

JURY REPRESENTATION IN CANADA

MEMO ON BILL C-75

Canadian Institute for the Administration of Justice

By Nathan Afilalo, April 2019



MEMO ON BILL C-75

Memo on Bill C-75:

Overview

Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, is an *omibus* bill that seeks to reduce delays in criminal proceedings.¹ The proposed law is a response to the Supreme Court's framework set out in *R v Jordan* to accomplish that very goal.²

The following text details the amendments made by the proposed law to the jury selection process set out in the *Criminal Code*.³ We first consider the addition of "maintaining public confidence in the administration of justice" as a ground to order that a juror "stand aside." Secondly, we turn to the elimination of peremptory challenges. The third are the changes to the wording of the some of the grounds for a "challenge for cause" against a juror. The fourth is the elimination of the "two-trier" and "static-trier" processes used to determine challenges for cause made against a juror. We will examine each in turn. For the sake of context, we have included at the end of this document a brief discussion of other sections in the *Criminal Code* that effect jury selection.

Outline

1. General Note on the Jury Selection Process as a Whole
2. Bill C-75 Amendments
 - a) Amendments to Stand-Asides
 - Critique of New Ground for Stand Asides
 - Discretion
 - *R v Kokopenace* and Representation
 - Systemic Discrimination
 - b) The Elimination of Peremptory Challenges
 - Positions for the Removal of Peremptory Challenges
 - Positions Defending Peremptory Challenges
 - c) Changes to Challenges for Cause
 - Partiality
 - Prison Sentence
 - Citizenship Requirement
 - d) Elimination of "Rotating-Trier" and "Static-Trier"
 - "Rotating-Triers"
 - "Static Triers"
 - The Elimination of the "Rotating-Trier" and "Static Trier" Process
 - e) Amendments to Section 644
3. Brief Overview of "Juries" and "Challenging the Array"
 - a) "Juries" Section 626
 - b) "Challenging the Array" Sections 628, 629 and 630

¹ Department of Justice, *Charter Statement – Bill C-75: An Act to Amend the Criminal Code, Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, 29 March 2018.

² *R v Jordan*, 2016 SCC 27, [2016] 1 SCR 631 ; *R v Cody*, 2017 SCC 31, [2017] 1 SCR 659, see also Senate, Standing Committee on Legal and Constitutional Affairs [LCJC], *Delaying Justice Is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada*, Final Report, June 2017.

³ Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, Summary (c).

General Note on the Jury Selection Process as a Whole

The jury selection process for criminal trials in Canada occurs in two steps: (1) first the provincial selection process set out by provincial legislation and (2) then the federal “in-court” selection process set out in the *Criminal Code*.⁴

The provincial process has two components: preparing the jury-roll and selecting names from the jury role. Section 92(14) of the *Constitution Act, 1867* gives the provinces jurisdiction over “The Administration of Justice in the Province,” allowing to legislate how a jury is selected in the province. However, in all cases the jury-roll is formed by a random selection of names⁵ of potential jurors from a set of sources prescribed by the provinces’ jury legislation. These prescribed banks of names are called “source lists.” Once the jury-roll is prepared the names from the source lists are arranged into arrays (also known as jury panels). Arrays are the cohorts of names from which the jurors who will serve on a criminal jury (called the *petit jury*) are drawn.

The process of selecting the names from the array federal is governed by the *Criminal Code* and makes up the federal in-court selection process of jury selection. Once the names are chosen, the jurors can either be challenged by the judge or the parties’ counsel. If they are not challenged or the challenge fails, the juror serves on the petit jury. This process is repeated until the requisite number of jurors is reached. Section 91(27) of the *Constitution Act, 1867* grants parliament jurisdiction over both “The Criminal Law” and “Procedure in Criminal Matters.” Section 626 of the *Criminal Code* links the criminal and provincial selection processes by stating that whoever is qualified to serve as a juror by the law of the province is qualified to serve as a juror on a criminal trial.

