JURY REPRESENTATION IN CANADA

THE JURY: "WHAT IS A FAIR AND JUST CROSS-SECTION OF THE COMMUNITY?"

Report of the Canadian Institute for the Administration of Justice

By Nathan Afilalo, September 2019

MANITOBA REPORT

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PROVINCIAL ROUNDTABLES ON JURY REPRESENTATION (1/6)

The Jury: What is a Fair and Just Cross-Section of the Community?

April 6, 2019, Winnipeg, Manitoba

Faculty of Law, Robson Hall - Moot Court B (200B)

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AGENDA

8:45–9:00 am: Introduction and Welcome Remarks

- The Hon. Justice Christopher J. Mainella, Court of Appeal for Manitoba
- Elder Sherry Copenace, Ojibways of Onigaming – Welcome Song and Prayer

9:00–9:30 am: *Portrait of the Jury Process in Manitoba*

- Ms. Darcy Blackburn, Executive Director, Sheriff Services
- The Hon. Justice Brenda L. Keyser, Manitoba Court of Queen's Bench

9:30–10:30 am: *Problems and Results of the Study on Public Perceptions Jury Representativeness and Disability in the Jury Process*

- Professor Richard Jochelson, University of Manitoba
- Dr. Michelle Bertrand, Criminal justice at the University of Winnipeg

10:30–10:45 am—HEALTH BREAK –

10:45 am–NOON: *Jury Trial in an Indigenous Context: Example of a Tribal Court in the Us and the Situation in Canada*

- The Hon. William A. Thorne, Jr. (ret) Utah Court of Appeals
- Professor Aimée Craft, University of Ottawa, Faculty of Law

12:00–1:00 pm – LUNCH –

1:00–2:00 pm: *Ethical Considerations*

- Ms. Amanda Sansregret, Legal Aid, Manitoba
- Mr. Christian Vanderhooft, Justice Manitoba – Public Prosecutions

Moderator: Professor David Ireland, University of Manitoba, Faculty of Law

2:00–3:15 pm: Workshop

Participants will provide their questions/input to the Planning Committee in advance.

Moderators: Members of the Planning Committee

3:15–3:30 pm – BREAK –

3:30–4:45 pm: Plenary

Moderator: Professor David Ireland, University of Manitoba

Each group will report on their discussion.

4:45–5:00 pm: Closing Remarks

- The Hon. Justice Christopher J. Mainella, Court of Appeal for Manitoba

Official Reporter: Ms. Maria Aylward, Project Coordinator, CIAJ

PLANNING COMMITTEE

- The Hon. Justice Christopher J. Mainella, Chair
- Ms. Darcy Blackburn
- Professor Aimée Craft
- Professor Richard Jochelson
- Ms. Amanda Sansregret
- The Hon. Justice Colleen Suche
- Ms. Christine O'Doherty

BIOGRAPHIES

Darcy Blackburn is the Executive Director and Chief Sheriff of Sheriff Services for the Manitoba Department of Justice. Darcy is responsible for jury management, court security, prisoner movement, and civil enforcement province wide. Sheriff Services has offices in Winnipeg, Portage la Prairie, Brandon, Dauphin, The Pas and Thompson.Darcy's career with Manitoba Justice began in 1997 at Headingley Correctional Centre, where she was a Correctional Officer and Chemical Dependency program facilitator, she moved to Sheriff Services in 1999, where she worked her way through the ranks to her current role as Executive Director and Chief Sheriff. Darcy has over 15 years of supervisory and management experience, Certificates in Public Sector Management and Human Resource Management and a degree in Justice and Law Enforcement from the University of Winnipeg.

Michelle Bertrand completed her M.A. and Ph.D. at Queen's University in the Social-Personality Psychology program. Dr. Bertrand's research interests are in the general area of Psychology and Law, with specific interests in eyewitness memory and Canadian juries.In her jury-related work, Dr. Bertrand looks at issues related to jury representativeness and comprehension of judicial charges. She is a co-investigator on an interdisciplinary SSHRC-funded research project (2018 – 2023) studying how well jury-eligible Canadians understand criminal charges and instructions

that judges give to juries, as well as methods to improve juror understanding. Dr. Bertrand has taught Introduction to Criminal Justice, Criminal Justice Research Methods, and Forensic Psychology. She has supervised Criminal Justice and Psychology students' Honours theses. Dr. Bertrand's current research interests in eyewitness memory include police lineups, methodological issues in lineup construction and administration, policy issues regarding lineups, and lineup biases.

Born and raised in the Ojibway community of Onigaming, **Elder Sherry Copenace** is known for her experience in Indigenous social services as well as embracing her Anishnaabe traditions. Currently employed at the University of Manitoba in the MSW-Indigenous Knowledges program, Copenace holds a Masters in Social Work (MSW) which has enabled her to effectively help her community. She has offered and hosted coming of age teachings and ceremonies for young Anishinaabe women. Moreover, she has helped with the GCT3 Women's Council work on developing a water declaration. She is a board member at Wiijii'idiwag Ikwewag and Animikii Ozozon Family Services and has over 25 years of experience working in Indigenous social services. Elder Sherry Copenace is a rising voice for her Indigenous community.

Aimée Craft is an Indigenous lawyer (Anishinaabe-Métis), an Assistant Professor at the Faculty of Common law, University of Ottawa. Her expertise is in Anishinaabe and Canadian Aboriginal law. She is a leading researcher on indigenous laws, treaties, and water. Craft's award-winning 2013 book, Breathing Life Into the Stone Fort Treaty, focuses on understanding and interpreting treaties from an Anishinaabe inaakonigewin (legal) perspective. In 2016 she was voted one of the top 25 most influential lawyers in Canada. Prof. Craft is the former Director of Research at the National Inquiry into Missing and Murdered Indigenous Women and Girls and the founding Director of Research at the National Centre for Truth and Reconciliation. In her decade of legal practice at the Public Interest Law Centre, Craft worked with many Indigenous peoples on land, resources, human rights and governance issues.

David Ireland graduated from the Faculty of Law, University of Manitoba in 2010 and was called to the Manitoba Bar in 2011. He practiced criminal defence law at *Gindin Wolson Simmonds Roitenberg* where he defended clients charged under the *Criminal Code of Canada* and *Controlled Drugs and Substances* Act. In August 2011, David was retained by the Department of Justice (Manitoba) as a member of the counsel team representing Steve Sinclair and Kim Edwards in the *Commission of Inquiry into the Circumstances Surrounding the Death of Phoenix Sinclair*. In July 2012, while still in private practice, David was retained by the Department of Justice (Manitoba) as one of only a handful of special prosecutors to conduct prosecutions and provide opinions as requested by the Assistant Deputy Attorney General. In 2014, after completing his LL.M. graduate degree, David moved to the Department of Justice (Manitoba) as a full-time prosecutor. From 2014-2106, he prosecuted offences in Winnipeg as well as rural and northern Manitoba. In 2016 David was appointed to the Faculty of Law at the University of Manitoba where he teaches and researches in the area of criminal law and procedure, evidence law, advocacy and preventing wrongful convictions. He is also the Director of the Robson Hall Innocence Clinic, a live intake clinic conducting pro bono post-conviction legal work.

