SCC File No. 39062

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

HER MAJESTY THE QUEEN

APPELLANT
(Respondent)

-and-

PARDEEP SINGH CHOUHAN

RESPONDENT
(Appellant)

-and-

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PART I – OVERVIEW

1. Aboriginal Legal Services ('ALS') intervenes in this case pursuant to an Order issued by Justice Martin on August 24, 2020.

2. ALS is a non-profit organization that was incorporated to assist Indigenous people gain access and control over the justice-related issues that affect them.

PART II – STATEMENT OF POSITION

3. Parliament decided to eliminate peremptory challenges, in large part, to address concerns about systemic and direct racism against Indigenous people in the criminal justice system. ALS submits that the nature of this discrimination and the ways that peremptory challenges have exacerbated this problem is an important part of the analysis under ss. 7 and 11 of the *Canadian Charter of Rights and Freedoms* ('the *Charter*').

PART III – LEGAL ARGUMENT

4. ALS will argue the following:
    1) Peremptory challenges were often used in ways that perpetuated the discrimination faced by Indigenous people in the criminal justice system;
    2) Peremptory challenges were eliminated in part to address discrimination against Indigenous people and this ameliorative purpose must be considered when determining the constitutional challenges in this case; and
    3) The characterization of ss. 7 and 11 rights under the *Charter* includes the broader rights of the community to a fair trial and truth-seeking process.

1) Discrimination against Indigenous people and the use of peremptory challenges

a. Discrimination against Indigenous people in the criminal justice system

5. One of the key rationales for Parliament's elimination of peremptory challenges was to address discrimination against Indigenous people in the criminal justice system. Over the last 22 years, this Honourable Court has recognized this discrimination and provided important direction that is essential to an understanding of this case. The central theme of *R v Williams,*[1] *R v Gladue*[2]*, R v Ipeelee,*[3] *Ewert v Canada*[4] and, most recently, *R v*

[1] *R v Williams*, [1998] 1 SCR 1128, 124 CCC (3d) 481 [*Williams*]
[2] *R v Gladue*, [1999] 1 SCR 688, 133 CCC (3d) 385 [*Gladue*]
[3] *R v Ipeelee*, 2012 SCC 13 , [2012] 1 SCR 433 [*Ipeelee*]
[4] *Ewert v Canada*, 2018 SCC 30, [2018] 2 SCR 165 [*Ewert*]

Barton,[5] is that Indigenous people face systemic and direct discrimination in the criminal justice system.

6. The first time the Supreme Court addressed the issue of discrimination faced by Indigenous people in the justice system was in *Williams*. That case focused specifically on racist stereotypes towards Indigenous people held by potential jurors. The Court found:

> Racism against aboriginals includes stereotypes that relate to credibility, worthiness and criminal propensity… There is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system.[6]

7. In *Ewert*, the Court found that in the 20 years since *Williams*, little had changed with respect to the discrimination faced by Indigenous people:

> Numerous government commissions and reports, as well as decisions of this Court, have recognized that discrimination experienced by Indigenous persons, whether as a result of overtly racist attitudes or culturally inappropriate practices, extends to all parts of the criminal justice system...[7]

8. *Barton* in 2019, was concerned, in part, with the treatment of an Indigenous victim during a jury trial. The Court stated bluntly: "when it comes to truth and reconciliation from a criminal justice system perspective, much-needed work remains to be done." [8]

b. Indigenous people and the use of peremptory challenges

9. Those who have studied discrimination against Indigenous people in the justice system have long urged the elimination of peremptory challenges. In 1991, the Manitoba Aboriginal Justice Inquiry released its final report. The Inquiry called for the elimination of peremptory challenges as one way to address racism against Indigenous people in the criminal justice system. The report made particular reference to the way in which Indigenous people were excluded from juries through the use of peremptory challenges and concluded:

> When Aboriginal people are present on jury panels, we believe that both prosecutors and defence attorneys have used their peremptory challenges and

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[5] *R v Barton*, 2019 SCC 33 [*Barton*]
[6] *Williams*, *supra* note 1 at para 58
[7] *Ewert*, *supra* note 4 at para 57. See also *Ipeelee*, *supra* note 3
[8] *Barton*, *supra* note 5 at para 199

