# JURY REPRESENTATION IN CANADA

## VANCOUVER ROUNDTABLE

**Report of the Canadian Institute for the Administration of Justice**

By Maria Aylward, October 2019

BRITISH COLUMBIA REPORT

CIAJ | Canadian Institute for the Administration of Justice
Listening. Learning. Leading.

*The following individuals contributed to research, drafting or editing of this report:*

*Official Reporter:*

- Maria Aylward, Lawyer, Project and Business Development, CIAJ

*Student Reporters:*

- Alexa Ferguson, Judicial Law Clerk, Supreme Court of British Columbia
- Mark Iyengar, Judicial Law Clerk, Court of Appeal for British Columbia
- Sarah Ferencz, Student, Peter A. Allard School of Law, UBC
- Mohnaam Shergill, Student, Osgoode School of Law
- Nathan Afilalo, Law Student Intern, CIAJ

*A special thank you to the Planning Committee:*

- The Honourable Elizabeth Bennett, Co-Chair
- The Honourable Leonard Marchand, Co-Chair
- Professor Patricia M. Barkaskas, Instructor (tenure track)/Academic Director, Indigenous Community Legal Clinic
- Mr. Mark Gervin, Lecturer/Legal Services Director, Indigenous Community Legal Clinic
- Mr. Leslie Leclair, Public Prosecution Service of Canada
- Mr. Mark Levitz, Q.C. Senior Crown Counsel with the Ministry of Attorney General of British Columbia
- Ms. Erin Turner, Senior Policy Analyst, Court Services Branch, Ministry of Attorney General
- Ms. Christine O'Doherty, Lawyer, Executive Director, CIAJ

Canadian Institute for the Administration of Justice

Institut canadien d'administration de la justice

Listening. Learning. Leading.

Écouter. Apprendre. Inspirer.

# ROUNDTABLE ON JURY REPRESENTATION
# JUNE 1, 2019 ▪ VANCOUVER, BC

Vancouver Campus at Simon Fraser University, Wosk Centre for Dialogue
580 West Hastings St, Vancouver, BC – **WCC 420 Strategy Room**

## PREVIOUS ROUNDTABLE

- April 6, 2019, Winnipeg, Manitoba

## UPCOMING ROUNDTABLES

- September 21, 2019, Halifax, Nova Scotia
- Alberta, Ontario, Quebec (Dates to be confirmed)

## PLANNING COMMITTEE

- The Honourable Elizabeth Bennett, Co-Chair
- The Honourable Leonard Marchand, Co-Chair
- Professor Patricia M. Barkaskas, Instructor (tenure track)/Academic Director, Indigenous Community Legal Clinic
- Mr. Mark Gervin, Lecturer/Legal Services Director, Indigenous Community Legal Clinic
- Mr. Leslie Leclair, Public Prosecution Service of Canada
- Mr. Mark Levitz, Q.C. Senior Crown Counsel with the Ministry of Attorney General of British Columbia
- Ms. Erin Turner, Senior Policy Analyst, Court Services Branch, Ministry of Attorney General
- Ms. Christine O'Doherty, Lawyer, Executive Director, CIAJ

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

# AGENDA

**8:45–9:30 am: Introduction and Welcome Remarks**

- The Honourable Elizabeth Bennett, Court of Appeal for British Columbia, Co-Chair
- Rosalind Campbell, lawyer – Welcome Song
- The Honourable David Eby, Attorney General, Government of British Columbia
- Mr. Doug White, BC First Nations Justice Council and Councillor of the Snuneymuxw First Nation in Nanaimo, BC

**9:30–10:15 am: *Portrait of the Jury Process in British Columbia***

**Moderator:** The Honourable Elizabeth Bennett, Court of Appeal for British Columbia, Co-Chair
**Speakers:** Ms. Lynda Cavanaugh, Assistant Deputy Minister, Court Services Branch, Ministry of Attorney General; Staff Sergeant Steve Jervis, British Columbia Sheriff Service; Ms. Erin Turner, Senior Policy Analyst, Court Services Branch, Ministry of Attorney General

---

**10:15–10:30 am – HEALTH BREAK –**

---

**10:30–Noon: *Conflict Between Indigenous Culture and Court Structure***

**Moderator:** Professor Patricia Barkaskas, Instructor (tenure track)/Academic Director, Indigenous Community Legal Clinic
**Speakers:** Mr. David Milward, University of Victoria; Mr. Jonathan Rudin, Aboriginal Legal Services, Toronto

---

**Noon–13:00 pm – LUNCH –**

---

**1:00–2:00 pm: Practical Issues**

**Moderator**: The Honourable Leonard Marchand, Supreme Court of British Columbia, Co-Chair
Speakers: ACJ Heather Holmes, Supreme Court of British Columbia; Mr. Alexander MacDonnell, Crown Counsel; Mr. Mark Gervin, Lecturer/Legal Services Director, Indigenous Community Legal Clinic; Mr. Leslie Leclair, Public Prosecution Service of Canada

**2:00–3:30 pm: Workshop** (Health Break will be taken during the workshop)

**Moderators:**
Group 1: The Honourable Elizabeth Bennett and Leslie Leclair
Group 2: The Honourable Leonard Marchand and Erin Turner
Group 3: Mark Levitz and Mark Gervin

**3:30–4:15 pm: Plenary**

**Moderators:** The Honourable Elizabeth Bennett, Court of Appeal for British Columbia, Co-Chair
The Honourable Leonard Marchand, Supreme Court of British Columbia, Co-Chair

Each group will report on their discussion

**4:15–4:30 pm: Closing Remarks**

- The Honourable Elizabeth Bennett, Court of Appeal for British Columbia, Co-Chair
- The Honourable Leonard Marchand, Supreme Court of British Columbia, Co-Chair

# BIOGRAPHIES

**Patricia M. Barkaskas** is the Academic Director at the Indigenous Community Legal Clinic (ICLC) and a tenure track Instructor at the Allard School of Law, at the University of British Columbia. Patricia practiced child protection, civil, criminal, family, and prison law, and produced Gladue reports for all levels of courts in British Columbia. She has worked closely with Indigenous peoples in their encounters with the justice system and worked for Residential school survivors as an historical legal researcher for the Indian Residential Schools Settlement Agreement. Patricia's research focuses on clinical legal education, decolonizing and Indigenizing legal education, exploring the value of Indigenous pedagogies in legal education, experiential learning in law, and Métis law.

