suggests that the perspectives and values of white people “are more legitimate than the values, judgment and perspectives of those who are underrepresented.”⁹⁶

Juries serve an important symbolic purpose in our justice system that cannot be disregarded in this analysis, but they also serve, practically, to set and affirm community norms and values. Alice Woolley points out that, in 2011, 18% of the population of Saskatchewan was Indigenous and yet, in 2017, the entire jury in the Stanley trial was white.⁹⁷ Woolley argues that “if juries act as the conscience of the community, it is wrong to have juries that so obviously—as in the Stanley case—do not represent the demographics of their community.”⁹⁸ The overrepresentation of white jurors, therefore, perpetuates the systemic exclusion of Indigenous peoples and people of colour from the justice system and Canadian society as a whole.⁹⁹

2.3 Critical Race Litigation in Action: Reconstruction

While an “imbalance of attitudes”¹⁰⁰ on juries may in some situations be inevitable, CRT has a clear role in mitigating this imbalance through the tool of counterstorytelling. Counterstorytelling is the act of providing background information into the unique circumstances faced by a particular

⁹⁴ Henry & Henry, *supra* note 71.

⁹⁵ Petersen, *supra* note 2 at 165.

⁹⁶ *Ibid.*

⁹⁷ Alice Woolley, “An Ethical Jury? Reflections on the Acquittal of Gerald Stanley for the Murder/Manslaughter of Colten Boushie”, *Slaw* (20 February 2018).

⁹⁸ *Ibid.*

⁹⁹ Petersen, *supra* note 2 at 165.

¹⁰⁰ *Ibid* at 164.

person or community of colour, often by leading evidence. Critical race theorists seek to “challenge, displace, or mock” existing narratives associated with racial stereotypes of criminality through the act of counterstorytelling.¹⁰¹ Such racial stereotypes dominated much of the online discourse regarding the Stanley trial,¹⁰² and many commentators fear that such stereotypes influenced the jury’s decision-making process.¹⁰³ Andray Domise describes the insidious pervasiveness of racial stereotypes in Canadian society:

Despite the outward claims and appearances that give our justice system legitimacy, racial stereotypes have long polluted the process. The stereotype of the Native who drinks, and who steals, as with the stereotype of the negro who kills and rapes, has existed in Canadian culture for generations.¹⁰⁴

Richard Delgado and Jean Stefancic contend that such stereotypes “are probably at least as determinative of outcomes as the formal laws, since they supply the background against which the latter are interpreted and applied.”¹⁰⁵ In the context of juries (and judges), therefore, racial stereotypes have the dangerous potential to shape verdicts. Counterstorytelling may mitigate this risk. Delgado and Stefancic argue that: “[p]owerfully written stories and narratives may begin a process of adjustment in our system of beliefs and categories by calling attention to neglected evidence and reminding readers of our common humanity.”¹⁰⁶ Counterstorytelling is, thus, both an act of deconstruction—of breaking down preconceived notions—and reconstruction, as it is an active process through which jurors, judges, lawyers or other actors in the legal system are challenged to re-think and re-frame their perspectives.

¹⁰¹ Delgado & Stefancic, *supra* note 7 at 42-43.

¹⁰² Shree Paradkar, “Post Colten Boushie verdict, is Twitter taking sides?”, *The Star* (21 February 2018); Keith Thor Carlson, Keith Thor Carlson, “Social media full of vitriolic myths in the aftermath of the Stanley trial”, *The Conversation* (22 February 2018).

¹⁰³ Tony Pass, “A modest proposal concerning bias in the jury system”, *The Lawyer’s Daily* (23 March 2018).

¹⁰⁴ Domise, *supra* note 16.

¹⁰⁵ Delgado & Stefancic, *supra* note 7 at 43.

¹⁰⁶ *Ibid.*

Counterstorytelling has played a significant role in Canadian jurisprudence, notably in the areas of sentencing, with respect to the legal concept of the reasonable person, and through the practice of challenging for cause. A brief overview of the ways in which counterstorytelling functioned in these cases serves to demonstrate why and how the adoption of an explicit critical race litigation strategy on the part of Canadian law societies may serve to ameliorate the problem of unrepresentative juries and unchecked racial biases in the jury room.

2.3.1 Sentencing and *R v Gladue*

The SCC's decision in *Gladue* may be read as an adoption of counterstorytelling in the sentencing process. *R v Gladue* is a 1999 decision of the SCC in which the Court considered section 718.2(e) of the *Criminal Code* for the first time.¹⁰⁷ Section 718.2(e) directs trial courts to consider "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to the victims or to the community" in sentencing all offenders, "with particular attention to the circumstances of Aboriginal offenders."¹⁰⁸ Gladue was a 19-year-old Cree woman. She fatally stabbed her common law husband, who was also Indigenous, during an argument.¹⁰⁹ She pled guilty to manslaughter and was sentenced to three years' imprisonment.¹¹⁰ Gladue appealed her sentence, "on the grounds that the trial judge erred in not following the directives set out in section 718.2(e) of the *Criminal Code*."¹¹¹

In its decision, the SCC laid out the factors that "should be taken into account by a judge sentencing an aboriginal offender."¹¹² The Court directed sentencing judges to consider, *inter alia*,

¹⁰⁷ *R v Gladue*, [1999] 1 SCR 688, 1999 CanLII 679 (SCC).

¹⁰⁸ *Criminal Code*, RS C 1985, c C-46, s 718.2(e).

¹⁰⁹ *Gladue*, *supra* note 105.

¹¹⁰ *Ibid* at para 7; 13.

¹¹¹ Carmela Murdocca, *To Right Historical Wrongs: Race, Gender, and Sentencing in Canada* (Vancouver: UBC Press 2013) at 80.

¹¹² *Gladue*, *supra* note 107.