> stand-asides to screen Aboriginal people out of the jury system.[9]

10. In examining the process of jury selection, itself, the Commission found:

> On one day of the Thompson assizes in January 1989, 35 of the 41 Aboriginal people who were called to serve on three juries were rejected. In one case, the Crown rejected 16 Aboriginal jurors; in another, the defence rejected two and the Crown rejected 10; in the third and final case, the defence accepted all the proposed Aboriginal jurors, while the Crown rejected nine. Two jurors were rejected twice.[10]

11. This pattern of jury choice continues regardless of whether the Indigenous person involved is the accused or the victim. In the 1971 death of a young Cree woman named Helen Betty Osborne, the Commission examined the jury selection process for the non-Indigenous accused. Six potential Indigenous jurors attended for duty. Every single one was peremptorily challenged by the defence.[11] Clearly, there is a long-standing pattern of excluding Indigenous people from participating as a juror when either the accused or victim is Indigenous.

c. Perpetuation of discrimination against Indigenous people through peremptory challenges

12. In 2013, the Ontario government requested that former Supreme Court Justice Frank Iacobucci critically examine the under-representation of First Nations people from Northern First Nations on jury rolls and make recommendations to address this problem. In his comprehensive report titled *First Nations Representation on Ontario Juries,* Justice Iacobucci found the use of peremptory challenges to be a barrier to addressing the problem of Indigenous under-representation on juries and stated:

> [I]f every change in the Report is implemented to its fullest, First Nations jury service could still be significantly undermined through discriminatory use of peremptory challenges.[12]

13. In order to address this serious problem, he recommended a *Criminal Code* amendment be made to prevent the use of peremptory challenges to discriminate against First Nations

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[9] Government of Manitoba, The Aboriginal Justice Implementation Commission, *Report of the Aboriginal Justice Inquiry of Manitoba*, Chapter 9: Juries (November 1999) (Online: http://www.ajic.mb.ca/volumel/chapter9.html)
[10] *Ibid*
[11] *Ibid*
[12] *Ibid* at para 376

people serving on juries.[13] The report also noted that the exclusion of Indigenous people from juries through the use of peremptory challenges has serious impacts on the perceived fairness of the criminal justice system:

> …the wholesale exclusion of particular groups from the jury pool risks undermining public acceptance of the fairness of the criminal justice system. A jury cannot act as the conscience of the community unless it is viewed favorably by the society that it serves.[14]

14. Eliminating peremptory challenges addresses not only longstanding concerns by accused Indigenous people with respect to the underrepresentation of Indigenous people on juries[15] but also community concern for Indigenous victims. Indigenous people are overrepresented as victims of crime and thus are also affected by fairness in jury trials.[16]

15. As noted by Watt J.A. in the Ontario Court of Appeal decision in this matter: "… the dominant considerations which influence the exercise of peremptory challenges are subjective."[17] For Indigenous people, the subjective basis of peremptory challenges includes discriminatory stereotypes about who Indigenous people are and how Indigenous people will think. Crown attorneys may assume prospective Indigenous jurors will be biased in favour of an Indigenous accused and the accused or their lawyers may assume that prospective Indigenous jurors will be biased in favour of an Indigenous complainant or victim.[18]

16. In the problematic use of peremptory challenges, each side of the adversarial criminal justice system points the finger at the other. When the Manitoba Aboriginal Justice Inquiry examined this issue, crown counsel generally felt that they did not use peremptory