Bill C-75 Amendments

Bill C-75 reforms the jury selection process by changing the powers of the three different actors in a criminal jury trial who can bar a juror from serving. The discussion that follows will detail how these proposed changes vest judges with greater discretionary power, pushing them into a more active role in the jury selection process. In exchange, the ability of both counsel and the jury itself to participate in the formation of the jury is restricted. In the case of the former this ability is only lessened, while in the case of the latter it is removed completely.

At this stage it is important to overview how Bill C-75 impacts the different avenues available to counsel, the judge and the jury to impact the formation of the *petit jury*. The *Criminal Code* sets out four regimes through which a juror can be barred from serving on a criminal trial. These are (1) peremptory challenges, (2) challenges for cause, (3) judicial orders for a “stand-aside” or (4) a judicial order to “excuse a juror.” Bill C-75 makes amendments to each of these processes save the power of a judge to “excuse” a juror. The changes to the

⁴ Section 92(14) of the *Constitution Act* gives the provinces jurisdiction over “The Administration of Justice in the Province.” This allows the provinces to have a jury selection process for civil cases.

⁵ *R v Kokopenace*, 2015 SCC 28, [2015] 2 SCR 398, at para 40. Of course, the province cannot legislate whatever process it will. To ensure that a jury is representative and respects the defendant’s sections 11(d) and (f) right of the *Charter of Rights and Freedoms* to an independent and impartial jury the selection process must “draw from a broad cross-section of society” and draw the names of jurors randomly from the sources capturing that broad-cross section.

“peremptory challenges” and “challenges for cause” regimes impact the power of counsel to strike jurors. The changes to the “stand-aside” regime and the “challenges for cause” regime give judges more discretionary power to bar jurors. The elimination of the “rotating-trier” system to resolve “challenges for cause” removes the ability of the jury itself, and by extension the public, from a decision-making role concerning the composition of the jury.⁶ We will examine each concept further below.

Amendments to “Stands Asides”

Judges have two ways to bar a juror from serving on a criminal jury. The judge can either “excuse a juror”⁷ or order a “stand aside.”⁸ What distinguishes the two is that the former can be used at any time before the start of a criminal trial. The latter is only used during the jury selection process that forms the *petit jury*. The grounds to order a stand-aside and to excuse a juror are similar with the exception that section 632 explicitly holds that a judge will excuse a juror if the juror has a personal relationship with the accused, counsel or the judge.

Bill C-75 provides an additional ground to order a “stand aside.” Provided for in section 633 of the *Criminal Code*, stand asides allow a judge to bar a juror whose name has been called from the jury pool to serve on the *petit jury*. The judge uses her discretion to order a stand aside on the grounds of “personal hardship” or for “any other reasonable cause” which includes signs of partiality.⁹ Any number of jurors can be asked to stand aside.

The amendment proposed by Bill C-75 adds a third ground to section 633 that allows a judge to order a “stand-aside” to maintain “public confidence in the administration of justice.”¹⁰ While the addition of this third ground is phrased in broad language, the Legislative Summary of Bill C-75 explains that:

“[it might be] possible that it could provide an opportunity for a judge to consider whether a jury appears to sufficiently representative (sic) or appropriately empanelled to promote a just outcome, perhaps even considering whether racial bias could be a factor.”¹¹

⁶ *Supra* note 5 at para 220.

⁷ *Criminal Code*, RSC 1985, c C-46 at s 632.

⁸ *Supra* note 7 at s 633.

⁹ *R v Yumnu*, 2012 SCC 73, [2012] 3 SCR 777 at para 54.

¹⁰ *Bill C-75, An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, 1st Sess 42nd Parliament, s 269.

While our concern are the amendments made to jury selection, it’s helpful to consider some of the changes to other sections of the *Criminal Code* working in tandem with the amendments to the jury selection process. Some of these include: giving judges larger discretion concerning administration of justice offences while strengthening their case management powers, reclassifying many indictable offences as hybrid offences, and changing bail practices and procedures to make them more lenient generally, paying particular attention to accused who are Indigenous or from a racialized minority, but more restrictive in instances of intimate partner violence.