Richard Jochelson is at the Faculty of Law at the University of Manitoba and holds his PhD in law from Osgoode Hall Law School at York University, a Masters in Law from University of Toronto Law School, and a Law Degree from University of Calgary Law School (Gold Medal). He is a former law clerk who served his articling year at the Alberta Court of Appeal and Court of Queen's Bench, before working at one of Canada's largest law firms. He worked for ten years teaching criminal and constitutional law at another Canadian university prior to joining Robson Hall. He has published peer-reviewed articles dealing with obscenity, indecency, judicial activism, police powers, criminal justice pedagogy and curriculum development, empiricism in criminal law, and conceptions of judicial and jury reasoning. He is a member of the Bar of Manitoba and has co-authored and co-edited several books. He has recently co-authored *Criminal Law and Precrime*.

Brenda L. Keyser was appointed a judge of the Court of Queen's Bench of Manitoba on October 5, 1995. Keyser graduated in law from the University of Manitoba in 1978, and was called to the Manitoba Bar in 1979. From 1978 to 1986, she practised mainly criminal, labour and civil litigation with the firm Pollock and Company. After practising exclusively criminal law with the firm Gindin, Soronow, she became a founding partner, in 1987, of the firm Keyser, Baragar, Harris & Sadana, later known as Keyser, Harris. Justice Keyser practised mainly criminal law, but was also involved in child welfare and aboriginal law cases. She became a Bencher of the Law Society of Manitoba in 1994.

The Hon. Christopher J. Mainella has been a judge of the Court of Appeal for Manitoba since his appointment from the Court of Queen's Bench of Manitoba in 2013. Justice Mainella has a Bachelor of Arts from McGill University, a Master of Arts from the University of Western Ontario, a Bachelor of Laws from the University of Manitoba and a Master of Laws from the University of London (London School of Economics). Prior to his judicial appointments Justice Mainella worked as a prosecutor and counsel to the Minister of Justice (Canada) practicing in the areas of criminal law, constitutional law, and extradition.

Judge William A. Thorne, Jr. (ret.), a Pomo/Coast Miwok Indian from northern California, was appointed to the Utah Court of Appeals in May 2000 by Gov. Michael O. Leavitt. He retired in September of 2013. He was a judge in the Third Circuit Court for eight years, having been appointed by Governor Norman Bangerter in 1986, and then served in the Third District Court for six years, having been appointed by Governor Leavitt in 1994. Judge Thorne received a B.A. from the University of Santa Clara in 1974 and a J.D. from Stanford Law School in 1977. Judge Thorne has served for over 34 years as a tribal court judge in Utah, Idaho, Montana, New Mexico, Colorado, Arizona, Wisconsin, South Dakota, Nevada, California, Nebraska, and Michigan. He is the former president and current vice-president of the National Indian Justice Center (a nonprofit that trains tribal court and other personnel around the country), and a former member of the Board of Directors for National CASA (Court Appointed Special Advocates, a nonprofit group that provides volunteer representation for abused and neglected children in court).

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Introduction

This report concerns the first of a series of Roundtables on jury representativeness, held in Winnipeg on April 6, 2019.

The objective of the Roundtables is to gather the views and suggestions of a cross-section of the community about juries with a goal to achieving greater inclusivity and build confidence in the criminal justice system.

Structured as a one-day event, representatives from all parts of the justice system – defence and Crown lawyers, judges, court administrators, academics and law students were brought together with members of various communities: Indigenous people, persons with disabilities and newcomers. The event offered the opportunity for participants in the various aspects and different stages of jury trials to hear from members of these communities.

This report, together with those of the other Roundtables across Canada, will be discussed at a national symposium on jury representativeness.

The Manitoba Roundtable provided insights and perspectives on a variety of issues, some of which resulted in immediate action. The Sherriff implemented several new policies in the jury office, including increasing the number of jury notices sent out for each jury section by 25%, sending their notices two weeks earlier, and keeping the list "open" until a week before jury selection, to allow persons in rural communities with post office delivery only more time to receive, review and respond to the notice. Changes have been made to the wording of the Notice to Jurors and on the court's website. Additional changes are expected to address concerns identified by Roundtable participants.

The possibility of delivering outreach and educational programming to communities concerning the role of juries is under consideration by the court's Reconciliation and Access to Justice Committee; and the feasibility of conducting jury trials in some communities is being examined by the court. A request to increase compensation for jurors (Manitoba pays $30 per day after 10 days of trial) will be made to the Province.

Modifications to the jury boxes and other issues of comfort are being examined; and the Manitoba Law Reform Commission has been asked to consider undertaking a review of *The Jury Act*, in light of issues raised at the Roundtable.

Background

The law in Canada regarding "A Representative Jury"

Any discussion of the notion of a "representative jury" is, of course, framed by the current state of the law.

R v Kokopenace

In 2015, the Supreme Court of Canada set out the law governing representation for the purposes of jury selection, holding that representation concerns the quality of the state's process and efforts to compile the jury that eventually hears a criminal trial.[1] Representation *does not* bear on the ultimate composition of the jurors who hear a trial, nor does it demand that particular groups always be included in the jury selection process.[2]

Writing for the majority, Moldaver J. concluded that a jury roll is representative where the source lists used to collect the names of jurors are:

(1) randomly drawn from;
(2) a "broad cross-section of society"; and
(3) notices are delivered to the persons randomly selected.[3]

If these requirements are met, inadvertent exclusion of historically underrepresented people on juries will not violate an accused's rights.

Cross-Section of Society

The majority of the court[4] held that drawing from "a broad cross-section of society" does not mean the list needs to be perfectly or "proportionately representative" of the different demographics in a district.[5] Moldaver J. stated that it is impossible to create a jury roll that represents every group in our society given the "infinite number of characteristics"[6] from which one can try to delineate groups. Further, representativeness cannot require a jury roll of a particular composition as the state would then have to inquire into the background

[1] *R v Kokopenace* [2015] 2 SCR 398, 2015 SCC 28 at para 63.

[2] *Supra* note 1 at para 39.

[3] *Ibid* at para 40.

[4] McLachlin CJC and Cromwell J dissenting.

[5] *Ibid* at para 41.

[6] *R v Brown* (2006), 2006 CanLII 42683 (ON CA), 215 C.C.C. (3d), at para 22. *Kokopenace* at para 42.

of any potential juror, which contradicts the "random selection" aspect of the test.[7] Rather, the list needs to try to capture as many eligible jurors in each district as possible.[8] The obligation to form a representative jury is met when the state provides a "fair opportunity" for a "broad cross-section of society" to be included in the jury rolls.[9]

As for a fair opportunity, Justice Moldaver said:

> "… A fair opportunity will have been provided when the state makes reasonable efforts to: (1) compile the jury roll using random selection from lists that draw from a broad section of society, and (2) deliver jury notices to those who have been randomly selected. …"[10]

The circumstances before the court were that the lists used by the Ontario government excluded four of the forty-six bands, only 10% of the questionnaires were returned and only 5.7% of the returned questionnaires were eligible.[11] However, the court found the efforts of an employee of the sheriff's office effectively remedied the deficiencies in the selection and thereby created a reasonable process.[12] Thus, the systemic problem was cured by the actions of one government worker, rather than a policy or comprehensive government plan.[13]

Representation and Charter Rights

The court also noted that representation itself concerns two *Charter* rights: the right to be tried by an impartial and independent tribunal (s. 11(d)), and the right to be tried by a jury (s. 11(f)). Any issue of representation under s. 11(d) only arises in the context of the impartiality and independence of the tribunal.