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[13] *Ibid* at para 44
[14] Ontario Ministry of the Attorney General, Report of the Independent Review of Frank Iacobucci, *First Nations Representation on Ontario Juries* (February 2013) at para 116 (Online: https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/iacobucci/First_Nations_Representation_Ontario_Juries.html)
[15] *R. v Kokopenace*, 2015 SCC 28
[16] Statistics Canada, 2016. "Victimization of Aboriginal people in Canada, 2014." Jillian Boyce, Canadian Centre for Justice Statistics. Juristat 85-002-X [Accessed November 2019] (Online: https://www150.statcan.gc.ca/n1/pub/85-002-x/2016001/article/14631-eng.htm)
[17] *R v Chouhan*, 2020 ONCA 40 [*Chouhan ONCA*]
[18] Kent Roach, "The Urgent Need to Reform Jury Selection after the Gerald Stanley and Colten Boushie Case" (2018) 65 CLQ 271 at 274

challenges to target Indigenous people but defence counsel believed that crowns did exactly that. Not surprisingly, defence counsel also denied excluding Indigenous jurors on the basis of race, but crown counsel felt that they did do so.[19] Given this Honourable Court's findings about the pervasive nature of discrimination against Indigenous people throughout the criminal justice system, it is not surprising that it is a problem perpetuated by both sides. As further stated by Watt J.A. on the matter:

> … [peremptory challenges] can and often are exercised, not on the basis of facts which have been or can be proven, but rather on the mere belief by a party in the existence of a certain state of mind in the prospective juror. Often, stereotypical reasoning is afoot in their exercise. No one gainsays that they are open to abuse.[20]

17. The exclusion of Indigenous jurors through the use of peremptory challenges is a real and persistent problem that has a corrosive impact on the jury process. Any attempt to remedy Indigenous underrepresentation on juries will be subverted when potential Indigenous jurors see that they are deliberately excluded from serving because of their Indigeneity.

18. There is real danger that the continued use of peremptory challenges against potential Indigenous jurors will further stoke the reluctance of Indigenous people to participate in the jury process. The Supreme Court of Canada has made it clear that Indigenous people experience bias and alienation from the criminal justice system,[21] with reports such as the *Manitoba Aboriginal Justice Inquiry* and *First Nation Representation on Ontario Juries* outlining the profound harm that occurs as a result. This was noted by Watt J.A. in his decision: "Peremptory challenges may also be a source of juror frustration and humiliation, all the more so when they are exercised after the prospective juror has been found to be impartial on a challenge for cause."[22] While a judge may tell the newly dismissed Indigenous juror to not take it personally, many will.[23]

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[19] *Manitoba Justice Inquiry*, *supra* note 9
[20] *Chouhan ONCA*, *supra* note 17 at para 82
[21] *Gladue*, *supra* note 2 at para 65
[22] *Chouhan ONCA*, *supra* note 17 at para 55
[23] Kent Roach, *Canadian Justice, Indigenous Injustice: The Gerald Stanley and Colten Boushie Case* (Montreal: McGill-Queen's University Press, 2019) at 121

2) The purpose of abolishing peremptory challenges was to address discrimination against Indigenous people

19. One of the precipitating events leading to the elimination of peremptory challenges was the trial of Saskatchewan farm-owner Gerald Stanley, who shot and killed a young Indigenous man named Colten Boushie in 2018.[24]

20. Prior to selection of the jury for Gerald Stanley's trial, criminal law professor Glen Luther at the University of Saskatchewan correctly predicted that the accused would use peremptory challenges to remove prospective Indigenous jurors, but that the Crown attorney would not use peremptory challenges to remove non-Indigenous jurors. Professor Luther anticipated this, even though the jury trial was scheduled to take place in the Battleford Judicial district in Saskatchewan, where an estimated 30% of the adult population identifies as Indigenous.[25]

21. At the time of jury selection, Debbie Baptise, the mother of Colten Boushie, was quoted as saying: "If it's an all-white jury, I don't think we have a chance."[26] Foreseeably, the jury at Gerald Stanley's trial did not include an Indigenous juror. Professor Kent Roach commented that:

> [t]he Stanley case would be decided by an all-white jury even though five visibly Indigenous people were called and prepared to serve as jurors. The unfair jury selection process in the case greatly aggravated the racial polarization that had beset the Stanley/Boushie case from the start.[27]

22. In a case where it was open to the jury to convict for second degree murder or manslaughter, the jury did neither. Gerald Stanley was acquitted on February 9, 2018. The notoriety of the Stanley trial and final verdict from the jury raised questions and drew widespread public attention to the practice of excluding Indigenous people from juries.