**The Honourable Elizabeth Bennett** obtained her Bachelor of Arts degree in Criminology from Simon Fraser University in 1978 and her LL.B. from the University of British Columbia in 1981. Her law practice was exclusively in the area of criminal law, both Crown and defence. She specialized as appellate counsel. She was appointed Queen's Counsel in 1994. Justice Bennett was appointed to the Supreme Court of British Columbia in 1997 and to Court Martial Appeal Court of Canada in 1999. She was appointed to the Courts of Appeal of British Columbia and Yukon in 2009. She is the Past-President of the International Society for the Reform of Criminal Law, the Co-chair of the Canadian Judicial Council's Committee on Criminal Jury Instructions, and has a number of publications in the field of criminal law. She was the Chair of the Canadian Bar Association National Criminal Law Section and a former member of the Citizens Advisory Committee of the National Parole Board. She has lectured with the Federation of Law Societies National Criminal Law Program, the National Judicial Institute, the Canadian Association for the Administration of Justice, numerous CLE's and Fordham University Law School in New York on the topic of neuroscience and criminal law.

**Lynda Cavanaugh** was appointed Assistant Deputy Minister of Court Services Branch on June 1, 2015, and fulfills the roles of Chief Court Administrator and Director of Sheriffs. With more than 1,300 staff, Lynda is responsible for the operation of 89 court locations across the province. Key aspects of the position include strategic and operational leadership regarding all matters of court administration, court security and the harmonization of court and judicial administration processes to support an effective justice system.

From 2011 to 2015, Lynda worked as the Assistant Deputy Minister of Community Safety and Crime Prevention Branch, where she was responsible for victim services, violence against women programs, and crime prevention initiatives. She also spent many years in various capacities in the social sector and led a number of initiatives, such as working to improve coordination and integration of services to the chronically homeless population, many of whom are mentally ill and challenged with addictions. She holds leadership certificates from Queen's University School of Business, Royal Roads University and the Niagara Institute Executive Leadership Program.

**The Honourable David Eby** is the MLA for Vancouver-Point Grey, first elected in 2013. A proud local resident, David was re-elected in 2017 to serve a second term in the B.C. Legislature and in July 2017 was appointed to his current role as Attorney General by Premier John Horgan. David is also responsible for Gambling policy, Liquor policy and the Insurance Corporation of BC (ICBC) for the province.

Before he was elected, David was the Executive Director of the BC Civil Liberties Association, an adjunct professor of law at the University of British Columbia, president of the HIV/AIDS Legal Network, and served on the Vancouver Foundation's Health and Social Development Committee. An award-winning human rights lawyer, he has been repeatedly recognized in local media as one of British Columbia's most effective advocates and has appeared at all levels of court in BC. His years of legal advocacy at Pivot Legal Society to protect the human rights and dignity of homeless and under-housed residents of Vancouver's Downtown Eastside were recognized in 2011 by the UN Association in Canada and the B.C. Human Rights Coalition with their annual award.

**Mark Gervin** graduated from UBC Law and was called to the Bar in 2000 after wonderful articles with Glen Orris, Q.C. which included two long murder trials one of which was a Mr. Big acquittal. He has worked primarily as criminal defence counsel from 2000 to present defending everything from thefts to murder including five Mr Big files. Mark worked as ad hoc Crown Counsel for the last eight years in many different roles. He spent one year as Director of the Peter A Allard Law School's Innocence Project in addition to working as a supervising lawyer over multiple years and three years as Legal Director of the Peter A Allard Law School's Indigenous Community Legal Clinic. He co-founded and was Vice Chair of the Criminal Defence Advocacy Society (CDAS). He is the former Chair of the BC Branch of the CBA Criminal Section.

**The Honourable Heather J. Holmes** was appointed Associate Chief Justice of the Supreme Court of British Columbia in June 2018. She has been a justice of the court since March 2001. Prior to her judicial appointment, and for much of her career as a lawyer, she was Crown Counsel with the Commercial Crime Section, Ministry of the Attorney General of British Columbia, specializing in securities fraud prosecutions, and commercial crime trials and appeals. She also spent four years (1991-1995) as counsel with the Criminal Law Policy Section, Department of Justice, Canada, in Ottawa, where she developed recommendations for criminal law reform and provided advice and support to the Minister of Justice.

**Steve Jervis** is a staff sergeant with the B.C. Sheriffs at the Vancouver Law Courts. Steve is responsible for courts, jail, escorts and all high security matters for the courthouse. Steve was involved in many high profile jury selections and trials including; R v. Pickton, R v Legebokoff, R v Sipes et al, R v Berry and R v Bacon. Steve was involved in the implementation of the Sheriff Recruit Training program and the Jury Management Centralization program.

**Leslie LeClair** is an Ojibway from the Sand Point First Nation (Bingwi Neyaashi Anishinaabek) located in Northwestern Ontario. He is Senior Crown Counsel with the Public Prosecution Service of Canada. He has been employed with the PPSC since graduating from the University of Victoria in 2000. Leslie is the Team Leader for the Agent Supervision Unit, responsible for supervising Agent Law Firms contracted to conduct prosecutions on behalf of the Federal Government. Leslie has extensive experience prosecuting criminal conspiracies to import, export and traffic drugs. He also has experience prosecuting cases involving production of methamphetamine, MDMA (ecstasy) and marihuana.

