

5-16-2019

## Lessons from Batson in a Comparative Criminal Context: How Implicit Racial Biases Remain Unaddressed in Canadian Jury Section

Brittney Adams

Follow this and additional works at: <https://digitalcommons.law.seattleu.edu/ailj>



Part of the [Criminal Law Commons](#), [Human Rights Law Commons](#), [Indian and Aboriginal Law Commons](#), and the [Law and Race Commons](#)

---

### Recommended Citation

Adams, Brittney (2019) "Lessons from Batson in a Comparative Criminal Context: How Implicit Racial Biases Remain Unaddressed in Canadian Jury Section," *American Indian Law Journal*: Vol. 7 : Iss. 2 , Article 1.

Available at: <https://digitalcommons.law.seattleu.edu/ailj/vol7/iss2/1>

This Article is brought to you for free and open access by the Student Publications and Programs at Seattle University School of Law Digital Commons. It has been accepted for inclusion in American Indian Law Journal by an authorized editor of Seattle University School of Law Digital Commons. For more information, please contact [coteconor@seattleu.edu](mailto:coteconor@seattleu.edu).

LESSONS FROM BATSON IN A COMPARATIVE CRIMINAL  
CONTEXT: HOW IMPLICIT RACIAL BIASES REMAIN  
UNADDRESSED IN CANADIAN JURY SECTION

*By Brittney Adams*

CONTENTS

I.	INTRODUCTION.....	1
II.	CENSUS-BASED SUMMONS: WHO GETS SUMMONED FOR JURY DUTY? .....	5
	A. <i>Jury System Canada</i> .....	7
III.	JUROR CHALLENGES IN CANADA: WHO GETS TO SIT ON A JURY? .....	9
IV.	LESSONS FROM BATSON: WHO IS DENIED JUSTICE?.....	12
V.	CONCLUSION: JUSTICE FOR COLTON BOUSHIE?.....	17

# LESSONS FROM BATSON IN A COMPARATIVE CRIMINAL CONTEXT: HOW IMPLICIT RACIAL BIASES REMAIN UNADDRESSED IN CANADIAN JURY SECTION

*By Brittney Adams<sup>1</sup>*

## I. INTRODUCTION

In Canada, criminal procedure—specifically the process of jury selection—too often fails Aboriginal victims of crime. The case of Colton Boushie is perhaps the best-known example of this failure. In the late afternoon of August 9, 2017, on a country road in Saskatchewan, a twenty-two-year-old Cree man named Colten Boushie, who was looking for someone to help him with a flat tire, was fatally shot in the head by Gerald Stanley.<sup>2</sup> Boushie and several friends were returning to their home on the Red Pheasant reserve after a day of swimming, and they ended up on Stanley’s property after their vehicle broke down. Although specific events leading up to Boushie’s death are still unclear, it is confirmed that Stanley approached the vehicle in which Boushie was sitting while firing two warning shots into the air from his semi-automatic handgun, and then he shot Boushie in the back of the head. Stanley’s defense was that the gun failed to discharge at some point and that the fatal shot was the result of a hangfire.<sup>3</sup> Stanley also alleged that Boushie was

---

<sup>1</sup> J.D. Candidate, 2019, Seattle University School of Law, M.A., 2016, University of Lethbridge, B.A., 2012, University of Lethbridge. I am not of Native descent, but the land that I was born on is part of Treaty 7 land in Southern Alberta, and I am deeply influenced by that history. A special thanks to Professor Janet Ainsworth for her help on launching this Article.

<sup>2</sup> Some events of this case are contested, and the reason why Boushie was on Stanley’s property is a central area of contention. However, three Crown witnesses testified to the fact that Boushie was seeking help to deal with a flat tire. See Guy Quenneville, *What Happened on Gerald Stanley’s Farm the Day Colten Boushie was Shot, as Told by Witnesses*, CBC NEWS (February 6, 2018, 3:45 PM), <https://www.cbc.ca/news/canada/saskatoon/what-happened-stanley-farm-boushie-shot-witnesses-colten-gerald-1.4520214> [http://perma.cc/83JC-SL6W].

<sup>3</sup> Brian Pfefferle, *Gerald Stanley’s Defence of Hang Fire “Accident” Key to Jury Decision*, CBC NEWS, (February 9, 2018, 10:23 AM), <https://www.cbc.ca/news/canada/saskatchewan/hang-fire-jury-decision-1.4526255> [http://perma.cc/LMV6-FNME].

improperly on his property and that he was concerned about theft and defending his home and the surrounding farmland.<sup>4</sup>

Despite the fact that the alleged murder occurred on rural farmland, the shooting garnered particular attention in the Canadian media due to the overt racial tensions inherent to the incident. Stanley's property is on Treaty Six territory, which is home to many Cree and Assiniboine peoples. It's an area largely disconnected from the outside world; indeed, the nearest metropolitan city is 141 kilometers away.<sup>5</sup> Racial tensions in the area are tense, which is one of the reasons why it is known as the second-most dangerous place to live in the country.<sup>6</sup> Contextually, the location of Stanley's farmland is notable because of the significant number of Aboriginal people in nearby urban centers like Fort Battleford, which is where Stanley's trial ultimately occurred.

The criminal investigation following Boushie's death provoked harsh criticism from several Aboriginal advocacy groups in Canada, most of whom pointed out that the focus of the investigation appeared to concern the implied contributory fault of Boushie rather than the alleged criminality of Stanley's actions.<sup>7</sup> For example, Stanley was not immediately charged for the death of Boushie, and the crime scene was left uncovered in the rain for two days before a forensic team arrived to assess the scene. Furthermore, Boushie's family has publicly noted the insensitivity of the Royal Canadian Mounted Police (RCMP) when conveying the news that Boushie had been killed, indicating that the RCMP had taken the opportunity to rummage through their home and inquired as to

---

<sup>4</sup> *Id.*

<sup>5</sup> As of the 2016 Census, Saskatoon had a population of less than 250,000 even though it is the only metropolitan area in the region and one of only two major cities in the province. See STATISTICS CANADA, 2016 CENSUS OF POPULATION (2017), <https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/prof/details/page.cfm?Lang=E&Geo1=CSD&Code1=4711066&Geo2=PR&Code2=01&Data=Count&SearchText=saskatoon&SearchType=Begins&SearchPR=01&B1=All&TABID=1> [<http://perma.cc/6U3Z-B8B4>].

