

# #A2JTM2020

## OJEN's Access to Justice Week Twitter Moot About Peremptory Challenges

### Should we allow peremptory challenges in criminal jury trials?

#### About juries and jury selection

A jury is a group of citizens who decide the outcome of some trials and other hearings. Juries can be involved in both criminal and civil trials, but are only required in criminal cases involving serious offenses, like treason or murder. The juror's job is to listen to the evidence and decide whether the defendant is responsible for the acts that they have been accused of committing<sup>1</sup>.

Because juries play such a critical role, there are rules about who can be a juror and how potential jurors are chosen. This is to ensure that jurors will decide a case fairly and impartially, to protect defendant's right to a fair trial.

When we select juries for criminal trials, lawyers for both sides ask potential jurors questions to learn about their views and biases. From this information, lawyers can exclude a potential juror if they believe they will be unable to decide the case fairly. We call these exclusions **challenges**.

#### About challenges

In a criminal trial, the Crown or defence lawyer may challenge the suitability of a potential juror. The lawyer must give a reason for the challenge. For instance, in a case where the accused is Black, the defence may ask potential jurors whether they can decide the case without bias, prejudice or partiality. Excluding a potential juror for this reason is a **challenge for cause**. All of the possible challenges that can be made are outlined in section 638 of the *Criminal Code*. After hearing the challenge for cause, a judge decides whether the potential juror is suitable. The Crown and defence can each make an unlimited number of challenges for cause.

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<sup>1</sup> For a deeper discussion of the jury selection process and juries in general, please refer to the OJEN resource, [Jury Duty in Ontario and Mock Jury Selection](#), available on the OJEN website.

Prior to September 2019, both Crown and defence lawyers could exclude a potential juror without giving a reason; this was called exercising a **peremptory challenge**. Lawyers were limited in the number of peremptory challenges they could use. The exact number depended on:

- the type of charge,
- the severity of the potential sentence,
- the number of alternate jurors, and
- whether there was a co-accused in the case

For some charges, as few as 4 peremptory challenges were allowed; for other charges, as many as 20. Peremptory challenges used to be allowed under section 634 of the *Criminal Code*. They were recently eliminated in all Canadian criminal trials, after a controversial murder trial brought issues with the use of peremptory challenges into sharp focus.

## The Gerald Stanley / Coulten Boushie Trial

The trial of a white Saskatchewan farmer named Gerald Stanley brought media attention to the jury selection process. Mr. Stanley was accused of murdering Colten Boushie, a young Cree man.

Mr. Stanley testified that he had accidentally shot Mr. Boushie. This happened after Mr. Boushie and four other people drove onto Mr. Stanley's farm. They tried to start an ATV that belonged to Mr. Stanley. Mr. Stanley got his gun and approached Mr. Boushie. Mr. Stanley fired two warning shots into the air and then pointed the gun in Mr. Boushie's direction. He fired a third shot that hit and killed Mr. Boushie. Mr. Stanley claimed this third shot was an accident.

Mr. Stanley was acquitted of both murder and manslaughter by an all-white jury. In Canada, jurors are not allowed to discuss their decisions, so it is not clear why they acquitted Mr. Stanley. The lack of Indigenous representation on the jury frustrated Mr. Boushie's family. It was reported that Mr. Stanley's defence lawyer had used peremptory challenges to remove potential jurors who were Indigenous.

Some legal experts and Indigenous advocates argued that this case highlighted a long-standing need for change to the jury selection process. They claimed there was a need for more diversity on juries and that peremptory challenges were used in a discriminatory way.

## Bill C-75

In response to this case, government officials stated they were concerned with the under-representation of Indigenous jurors. They began a review of the use of peremptory challenges in criminal trials.

On September 19, 2019, Bill C-75 came into effect. The bill eliminated peremptory challenges and made other changes to the jury selection process and to the criminal justice system.

## Discussion

People in favour of keeping peremptory challenges believe that they are an important tool to ensure a fair and impartial trial. Peremptory challenges give both sides some control over selecting the jury, and this control can be useful. They can be used to avoid potentially problematic jurors. This would include, for instance, excluding potential jurors that flash “dirty looks” to an accused while the judge is not watching.

Some lawyers have also argued that peremptory challenges can be used to make a jury more representative, rather than less. Challenges can be used in order to skip ahead and get to jurors that are different in race, age, gender and occupation than the previously selected juror. Lastly, peremptory challenges can act as a safeguard when a judge denies a challenge for cause, but the lawyer still believes the juror is unsuitable.<sup>2</sup>

On the other side, legal experts have pointed out that potential jurors could be excluded based on a possible stereotype or a “hunch” which is ultimately unreliable and inappropriate. Retired Supreme Court Justice Frank Iacobucci published a report on Indigenous representation on Ontario juries in 2013. The report showed how peremptory challenges could be used in a way that discriminates against Indigenous people by excluding them from juries.<sup>3</sup>

Some people argue that the use of peremptory challenges leads to concerning or discriminatory results.<sup>4</sup> There have been several allegations of lawyers abusing peremptory challenges to “stack” the jury with people lawyers believe to be more favourable to one side over the other.<sup>5</sup>

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<sup>2</sup> <https://law.jrank.org/pages/7925/Jury-SHOULD-PEREMPTORY-CHALLENGE-BE-ABOLISHED.html#ixzz6ZGHWtyvM>

<sup>3</sup> [https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/iacobucci/First\\_Nations\\_Representation\\_Ontario\\_Juries.html#\\_Toc436052363](https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/iacobucci/First_Nations_Representation_Ontario_Juries.html#_Toc436052363)

<sup>4</sup> <https://www.cba-alberta.org/Publications-Resources/Resources/Law-Matters/Law-Matters-Spring-2018/A-Good-Step-Towards-Diverse,-Impartial-Canadian-Ju>

<sup>5</sup> [https://uwaterloo.ca/scholar/sites/ca.scholar/files/csalahub/files/seentobedone\\_chrisalahub.pdf](https://uwaterloo.ca/scholar/sites/ca.scholar/files/csalahub/files/seentobedone_chrisalahub.pdf)

## Additional Reading

OJEN resources:

[OJEN summary of R v Kokopenace \(SCC\) – orientation to issues with jury selection and on-reserve Aboriginal People in Canada](#)

[OJEN In Brief: Jury Duty in Ontario and Mock Jury Selection](#)

Canadian cases and government links:

[Full text of the trial decision in the Gerald Stanley/Coulten Boushie case.](#)

[First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by The Honourable Frank Iacobucci, February 2013](#)

[Section 634 of the Criminal Code of Canada, which sets out the law on peremptory challenges prior to September 19, 2019 \(repealed\).](#)

The opinions expressed in these articles and on these websites are not representative of those of participating school boards, Ontario courts or the Ontario Justice Education Network.

[The Jury System and First Nations People: Frequently Asked Questions answered in plain language](#)

[Prominent defence lawyers commenting on the importance of peremptory challenges](#)

['Knee-jerk reaction:' Lawyers worried about proposed changes to trial system](#)

[Article from soon after the ban on peremptory challenges; may be an unjust infringement of constitutional rights.](#)

[Recent Ontario criminal cases could require retrial after court rules new jury selection rules were misapplied](#)

[Court of Appeal for Ontario finds in favour of accused having access to peremptory challenges despite their removal from Law.](#)

[Fairness of Ontario jury pools need inquest, judge rules](#)