**Mark Levitz** is a Crown counsel in Vancouver. He has been lead Crown on two lengthy organized crime trials. He is both trial counsel and appellate counsel. He has practiced corporate commercial law in Asia, and civil litigation in Vancouver. He has lectured extensively on criminal law topics, including at programs organized by the Canadian Bar Association, Continuing Legal Education, and the B.C. Prosecution Service. He has participated in international work in Central America for the

Justice Education Society and in Africa for Lawyers Without Borders. He was appointed Queen's Counsel in February 2009.

**Sandy MacDonell** started his career in 1989 with a Labour Law firm in Vancouver, McTaggart Ellis & Co. In 1993 he moved to the provincial Crown in Nanaimo, then worked from 1995 to 1999 in Victoria conducting Federal Prosecutions with McConnan Bion O'Connor and Peterson. Since 1999 he has worked for the Provincial Crown in Smithers, first as an Administrative Crown Counsel, then from 2007 to 2012 as a Deputy Regional Crown. He was the Regional Crown Counsel for Northern BC from 2012 to 2017 and is now working in Smithers as a Deputy Regional Crown Counsel.

**The Honourable Len Marchand, Jr.** is a member of the Okanagan Indian Band and grew up in Kamloops. He graduated from law school at UVic in 1994. He articled and practised law at Fulton & Company LLP in Kamloops from 1994-2013. Justice Marchand has dedicated much of his career to achieving reconciliation for many Indigenous people through, among other things, advancing civil claims for abuses suffered by residential school survivors. In 2005, he helped negotiate the Indian Residential Schools Settlement Agreement, Canada's largest class action settlement. He served on the Oversight Committee for the Independent Assessment Process and on the Selection Committee for the Truth and Reconciliation Commission. Justice Marchand was appointed to the Provincial Court of British Columbia in 2013. As a Provincial Court judge, he had the privilege of presiding in First Nations Court where, with input from Elders, healing plans are developed for offenders. Justice Marchand was appointed to the Supreme Court of British Columbia on National Indigenous People's Day, June 21, 2017. Justice Marchand sits in Kamloops.

**Dr. David Milward** is a law professor with the University of Victoria, and a member of the Beardy's & Okemasis First Nation in Saskatchewan. His first book, *Aboriginal Justice and the Charter*, won the K.D. Srivastrava Prize in 2012 for the best book published by U.B.C. Press that year. It was also short-listed for the Canadian Law and Society Association Book Prize Award that same year. His second book, *The Art of Science in the Canadian Justice System: A Reflection on my Experiences as an Expert Witness*, was co-authored with the late Dr. Charles Ferguson. The book describes Dr. Ferguson's experiences with calling into question deficient forensic science evidence in Canadian courts, particularly that of former Ontario forensic pathologist Dr. Charles Smith. He also has numerous publications in international and leading national law journals in the areas of criminal law, evidence, and Indigenous justice.

**Kim Pate** was appointed to the Senate of Canada on November 10, 2016. First and foremost, the mother of Michael and Madison, she is also a nationally renowned advocate who has spent the last 35 years working in and around the legal and penal systems of Canada, with and on behalf of some of the most marginalized, victimized, criminalized and institutionalized — particularly imprisoned youth, men and women.

Senator Pate graduated from Dalhousie Law School in 1984 with honours in the Clinical Law Programme and has completed post graduate work in the area of forensic mental health. She was the Executive Director of the Canadian Association of Elizabeth Fry Societies (CAEFS) from January 1992 until her appointment to the Senate in November 2016. CAEFS is a federation of local societies who provide services and work in coalition with Aboriginal women, women with mental health issues and other disabling conditions, young women, visible minority and immigrant women, poor women and those isolated and otherwise deprived of potential sources of support. Prior to her work with CAEFS, she worked with youth and men in a number of capacities with the local John Howard Society

in Calgary, as well as the national office. She has developed and taught Prison Law, Human Rights and Social Justice and Defending Battered Women on Trial courses at the Faculties of Law at the University of Ottawa, Dalhousie University and the University of Saskatchewan. She also occupied the Sallows Chair in Human Rights at the University of Saskatchewan College of Law in 2014 and 2015.
Kim Pate is a member of the Order of Canada, a recipient of the Governor General's Award in Commemoration of the Persons Case, the Canadian Bar Associations's Bertha Wilson Touchstone Award, and five honourary doctorates (Law Society of Upper Canada, University of Ottawa, Carleton University, St. Thomas University and Wilfred Laurier University) and numerous other awards. Her extensive list of publications, national and international speaking engagements and her strategic intervention and advocacy for substantive equality testify to her commitment to broader social, economic and cultural change. She continues to make significant contributions to public education around the issues of women's inequality and discriminatory treatment within social, economic and criminal justice spheres.

**Jonathan Rudin** was hired in 1990 to establish Aboriginal Legal Services and has been with ALS ever since - currently he is the Program Director. He has appeared before all levels of court, including the Supreme Court of Canada. His book, Indigenous People and the Criminal Justice System was released by Emond Publishing in 2018.

**Erin Turner** is a Senior Policy and Business Analyst at Court Services Branch (CSB), Ministry of Attorney General. Erin is currently responsible for managing policy, legislation and strategic corporate initiatives for the BC Sheriff Service. Before working at CSB headquarters, Erin was a deputy sheriff at the Victoria courthouse.