¹¹ Legal and Social Affairs Division Parliamentary Information and Research Service, “Legislative Summary of Bill C-75: An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts,” Publication No. 42-1-C75-E, 7th of May

The Legislative Summary further details that stand asides based on this ground would be determined on a case-by-case basis, upon consideration of all relevant circumstance. The amendment is meant to remind judges of the importance of an “impartial, competent and representative” jury and their role in promoting one.¹²

Critique of the new ground for “Stand Asides”

The addition of a third ground for a stand aside did not receive much attention in the parliamentary debates as did the eliminations of peremptory challenges. While such an instrument would have been more useful in the context of peremptory challenges, it does permit judges more discretion to intervene. There are however some problems with this amendment.

Discretion

Firstly, while the wording of the new ground seems to give a judge more discretion to ensure that the jury panel is representative, judges already have considerable discretion to excuse a juror under the “any other reasonable cause” ground.¹³ In light of this, the Criminal Lawyers’ Association (CLA) maintains that while the amendment may give judges more tools to root out bias, it will take time consuming litigation to clarify the meaning and scope of the new ground.¹⁴

R v Kokopenace and Representation

Secondly, it is difficult to see how a judge’s discretion under the proposed third ground could create a representative jury beyond what is set out for representation in the Supreme Court case *R v Kokopenace*.^{15 16} In that case the majority held that the ss.11(d) and (f) ensure a right to a process of random juror selection and not to a jury of a “particular composition.”¹⁷ Representativeness for the sake of a ss.11(d) and (f) means that the jury is randomly selected from the prescribed provincial source-lists that draws “from a broad-cross section of society.”¹⁸ Representativeness does not concern the ultimate composition of the jury.¹⁹ Nor does it demand that the province use lists that proportionately represent all eligible groups for jury service.²⁰ It only requires that the state make reasonable efforts to have lists that are able to draw from a large “cross-section” of society and do not deliberately exclude a given group.²¹ As a result, it would be inconsistent, if not discriminatory, if a judge used their powers to give the jury a particular composition and deliberately prefer one type of juror over another.

2018, Revised December 8th 2018:

https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/LegislativeSummaries/421C75E#a2-1-6, accessed February 5th 2019.

¹² *Supra* note 11.

¹³ *Supra* note 5 at para 236.

¹⁴ Criminal Lawyers’ Association, *Submission on behalf of the Criminal Lawyer’s Association to the House of Commons Standing Committee on Human Rights Discussion on Bill C-75*, online [\[https://www.criminallawyers.ca/wp-content/uploads/2018/09/CLA-submission-Bill-C75-August-2018.pdf\]](https://www.criminallawyers.ca/wp-content/uploads/2018/09/CLA-submission-Bill-C75-August-2018.pdf) at 6.

¹⁵ *Supra* note 5 at para 236.

¹⁶ *Ibid* paras 29-46.

¹⁷ *Ibid* para 42 and lastly that notices have been given to those persons selected.

¹⁸ *Ibid* para 62.

¹⁹ *Ibid* at para 40.

²⁰ *Ibid* at paras 44 and 46

²¹ *Ibid* paras 39-54.

Systemic Discrimination

Finally, it is clear from the Legislative Summary that the drafters of the amendment rely heavily on the ability of individual judges to combat discrimination in the jury selection process for criminal trials. But as the 2013 *First Nations Representation on Ontario Juries: Report of the Independent Review by the Honourable Frank Iacobucci* details, what prevents Indigenous People and racialized people from serving on juries is systemic discrimination that comes into being by the interworking of myriad and disparate causes that go beyond the power of one agent to solve.²² We will outline some of those factors in the following paragraphs. In contrast, the elimination of peremptory challenges and addition of the third ground to stand-asides addresses discrimination on an individual basis. The discretionary power that the proposed Bill gives judges might not be enough to counteract the larger systemic barriers in the jury selection process that prevent Indigenous People and racialized people from serving on the *petit jury*.

What systemic discrimination particularly means in the context of jury selection are compounding barriers that exclude particular groups at every step of the provincial and federal processes.