“the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts.”¹¹³ In order to do so, the Court explained, trial judges “will require information pertaining to the accused” and may “take judicial notice of the broad systemic and background factors affecting aboriginal people.”¹¹⁴

This decision, and the *Criminal Code* provision that it serves to elaborate, are a call to make race visible in sentencing. Kelsey Sitar describes the CRT approach taken by the SCC decision:

Taking a page directly from the Critical Race Theory textbook, the Supreme Court thereby recognized the different treatment of non-aboriginal (read: White) persons within the criminal justice system and that, to avert the crisis at hand, Aboriginal persons must have their backgrounds and perspectives recognized, validated, and incorporated into all aspects of the criminal justice system.¹¹⁵

Section 782(1)(e) and *Gladue* mandate contextual analysis, consistent with the fundamental principles of CRT. *Gladue* reports are a kind of counterstorytelling, through which key contextual information is provided to sentencing judges. Under section 782(1)(e) of the *Criminal Code*, counterstorytelling is *required* as a means of informing sentencing decisions and bringing the systemic oppression of Indigenous peoples into sharp focus.

It is important to note, however, that since the SCC’s decision in *Gladue* (and its 2012 reaffirmation of those principles in *R v Ipeelee*¹¹⁶) the overrepresentation of Indigenous offenders in the criminal justice system has not diminished.¹¹⁷ Indigenous peoples “make up 20 per cent of the federal penitentiary population, and as much as 70 to 80 per cent of the jail population in some provinces, despite representing only 3 per cent of the Canadian population.”¹¹⁸

¹¹³ *Ibid* at para 93.

¹¹⁴ *Ibid*.

¹¹⁵ Kelsey L Sitar, “Gladue as a Sword: Incorporating Critical Race Perspectives into the Canadian Criminal Trial” (2016) 20 Can Crim L Rev 247 at 5.

¹¹⁶ *R v Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433.

¹¹⁷ Sitar, *supra* note 115 at 1.

¹¹⁸ Milward, *supra* note 40.

Therefore, Sitar calls for an expansion of the application of the principles arising out of *Gladue* to a more proactive and preventative approach, rather than remedial.¹¹⁹ Sitar proposes: “It is time for defence counsel to lead the charge against over-representation of Aboriginal persons in our criminal justice system, applying these principles to the trial process and invoking the power of *Gladue* before a conviction is ever rendered.”¹²⁰ While Sitar does not directly consider jury representation in this analysis, a proactive emphasis on rendering systemic racism visible in juror selection would be an important aspect of such a front-end approach. In order for defence counsel to “lead the charge”¹²¹ in this respect, law societies must take proactive measures to educate, train, and guide defence counsel and Crowns on systemic racism in Canadian society, and on how to call it out.

2.3.2 The Reasonable Person: RDS

The SCC’s decision in *R v RDS*¹²² demonstrated the power of the deliberate use of counterstorytelling, which served to deconstruct the legal concept of the reasonable person and *reconstruct* it in a way that uses law as a tool to lessen the subordination of people of colour.

In October 1993, RDS, a black 15-year-old, was arrested and charged while riding his bicycle home, for allegedly interfering with the arrest of another youth, his cousin, when he stopped to ask whether he should call his cousin’s mother.¹²³ In December 1994, RDS was tried and acquitted by a black Youth Court Judge, Judge Sparks.¹²⁴ In the course of delivering her oral reasons and in response to a question by the Crown, Judge Sparks commented, regarding her assessment of the credibility of RDS and the white police officer, that “police officers had been

¹¹⁹ Sitar, *supra* note 115 at 1.

¹²⁰ *Ibid* at 10.

¹²¹ *Ibid*.

¹²² *R v S (RD)*, [1997] 3 SCR 484, 1997 CanLII 324 (SCC) [*RDS*].

¹²³ *Ibid*; Aylward, *supra* note 7 at 83.

¹²⁴ Aylward *supra* note 7 at 83.

known to mislead the court in the past” and “had been known to overreact particularly with non-white groups.”¹²⁵ The Crown appealed to the Nova Scotia Supreme Court (Trial Division) on the basis that the judge’s comments indicated a reasonable apprehension of bias.¹²⁶ The Crown’s appeal was allowed, and subsequently upheld by the NSCA.

Before the SCC, counsel for RDS contextualized the events between the black accused and the White police officer within a larger history of systemic racism in Nova Scotia, through the use of counterstorytelling. Aylward explains: “Narrative allowed the lawyers representing R.D.S. to tell the story of the racial conflict between the police and the black community of Nova Scotia, and indeed in the whole of Canada, at the time of the encounter.”¹²⁷ With extensive evidence of such systemic racism before the Court, the SCC was able to affirm that the reasonable person must be aware of “the existence in the community of a history of widespread and systemic discrimination against black and aboriginal people.”¹²⁸ The Court directed that “judges may take notice of actual racism known to exist in a particular society.”¹²⁹ The Court’s recognition that it is appropriate to take judicial notice of racism in Nova Scotia enhances the work of critical race litigation moving forward, as it lessens the burden on the accused of providing the kind of extensive counternarrative that was submitted in *RDS*.

2.3.3 Challenges for Cause: *Parks* and *Williams*

Judicial notice also played a key role in *R v Parks* and *R v Williams*—two cases which specifically demonstrate the potential for the application of CRT in the jury selection process.¹³⁰ In *R v Parks*, briefly described in the first part of this paper, defence sought to ask potential jurors:

¹²⁵ *RDS*, *supra* note 122.

¹²⁶ *Ibid.*

¹²⁷ Aylward, *supra* note 7 at 85.

¹²⁸ *RDS*, *supra* note 122 at para 47.

¹²⁹ *Ibid.*

¹³⁰ Aylward, *supra* note 7 at 114.

(1) whether their ability to judge witnesses without bias, prejudice or partiality would be affected by the fact that the witnesses were involved in drugs, and (2) 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.¹³¹

At trial, counsel for Parks did not engage in the kind of counterstorytelling undertaken by counsel in *RDS*. Counsel “did not call any evidence in support of the proposed challenge” but, rather, “argued that anti-black racism in Toronto was a ‘notorious fact’” upon which the challenge could be founded.¹³² The trial judge in *Parks* refused to permit the question.