<sup>6</sup> Jason Markusoff, *Canada's Most Dangerous Places*, MACLEAN'S MAGAZINE, November 23, 2017, <http://www.macleans.ca/canadas-most-dangerous-places/> [<http://perma.cc/S83C-6WPS>].

<sup>7</sup> In particular, the Federation of Sovereign Indigenous Nations released several statements in August criticizing the RCMP's investigation. See The Federation of Sovereign Indigenous Nations facebook page, <https://www.facebook.com/FSINations/posts/justiceforcolten-colton-boushie-deserves-justice-and-anything-less-is-unacceptab/1052037891549628/> [<http://perma.cc/PX6E-6CKS>].

whether Colten's mother, who was inconsolable with the news, had been drinking that night.<sup>8</sup>

At the close of the ensuing jury trial, an all-white jury comprised predominately of local farmers found Stanley not guilty of Boushie's murder.<sup>9</sup> Given that jurors in Canada may not be questioned about their personal reasons for or deliberations in deciding a verdict, there are no public details about the jury's finding. However, the racial composition of the jury likely had a particularly significant impact on the verdict in this case. While the Crown prosecutor office has subsequently indicated that it was pleased with the composition of this jury, it is an oddity that, given the demographic of the location of the crime, not a single Aboriginal person served as one of its members; this is peculiar since the jury pool included 750 summons and 204 potential jurors appeared for *voir dire*. Of the five persons who appeared and were identified as Aboriginal, all were struck by the defense with peremptory challenges.<sup>10</sup> The ensuing outcry and media storm set the country alight with questions concerning the Canadian justice system and, in particular, juror selection in Boushie's case. Unfortunately, as legal researchers have pointed out, Boushie's case is but one of many in which white defendants have been tried by predominantly white juries for crimes committed against Aboriginal persons and found not guilty.<sup>11</sup> While some researchers have suggested that there is an undertone of malice expressed in these "not guilty" verdicts

---

<sup>8</sup> The family's account of the event was publicized in a Canadian newspaper. See Joe Friesen, *The Night that Colten Boushie Died: What Family and Police Files Say About His Last Day, and What Came After*, THE GLOBE AND MAIL (February 14, 2018), <https://www.theglobeandmail.com/news/national/colten-boushie/article32451940/> [<http://perma.cc/3LJ2-CM2G>].

<sup>9</sup> Stanley was charged with second-degree murder, or manslaughter in the alternative, and was acquitted on both charges; he later pleaded guilty to improper storage of firearms, which carries a penalty of a \$3,900 fine and disqualifies him from owning a gun for the next ten years. See Meaghan Craig, *Gerald Stanley Pleads Guilty to Gun Charge*, GLOBAL NEWS (April 17, 2018, 9:29 AM), <https://globalnews.ca/news/4148092/gerald-stanley-pleads-guilty-gun-charge/> [<http://perma.cc/HWA2-NC28>].

<sup>10</sup> Guy Quenneville, "Huge" Pool of 750 People Summoned as Potential Jurors for Colten Boushie Case, CBC NEWS (January 28, 2018, 10:00 AM), <https://www.cbc.ca/news/canada/saskatoon/huge-pool-750-people-summoned-potential-jurors-colten-boushie-1.4504633> [<http://perma.cc/E2BR-ZX89>].

<sup>11</sup> See, for example, the case of Tina Fontaine. Katie Dangerfield, *How the Tragic Death of Tina Fontaine Helped Spark the MMIWG Inquiry*, GLOBAL NEWS (February 23, 2018, 3:14 PM), <https://globalnews.ca/news/4043492/tina-fontaine-march-mmiwg-inquiry/> [<http://perma.cc/35R8-SELW>].

that stems from implicit and explicit bias,<sup>12</sup> others have sought to point the finger of blame at strong defense positions coupled with weak police investigations related to crimes involving Aboriginal victims and white defendants.<sup>13</sup> For example, many Aboriginal people in Canada have noted that police often do not adequately investigate a missing person's report when the person is Aboriginal.<sup>14</sup>

To be sure, there is not a singular factor as to why Aboriginal victims are perpetually denied justice when a white defendant is on trial or indicted as a suspect. It is likely that some of the blame for this problem may be attributed to deeply-rooted, systemic racism evidenced by a large pool of data, including the fact that Aboriginal women and girls in Canada face violence at a staggering rate;<sup>15</sup> indeed, Canada has been shamed on an international stage for its failure to address the ongoing issue of missing and murdered Aboriginal women and girls in the country.<sup>16</sup> Part of the blame may be attributed to police officers who are often less likely to investigate crimes committed against Aboriginal people, particularly when

---

<sup>12</sup> See Colby Cosh, *Gerald Stanley Being Tried By His Peers Isn't a Bug, It's a Feature*, NATIONAL POST (February 12, 2018, 3:07 PM), <http://nationalpost.com/opinion/colby-cosh-gerald-stanley-being-tried-by-his-peers-isnt-a-bug-its-a-feature> [<http://perma.cc/JZ2X-NXB3>].

<sup>13</sup> Logan Ewanation et al., *The Issue of Indigenous Underrepresentation in Canadian Criminal Juries*, AMERICAN PSYCHOLOGY-LAW SOCIETY: AP-LS NEWS, June 2017, <https://www.apadivisions.org/division-41/publications/newsletters/news/2017/06/indigenous-underrepresentation> [<http://perma.cc/HF3D-5VX9>].

<sup>14</sup> John Paul Brammer, *Why Thousands of Indigenous Women Have Gone Missing in Canada*, VOX NEWS (July 5, 2016, 2:00 PM), <https://www.vox.com/2016/7/5/12096898/missing-indigenous-women-canada> [<http://perma.cc/D787-KYCH>].

