

Jury Selection after Bill C-75 and *Chouhan* 2021 SCC 26

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Bill C-75

- Judge now is the trier of a challenge of cause Criminal Code s.640
- Some minor changes to jury qualification- still citizenship but now jurors can have criminal convictions of 2 years less a day s.638(1)(c)
- Added powers to stand aside for reasons of “maintaining public confidence in the administration of justice” s.633
- Abolition of peremptory challenges
- Need to see the changes as interconnected

R. v. Chouhan 2021 SCC 26

- Upholds abolition of peremptory challenges as not violating ss.11(d) and 11(f) of the Charter
- Also procedural change that can be applied retroactive
- Moldaver and Brown JJ. (Wagner CJ concurring), Rowe J. substantially agreeing but perhaps not on stand aside
- Stand aside should not be used as a means to increase diversity of jury
- Warnings should be given to jury re racial bias as in *Barton*
- Open to more questions about challenge for cause (with other prospective jurors removed) but still juror privacy concerns

Moldaver and Brown JJ

- “Appropriate questions on a challenge for cause will ask prospective jurors for their opinion as it relates to *salient aspects of the case*. For instance, counsel may point to characteristics of the accused, complainant or victim, such as *race, addiction, religion, occupation, sexual orientation or gender expression*, and ask prospective jurors whether, in light of such characteristics, they would have difficulty judging the case solely on the evidence and the trial judge’s instructions, because they hold an opinion about such characteristics that on careful reflection, they do not believe they could put aside. Before posing that question to jurors, trial judges ought to call each individual juror’s attention to the possibility of unconscious bias and impartiality. It should be stressed that the mischief is not in acknowledging a difficulty setting aside unconscious bias, but in failing to acknowledge such a difficulty where one exists.” para 64 (emphasis added)

Moldaver and Brown JJ. (plus 2)

- “Anti-bias instructions will be appropriate wherever “specific biases, prejudices, and stereotypes . . . may reasonably be expected to arise in the particular case” (*Barton*, at para. 203). ” para 50

Moldaver and Brown JJ.

- It follows that we respectfully reject our colleague Abella J.'s suggestion that trial judges use the stand-aside power to “actively promote jury diversity” and to approximate “Canada’s kaleidoscope of human diversity” (para. 164).... As a matter of law, we cannot accept that public confidence in the administration of justice depends on achieving a jury that approximates the diversity of Canadian society.” at para 74

Martin J. (Karkatsansis and Kaisirer JJ. Concurring)

- Premature to decide stand aside
- Never limited to one loaded question at challenge for cause and the privacy of prospective jurors is “just one interest to be weighed against others” at the challenge for cause. Ibid at para 120
- Abella J. expand questions for challenge and use of stand aside to increase diversity
- Cote J. in dissent but expresses concerns about lack of diversity of juries, and ability of question of questions to root out deep rooted prejudice and stereotypes at para 262

Martin J. (plus 2)

- “ I part ways with my colleagues to the extent they suggest limits on how stand asides and challenges for cause may be developed under the new jury selection regime, particularly since we heard no submissions on those limits in the appeal. At this early stage in the development of the regime, and given that the proper use of these tools is not relevant to the outcome of the appeal, I would refrain from deciding their scope.” para 105
- “With respect to the stand-aside power, I would caution against placing undue weight on the principle of random selection.” para 113

Martin J.

- “The enhanced stand-aside mechanism in [s. 633](#) seeks to counteract systemic discrimination in jury selection and recognizes that public confidence in the administration of justice is undermined when random selection routinely results in all-white juries. It gives trial judges the discretion “to make room for a more diverse jury””

Abella J.

- The new robust challenge for cause process will require more probing questions than have traditionally been asked to properly screen for subconscious stereotypes and assumptions” and will necessitate “a more sophisticated manner of questioning” (paras. 160-61).
- The enhanced stand-aside mechanism in [s. 633](#) seeks to counteract systemic discrimination in jury selection and recognizes that public confidence in the administration of justice is undermined when random selection routinely results in all-white juries. It gives trial judges the discretion “to make room for a more diverse jury” para 163

Cote J.

- Disagrees with Moldaver and Brown JJ. whether new stand aside powers under s.633 can be used to remove jurors who survived challenge for cause but who may not be impartial because they could still be called as jurors again *ibid* at p. 269
- Thus four judges say s.633 can be a back up challenge for cause and one judge says no and the other four do not address
- One the stand aside four judges say no to using to increase diversity, one says yes, three do not decide and Cote J. in dissent but expresses concerns that without peremptories juries may be less diverse.

Putting Together the Different Parts of Jury Selection

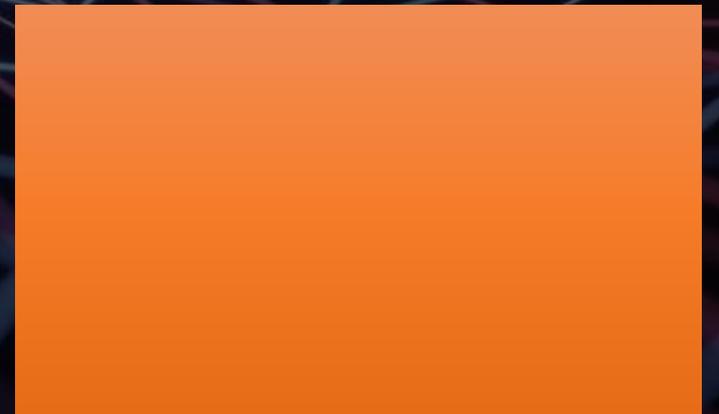
Hypothetical: Accused is white male and Complainant in a self-defence is Indigenous male

Pre-trial publicity including hate and stereotypes about Indigenous

Crown wants 1) a number of questions not only about Indigenous victim but stereotypes relating to violence and intoxication

2) wants a judicial instruction on such stereotypes

3) during jury selection with 11 non visibly Indigenous people selected wants a) inquiry into whether any of the 11 are Indigenous and 2) use of 3 stand asides to call a visibly Indigenous person



Different Facts

Same problem but the accused is Indigenous and the victim is a white female

Additional questions: On the challenge for cause the 11th juror answers "not really" when asked about prejudice because the accused is Indigenous

Should the trial judge accept him

1) Should the trial judge stand aside if you had second thoughts about the juror's impartiality?

2) Should the trial judge stand aside if the next juror was visibly Indigenous on a panel with no visibly Indigenous jurors?

Stand-asides

- Roach “Juries, Miscarriages of Justice and the Bill C-75 reforms” (2020) 98 Can. Bar Rev.315 at 340
- An invitation to affirmative action
- But one declined by most trial judges and some judges is foreclosed by Chouhan –*Bhogal* 2021 ONSC 4925 *Stanley* 2021 ONSC 6110
- *Dorion* 2019 SKQB 266 [36] *Smith* 2021 ONSC 8405 reject a Black accused’s request to stand aside to have a Black juror but also rejects slippery slope formal equality reasoning
- Also unfinished reform agenda both provincially and federally
- But random selection and *Kokpenance* 2015 SCC 28 remain barriers to more representative juries