



BILL C-75: Peremptory Challenges



Role of Jury in Canadian Court System

Canadian Charter of Rights and Freedoms - Section 11(f):

“Any person charged with an offence has the right [...] except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment”

“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.”

- L'Heureux-Dubé J. *R v Sherratt*, [1991] SCR 509 at para 30

Jury Selection, Pre C-75

- ▶ Jury array selected from citizens within a jurisdiction according to the *Jury Act* taken from list of electors, telephone directories, Henderson Directories, or “any other source the sheriff considers appropriate”
 - ▶ People with a criminal record not
- ▶ Juries members assembled are excused for a variety of reasons by the judge
- ▶ After this, Crown or accused can dismiss juries in one of two ways:
 - ▶ Challenge for Cause
 - ▶ Peremptory Challenge

Peremptory Challenges

Pre C-75

- ▶ *Criminal Code* s 635
- ▶ **Order of challenges**
- ▶ **635 (1)** The accused shall be called on before the prosecutor is called on to declare whether the accused challenges the first juror, for cause or peremptorily, and thereafter the prosecutor and the accused shall be called on alternately, in respect of each of the remaining jurors, to first make such a declaration.

Peremptory Challenges

Pre C-75

- ▶ *Criminal Code s 634*
- ▶ **Peremptory challenges**
- ▶ **634 (1)** A juror may be challenged peremptorily whether or not the juror has been challenged for cause pursuant to [section 638](#).
- ▶ **Maximum number**
- ▶ **(2)** Subject to subsections (2.1) to (4), the prosecutor and the accused are each entitled to
 - ▶ **(a)** twenty peremptory challenges, where the accused is charged with high treason or first degree murder;
 - ▶ **(b)** twelve peremptory challenges, where the accused is charged with an offence, other than an offence mentioned in paragraph (a), for which the accused may be sentenced to imprisonment for a term exceeding five years; or
 - ▶ **(c)** four peremptory challenges, where the accused is charged with an offence that is not referred to in paragraph (a) or (b).

Gerald Stanley Trial



As each indigenous juror was challenged, there was a deepening feeling of hopelessness [...] I walked away from this case believing that peremptory challenges are not in the interests of justice, and indeed borders on state-sanctioned discrimination.

- Chris Murphy
lawyer for family of Colten Boushie

Trial of Gerald Stanley: Reaction

Indigenous · Opinion

Canadian justice system needs overhaul in light of Gerald Stanley verdict

'Knee-jerk reaction': Lawyers worried about proposed changes to trial system in wake of Gerald Stanley trial

'It could have been me': Some farmers say they are easy targets, donate to Gerald Stanley fund

'We have a problem here. It's not a race problem. It's a criminal problem'

Canadians divided on Gerald Stanley verdict: poll

Bill C-75

► *Bill C-75 Summary (c):*

(c) abolish peremptory challenges of jurors, modify the process of challenging a juror for cause so that a judge makes the determination of whether a ground of challenge is true, and allow a judge to direct that a juror stand by for reasons of maintaining public confidence in the administration of justice;

“[Bill C-75] will help reduce over-representation of indigenous people and marginalized people in the criminal justice system. It will make our juries more representative of the communities they serve and they will make the criminal justice system fairer, more efficient and effective”

- Jody Wilson-Raybold, March 28, 2018

Peremptory Challenges: Advantages to Accused

- ▶ For the most part, Peremptory Challenges give advantages to accused people:
 - ▶ Can attempt to get a more representative jury for an accused of a visible minority
 - ▶ Can rule out disinterested or overtly hostile parties
 - ▶ Can ensure that those who do not take the court system seriously do not participate in a finding of guilt
 - ▶ Attempts to ensure a jury that is more in tune with a set of circumstances and common experiences to an accused person and population of the community
- ▶ Courts have long ruled there is no right to a perfectly representative jury:
 - ▶ *R v Biddle*, [1995] 1 SCR 761 hold that, so long as the jury array is conducted adequately the juries must not be strictly representative of the population

Peremptory Challenges: Reaction to Bill C-75

It serves as a limited and quick means for Crown and defence lawyers alike to dismiss jurors who they suspect may be unsuitable. These suspicions might be based upon subtle visual cues such as frowning or smirking, or perhaps a juror expressed no interest in serving but was denied a hardship exemption.

[...]

Ironically, it is Indigenous members of our society who disproportionately find themselves standing in a prisoner's dock before a room full of white potential jurors, with few if any Indigenous people in sight. It is a common experience for defence lawyers in this situation to challenge as many non-Indigenous members of the jury pool as possible in the usually futile hope of securing even one Indigenous juror to “even the deck.”