23. The concern with the lack of Indigenous representation on juries was expressed by the Honourable Jody Wilson-Raybould, then Minister of Justice, when she stated:

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[24] *R v Stanley*, 2018 SKQB 27
[25] Roach, *supra* note 23 at 91
[26] *Ibid* at 118
[27] *Ibid* at 117

> Discrimination in the selection of juries has been well documented for many years. Concerns about discrimination in peremptory challenges and its impact on indigenous peoples being represented on juries was raised back in 1991 by Senator Murray Sinclair, then a judge, in the Manitoba aboriginal justice inquiry report. That report, now over 25 years old, explicitly called for the repeal of peremptory challenges… Reforms in this area are long overdue. Peremptory challenges give the accused and the crown the ability to exclude jurors without providing a reason. In practice, this can and has led to their use in a discriminatory manner to ensure a jury of a particular composition. I am confident that the reforms will make the jury selection process more transparent, promote fairness and impartiality, improve the overall efficiency of our jury trials, and foster public confidence in the criminal justice system.[28]

24. During the Bill C-75 debates of the Standing Senate Committee, Senator Murray Sinclair supported the elimination of these challenges and described their problematic history:

> We [the Aboriginal Justice Inquiry of Manitoba] made a very clear recommendation that peremptory challenges be eliminated from the code… peremptory challenges historically have been used and are being used in a discriminatory fashion. That's what the research has shown…[29]

> It results in injustice to continue to allow lawyers to discriminate by removing Indigenous people. I know of no situation where the use of peremptory challenges has resulted in a balanced jury.[30]

25. In the Department of Justice's legislative background report on the passage of Bill C-75 and abolition of peremptory challenges, the Government of Canada signaled to the criminal justice system that "discrimination of any kind has no meaningful role in promoting fairness and impartiality in the criminal justice process."[31]

3) The characterization of ss. 7 and 11 Charter rights requires consideration of the broader community perspective

26. ALS takes the position that the resolution of the s. 11 challenges will inevitably dispose of the claim under s. 7.[32]

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[28] *House of Commons Debates*, 42nd Parliament, 1st Sess, Vol. 148, No. 300 (24 May 2018) at 1530 (Online: https://www.ourcommons.ca/DocumentViewer/en/42-1/house/sitting-300/hansard)
[29] *House of Commons Debates*, 42nd Parliament, 1st Sess, Vol. 62 (16 May 2019) (Online: https://sencanada.ca/en/Content/SEN/Committee/421/lcjc/62ev-54807-e)
[30] *Ibid*
[31] Department of Justice, Legislative Background: An act to amend the *Criminal Code*, the *Youth Criminal Justice Act* and other *Acts* and to make consequential amendments to other, as enacted (Bill C-75 in the 42nd Parliament), June 21, 2019 (Online: https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/c75/p3.html)
[32] *Chouhan ONCA*, *supra* note 17 at para 136

27. The s. 11 provision of the *Charter* guarantees the right to a fair trial from the perspective of not only the accused, but the community as well. As the Supreme Court said in *R v Harrer*:

> At base, a fair trial is a trial that appears fair, both from the perspective of the accused and the perspective of the community. A fair trial must not be confused with the most advantageous trial possible from the accused's point of view… Nor must it be conflated with the perfect trial; in the real world, perfection is seldom attained. A fair trial is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness to the accused.[33]

28. In *Barton*, the Supreme Court restated its finding in *R v Bjelland* [34] that "the truth-seeking process, and trial fairness, … must be assessed 'from both the perspective of the accused and of society more broadly.'" [35] The jury serves the collective interests of the Canadian community, as well as being a right of the accused.[36] This broader characterization of the rights protected by s. 11 is essential to determining whether the elimination of peremptory challenges violates the *Charter*.