<sup>15</sup> Douglas A. Brownridge, *Male Partner Violence Against Aboriginal Women in Canada: An Empirical Analysis*, 18:1 JOURNAL OF INTERPERSONAL VIOLENCE 65, 66 (2003).

<sup>16</sup> At last count, approximately 1,000 Aboriginal women have gone missing or were murdered in the last three decades, marking a systemic failure on behalf of the justice system to address the rampant violence against Aboriginal women in the country. See *Our Women and Girls Are Sacred*, THE NATIONAL INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS (2017), <http://www.mmiwg-ffada.ca/files/ni-mmiwg-interim-report-en.pdf> [<http://perma.cc/YA8X-7WD7>]; Chantelle Bellrichard, "Urgent Actions" Needed to Address Violence Against Indigenous Women and Girls: UN Report, CBC NEWS (April 27, 2018, 4:00 AM), <https://www.cbc.ca/news/indigenous/un-special-rapporteur-violence-against-women-1.4637613> [<http://perma.cc/5ZER-4G49>].

criminal cases that occur on reserves.<sup>17</sup> But perhaps much of the blame must be attributed to the criminal justice system itself, especially the ways in which jury selection in Canada is systemically and problematically designed to produce all-white juries.

To address this systemic injustice, this Article proposes a nuanced approach to *voir dire* for Canadian criminal proceedings. Part I of this Article addresses the ways in which people are summoned for jury duty—specifically in criminal cases—in Canada. It highlights how the census-based summons process of selection for jury duty often results in the systemic erasure of Aboriginal people from opportunities to serve as potential jurors.<sup>18</sup> Part II of this Article addresses the challenges that both prosecutors and defense counsel can employ to strike jurors in criminal cases in Canada; in particular, it emphasizes the lack of attention paid to the implicit racial biases of potential jurors and attorneys during *voir dire*. Part III illustrates the potential for Batson challenges—a part of jury selection in the United States—to inform jury selection in Canada. Lastly, Part IV sets out the argument that Batson challenges, while far from perfect, still offer a markedly better option for attorneys in a Canadian context to dispute juror-challenges made on the basis of race that anything else they have at their disposal; this argument draws on the trial of Gerald Stanley as an illustration of how Canada’s adoption of Batson challenges may have produced a different jury—and possibly justice—for Colton Boushie’s family.

## II. CENSUSED-BASED SUMMONS: WHO GETS TO BE CONSIDERED FOR JURY DUTY?

---

<sup>17</sup> Melissa S. Williams, *Criminal Justice, Democratic Fairness, and Cultural Pluralism: The Case of Aboriginal Peoples in Canada*, 5:2 BUFFALO CRIM. L. REV. 451, 470 (2002).

<sup>18</sup> It should be stated from the outset that despite the importance of criminal procedure as it applies to jury trials, “criminal jury trials in Canada were used at times as a tool to punish, what the British viewed as, disloyal behavior on the part of Aboriginal people, and to persecute the customary practices of First Nations on the grounds that they constituted criminal behavior.” MINISTRY OF THE ATTORNEY GENERAL, FIRST NATIONS REPRESENTATION ON ONTARIO JURIES Para 79 (February 2013), [https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/iacobucci/First\\_Nations\\_Representation\\_Ontario\\_Juries.html#content](https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/iacobucci/First_Nations_Representation_Ontario_Juries.html#content) [http://perma.cc/RJ6P-FQ9F].

In terms of criminal procedure, there are several central tenets that underpin how potential jurors will be selected in Canada. First, Canadian criminal procedure is founded upon British common law and the British America Act of 1867.<sup>19</sup> Also, most regulations pertaining to *voir dire* in criminal cases are enshrined in the Canadian Criminal Code. A revised Criminal Code was enacted in 1955, with the second part of the Criminal Code outlining criminal procedure and sentencing.<sup>20</sup>

In addition, there is a second body of law that serves as an authority on criminal law in Canada. Drafted in 1982, the Canadian Charter of Rights and Freedoms (Charter) serves as the basis for constitutional law in Canada.<sup>21</sup> Section 11 of the Charter outlines a number of matters pertaining to criminal procedure, including the right to be presumed innocent until proven guilty, a prohibition on double jeopardy, and the right to a trial by jury.<sup>22</sup> The Charter also contains a number of provisions pertaining to Aboriginal peoples specifically, including treaty rights provisions.<sup>23</sup>

Clearly, dueling bodies of legal authority on matters of criminal law in Canada can create conflict as to which one is considered the final authority in a particular context. Typically, when provisions of the Code and the Charter conflict, the Supreme Court of Canada has most often found that Charter provisions hold.<sup>24</sup> Given the subject of this Article, it is important to note that the Charter does not feature enshrined Due Process rights equivalent to those that may be found in the United States Constitution. Instead, those rights are summarized under the umbrella category of Section 15 of the Charter, which includes the following provisions:

---

<sup>19</sup> William Renwick Riddell, "Criminal Procedure in Canada," 3 J. AM. INST. CRIM. L. & CRIMINOLOGY 28 (May 1912 to March 1913).

<sup>20</sup> PUBLIC PROSECUTION SERVICE OF CANADA, UNDERSTANDING CRIMINAL LAW IN CANADA, (December 24, 2008), <https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/fpd/ch01.html> [<http://perma.cc/6KUX-C8R5>].

<sup>21</sup> *Id.*

<sup>22</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, C 11, sec. 11 (U.K.).

<sup>23</sup> McNeil, Kent, *Aboriginal Governments and the Canadian Charter of Rights and Freedoms*, 34:1 OSGOODE HALL L. J. 61, 64-65 (1996); Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, C 11, sec. 35 (U.K.).

<sup>24</sup> Andrew Petter and Allan C. Hutchinson, "Rights in Conflict: The Dilemma of Charter Legitimacy," 23:3 UNI. BRITISH COLUMBIA L. REV. 531, 540 (1989).



(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Furthermore, as noted above, Section 11 of the Charter outlines various rights that defendants in criminal cases have, including the right “to the benefit of trial by jury where the maximum punishment for the offense is imprisonment for five years or a more severe punishment.”<sup>25</sup> Conspicuously absent is something within this Charter’s provision about the right of a defendant to be tried by a *jury of one’s peers*, though this nuance has been read into most criminal procedure in Canada via common law.<sup>26</sup> However, the absence of language pertaining to a defendant’s right to be tried by a jury of his or her peers is potentially a critical omission.