With significant evidence of racial discrimination in Canada and in Toronto before it, a majority of the Ontario Court of Appeal (ONCA) allowed the appeal on the basis that the accused should have been able to challenge potential jurors for cause based on racial discrimination.¹³³ In finding that the trial judge did not adequately address the possibility that “one or more potential jurors” may be biased against a black accused, the ONCA explained:

Racism, and in particular anti-black racism, is a part of our community’s psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including. the criminal justice system, reflect and perpetuate those negative stereotypes. These elements combine to infect our society as a whole with the evil of racism.¹³⁴

The Court in *R v Parks*, therefore, emphasized the importance of a contextual approach in jury selection processes, which takes into account the broader “psyche” of the community in safeguarding impartiality. The SCC approved of the ONCA’s reasoning in its decision in *R v Williams*—a case which extended race-based challenges for cause to the Aboriginal context.

¹³¹ *Parks*, *supra* note 47 at para 16.

¹³² *Ibid* at para 20.

¹³³ *Ibid* at para 93.

¹³⁴ *Ibid* at para 54.

In *R v Williams*, the accused was an Aboriginal man who pled guilty to a charge of robbery in October 1993.¹³⁵ At trial, Williams sought to challenge potential jurors “to determine whether they [possessed] prejudice against aboriginals which might impair their impartiality.”¹³⁶ The trial judge dismissed the application to challenge potential jurors for cause, and distinguished the ONCA’s decision in *R v Parks* on the basis that it was limited to a “perception in the community of Toronto that black people were linked to violent crime.”¹³⁷ The British Columbia Court of Appeal (BCCA) upheld the trial judge’s decision. The SCC allowed the appeal. It held that “the lower courts had set too high a standard for showing a realistic possibility of prejudice in these circumstances” and that it is unreasonable to expect “that juror attitudes would be ‘cleansed’ by instructions about how they should discharge their duties.”¹³⁸ Justice McLachlin took judicial notice of the existence of widespread prejudice against Indigenous peoples and noted, in particular, that this prejudice has the potential to affect juror impartiality, through the proliferation of “stereotypes that relate to credibility, worthiness and criminal propensity.”¹³⁹

The right to challenge for cause is not automatic.¹⁴⁰ The challenger must lead evidence to be able to challenge for cause on racial grounds, the “threshold” for which was articulated by L’Heureux-Dubé in *R v Sherratt*.¹⁴¹ While L’Heureux-Dubé emphasizes that the burden is not expected to be significant, she explains that some evidence is required such that “a reasonable degree of control [may] be retained by the trial judge.”¹⁴² L’Heureux-Dubé lays out the test for challenging for cause:

¹³⁵ *Williams*, *supra* note 63 at para 1.

¹³⁶ *Ibid.*

¹³⁷ *Ibid* at para 5.

¹³⁸ Coughlan, *supra* note 20 at 380; *Williams*, *supra* note 63.

¹³⁹ *Williams*, *supra* note 63 at para 58.

¹⁴⁰ Coughlan, *supra* note 20 at 356.

¹⁴¹ *R v Sherratt*, [1991] 1 SCR 509, 1991 CanLII 86 (SCC) at para 64.

¹⁴² *Ibid* at para 63.

The threshold question is not whether the ground of alleged partiality will create such partiality in a juror, but rather whether it could create that partiality which would prevent a juror from being indifferent as to the result. In the end, there must exist a realistic potential for the existence of partiality, on a ground sufficiently articulated in the application, before the challenger should be allowed to proceed [emphasis in original].¹⁴³

Thus, a challenger must lead evidence—a kind of counterstorytelling—in order to displace the presumption in Canadian law that potential jurors are impartial.¹⁴⁴

The Court in *Williams* acknowledged the existence of widespread racial prejudice against Indigenous peoples, and explained that judicial notice may be employed, where appropriate, to eliminate the burden of displacing the presumption of impartiality. Justice McLachlin explained:

In the case at bar, the accused called witnesses and tendered studies to establish widespread prejudice in the community against aboriginal people. It may not be necessary to duplicate this investment in time and resources at the stage of establishing racial prejudice in the community in all subsequent cases.¹⁴⁵

In this way, the legal tool of judicial notice is a means by which existing law is used in a new way to lessen the subordination of people of colour—as lawyers engage in critical race litigation strategy by leading evidence of counternarrative in support of challenges for cause, the burden on subsequent challengers is reduced through the tool of judicial notice.

However, it is important to acknowledge the key limitation of a CRT litigation strategy: “without the consent and full participation of the client, raising issues of race in litigation can be difficult, if not impossible.”¹⁴⁶ While lawyers are duty-bound to fearlessly raise any issue that could assist their client, they are also limited by the individual interests (and budgets) of their clients. Law societies must, thus, contemplate the individual and financial costs associated with

¹⁴³ *Ibid* at para 64.

¹⁴⁴ *Williams*, supra note 63 at para 7.

¹⁴⁵ *Ibid* at para 54.

¹⁴⁶ Aylward, supra note 7 at 98.

critical race litigation strategy in seeking to further the equality interests of Indigenous and racialized defendants and victims in jury trials.

3. APPLICATION: CRITICAL RACE THEORY IN THE JURY SELECTION PROCESS

While the ONCA and SCC's decisions in *Parks* and *Williams* demonstrate the potential for CRT in the jury selection process, the application of the principles arising out of those cases has been limited in scope.¹⁴⁷ In order to expand the use of "the *Parks* question," both Crown and defence lawyers must apprise themselves of the systemic factors affecting the lives of Indigenous peoples. By providing further guidance on Rule 5.1-1 specific to the use of peremptory challenges and challenges for cause, by educating lawyers on systemic racism affecting jury decision-making, and by disciplining lawyers who fail to meet the required standard of cultural competency, law societies can and should push forward the use of the law as a tool to address the problem of unrepresentative juries in Canada.

There are three means by which counsel may challenge potential jurors: challenges to the jury array, peremptory challenges, and challenges for cause. Jury array challenges were considered by the SCC in the 2015 decision *R v Kokopenace*,¹⁴⁸ in which a majority of the SCC held that "there is no right to proportional representation on a jury roll or the actual jury."¹⁴⁹ In dissent, Justice Cromwell emphasized his concerns that the "unintentional yet substantial under-representation of [Indigenous peoples] from the jury roll inevitably [...] casts a long shadow over the appearance that justice has been done".¹⁵⁰ Commentators have called for Parliament to reverse

¹⁴⁷ Rakhi Ruparelia, "Erring on the Side of Ignorance: Challenges for Cause Twenty Years after Parks" (2013) 92 *Can Bar Rev* 267 at 268 [Ruparelia, "Erring on the Side of Ignorance"].