**Douglas S. White, B.A. J.D.**, is a practising lawyer (called to the BC Bar in 2008) and is Chair of the BC First Nations Justice Council. He is also a Co-Chair of BC's Provincial Advisory Committee for Indigenous and Specialized Courts and Related Initiatives. His Coast Salish name is Kwulasultun, his Nuu-chah-nulth name is Tliishin and he is a member, former Chief, and current Councillor and Negotiator of the Snuneymuxw First Nation in Nanaimo, BC.

After completing his B.A. in First Nations Studies (with distinction) from Malaspina University-College (now Vancouver Island University), he graduated from the Faculty of Law at the University of Victoria in 2006, and was called to the Bar of British Columbia in January 2008. He has been granted Distinguished Alumni Awards from both Vancouver Island University (2013) and the University of Victoria (2015). He has been a director of the Indigenous Bar Association of Canada and an associate lawyer at Mandell Pinder. He was the elected Chief of the Snuneymuxw First Nation from December 2009, to February 2014, where a major focus of his work was implementation of the Snuneymuxw Treaty of 1854. From June of 2010, to June 2013, he was also elected to lead the First Nations Summit as a member of the FNS Task Group. In that role, he was also a member of the BC First Nations Leadership Council working on common issues with BC First Nations and advocated on their behalf with the governments of British Columbia, Canada and internationally at the United Nations. He is currently the Director of the Centre for Pre-Confederation Treaties and Reconciliation at Vancouver Island University and practices as a lawyer and negotiator across the country for First Nations governments.

# Table of Contents

**INTRODUCTION** .......... **2**
CIAJ Roundtables .......... 2
Overlapping Issues: The Plight of Indigenous Peoples in Canada .......... 2
Conflict Between Indigenous Culture and Court Structure .......... 3
R v Kokopenace .......... 5
**THE JURY SELECTION PROCESS: WHERE ARE WE FALLING SHORT?** .......... **6**
Finding Jurors Generally .......... 6
The Jury Project .......... 7
Practical Issues in the British Columbia Jury Regime .......... 9
Sources of the Jury Summons List .......... 9
Peremptory Challenges: Is Bill C-75 a Commitment to Acknowledging the Problems in our Justice System? .......... 10
The Illusory Impartial Jury .......... 11
Exclusions .......... 13
Personal Hardship .......... 14
**RECOMMENDATIONS** .......... **15**
Modify British Columbia's *Jury Act* .......... 15
Reconsider Current Sheriff Services Practices .......... 16
Ameliorate Current Geographical Constraints .......... 17
Reduce Financial Stress on Jurors .......... 17
Modernize the Summons Process .......... 18
Emphasize Civic Involvement through an Educational Campaign .......... 19
Foster Relationships with Indigenous Communities .......... 19
Prioritize Accessibility in Eligibility .......... 20
**CONCLUSION** .......... **21**

## INTRODUCTION

### CIAJ Roundtables

An integral part of CIAJ's (Canadian Institute for the Administration of Justice) mandate is to recognize and engage in issues of legal importance in Canada, and to encourage discussions that lead to recommendations and the promotion of change. CIAJ is holding a set of roundtables in jurisdictions across Canada, composed of judges, defence lawyers, Crown lawyers, professors and other important players in the justice system. Not only do these roundtables include legal professionals, they also include First Nations representatives. The goal of these individual roundtables is to discuss the pressing issue of jury representation in a given jurisdiction. A national symposium may be held at the end of the process to share ideas and perspectives from each roundtable, with the goal of presenting concrete recommendations in a report that captures a national outlook on the issue of jury representation in Canada.

### Overlapping Issues: The Plight of Indigenous Peoples in Canada

Roundtable participants agreed that the issue of indigenous underrepresentation cannot be viewed in a vacuum. As explored in the *Iacobucci Report*, the issue of First Nations jury representation is "inextricably connected with problems arising from the justice system's treatment of members of First Nations generally."[1] Accordingly, resolving challenges of jury representation necessarily requires consideration of the over-incarceration and victimization of Indigenous peoples. First Nations' difficulties under colonization and the long-standing conflict between Indigenous culture and court structure.

The *Criminal Code* mandates that all sanctions other than imprisonment are to be considered with particular attention to the circumstances of Aboriginal offenders.[2] In 2016-2017, Aboriginal adults accounted for 28% of admissions to provincial/territorial correctional services and 27% for federal correctional services, while representing 4.1% of the Canadian adult population. In 2006-2007, the proportion of admissions of Aboriginal peoples to correctional services was 21%

---

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

[2] *Criminal Code*, s. 718.2 (e). Aboriginal identity is determined via self-identification within Canadian correctional services.

for provincial and territorial correctional services and 19% for federal correctional services.[3]

As a group that has been "socially, economically, and politically marginalized",[4] Indigenous women have been frequent targets for hatred and violence. Underlying factors such as poverty and homelessness contribute to their victimization, as do historical factors such as racism, sexism, and the legacy of colonialism. The trauma caused by abuses under Canada's residential school system also likely plays a role. Indigenous women have a 37% chance of being a victim of a crime (compared to 26% for non-Indigenous women),[5] and the violence they face is often more severe.[6]

### *Conflict Between Indigenous Culture and Court Structure*

The common thread during the Roundtable was that the issue of jury representation in British Columbia is tied to an underlying conflict between Indigenous communities and the structure of our court system.

Professor Patricia Barkaskas of the Indigenous Community Legal Clinic emphasized that the struggle between Indigenous communities and the Canadian legal system begins long before a jury summons is sent out. Instead, this conflict can be traced back to the colonization of Canada, when a foreign and unwelcome colonial legal system was imposed on Indigenous groups. Not only does the Canadian legal system fail to successfully incorporate Indigenous peoples, it has also actively excluded Indigenous approaches and traditions.

