

JURY REPRESENTATION IN CANADA

SYSTEMIC BARRIERS AND BIASES IN THE "CONSCIENCE OF THE COMMUNITY"

Report of the Canadian Institute for the
Administration of Justice

By Nathan Afilalo, July 2018



Friday, July 20, 2018

EXECUTIVE SUMMARY

Legal and Administrative Rules of Jury Representation

Context:

In the following report, CIAJ examines the factors that account for problems with representation of Indigenous and ethnic and cultural minorities on criminal jury trials. To begin its discussion of the topic, CIAJ has conducted a comparative analysis of the legal and administrative rules governing the provincial and federal jury selection process in Canada. The paper will serve as background information to the ensuing provincial roundtables and national symposium tackling the subject of representation on criminal jury trials.

Method:

In the report, we substantively explore the rules and practices concerning: 1) the juror roll preparation and sources lists, 2) juror eligibility criteria, 3) juror language requirements, 4) discretion of court officials, 5) the juror summons process, 6) juror compensation, and 7) criminal code provisions that orchestrate the jury selection process at the trial level. A detailed outline of the paper can be found at the end of this document.

The main sources drawn upon for the paper are the final report of the *Debwewin Jury Review Implementation Committee* (the *Debwewin Report*), the final report of the *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by the Honourable Frank Iacobucci* (the *Iacobucci Report*), the *Public Inquiry Into the Administration of Justice and Aboriginal People: Report on Aboriginal Justice Inquiry of Manitoba: Chapter 9-Juries* (the *Manitoba Report*), the final report of the *Law Reform Commission of Nova Scotia: Final Report on Juries in Nova Scotia* (the *Nova Scotia Report*), as well as other provincial and federal reports, and federal, provincial and territorial legislation.

Findings:

The findings of the research demonstrate that problems of representation on criminal juries have been studied by federal and provincial reports and academics for over thirty years. Yet there has been little action taken up to remedy those problems. Substantively, the research reveals that the jury selection process most fundamentally has a systemic bias which favours financially stable urban homeowners. Growing from this foundational systemic barrier are interlocking issues of exclusion based on criminal records, language requirements, selection procedures that target on-reserve residents particularly, discretion of court officials, conscious and unconscious racial bias, and trust in the criminal justice system.

Limitations:

The paper does not possess an extensive review of case law concerning jury representation. However, we do discuss the leading Supreme Court case on jury representation as understood by s.11(d) and (f) of the *Charter*, *R v Kokopenace*, as well as a selection of a few other cases.

**Representation on Criminal Juries:
Systemic Barriers and Biases in the "Conscience of the Community"**

Outline

1. Introduction
2. General Framework of Jury Selection and Formation
3. What does it mean to have a Representative Jury?
4. The Out-of-Court Provincial Process:
 - a. Overview
 - b. Roll Preparation and Source Lists
 - i. Broad Collection Powers
 - ii. Provincial Health Insurance Lists
 - iii. Specific provisions
 - *Quebec*
 - *Ontario*
 - c. Eligibility
 - i. Baseline Eligibility
 - ii. Explicit Ineligibility
 - *Graphs of Questionnaires sent to Ontario First Nations for 2016 and 2017 Jury Roll*
 - d. Language
 - i. Juror Eligibility Requirements
 - *Indigenous Language Provisions in Quebec and the Northwest Territories*
 - *Indigenous Languages and the Federal Government*
 - ii. Juror Summons
 - *Threatening Language*
 - *Translations of Juror Summons*
 - iii. Discretion of Court Officials
 - Exemption Procedures
 - a. *Exemptions and Language*
 - b. *Exemptions Generally*
 - Summons Delivery and Follow Up
 - a. *Problems with Mail Delivery*
 - b. *Short Return Delays*
 - Proposed Solutions
 - a. *Manitoba*
 - b. *Nova Scotia*
 - c. *Ontario*
 - Juror's Compensation
5. The In-Court Criminal Process
 - a. *Stand-Asides and Peremptory Challenges*
 - b. *Other Criminal Code Provisions*
6. Conclusion

1. INTRODUCTION

In April 2018, the *Debwewin Jury Review Implementation Committee* submitted its final report to the Deputy Attorney General of Ontario. Its task was to provide advice on the implementation of the recommendations submitted to the Ministry of the attorney General in the *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by The Honourable Frank Iacobucci* (the *Iacobucci Report*). Understood narrowly, both reports examine the particularities of the Ontario jury selection process and how it produces a lack of representation on juries of Indigenous Peoples living in reserves in Ontario. Considered broadly, the reports detail how the jury, understood as the “conscience of the community,” fostering the public’s trust in the administration of justice, fails to uphold the laurels bestowed upon it by excluding alienated and marginalized communities.¹ The systemic barriers to the inclusion of Indigenous Peoples on juries were the very same issue addressed by the 1991 *Public Inquiry Into the Administration of Justice and Aboriginal People, Report on Aboriginal Justice Inquiry of Manitoba*. Yet between 1991 and 2018 there has been little reform.

The Canadian Institute for the Administration of Justice (CIAJ) wishes to explore the persistence of problems with representation on juries in a series of provincial roundtables followed by a national symposium. The roundtables would gather Indigenous organizations and communities, the Indigenous Bar Association, Chief Justices, provincial and federal Justice departments, provincial associations of Defence lawyers, faculties of law in the different provinces, the Federation of Law Societies of Canada to discuss the topic of systemic barriers as consequences of particular provincial procedures and federal law. Following the roundtables CIAJ would, in collaboration with the participating organizations, issue recommendations and publish a report in order to promote the results of the discussions.

The following paper begins CIAJ’s discussion of the topic through a comparative analysis of the legal and administrative rules in Canadian provinces and territories that govern the jury selection process. This summary will chiefly focus on the systemic barriers to Indigenous Peoples’ participation on criminal jury trials. We will also briefly detail problematic provisions in the *Criminal Code* that bear upon representation as well as discuss the leading cases on representativeness as it pertains to ss.11(d) and (f) of the *Canadian Charter of Rights and Freedoms* (the *Charter*).²

Because many of the issues present in jury selection overlap, we have set out the issues thematically rather than chronologically. While we discuss the legislation of many of the Canadian provinces when it comes to the out-of-court (provincial) jury selection process, we have focused particularly on British Columbia, Alberta, Manitoba, Ontario, New Brunswick and Nova Scotia. However, we do look at the rules in Nunavut, the Northwest Territories, Saskatchewan and Quebec for the sake of comparison and to gain an understanding of how

¹ *R v Sherratt*, [1991] 1 SCR 509.

² *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11.

some provinces have created, or neglected, legal and administrative solutions to problems with representation on criminal jury trials.

2. General Framework of Jury Selection and Formation

The jury selection process in Canada can be broken down into three stages: (1) the preparation of the jury rolls, (2) the selection of names to fill the jury rolls to create jury panels, and (3) the formation of the trial-jury panel that sits on a particular case called the *petit jury*. Informing this three-tiered process is a matrix of federal and provincial powers, rights enshrined in the *Charter*, provisions from the *Criminal Code* and provincial jury laws and regulations.³ Framing the positive law are a series of studies and reports on problems with jury representation in Canada, whose recommendations range from general problems of societal bias to normative issues that arise because of the particularities of a piece of legislation.

The right to juries in criminal trials arises from ss.11 (d) and (f) of the *Charter*. S.11 (d) provides the right to a fair trial by an impartial tribunal and s.11(f) provides the right to be tried by a jury. The role of representation in ss.11(d) and (f) has most recently been interpreted by the Supreme Court of Canada in *R v Kokopenace (Kokopenace)*, which we will discuss further below.⁴ It is enough for now to say that in *Kokopenace*, the Court held representativeness as a right to the procedure for randomly selecting and forming a jury from a broad cross-section of society.

S.91(27) of the *Constitution Act 1867* gives the federal government jurisdiction over “the Criminal Law” which includes “the Procedure in Criminal Matters.”⁵ Therefore it is the Canadian Parliament which governs the formation of jury panels that sit on criminal trials through the provisions in the *Criminal Code*. The important provisions bearing upon jury selection in the *Criminal Code* are ss.629, 638 and 634. S.629 allows for the accused and the prosecution to challenge the jury panel on the basis of partiality, fraud, or willful misconduct on the part of the provincial officials, such as the sheriff. S.638 allows for the accused and the prosecution to challenge jurors for cause, and s.634 provides for peremptory challenges. Issues concerning the adverse impact of peremptory challenges on representation have been addressed by many of the jury reform reports, including the *Manitoba Report* and *Iacobucci Report*. We discussed issues with the criminal provisions further below.

S. 92(14) of the *Constitution Act 1867* gives the provinces jurisdiction over “The Administration of Justice in the Province.” This has been interpreted to allow the provinces the ability to govern jury roll preparation and jury selection through provincial acts and regulations. Jurisdictional conflict is avoided by s.626(1) of the *Criminal Code*, which recognizes that persons are qualified to serve as jurors in a criminal proceeding if they meet the requirements

³ *Criminal Code*, RSC 1985, c C-46.

⁴ *R. v. Kokopenace*, 2015 SCC 28, [2015] 2 SCR 398

⁵ *The Constitution Act*, 1867, 30 & 31 Vict, c 3

established by the law of the province where the trial is to be conducted.⁶ S.626(2) limits provincial jurisdiction by requiring that no person may be disqualified or exempt from jury duty based on their sex, however, there is no mention of ethnicity or “race.”

3. What does it mean to have a Representative Jury?

We begin by detailing the very rights that gives rise to the jury selection processes, ss. 11(d) and (f) of the *Charter*. The leading case concerning representativeness of juries is the 2015 case *Kokopenace* decided by the Supreme Court of Canada.

In *Kokopenace*, the Court had to determine what are the efforts required of the state to ensure that a jury is representative within the meaning of ss.11(d) and (f) of the *Charter*. Justice Moldaver writing for the majority found that the province of Ontario did meet its obligations to make reasonable efforts to ensure that the jury was representative. The majority set out that representativeness only concerns the process used to create the final composition of the jury roll, not the final substantive composition of the panel itself.⁷ Representativeness is not a right to a particular composition of jurors, nor a right to a jury that proportionately represents diversity in Canada. The selection process will be representative where the state has not deliberately excluded a group from the jury roll and makes reasonable effort to ensure that (i) the source lists used draws from a broad cross-section of society, (ii) the names chosen from the source list are done so at random, and (iii) the jurors notices are delivered to the names randomly selected from the source lists.⁸

For a source list to draw from “a broad cross-section of society” the list must capture as many eligible jurors as possible in a judicial district.⁹ The *Charter* does not require a perfect source list capturing all potential jurors.¹⁰ Randomness means that all persons on the source list stand an equal chance of being selected to have their name included on the jury roll. The majority held that the randomness requirement means that there can be no jury roll of a predetermined or particular composition as this would involve a selection process that pries into the potential juror’s backgrounds.¹¹ That a jury be representative of all the diversity in a district was held to be impossible as there would be an infinite number of characteristics to consider that should be represented on a jury.¹²

Concerning representativeness, s.11(d) will only be violated where there is a reasonable apprehension of bias concerning the impartiality of the state.¹³ The problem of representativeness must bear upon whether the state creates the appearance of partiality of the

⁶ Cynthia Petersen, “Institutionalized Racism: The Need for Reform of the Criminal Jury Selection Process,” (1993) 38 MLJ 147-79.