The test to determine whether a tribunal is impartial is long established: "whether a reasonable person, fully informed in the circumstances, would have an apprehension of bias?"[14] Thus, the tribunal must not only be impartial, but must be seen to be impartial. The court concluded that there are only two forms of conduct that will violate s. 11(d): (1)

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[7] *Supra* note 1 at para 42.

[8] *Ibid* at paras 41 and 73.

[9] *Ibid* at para 61.

[10] *Ibid* at para 61.

[11] *Ibid* at paras 26-27. On the facts of the case, the lists used by the Ontario government excluded four of the forty-six bands, where only 10% of the questionnaires were returned and only 5.7% of the returned questionnaires were eligible.

[12] *Ibid* at paras 108-113.

[13] *Ibid* at paras 65 and 66. The court does hold that ss. 11(d) and (f) of the *Charter* are rights granted to an individual and not to groups to be represented on juries, and that these rights are not the proper grounds to produce systemic change. The majority also discuss this in the context of s. 6(2) of Ontario's *Juries Act* and the honour of the Crown and *Gladue* principles (Kokopenace at paras 98-101).

[14] *Valente v The Queen,* 1985 CanLII 782 (SCC) [1998] at para 46, Kokopenace at para 49.

if there is deliberate exclusion of a group from the jury selection process, making the state actually partial; and (2) if the state's efforts in compiling the jury roll were "so deficient" that they give rise to an appearance of partiality, making the state appear partial.[15] Addressing the latter, the majority found that "a jury roll containing few individuals of the accused's race or religion is not itself indicative of bias."[16]

Concerning s. 11(f), Moldaver J. explained that representativeness is a necessary component of the right to a jury trial as it legitimizes the jury. It is a proxy for the "conscience" of the community."[17] Representativeness for s. 11(f) is defined as for s. 11(d); the right to a process of "adequate" jury selection. An "absence" of representation will violate s. 11(f) even if it does not meet the threshold for a violation under s. 11(d).

Kokopenace is important because court clarified the meaning of ss. 11(d) and (f) of the *Charter* in the context of representation. The case also reaffirmed the old dictum of the jury as the "conscience of the community"[18], observing that the right to be tried by one's peers is a cornerstone of Canada's legal system[19] that helps legitimize and promote public trust in the criminal law.[20]

The Manitoba Roundtable

The Roundtable format consisted of a series of presentations followed by breakout discussions with participants being divided into several groups.

The presentations included a review of the current jury process, being both the administrative practices and procedures within the jury office and a review of the provisions of *The Jury Act* of Manitoba; a presentation of the results of a study in public perceptions of the suitability of persons with disabilities to serve as jurors, a presentation of tribal court practices in the United States, and a panel on ethical considerations with respect to the use of peremptory challenges.

The questions posed to the participants to discuss in the small groups were:

1. What are the strengths and weaknesses of Manitoba's current jury selection system in terms of creating a jury that is representative of the community?
2. What are the barriers to representative juries and how can they be addressed?

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[15] *Supra* note 1 at para 50.

[16] *Ibid* at para 51.

[17] *Ibid* at para 55.

[18] *Ibid* at paras 55-56, *R v Sherratt* [1991] 1 SCR 509, 1991 CanLII 86 (SCC); pp. 523-25 (*Sherratt*).

[19] *Supra* note 1 at para 1.

[20] *Sherratt*, at pp. 523-25.

3. Who should be excluded from jury service and why?

4. What is a fair and just cross-section of the community and how could that be achieved?

The small groups were structured to give voice to the specific communities – Indigenous peoples, the disabilities community and newcomers. Most of the discussion focused on the systemic barriers preventing members of these communities from becoming jurors. Participants were less concerned whether the current test is sufficiently inclusive, but instead asked what needs to be done so that juries adequately represent them and their communities?

Kokopenace received only passing mention in the discussions at this Roundtable. Rather, the focus of the day was the broader question of what jury representativeness means to members of the different communities and particularly what it meant for Indigenous people and people with disabilities. “Representation” for members of these communities meant looking at the obstacles that disproportionately bar certain communities from jury service and making positive efforts to remove those obstacles.

A final group engaged in a discussion of the issue of peremptory challenges and the potential impact of what at the time was Bill C-75 (since passed into law).

Contents of the report

This report details the following:

Part 1: A summary of problems in the jury selection process identified by the participants.

Part 2: The beginnings of a framework to change the jury selection process, focusing on the issues of Indigenous communities reclaiming jurisdiction to govern their own people, and better accommodation of the needs of disabled persons and people new to Canada.

Part 3: Recommendations made by the participants in their discussion of problems posed in the various small groups.

Part 4: Concluding remarks concerning the day’s discussions.

The report refers to many studies that rigorously analyze this topic and is no substitute for them. Rather, this report is intended to reflect the views of the different groups of people who see themselves as being excluded from participating in juries as well as the larger legal system.

Part 1: Problems

The problems outlined in this section represent the nodes around which the Roundtable discussions circled. As a whole, they represent distinct stages in the jury selection process that exclude Indigenous people, people living with disabilities and new Canadians. As individual units, they range from administrative processes and practices within the jury office, to provisions in Manitoba's *Jury Act* and the *Criminal Code,* and to much larger social issues identified as symptoms of colonialism and indicative of cultural and other biases.

The majority of problems identified here with respect to Indigenous people are very similar to those detailed elsewhere – the *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by The Honourable Frank Iacobucci* (*Iacobucci Report*),[21] or are enduring problems detailed in the *Report of the Aboriginal Justice Inquiry of Manitoba* (*AJI*) [22] twenty years ago. However similar or familiar these issues are, they are unique in tone as Manitoba is one of the few jurisdictions to have rigorously looked at the particular problem of jury representation. That is to say, most of these problems have been documented and are known. Many of the Indigenous participants expressed frustration that the problems discussed in 2019 concerning representation on juries were very similar to those detailed in the *AJI* in 1999.

Concerning people with disabilities, the problems are distinct. In their paper titled "The Jury Representativeness Guarantee in Canada: The Curious Case of Disability and Juice Making", Professor Bertrand from the University of Winnipeg and Professor Jochelson from faculty of law at the University of Manitoba discuss how little disability is brought up in the context of representation as a stand-alone issue.[23] This is despite the finding that nearly half of Canadians will be defined as living with a disability over their lifetime.[24] Other than this work, which demonstrates negative community biases towards the aptitude of people with disabilities to serve on juries, little research or case law on the issue exists in Canada.

The current immigration pattern in Manitoba is that newcomers originate primarily from the Asia/Pacific and Africa/Middle East areas. Most are settling in Winnipeg. There is little education for newcomers about the jury system, its role in Canadian society and the importance of participating in it when selected for jury duty. Language barriers also affect the ability of new Canadians to participate in the jury process even when otherwise eligible. Unfortunately, given the limits of a one-day Roundtable, and the multiplicity of

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[21]Iacobucci, Frank. *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by The Honourable Frank Iacobucci*. Toronto: Ontario Ministry of the Attorney General, 2013.

[22]Manitoba. Public Inquiry into the Administration of Justice and Aboriginal people. *Report of the Aboriginal Justice Inquiry of Manitoba*, vol 1, *The Justice System and Aboriginal people*. Winnipeg: The Inquiry, 1991.