- Kelly Dawson, former CTLA president

“Should Jury Selection Be Changed?” December 1, 2018

Challenge for Cause: Pre C-75

- ▶ **638 (1)** A prosecutor or an accused is entitled to any number of challenges on the ground that
 - ▶ **(a)** the name of a juror does not appear on the panel, but no misnomer or misdescription is a ground of challenge where it appears to the court that the description given on the panel sufficiently designates the person referred to;
 - ▶ **(b)** a juror is not indifferent between the Queen and the accused;
 - ▶ **(c)** a juror has been convicted of an offence for which he was sentenced to death or to a term of imprisonment exceeding twelve months;
 - ▶ **(d)** a juror is an alien;
 - ▶ **(e)** a juror, even with the aid of technical, personal, interpretative or other support services provided to the juror under [section 627](#), is physically unable to perform properly the duties of a juror; or
 - ▶ **(f)** a juror does not speak the official language of Canada that is the language of the accused or the official language of Canada in which the accused can best give testimony or both official languages of Canada, where the accused is required by reason of an order under [section 530](#) to be tried before a judge and jury who speak the official language of Canada that is the language of the accused or the official language of Canada in which the accused can best give testimony or who speak both official languages of Canada, as the case may be.

Challenge for Cause: Bill C-75

- ▶ **638 (1)** A prosecutor or an accused is entitled to any number of challenges on the ground that
 - ▶ (a) the name of a juror does not appear on the panel, but no misnomer or misdescription is a ground of challenge where it appears to the court that the description given on the panel sufficiently designates the person referred to;
 - ▶ (b) a juror is not impartial;
 - ▶ (c) a juror has been convicted of an offence for which they were sentenced to a term of imprisonment of two years or more and for which no pardon or record suspension is in effect;
 - ▶ (d) a juror is not a Canadian citizen;
 - ▶ (e) a juror, even with the aid of technical, personal, interpretative or other support services provided to the juror under [section 627](#), is physically unable to perform properly the duties of a juror; or
 - ▶ (f) a juror does not speak the official language of Canada that is the language of the accused or the official language of Canada in which the accused can best give testimony or both official languages of Canada, where the accused is required by reason of an order under [section 530](#) to be tried before a judge and jury who speak the official language of Canada that is the language of the accused or the official language of Canada in which the accused can best give testimony or who speak both official languages of Canada, as the case may be.

Challenge for Cause: Bill C-75

- ▶ **Determination of challenge for cause**

- ▶ **640 (1)** If a challenge is made on a ground mentioned in section 638, the judge shall determine whether the alleged ground is true or not and, if the judge is satisfied that it is true, the juror shall not be sworn.

- ▶ **Exclusion order**

- ▶ **(2)** On the application of the accused or prosecutor or on the judge's own motion, the judge may order the exclusion of all jurors, sworn and unsworn, from the court room until it is determined whether the ground of challenge is true if the judge is of the opinion that the order is necessary to preserve the impartiality of the jurors.

Peremptory Challenges Retrospectivity

- ▶ Came into force on September 19th, 2019
- ▶ Do those provisions apply to all jury selections which take place after this date, regardless of offence date? (Is the legislation retrospective)
- ▶ Initial Position of Alberta Crown Prosecution Service:
 - ▶ As of September 19, 2019, peremptory challenges during jury selection will be eliminated entirely. The ACPS takes the position that this is a procedural change to the Code, and as such, that it operates retrospectively. As a result, it is the position of the ACPS that, regardless of offence date, no peremptory challenges will be available during any jury selections occurring on or after September 19, 2019.

Peremptory Challenges

Retrospectivity

- ▶ Many lower Court decisions have ruled the new provisions do not apply retrospectively, and therefore, accused people in those cases were still afforded peremptory challenges:
 - ▶ *R v Levillant*, 2019 ABQB 837 (Michalyshyn J)
 - ▶ *R v Kebede*, 2019 ABQB 858 unreported (Nixon J)
 - ▶ *R v Way*, ABQB (unreported)
 - ▶ *R v Treen*, ABQB unreported (Marriott J)
- ▶ The large majority of trial decisions from other jurisdictions agree with the Alberta cases cited above
- ▶ ABCPS and other Crown Prosecutor's offices have since stopped challenging the retrospectivity at the trial level, and await Court of Appeal rulings

Peremptory Challenges Constitutionality

- ▶ To our knowledge, three decisions have been made regarding the constitutionality of amendments to the peremptory challenges, all at the Ontario Court of Justice:
 - ▶ *R v King*, 2019 ONSC 6386 (amendments unconstitutional)
 - ▶ *R v Gordon*, 2019 ONSC 6508 & *R v Muse*, 2019 ONSC 6119 (amendments constitutional)
- ▶ Again, waiting for Court of Appeal rulings on this issue