Similarly, Dr. David Milward of the University of Victoria discussed the importance of legitimacy to the proper functioning of the Canadian justice system. With respect to the court structure, Dr. Milward noted that the system is perceived to be legitimate if it protects the larger population while also providing accused individuals with an opportunity to defend themselves. The problem, however, is that this perception of legitimacy is often lacking within Indigenous communities because of the historic imposition of a colonial justice system as well as the fact

---

[3] Population counts are based upon July 1st, 2017 estimates provided by Statistics Canada, Demography Division.
[4] *National Inquiry into Missing and Murdered Indigenous Women and Girls. Retrieved July 29,* 2019.
[5] *"Background". National Inquiry into Missing and Murdered Indigenous Women and Girls. Retrieved July 29,* 2019.
[6] "Violent victimization of Aboriginal women in the Canadian provinces, 2009". *www.statcan.gc.ca*. Retrieved October 2, 2019.

that Indigenous peoples are often assumed or perceived to be perpetrators of crime as opposed to victims. As such, crimes committed against Indigenous peoples are often not taken as seriously as those committed against non-Indigenous people. For instance, the murder of Helen Betty Osborne was raised as an example of community indifference towards crimes committed against Indigenous people, which resulted in a 16-year delay before a first conviction. [7]

While statistics in this area look grim, Mr. Doug White of the BC Aboriginal Council and Counsellor of the Snuneymuxw First Nation in Nanaimo reminded the group that we are at a defining moment in the province's and country's history. The FNJC (formerly the British Columbia Aboriginal Justice Council) was formed in 2015 through resolutions made by the First Nations Summit (FNS), the Union of British Columbia Indian Chiefs (UBCIC), and the British Columbia Assembly of First Nations (BCAFN). In September 2017, the BCAJC, Attorney General, and Minister of Public Safety and Solicitor General signed a Memorandum of Understanding with the aim of jointly developing a provincial Indigenous Justice Strategy, reflecting the following key priorities:

1. Reconciliation with Indigenous people;
2. Decreasing the overrepresentation of Indigenous people in the justice system;
3. Improving the experience of Indigenous people within the justice system;
4. Addressing violence against Indigenous people, especially women and girls;
5. Engagement with Indigenous communities and organizations in a respectful and culturally appropriate manner;
6. Improved access to justice services by Indigenous people; and,
7. Designing services that provide Indigenous people with culturally relevant, flexible and user-focused processes.[8]

Furthermore, as of May 2016, Canada became a supporter, without qualification, of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). While not yet implemented, strides such as these, coupled with a continuous dialogue on how to improve these issues, are steps in the right direction.

---

[7] *Report of the Aboriginal Justice Inquiry of Manitoba,* Aboriginal Justice Implementation Commission, Volume II, The Death of Helen Betty Osborne, November 1999.
[8] https://bcafn.ca/event/first-nations-provincial-justice-forum/

### R v Kokopenace

The leading case governing jury representation remains the 2015 Supreme Court of Canada (SCC) decision in *R v Kokopenace*[9], where the Court had to determine what efforts must be made by provinces to ensure that a jury is actually "representative". Representativeness was examined for its definition and its role respecting the rights guaranteed under ss.11(d) and 11(f) of the *Charter*.

Writing for the majority, Justice Moldaver determined that a jury roll will be considered representative where the source lists used to collect the names of jurors **randomly draws** from a **"broad cross-section of society"** followed by the **delivery of notices to the persons randomly selected**.[10] This process is touted as providing potential jurors with a "fair opportunity" to participate in jury selection. Additionally, the requirements are further narrowed since the state must only make *reasonable efforts* to ensure that all of the above conditions are met, to satisfy their requirements.[11]

Representativeness in this context centres on the process used to compile the jury roll and not the jury's ultimate composition.[12] Thus, the exclusion of underrepresented people on juries will not violate an individual's rights, as the SCC concluded that a jury roll containing few individuals of the accused's race or religion was not indicative of bias.

Justice Cromwell delivering minority reasons for himself and Chief Justice McLachlin remarked that ignoring the State's obligations of inclusion "is an affront to the administration of justice and undermines public confidence in the fairness of the criminal process."[13] Furthermore, the process of random selection should not allow the State to ignore significant departures from a properly conducted selection process.[14] Justice Cromwell emphasized that the "fair opportunity" test takes the focus off the State's constitutional obligation to provide a representative jury.[15] The State has a constitutional obligation not to breach *Charter* rights, not just to make "reasonable efforts" not to breach their rights.[16]

---

[9] *R v Kokopenace* 2015 SCC 28. [*Kokopenace*]
[10] *Supra* note 9 at para 40. (Emphasis added.)
[11] *Ibid* at para 134.
[12] *Ibid*, generally.
[13] *Ibid* at para 195.
[14] *Ibid* at para 233.
[15] *Ibid* at para 249.
[16] *Ibid* at para 250.

## THE JURY SELECTION PROCESS: WHERE ARE WE FALLING SHORT?

### Finding Jurors Generally

Jury selection in Canada includes (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 jury panel. This process is governed by federal and provincial powers, rights enshrined in the *Charter*, provisions from the *Criminal Code* and provincial jury laws and regulations.[17] In British Columbia, the *BC Jury Act*[18] is the relevant provincial statute.

The pool of potential jurors used in British Columbia is assembled with data from Elections BC, the Insurance Corporation of British Columbia and Vital Statistics BC. Court Services reported during the Roundtable that this Jury Management System provides the province with roughly 3.6 million names and addresses. However, Court Services also stated there are 3.8 million citizens in BC who are eligible for jury service. Presumably, and for reasons that will come to light in this Report, Indigenous peoples likely constitute much of this discrepancy. Court Services has attempted to address the discrepancy by emailing all First Nations Bands in the province on two occasions requesting names and mailing addresses. In 2012, Court Services also attempted to include data from the health sector in their system.[19] While these efforts have not been successful, Court Services is renewing its efforts to include data from the health sector.