⁷ *Supra* note 4 at para 40.

⁸ *Ibid*, at para 40.

⁹ *Ibid* at para 41.

¹⁰ *Ibid* at para 41.

¹¹ *Ibid* at para 42.

¹² *Ibid* at para 42.

¹³ *Ibid* at para 50.

composition of the jury through (1) the deliberate exclusion of a particular group, or through (2) deficient efforts in compiling the jury roll.¹⁴

While for both ss.11(d) and (f) representativeness protects the right to an “adequate jury selection process,” an absence of representativeness will violate s.11(f), while an absence of representativeness will only violate s.11(d) if it bears upon the reasonable apprehension of bias- here understood as partiality- of the state.¹⁵ Representativeness for s.11(f) therefore is broader than for s.11(d) as it is a necessary component the right to a jury.

The facts of the case merit some detail. The accused in *Kokopenace* was an Indigenous man charged with second degree murder and was convicted of manslaughter by a jury. On appeal, the accused claimed that the state did not adequately represent on-reserve Indigenous residents in the judicial district of Kenora, thus failing its obligation to ensure representativeness. The claim was based in part on the state using Indigenous and Northern Affairs Canada (INAC) lists from 2000 for the creation of the 2008 jury roll for 32 of the district’s forty six reserves. The province did not possess any lists for four of the reserves. There was also poor delivery of the juror summons, and there was a historically low response rate of returning summons from on-reserve residents, which in 1993 was at 33%, and dropped to 10% in 2008.¹⁶

The majority held that the province did meet its obligations despite these problems, finding that the official in charge of compiling the roll between 2001 and 2007 made reasonable efforts to obtain reliable source lists. Amongst these efforts included: the official meeting with the leadership of 15 reserves, attempting to enlist aid of Indigenous leadership, and making many efforts to contact reserves who did not respond to the official’s communications.¹⁷ Because the province was found to have made reasonable efforts to compile appropriate lists, the Court did not consider the problems with the delivery of the notices.¹⁸ Lastly, the Court held that the province was only required “to address the ways in which the problems with the source lists and delivery contributed to the low response rate,” which it was found to have been reasonably done.¹⁹

We will detail the selection procedure and highlight the factors that give rise to systemic barriers that block First Nations, Inuit, Métis, and other minority groups in Canada, from serving as jurors on criminal trials.

4. The Out-of-Court Provincial Process:

a. Overview

¹⁴*Ibid* at para 50.

¹⁵ *Supra* note 4 at para 57.

¹⁶ *Ibid* at paras 18 and 27.

¹⁷ *Ibid* at paras 107 and 122.

¹⁸ *Ibid* at para 119.

¹⁹ *Ibid* at para 122.

As indicated above, the jury selection process occurs in three steps: the preparation of the jury roll, the selection of names from the roll for the formation of the jury panels, and the formation of the jury sitting on a case. The first two steps are governed by the provinces and together are called the out-of-court jury selection process.

Jury roll preparation is the process whereby court officials randomly select a pool of names for each judicial district. These names are selected from one or many namebanks (called source lists) prescribed in the provincial act governing jury selection. We have divided our discussion of source lists by distinguishing between three different methods of collecting names for the roll. Though the methods may overlap these divisions present themselves as processes that (i) have *broad collection powers*, (ii) use *provincial health insurance lists* and (iii) have *specific provisions* for First Nations, Inuit and Métis.

The selection of the names chosen from the jury roll list to create the jury panels involves court officials, usually sheriffs, sending out “summons” or “questionnaires” to the persons randomly chosen from the source lists. These questions screen for eligibility. Eligibility criteria are prescribed in the provincial jury act legislation on such bases as language, citizenship and professional requirements. The summons/questionnaires are then returned to the officials who form the jury panels, based on an evaluation of those who meet eligibility criteria. Those persons comprising the jury panel will then be partitioned further to form the *petit jury* sitting on individual criminal trials.

What follows will be an examination of each step in these processes and the problems that arise. It is important to note that many of these problems of representation extend to the lack of representation of Canadian minority groups generally. It is believed that the jury selection process is founded on certain biases that result in systemic discrimination of certain economic classes. However, some of these general systemic problems are compounded by other societal problems, and affect Indigenous Peoples in ways distinct from that of other minority groups.

We have divided the discussion concerning the selection of jurors’ names into three broad sections, which themselves are subdivided. These broad sections are: (i) *eligibility*, (ii) *language* and (iii) *discretion of court officials*. With the division of the name selection process into these categories, it is important to remember that they are not all strictly independent one from the other.

b. Roll Preparation and Source Lists

Both Indigenous Peoples and ethnic minority groups in Canada face their first systemic barrier to sitting on criminal juries at the roll preparation stage.²⁰ As the source list is the fundamental database from which jurors are drawn, any problem that occurs there will, from the very beginning of the process, eliminate potential jurors. Generating problems with representation

²⁰ *Supra* note 6 at 150.

are a convergence of the two general problems of economic biases within the selection procedure and discretionary power on the part of court officials. The impact of either of these factors depends on the selection process set out by a province.

Despite the differences between the provinces concerning which source lists are to be used, there is nevertheless a general procedure for the creation of a jury roll.

The roll preparation process begins with the province's jury act authorizing an annual preparation of the jury roll. The initial step is the creation of the jury roll from which the selection of the names is to be drawn. All provincial legislations provide that a court official, either the sheriff or the jury-coordinator, prepare a juror's roll for their judicial district. This power can be devolved from the head official, such as the sheriff in Ontario, to other officials who have been assigned those powers.²¹

The particularities of this process will differ for each province, or will be described in different ways. Below are examples of the Nova Scotia's and Manitoba's provision providing for the creation of jury rolls:

1. *Manitoba, The Jury Act,*

- 5. The Chief Sheriff shall, in each numerical year before November 1 in that numerical year, prepare for each jury district for use in the ensuing 12 months a jurors' roll comprised of names of persons residing in that jury district.²²

2. *Nova Scotia, Juries Act,*

- 7 (1) Before the end of August of each year, the jury co-ordinator for each district shall cause to be prepared a jury list of names drawn randomly from a data base that to the extent possible shall include the entire population, eighteen years or older, of the jury district.²³

The designated court officials prepare the juror rolls by randomly selecting names to fill the positions from the prescribed list set out in the provincial act governing jury selection. Roll preparation is dependent upon the kind of source lists used.

There is no uniform process among the Canadian provinces and territories for the use of source lists for the creation of jury rolls. There are wide ranging differences between roll selections, from giving sheriffs the discretion to choose what pre-existing lists to draw names from, to explicitly prescribing what source lists are to be used. We have found three trends in the use of source lists: (i) provinces which have *broad collection powers* given to the sheriff in the selection of the source list, (ii) provinces which use *provincial health insurance lists* as their source list and (iii) provinces which have *specific provisions* for the collection names First Nations, Inuit and Métis to put on the jury roll.

i. **Broad Collection Powers**

²¹ *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by The Honourable Frank Iacobucci*, 2013, at para 136. *Courts of Justice Act*, R.S.O 1990, c C-43, s.73(2).

²² *The Jury Act*, CCSM c C-J30, s.5.

²³ *Juries Act*, SNS 1998, c C-16, s.7(1).

While we do discuss the impact of sheriff discretion on representation on juries further on below, it is helpful to distinguish their discretionary powers generally from their powers to choose source lists due to the different impact the use of either has upon representation of Indigenous Peoples on juries. This section will detail sheriff discretion only in relation to the creation of source lists.

The British Columbia *Jury Act* gives the sheriffs wide discretion in choosing source lists, stipulating that it is the sheriff who determines the procedure for the selection of names for the jury roll and from which lists the names are to be drawn.^{24,25} The British Columbia government website explains that in practice sheriffs use the provincial voters lists as source lists. However, there has been a history of doubting the system's efficacy with representation widely. Mark Israel, in his work on Indigenous representation on Canadian jury panels, details:

“In 1989, the assistant deputy minister of court services prepared draft circulars instructing sheriffs to consult Native Band membership lists to remedy underrepresentation of Indigenous people on Provincial voter's lists...However, in *R v Chipisia* the sheriff testified that he has not received the circulars.”^{26, 27}

In *R v Fowler* the Supreme Court of British Columbia determined that while given broad power, sheriffs were nevertheless informed by policy guidelines and the demands of representation in ss.11(d) and (f) of the Charter.²⁸ The judge attributed the low turnout of Indigenous jurors not to the discretionary powers of the sheriff, but to the same factors as outlined in the *Manitoba Report* such as poverty, lack of adequate transportation and compensation, and alienation from the justice system, working in conjunction with the general trend of lack of responses to jury summons.²⁹ More recently in 2011, the British Columbia Civil Liberties Association raised concerns with the practices of the sheriff's office regarding the underrepresentation of Indigenous Peoples.³⁰ The province's Attorney General responded that “band” leaders were asked for lists of reserve residents, but that it was unknown to what extent Indigenous People living on reserves “chose to be enumerated” in the “band list.”³¹

In Alberta *Jury Act* regulations, the sources from which the sheriff can compose the juror list are specified.³² The regulations stipulate that jury selection can be made from any or all of:

- a. lists of electors, assessment rolls and other public papers obtained from municipalities;

²⁴ *Jury Act*, RSBC 1996, c C-242, s.8.

²⁵ Mark Israel, “The Underrepresentation of Indigenous Peoples on Canadian Jury Panels,” (2003) 25 (1) *Law and Policy* 40.

²⁶ *Supra* note 25 at 40.

²⁷ *R v Chipisia* 1991 CarswellBC 413.

²⁸ *R v Fowler*, 2005 BCSC 1874 at paras 62 and 64.