[23] Michelle I. Bertrand, Richard Jochelson and Laure Menzie, "The Jury Representativeness Guarantee in Canada: The Curious Case of Disability and Juice Making," JEMH 10 at 2.

[24]*Ibid* at 2.

issues, solutions that would address the need to provide education to new Canadians about the jury system could not be discussed more fully.

It was clear that while the issues discussed were facets of problems common in all these communities, they require unique remedies, including the adoption and adaptation of techniques tried elsewhere.

As noted above, this report cannot substitute the extensive research and consultation done by the *AJI* or the findings and analysis of ongoing academic research.

The following issues were identified by participants:

- **Neglect of the AJI's Recommendations:** The Province has not adopted the recommendations of the *AJI* or put forward an alternative solution to increase Indigenous participation on juries and ameliorate the poor relationship between Indigenous people and the criminal justice system.

- **Indigenous Jurisdiction, Residency and Local Jury Trials:** The institution of the jury is not meeting its objective of increasing public trust in the justice system and protecting Indigenous people from the oppressive enforcement of laws. Many participants expressed the view that the provincial government retains too much of the jurisdiction and decision-making power that ought to be placed in the hands of First Nations, Inuit and Métis communities.

- **People Living with Disabilities:** Systemic biases discourage and make difficult the participation of people with disabilities through obstructions at the level of receiving juror summons, source lists, support, compensation, active measures to foster inclusion, and the solitude of living in remote and marginalized communities. Section 627 of the *Criminal Code* provides that a judge may permit a person with physical disability to have technical, personal of interpretative supports or services. This is insufficient to protect against barriers at the provincial level and pushes people to self-eliminate from the process by making a claim of undue hardship, or being subject to a finding thereof by a challenge under s. 638(1)(e) or by a judge under s. 632(c) and 633 of the *Criminal Code*.

- **Low State Burden and Self-Elimination:** The state's burden to create representative juries is too low. The requirements are not sufficient to redress the systemic barriers that exclude Indigenous people and people living with disabilities from participating in juries fully. This low-burden encourages self-elimination of people from groups already under-represented in the jury selection process as well as weakens the public's trust in the legitimacy of the jury as a pillar of the Canadian justice system.

- **Language:** The language requirements in s. 638(1)(f) of the *Criminal Code* and s. 4 of *The Jury Act* bar participation of persons who do not or struggle to speak and read Canada's and Manitoba's official languages. The prescription of language also

prescribes which cultures are welcomed into the justice system. Language further impacts many aspects of the jury selection process, particularly in the context of eligibility requirements and juror summons.

- **Source Lists:** The use of Manitoba Health's database provides a very broad cross-section of the community for jury selection. However, the health database still does not ensure adequate numbers of Indigenous people or people with disabilities will be selected for jury duty.

- **Compensation:** The low rate of compensation for jurors excludes people of lower income, particularly members of Indigenous communities and people living with disabilities.

- **Summons:** Juror summons are not available in Indigenous languages and use threatening and imperative terms that discourage participation of people wary of the justice system. This encourages self-elimination from the jury selection process of Indigenous people and people living with disabilities.

- **Disqualifications:** The varying eligibility requirements and grounds for challenge due to a criminal conviction at ss. 3(q), (p) and (r) of *The Jury Act*[25] and s. 638(1)(c) of the *Criminal Code* disproportionately excludes Indigenous people.

- **Legal Reform:** The elimination of peremptory challenges in *Bill C-75: An Act to Amend the Criminal Code, the Youth Criminal Justice Act* (*Bill C*-75) and other Acts and to make consequential amendments to other Acts by itself will not make a jury more representative. Vesting judges with more discretionary power will not guarantee alleviation of barriers.

Part 2: Approach

Developing a Framework for Change

Although applicable to people living with disabilities, the follow discussion of a framework for change focuses on Indigenous issues in jury representation. This focus was not intended to lessen the importance and complexity of addressing barriers faced by newcomers to Manitoba or people with disabilities in jury selection. Rather, it reflects the care by participants to discuss Indigenous representation on juries' issues in the broader context of reconciliation and Indigenous jurisdiction.

Indeed, changes to include people with disabilities in the jury selection process were discussed at length. Participants focused on what might be considered more traditional strategies and solutions, such as taking legal action under the s. 15 equality rights of the

[25] *The Jury* Act, CCSM c J30.

Charter or *The Human Rights Code*[26], and advocating in the public sphere to compel governments to change both law and practices, and people to overcome their biases. Importantly, it was recognized that many of the barriers that excluded Indigenous people also excluded people with disabilities. The discussion of issues, while addressed to a degree in this section, is also captured in Part 3.

In the Indigenous context, participants discussed opening up the Canadian justice system to include texts that incorporate new protections and obligations towards Indigenous people and marshalling existing powers to do so and creating a framework that begins with existing law and the obligations that the state has already taken on.
The framework for change discussed by the participants and set out here can be understood in four steps:

(1) establishing what purposes guide the change sought;
(2) establishing what is required to produce change;
(3) outlining a framework of laws to incorporate new norms;
(4) detailing an overview on how this framework might apply.

1. *What Guides Change*

Many participants advocated that any changes made to the jury selection process must be done in the service of giving greater decision-making power to Indigenous people. Many First Nations, Inuit and Métis communities know what kind of justice system they want. Achieving this may include a transfer of power and jurisdiction. Participants suggested the ultimate goal is the establishment of some form of Indigenous courts. An initiative of the Southern Chiefs Organization was referred as a concrete example of how this can happen.

For people with disabilities change must be made in the service of respecting human dignity, equal inclusion and combating the cultural bias that sees them less fit for serving as jurors. This involves eliminating the practical obstacles that bar people with disabilities from serving as jurors through change in discretionary practices and legislation. Governments must take positive steps to include and support the participation of people with disabilities on juries, and advocate with them to dispel the myth that people with disabilities are unfit to serve as jurors.

2. *Action and Advocacy*

Discussions centered on two complementary methods to redress the inequities of the jury selection process, and further the Canadian justice system as a whole: (1) advocacy; and (2) developing a framework for change from existing measures.

[26] *The Human Rights Code*, CCSM c H175.

In her presentation, Professor Bertrand explained that the mere publication of studies showing that bias exists in the community does compel government action. The findings of studies, surveys and inquiries require action, be it advocacy or litigation, to be of any use to produce change. It is only by pressing the public and the government that democratic transformation of the status quo can occur.

The view was also expressed that for Indigenous people producing change requires bringing an end to writing reports and launching inquiries and moving to develop a framework using existing measures. Implementing the findings and recommendations of studies and inquiries must occur. Further, change should incorporate the larger context of the obligations of governments.

In this respect, Canada and Manitoba have taken steps to build on. Legislation and norm-generating documents exist to turn to and marshal to begin solving the problems that afflict the communities.

Change can be made at three levels: (1) policies, practices and procedures, which can be changed immediately; (2) legislative; and (3) foundational. Effective action and advocacy must be holistic and target all three, but immediate solutions are essential if only because they start the basis for more fundamental change in the long term.

Immediate change looks at current, often discretionary, practices that do not require legislative sanction to produce the best version of the system already in place, even if flawed. Legislative changes focus on the longer term, involving the creation of a legal framework that both reforms current practice and gives space for unexplored future ones.