In her essay “Institutionalized Racism: The Need for Reform of the Criminal Jury Selection Process” Cynthia Petersen details what the *Iacobucci Report* later repeats: the problem of representation begins with the kind of lists the province use to call people to jury service.²³ This can be due to the lists prescribed by the province not being up-to-date, such as voters lists, the lists only selecting for certain kinds of jurors, or special provisions in some provinces for Indigenous people.²⁴ This was the very problem in *R v Kokopenace* where the sources lists used by Ontario inadvertently excluded the names members of four First Nations from being on the jury role.²⁵

If jurors get passed the problems posed by source lists, there are other barriers that present themselves when the jurors are summoned to form the arrays and these make juries less representative.²⁶ Mistrust of the judicial system by Indigenous People, methods of delivery of summons, poor compensation, expensive travel, existence of a criminal record (see amendment to challenges for cause below), discrimination on the part of the overseeing sheriff and language barriers all form significant hurdles for jurors nation-wide and particularly Indigenous People and racialized persons from being chosen to form the array.²⁷

In short, it is difficult to foresee the amendment to the “stand-aside” regime being able to make a jury more representative given that this expansion of a judge’s discretionary power

²² Frank Iacobucci, *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by the Honourable Frank Iacobucci*, (2013) Ontario Ministry of the Attorney General, at paras 231-236, 372 [*Iacobucci Report*].

²³ Cynthia Petersen, “Institutionalized Racism: The Need for Reform of the Criminal Jury Selection Process” 38 McGill L.J 147, April 2003 at 2. See also *Iacobucci Report* at paras 231-236, 372, 374 and Recommendations 8 and 9.

²⁴ *Ibid* at 3.

²⁵ *Ibid* at paras 26, 27.

²⁶ *Supra* note 23 at 4.

²⁷ *Ibid* at 4. See also *Iacobucci Report* paras 214-223, 233, and *Report of Standing Committee on Justice and Human Rights*, “Improving Support for Jurors in Canada,” May 18th 42nd Parliament, 1st Session, at 35.

does little to alleviate the structural barriers that dissociate the composition of juries from the communities they are meant to be representative of.

The Elimination of Peremptory Challenges

Bill C-75 eliminates in its entirety peremptory challenges. Set out in section 634, peremptory challenges allow for both the prosecution and defense to bar a set number of jurors. These challenges are used at the counsel's discretion to bar a juror from serving on the *petit jury* without needing to provide a reason. The number of peremptory challenges accorded to either party depends on the nature of the offence.²⁸ If the accused is charged with high treason or murder, the prosecution and the defense can exclude up to 20 jurors each. A juror can also be challenged peremptorily regardless of any previously made challenge for cause. As the peremptory challenge process now stands, the jurors are presented to the accused and counsel monitors the juror's reaction to the accused. Counsel then asks a set of limited and prescribed questions to try and uncover a range of biases of a given juror. The defense or Crown can then decide to either strike or accept the juror to serve on the *petit jury*.²⁹

Positions for the Removal of Peremptory Challenges

There have been many calls for the elimination of peremptory challenges. The majority of these have been made on the ground that peremptory challenges are used to discriminate against jurors on the basis of their gender, ethnicity, social class, "race" and community.³⁰ In Canada the discussion has centered around peremptory challenges being used to exclude Indigenous People and racialized minorities from serving as jurors.³¹ The 1991 *Manitoba Public Inquiry into the Administration of Justice and Aboriginal People* found that in Manitoba it is common for both Crown and defense to exclude Indigenous jurors.³² The inquiry called for the elimination of peremptory challenges. After a systemic review of the jury selection process in Ontario, the *Iacobucci Report* recommended that peremptory challenges be eliminated from the Criminal Code due to their disproportionately adverse effect on Indigenous People and racialized groups.³³

It is also important to note that despite the longstanding critique of peremptory challenges, Bill C-75's elimination of them remains a response to the acquittal of Gerald Stanley on the charge of second-degree murder of Colten Bushie, an Indigenous man, by an all-white jury.³⁴ Bill C-75 was tabled only a month after that decision was rendered despite peremptory challenges being criticized for over twenty years.³⁵

²⁸ *Supra* note 7 at s 634.

²⁹ *Supra* note 14 at 6.