²⁹ *Public Inquiry Into the Administration of Justice and Aboriginal People, Report on Aboriginal Justice Inquiry of Manitoba*, Vol. 1 by A.C. Hamilton & C.M. Sinclair. (Winnipeg: Public Inquiry into the Administration of Justice and Aboriginal People, 1991) online: The Aboriginal Justice Implementation Commission <<http://www.ajic.mb.ca/volumel/toc.html>> at chapter 1.

³⁰ *Supra* note 21 at paras 162 and 163.

³¹ *Ibid* at note 163.

³² *Jury Act*, RSA 2000, c J-3.

- b. telephone directories;
- c. Henderson's Directories for municipalities; and
- d. any other source that the sheriff considers appropriate³³

Yet here too the 1991 *Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta* detailed that Indigenous People were not being summoned for jury duty.^{34 35} In *R v Nepoose*, it was reported by the sheriff of the Alberta Court of Queen's Bench that voter lists generally constituted a small percentage of persons resident in the given area, and only provided names of persons who own property and did not include Indigenous People living on reserves.³⁶ It has been further recognized in the *Nova Scotia Report* and the *Iacobucci Report* that the voter lists are not reliable sources from which to draw names.³⁷

ii. Provincial Health Insurance Lists

The use of provincial health insurance lists have been found to be the most effective at eliminating the barriers to being placed on the juror roll. The *Nova Scotia Report* recommended that the use of voter lists should be supplemented with the more reliable and comprehensive provincial medical insurance list.³⁸ There was concern that the use of voter lists excluded the Mi'kmaq from being placed on the jury rolls. Accesses to the jury panels was further limited by the lack of public access to the jury lists to see which names were on the available source lists.³⁹ The *Nova Scotia Report* noted that voter lists became more inaccurate the further away one was from elections, and those resulting inaccuracies disproportionately affected people who rent or are otherwise more mobile than homeowners.⁴⁰

The final report recommended that educational materials be made available in the Mi'kmaq language to foster greater interest in the jury system among members of that community, and further that the province account for a system whereby people can check to see if their names on the source lists.^{41 42} S.4 of the Nova Scotia's *Juries Regulations* now prescribes that the Department of Health's Health Insurance list is the prescribed list to be used in juror selection rolls.⁴³ There is no provision allowing the public to see if they are on the juror roll.

³³ *Jury Act Regulation*, Alta Reg. 68/1983.

³⁴ *Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta*, vol. 1 (Main Report) (Alberta: Justice and Solicitor General, March 1991) at 44-45 to 44-46.

³⁵ *Supra* note 25 at 41.

³⁶ *Ibid* at 41.

³⁷ *Law Reform Commission of Nova Scotia, Final Report on Juries in Nova Scotia*, (1994) at 27: https://www.lawreform.ns.ca/Downloads/Jury_FIN.pdf.

³⁸ *Supra* note 37 at 45.

³⁹ *Supra* note 25 at 42.

⁴⁰ *Supra* note 37 at 27.

⁴¹ *Supra* note 21 at para 172.

⁴² *Supra* note 37 at 42.

⁴³ *Juries Regulations*, NS Reg 126/2000, s.4.

The *Manitoba Report* found that the legal system of the province historically excluded Indigenous Peoples from participation on juries. In 1971, Indigenous Peoples living on reserves could not be placed on the jury roll, and it was only when the province began to use the “computerized records” of the Manitoba Health Services Commission in 1986 that Indigenous Peoples began to be properly represented in the source lists.⁴⁴ The *Manitoba Report* found, however, that the city of Winnipeg was the exception to this. The *Iacobucci Report* and *Debwewin Report* also strongly recommend the use of the Ontario health insurance database as a source list as it had the greatest potential to generate a representative jury list. The problems with the Ontario process are examined in the proceeding section.

While provincial health insurance lists are more representative source lists for potential jurors, the benefits of using those lists may be strongly offset by juror summoning procedures. Nor does the use of provincial health insurance lists alone do away with all problems to Indigenous participation on juries. The *Law Reform Commission of Saskatchewan, Proposals for the Reform of the Jury Act* proposed that the province use the register for the *Saskatchewan Medical Care Insurance Act* as the province’s source list.⁴⁵ The province now uses this very list.⁴⁶ Yet two reports made in 1992 and 2004 found that accused Indigenous People still lacked Indigenous representation on juries serving on their cases.^{47 48} The most recent example is *R v Stanley* where the accused was found not guilty of second degree murder by an all white jury concerning an alleged misfire of his firearm that resulted in the death of Colten Boushie, a 22 year old Indigenous man.⁴⁹ The accused used peremptory charges to exclude four visible Indigenous jurors from the composition of the *petit jury*.⁵⁰ Issues with peremptory charges are detailed below in the discussion of the in-court selection process.

iii. Specific provisions

While most jurisdictions have their source list selection procedure apply indiscriminately to all persons in the province, Quebec and Ontario remain the exception. Both provinces possess special provisions for the collection of names when it comes to Indigenous Peoples living on reserves.

- *Quebec*

Quebec’s *Jurors Act* sets out that the source lists of general application for the creation of jury rolls are the “permanent list of electors.”⁵¹ This list is provided to the sheriff by the chief electoral officers of the municipalities forming the sheriff’s judicial district. The *Jurors Act*

⁴⁴ *Supra* note 27.

⁴⁵ *Law Reform Commission of Saskatchewan, Proposals for the Reform of the Jury Act* (1979) 18-20.

⁴⁶ *The Jury Act*, 1998, SS 1998, c J-4.2, s.7(1).

⁴⁷ *Report of the Saskatchewan Indian Justice Review* (1992) at 48.

⁴⁸ *Final Report from the Commission on First Nations and Metis Peoples and Justice Reform* (2004) ch. 6.

⁴⁹ *R v Stanley*, 2018 SKQB 27.

⁵⁰ Kent W. Roach, Matthew S. Estabrooks, Martha Shaffer, Gilles Renaud, “The Urgent Need to Reform Jury Selection After the Gerald Stanley and Colten Boushie Case,” (2018) 65 CLQ 271.

⁵¹ *Jurors Act*, CQLR c C J-2 ss.7, 7.1, 8.

provides special provisions concerning the collection of names from certain intra-provincial territories and “Indian Reserves.”⁵² S.42 of the act directs the sheriff:

To prepare the jury list and to form the panel, the sheriff may, with the authorization of the judge and in accordance with the terms and conditions prescribed by the judge, use the municipal valuation roll, the Band List drawn up in accordance with the Indian Act (Revised Statutes of Canada, 1985, chapter I-5) or the population register of the Ministère de la Santé et des Services sociaux.

Quebec acts as a foil to Ontario’s provision concerning on-reserve residents. While Ontario has a permissive special provision for on-reserve residents, as will be seen in the next section, the use of sources for the list for on-reserve residents in Quebec is strictly prescribed. Moreover, given the breadth of sources that can be used by sheriffs to compile the list, it appears that the lists from which on-reserve residents are chosen is more comprehensive than the lists used for general application.

- **Ontario**

A detailed review of the Ontario source list selection process can be found in the *Iacobucci Report*.⁵³ In short, each year the Court Services at each Ontario Superior Court gives an estimate number of jurors required for the year’s upcoming trials to the Provincial Jury Center (PJC). The PJC then informs the Municipal Property Assessment Corporation (MPAC) of the requisite number of jurors, which the MPAC then “selects at random from the list of municipal residents within each county and district, and forwards these names to a third party which is responsible for sending out jury questionnaires.”⁵⁴

The problems with Ontario’s system have been well-documented and present themselves as the best example of what it means for a source list to be systematically biased. The 1995 *Commission on Systemic Racism in the Ontario Criminal Justice System* (the *Ontario Report*) issued a recommendation that the Ontario *Juries Act* be amended so as to make the Ontario Health Insurance Plan (OHIC) the source for jury pools.⁵⁵ The commission noted in particular that:

The database is organized around property, information about home ownership is quickly updated upon purchase and sale, but tenant information is much less accurate. As the database is more likely to have accurate information about owners than about tenants, the latter are less likely to receive the questionnaire used to select the jury pool. This bias has clear implications for the age and income level of jurors. Moreover, since members of some black or other racialized communities tend to be younger and poorer than white Ontarians, the current database also subtly contributes to racial exclusion.⁵⁶

⁵² *Supra* note 51 at ss.41-45.

⁵³ *Supra* note 21 at paras 98-103.

⁵⁴ *Ibid* at para 100. *Juries Act*, RSO 1990, c C.J.3, s.6(2).

⁵⁵ *Commission on Systemic Racism in the Ontario Criminal Justice System* (1995), 253.

⁵⁶ *Ibid* at 253.

An investigation titled “How a broken jury list makes Ontario justice whiter, richer and less like your community” reported that the systemic bias favouring homeowners in the selection of jury rolls persists, and that the same problems outlined by the *Ontario Commission* endure.⁵⁷ Importantly, while Ontario made amendments to the *Juries Act*, and its juror questionnaire in 2018, the use of the MPAC lists has not been changed.

Ontario, like Quebec, has as a distinct provision for retrieving names for the jurors roll for people living on reserves. S.6(8) of the *Juries Act* provides that the sheriff of the judicial district is to “to obtain the names of inhabitants of the reserve from any record available.” It might be that the unique s.6 (8) exists because of the province’s use of the MPAC lists which does not include on-reserve homes as they are not taxable. The current procedure was described by the *Iacobucci Report* as being *ad hoc*, and using out of date information.⁵⁸ As it now stands “Indian Band” lists are relied upon for compiling the lists and out of date INAC lists, amongst other sources.⁵⁹ Responsibility for fulfilling the obligations of s. 6(8) is currently divided among different officials:

1. local judicial district or county court staff, who obtain the names of on-reserve inhabitants, select the individuals to receive questionnaires, and prepare and mail the questionnaires to on-reserve inhabitants;
2. the Provincial Jury Centre, which receives and reviews the questionnaires returned and enters the eligible names in the jury roll; and
3. the Director of Court Operations for the West Region, who carries out the sheriff’s responsibility to certify each jury roll to be the proper roll prepared as the law directs.⁶⁰

The problems with this *ad hoc* procedure were the very basis for the claim made in *Kokopenace* which we outlined above. The facts in *Kokopenace* detail that the Ontario Ministry of the Attorney General had in place a policy directive for the collection of names pursuant to s.6(8) guiding its staff to “attempt to obtain band electoral lists, or any other accurate lists of residents, by writing letters, telephoning, or visiting the reserves in the district.”⁶¹ While the wide discretion given to the sheriff may be supplemented by a policy directive, it nevertheless proved ineffectual at obtaining updated band lists for the purposes of s.6(8).⁶²

In its 8th recommendation, the *Iacobucci Report* presses the Ministry of the Attorney General to use the OHIP database to generate the database of First Nations people living on reserves.