Once names have been chosen from the Jury Management System, jury summons are sent to potential jurors who reside within an hour travel radius of a given courthouse. In the event that more jurors are required, the radius may be extended. The summons package includes an information letter and summons form that may be processed by mail or online. The Sheriff's Office has no information on the ethnicity, age, gender or occupation of the potential jurors, nor does the Office have procedures in place for acquiring information of Indigenous peoples living on reserves.

The juror response rate in British Columbia is low; unfortunately, not unlike other Canadian provinces. In 2018, 56 of the 339 jury cases went to trial. Of the 128,000

---

[17] *Criminal Code*, RSC 1985, c C-46. Nathan Afilalo, Systemic Barriers and Biases in the "Conscience of the Community", Report of the CIAJ, p. 4. July 2018.

[18] [RSBC 1996] CHAPTER 242

[19] Court Services could not confirm the details of these reforms beyond the fact that this data would not be equivalent to the sources used in other provinces.

summons' that were distributed, 24% provoked no response.[20] Court Services assumes that many addresses are incorrect, since voter registration lists (used as part of the Jury Management System), for example, are not updated frequently.

The province's *Jury Act* provides 16 disqualifications from service, which can be grouped into six broad categories: 1) criminal record, 2) occupation, 3) citizenship, 4) age, 5) infirmity and 6) language.[21] The possession of a criminal record was discussed as a particularly strict disqualification in British Columbia, as it renders anyone with a criminal conviction ineligible. In contrast, the Ontario's *Juries Act*[22] bars people who have been convicted of an indictable offence and who have not received a pardon from sitting on a jury. Furthermore, the *Criminal Code* allows a juror to be challenged for cause if they have been convicted of an offence for which the sentence was a term of imprisonment exceeding 12 months.[23] Bill C-75 has raised this ceiling to bar people only if their term of imprisonment is in excess of two years.[24]

### The Jury Project

With a goal of increasing the involvement of Indigenous peoples in the jury process and improving numbers generally, Court Services has developed "The Jury Project." While still in its early stages, "The Jury Project" has four streams: *Education, Processes, Incentives* and *Outreach*.

The *Education stream* provides resources to the public about the jury process, which include online resources, information disseminated through social media, as well as printed sources. All information is provided in plain and non-threatening language, with the goal of encouraging participation, and not alienating or intimidating potential jurors. Information is provided on how to respond to a summons and what to expect during jury selection.

The *Process stream* moves to simplify and remove threatening language on forms, as well as improve e-responses to jury summonses. Another task of this stream is

[20] These statistics were presented during the Roundtable by Ms. Erin Turner, Senior Policy Analyst, Court Services Branch, Ministry of the Attorney General.
[21] *Jury Act*, RSBC 1996, c 242
[22] *Juries Act*, R.S.O. 1990, c. J.3
[23] S. 638(1)(c) of the *Criminal Code*.
[24] S.271 of Bill C-75.

to identity areas in the regulations and legislation that require change to increase juror participation.

The *Incentives stream* seeks to provide jurors with better supports before and after the trial. An example is the Juror Support Program implemented in January 2019, which gives jurors four free one-hour sessions with a counsellor.[25] This program is in line with recommendations made by the Standing Committee on Justice and Human Rights to improve support for jurors.[26] Jurors' compensation is also under review by the *Incentives stream*. Currently jurors are only paid minimal amounts for service: $20 a day for the first ten days[27], $60 for days 20 to 49 and $100 a day for trials lasting more than 50 days.[28] For the most part, these rates lie within the standard range of most provinces.[29]

The *Outreach stream* is designed to increase Indigenous representation on juries. The *Outreach stream* attempts to gather Indigenous community members and service providers to find means to make the jury process, and justice system in general, more accessible to Indigenous peoples. The purpose of the project is to ask communities what their needs are in order to participate more fully in the justice system. The *Outreach stream* is part of the larger efforts of the BC Assembly of First Nations Justice Council working with the Ministry of the Attorney General to create an "Indigenous Justice Strategy" to reform the justice system in the province.[30]

British Columbia's approach is similar to Ontario's efforts. After receiving the *First Nations Representation on Ontario Juries* (*Iacobucci Report*) final report in 2013, the province commissioned the *Debwewin Jury Review Implementation Committee* to meet with Indigenous communities to discuss the recommendations made in 2013. British Columbia's efforts also resemble Manitoba's *Aboriginal*

[25]https://www2.gov.bc.ca/gov/content/justice/courthouse-services/jury-duty/being-a-juror/juror-support-program

[26]"Improving Support for Jurors," Standing Committee on Justice and Human Rights, Recommendation, "https://www.ourcommons.ca/Content/Committee/421/JUST/Reports/RP9871696/justrp20/justrp20-e.pdf."

[27] This figure is already an improvement over Ontario's system in which jury duty is unpaid for the first ten days. https://www.thestar.com/news/investigations/2018/02/16/can-you-afford-jury-duty-heres-how-each-province-compensates-you-for-your-service.html

[28] *Jury Regulation*, B.C. Reg. 282/95.

[29]*Supra* note 4 at 36.

[30] "First Nations plan how to reform B.C. justice system and revitalize Indigenous laws," by Stephanie Wood in Features, Politics in Canada's National Observer,| May 7th 2019. https://www.nationalobserver.com/2019/05/07/features/first-nations-plan-how-reform-bc-justice-system-and-revitalize-indigenous-laws, https://news.gov.bc.ca/releases/2017AG0020-001548.