#### A. *Jury Selection in Canada*

Procedurally, every province in Canada provides for its own methods of juror selection in criminal trials, though all provinces use a roughly equivalent system.<sup>27</sup> For example, in the province of

---

<sup>25</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, C 11, sec. 11(f) (U.K.).

<sup>26</sup> See the reasoning in *R. v. Sherratt*, 1 S.C.R. 509 (Can. 1991), a case that describes a jury in a contemporary setting as being “envisioned as a representative cross-section of society, honestly and fairly chosen.” Notably, in most provinces in Canada until the 1970’s, only men with minimum property requirements could serve on juries. See Ministry of the Attorney General, *supra* 18, para 107.

<sup>27</sup> In addition to similar processes for juror selection, all provinces also utilize a procedure called a “coroner’s inquest” prior to *voir dire* for homicide trials. These processes serve the narrow interest of fact-finding to determine whether a crime is suspected to have had occurred, and a broader public function to determine whether public interest would be best served by pursuing an

Alberta, the process for jury selection is outlined in the Jury Act and the Jury Act Regulation, both of which are provincial statutes.<sup>28</sup> Since 1993, juror panels in Alberta have been drawn from the Motor Vehicle client database (MOVES).<sup>29</sup> MOVES contains information on individuals who have any of the following: (1) an operator's license, (2) a vehicle registration, (3) an identification card, (4) a handicapped placard, or (5) an unpaid fine resulting from a motor vehicle/traffic/pedestrian violation.<sup>30</sup> Further, in most districts, there is a specified geographic radius around the courthouse from which prospective jurors are drawn based on directory information contained in MOVES. Similarly, in other provinces, potential jurors are selected according to data collected from annual census data.<sup>31</sup> The result of employing this selection system is that a disproportionate number of individuals are drawn from the urban communities where courthouses are located.

This urban-rural divide is not a novel concept in terms of socio-political contexts, but it does have specific implications for racial divides in juror selection in Canada. Traditionally, the border lines for most reservations and treaty-territories in Canada have been drawn in rural and remote areas that are far from metropolitan opportunities and influences.<sup>32</sup> This rural-urban divide, as well as the fact that many Aboriginal people continue to live on rural reserves, has resulted in the rampant poverty, systemic lack of resources, and marginalization of many Aboriginal communities in

---

investigation into the death. See Ministry of the Attorney General, *supra* 18, para 245-247. All criminal law in Canada is technically considered to be of federal jurisdiction. However, individual provinces have the power to set their own regulations pertaining to the administration of criminal law matters. See *Who's Law Is It Anyways? A Guide to Canadian Criminal Law*, QUEEN'S UNIVERSITY (January 2, 2018) <https://certificate.queenslaw.ca/blog/whose-law-is-it-anyway-a-guide-to-canadian-criminal-law> [http://perma.cc/7N7F-WY3R].

<sup>28</sup> Letter from Marie Strauss, Executive Director, Court of Queen's Bench Administration. On file with author.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> See, for example, Ministry of the Attorney General, *supra* note 18, for more information on juror selection in Ontario. The central concern with census-based data as the foundation for juror selection is that census data is not always conducted on Indian reservations.

<sup>32</sup> See Indigenous and Northern Affairs Canada, *Urban Reserves*, GOVERNMENT OF CANADA (April 11, 2017) <https://www.aadnc-aandc.gc.ca/eng/1100100016331/1100100016332> [http://perma.cc/W29X-LSKS].

Canada.<sup>33</sup> Additionally, for those Aboriginal peoples who do reside in major metropolitan or urban areas, statistics show that they are between three and six times as likely as non-Aboriginal peoples to become the victims of violent crime.<sup>34</sup>

Further, unlike in the United States there are no drawn jurisdictional lines distinguishing “Indian Country” in Canada apart from those that recognize treaty territory or reserve lands.<sup>35</sup> For example, while there are some “stand alone” police departments that are controlled by Aboriginal peoples that have jurisdiction concerning the enforcement of the Criminal Code in a reserve, there are relatively few of these departments, and arrests made within those communities will still be funneled into the mainstream criminal justice system because Aboriginal tribes in Canada do not have their own court systems.<sup>36</sup>

This form of imposed integration has profound implications on the criminal justice system as well. For example, as noted above, while some Aboriginal reserves are located near enough to courthouses to be drawn within the radius from which jury selection is pooled, many reserves are not. Beyond that, individuals who do not own a vehicle or who are not listed in MOVES will not be included in the potential juror selection process. Thus, any pool of potential jurors is likely to be disproportionately composed of those individuals who both live in urban areas near courthouses and have produced or submitted data that has been stored in MOVES. As noted above, no Charter provision provides for a defendant’s right to be tried by a jury of his or her peers, and as such, there has been little concern expressed regarding the composition of juries in Canada.

### III. JUROR CHALLENGES: WHO ACTUALLY GETS TO SIT ON THE JURY?

One of the central differences between jury selection in Canada and the United States is the likelihood for potential jurors to be

---

<sup>33</sup> See generally Christopher Bagley, *Poverty and Suicide Among Native Canadians: A Replication*, 69:1 PSYCHOLOGICAL REPORTS 149-150 (1991).

<sup>34</sup> CRIME IN CANADIAN SOCIETY 250-262 (Robert A. Silverman, James J. Teevan, & Vincent F. Sacco eds., 6th ed. 2000).

<sup>35</sup> There are substantial legal jurisdictional differences between Canada and the United States pertaining to reservations. See Williams, *supra* note 17.