¹⁴⁸ *Kokopenace*, *supra* note 4.

¹⁴⁹ Roach, "The Urgent Need to Reform", *supra* note 38.

¹⁵⁰ *Kokopenace*, *supra* note 4 at para 304.

the *Kokopenace* decision.¹⁵¹ However, at present, it is unlikely that challenges to the array pose a significant chance of success in ameliorating the crisis of unrepresentative juries; legislative reform is very unlikely, due—at least in part—to the *Kokopenace* decision. Indeed, Ruparelia explains that “[m]eaningful vetting is even more critical now that the [SCC] has determined in *R v Kokopenace* that juries can be deemed fair even if they are drawn from unrepresentative jury rolls.”¹⁵² Thus, this section focuses on the potential application of CRT in peremptory challenges and challenges for cause, as a means of addressing racism head-on.

3.1 Peremptory Challenges

Peremptory challenges, as discussed above, are a means of excusing potential jurors without any required explanation. Because no reason is required for the removal of jurors, peremptory challenges are sometimes used to make juries less representative and may be “a stone-cold invitation for jury selection to be infected by conscious or unconscious racist stereotypes.”¹⁵³

In 1991, the Aboriginal Justice Inquiry of Manitoba recommended that the *Criminal Code* be amended to eliminate peremptory challenges.¹⁵⁴ It found that the use of peremptory challenges to exclude potential Indigenous jurors was “common practice” by both Crown attorneys and defence counsel.¹⁵⁵ In 2013, the Honourable Frank Iacobucci, in an independent review of First Nations representation on juries in Ontario, recommended that the *Criminal Code* be amended to “prevent the use of peremptory challenges to discriminate against First Nations people serving on juries.”¹⁵⁶ Following the Stanley verdict, the federal government responded to renewed public

¹⁵¹ Roach, “The Urgent Need to Reform”, *supra* note 38.

¹⁵² Rakhi Ruparelia, “Who are you calling racist? Challenging jurors for cause 20 years after *Parks*”, *CBA National Magazine* (14 July 2015) [Ruparelia, “Who are you calling racist?”].

¹⁵³ Roach, “Our jury selection procedure is not fair”, *supra* note 1.

¹⁵⁴ The Manitoba Aboriginal Justice Inquiry, *supra* note 3.

¹⁵⁵ *Ibid.*

¹⁵⁶ Iacobucci Report, *supra* note 3 at Recommendation 15.

criticisms of peremptory challenges¹⁵⁷ with the introduction of Bill C-75.¹⁵⁸ Along with a series of criminal justice and sentencing reforms, the bill would eliminate peremptory challenges entirely.¹⁵⁹ However, Bill C-75 has also been the subject of criticism on the basis that its provisions pertaining to jury processes are reactionary and fail to consider the real benefits that peremptory challenges may have for racialized defendants and victims.¹⁶⁰ If peremptory challenges are to be maintained, law societies bear a responsibility to guide lawyers in using them ethically and in a way that enhances access to justice for Indigenous peoples.

In support of the abolition of peremptory challenges, commentators often call attention to the fact that countries such as the United Kingdom have already “abolished peremptory challenges in the name of equity.”¹⁶¹ However, in response to such claims, it is important to note that much of our legal history regarding peremptory challenges borrows from our American neighbours. Blake Brown explains that affording peremptory challenges to the Crown in addition to the accused is a mark of American influence on Canadian law, as “[n]o such right ever existed in English practice.”¹⁶² This distinction is important, because if both sides have the power to remove jurors peremptorily, then either side may use peremptory challenges in a responding manner to increase representation, where possible.

As our Canadian version of peremptory challenges has been influenced by American law, a brief overview of the state of such challenges in the U.S. context is appropriate. In *Batson v*

¹⁵⁷ Sarah E Leamon, “Bill C-75 Fails to Deliver Necessary Changes to the Justice System”, *The Huffington Post* (17 April 2018).

¹⁵⁸ 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, 2018, (first reading 29 March 2018).

¹⁵⁹ *Ibid.*

¹⁶⁰ John Paul Tasker, “Lawyers say post-Boushie justice reforms could actually make juries less diverse”, *CBC News* (30 March 2018); Aidan Macnab, “Stanley acquittal should not lead to scrapping peremptory challenges, say criminal lawyers”, *Canadian Lawyer Magazine* (14 February 2018).

¹⁶¹ Tasker, *supra* note 160; Kent Roach, “A good first step towards diverse, impartial Canadian juries”, *The Conversation* (2 April 2018) [Roach, “A good first step”].

¹⁶² Brown, *supra* note 25 at 484.

Kentucky,¹⁶³ the United States Supreme Court (USSC) held that the use of peremptory challenges to remove potential jurors on the basis of race violates the Equal Protection Clause and is, thus, unlawful. Following *Batson* in the US, lawyers can exercise a “Batson challenge”—meaning that one side can object to the other’s exercise of peremptory challenges, if it appears that those challenges are being made on race-based grounds.¹⁶⁴

Nader Hasan, a Canadian criminal defence lawyer, argues that peremptory challenges should be maintained, and emphasizes that in everyday trial practice, criminal lawyers use peremptory challenges as a “tool” to “pursue a diverse jury.”¹⁶⁵ Hasan advocates for the adoption of “Batson challenges” into Canadian jurisprudence, whereby lawyers can and should object where “either side appears to use their challenges in a discriminatory manner.”¹⁶⁶ This objection has the potential to make race visible in the courtroom—by calling race out through the tool of the “Batson challenge,” those in the courtroom “are sensitized from the outset of the proceedings to the need to confront potential racial bias and ensure that it does not impact on the verdict.”¹⁶⁷ Hasan argues that in some places in the U.S., “the mere existence of the Batson process has a mitigating effect on a prosecutor’s conduct.”¹⁶⁸ Thus, the Batson challenge is a CRT tool, used to identify and confront racial biases and to lessen the subordination of people of colour.