³⁰ *Supra* note 23 at 2-3.

³¹ *Supra* note 22 at paras 231-236, 372, 372, recommendations 8 and 9.

³² Manitoba, *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 [*Manitoba Report*].

³³ *Supra* note 22 at recommendation 15.

³⁴ Legal and Social Affairs Division Parliamentary Information and Research Service, "Legislative Summary of Bill C-75: An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts," Publication No. 42-1-C75-E, 7th of May 2018, Revised December 8th 2018, at para 2.1.6.1:

Positions Defending Peremptory Challenges

Peremptory challenges have been defended on the ground that they can ensure a fair jury selection process. In *R v Sherratt* the Supreme Court maintained the position that peremptory challenges can, in certain circumstances, produce a more representative jury depending on the community that the accused is a part of.³⁶ The CLA argued a similar position, holding that peremptory challenges are used to exclude jurors who seem to have hidden biases.³⁷ The Law Reform Commission of Canada explained that peremptory challenges could make the accused feel like they had some control over the case against them.³⁸ The CLA maintains that a verdict from a jury configured by both parties in this way is more likely to appear impartial and make the accused more confident that they had a fair trial and be seen as legitimate to the wider public.³⁹

As mentioned above, the elimination of peremptory challenges alone does not remove many of the systemic barriers that prevent Indigenous People and racialized minorities from serving on juries. Recognizing this, the CLA submitted that instead of removing peremptory challenges, Bill C-75 ought to have legislated the dissenting position in *Kokopenace* and directly address the jury selection process at the federal and provincial level, pointedly meaning, the use of sources and lists and composition of the array.⁴⁰

In *R v Kokopenace*, McLachlin C.J. (as she then was) and Cromwell J.'s dissent maintained that for a jury roll to be representative the names chosen to be on the roll should be representative of the community from which it is drawn. Cromwell J. explained:

“The focus of representativeness is on whether the jury roll, from which jurors will ultimately be selected, is as broadly representative of the community as would a group of people selected at random from within that community...A representative jury roll is one that substantially resembles the group of persons that would be assembled through a process of random selection of all eligible jurors in the relevant community.”⁴¹

Consequently, the *petit jury* will be held to be representative when drawn from a jury-roll that is representative of the community from which the jurors are drawn.⁴² Note that as outlined above, the majority's position is that representativeness of the jury is ensured for the sake of s.11(d)(f) when the source lists chosen draw broadly from “society” and the names selected from them are done so randomly. The minority's position takes a much more localized

https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/LegislativeSummaries/421C75E#a2-1-6, accessed February 5th 2019.

³⁵Legislative Background – An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts (Bill C-75)

<https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/c75/p3.html>.

³⁶ *R v Sherratt*, [1991] 1 SCR 509 at 532-533, 1991 CanLII 86 (SCC).

³⁷ *Supra* note 14 at 6.

³⁸ 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.

³⁹ *Supra* note 14 at 6.

⁴⁰ *Ibid* at 7.

⁴¹ *Supra* note 5 at paras 224 and 226.

⁴² *Ibid* para 226.

understanding of representativeness, holding further that a jury “representative of the community is more likely to result in a *petit jury* that can avoid these unconscious effects of racism.”⁴³ Considering the dissent’s position, the CLA recommended that the accused or prosecution should be able to challenge the array (discussed below) on the grounds that it is “not representative of the community from which it is drawn.”⁴⁴

Importantly, this is not a novel recommendation to make juries more inclusive. The *Manitoba Public Inquiry into the Administration of Justice and Aboriginal People* held that a localized jury roll would increase representation on juries. They recommended that jurors should be drawn from within 40 kilometers of the community in which a trial is held, and if additional jurors were needed, these should be chosen from communities demographically similar to the one where the offence took place.⁴⁵ Such an approach would allow the communities affected by the harm greater input into its resolution. This localized approach is adopted in The Northwest Territories’ *Jury Act* which holds that no person more than “20 miles” from the sitting of the court is to be included on the jury list.⁴⁶

Changes to Challenges for Cause

Section 683(1) of the *Criminal Code* provides 6 grounds for the accused or the prosecution to try to bar a juror from serving. These are called “challenges for cause,” and they vary from challenging a juror because the name of a juror does not appear on the panel, to challenging a juror on the basis that they cannot perform the required duties of the position. Bill C-75 chiefly changes the wording of three of the grounds to challenge a juror for cause. We will examine each of the three amendments.