<sup>36</sup> *Id.*

questioned prior to actual selection. Barring extraordinary circumstances, jurors in Canada may not be questioned prior to trial.<sup>37</sup> In fact, the common practice for juror selection in most criminal cases involves each counsel receiving a list of potential jurors that sometimes includes information about each potential juror's occupation.<sup>38</sup> This is the only data regarding the potential jurors available to counsel. For example, the Ontario Bar Association describes the jury selection process as follows:

In a criminal trial, the prospective juror goes to the front of the courtroom and faces the accused. At that point, the person is either accepted by each of the lawyers or rejected by one of them. The Crown attorney and defense counsel can reject a limited number of prospective jurors without giving a reason. That is known as a peremptory challenge. In some cases, counsel pose a few pre-determined questions to each prospective juror to ensure that they will be able to decide the case free of prejudice or bias such as: Would your ability to judge the evidence in this case without bias be affected by anything you have heard or read about this case in the media?<sup>39</sup>

In short, in most province, the Crown and defense counsel alternate between calling potential jurors to come forward. When the potential juror comes forward, each counsel is given the opportunity to observe the juror.<sup>40</sup> As noted in the example above, counsel may or may not ask the potential juror rudimentary questions; specifically, no attempts to expose the biases or other personal experiences of a juror are permitted. Conversely, for American criminal trials it is not uncommon for both the prosecutor and defense counsel to ask potential jurors a plethora of questions, including those that may indicate racial bias among potential

---

<sup>37</sup> Regina Schuller & Neil Vidmar, *The Canadian Criminal Jury*, 62 CHICAGO-KENT L. REV., 497, 502 (2010).

<sup>38</sup> *Id.*

<sup>39</sup> Judith Heinz, *Peremptory Challenges in Criminal Cases: A Comparison of Regulation in the United States, England, and Canada*, 16 LOYOLA OF LOS ANGELES INTERNATIONAL AND COMPARATIVE LAW REVIEW 201, 206 (1993).

<sup>40</sup> Neil Vidmar, *The Canadian Criminal Jury: Searching for a Middle Ground*, 62 LAW AND CONTEMPORARY PROBLEMS, 141, 150 (1999).

jurors.<sup>41</sup> For example, some attorneys pose broader political questions on topics like illegal immigration in an attempt to uncover underlying racial biases of potential jurors.<sup>42</sup> In this way, the American system seeks to solicit certain information from individual jurors, whereas the Canadian systems purposefully preserves ambiguities.

The remaining ambiguity leads to what some legal critics in Canada have called a reliance on stereotypes, whereby counsel simply decides to strike a juror based primarily on what they observe about that individual when he or she is called forward.<sup>43</sup> Based primarily on these observations, each counsel takes turns striking potential jurors without explanation.<sup>44</sup> The process is short, to the point, and unclear in terms of the identities, experiences, and personal intersections of each juror. The number of peremptory challenges that each attorney may use in criminal cases is dictated in the Canadian Criminal Code Section 634 and varies based on the crime for which the defendant is accused. For example, if a defendant is charged with first degree murder, the prosecutor and defense counsel may each strike 20 potential jurors with peremptory challenges.

Because of these structural issues, the Canadian jury selection process is flawed in several ways. In Canada, an attorney's ability to decide a juror's fitness based on his or her occupation or a first impression of a potential juror hosts a multitude of implicit—or even potentially explicit—bias issues, the parameters of which are too lengthy for this Article.<sup>45</sup> A system that relies on counsel leaving unaddressed even the most basic questions regarding the fitness of a potential juror inevitably results in attorney's making decisions about potential jurors that are based on mere first impressions. While racial biases are of central concern in this Article, it should also be noted that the Canadian jury selection

---

<sup>41</sup> David Suggs & Bruce Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 INDIANA L. J. 245, 258-259 (1980).

<sup>42</sup> Ashok Chandran, *Color in the "Black Box": Addressing Racism in Juror Deliberations*, 5 COLUM. J. RACE & L. 28, 39 (2014).

<sup>43</sup> Robert Khurana, *Racially Representative Juries: Empowering People of Color and Local Communities*, thesis submission to Carlton University, (1997), <https://www.collectionscanada.gc.ca/obj/s4/f2/dsk2/ftp04/mq22088.pdf>. [<https://perma.cc/NTY6-E3T5>] (last visited Mar. 18, 2019)

<sup>44</sup> *Id.*

<sup>45</sup> Schuller & Vidmar, *supra* 37 at 502 (noting the usual lack of juror questioning in voir dire in Canada).

process has also been used to prop up essentialist notions of gender, which prosecutors have utilized to strike all self-identifying men from a jury, believing that women were more likely to convict a man accused of sexually harassing a woman in her workplace.<sup>46</sup> Thus, the Canadian jury selection process provides no method for addressing the issues associated with having biased jurors serve on a trial and nullifies any opportunity for counsel to strike potential jurors for cause.<sup>47</sup>

### III. LESSONS FROM BATSON: WHO IS DENIED JUSTICE?

In juxtaposition with the options available to Canadian attorneys during jury selection, Batson challenges provide a layer—although perhaps a toothless one—to ensure that American attorneys are not striking potential jurors solely on the basis of race.<sup>48</sup> Beginning with the advent of the Fifth Amendment, the protections of which were subsequently applied to the states by the Equal Protection Clause of the Fourteenth Amendment, courts in the United States have recognized that individuals may not be excluded from serving on juries solely due to race or ethnicity.<sup>49</sup> However, it was not until *Batson v. Kentucky* which was decided in 1986 that the Supreme Court fully and tangibly recognized this right.<sup>50</sup>

*Batson* established that a criminal defendant has the right to show or allege that a prosecutor has unconstitutionally used his or her peremptory challenges to remove potential jurors solely on the basis of their race.<sup>51</sup> In addition, the *Batson* Court outlined a three-step analysis for determining whether or not a defendant has successfully raised a *Batson* challenge.<sup>52</sup> First, the defendant must establish that the juror in question is a member of a particular and

---

<sup>46</sup> R. v. Pizzacalla (1991) 50 O.A.C 161 (CA).

<sup>47</sup> Heinz *supra* 39 at 506.

<sup>48</sup> See *Batson v. Kentucky*, 476 U.S. 79 (1986).

<sup>49</sup> U.S. Const. amend. V; U.S Const. amend. XIV; *see generally Chavez v. Martinez*, 538 U.S. 760, 123 S. Ct. 1994 (2003). It is not my intention to use race and ethnicity as synonymous, but rather a parallel in this case to broaden the scope of this discussion to include individuals who have experienced disenfranchisement based on race, ethnicity, or both.