Legislative change needs to transfer power to pertinent Indigenous political bodies that can themselves make normative changes and not merely circumscribe or regulate the existing powers of government. Legislative change required to increase the representation of people with disabilities on juries would impose more rigorous obligations on the government to lift the barriers to participation and representation of this community.

Foundational change is built from both sustained practice and effective legislation. It involves the transformation of the preconceptions that predicate all other action and form the basis of normative behaviour. This is needed to bridge the gap between seemingly irreconcilable perspectives of justice and recognize the jurisdiction of Indigenous communities and establishment of Indigenous Courts.

Foundational change for people with disabilities involves changing the cultural bias that prejudices those with physical and mental disabilities from serving on juries and otherwise participating in legal and political processes.

3. A Constellation of Laws and Norm-Generating Texts

Professor Craft offered some specific examples of how the jury system could be reformed to better accommodate Indigenous peoples. She pointed to the significant legislation and

norm-generating texts that can be used to make changes, such as Manitoba's *The Path to Reconciliation Act* and *The Aboriginal Languages Recognition Act. The Path to Reconciliation Act* (*PRA*) recognizes the harm and abuse caused to Indigenous people since "European contact."[27] The law commits to creating a report each fiscal year on the Province's progress to advance reconciliation and implement reconciliation strategy.[28] Litigation involving the *PRA* is currently before the Manitoba courts. The *PRA* also affirms the Province's commitment to reconciliation, stated in the preamble as follows:

> "AFFIRMING that the Government of Manitoba is committed to reconciliation and will be guided by the calls to action of the Truth and Reconciliation Commission and the principles set out in the United Nations Declaration on the Rights of Indigenous peoples".[29]

Affirming the United Nations Declarations on the right of Indigenous people the Truth and Reconciliation Commission's calls to action helps concretize the steps the Province must take towards reconciliation.[30] The *PRA*'s preamble begins to put into action some of the TRC's calls to action, particularly the 43rd, which urges provincial governments to "adopt and implement" the UNDRIP as a framework to guide governmental efforts of reconciliation.

Professor Craft observed that in its recognition of the TRC's calls to action and UNDRIP, the *PRA* opens up Manitoba's legal landscape to the creation of substantive and enforceable obligations. The Supreme Court of Canada has looked to foundational principles in legislative preambles[31] as a tool to guide the interpretation of law and give rise to substantive legal obligations.[32] Thus, Professor Craft pointed out, just as the reference to "the rule of law" in the preamble to the *Constitution Act 1867* was found to be a substantive normative principle that legally limited government action,[33] the *PRA* could be a starting point for the creation of substantive government responsibilities and obligations in Manitoba based on the TRC's calls to action and UNDRIP.

The recognition of the TRC and UNDRIP could also further open legal space for these two texts to be incorporated into an analysis of existing laws and obligations that concern Indigenous people directly. These can include using article 13 of UNDRIP and the TRC's many recommendations concerning language to guide the application of Manitoba's *Aboriginal Languages Recognition Act* (or determine how *The Path to Reconciliation Act*

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[27] *The Path to Reconciliation Act*, CCSM c R30.5.

[28] *Supra* note 26.

[29] *Ibid*.

[30] It was noted that the *Act* does not recognize the "rights" set out in UNDRIP, but rather the "principles" of UNDRIP, which likely lessens the actionable and binding strength of the "rights" set out in the declaration.

[31] *Reference re Secession of Quebec*, [1998] 2 SCR 217, 1998 CanLII 793 (SCC) at paras 51-54, *Re: Resolution to amend the Constitution* (*Re Succession Reference*), [1981] 1 SCR 753, 1981 CanLII 25 (SCC), at 845, *Re Manitoba Language Rights*, [1985] 1 SCR 721, 1985 CanLII 33 (SCC) at paras 63-66.

[32] *Re Succession Reference* paras 51-54.

[33] *Ibid* at para 54.

can apply to Indigenous languages) or vice versa in the context of the *PRA* to further concretize what reconciliation entails.[34]

Another example given by professor Craft is *The Aboriginal Languages Recognition Act*.[35] This is a legal source that could be relied on in the context of jury selection.

In its recognition of Cree, Dakota, Dene, Inuktitut, Michif, Ojibway and Oji-Cree, and the importance of sustaining these languages, the *Act* already sets out the scope for which languages to include in the jury selection process in addition to French and English. Indeed, many of the Roundtable participants noted that language is a crucial aspect of jury selection. Language requirements serve as grounds for disqualification in *The Jury Act* and in the *Criminal Code*, excluding those migrants and Indigenous people who speak neither English nor French. Canadian law is itself expressed in particular languages and conventions. As the *AJI* points out, laws are contained within language.

4. The Framework

On the issue of jury representation and Indigenous people in Manitoba, the starting point is the *AJI*. The *AJI* has already done extensive work detailing the problems between Indigenous people in Manitoba and the justice system, and solutions to those problems. This includes issues of jurisdiction, residency, local jury trials/source lists and language. It ought thus to be the foundation for any framework to change the jury selection process.

Looking to Other Successes

Participants stressed looking to other successful instances of jurisdiction being given to Indigenous organizations and institutions pursuant to recommendations made by Indigenous inquiries and political bodies. Areas of success relative to the issues of (a) jurisdiction and (b) language.

a) Jurisdiction

Participants pointed to the changes made to Manitoba's child welfare system as an example of how the Province can engage with Indigenous people to reform the law. The same approach could be taken to the jury selection process.

The recommendations of the *AJI*[36] and the subsequent Aboriginal Justice Inquiry – Child Welfare Inquiry (*AJI*-CWI)[37] led to the creation of *The Child and Family Services Authorities Act*.

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[34] *The Aboriginal Languages Recognition Act*, CCSM c A1.5. Note this can extend to the application of the more rigorous Bill C-91 *An Act respecting Indigenous languages*.

[35] *Supra* note 34.

[36] *Supra* note 22 at chapter 14.

[37] Southern Nations Network of Care website; https://www.southernnetwork.org/site/history, Anna Kozlowski, Vandna Sinha, Tara Petti and Tara Petit, "First Nations Child Welfare In Manitoba," CWRP

The Child and Family Services Authorities Act created four authorities to administer child and family services in Manitoba, two of which are First Nations (the Southern First Nations Network of Care and the First Nations of Northern Manitoba Child and Family Services Authority) and one Métis (the Métis Child and Family Services Authority, which also has responsibility for Inuit children).[38] [39] These authorities oversee the older mandated[40] child welfare agencies established by Indigenous communities (such as Dakota Ojibway Child and Family Services Agency) mandated in 1981[41], providing services under *The Child and Family Services Act* within the authorities designated region.[42] While many issues remain, this initiative is an example of the Province facilitating Indigenous self-governance[43] through a transfer of jurisdiction.

b) Language

It was pointed out that the Northwest Territories has adopted nine Indigenous languages as official languages.[44] This allows unilingual speakers of these languages to serve on juries.[45] Jury summons are translated into the language prevalently spoken in a community. Thus, people whose first language is any of the Indigenous languages receive an appropriate summons.

The Northwest Territories also has a further mechanism to respect linguistic realities. The sheriff can appoint a panel of three people familiar with the French-speaking community of Yellowknife to compile a list of French and French-English bilingual jurors.[46] More engagement with the community by the sheriff could ensure that the linguistic needs of unilingual Indigenous speakers are respected in the jury selection process. Formalizing institutional interaction between the sheriff and the community is required.