⁵⁷“How a broken jury list makes Ontario justice whiter, richer and less like your community,” by Ebyan Abdigir, Kvesche Bijons-Ebacher and Palak Mangat, Ryerson School of Journalism, Robert Cribb Investigative Reporter, Jim Rankin Feature Writer Fri., Feb. 16, 2018.

<https://www.thestar.com/news/investigations/2018/02/16/how-a-broken-jury-list-makes-ontario-justice-whiter-richer-and-less-like-your-community.html>

⁵⁸ *Supra* note 21 at para 13.

⁵⁹ *Ibid* at paras 41, 136 and 142.

⁶⁰ *Ibid* at para 136. *Supra* note 54 at s.9.

⁶¹ *Supra* note 4 at para 14.

⁶² *Ibid* at para 27.

The report's 9th recommendation pushes the Ministry of the Attorney General to consider "all other potential sources for generating this database, including band residency information, Ministry of Transportation information and other records." The *Debwewin Report* made in 2018 reaffirms that the OHIP database has the greatest potential to generate a representative jury list. *Debwewin* further detailed other database sources such as the Election Ontario Database and the Licensing and Control System (LCS). The former is federal and thus "creates legislative impediments to using the data for uses outside election-related sources." The LCS captures less people than the OHIP as it only includes drivers and licensed vehicle owners and therefore excludes persons of lower socioeconomic status who do not own cars or possess driver licenses, one of the very same issues that arise with the use of MPAC as a source list.

c. Eligibility

Eligibility requirements are the criteria set out by provincial and territorial jury acts that determine who can become a juror. For the sake of our discussion we have divided "eligibility" into two categories: (i) baseline eligibility and (ii) explicit ineligibility. The division between the two categories is not constant in every province and territory. However the division does serve as useful tool to distinguish between the different requirements for juror eligibility. A baseline eligibility requirement states that in order to become a juror a person must meet the stated criteria. Those who do not meet the criteria are ineligible. Explicit ineligibility refers to provisions in provincial jury acts that bar individuals from jury service despite satisfying the baseline eligibility criteria.

Language can also fall under one of these two categories depending upon how the requirement is phrased in the law. However, given that language presents an array of problems that reach many aspects of the out-of-court process, we detail it in its own section further below.

i. Baseline Eligibility

Baseline eligibility usually comprises an age of majority requirement, a citizenship requirement, and a residency requirement. It is the citizenship requirement which has caused the most controversy concerning representation of minority groups on criminal juries.

While all three requirements can be found in Newfoundland and Labrador, Prince-Edward-Island, Nova Scotia, New Brunswick, Quebec, Ontario, Saskatchewan, Alberta, British Columbia, the Yukon and Nunavut, it is Manitoba's and the Northwest Territories' jury legislation that stand out. The former only requires that the potential juror be of majority age and be a resident of the province, while the latter opens eligibility to both permanent residents and citizens.

The *Nova Scotia Report* considered removing the citizenship requirement from its *Juries Act* but ultimately declined. Notably one commissioner dissented, holding that landed immigrants

subject to Canadian laws should have the same obligation to serve on a jury as anyone else benefiting from the legal system.⁶³

The issue of the citizenship requirement as a systemic barrier to access to jury rolls has also been discussed in Ontario. The 1995 *Ontario Report* found that “the main systemic barriers to participation of black and other racialized people on trial juries appear to be the citizenship requirement and the database used to list the names from which the jurors are select.”⁶⁴ The *Ontario Report* further commented that while citizenship was useful as an objective marker of commitment to community, “a more inclusive qualification for jury service could maintain the same values, with little or no loss to administrative efficiency.”⁶⁵ However, in *R v Church of Scientology of Toronto*, the Ontario Court of Appeal found that the exclusion of non-citizens on jury rolls did not infringe the right to a representative jury.⁶⁶ Further, in *R v Laws*, the Ontario Court of Appeal found that the citizenship requirement for inclusion on the jury roll did not result in unrepresentative jury by precluding large numbers of black permanent residents.⁶⁷

The *Iacobucci Report* highlights a different facet of the citizenship requirement, namely, its impact on nation-to-nation relations with Indigenous Peoples and recognition of Indigenous self-government. The 10th recommendation of the *Iacobucci Report* sets out that:

On the premise that a First Nations member living on reserve in Ontario satisfies the Canadian citizenship requirement under s. 2(b) of the *Juries Act*, add an option for First Nations individual to identify themselves as First Nations members or citizens rather than Canadian citizens.

The *Debwewin Report* added that jury summons should recognize Indigenous citizenship as satisfying the Canadian citizenship requirement.⁶⁸ Despite the amendments to its jury act, Ontario has not included an Indigenous citizenship option in the act itself or in its juror summons form, nor does one formally exist in any other jury act.

ii. Explicit Ineligibility

Common to all jury acts are provisions that qualify ineligibility based on a person’s profession, not meeting a language requirement, or possessing a criminal record. Ineligibility based on professional requirements has been flagged by the *Iacobucci Report* as it does not include Indigenous elected officials as being ineligible the same as provincial and federal officials. Criminal records, however, have proven to be one of the greatest barriers to serving on a jury.

⁶³ *Supra* note 37 at appendix A iv.

⁶⁴ *Supra* note 55 at 251.

⁶⁵ *Ibid* at 251.

⁶⁶ *R v Church of Scientology of Toronto* 1997 Canlii 16226 (ONCA).

⁶⁷ *R v Laws* 1998 CarswellOnt 3509.

⁶⁸ *Debwewin Jury Review Implementation Committee*, 2018, “Amending the Juror Questionnaire.”

Historically, Indigenous Peoples and members of other minority groups were explicitly excluded from participation in juror rolls.⁶⁹ Universal Indigenous suffrage only came in 1969, yet it was only in 1972 that the first Indigenous person was reported to have served on a Canadian jury, though Inuit first served as jurors in 1957.⁷⁰ Now, the typical groups of persons who are ineligible despite satisfying the baseline eligibility criteria are done so by virtue of their profession. The typical professions that have been considered ineligible are lawyers, judges, justices of the peace, members of Parliament and medical practitioners, law enforcement officers, and in some case law students.⁷¹ The *Iacobucci Report* recommends that elders and First Nations, Inuit and Métis elected officials, such as Chiefs and Councillors, be excluded from serving as jurors similarly to the exemption from jury service of federally and provincially elected officials. Despite its 2018 reforms to the *Juries Act*, Ontario made no further exemption to First Nations elected officials, nor does any other provincial and territorial jury legislations.

Equally ubiquitous as members of Parliament being excluded from jury service are variations of the conditions of ineligibility for individuals convicted of criminal offences.⁷² While all provinces have provisions referring to criminal convictions and allow people who have been granted pardons to sit on a jury, not all provincial and territorial legislation articulates this in the same way. Here are examples from New Brunswick's *Juries Act*, *Nova Scotia's Juries Act* and Ontario's *Juries Act* that demonstrate how barring eligibility based on criminal convictions can differ amongst the provinces:

1. **NB *Juries Act* s.3(r):** persons convicted of an offence under the *Criminal Code* (Canada), the *Food and Drugs Act*(Canada) or the *Narcotic Control Act* (Canada) unless they have obtained a pardon.
2. **NC *Juries Act* s.4** Disqualification: (e) a person who has been convicted of a criminal offence for which the person was sentenced to a term of *imprisonment of two years or more*;
3. **ONT *Juries Act* s.4:** A person is ineligible to serve who...(b) has been convicted of an offence that may be prosecuted by indictment unless the person has subsequently been granted a pardon.

The *Iacobucci Report* and *Debwewin Report* make for extensive and nuanced reform in the area of criminal ineligibility for jury service. The 14th recommendation of the *Iacobucci Report* calls for Ontario to narrow the group of offences that bar persons with criminal convictions from jury service. The *Debwewin Report* asks further that instead of reforming provincial jury act provisions, Public Safety Canada undertake to (1) create a program where the criminal records of all Indigenous People convicted of crimes are expunged after five years, (2) to recognize the authority of Indigenous communities to offer its members amnesty, and (3) repeal the amendments in the 2012 *Safe Streets and Communities Act* decreasing the amount of

⁶⁹ *Supra* note 6 at 150.

⁷⁰ *Ibid* at 150.*Ibid* at note 25 at 40.

⁷¹ *Ibid* at 149.

⁷² *Ibid* at 149.

pardons granted, thereby disproportionately affecting Indigenous People found guilty of criminal offences.^{73 74}

A juror will also be declared ineligible for service if they have a disability that would prevent them from being able to perform their duties.⁷⁵ The “Study Leave Report” of *The Report to the Canadian Judicial Council on Jury Selection in Ontario* gives data on juror summons response rates from Indigenous communities in Ontario, particularly Belleville and Ottawa. The proceeding table uses data for Ontario First Nations response rates, demonstrating that mental or physical disabilities have been the leading cause of juror ineligibility among Indigenous Peoples living in Ottawa.⁷⁶

The 2016 final report *Feathers of Hope: A First Nations Youth Action Plan (FOH Report)* identified that the severe disadvantages Indigenous youth and People face concerning physical and mental health.⁷⁷ This can possibly account for the high rate of Indigenous ineligibility concerning disabilities. The *FOH* further linked problems with mental and physical health to a systemic barrier overarching problems with Indigenous representation on jury trials: poor economic and living conditions.⁷⁸

*Questionnaires sent to Ontario First Nations for 2016 and 2017 Jury Roll*⁷⁹

	2016 Jury Roll
FN Questionnaires Sent Out	6023

⁷³ *Supra* note 21 at para 279.

⁷⁴ *Safe Streets and Communities Act*, SC 2012, c 1.

⁷⁵ Examples of which can be found in Ontario’s *Juries Act*, s.4(a), Manitoba’s *Jury Act* s.2(o), and British Columbia’s *Jury Act* s.2(o). In *R v Newborn*, 2016 ABQB 13 the accused challenged the exclusion of persons convicted of a criminal charge from serving as a juror in Alberta’s *Jury Act*. The accused argued that the disproportionate percentage of Indigenous people who are criminally accused violated his s.11(f) and (f) rights to representativeness. The provision was upheld on the grounds that a person who has been accused is *prima facie* not impartial towards the Crown in a criminal proceeding. Also see Erin Sheley, “The Tension BETWEEN Process and Outcome in Creating Representative Juries: Case Comment on *R v Newborn*, 2016 ABQB 13,” (2016), *ablaw.ca*: http://ablawg.ca/wp-content/uploads/2016/02/Blog_ES_Newborn_Feb2016.pdf.