<sup>50</sup> Anthony Page, *Batson's Blind Spot: Unconscious Stereotyping and the Preemptory Challenge*, 85 BOSTON UNIVERSITY LAW REVIEW 155, 158 (2005).

<sup>51</sup> Specifically, the *Batson* court holds that a prosecutor may not use peremptory strikes to remove potential members of a jury who are of the same race as the defendant.

<sup>52</sup> *Batson*, 476 U.S. at 96..

identifiable racial group, and that the facts surrounding the prosecutors peremptory challenges raises the inference of discrimination.<sup>53</sup> The prima facie burden is originally on the defendant, but if this burden is met, responsibility shifts to the prosecutor in the second step and requires her to show “a reasonably specific neutral explanation of legitimate reasons, related to the case being tried, for the peremptory challenges.”<sup>54</sup> Finally, the court must determine whether or not the *Batson* standard has been met:

The decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge.<sup>55</sup>

Despite the promise of these challenges, a great deal of ink has been spilled by legal scholars remarking on the ineffectiveness of *Batson* challenges in safeguarding potential jurors from being struck on the basis of their race.<sup>56</sup> According to recent studies, approximately only seventeen percent of *Batson* challenges are sustained.<sup>57</sup> While *Batson* challenges are one tool in ensuring that a criminal defendant is truly tried by a jury of his or her peers, it is far from a comprehensive solution when it comes to ensuring equitable juries for American criminal trials.

And yet, despite the ineffectiveness of *Batson* challenges in ensuring that potential jurors are not struck on the basis of race, there are no similar protections afforded to potential jurors in Canada. Canadian political scientists and legal scholars have, for years, been

---

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* Scholars and researchers have argued that this burden of showing on the prosecution is a relatively low threshold. For example, see the discussion in the podcast “More Perfect” *Object Anyway*, <https://www.wnycstudios.org/story/object-anyway>.

<sup>55</sup> Mikal C. Watts and Emily C. Jeffcott, *A Primer on Batson, Including Discussion of Johnson v. California, Miller-El v. Dretke, Rice v. Collins, & Snyder v. Louisiana*, 42 ST. MARY'S L. J. 337, 346 (2011).

<sup>56</sup> Heinz, *supra* 39 at 201.

<sup>57</sup> Sean Overland, *The Shrinking Strike Zone: Avoiding Problems During Jury Selection in the Age of Batson*, THE JURY EXPERT: THE ART AND SCIENCE OF LITIGATION ADVOCACY (2010). <https://www.thejuryexpert.com/2010/05/the-shrinking-strike-zone-avoiding-problems-during-jury-selection-in-the-age-of-batson/> [(last visited May 8, 2019)].

emphasizing issues with jury selection, but no one has yet to address the ways in which *Batson* is applicable in cases where the victim is Aboriginal and the defendant is white.<sup>58</sup> Specifically, in the case of Colten Boushie, the wake of Gerald Stanley’s trial has produced a bona fide media storm from journalists and political scientists alike; however, as of this publication, there are no scholarly sources that have investigated and considered the applicability of a *Batson*-like challenge to peremptory strikes in Canadian criminal cases. Why is this?

In terms of structure, many of the rules that bind the courts of both Canada and the United States are based on legal precedent; in other words, rules of law arise from binding legal decisions established within relevant jurisdictions. Although all provinces in Canada except Quebec follow common-law systems, the procedural intricacies that dictate how legal precedent must be followed are largely the same in terms of rules and procedure in both countries.<sup>59</sup> Thus, given that the United States has had the opportunity to recognize race-based challenges to peremptory strikes,<sup>60</sup> the question becomes the following: Have Canadian courts ever been faced with the same question or consideration?

The first occasion in recent history upon which the Supreme Court of Canada was presented with the opportunity to address a bare requirement of a representative jury as a constitutional prerequisite in criminal trials, was *R. v. Sherratt* in 1991.<sup>61</sup> In that case, the defendant had been accused of killing a pimp; the case itself was highly publicized, and many facts of the case became known to the public well in advance of the trial. As a result, at trial, the Defendant attempted to strike every single juror that was called, based on the grounds of partiality. The judge did not permit the

---

<sup>58</sup> There is an abundance of newspaper articles on this topic specifically, but there is a general gap in the literature on this topic that draws on particular case studies as illustrative of how this application is possible.

<sup>59</sup> Although Quebec follows a civil law system, the Supreme Court of Canada is still the ultimate authority for all appellate issues. See France Allard, “The Supreme Court of Canada and its Impact on Bijuralism,” *The Department of Justice Canada*, <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/harmonization/hfl-hlf/b3-f3/bf3a.pdf> [<https://perma.cc/A3LC-9F34>] (last visited Mar. 18, 2019).

<sup>60</sup> See Richard Wolf, “Six Trials for the same murders: Justices Side with Inmate Curtis Flowers,” USA TODAY (March 20, 2019) [https://www.usatoday.com/story/news/politics/2019/03/20/six-trials-same-murders-justices-side-black-mississippi-inmate-curtis-flowers/321626002/\(discussing the case of Curtis Flowers\)](https://www.usatoday.com/story/news/politics/2019/03/20/six-trials-same-murders-justices-side-black-mississippi-inmate-curtis-flowers/321626002/(discussing%20the%20case%20of%20Curtis%20Flowers)).