Information Sheet 97E. (2012); https://cwrp.ca/information-sheet/first-nations-child-welfare-manitoba-2011.

[38]Section 2 of *The Child and Family Services Authorities Act*, CCSM c C90.

[39]*Supra* note 37 at s. 17(3)(a).

[40]*Ibid* at s. 19(e).

[41]Dakota Ojibway Child and Family Services website; https://www.docfs.org/mandate.

[42]*Supra* note 36.

[43] Manitoba. *Transforming Child Welfare Legislation in Manitoba: Opportunities to Improve Outcomes for Children and Youth Report of the Legislative Review Committee*, September 2018, at 8.

[44] Government of Northwest Territories website;https://www.ece.gov.nt.ca/en/services/secretariat-des-langues-autochtones/official-languages-overview. Of these nine (9) Indigenous languages, three (3) different language families: Dene, Inuit and Algonquian/Cree, while the remnant two are French and English.

[45] s. 4 of *Jury Act* R.S.N.W.T. 1988, c.J-2.

[46] s. 3 *Jury Regulations*, NWT Reg 034-99. It remains to be seen whether the proposed Bill C-91 *An Act Respecting Indigenous Languages* will have any effect in allowing unilingual speakers of Indigenous languages to serve on juries. Bill C-91 *An Act Respecting Indigenous Languages* *https://www.parl.ca/DocumentViewer/en/42-1/bill/C-91/first-reading*.

Part 3: Recommendations

The recommendations below each respond to the problems outlined in Part 2. They represent the reports of the small groups. The reports consisted of suggestions made by participants more so than consensus views.

Problems:

1. Neglect of the *AJI*'s Recommendations
2. Indigenous Jurisdiction, Residency and Local Jury Trials
3. People Living with Disabilities
4. Low State Burden and Self-Elimination
5. Language
6. Source Lists
7. Jury Summons
8. Pay, Compensation and Support
9. Peremptory Challenges
10. Disqualifications

1. Neglect of the AJI's Recommendations

The recommendations set out in Chapter 9 of the *AJI* should be implemented.[47] Further, given that the issues of Indigenous sovereignty and jury representation are inextricably tied together, ways to improve the relationship between Indigenous people and the Criminal justice system should be sought in an extensive review of the *AJI.*

The 20th anniversary of the *AJI* is in two years. It is timely to undertake a comprehensive review analysis of which recommendations have been implemented.

Recommendations

- The Recommendations in the *Report of* the *AJI*, Chapter 9, Volume 1: *Juries*, be implemented.

2. Indigenous Jurisdiction, Residency and Local Jury Trials

Systemic change is required to solve systemic problems. Representation on juries for Indigenous people will remain an issue so long as the dysfunctional and harmful relationship between Indigenous people and the Canadian justice system endures.[48] The way to solve these problems is through efforts to restore jurisdiction and decision-making power in the hands of the First Nations, Métis and Inuit communities.

[47] *Ibid*.

[48] *Supra* note 21 at para 15. *Supra* note 1 at para 104.

The first step is to make the jury selection process more participatory. Indigenous communities affected by the harm that is at the centre of a case require greater input. Localizing a trial in a community ensures that community members are included as jurors and are actually given a fair chance to be so without the manifold systemic barriers at the level of language, sources lists, summons and compensation excluding them.

The *AJI* recommendations provide crucial insight on how to begin accomplishing this goal. Further assistance for the Province can be found by turning to the Southern Chiefs Organization's First Nations Justice Strategy, a comprehensive four-year plan for establishing Indigenous jurisdiction in areas of Criminal and Family (amongst many other things) in the Province.

Recommendations

- The following recommendations from the *AJI* offer concrete solutions:
    - Draw jurors from within 40 kilometres of the community in which a trial is held.
    - When a sheriff grants an exemption to a potential juror, the individual is replaced by someone from the same community.
    - In the event that there is a need to look elsewhere for jurors, the jury be selected from a community as similar as possible demographically and culturally to the community where the offence took place.
    - In urban areas, draw juries from specific neighbourhoods of the town or city in which victims and accused reside.
    - Amend *The Jury Act* to permit those who only speaks and understands an Indigenous language to serve as a juror. In such cases translation services be provided.[49] [Note: Discussed below in section titled "Language." The *AJI's* recommendations for juries are reproduced in Appendix A]
- Indigenous communities must be consulted on how they wish to participate in the jury selection process.
- Increased Indigenous representation in the jury selection process must be accompanied by increased efforts to invest communities with jurisdiction.

3. People Living with Disabilities

The current jury selection process excludes many people with disabilities. Beyond the problems of compensation, summons and legislated grounds for exclusion, differently abled people often face physical barriers. The physical space of the courtroom and

[49] *Supra* note 22.

deliberation room excludes people in wheelchairs or makes their presence in those spaces cumbersome and uncomfortable. Physical impediments may make responding to summons difficult if they need to go out of the house to buy stamps, mail their response or inquire about their obligations. Indeed, courtroom norms themselves, such as jurors having to look at the accused or rising for the judge, are exclusionary. These factors drive people living with disabilities to self-eliminate and compound other barriers.

Justice Thorn provided some insights in his presentation as to the operation of juries in the tribal court setting in the United States. He provided a model of what an accommodating system could look like that is applicable to both Indigenous people and persons with disabilities. The substance of his presentation addressed many of the concerns raised by the Report of the Standing Committee on Justice and Human Rights.[50] He stressed the importance of letting jurors guide the trial. To make them comfortable and to treat them with respect and dignity and not as infants. To listen to jurors' needs and make efforts to accommodate them, as they are the representatives of the public who determine the guilt of the accused.

Recommendations

- The Province should undertake a comprehensive review in an effort to include people with disabilities into the jury selection process beyond what is called for in *Kokopenace*.

4. Low State Burden and Self-Elimination

The problems of low state burden and self-elimination from the jury selection process are a theme present in many of the problems identified. The low burden on the state to take active measures to include underrepresented groups underlies many of the systemic barriers discussed. Self-elimination from the jury process is a consequence of the low burden of the state to redress the systemic forces that mitigate against the presence of Indigenous people and people with disabilities on juries. This intersects with most distinct issues, such as disqualifications, summons, and compensation, detailed below.

As such, this particular issue generated no recommendations *per se*, except that the truth of this statement be acknowledged. The remedy for self-elimination and low state burden includes positive measures by the state to include people currently excluded.

Recommendation

The Province take meaningful and positive steps to increase participation of communities underrepresented on juries, beyond the requirements set out in *Kokopenace.*

[50] *Improving Support for Jurors in Canada: Report of the Standing Committee on Justice and Human Rights*, May 2018.

5. Language

Language is a problem that touches on many aspects of the jury selection process, from the juror summons forms and disqualifications set out in *The Jury Act* and *Criminal Code*, to the tone of the relationship between the justice system and Indigenous people and people with disabilities.

Participants were mindful that law is contained in language and the effect of the language requirements set out in *The Jury Act* and *Criminal Code* do not simply exclude people on the technical base of language, they exclude on the basis of culture. People who recently arrived in Manitoba/Canada and would otherwise be qualified to serve, are barred. Not allowing unilingual Indigenous language speakers keeps both the court processes and the law insular.