⁷⁶ Justice Giovanna Toscano Rocammo, “Study Leave Report” of *The Report to the Canadian Judicial Council on Jury Selection in Ontario*, (2018), 17-18.

⁷⁷ *Feathers of Hope: A First Nations Youth Action Plan*, (2016), 37.

⁷⁸ *Ibid* at 33.

⁷⁹ *Supra* note 76 at 16.

FN Total Responses	650
Eligible Response	294
Ineligible Responses	356

	2017 Jury Roll
FN Questionnaires Sent Out	6131
FN Total Responses	553
Eligible Response	259
Ineligible Responses	294

d. Language

The issue of language pervades many parts in the jury selection process. Namely, language is found to be at issue in (1) *juror eligibility requirements*, (2) *juror summons*, and (3) in the *discretion of court officials*. In this section we discuss issues related to (1) *juror eligibility requirements* and (2) *juror summons*.

The effects of language requirements and discretion are detailed in the discussion of *exemption procedure* in the below section titled “*Discretion of Court Officials*.” Here, the discussion of “*Juror Summons*” is divided into two sections: (1) the first concerning *threatening language* used in juror summons, and (2) other concerning the *translations of juror summons*.

i. *Juror Eligibility Requirements*

In addition to citizenship, residency and majority age requirements, some provinces further stipulate language as a qualification for jury eligibility. Importantly, not all provinces have this requirement, and if they do, it is not uniform across all jurisdictions. Some acts have the language requirement as a distinct conceptual ground of disqualification for jury service, such as Manitoba’s and British Columbia’s jury legislation, while others, such as Alberta, have it set as a ground to be exempted from jury service.⁸⁰ Further, in this section we look at the provisions concerning Indigenous languages in Quebec and the Northwest Territories. We also consider the recent efforts to protect Indigenous languages made by the federal government.

⁸⁰ For examples see: Manitoba’s *Jury Act*, s.4, British Columbia’s *Jury Acts*.4, Alberta’s *Jury Act*, RSA 2000, c C-J-3, s.5(1)(f).

The jury legislation of Prince Edward Island, Quebec, Manitoba, Saskatchewan, Yukon and British Columbia. have a language requirements while Nova Scotia, New Brunswick and Ontario do not. Language requirements also present themselves as barriers to non English or French speaking immigrants, and exclude similar classes from serving as jurors as does the citizenship requirement discussed above. However, the absence of explicit language requirement does not mean that language does not become an issue. The *Nova Scotia Report* found that while there was no formal language requirement set out in its legislation, people who only spoke Mi'kmaq were in practice excluded by local court administrators or jury officers.⁸¹ Further, s.638(2) of the *Criminal Code* also allows for a juror to be challenged, and thereby be removed from the panel, if they do not speak one of the official languages of Canada in which the juror can best give their testimony.

The *Nova Scotia Report* considered the issue of Indigenous languages as barriers to representation on juries. While the report recommended that educational materials concerning the justice system be made in Mi'kmaq, it withheld any provision explicitly including the Mi'kmaq language as a qualification for juror eligibility. The report recommended only that a study be made to investigate the use of the Mi'kmaq language for the purposes of including Indigenous People on the jury roll.

The 13th recommendation of the *Iacobucci Report* calls for amending the jury questionnaire to allow for Indigenous Peoples to participate in juries while speaking an Indigenous language. The *Debwewin Report* provides for an investigation to be done on behalf of the Ontario Ministry of the Attorney General into whether there are sufficient number of Indigenous interpreters available, and if not, to fund translation services as is done in Nunavut and Saskatchewan.⁸²

- ***Indigenous Language Provisions in Quebec and the Northwest Territories***

Concerning problem of language barriers to Indigenous Peoples, the Quebec and the Northwest Territories have provisions that stand out. Quebec's *Jurors Act*, does not allow people who do not speak English or French fluently to sit on juries.⁸³ However, the act also provides that an "Indian" or Inuk who speaks neither French nor English can sit as a juror if the accused is an "Indian" or Inuk.⁸⁴ While this does not solve the issue of Indigenous representation in juries (and problems between the Cree and Inuit and the Canadian system of justice) it is an example of the flexibility of criminal law and demonstrates a measure for other provinces to follow should they not take on the more comprehensive approach of the Northwest Territories.

The Northwest Territories' reforms followed from Quebec's amendment of its jury act allowing for unilingual Indigenous jurors to be in conformity with the 1975 *James Bay and*

⁸¹ *Supra* note 37 at 52.

⁸² *Supra* note 68 at "Translation Services for Indigenous Jurors."

⁸³ *Supra* note 51 at s.4(i).

⁸⁴ *Ibid* at s.45.

Northern Quebec Agreement.⁸⁵ The Northwest Territories' *Jury Act* provides that juror eligibility is open to anyone who speaks one of the nine Indigenous languages that form the majority of the eleven official languages of the territory:⁸⁶

- (1) Chipewyan (Dëne Sų́łné Yatı́é),
- (2) Cree (Nēhiyawēwin),
- (3) Gwich'in,
- (4) Inuinnaqtun,
- (5) Inuktitut,
- (6) Inuvialuktun,
- (7) North Slavey (Sahtúqt'ı́ne Yatı́),
- (8) South Slavey (Dene Zhatı́é),
- (9) Tłı́chų́,
- (10) French
- (11) English

The *Manitoba Report* placed language in the context of a holistic approach of reform that focused on local jury trials". The report noted that the Northwest Territories inclusive language provision allowed for an Indigenous person to be tried by an all-Indigenous jury. It is clear that the Notably, the Northwest Territories' inclusive approach inspired the *Manitoba Report's* final recommendation on jury reform that an Indigenous person who does not understand nor speak English or French but speaks an Indigenous language be allowed to serve as a juror, with the appropriate translation services accompanying them. The *Manitoba Report* found that language requirements that include Indigenous languages eliminated many systemic barriers when used in conjunction with a) jury catchment provisions that locates the trial in the community where the alleged crime took place and b) recruits jurors only from a proximity of 20 kilometers from the location where the trial will take place.⁸⁷

A large problem in the Northwest Territories is that despite its inclusive language provisions, a lack of trained interpreters results in cases missing an interpreter, and thus having to exclude unilingual jurors.⁸⁸ For trials to run efficiently, two interpreters are often required, and sometimes three for more complex cases.⁸⁹ Furthermore, the Northwest Territories face issues particular to itinerant courts, such as those used in Indigenous communities in northern Quebec. For example, due to the movement of itinerant courts, translators cannot rely on in-court translations as a steady means of income. Often, translators must find other employment which then prevents them or gives little incentive to do in-court translation work.

- ***Indigenous Languages and the Federal Government***

⁸⁵ Christopher Gora, "Jury Trials in the Small Communities of the Northwest Territories," (1993) 12 *Windsor Yearbook of Access to Justice*, 163. The *James Bay and Northern Agreement* holds in provisions 18.0.19 and 20.0.07 that Cree and Inuk jurors are allowed to serve on juries despite the fact that they would otherwise not be qualify as jurors according to Quebec's *Juror's Act* prior to the s.45 amendment.

⁸⁶ *Jury Act* R.S.N.W.T 1988 c. J-2, s.4 (c).

⁸⁷ *Supra* note 29.

⁸⁸ *Supra* note 81 at 166.

⁸⁹ *Ibid* at 166.

While language acts as a systemic barrier to Indigenous Peoples' participation on jury panels, fluency in Indigenous languages by First Nations, Inuit and Métis people is in decline. In its "Calls to Action," the *Truth and Reconciliation Commission* called upon the federal government to enact legislation that would protect and revitalize Indigenous languages. In response, the federal government in 2016 announced that it will create an *Indigenous Languages Act*.⁹⁰ The Minister of Canadian Heritage began community engagement sessions in June 2018 to gather input that will inform the drafting of the law. The *Iacobucci Report* soberly reminds us however that solving language issues alone is not enough to repair the barrier between Indigenous People and the Canadian criminal justice system.

ii. *Juror Summons*

Generally, Once the number of jurors required for the coming year is determined and the names are picked randomly from the source lists, the sheriffs in each judicial district sends out juror summons to the selected names. Here the potential jurors are meant to answer the questionnaire to determine their eligibility to serve on the jury panel. The *Manitoba Report* and *Iacobucci Report* have outlined the many reasons for which indigenous people are excluded from participation on jury panels, which range from how the summons are delivered, answered, pooled, and followed up upon. We will explore the ways in which questionnaires exclude Indigenous People in the sections below concerning *threatening language* and *translations of juror summons*.

• *Threatening Language*

The *Iacobucci Report* deals with the issue of jury summons most comprehensively, and while the report's recommendations concern Ontario only, it is clear through an examination of the jury questionnaires sent out by other provinces that the problems identified in the report can also apply broadly.

The 10th recommendation of the *Iacobucci Report* explains that the language used in juror summons is threatening and imperious. Most acutely, this occurs where the summons demand the potential jurors return such on pain of incurring fines or imprisonment. While meant to encourage participation in the jury system, the threat of fines or imprisonment deter people from participating in the first place, and results in potential jurors not returning the questionnaire at all. Further, imprisonment or fines resulting from a lack of response are not enforced in many jurisdictions, and thus serve little purpose on the summons form.⁹¹

⁹⁰ The act is currently being co-developed by the Department of Canadian Heritage, the Assembly of First Nations, Inuit Tapiriit Kanatami and the Métis Nation. Government of Canada website, accessed June 2018: <https://www.canada.ca/en/canadian-heritage/campaigns/indigenous-languages-legislation/working-collaboratively.html>.

⁹¹ *Supra* note 21 at para 237.

Provincially, the language is used in the forms spans a broad spectrum, as do the repercussions for not returning them. Below we have enumerated some examples of the language used demanding that the potential jurors return their summons. Note that Ontario did amend its questionnaire to have much less threatening language as per the recommendation the *Debwewin Report*.