Partiality

We first turn to the amendment to section 683(1)(b). Currently the provision holds that a juror can be challenged on the ground that they are “not indifferent between the Queen and the accused.” Fundamentally the provision screens for partiality.⁴⁷ The proposed amendment makes this clearer by removing mention of “the Queen,” simply stating that a juror can be challenged because that “a juror is not impartial.”⁴⁸ As such it is not probable that the amendment changes the test to determine partiality set out in *R v Find*, which rebuts the presumption of juror impartiality.⁴⁹ While not a substantive change, the amendment might be an attempt to make the provision less alienating to jurors from communities who have been historically oppressed or currently are adversely treated by Canadian law and colonialism.⁵⁰

⁴³ *Ibid* para 238.

⁴⁴ *Supra* note 14 at 7.

⁴⁵ *Manitoba Public Inquiry into the Administration of Justice and Aboriginal People* They further recommended that when in urban areas, juries be drawn from the neighborhoods of the city in which the victims and accused reside.

⁴⁶ *Jury Act*, RSNWT 1988, c J-2, s 4. Note these provisions operate in the context of circuit courts as well as fixed courts. The act also has more inclusive language laws in its jury law, allowing the 11 manor indigenous language groups to serve as jurors which the *Criminal Code* at this point bars.

⁴⁷ *R v Find*, 2001 SCC 32, [2001] 1 SCR 863, at para 30 [*Find*].

⁴⁸ *Supra* note 3 at section 271 (b).

⁴⁹ *Supra* note 47 at paras 30-45.

⁵⁰ *Supra* note 22 at paras 37, 222, 262, 271, 289, 311, 372.

Prison Sentence

Bill C-75 introduces more substantial change to section 683(1)(c). As it stands this provision allows the prosecution or defense to challenge a juror if they have been convicted of an offence for which they received either the death sentence or a term of imprisonment exceeding twelve months. The proposed amendment focuses on jurors convicted of more serious offences by only barring those who have been convicted of an offence for which they received a prison sentence of two years and have neither received a pardon nor a record suspension for it.⁵¹

This amendment partially responds to the recommendations made in the *Iacobucci Report* and *Debwewin Jury Review Implementation Committee's* Final Report. In the former it was recommended to the government of Ontario to narrow the exclusion of jurors convicted of criminal offences as Indigenous People were particularly affected by this provision.⁵² In the later report it was additionally recommended to repeal the 2011 amendments to the *Criminal Records Act* and to offer support for Indigenous People seeking pardons.⁵³

Citizenship Requirement

Finally, the amendment to section 683(d) proposes a discrete change of phrasing. The subsection currently holds that a juror can be challenged for cause if the “juror is an alien.” The amendment changes the ground to read that a juror will be challenged if the juror “is not a Canadian citizen.” The amendment here again seems more cosmetic than substantive. In both *R v Laws* and *R v Church of Scientology* the Court of Appeal of Ontario decided that as concerns the provincial jury legislation, the exclusion of non-Canadian citizens from being jurors does not infringe an accused’s ss.11(d) and (f) rights even such a provision excludes a large number of jurors from a minority community.⁵⁴

The proposed changes only seem to reaffirm these holdings at the criminal level. The *Iacobucci Report* discussed that many Indigenous People would decline from serving as jurors because of the Canadian citizenship requirement. *Debwewin Jury Review Implementation Committee's* final report recommended including a provision to recognize Indigenous citizenship instead of the Canadian citizenship requirement.⁵⁵ While these recommendations were made to the provincial government, they equally apply in the criminal context. However, Bill C-75 does not address them.

⁵¹ *Supra* note 3 at 271 (c).

⁵² *Juries Act*, R.S.O. 1990, c. J.3 s 4(b). *Supra* note 22 at recommendation 14, paras 33, 244, 279.