If the Province trained translators in Indigenous languages not only the jury process but the larger justice system would effectively be opened up to speakers of Indigenous languages. Many participants pointed to the process in the Northwest Territories where, unlike in Manitoba, they send out their summons in the nine official Indigenous languages[51] and allow unilingual speakers of these languages to serve on juries.[52] [53] The *AJI* held the Northwest Territories' approach as an example of how to increase Indigenous participation on juries.

Recommendations

- The *AJI's* recommendation is that
    - "The Manitoba *Jury Act* be amended to permit an Aboriginal person who does not speak and understand either French or English, but who speaks and understands an Aboriginal language, and is otherwise qualified, to serve as a juror in any action or proceeding that may be tried by a jury, and that, in such cases, translation services be provided."[54]
- Section 638(1)(f) of the *Criminal Code* similarly be amended.
- The Province train and make available Indigenous language interpreters.

[51] *Supra* note 43

[52] *Supra* note 44 at s. 4.

[53] *Supra* note 45 at s. 3. The Northwest Territories have a practice of translating their summons sent to a particular community to the language prevalently spoken there. Also instructive are the Northwest Territories' *Jury Regulation* provisions on how to compile a French and Bilingual jury list where the sheriff can appoint a panel of three people familiar with the French-speaking community of Yellowknife to compile a list of French and French-English bilingual jurors.

[54] *Supra* note 22 at "Local Jury Trials".

6. Source Lists

The lists currently used are those maintained by the Minister of Health of Manitoba of residents registered under *The Health Act*.[55] Manitoba needs lists that are representative of Indigenous people. Participants agreed with the *AJI*'s recommendation that jurors be drawn from the community where the trial is held and has suffered the impact of the harm done. Source lists should be based on postal codes.[56]

Uniquely in Canada the *Health Act* includes Canadian citizens, permanent residents, various work permit holders and their spouses, persons who establish a permanent residence in Manitoba and people who reside physically in Manitoba six months in a calendar year.[57]

In contrast, the *Criminal Code*, s. 681(d), states that a juror can be challenged for cause on the grounds that "the juror is an alien." *Bill C-75* has changed the language of s. 681(d)) to "a juror [who] is not a Canadian citizen."[58] The *Criminal Code* seems to contradict *The Jury Act*, which uses residency as opposed to citizenship as the disqualifier to juror eligibility (see s. 3).

Recommendations

- The Province implement the following *AJI* Recommendations:
    - Jurors be drawn from within 40 kilometres of the community in which a trial is to be held.
    - In urban areas, juries be drawn from specific neighbourhoods of the town or city in which victims and accused reside.

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[55] *Jury Act Regulation* 320/87 r at s. 6(a). We note that in Ontario the *Iacobucci Report* and the *Debwewin Jury Review Implementation Committee Report* recommended that the Province use the Ontario Health Insurance Plan lists instead of the special provision for on-reserve residents in Ontario's *Jury Act*. The *Debwewin Jury Review Implementation Committee Report* stressed that if the OHIP lists were to be used, then there would have to be continuous engagement with Indigenous communities on policy development.

[56] Thus, a given number of jurors from given area (determined by their postal code) are placed in the jury pool. This avoids the problem discussed in *Kokopenace* of how to delineate a group and determine which group ought to be represented while allowing lists to focus on areas with historically underrepresented groups.

[57] *The Health Services Insurance Act*, CCSM c H35, at s. 2(1) "resident" people who are present in the province on a less permanent basis such students temporarily absent from other provinces or "a person who holds a temporary resident permit under the *Immigration and Refugee Protection Act*" (unless the minister holds otherwise).

[58] *Bill C-75: An Act to amend the Criminal Code, the Youth Criminal Justice Act* as passed by the House of Commons December 3rd 2018 at 271.

- The Province use source lists supplied to them by Indigenous Communities containing names of people who want to serve on juries.

- The Province use the postal codes of residents as a means to identify jurors from specific neighbourhoods and communities.

- When the Jury manager grants an exemption from jury duty, the person who is exempted be replaced with someone from the same community.

- The *Code* be amended to eliminates the requirement that jurors be a Canadian citizen

7. Jury Summons

Participants discussed several aspects of a jury summons.

1) Seven-day return period

The practice in the jury office is that juror notices are not responded to. Longer response times are needed given the different lifestyles and methods of receiving and responding to mail of northern communities.[59] Receiving the material, reading it, understanding it, inquiring about the process, compensation and accommodation, considering if it is financially or physically feasible, and making arrangements with work and care for children, requires more time than allowed.

2) Closing jury panel list after 60 returns are received

The jury office has a practice that once 60 persons of the 200 who were sent notices are identified for a jury panel, the list is closed. Anyone whose return arrives thereafter is automatically excused. Participants observed that this excludes many people, particularly those whose mail delivery is not daily, and to a post office box. This privileges urban residents.

3) Informing communities about the jury process must be meaningful and meet their needs

Notices indicate that information about the jury process is available online or by calling the jury office. Calling the sheriff or going online to get informed about the jury process in remote areas should be as easy of a task as it might be in urban areas. People with disabilities should have as few barriers as possible to accessing and responding to jury summons.

A better approach is needed to inform individuals and communities about the jury process. A designated person, such as an Aboriginal court worker, could be appointed in each community for this function and answer questions about all aspects of jury duty. This

[59] *Supra* note 55 at Schedule A.

could also include a special protocol for sheriffs to follow up with jurors who report undue hardship due to a disability. This might increase trust and address the problem of self-elimination from the selection process.

4) The language of the summons

The imperative language used in the summons contributes to the self-elimination of people already wary of the justice system, reducing participation and representation. Languages in the summons ought to be more accommodating, stating explicitly how much jurors will be paid, what accommodations are available for people with disabilities, what is compensated and how compensation is given.

Recommendations

- The Province implement the following recommendations of the *AJI*:
    - "Every person called for jury duty, who is not granted an exemption, be required to attend, and summonses be enforced even when sufficient jurors have responded."[60]
    - In the event that there is a need to look elsewhere for jurors, the jury be selected from a community as similar as possible demographically and culturally to the community where the offence took place.
- The seven-day return period be extended to more reasonable time to allow people to receive, read and inquire about jury service.
- Language used in summons must be less threatening and more accommodating, stating in simple but clear language how much jurors will be paid, what accommodations there are available for people with disabilities, what is compensated and how compensation is given.
- The Province must undertake sustained efforts to inform Indigenous communities on an ongoing basis about the jury process.

8. Pay, Compensation and Support

All groups considered that compensation under the Manitoba *Jury Act* as it stands is unacceptable. *The Jury Act*'s regulations currently set out that jurors will only be paid $30 for a day or one-half day of service where the case extends beyond 10 days.[61] While jurors receive compensation, even if the case is unusually long or endures hardship, they will receive an additional $10 per day.[62] Low compensation practices exclude segments

[60] *Supra* note 22.

[61] *Supra* note 25 at s. 41(1). *Supra* note 55 at s. 1(2).