1. **Ontario (current 2018):** “Ontario law requires you to complete and return this form because of the importance of the jury in ensuring fair trials under Ontario’s justice system.”⁹²
2. **Ontario (previous):** “[i]f you fail to return the form without reasonable excuse within five (5) days of receiving it, or knowingly give false information on the form, you are committing an offence. If convicted of this offence, you may be fined up to \$5000.00, or imprisoned up to six (6) months, or both.”⁹³
3. **Alberta:** “WARNING:Failure to obey this Summons is an offence punishable by a fine or imprisonment, or both.”⁹⁴
4. **Manitoba:** “Unless you are disqualified or are excused from jury service, you must attend Court for jury selection on the date and time specified on your summons. You must complete and return the attached Juror Declaration Form within 7 days after receiving this notice and summons.”⁹⁵
5. **Nova Scotia:** “Please read this document carefully. This summons requires action by you immediately. Failure to obey this summons is an offence punishable by a fine. Every person who is required to complete and return a juror information form or in an application to be excused/deferred from service as a juror; is summoned to attend, and fails to obey this summons or fails to answer when called by the juror-coordinator or contravenes any other provisions of the Jury Act, is guilty of an offence and liable on summary conviction of a penalty not more than a thousand dollars.”⁹⁶

The *Iacobucci Report* further recommends that the summons be written in a clear and simple language. Opaque legalisms, combined with threatening language and overall mistrust and confusion towards the criminal justice system, simply hinder the willingness of Indigenous People to participate in the criminal process.

- ***Translations of Juror Summons***

Necessary to allowing Indigenous Peoples who speak Indigenous languages to serve on juries is the availability of juror summons to be in those very languages. However, as allowing unilingual Indigenous jurors to serve is not the norm in Canada, neither is the availability of translated juror summons.

⁹² Court Services website, “Juries Act Form Archives,”: <http://ontariocourtforms.on.ca/en/juries-act-forms/juries-act-forms-archive/>

⁹³ *Supra* note 92.

⁹⁴ *Jury Act Regulation*, Alta Reg 68/1983, Schedule Form C “Jurors Summons.”

⁹⁵ *Jury Regulation*, M.R. 320/87 R, Schedule A, “Notice to Jurors.”

⁹⁶ Government website: www.courts.ns.ca/Jury_Duty/jury_duty_docs/jury_duty_summons.pdf

While the *Iacobucci Report* detailed that the language of the jury summons acts as a barrier excluding Indigenous People's from serving as jurors, the Ontario summons form does not indicate whether there is an option for translation into an Indigenous language. However, we do know from *Kokopenace* that the jury summons in the Ontario judicial district of Kenora did have a precedent of sending translations of the summons in Ojibway and Oji-Cree syllabics.⁹⁷ However, that the *Iacobucci Report* recommends that the jury summons be translated into Indigenous languages reveals that this practice is not the norm nor province wide. The lack of translated summons hinder many Indigenous People from completing and returning them. This further contributes to the low summons response rate from Indigenous People caused by the threats of fines and imprisonment detailed in the previous section.⁹⁸

There is no translation explicitly provided for in the legislation or jurors summons (into any Indigenous languages) in British Columbia, Alberta, Manitoba, New Brunswick or Nova Scotia. The data concerning whether translated questionnaires are in fact sent out is unclear, seemingly as a result of the practice of sending out translated documents being dependent on the ministerial discretion, or discretion of the responsible Court Official.

However, Nunavut serves it summons in English, French and Inuktitut, and uses bailiffs to explain the summons when they are served.⁹⁹ Israel reports that in the Northwest Territories official make sure that the summons are delivered so as to be understood by the persons receiving them.¹⁰⁰ In *R v Redhead*, the judge urged the Manitoba government nevertheless to translate juror summons forms into Cree when the summons were served in the North of the province.¹⁰¹ However, no order to do so was made. Israel further argues that simply because a person cannot read the official documents in English or French, it does not follow that they do not understand those languages, nor that they do not possess the level of knowledge of that language to act as a juror.¹⁰²

iii. Discretion of Court Officials

In this section we will explore aspects of discretion on the part of court officials separate from their powers in relation to roll selection, which we discussed above. Here, we also discuss the broader theme of unilateral relationship between the juror and the state. We will see that many of the provincial reports on jury reform recommend new provisions that seek to increase public participation in the jury selection process.

The discretionary powers of court officials are present throughout the jury selection process. The extent of that discretion is circumscribed by the individual provincial act governing jury

⁹⁷ *Ibid* at para 18.

⁹⁸ *Ibid* at paras 240 and 241.

⁹⁹ *Supra* note 25 at 53.

¹⁰⁰ *Ibid* note 25 at 53.

¹⁰¹ *R v Redhead* 1995 CarswellMan 319 para 89.

¹⁰² *Supra* note 25 at 52.

selection. As detailed above, British Columbia gives its sheriff much wider discretion in the selection of source lists than does Nova Scotia, and similarly, the Ontario legislation gives its sheriff wider discretion for collecting names of on-reserve Indigenous people than does Quebec for that same purpose. In this section we examine (1) *exemption procedures*, (2) *summons delivery and follow up*, (3) *proposed solutions* to problems with delivery and follow up and (4) *juror's compensation*.

- **Exemption Procedures**

One aspect in which the discretion of provincial officials is particularly felt is in the exemption procedure. This allows for jurors to state that they cannot serve on a jury for various reasons that we explore below. Generally, exemption procedures operate in such a way that the persons to which jury questionnaires are sent apply to be exempted based on enumerated grounds or by virtue of the discretion of the designated official. Not all provinces have similar exemption procedures, nor the same grounds for exemptions or officials presiding over them.

The impact of discretion will depend on the process set out in the provinces jury legislation and regulations. However, systemic discrimination often occurs at an intersection of many factors that can be equally legal and regulatory requirements, sheriff or citizen discretion, practices born out of the scarcity of resources or neglect, and broader societal norms. The *Manitoba Report* detailed how several of these moving parts contributed to the obstruction of Indigenous participation on juries through the lens of language, which we will now explore.

a. Exemptions and Language

S.4 of Manitoba's *The Jury Act* sets out that "where the language in which a trial is primarily to be conducted is one that a person is unable to understand, speak, or read, that person is disqualified from serving as a juror in that trial." The act thus provides one additional ground to exclude a potential juror. The combined effect of the language requirements and grounds for exemption allow for a sheriff to exclude Indigenous Peoples from participating in the jury selection process, or allow for Indigenous People to exclude themselves from participating through the s.25 exemption.

At the time of the *Manitoba Report*, though it is no longer the case, residents of Manitoba who received juror questionnaires could either respond to the sheriff by phone or by mail. An Indigenous person who told the sheriff that he or she did not understand English or French well enough to sit on a jury, or "whom the sheriff believes cannot understand" either of those languages well enough, was exempted from sitting on a jury. In her work on the systemic bias of the jury selection process, Cynthia Petersen highlights a study done by Mari Matsuda concerning language discrimination whereby there is the effect of believing a person cannot adequately understand a language simply based on their accent.¹⁰³

¹⁰³ *Supra* note 6 at 151.

Some form of accents impede access to sit on juries as they, to the ear of the listener, falsely suggest a greater lack of comprehension of a language than other accents.¹⁰⁴ The sheriff is given an easy means to exempt Indigenous peoples through the language requirement. In turn, Indigenous peoples are given little incentive to participate in a system that has historically oppressed them, and through the language requirement possess an easy way to abstain from participation, if they so desire. However, for those people who are inclined to serve as a juror, the process is much more difficult. Petersen also indicates that based on the available evidence in 1993, exemption rates were higher for Indigenous peoples than for non-Indigenous people in Alberta and British-Columbia.¹⁰⁵

b. Exemptions Generally

British Columbia's *Jury Act* allows jurors to apply for an exemption from sitting on a jury panel upon application to the sheriff who has the discretion to accept or deny the exemption.¹⁰⁶ S.25 of Manitoba's *The Jury Act* gives the sheriff similar powers. In both provinces, serious hardship and religious grounds qualify jurors for exemptions. Manitoba's legislation adds that service in the Canadian Forces is also a ground for exemption. Nova Scotia provides that it is the jury-coordinator or a judge, and not the sheriff, which may exempt a person from sitting on the jury panel.¹⁰⁷ Nova Scotia further uses different language than Manitoba and Ontario, providing for "inconvenience or illness" and allows for exemption and deferrals so that the person can sit on a jury panel at a more convenient date. Ontario provides similar exemption and deferral provisions, and while submitted to the sheriff, the decision to exempt is reserved to the judge alone.¹⁰⁸

- ***Summons Delivery and Follow Up***

The standard practice of sheriffs and Court Officials is to send more questionnaires than names needed to be filled on the juror rolls. This is to ensure that the juror roll is filled, taking into account the low response rates and the number of persons who will be found ineligible or asks to be exempted from sitting on a jury. While the net is cast wide, the practice of sheriffs is that once there are the requisite number of questionnaires/summons returned, sheriffs stop pressing those who have failed to respond. This has the consequence that those who answer first are going to first be represented on the jury panels.¹⁰⁹

a. Problems with Mail Delivery

The *Manitoba Report* and *Iacobucci Report* both found that the practice of mailing summons to jurors had the effect of excluding Indigenous people both on and off reservations. The

¹⁰⁴ *Ibid* at 151.

¹⁰⁵ *Ibid* at 151.

¹⁰⁶ *Jury Act*, RSBC 1996, c 242, s.6.

¹⁰⁷ *Juries Act*, SNS 1998, c 16, s.5.

¹⁰⁸ *Supra* note 51 at s.23.

¹⁰⁹ *Supra* note 29.

Manitoba Report found that Indigenous peoples in remote communities have less easy access to their mail than urban persons in urban centers. The Court in *Kokopenace* detailed that in Ontario jury questionnaires sent to on-reserve residents in the remote district of Kenora are not delivered to personal or communal post offices but to the community post office, where it is the task of the post office employees to personally deliver the questionnaires.¹¹⁰

The Iacobucci Report, Manitoba Report, and Toronto Star investigation all find that in urban centers, Indigenous Peoples, who people are more likely to be renters and thereby more frequently change address, have difficulty receiving their mail and therefore their juror questionnaires. This problem is further compounded upon consideration of the issues detailed above concerning Ontario's source lists through its use of MPAC and its permissive procedures for s.6(8) of the *Juries Act*. It is important to note that the *Toronto Star* investigation has been criticized in the *The Report to the Canadian Judicial Council on Jury Selection in Ontario* due to the way in which it pooled non-white jury members on the issue of representation on trial jury panels, but not its data concerning use of the MPAC.

b. *Short Return Delays*

Problems receiving summons are compounded by the short delay period in which jurors are expected to return their summons forms upon pain of fine or imprisonment. The *Iacobucci Report* recommended that the Ontario delays to return the questionnaire be increased from five days to a more reasonable delay period. The amendments to the Ontario legislation now provide for a 30 day return period. However, most provinces still have very short delays. In New Brunswick, Alberta, and Nova Scotia, the delay period remains 5 days while in Manitoba it is 7 days and it in British Columbia it is 10.¹¹¹

The combined effect is that the inherent biases of the selection process favours urban sedentary homeowners disproportionately to the harder economic conditions faced by many Indigenous people. This eliminates many First Nations, Inuit and Métis Peoples from sitting on jury panels as the questionnaires never reach them.