⁵³ *Debwewin Jury Review Implementation Committee: Final Report*, [2018], online, <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/debwewin/>, recommendation 14.

⁵⁴ *R v Laws*, 1998 CanLII 7157 (ON CA), [1998] CarswellOnt 3509 (Ontario Court of Appeal) at para 66. See also *R v Church of Scientology of Toronto*, (1997) CanLII 16226 (ON CA), [1997] CarwellOnt 1565, at paras 85-88.

⁵⁵ Recommendation 10 *Debwewin*. *Iacobucci* para 32-note that the citizenship requirement still remains in Ontario. However, in the Northwest Territories, it is enough that a person merely be a permanent resident to serve as a juror.

Elimination of “Rotating Trier” and “Static Trier”

If a juror is challenged for cause, the *Criminal Code* provides for two mechanisms to determine the truth of the challenge. The first is the “rotating-trier” process, and the second is the “static-trier” process.” Bill C-75 eliminates both these processes, vesting the judge with the power to determine challenges for cause. Before we discuss the amendments, it is helpful to outline both the “two-trier” and “static-trier” processes.

Rotating-Triers

Section 640 sets out the procedure to determine any challenge for cause. Section 640 (2) holds that if a juror is challenged for cause then “the two jurors who were last sworn” will determine whether the ground for the challenge is true. Alternatively, if no jurors have been chosen, then the judge appoints two other jurors present to determine the ground of the challenge.

As discussed in *R v Nouredine* by the Ontario Court of Appeal, section 640 enshrines a right to the use of “rotating triers” to decide challenges for cause.⁵⁶ As the jury panel during the challenges process is not complete, there will be a rotation of triers who determine the different challenges for cause. Using rotating triers allows for a variety of views to prevail and counterbalance each other when determining challenges for cause.⁵⁷ The Court in *Nouredine* explained:

“Rotating triers avoids the risk, present when static triers are used, that a single person, chosen as a trier, with a skewed sense of impartiality, could profoundly affect the jury selection process and ultimately the impartiality of the jury empanelled to try the case.”⁵⁸

Rotating jurors have been in use in Canada since 1892. Subsection 640(2.1) provides that on the application of the accused, the judge can order all jurors to be excluded from the court during the challenges for cause process. The judge will grant the exclusion order if she thinks it is required to preserve the impartiality of the jurors.

Static Triers

Such an order means that sworn jurors cannot be used as rotating triers as they would be excluded as per the exclusion order.⁵⁹ This is a problem solved by section 640(2.2) which introduces the “static trier. Introduced in 2008, the “static-trier” allows for the two persons chosen to be the triers to not be part of the jury for the sake of preserving the overall impartiality of the jury.⁶⁰ Section 640(4) sets out that if, after what the court considers a reasonable time, the two have not made a determination, the court can elect two other jurors to perform the task.

⁵⁶ *R v Nouredine*, [2015] ONCA 770 at para 34.

⁵⁷ *Supra* note 2 at para 34.

⁵⁸ *Ibid* at para 34.

⁵⁹ *Ibid* at para 36.

⁶⁰ *Ibid* at paras 35-36.

The Elimination of “Rotating-Trier” and “Static-Trier” Process

The proposed amendments in Bill C-75 would be the first proposed amendment details that it is a judge who will determine any challenge for cause. The second proposed amendment holds that any challenge for cause can warrant the exclusion of all jurors sworn or unsworn on application of the defence, the Crown or by an independent order of the judge in order to preserve the impartiality of the jurors.

The Bill C-75 amendments eliminates the requirement that two jurors determine whether the ground for the challenge is true, instead giving that role to the presiding judge. Thus it will be the judge who decides whether any of the grounds of the challenges for cause are true. Bill C-75 also eliminates any distinction between the grounds for a challenge under 638(1) for the purposes of the process of determining their veracity. The judge can, for any ground, excuse the jurors while the determination of that issue is being made. The justification for this change is based on the recommendation made in 2009 by the Steering Committee on Justice Efficiencies and Access to the Justice System.