<sup>61</sup> *R. v. Sherratt*, [1991] 1 S.C.R. 509, [1991] S.C.J. No. 21.



strikes, and the Defendant was subsequently convicted. Later, the appellate court dismissed the appeal, noting that “[c]hallenges for cause are properly used to rid the jury of prospective members who are not indifferent . . .but they stray into illegitimacy is used merely, without more, to over—or under—represent a certain class in society or as a ‘fishing expedition’ in order to obtain personal information about the juror.”<sup>62</sup>

Later, in *Pierre v. McRae* (2010), similar issues of representation on juries were addressed.<sup>63</sup> In two separate cases where suspicious deaths occurred, the families of the deceased Aboriginal victims produced an affidavit demonstrating the shocking lack of inclusion of Aboriginal peoples on juries in neighboring districts and, subsequently, requested that the presiding coroner on each case issue a summons to the Director of Court Operations to inquire as to how the jury call would occur in each potential case. Each coroner refused to issue the summons. Specifically, one of the families of the deceased victims posed the following four questions about jury call:

- i. What efforts were made by the Sheriff to select names of eligible persons for the jury roll that reside on Indian reserves in the Thunder Bay district?
- ii. What records were used by the Sheriff to obtain the names of the residents of the Indian reserves that exist in the Thunder Bay district?
- iii. How many jury questionnaires/notices were sent to First Nation on-reserve residents?
- iv. How many First Nation individuals from Indian reserves are on the current jury roll?<sup>64</sup>

Each coroner refused to issue the summons. Ultimately, the reviewing body ignored the questions posed by the families after deciding that they were “not vital to the purpose of the inquest.”<sup>65</sup> No other legal action was then taken to further investigate the deaths.<sup>66</sup> More recently, Canadian courts were presented with the

---

<sup>62</sup> *Id.*

<sup>63</sup> *Pierre v. McRae*, [2011] 104 O.R. (3d) 321, 2011 ONCA 187.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

opportunity to consider the issue of racial bias in jury selection in the 2015 Supreme Court case of *R. v. Kokopenace*.<sup>67</sup> The facts of that case surrounded the trial and conviction of Clifford Kokopenae, an Aboriginal man from Ontario's Kenora District, for manslaughter. Kokopenae appealed his conviction, arguing that his Charter rights had been violated because the composition of the jury that convicted him was not sufficiently representative of his peers. The Court expressed its views on the matter as follows:

Representativeness is an important feature of our jury system, but its meaning is circumscribed. What is required is a representative cross-section of society, honestly and fairly chosen. With respect to the jury roll, representativeness focuses on the process used to compile it, not its ultimate composition.<sup>68</sup>

While the Ontario Court of Appeals agreed with Kokopenae and ordered a new trial, the Supreme Court reversed and reinstated Kokopenae's conviction, noting that the critical feature at issue was limited to whether or not a "fair opportunity" had been provided to select "a broad cross-section of society to participate."<sup>69</sup> While *Kokopenae* is illustrative of several issues associated with the problem of jury selection in Canada, it provides no meaningful solution to the issue raised and serves as a rejection of the notion that implicit bias and inequality permeates the current jury selection process. The holding in this case erodes the possibility of common law evolving to a point that would allow for the recognition of *Batson*-like challenges in Canada.

Since Canadian courts have offered no meaningful solution to the ongoing matter of racial bias in jury selection, the federal government recently took action in response to the swell of public attention that the issue has received. On March 29, 2018, Minister of Justice and Attorney General of Canada Jody Wilson-Raybould introduced Bill C-75. Reaching over 300 pages in length, the proposed legislation would establish sweeping reforms to *voir dire*

---

<sup>67</sup> *R. v. Kokopenace*, [2015] S.C.C 28, [2015] S.C.J. No. 28.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

in Canada by striking entire portions of the Criminal Code that provide for peremptory juror strikes.<sup>70</sup> This proposed legislation has provoked extensive backlash—primarily from defense attorneys who have convincingly argued that they use peremptory strikes to include more non-white individuals on juries.<sup>71</sup>

As of yet, beyond the flippant attitude that Canadian courts have thus far adopted in response to criticism of the system by legal scholars and activists in the country, there are other measures that some American states have adopted to attempt to combat racist underpinnings in the criminal justice system that reach beyond the scope of a judge or panel of justices. For example, Washington state has recently adopted pattern jury instructions that attempt to correct—or at least address—the issue of racial bias on juries when deliberating.<sup>72</sup> Conversely, there are no steps that have been taken to address similar issues in Canada, a fact which has prompted many legal scholars to comment that “justice is blind”—especially when it comes to race—in a way that preserves racial disparities in the criminal justice system and thereby disadvantages Aboriginal peoples.<sup>73</sup>

#### PART IV: CONCLUSION: JUSTICE FOR COLTEN BOUSHIE ?

In light of the clear distinctions between Canadian and American legal approaches to *voir dire*, the central question of inquiry is whether or not the adoption of *Batson*-style challenges in

---

<sup>70</sup> A proposed elimination of peremptory strikes is not a concept that is new to American law. *See, for example*, Jeff Rosen, *Jurymandering: A Case Against Peremptory Challenges*, 23 NEW REPUBLIC 15 (Nov. 30, 1992). Bill C-75 is currently in the process of being reviewed by the Senate Committee on Legal and Constitutional Affairs. *See* Legis Info Bill Tracker, <https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=9745407> [<https://perma.cc/Y8VE-GUAR>] (last visited Mar. 19, 2019). *See also* Bill C-75, <https://www.parl.ca/DocumentViewer/en/42-1/bill/C-75/third-reading> (last visited May 8, 2019) (containing the text of the Bill).

<sup>71</sup> John Paul Tasker, *Lawyers say post-Boushie justice reforms could actually make juries less diverse*, CBC NEWS, March 30, 2018, <http://www.cbc.ca/news/politics/liberal-justice-reforms-jury-selection-1.4600007> [<https://perma.cc/3UZW-J7G3>] (last visited Mar. 19, 2019).

<sup>72</sup> *See* the Washington General Rule 37, <https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/GR37.pdf> (last visited May 8, 2019).

<sup>73</sup> Chelsea Laskowski, *New Book Says Jurors at Gerald Stanley Trial Weren't Equipped to Tackle Hangfire Defense*, CBC NEWS, January 21, 2019, <https://www.cbc.ca/news/canada/saskatchewan/gerald-stanley-trial-book-1.4986715> (last visited May 8, 2019).

