

TOP FIVE 2021

Each year at OJEN's Toronto Summer Law Institute, a leading jurist identifies five cases that are of significance in the educational setting. The 2021 cases were selected and discussed by Professor Sonia Lawrence of Osgoode Hall Law School in Toronto. Professor Lawrence is a leading scholar in Canadian constitutional law and a prolific champion working at the intersection of law and social justice. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

R v Chouhan, 2021 SCC 26

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<https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18932/index.do>

Case Background

In 2018, Gerald Stanley, a White man, was acquitted of second-degree murder and manslaughter for killing Colton Boushie, a Cree man¹. At his trial, Stanley had used peremptory challenges to exclude five Indigenous jurors from the jury, leading to an all-white jury.

Peremptory challenges allow lawyers for both the Crown and the accused person to dismiss a prospective juror without having to give any explanation. This case led to wide-spread public awareness of racial prejudice in the criminal justice system and debate about the use of peremptory challenges when selecting jurors for criminal trials. Mr. Stanley was ultimately found not guilty. The verdict prompted the federal government to abolish peremptory challenges in 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*.

Facts

Pardeep Singh Chouhan (Chouhan) was charged with first-degree murder. His trial began on September 19, 2019, the same day Bill C-75 came into effect.

Under Bill C-75, the Crown and defence no longer had the right to any peremptory challenges. However, both could still challenge prospective jurors for cause according to section 638 of the *Criminal Code*. Peremptory challenges do not require that a reason be provided for dismissing a juror whereas challenges for cause require this.

Procedural History

Prior to trial, Mr. Chouhan challenged the abolition of peremptory challenges, arguing it infringed his rights to an independent and impartial jury according to sections 11(d) and 11(f) of the *Charter of Rights and*

¹ See *R v Stanley*, [2018 SKQB 27](#)



Freedoms. In the alternative, he argued that the amendments to the *Criminal Code* were important to his case because he had chosen to have a jury trial before the law was changed. He made this challenge because during the selection of jury members, Chouhan wanted three prospective jurors to be dismissed based on perceived racial micro-aggressions.

The trial judge denied Mr. Chouhan's request, finding that there are a range of procedural protections that protect the independence and impartiality of juries even if peremptory challenges are eliminated, including:

- the random selection of jurors;
- the challenge for cause process; and
- the judge's power to stand aside prospective jurors.

Accordingly, the trial judge found that Chouhan's *Charter* rights were not infringed. The trial judge also found that the amendments were purely procedural and applied to all cases as soon as they came into force. Mr. Chouhan's trial proceeded without peremptory challenges and he was convicted of first degree murder.

The Ontario Court of Appeal unanimously held that abolishing peremptory challenges was constitutional. However, the court

determined that the amendments abolishing peremptory challenges were substantive and could not apply to any case where the accused person's right to a jury trial had "vested" on or before September 19, 2019. Not all criminal trials use a jury. An accused's right to a jury trial "vests" when they are charged with an offence that must be tried by the Superior Court of Justice or, if the option exists, when they have elected to be tried by a jury.

The Court of Appeal ruled that Chouhan should not have been deprived of his right to peremptory challenges. The Crown appealed the Court of Appeal's finding that the amendments were substantive and only applied prospectively (going forward). Chouhan cross-appealed the Court of Appeal's ruling on the constitutionality of the abolishment of peremptory challenges.

Issues

Two issues arose in this case:

1. Does the abolition of peremptory challenges violate the rights of accused persons under sections 11(d) and 11(f) of the *Charter of Rights and Freedoms*?
2. If not, does the abolition of peremptory challenges apply to accused persons who were awaiting trial on September 19, 2019?



Decision

The Supreme Court of Canada (SCC) held in a 7-2 decision that the Crown's appeal for retroactive application should be allowed, Chouhan's cross-appeal for the constitutionality aspect dismissed, and Chouhan's conviction restored.

Ratio

In this case, the Court had to balance trial fairness and maintaining public confidence in the criminal justice system. According to the *Charter*, an accused has the right to a fair trial and an impartial and independent jury. The *Charter* protects an accused person's right to remove prospective jurors based on perceived prejudices, stereotypes, or biases.

The SCC ruled that there are safeguards and features of the jury selection regime in the *Criminal Code*. Despite the abolishment of peremptory challenges, these safeguards identified by lower courts continue to protect racialized accused and ensure an independent and impartial jury. Thereby, the abolishment of peremptory challenges continues to uphold the rights of accused persons under sections 11(d) and 11(f) of the *Charter*.

Regarding the retroactive application of Bill C-75, the majority held that abolishing peremptory challenges is purely procedural. The Court, therefore, held that the

amendments apply to all proceedings as soon as it comes into effect.

Dissent

Dissenting in part and agreeing with the Ontario Court of Appeal, Abella J. held that the abolishment of peremptory challenges is constitutionally valid but should not apply retroactively. Côté J. also dissented, holding that the appeal should be dismissed and the cross-appeal allowed. Côté J. found that abolishing peremptory challenges infringes on section 11(f) *Charter* rights. She also found the abolishment affects substantive rights and therefore should not be applied retrospectively to Mr. Chouhan's trial.

Discussion

1. What is the difference between a peremptory challenge and a challenge for cause?
2. What do you think the courts mean when they distinguish between “substantive” and “procedural” matters in trials?
3. Mr. Chouhan chose to have his trial decided by a jury before the law changed. Why might he have made a different choice if he knew that peremptory challenges would not be allowed?
4. Peremptory challenges can lead to an all-white jury as was the case in *R v Stanley*. Could they also be used to ensure a racially-diverse jury, or in other ways to promote trial fairness?
5. Which, in your opinion, would do more to improve people’s perception of the criminal justice system: restoring peremptory challenges or leaving the law as it now stands? Why?