29. The cross-appeal in this matter claims that the elimination of peremptory challenges would make a reasonable person doubt the impartiality of the jury, thus raising reasonable apprehension of bias. However, as noted earlier, these challenges are often exercised by crown and defence as a deliberate means of keeping members of a specific group off the jury panel. This was pointedly noted by Watt J.A.:

> … the appellant's argument that peremptory challenges are essential to ensure an impartial jury has inherent in it a paradox. Impartiality is an objective standard or quality. Yet to achieve it, the appellant invokes peremptory challenges which he acknowledges are exercised for purely subjective, often stereotypical reasons.[37]

30. In *R v Gordon*, another recent *Charter* challenge to the elimination of peremptory challenges, Forestall J. concluded:

> A reasonable person could not conclude that the elimination of a challenge that could be exercised by the Crown or the defence, arbitrarily and without giving any reasons, and replacing it with a provision that requires the parties to articulate a reason to reject a potential juror would create a reasonable apprehension of

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[33] *R v Harrer*, 1995 CanLII 70 (SCC), [1995] 3 SCR 562 [*Harrer*]
[34] *R v Bjelland*, 2009 SCC 38 (CanLII), [2009] 2 SCR 651 [*Bjelland*]
[35] *Barton*, *supra* note 5 at para 83 (emphasis in original – footnotes omitted)
[36] *R v Turpin*, 1989 CanLII 98 (SCC) at para 72, [1989] 1 SCR 1296; *R v Stillman*, 2019 SCC 40 (CanLII) at 28, 139
[37] *Chouhan ONCA*, *supra* note 17 at para 87

bias. [38]

31. It is the submission of ALS that a reasonable person armed with the knowledge of the way Indigenous people have been discriminated against in the jury selection process would not view the abolition of peremptory challenges as creating a reasonable apprehension of bias. Such a view is strengthened by the new role of judges in deciding challenges of cause and using stand asides.

32. As noted by this Honourable Court in *Sherratt*, the jury selection process should not "be a tool in the hands of either the Crown or the accused… rather was envisioned as a representative cross-section of society, honestly and fairly chosen."[39] This honestly and fairly chosen cross-section of society is not possible if the selection process is used by the crown or accused to frustrate representativeness by systemically challenging Indigenous people that are called upon to serve as jurors.

33. In addition to the harm caused by peremptory challenges to Indigenous people, a recently published study suggests that any visible and numerically smaller minority are vulnerable to deliberate exclusion by the use of peremptory challenges. [40]

34. Respectfully, speculation that peremptory challenges can "produce a more representative jury depending on the nature of the community and the accused" [41] as this Honourable Court suggested in *Sherratt*, fails to account for undisputed cases that achieved the exact opposite result. It also ignores the repeated findings of this Honourable Court that there exists a "troubled relationship"[42] between Canada's criminal justice system and Indigenous peoples.

35. There has been much debate concerning the elimination of peremptory challenges. Ultimately, however, as stated by Watt J.A.:

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[38] *R v Gordon*, 2019 ONSC 6508 at 53
[39] *R v Sherratt*, [1991] 1 SCR 509 at para 31
[40] Christian Miller, "Peremptory Challenges During Jury Selection as Institutional Racism" (2019) 67 CLQ 215 at 258
[41] *Sherratt*, *supra* note 39 at para 58
[42] *Ewert*, *supra* note 4 at para 57

> Parliament determined that their potential for abuse outweighed their benefits as a part of a selection process designed to ensure a fair trial and the empanelment of an impartial just. This cost-benefit analysis was for Parliament to undertake. Parliament made its decision. That decision must be respected by the court unless the statutory result is unconstitutional.[43]

36. As Professor Roach set out in his examination of the Gerald Stanley trial:

> If peremptory challenges had been abolished at the time of the Stanley trial, a more representative jury would have been selected. A jury with Indigenous people might have appreciated the difficulties faced by Indigenous witnesses. It might have questioned Stanley's implicit rural crime defence and his subjective fears of Boushie and his friends."[44]

37. The right to a fair trial guaranteed by s. 11 does not guarantee a jury selection process that is most advantageous to the accused.[45] Indigenous people in Canada are part of the community whose perspective must be considered in assessing trial fairness and the truth-seeking process. This Court has long recognized the discrimination faced by Indigenous people in the criminal justice system. The practice of peremptory challenges has unquestionably excluded Indigenous people from serving as jurors and furthered their estrangement from the justice system. In 2020, it is impossible to see the retention of these challenges as anything other than antithetical to every notion of fairness.