The purpose of the amendment is to expedite the jury trial process. As it currently stands the two-trier system can contribute to delays even before the trial begins as it tasks two persons not trained in law to resolve a legal problem. By giving this responsibility to the judge, Bill C-75 seeks to bypass potential sources of delay.

However, by eliminating the “two-trier” process all together, Bill C-75 opens the door to the very problem that the two-trier process seeks to solve, that a single person’s sense of impartiality decides questions of partiality for every challenge for cause.⁶¹ While the new section relies on the presumption of impartiality accorded to judges, it (1) removes the more democratic sub-process of the two-trier system of the jury selection process, the jury itself a fundamental institution to Canada’s, and further the common-law world, criminal justice system, and (2) ignores the role of judges in perpetuating systemic discrimination by placing them in a unique role to decide the composition of juries.⁶²

We can see the different values at work in Bill C-75 in competition with each other. The elimination of the “rotating-trier” process creates a more expeditious jury selection process at the expense of the more democratic process. Further, while the eliminations of peremptory challenges and the changes to challenges for cause are said to make the jury selection process more inclusive, the amendments assume that the solution to make it so is reliance upon judges. Even if the bias of the presiding judge has no racial basis, it may extend to economic class, age, sex or any other number of factors. Fundamentally Bill C-75 makes one person determine who sits on the body (the jury) that represents the larger community to judge criminal guilt. It can be argued that while it is by definition the fundamental role of the judge to singularly determine issues, the amendments to section 640 involve the singularity of the judge’s voice deciding over the multi-choral tone of the “rotating-trier” process, replicating some of the problems of using the “static-trier.”

⁶¹ *Ibid* at para 34.

⁶² *Ibid* at para 35. *Supra* note 5 at para 1.

Amendments to Section 644

Lastly, Bill C-75 adds a new subsection to section 644. As the law currently stands, section 644 guides the process for replacing a juror or continuing a trial after a juror has been challenged. The amendments add that if throughout the trial the number of jurors is reduced below 10, the judge can, with the consent of the parties, discharge the jurors, continue the trial and render a verdict without any jury.

Brief overview of “Juries” and “Challenging the Array”

For the sake of context I have included a brief discussion concerning the other sections in the *Criminal Code* that either establish requirements to serve as a juror or allow for grounds to challenge jurors. Note that the jury selection process in the *Criminal Code* is set out in 3 subsections: (1) “Juries” (626-627), (2) “Challenging the Array” (628-630) and (3) “Empaneling a Jury” (631-644). The six sections that Bill C-75 amends are found entirely within the “Empaneling a Jury” range.

Juries: Section 626

Section 626(1) explains that if a person qualifies to serve as a juror in accordance with the jury selection law of the province that person can also sit as a juror in a criminal proceeding. It is a general stipulation detailing who is eligible to serve as a juror. However, it is supported by two other articles.

Firstly, section 626(2) offers the caveat that notwithstanding any provincial jury selection process, no one can be “exempted, disqualified or excused” from serving on a criminal jury according on the grounds of their sex. Secondly, section 627 holds that a judge “may permit” a juror who, while otherwise qualified, has a disability to have the support necessary to allow them to serve. It is a strange omission that the federal reforms to the jury selection process neglect to add any additional caveats or protections to the section 626 despite that section being the very one that ties the provincial process to the federal one.

Challenging the Array: sections 628, 629 and 630

Section 629(1) provides the grounds upon which the accused or the defence may challenge for cause the jury panel on account of the partiality, fraud or wilful misconduct of the sheriff who assembled it. Section 630 provides that when a challenge under 629(1) is brought, a judge will must determine whether the accusation is true, and if so, must direct a new panel to be formed.

This allows a juror who has not yet been called to serve on a case to be excused from jury service on the grounds that they have a personal interest in the case, have a personal relationship with the judge of the judge presiding over the jury selection independently of counsel process, the judge presiding over the trial, the accused, defence counsel, the prosecution or a witness, would suffer from hardship due to serving as a juror or for any other reasonable cause. This process concerns maintaining an impartial jury. Bill C-75 makes no amendments to it.