However, following *Batson*, “Batson challenges” have been limited in their practical utility. In practice, when defence counsel object to the prosecution’s use of peremptory challenges to remove potential jurors of colour, prosecutors often give race-neutral reasons for their challenges, (for example, age or employment status) which are accepted by judges determining the

¹⁶³ *Batson v Kentucky*, 476 US 79 (1986) (USSC).

¹⁶⁴ Nader R Hasan, “Eliminating peremptory challenges make trials less fair”, *The Star* (10 April 2018).

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

¹⁶⁷ *Parks*, *supra* note 47 at 92.

¹⁶⁸ Hasan, *supra* note 164.

final validity of such challenges.¹⁶⁹ In response, and in defence of his call for lawyers to object to the discriminatory use of peremptory challenges in Canada, Hasan argues:

I have no doubt that the Batson process may be illusory in some U.S. states, which suffer from injustices that go far deeper than the jury selection process. But I have a high regard for Canadian judges' ability to adjudicate objections to discriminatory peremptory challenges. Just because it does not work in Alabama does not mean it won't work in Canada.¹⁷⁰

Indeed, Canadian courts have had occasion to consider the appropriateness of judicial intervention where peremptory challenges are used in a discriminatory manner. In *R v Gayle*, the ONCA held that “it follows from the quasi-judicial nature of the Crown’s discretionary powers and from the overriding values of the Charter that there are circumstances where a court will review and constrain the exercise of the Crown’s right of peremptory challenge.”¹⁷¹ The Court explained that “public confidence in the administration of justice would be seriously undermined if Crown counsel were permitted to exercise the power of peremptory challenge on racial or ethnic grounds” and that judicial intervention in such situations was, therefore, warranted.¹⁷²

The approach by the ONCA in *R v Gayle* demonstrates the potential application of a Batson-style challenge in the Canadian context, and the importance of remembering that the role of the Crown is not to seek conviction, but “to see that justice is done through a fair trial on the merits.”¹⁷³ Such fairness undeniably includes the right to a trial free from racial discrimination.

The future of peremptory challenges in Canadian criminal law is unclear. For now, law societies should train lawyers on how to use peremptory challenges in a way that furthers representation, where possible. This paper does not suggest that defence counsel should be

¹⁶⁹ Gilad Edelman, “Why is it so easy for prosecutors to strike black jurors?”, *The New Yorker* (5 June 2015).

¹⁷⁰ Hasan, *supra* note 164.

¹⁷¹ *R v Gayle*, 2001 CanLII 4447 (ONCA), 54 OR (3d) 36 at para 66.

¹⁷² *Ibid.*

¹⁷³ Code of Conduct, *supra* note 61, ch 5.1-3[1].

disciplined for using peremptory challenges, *per se*. The duty of defence counsel is, above all, to her client—although, such duties must be carried out in an ethical manner. However, through the adoption of a Batson-style challenge in the Canadian context and through an expansion of the principles articulated in *R v Gayle*, the process surrounding peremptory challenges may be used to draw attention to the role of race and racism in the court room and ensure public faith in the administration of justice through “checks and balances” on the Crown. In this way, the principles of CRT function to make the ever-present role of race visible, knowable, and, thus, confrontable.

3.2 Challenges for Cause

Where it is impossible to assemble a representative jury (for example, due to problems with the array, or simply based on populations in a given community), it is especially important that lawyers are well-trained, willing, and able to exercise challenges for cause as a means of eliminating or reducing the threat of racially-biased juries. Challenges for cause, as described above, are a kind of counterstorytelling, in which counsel leads evidence of racial prejudice as a means of discerning whether potential jurors are able to judge the case impartially, given that the accused or victim is a person of colour (or, a judge may take judicial notice of such prejudice). Ruparelia explains that challenges for cause “cannot remedy all that is wrong with a system mired in racism, but they do have a crucial role to play.”¹⁷⁴ When used appropriately and competently, challenges for cause can be a key tool in a critical race litigation strategy to make race visible and, thus, address it directly.

Challenges for cause may enhance the fairness of a jury trial “by increasing the range of perspectives among its members and by eliminating strong prejudices which will prevent rational deliberation.”¹⁷⁵ The procedure of challenging for cause is complex, as Petersen describes:

¹⁷⁴ Ruparelia, “Who are you calling racist?”, *supra* note 152.

¹⁷⁵ Kent Roach, “Challenges for Cause and Racial Discrimination” (1995) 37 CLQ 410.

When a challenge for cause is asserted, the opposing party may admit it, in which case the juror will not be sworn. The opposing party may alternatively submit that the ground for the challenge is not recognized in law, in which case the judge will rule on the propriety of the challenge. Finally, the opposing party may contest the challenge, in which case the issue will be tried by the two jurors who were last sworn. Given the stringency of the challenge procedure, it would be very difficult to effect a race-motivated exclusion under the pretext of one of the permitted grounds.¹⁷⁶

Thus, Petersen asserts, challenges for cause “are not readily susceptible to abuse” in the way peremptory challenges are, because there are a series of procedural safeguards in place to ensure the appropriateness of the challenge.¹⁷⁷

Together, *Parks* and *Williams* recognized the right of people of colour to challenge potential jurors for cause, on the basis of racial discrimination or biases. However, the manner in which those challenges have been made in subsequent cases has been limited. Rakhi Ruparelia explains: “The questions we use to screen prospective jurors for racial partiality in trials involving racialized accused are equally blunt, unsophisticated, and unhelpful.”¹⁷⁸ Ruparelia argues that the “*Parks* inquiry” has failed to remain in-step with modern manifestations of prejudice, which are less overt in an era where racism is socially stigmatized.¹⁷⁹ Post-*Parks* and *Williams*, courts have been hesitant to allow race-based challenges for cause.¹⁸⁰ Ruparelia explains that in Ontario, following the *Parks* decision, “[m]any trial judges were quick to distinguish *Parks* on the basis that widespread prejudice against Blacks did not exist in their communities.”¹⁸¹ Moreover, in some cases, Ruparelia describes, “trial judges reluctantly allowed a challenge for cause on racial

¹⁷⁶ Petersen *supra* note 2 at 175.