- **Proposed Solutions**

a. *Manitoba*

The *Manitoba Report* recommended that when a sheriff grants an exemption, the exempted person be replaced by someone from the same community. The report further recommended

¹¹⁰ *Supra* note 4 at para 19 and 20. The findings the *Toronto Star* investigation looking at the uses of source lists to send out juror questionnaires/summons report similar issues in Toronto fit the more macrocosmic issues concerning the disproportionate impacts of Ontario source list system upon Indigenous people province wide provided in the *Iacobucci Report*.

¹¹¹ NB Reg 95-126 s.9, Alberta *supra* note 94 at "Jurors Summons Form," Nova Scotia *supra* note 96 "Summons Form," Manitoba *supra* note 95 "Jurors Summons," British Columbia from government website: [website-https://www2.gov.bc.ca/gov/content/justice/courthouse-services/jury-duty/respond-to-summons/](https://www2.gov.bc.ca/gov/content/justice/courthouse-services/jury-duty/respond-to-summons/)

that every person sent a questionnaire should have their summons enforced and be required have their name put on the jury roll even when a sufficient number of jurors have responded to fill the roll. Both recommendations are interesting answers to the unilateral discretion of the official, in this case the sheriff, in charge of jury selection. If a person is exempted for whatever reason, the first recommendation seems to supply a ready stand in, so that the particular insight of that community is not lost. It has to be noted that the first recommendation is participatory in that it forces inclusion where the hand of the sheriff would exclude. The second recommendation acts more of a corrective to the practice of the sheriffs to exclude summons once the jury selection roll is completed than imposing stricter demands on persons summoned for service, though could also have that effect. While the *Manitoba Report* included juries, the *Commission's final report made in 2001 Aboriginal Justice Implementation Commission's Final Report* did not discuss juries. Neither of the recommendations in the *Manitoba Report* have been implemented.

b. *Nova Scotia*

Both the *Nova Scotia Report* Commission and the *Iacobucci Report* include similar participatory recommendations. The recommendations of the *Nova Scotia Report*, *Manitoba Report* and *Iacobucci Report* reports taken together indicate that what is needed is not simply to remove barriers for the sake of inclusion on jury panels, but include positive measure as well. Though this approach has not been favoured by Canadian inquiries looking into issues in jury representation nor tribunals.¹¹² In *R v Born With a Tooth* a jury panel was successfully challenged on the grounds that the Sheriff's Office had been told by Alberta's chief justice to ensure First Nation representation on the panel, presumably, because the accused was an indigenous man. The sheriff sent two hundred summons to residents in Calgary and fifty-two summons to indigenous people. The judge held that this constituted as "skewing" the composition of the jury panel in favour of the accused which comprised the trust in the criminal justice system.¹¹³

The *Nova Scotia Report* recommended that the members of the public concerned with whether their name might be on any of the lists used by the sheriff to compile the jury rolls should be able to verify their presence on those lists with the Court Administrator. The report further recommended that members of the public should be able to register with the Court Administrator that their name be used. This method would make the jury selection process more of a participatory process, leaving people less vulnerable to the biases of the selection system.¹¹⁴ Despite many of the commission's recommendations being implemented, this one was not.

c. *Ontario*

¹¹² *Supra* note 25 at 44.

¹¹³ *R v Born With a Tooth*, 1993 CanLII 7066 AB QB at para 16.

¹¹⁴ *Supra* note 37 at 28.

The *Iacobucci Report* gives similar recommendations that focus on active participation of the public in the jury selection process. Recommendation 11 calls for the Ministry of the Attorney General to implement a practice, taken from the U.S, that when a jury summons is undeliverable or not returned, another summons is sent to the resident with the same postal code. The Court Services Division of the Ministry of the Attorney General implemented a pilot project in two judicial districts where every questionnaire returned to the post office as undeliverable is followed up upon.

The 12th recommendation of the *Iacobucci Report* might be its most innovative answer to the discretionary power of the sheriff. It calls for the implementation of voluntary jury service as a supplement to the existing processes identifying jurors. The *Debwewin Report* did not reach a consensus on volunteer jury service, but offered two different articulations of it: (i) permitting First Nations people on reserve to volunteer to put their names on jury rolls to supplement existing process for identifying jurors, and (ii) or use a volunteer jury service to supplement only the use of the OHIP database as set out in recommendations 8 and 9 of the *Iacobucci Report*. *Debwewin* noted that any issues of partiality would nevertheless be tempered by the in-court jury screening processes. To date no jury legislation in any Canadian province or territory has adopted volunteer provisions.

- **Juror's Compensation**

While mailing, collection practices, and use of source lists present themselves as serious barriers to jury representation, perhaps no systemic barrier is more visceral and widespread as the issue of juror compensation. In this section we look at problems with juror support, fees and payment for accommodations.

The 2018 *House of Commons Standing Committee on Justice and Human Rights Report: Improving Support for Jurors in Canada* (the *Human Rights Report*) recommends that psychological support and counselling be provided for all jurors once jury service has ended.¹¹⁵ Inquiries into barriers for jurors with disabilities has also been understudied.¹¹⁶ Quebec provides jurors with allowances for psychological care.¹¹⁷ Saskatchewan has a Juror Assistance and Support Program which provides access to four sessions with a healthcare professional to aid with difficulties resulting from jury service.¹¹⁸ Additional visits can be asked for. Alberta launched a juror support program in 2015.

¹¹⁵ *Commons Standing Committee on Justice and Human Rights Report: Improving Support for Jurors in Canada* (the *Human Rights Report*), 2018, Ch:5.

¹¹⁶ Michelle I. Bertrand, Richard Jochelson, Lauren Menzie, "The Jury Representativeness Guarantee in Canada: The Curious Case of Disability and Justice Making," (2017) 10 JEMH 3.

¹¹⁷ *Regulation respecting indemnities and allowances to jurors*, c C J-2, r. 1, s.4.

¹¹⁸ Government Website: <https://www.saskatchewan.ca/government/news-and-media/2017/november/30/support-to-jurors>

The *Human Rights Report* stresses that these services should be freely provided, and that counselling ought to be available in both official federal languages and where possible, in Indigenous languages.¹¹⁹ The report also recommends that the provinces and territories provide jurors with a daily allowance of 120\$ per day throughout the proceedings, which should be adjusted to meet increase in the cost of living, and compensation for the cost of serving as a juror, such as care for children or adults, travel, parking and meals.

The *Human Rights Report* recognized that without these essential means of support for jurors, the system as it stands now systematically bars a segment of the population from serving as jurors. The report states that:

“When jurors are not compensated adequately, a segment of the population is effectively missing from the jury. While the goal is for a jury to represent a cross-section of the population, “the right demographic,” with people from all economic backgrounds, currently only people who have the financial means or who are still able to draw on their salary or other income, such as some people who are union members, can sit on a jury. According to Mr. Patrick Baillie, in these conditions, it is “hardly a jury of one’s peers.”¹²⁰

While all provinces require that jurors get leave for service, that this is unpaid impacts jurors who work by the hour disproportionately to jurors who work on salary. Further, salaried jurors might have more accessible means to vindicate their rights should the employer fire the worker during jury service than hourly workers.

The *Manitoba Report* found that the fact that travel costs and other associated costs with jury service were only paid after the fact as reimbursements, and not in advance, was also a barrier for Indigenous people, and compelled them to ask for exemptions from service or disregard a summons, which was similarly raised in the *Iacobucci Report*.¹²¹ The *Iacobucci Report* detailed that Indigenous peoples who lived on-reserves and had to attend jury service in urban centres, particularly for those who live in the north of the province, incurred considerable costs as there is required multiple days of transportation, sometimes including costly airfare.

The report did note that Court Services Division in the Kenora judicial district pre-arranged travels, accommodation and meal allowances for potential First Nations jurors, but that service was no consistently offered in all districts. The *Iacobucci Report* detailed that the accommodated hotels were sub-par, and meal stipends only allowed for unhealthy food. It further raised the persistent problem of a lack of translation services for Indigenous people where their dominant language is an Indigenous language and they are visiting an English speaking urban center. Lastly, the report recommended that childcare and Elder care expenses ought to be paid by the province, or allow children and Elders to accompany the potential jurors on an expense-paid basis.¹²²

¹¹⁹ *Supra* note 115 at Ch: 5.

¹²⁰ *Ibid* at Ch: 5.

¹²¹ *Supra* note 21 at para 242.

¹²² *Ibid* at 243.

As it stands only Quebec and Nunavut today meet the *Human Right Report's* recommended number for juror's fees.¹²³ Quebec entitles jurors to an indemnity of 103\$ per day or half day of trial.¹²⁴ They also receive 160\$ per day beginning on the 57th day of proceedings. In Nunavut jurors are given 100\$ a day which increases to 150\$ after the fifth day of trial. Only Quebec provides explicitly for child-care during jury service. Quebec jurors are also given allowances for meals, accommodations and transportation. Alberta entitles their jurors to 50\$ for a day or half day served, covers the actual cost of fare by public transportation, gives allowance for travel expense incurred by car, and reasonable accommodations for actual expenses determined by the sheriff.¹²⁵ In New Brunswick and Nova Scotia jurors are paid 40\$ for per full day, while the former covers for sequestered jurors all expenses, including meals and accommodations, while the later partially covers travel, but fully covers parking.¹²⁶ Saskatchewan provides 80\$ a day to sit on a criminal trial, and covers reasonable travel expenses, accommodations, meals, parking expenses, and parking tickets if incurred in necessary and unavoidable circumstance.¹²⁷

Both Ontario and Manitoba do not pay their jurors until the 11th day of service.¹²⁸ Beginning the 11th day, Ontario pays their jurors 40\$ per day, and 100\$ per day beginning the 50th day, whereas Manitoba pays jurors 30\$ per day after the 10th day. Manitoba however covers jurors who do not live within the limits of the town or city in which the trial is taking place for reasonable expenses incurred for food and accommodation, and for those living within the city for reasonable out-of-pocket expenses. Ontario provides for travel allowances for persons living 40km outside the city, but none for those living within. There is no allowance for child care expenses or parking. Lastly, it is only Newfoundland where employers must grant their employees a paid leave of absence.^{129 130}

5.The In-Court Criminal Process

As described above, ss. 626 to 644 of the *Criminal Code* provide the procedures for the creation of the trial jury. Here we are going to detail those provisions that are most pertinent to the issues of representation. We will first discuss the two in-court process reforms concerning stand-asides and peremptory challenges, which have historically been the provisions pointed to that exclude Indigenous Peoples during the in-court selection process. We will then quickly detail ss.629, 632 and 638 of the *Criminal Code* which bear upon the ability of the judge, defence and prosecution to exclude jurors.