*Justice Inquiry (AJI)*[31] which comprehensively conducted a review, and issued recommendations, on the relationship between Indigenous peoples and the justice system in Manitoba.

### Practical Issues in the British Columbia Jury Regime

Reforming the jury selection process to achieve greater representation of Indigenous peoples and other racialized minorities is compounded by numerous practical challenges. Difficulties include challenges associated with the sources for jury summons lists; disagreement within the legal community around peremptory challenges[32]; identifying prejudicial and biased jurors for a truly impartial jury; exclusionary criteria that disproportionately affect Indigenous people; and low financial incentives that prevent people with personal and economic hardship from participating.

#### *Sources of the Jury Summons List*

The majority held in *Kokopanace*[33] that the right to jury representativeness does not focus on the ultimate composition of the jury roll. Rather, it is a right to a fair procedure for randomly selecting and *forming* a jury from a broad cross-section of the community. As such, the representativeness of jury rolls and the selection of names to fill them is often discussed in the context of increasing the representativesness of juries in Canada. In British Columbia, Section 8 of the *Jury Act* gives the Sheriff wide discretion to determine the procedure for jury selection. As discussed, lists are drawn from the Jury Management System, which includes data from Elections BC, ICBC, and Vital Statistics. Previous research has recognized that the use of Provincial Health Insurance lists is preferable for reaching traditionally underrepresented groups.[34] However, Court Services stated that prior attempts to access health insurance lists had been hindered by privacy concerns.

Even if health records are used, representative lists may not resolve the problems that occur throughout jury summoning procedures. During the Roundtable

[31] *Supra, note* 7.
[32] Bill C-75 included the abolition of peremptory challenges in the jury selection process.
[33] *Kokopenace*, *supra note* 9.
[34] Nathan Afilalo, "Jury Representation in Canada: Systemic Barriers and Biases in the 'Conscience of the Community'" (July 2018) Preliminary Report to the Canadian Institute for the Administration of Justice.

discussions, an experienced crown prosecutor, who had practiced in the Yukon where health insurance lists were used, clarified that all white juries remain a problem in the territory. Notably, health records also did not resolve representativeness concerns in *Stanley*.[35] Such incidents are consistent with reports published in 1992 and 2004 in Saskatchewan, which showed that representation remained an issue after the province switched to using health insurance records.[36]

Efforts to update source lists in British Columbia by contacting Indigenous communities have not proven successful. One Roundtable participant responded that this lack of success might be a result of being overly-reliant on mail communications. Both the *Manitoba Report* and *Iacobucci Report* found that mailing summons excluded Indigenous people because of reduced access to mail. Mail is less accessible in rural locations. In urban contexts, Indigenous people are more likely to be renters who have more challenges in receiving mail than homeowners.[37] In Kelowna, Sheriffs have reached out to local communities to expand the lists, but these efforts have also received little response.

### ***Peremptory Challenges: Is Bill C-75 a Commitment to Acknowledging the Problems in our Justice System?***

The timeliness of CIAJ's Roundtables on Jury Representation has been amplified by the recent passing of Bill C-75, which is a wide-ranging bill that includes amendments to the jury selection process.[38] At the time of the Roundtable, the bill had not yet passed but the participants were aware of its implications.

One of the more controversial changes to the jury selection process is the abolition of peremptory challenges. A peremptory challenge is the right of both the prosecutor and the accused to have a juror removed or replaced without having to provide a reason. The prosecutor and the accused each have a limited number of peremptory challenges, which varies with the offence charged.[39] In the wake of Bill

[35] 2018 SKQB 27.
[36] *Supra note* 16 at 8–11.
[37] *Ibid*.
[38] The sections of Bill C-75 dealing with the jury selection process are ss. 626 to 643. Bill C-75 is also a response to the problem of lengthy criminal delays in Canada, a topic for which CIAJ has also held a series of roundtables: https://ciaj-icaj.ca/en/library/papers-and-articles/roundtables/#goto-roundtables-criminal-delays
[39] Section 634 of the *Criminal Code*

C-75, the judge will continue to have the express authority to stand aside a potential juror.

Disagreement remains within the legal community whether peremptory challenges should have been eliminated. One defence lawyer argued that in cases with a racialized accused, peremptory challenges are a safeguard used to challenge non-racialized jurors in favour of more representative jurors. However, Senator Kim Pate, who opened the Roundtable, made mention of her colleague Senator Murray Sinclair, the sponsor of Bill C-75 and Manitoba's first Indigenous judge. Senator Sinclair has said that he has never seen a peremptory challenge benefit an Indigenous accused. While the misuse of peremptory challenges has been well-documented, some participants believe the complete removal of this process may have unintended adverse consequences.

According to Professor Milward, the elimination of peremptory challenges may result in increased use of challenges for cause, used to disqualify a potential juror for some stated reason. Bill C-75 has eliminated the use of "triers" during a challenge for cause, which will now be determined by the judge. Despite some optimism within the legal community, several lawyers expressed concerns with challenges for cause as an alternative to peremptory challenges. One lawyer explained that the legal community does not have adequate experience with such challenges, as they are not as commonly used in British Columbia as in other provinces such as Ontario. Another lawyer who practices in rural British Columbia stated that of his colleagues, he could only recall one lawyer who had successfully used a challenge for cause. Interestingly, the successful use of a challenge for cause in this community resulted in a precedent for future successful challenges. Accordingly, the concern around a lack of familiarity should resolve itself over time. Still, participants expressed that challenges for cause are a long and arduous procedure compared to peremptory challenges. In the new *status quo*, lawyers may advise clients more frequently to proceed by way of trial by judge alone. While not a negative outcome on its face, trial by jury is a right which accused are entitled to in accordance with sections 11(d) and 11(f) of the *Charter*.