¹⁷⁷ *Ibid.*

¹⁷⁸ Ruparelia, “Who are you calling racist?”, *supra* note 152.

¹⁷⁹ *Ibid.*

¹⁸⁰ Ruparelia, “Erring on the Side of Ignorance” *supra* note 147 at 274.

¹⁸¹ *Ibid.*

partiality to proceed, but took pains to explain that they were not conceding racism was prevalent in their community.”¹⁸²

Critical race theorists emphasize that the denial of racism in everyday society is a key means by which such racism is perpetuated. Aylward explains:

It has been said that the image Canadians wish to portray to the world is one of racial and cultural tolerance, of Canada as a mecca for the oppressed of the world. If racism is a problem at all in Canada, these image-makers insist, it is an ‘aberration,’ merely the action of a few misguided individuals that should not reflect on Canadian society as a whole.¹⁸³

The insistent denial of the role of racism was a constant theme during the Stanley trial. For example, Gerald Stanley’s lawyer, Scott Spencer, told CBC News: “I have seen no evidence that race played any part in the tragic circumstances that escalated on the Stanley Farm on August 9, 2016. And I’m confident that will be borne out at trial.”¹⁸⁴ Such denial of the role of racism in Colten Boushie’s death and the subsequent trial are further erasures of the lived experiences of Indigenous peoples in the Canadian justice system and must be addressed directly. Ruparelia explains that the “choice not to grapple with the complexities of racism is a manifestation of white privilege; wilful ignorance about racial prejudice is not an option that is available to everyone.”¹⁸⁵ The subversion of “colour-blindness” is the main project of CRT, and it is a project that law societies must take up, in order to ensure that white juries like the one that acquitted Gerald Stanley are challenged to confront the race-based “elephant in the room.”

A main counterargument levelled at proposals to expand the use of race-based challenges for cause is that such challenges and the process required to bring them create undue delay in trials.

¹⁸² *Ibid* at 276.

¹⁸³ Aylward, *supra* note 7 at 40.

¹⁸⁴ “‘I’ve seen no evidence that race played any part’: Gerald Stanley’s lawyer comments on the Colten Boushie case”, *CBC Radio* (26 March 2017).

¹⁸⁵ Ruparelia, “Erring on the Side of Ignorance”, *supra* note 147 at 271.

While concerns regarding trial delays are particularly relevant post-*Jordan*,¹⁸⁶ it must be remembered that the “Canadian way of selecting jurors may be efficient, but it is not fair.”¹⁸⁷ Moreover, if lawyers push to expand the *Parks* inquiry, delays experienced at the “front-end” of those trials will be mitigated by courts’ ability to take judicial notice of the factors giving rise to the questions, as anticipated and directed by Justice McLachlin in *Williams*.¹⁸⁸

Guided by law societies, both Crown and defence counsel must seek to expand the application of the *Parks* inquiry. Challenges for cause enhance the appearance of fairness in trial processes and serve to eliminate at least some potential jurors who may harbor discriminatory biases toward an Indigenous or black victim or accused.¹⁸⁹ Above all, challenges for cause “sensitize” those in the courtroom, including the ultimate jury panel, of “the need to confront potential racial bias and ensure that it does not impact on their verdict.”¹⁹⁰ Henry and Henry note that “Even if a potential juror is aware of having anti-black sentiments, there are social pressures not to admit to oneself or others that one is prejudiced.”¹⁹¹ However, they argue, even if potential jurors do not reveal their racial biases when challenged:

[B]y raising the issue of race prejudice and the need for racial impartiality before the case is presented, jurors will be made aware of the need for their unprejudiced participation. As well, questions regarding intolerance **acknowledge that biases exist, impact in the courtroom and are not tolerated by the courts** [emphasis added].¹⁹²

Thus, challenges for cause hold a significant potential to enhance trial fairness for Indigenous and black defendants and victims by addressing juror impartiality and must, therefore, be carried out competently. Henry and Henry explain: “questions must be carefully designed, methods of

¹⁸⁶ *R v Jordan*, 2016 SCC 27, [2016] 1 SCR 631.

¹⁸⁷ Roach, “Our jury selection procedure is not fair” *supra* note 1.

¹⁸⁸ *Williams*, *supra* note 63 at para 54.

¹⁸⁹ *R v Rogers*, 2000 CanLII 22829 (ONSC), 38 CR (5th) 331 at para 8.

¹⁹⁰ *Ibid.*

¹⁹¹ Henry & Henry, *supra* note 71.

¹⁹² *Ibid.*

assessment must be controlled and expert evidence should be used.”¹⁹³ Therefore, law societies must provide lawyers with education and guidance on when and how to challenge for cause on racial grounds when representing or prosecuting an Indigenous accused, when the victim of the alleged crime is Indigenous, or where the alleged crime is interracial in nature.¹⁹⁴ An appropriate challenge for cause in the Stanley trial may have looked something like the following challenge, exercised by the Ontario Crown in *R v Rogers*:

Would your ability to judge the evidence in this case without bias, prejudice or partiality be affected by the fact that the deceased victim [is] an Aboriginal person and the person charged with the crime is a white person?¹⁹⁵

In deciding to allow the above challenge for cause, MacKinnon J explained: “Racism will be at work on the jury panel as soon as the victim is described as an Aboriginal.”¹⁹⁶ In considering this inevitability, it is key to remember that the jury selection process is driven in large part by the *discretion* of lawyers, who elect to challenge where they deem appropriate. It is, therefore, essential that lawyers receive training and guidance on the importance of using challenges for cause as a means of making race in the courtroom visible. Ruparelia explains:

Judges are not the only ones who bear responsibility for advancing change in this context. Defence lawyers must reject convenient but empty gestures to address racial inequality and vigilantly defend thoughtful, informed, and comprehensive requests to challenge for cause and appeal unreasonable denials. Prosecutors, too, have an ethical responsibility to expose juror racism by not habitually opposing challenge for cause requests and even initiating their own.¹⁹⁷

For defence counsel to make such comprehensive requests to challenge and for prosecutors to fully understand their ethical duties, law societies can and should adopt an explicit critical race litigation strategy, premised on the importance of identifying the ways in which racism frames legal

¹⁹³ *Ibid.*

¹⁹⁴ *R v Spence*, 2004 CanLII 34919 (ONCA), 73 OR (3d) 81.