PART IV – POSITION ON COSTS

38. ALS seeks no costs and respectfully submits that no costs be ordered against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of September, 2020.

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Jonathan Rudin
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[43] *Chouhan ONCA*, *supra* note 17 at para 58
[44] Roach, *supra* note 23 at 114, 211
[45] *R v Rodgers*, 2006 SCC 15 at para 47; *Harrer*, *supra* note 33 at para 45

PART V – TABLE OF AUTHORITIES

AUTHORITIES	Cited at Para. No.
Cases	
1. *R v Williams*, [1998] 1 SCR 1128, 124 CCC (3d) 481	58
2. *R v Gladue*, [1999] 1 SCR 688, 133 CCC (3d) 385	65
3. *R v Ipeelee*, 2012 SCC 13 , [2012] 1 SCR 433	
4. *Ewert v Canada*, 2018 SCC 30, [2018] 2 SCR 165	57
5. *R v Barton*, 2019 SCC 33	83, 199
6. *R v Kokopenace*, 2015 SCC 28	
7. *R v Chouhan*, 2020 ONCA 40	55, 58, 82, 87, 136
8. *R v Stanley*, 2018 SKQB 27	
9. *R v Harrer*, 1995 CanLII 70 (SCC), [1995] 3 SCR 562	45
10. *R v Bjelland*, 2009 SCC 38 (CanLII), [2009] 2 SCR 651	
11. *R v Turpin*, 1989 CanLII 98 (SCC), [1989] 1 SCR 1296	72
12. *R v Stillman*, 2019 SCC 40 (CanLII)	28, 139
13. *R v Gordon*, 2019 ONSC 6508	53

	AUTHORITIES	Cited at Para. No.
14.	*R v Sherratt*, [1991] 1 SCR 509	31, 58
15.	*R v Rodgers*, 2006 SCC 15	47
	Secondary Sources	
16.	Government of Manitoba, The Aboriginal Justice Implementation Commission, *Report of the Aboriginal Justice Inquiry of Manitoba*, Chapter 9: Juries (November 1999) (Online: http://www.ajic.mb.ca/volumel/chapter9.html)	44, 376
17.	Ontario Ministry of the Attorney General, Report of the Independent Review of Frank Iacobucci, *First Nations Representation on Ontario Juries* (February 2013) at para 116 (Online: https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/iacobucci/First_Nations_Representation_Ontario_Juries.html)	116
18.	Statistics Canada, 2016. "Victimization of Aboriginal people in Canada, 2014." Jillian Boyce, Canadian Centre for Justice Statistics. Juristat 85-002-X [Accessed November 2019] (Online: https://www150.statcan.gc.ca/n1/pub/85-002-x/2016001/article/14631-eng.htm)	
19.	Kent Roach, "The Urgent Need to Reform Jury Selection after the Gerald Stanley and Colten Boushie Case" (2018) 65 CLQ 271	274
20.	Kent Roach, *Canadian Justice, Indigenous Injustice: The Gerald Stanley and Colten Boushie Case* (Montreal: McGill-Queen's University Press, 2019)	91, 114, 117-118, 121, 211
21.	*House of Commons Debates*, 42nd Parliament, 1st Sess, Vol. 148, No. 300 (24 May 2018) at 1530 (Online: https://www.ourcommons.ca/DocumentViewer/en/42-1/house/sitting-300/hansard)	
22.	*House of Commons Debates*, 42nd Parliament, 1st Sess, Vol. 62 (16 May 2019) (Online: https://sencanada.ca/en/Content/SEN/Committee/421/lcjc/62ev-54807-e)	

23. Department of Justice, Legislative Background: An act to amend the *Criminal Code*, the *Youth Criminal Justice Act* and other *Acts* and to make consequential amendments to other, as enacted (Bill C-75 in the 42nd Parliament), June 21, 2019 (Online: https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/c75/p3.html)

24. Christian Miller, "Peremptory Challenges During Jury Selection as Institutional Racism" (2019) 67 CLQ 215 258