[62] *Supra* note 25 at ss. 41(1)(b) and 42(2). *Supra* note 55 at s. 1(3).

of the population from service, forcing people to self-eliminate by claiming undue hardship narrowing the pool of candidates that represent a "cross-section" of the population.[63]

Jurors ought to be well compensated for their work, as well as receive more reliable source of funding for accommodations for jurors with disabilities and for psychological support for jurors after the trial. While the participants did not determine a per diem amount, the House of Commons Standing Committee on Justice and Human Rights presented its report "Improving Support for Jurors in Canada"[64] recommended that jurors be given an allowance of at least $120 per day of service and compensation to cover the costs that follow from serving on the jury.[65]

Recommendations

- Juror compensation increase to a realistic amount that gives jurors the financial stability not to suffer hardship if they chose to serve.

9. Peremptory Challenges

Participants heard a presentation on the pros and cons of eliminating peremptory challenges during the jury selection process. The issue is controversial. In short, some participants felt removing peremptory challenges was a positive step, while others championed its persistence because it is a useful tool for the defence to increase representation.

The *AJI* and the *Iacobucci Report*, and subsequently the *Debwewin Report*, recommended eliminating peremptory challenges on account of their use to exclude Indigenous jurors from juries. *Bill C-75* would give judges the authority to determine challenges for cause to detect bias.[66] However, while *Bill C-75*'s amendments fulfills two of the recommendations made by the *AJI* to the jury process, people with disabilities would still be prone to exclusion and self-elimination due to the discretionary power of the judge to exempt from service due to hardship.[67]

Discussion took place as to the efficacy of *Bill C-75*'s amendments for getting more Indigenous jurors on juries and offering adequate protections for the accused against unbiased jurors. Some participants were of the view that giving the judges more discretionary power to excuse jurors will not counterbalance the manifold systemic barriers that line the road to becoming a juror. Further, participants asked how a judge would know who is Indigenous, has a disability or has a bias against the accused? Some participants asked whether the scope of the questions counsel or judges could ask jurors

[63] *Supra* note 25 Schedule A "Notice to Jurors".

[64] *Supra* note 50.

[65] *Ibid* at 38 Recommendations 5 and 6.

[66] *Supra* note 58 at 269.

[67] *Supra* note 22.

when without peremptory challenges might run afoul of privacy laws and would only be determined after long and costly litigation.

In the middle of the road, some participants discussed the possibility of only the defence retaining the ability to challenge peremptorily. It was noted, however, that in the case of *R v Stanley*, it was the Crown who pled on the side of Colton Boushie, an Indigenous man, while Gerald Stanley was accused of his murder. In cases like that, peremptory challenges are not helping to increase Indigenous representation on juries.

10. Disqualifications

Much concern was raised as to the wide array of disqualifications set out in *The Jury Act*. Particular concern was raised with the disqualification based on a "mental or physical infirmity"[68] given the findings of bias against people with disabilities to serve as not being competent jurors as found in Professor Bertrand's studies.

Disqualifications based on criminal charges and records were also widely discussed. It was suggested that there should be a period after the conviction which upon expiry allows a person to serve as a juror without needing to apply for a pardon whether or not the offence is indictable or summary. To mitigate any bias, counsel could, during the challenges process, inquire into the nature of offences. This would represent a more subtle and inclusive approach than the current disqualifications.

Much like the problems with compensation of jurors, laws that prevent people with criminal convictions who have not received a pardon exclude a significant segment of a population from serving. It also represents cynicism towards the rehabilitative effects of serving prison sentences (and further, implicitly challenging the salutary effects of a more punitive system).

Further, while no longer explicitly barred[69] from participating in the jury process, the combined systemic hurdles that Indigenous people in Canada face come close in fact to doing just that. The disproportionate rates of incarceration[70] amongst Indigenous people combined with the problems of jury summons, sources lists, compensation and peremptory challenges, the various aspects of jury service further reduce the chance of Indigenous participation in juries.

Recommendations

- The provincial and federal governments, respectively, amend s. 3(p), (q) and (r) of *The Jury Act* and s. 638(c) of the *Criminal Code* to allow people convicted with an

[68] *Supra* note 25 at s. 3(o).

[69] *Supra* note 22.

[70] Statistics Canada website; https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2018001/article/54972-eng.pdf?st=pzLmsn_T.

indictable or summary crime to serve on juries after a certain period of time without need of a record suspension.

- The Province re-examine and refine the wide scope of disqualifications.

Part 4: Some Conclusions

Representation took on an interesting meaning during the Roundtable. As stated above, while *Kokopenace* was not discussed overtly, its definition of representation as a process was the understated backdrop to the discussions. Many of the recommendations made by the participants discussed representation as something substantive. It did not mean having a particular group represented on every jury. Rather, representation meant making efforts on behalf of the state and its actors to encourage the participation of groups that are inadvertently not represented on trials. Representation thus means helping groups of jurors who face systemic barriers that exclude them all but in print.

There is little consolation to people who are excluded and alienated from the justice system in knowing that they are not done so deliberately. The *AJI* wisely notes:

> "We do not doubt for a moment that its doing (excluding Indigenous peoples) so arises as much through inadvertence as through willfulness, but to Aboriginal people that difference is of no import."[71]

Justice Cromwell's admonition of the majority position in *Kokopenace* has a similar message:

> "We must first be clear what the phrase "systemic problems" in this context refers to. It is a euphemism for, among other things, racial discrimination and Aboriginal alienation from the justice system."[72]

For people with disabilities the state set out rules that explicitly exclude them. On their face, these are not written with malicious intent but are seemingly based on compassionate grounds. However, they become a serious problem when prejudices towards people with disabilities undergird the system whose actors can use discretionary powers to act on those laws. The narrow definition of what representation means in the context of the jury seems bitterly sanguine to many when it offers no substantive means to rebut the "inadvertent' exclusion of differently abled people.

The discussion of what a "fair cross-section of the community" meant also took on an independent meaning from that of *Kokopenace*. For the participants it meant juries composed of people who have some proximity to the harm. The "community" is not a faceless general mass, but a body of particularities. While randomness was agreed to

[71] *Supra* note 22.

[72] *Supra* note 1 at para 282.

be essential to the process, what was important for the participants was defining which communities were to be randomly chosen from. It meant circumscribing and localizing the scope from which jurors are drawn to allow for a more participatory body of jurors. It means recognizing that harm does not occur in a vacuum, but to particular people in particular places.

Appendix A

Report of the Aboriginal Justice Inquiry of Manitoba, Volume 1: The Justice System and Aboriginal People, Appendix 1 Recommendations: Juries

Juries

How Aboriginal People Are Excluded from Juries

- When a sheriff grants an exemption from jury duty, the person who is exempted be replaced with someone from the same community.

Every person called for jury duty, who is not granted an exemption, be required to attend, and that summonses be enforced even when sufficient jurors have responded.

- The Criminal Code of Canada be amended so that the only challenges to prospective jurors be challenges for cause, and that both stand-asides and peremptory challenges be eliminated.
- The Criminal Code be amended so that rulings on challenges for cause be made by the presiding judge

Local Jury Trials

- Jurors be drawn from within 40 kilometres of the community in which a trial is to be held.

In the event that there is a need to look elsewhere for jurors, the jury be selected from a community as similar as possible demographically and culturally to the community where the offence took place.

In urban areas, juries be drawn from specific neighbourhoods of the town or city in which victims and accused reside.

The Manitoba Jury Act be amended to permit an Aboriginal person who does not speak and understand either French or English but who speaks and understands an Aboriginal language, and is otherwise qualified, to serve as a juror in any action or proceeding that may be tried by a jury, and that, in such cases, translation services be provided.

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