¹⁹⁵ *Rogers*, *supra* note 189 at para 1.

¹⁹⁶ *Ibid* at para 6.

¹⁹⁷ Ruparelia, “Who are you calling racist?”, *supra* note 152.

processes and addressing it head-on. While challenges for cause do not directly address the problem of unrepresentative juries, they have the potential to work toward the heart of the public's concern with representation: eliminating racial biases on juries and, thus, enhancing public faith in the administration of justice.

CONCLUSION

In the wake of the Stanley trial, law societies must proactively educate and regulate lawyers with respect to jury selection, as a means restoring public faith in the administration of justice. Counterstorytelling has been used as a tool of CRT with success in Canadian jurisprudence to contextualize the lived experiences of defendants and victims, break down stereotypes, and bring the role of race in the courtroom into plain view. Law societies can and should address the crisis of unrepresentative juries by adopting the CRT strategy of counterstorytelling, as a means of expanding the *Parks* inquiry and, thereby, eliminating the possibility of unchecked racial prejudice on juries and in courtrooms. By educating lawyers on systemic racism and barriers affecting Indigenous and racialized peoples in Canada and guiding lawyers on how to ethically and correctly exercise peremptory challenges and challenges for cause, law societies have a clear and important role to play in ensuring that the Canadian justice system extends to Indigenous peoples in Canada, too.

BIBLIOGRAPHY

LEGISLATION

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, 2018, (first reading 29 March 2018).

Criminal Code, RS C 1985, c C-46, s 629(1).

Criminal Code, RS C 1985, c C-46, s 634(1).

Criminal Code, RS C 1985, c C-46, s 638(1).

Criminal Code, RS C 1985, c C-46, s 718.2(e).

Legal Profession Act, SNS 2004, c 28.

FOREIGN LEGISLATION

Criminal Justice Act 1988 (UK), c 33, s 118.

JURISPRUDENCE

R v Biddle, [1995] 1 SCR 761, 22 OR (3d) 128.

R v Fraser, 2011 NSCA 70, 273 CCC (3d) 276.

R v Gayle, 2001 CanLII 4447 (ONCA), 54 OR (3d) 36.

R v GDB, [2000] 1 SCR 520, 2000 SCC 22 (CanLII).

R v Gladue, [1999] 1 SCR 688, 1999 CanLII 679 (SCC).

R v Ipeelee, 2012 SCC 13, [2012] 1 SCR 433.

R v Jordan, 2016 SCC 27, [2016] 1 SCR 631.

R v Kokopenace, 2015 SCC 28, [2018] 2 SCR 398.

R v Parks, 15 OR (3d) 324, 24 CR (4th) 81.

R v Rogers, 2000 CanLII 22829 (ONSC), 38 CR (5th) 331.

R v S (RD), [1997] 3 SCR 484, 1997 CanLII 324 (SCC).

R v Sherratt, [1991] 1 SCR 509, 1991 CanLII 86 (SCC).

R v Spence, 2005 SCC 71, [2005] 3 SCR 458.

R v Williams, 1998 CanLII 782 (SCC), [1998] 1 SCR 1128.

INTERNATIONAL JURISPRUDENCE

Batson v Kentucky, 476 US 79 (1986) (USSC).

Regents of Univ. of California v Bakke, 438 US 265 (1978) (USSC).

GOVERNMENT REPORTS

Manitoba, The Aboriginal Justice Implementation Commission, *Report of the Aboriginal Justice Inquiry of Manitoba* (1991) vol 1.

Nova Scotia, *Royal Commission on the Donald Marshall, Jr, Prosecution: Digest of Findings and Recommendations* (Nova Scotia: 1989).

Ontario, *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by the Honourable Frank Iacobucci* (Toronto: Ministry of the Attorney General, 2013).

SECONDARY MATERIAL: MONOGRAPHS

Carol A Aylward, *Canadian Critical Race Theory: Racism and the Law* (Halifax: Fernwood Publishing 1999).

Dorothy A Brown, *Critical Race Theory: Cases, Materials and Problems* (St Paul: Thomson/West 2007).

Steve Coughlan, *Criminal Procedure*, 3rd ed (Toronto: Irwin Law 2016).

Richard Delgado and Jean Stefancic, *Critical Race Theory: an Introduction* (New York: New York University Press 2001).

Carmela Murdocca, *To Right Historical Wrongs: Race, Gender, and Sentencing in Canada* (Vancouver: UBC Press 2013).

SECONDARY MATERIAL: ARTICLES

Misha Boutilier, "Optional By-Products or Constitutionally-Protected Purposes? Societal Interests in Representativeness, the s.11(f) Right to Trial by Jury, and the Kokopenace Decision" (2018) 65 Crim LQ 458.

R Blake Brown, "Challenges for Cause, Stand-Asides, and Peremptory Challenges in the Nineteenth Century" (2000) 38:3 Osgoode Hall LJ 453.

Rosemary Cairns Way, "An Opportunity for Equality: Kokopenace and Nur at the Supreme Court of Canada" (2014) 61 Crim LQ 465.

Arthur J Cockfield, "Limiting Lawyer Liberty: How the Statement of Principles Coerces Speech" (2018) Queen's Law Research Paper Series.

Richard Devlin and David Layton, "Culturally Incompetent Counsel and the Trial Level Judge: A Legal and Ethical Analysis" (2014) 60 Crim LQ 361.

Miriam Henry and Frances Henry, "A Challenge to Discriminatory Justice: the Parks Decision in Perspective" (1996) 38 Crim LQ 333.

Cynthia Petersen, "Institutionalized Racism: the Need for Reform of the Criminal Jury Selection Process" (1993) 38 McGill LJ 147.

Kent Roach, "Challenges for Cause and Racial Discrimination" (1995) 37 CLQ 410.