Canada may have produced different results in cases like Stanley's. The answer is most likely an unsatisfactory "maybe." Given the location of the crime and subsequent trial, the disproportionate majority of juror panelists called for Gerald Stanley's trial were members of the city of Battleford and members of other surrounding rural communities who had the time, means, and resources to respond to their juror summons.<sup>74</sup> Aboriginal peoples constitute approximately one-quarter of the city's population.<sup>75</sup> However, at jury selection, only five individuals who responded appeared to be Aboriginal, and all five of them were struck by the defense.<sup>76</sup> As a result, the entirety of the jury at trial appeared to be white.<sup>77</sup> This left such an impression on the Boushie family that they went public about their concerns that peremptory strikes were used to eliminate all individuals who appeared to be Aboriginal.<sup>78</sup>

Further, this case is particularly illustrative of how peremptory challenges are used to eliminate any opportunity for defendants to truly be tried by "a jury of their peers."<sup>79</sup> For example, as noted above, nearly one quarter of Battleford's population is of Aboriginal descent, with an even higher concentration of Aboriginal peoples on the reservations surrounding the city.<sup>80</sup> However, given the fact that not a single member of Gerald Stanley's jury was Aboriginal, he was not truly tried by a jury that adequately represented his community. Further, given that jurors in Canada are not permitted to speak about the reasoning behind their verdicts—

---

<sup>74</sup> Battleford has been called the most dangerous place to live in Canada, due to high crimes rates. See Markusoff *supra* 6.

<sup>75</sup> *Id.*

<sup>76</sup> Bill Graveland, *Gerald Stanley Trial: Lawyers Rejected Indigenous Jurors, Boushie's Family Says*, HUFFINGTON POST, January 29, 2017, [https://www.huffingtonpost.ca/2018/01/29/gerald-stanley-trial-lawyers-rejected-indigenous-jurors-boushies-family-says\\_a\\_23347254/](https://www.huffingtonpost.ca/2018/01/29/gerald-stanley-trial-lawyers-rejected-indigenous-jurors-boushies-family-says_a_23347254/) [<https://perma.cc/APX4-59NN>] (last visited Mar. 19, 2019).

<sup>77</sup> *Id.*

<sup>78</sup> CBC Radio, *I Was Blind to the Racial Tension: Colton Boushie's Family Speaks Out in the Aftermath of His Death*, February 21, 2018, <https://www.cbc.ca/radio/outintheopen/i-was-blind-to-the-racial-tension-colten-boushie-s-family-speaks-out-about-the-aftermath-of-his-death-1.4445326> [<https://perma.cc/BU5Y-K9NC>] (last visited Mar. 19, 2019).

<sup>79</sup> See Part I this Article.

<sup>80</sup> See Statistics Canada Report (2016), <https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/prof/details/page.cfm?Lang=E&Geo1=POPC&Code1=1538&Geo2=PR&Code2=47&Data=Count&SearchText=Battleford&SearchType=Begins&SearchPR=01&B1=All&GeoLevel=PR&GeoCode=1538&TABID=1> [<https://perma.cc/J4EB-QJK2>] (last visited Mar. 19, 2019).

another significant difference from the American system—it is practically impossible to discern the extent to which race may have played a part in Stanley’s acquittal.

Even beyond the surface-level issues associated with juror selection in Boushie’s case, Stanley’s case was also especially controversial because it ignited fierce debate in the country about gun ownership and property defense.<sup>81</sup> In particular, the rural area surrounding Fort Battleford has historically been politically conservative, and one of the prevalent legal theories espoused by individuals in that community who supported Stanley’s acquittal stressed the importance of a legally-recognized right to defend one’s property; in this case, Stanley alleged that Boushie was improperly on his property and that he was concerned about property theft, so—just as many citizens of Florida have openly endorsed the “stand your ground” doctrine—supporters of Stanley alleged that he was well within his right to “defend” his property.<sup>82</sup> However, as noted by Mi’kmaq lawyer and professor Naomi Metallic, those same people “fail to see the bitter irony that the property in question here are lands from which Indigenous groups have been displaced through colonization.”<sup>83</sup>

Thus, Colten Boushie’s case not only illustrates issues associated with the current jury selection process in Canada, it also highlights its need for reformation and restructuring. In particular, the outright refusal of the Supreme Court of Canada to interpret common law in a manner that adequately addresses the issue of racial disparities in jury compositions has left little room for any change to occur via the courts. Moreover, as the precedent set in *Kokopenace* is but three years old, it is difficult to imagine the potential for it to be overturned in the near future.<sup>84</sup>

---

<sup>81</sup> See Joe Friesen, *The Night Colten Boushie died: What Family and Police Files Say About His Last Day, and What Came After*, THE GLOBE AND MAIL, February 14, 2018, <https://www.theglobeandmail.com/news/national/colten-boushie/article32451940/> [<https://perma.cc/S93D-WTKC>] (last visited Mar. 19, 2019)

<sup>82</sup> See Denise Drake, *The Castle Doctrine: An Expanding Right to Stand Your Ground*, 39 ST. MARY’S L. J. 573 (2008).

<sup>83</sup> Naomi Metallic, *I am a Mi’kmaq lawyer, and I despair over Colten Boushie*, THE CONVERSATION, March 18, 2018, <http://theconversation.com/i-am-a-mikmaq-lawyer-and-i-despair-over-colten-boushie-93229> [<https://perma.cc/8GA3-SWLK>] (last visited Mar. 19, 2019).

<sup>84</sup> Zinejda Rita, *R.v. Kokopenace: A Missed Opportunity for Action*, THE COURT, (September 1, 2015), <http://www.thecourt.ca/r-v-kokopenace-missed-opportunity-for-action/>.

In terms of legislative progress vis-a-vis the issues expressed around Bill C-75, the possibility of this legislative action resulting in a more equitable system is unclear. Further, the conflict between the Charter's requirements and the jury selection process detailed in the Canadian Criminal Code, it is unlikely that the passage of Bill C-75 would lead to comprehensive and systemic changes pertaining to this problematic process. However, what is clear is that the implementation of *Batson*-like peremptory challenges in Canada would offer a sorely lacking foundational layer of protection against those racial biases that affect jury selection, and at the bare minimum, such a change would contribute to the widespread recognition of the fact that racial bias not only exists in the Canadian criminal justice system but also has a profound impact on who has access to—or the right to receive—the protections of justice in Canada.