¹²³ *Supra* note 115.

¹²⁴ *Regulation respecting indemnities and allowances to jurors*, R.R.Q., 1981, c. J-2, r. 1; O.C. 59-96, s. 1.

¹²⁵ *Jury Act Regulation*, Alta Reg 68/1983, s.4.

¹²⁶ *General Regulation*, NB Reg 95-126, s.13(1) of *Juries Regulations*, NS Reg 126/2000, s.5(c).

¹²⁷ *Jury Regulations*, 2000, RRS c J-4.2 Reg 1.

¹²⁸ *Fees and Expenses of Jurors and Crown Witnesses*, RRO 1990, Reg 4, s.1. *Jury Regulation*, Man Reg 320/87, s.1(2).

¹²⁹ *Jury Act*, 1991, SNL 1991, c 16, s.42.

¹³⁰ The *Toronto Star* has also published a comparative list of the fees of all the provinces and territories in Canada. See "Can you afford jury duty? Here's how each province compensates you for your service" by Miriam Katawazi in the *Toronto Star*, February 2016. <https://www.thestar.com/news/investigations/2018/02/16/can-you-afford-jury-duty-heres-how-each-province-compensates-you-for-your-service.html>

a. *Stand-Asides and Peremptory Challenges*

The *Manitoba Report* recommended that both peremptory challenges and stand-asides be eliminated from the *Criminal Code* of Canada. The report found that the common practice of the use of stand-asides and peremptory challenges resulted in the exclusion of Indigenous jurors from sitting on the *petit jury* in criminal trials. Similar concerns were raised by the 1982 *Report on the Jury* made by the Law Reform Commission of Canada (the *LRC Report*) which also recommended the abolishment of stand-asides and peremptory challenges.¹³¹ Subsequent reform to these two in-court selection procedures has been staggered.

- *Stand Asides*

S. 634 of the *Criminal Code* which provided for stand-asides and peremptory challenges was amended in 1992 by Bill C-70, *An Act to Amend the Criminal Code (Jury)* in response to the Supreme Court decision *R v Bain*.^{132 133} In *R v Bain*, the Supreme Court held that the Crown's exclusive right to stand-asides violated the right to an independent and impartial jury protected by s.11(d) of the Charter. Stand-asides were the ability of the Crown to ask a total of 48 jurors from the panel to not be called forward and probed by the defence until all other jurors on the panel were called. Crown exclusive-stand asides resulted in the prosecution having a greater numerical ability to dismiss jurors, and therefore a greater role in fashioning the jury.¹³⁴ This created a reasonable apprehension of bias in favor of the Crown, and infringed the right to an impartial jury provided by s.11 (f) of the *Charter*.¹³⁵ The 1992 amendments to the *Criminal Code* resulted in the elimination of stand-asides. Peremptory challenges remained however, and the 1992 amendment provided for an equal distribution of peremptory challenges between the defence and prosecution. S.634 holds that the amount of permitted challenges increases in relation to the gravity of the offence.¹³⁶

- *Peremptory Challenges*

In March of 2018, the federal government introduced Bill C-75 which would eliminate peremptory challenges and give judges more power to stand-aside jurors. *The Iacobucci Report* called for the elimination of peremptory challenges in its 15th recommendation. The concern with peremptory challenges is that their existence allows for the discrimination of jurors as was the case with stand-asides. The difference with peremptory challenges is that they distribute

¹³¹ *Law Reform Commission of Canada, Working Paper 27: The Jury in Criminal Trials by Chairman Francis Muldoon* (1980) Ottawa: Minister of Supply and Services Canada, at 54.

¹³² Richard Jochelson, Michelle, RCL Lindsay, Andrew M Smith, Michael Ventola, and Natalie Kalmet, "Special Issue: Underneath the Golden Boy: Revisiting Representativeness in the Manitoba Criminal Jury," (2014) 37:2 Man LJ, 371.

¹³³ *R v Bain* [1992] 1 S.C.R 91.

¹³⁴ *Supra* note 6 at 159.

¹³⁵ *Supra* note 132.

¹³⁶ *Supra* note 3 at s.634 (2).

the ability to discriminate to both prosecution and defence. This is the very nature of the controversy surrounding the Colten Boushie trial.

While called for by the *LRC Report*, *Iacobucci Report* and *Manitoba Report*, the elimination of peremptory challenges has been met with some resistance by criminal lawyers who claim that their elimination will produce more unfair and biased trial juries. The Criminal Lawyers Association (CLA) made a public commentary on the elimination of peremptory challenges, explaining that:

“In fact, in our experience, peremptory challenges are often used in an attempt to ensure there are racialized or indigenous people sitting on juries, particularly when the accused is racialized or indigenous. Peremptory challenges are often used in conjunction with restrictive challenge for cause questions to achieve this result. Without significant work to increase the diversity of the jury pool and to make jury service economically viable for everyone, eliminating peremptory challenges will likely make juries less representative, not more.”¹³⁷

While the Crown may exempt racialized jurors, the defence uses peremptory challenges to include minority jurors on the *petit jury*. Me Laurelly Dale, writing in the *The Lawyer's Daily*, said that she worked on *Kokopenace* at the trial level, and the resulting lack of Indigenous People on the jury was not due to peremptory challenges, but rather, due to the out-of-court jury selection process.¹³⁸ In retort, it could equally be said that there are better ways to achieve diversity on the jury than using peremptory challenges by reforming the selection process to abolish the exclusion of persons convicted of a criminal offence, or non-citizens.¹³⁹

As we have seen, reform of both in-court and out-of-court jury selection processes was contemplated by the *Manitoba Report*. It recommended that in conjunction with the elimination of peremptory challenges, jurors ought only to be chosen from 40 kilometers surrounding the community in which the trial is to be held similar to the selection process in the Northwest Territories.¹⁴⁰ Further, the report proposes that when there are new jurors needed, they ought to be chosen from communities that are culturally and demographically similar to the one in which the offence took place. Lastly, CLA commented that the broadening of the power of the judges may lead to problems of the impartiality of the judge as they will be optically scrutinizing jurors, bringing the impartiality of the selection process into question, the very issue in *R v Bain*.

b. Other Criminal Code Provisions

¹³⁷ Criminal Lawyers Association, “Position Paper Bill C-75,” (2018), 3. <https://s3.amazonaws.com/tld-documents.llnassets.com/0006000/6561/lawyer'spositionpaper.pdf>

¹³⁸ Laurelly Dale, “Bill C-75: Erasing due process one amendment at a time,” (May 22 2018) *The Lawyer's Daily Tuesday*.

¹³⁹ *Supra* note 50.

¹⁴⁰ *Supra* note 86 at s.8.

These last provisions of the *Criminal Code* are worth detailing here for the sake of completing the picture as to how a *petit jury* finally manifests in a criminal jury trial.

S.629 of the *Criminal Code* allows the prosecution or defense to challenge the entire jury panel on the basis of partiality, fraud or wilful misconduct on the part of the relevant provincial official, such as the sheriff or jury coordinator. Successful challenges to the entire array are difficult to achieve.¹⁴¹ S.629 has been raised, though unsuccessfully, in such cases where there was evidence that the sheriff had a policy of not including Indigenous people in the jury panel.^{142, 143}

Ken Roach reports that s.629 fails to allow the accused to successfully challenge jury panels where there is no evidence of intentional discrimination. S.629 therefore does not account for problems of systemic discrimination. Roach holds that s.629 ought to be reformed in the spirit of Justice Cromwell's dissent in *Kokopenace* in which he proposed a “results based analysis” of representativeness for s.11(d) and (f) of the *Charter* is a right for the accused to have “a right to a jury roll that that attempts to be proportionately representative of the population of eligible jurors in a judicial district.”¹⁴⁴ S.629 in this vein would allow the accused to challenge the jury panel if the selection process does not produce a jury panel that is a “fair and random sample of the community.”¹⁴⁵

S.632 allows a judge before the beginning of the trial to order that a juror be excused due to the juror having personal interest in the trial, a relationship with the judges presiding over the case as well as the lawyers, witnesses or accused, and personal hardship or other reasonable causes. S.631 (1) and (3.1) allow a judge to call a juror to stand by once their name has been called to sit on the *petit jury*.

S.627 of the *Criminal Code* provides that a judge can permit a juror with a physical disability to be provided with “technical, personal, interpretative, or other support,” if they are otherwise eligible. S.638 provides however that jurors who benefit from s.627 aid may be challenged for cause.

S.638(1) provides for an unlimited amount of challenges for cause to the defence and prosecution. S.638(2) restricts challenges for cause to what is enumerated in s.638(1). A juror could be challenged for cause if they are partial to the outcome of the trial, physically unable to perform duties of a juror, or speak the official language of Canada that is the language, are an “alien” or has been sentenced to death or a term of imprisonment exceeding twelve months. Parliament could introduce in this section a provision allowing for Indigenous People to serve as jurors where they speak Indigenous languages.¹⁴⁶ Further, it could eliminate the bar to

¹⁴¹ *Supra* note 6 at 152.

¹⁴² *Ibid* at 152.

¹⁴³ One such example is *R v Butler* (1984), 1984 CanLII 500 (BC SC), 63 C.C.C. (3d) 243.

¹⁴⁴ *Supra* note 4 at paras 246 and 247.

¹⁴⁵ *Supra* note 50.

¹⁴⁶ *Ibid*.

“aliens” given it the *Iacobucci Report*’s recommendations concerning citizenship as a requirement to serve as a juror which we dealt with above.

6. Conclusion

We have seen that the legal meaning of “representativeness” is a right to a certain kind of procedure that forms a jury panel. The road that procedure travels is long, and the barriers that obstruct it are many. The jury selection process has a built-in presupposition: the juror is sedentary, urban, a homeowner, financially flexible, possesses “Canadian values,” and speaks in Canadian tongues.

While there has been change and reform, there has not been much. However, the slow pace of reform at the federal level seems swift compared to that at the provincial level. The reforms called for by the *Iacobucci Report* now being put into place, echo recommendations made over twenty years earlier. Ultimately, what is at issue in both the provincial and federal processes are inarticulate responses to the foundational problems of implicit racial and economic bias. Whether embedded by design, tradition or omission, problems with representation of Indigenous Peoples and minority groups in Canada on jury trials have been reported, discussed, known and outstanding for several decades.