Kent Roach, "The Urgent Need to Reform Jury Selection after the Gerald Stanley and Colten Boushie Case" (2018) 65 Crim LQ 271.

Rakhi Ruparelia, "Erring on the Side of Ignorance: Challenges for Cause Twenty Years after Parks" (2013) 92 Can Bar Rev 267.

Kelsey L Sitar, "Gladue as a Sword: Incorporating Critical Race Perspectives into the Canadian Criminal Trial" (2016) 20 Can Crim L Rev 247.

SECONDARY MATERIAL: NEWSPAPER ARTICLES

"The Colten Boushie case: Canadians divided on jury's verdict, but think Trudeau was wrong to weigh in", *Angus Reid Institute* (26 February 2018).

"'I've seen no evidence that race played any part': Gerald Stanley's lawyer comments on the Colten Boushie case", *CBC Radio* (26 March 2017).

“Colten Boushie and beyond: A primer on the aftermath of Gerald Stanley’s acquittal”, *The Globe and Mail* (13 February 2018).

Ian Austen, “A Murder Trial Stirs Emotions About Canada’s Relations With Indigenous Population”, *The New York Times* (9 February 2018).

Lee Berthiaume, “Trudeau’s Comments on Gerald Stanley Acquittal Are Inappropriate, Conservative MPs Say”, *Huffington Post* (11 February 2018).

Christie Blatchford, “It’s 1984 all over again for Ontario lawyers arguing against compelled speech”, *National Post* (8 November 2017).

Keith Thor Carlson, “Social media full of vitriolic myths in the aftermath of the Stanley trial”, *The Conversation* (22 February 2018).

Leyland Cecco, “Canada: Indigenous groups urge reform after shock of white farmer’s acquittal”, *The Guardian* (12 February 2018).

Sunny Dhillon, “Court case highlights concerns about Indigenous representation on juries”, *The Globe and Mail* (27 February 2018).

Andray Domise, “What the tragedy of Colten Boushie says about racism in Canada”, *Maclean’s* (26 August 2016).

Ross Earnshaw, “Promoting Better Practices—a Proactive Approach to Lawyer and Paralegal Regulation”, *Slaw* (12 February 2016).

Kyle Edwards, “Saskatchewan officials skipped a step when they formed Gerald Stanley’s jury”, *Maclean’s* (31 March 2018).

Kyle Edwards, “The Gerald Stanley verdict is a blow to reconciliation—and a terrifying one at that”, *Maclean’s* (10 February 2018).

Gilad Edelman, “Why is it so easy for prosecutors to strike black jurors?”, *The New Yorker* (5 June 2015).

Jacques Gallant, “Lawyers challenging part of Law Society of Upper Canada plan to address racism”, *The Toronto Star* (23 October 2017).

Fernando Garcia, “Statement of Principles critics: Stop fighting against us”, *Canadian Lawyer Magazine* (18 December 2017).

John Geddes, “Did Trudeau cross a line commenting on the Stanley verdict?”, *Maclean’s* (27 February 2018).

Gabrielle Giroday, “Online campaign questions LSO statement of principles”, *Canadian Lawyer Magazine* (12 February 2018).

Emma Halpern, “Community engagement and commitment to social justice: A keynote addresses by the Society’s Equity & Access Officer”, *The Society Record* (2015).

Nader R Hasan, “Eliminating peremptory challenges make trials less fair”, *The Star* (10 April 2018).

Andrea Hill, “Colten Boushie shooting: A timeline”, *Saskatoon StarPhoenix* (8 August 2017).

Sarah E Leamon, “Bill C-75 Fails to Deliver Necessary Changes to the Justice System”, *The Huffington Post* (17 April 2018).

Aidan Macnab, “Stanley acquittal should not lead to scrapping peremptory challenges, say criminal lawyers”, *Canadian Lawyer Magazine* (14 February 2018).

Naiomi Metallic, “I am a Mi’kmaq lawyer, and I despair over Colten Boushie”, *The Conversation* (18 March 2018).

David Milward, “What could reform look like, after the fury over the Stanley acquittal?”, *Maclean’s* (14 February 2018).

Shree Paradkar, “Post Colten Boushie verdict, is Twitter taking sides?”, *The Star* (21 February 2018).

Tony Pass, “A modest proposal concerning bias in the jury system”, *The Lawyer’s Daily* (23 March 2018).

Jill Perry, “Call to Action #27: The cultural competence imperative”, *The Society Record* (2015).

Rakhi Ruparelia, “Who are you calling racist? Challenging jurors for cause 20 years after *Parks*”, *CBA National Magazine* (14 July 2015).

Kent Roach, “Colten Boushie’s family should be upset: Our jury selection procedure is not fair”, *The Globe and Mail* (31 January 2018).

Alex Robinson, “Professor challenges statement of principles in court”, *Canadian Lawyer Magazine* (7 November 2017).

David M Tanovich, “How racial bias likely impacted the Stanley verdict”, *The Conversation* (5 April 2018).

David Tanovich, “Boushie’s family—and our justice system—deserves answers. So why no appeal?”, *The Globe and Mail* (8 March 2018).

John Paul Tasker, “Lawyers say post-Boushie justice reforms could actually make juries less diverse”, *CBC News* (30 March 2018).

Alice Woolley, “An Ethical Jury? Reflections on the Acquittal of Gerald Stanley for the Murder/Manslaughter of Colten Boushie”, *Slaw* (20 February 2018).

OTHER

Law Society of Ontario, “Statement of Principles – Templates”, online:
<https://www.lsuc.on.ca/with.aspx?id=2147504074>.

Nova Scotia Barristers’ Society, *Code of Professional Conduct*, Halifax: NSBS, 2011, ch 5.1.

NSBS, “Nova Scotia Barristers’ Society Vision & Values” (17 June 2016).

NSBS, “Equity & Access: Resources for lawyers and law students”, online:
<http://nsbs.org/resources-lawyers-and-law-students>.

NSBS, “NSBS Regulatory Objectives,” online: <http://nsbs.org/nsbs-regulatory-objectives>.

NSBS, “Legal Services Regulation”, online: <http://nsbs.org/legal-services-regulation>.