### ***The Illusory Impartial Jury***

Is bias inherent in the jury process? This discussion is significant in the Canadian context where jurors are sworn to secrecy and cannot reveal if deliberations occurred in accordance with the judge's legal instructions. As Professor Milward

stated, the issue of bias is only apparent in comparison to other similar cases and the public statements of defence lawyers who suspect a biased outcome. For example, jurors rarely believe expert ballistic evidence that a gun misfired; however, in *Stanley*, the jury accepted the evidence of a misfire, relying on evidence from farmers. In a case with an Indigenous victim, a white accused, and an all-white jury, the influence of racial bias in the outcome is a reasonable concern.

Such speculation is part of a larger issue concerning a lack of data on jury composition. British Columbia Court Services records the proportion of those summoned do not respond (23%); the proportion who declare they are disqualified or are above age 65 and requesting to be removed from the list (25%); the proportion who are excused by Sheriffs for reasons such as financial hardship (37%); the proportion who confirm attendance (14%); and the proportion who actually attend on jury selection day (9%)[40]. However, throughout this process, demographic data is not collected, including gender, race, age, or socio-economic status. The relative success of future policy reforms without adequate data will be difficult to assess.

Another problem with partiality among jurors concerns the increased presence of social media and instant access to information that jurors have at their fingertips. In this modern context, it is challenging to expect jurors to avoid outside influence, especially for high profile cases that receive extensive media coverage. In response to these concerns, the Honourable Elizabeth Bennett of the British Columbia Court of Appeal explained that jurors generally want to do the right thing. In her experience, jurors are sometimes unaware of the issues with having recourse to media around the case, and in some instances believe that doing so is improving their understanding of the case. Upon advising jurors of the importance of remaining neutral and avoiding outside influence, Justice Bennett believes jurors take these instructions seriously and may even report a fellow juror to the judge for violating this instruction. As the Honourable Leonard Marchand of the Supreme Court of British Columbia stated, the fact that 12 people can come to a consensus after weighing the evidence is commendable in itself.

[40] These statistics were presented during the Roundtable by Ms. Erin Turner, Senior Policy Analyst, Court Services Branch, Ministry of the Attorney General.

One response to the bias of jurors is for defence lawyers to use the "*Williams"* question in challenges for cause[41].This process entails directly questioning jurors whether the race of the accused would affect the juror's ability to assess the evidence without bias and prejudice. Legal scholar Kent Roach cautions that relying on singular questions posed to jurors will not ensure an unbiased jury.[42] Roach also suggests that such questions ought to be more open and nuanced. One defence lawyer at the Roundtable stated that a forthcoming juror who acknowledges their own biases might be a better trier of fact than one who refuses to do so. In fact, such a juror's awareness might make them more successful in critically engaging with their preconceptions.

### *Exclusions*

The effect of eligibility criteria on excluding Indigenous peoples and other visible minorities has been acknowledged in previous reports.[43] Both federal and provincial jury legislation include provisions around excluding people with criminal records from jury participation. As discussed above, the *Criminal Code* states that jurors can be challenged for having a criminal record for which they were sentenced to a term of imprisonment for over one year.[44] Bill C-75 amended this provision, expanding to a term of imprisonment for over two years. However, this will not diminish provincial legislation.

In BC, the *Jury Act* more broadly disqualifies someone from serving as a juror if convicted of an offence under the *Criminal Code* or *Controlled Drugs and Substances Act*, unless the person has received a pardon or a record suspension, and neither the pardon nor suspension has been revoked. Given the overrepresentation of Indigenous peoples and other visible minorities in the Criminal Justice System[45], these exclusions disproportionately exclude them.

---

[41] As established in *R. v. Williams*, [1998] 1 SCR 1128, which accepted the reasoning in *R v Parks*.

[42] As cited in Richard Jochelson, Michelle I Bertrand, RCL Lindsay, Andrew M Smith, Michael Ventola & Natalie Kalmat, "Revisiting Representativeness in the Manitoban Criminal Jury" (2015) 37:2 Manitoba Law Journal 365 at 384.

[43] See for example the *Iacobucci Report*

[44] Section 638(1)(c) *Criminal Code.*

[45] See e.g. Malakieh, J, "Adult and youth correctional statistics in Canada, 2016/2017" (2018) Retrieved from Statistics Canada website at https://www150.statcan.gc.ca/n1/pub/85-002-x/2018001/article/54972-eng.htm (In the 2016 to 2017 year, among admissions in corrections, 28% of adult provincial and territorial corrections and 27% for adult federal Corrections were Indigenous, while only representing 4.1% of the general population).

Much scholarship and law reform in Canadian criminal justice has focused on Indigenous peoples as perpetrators and victims of crime, ignoring the potential contributions as active participants of justice. As Jochelson and colleagues argue in their article,[46] Indigenous peoples who have participated in the justice system, whether as victims or accused, might be suitable jurors and more representative of the community. Of course, this position is controversial. As one Crown prosecutor emphasized during the workshop session of the Roundtable, many prosecutors are resistant to the idea of someone with a serious conviction serving on a jury.

While some participants considered reforming the criteria to enable a person previously convicted of an offence to serve on a jury after an appropriate waiting time, Jonathan Rudin, Program Director of Aboriginal Legal Services (Toronto), cautioned that some previously convicted persons may mistakenly include or exclude themselves as jury candidates because these waiting times can be difficult to calculate when you consider probation periods.

The reasoning behind summonsing only within a one-hour radius is the disproportionate cost and time jury members from further away would endure. However, this effectively means that there are some communities that will never be summonsed unless the judge uses their discretion to expand the geographic scope. As Rudin critiqued, this has a disproportionate impact on Indigenous communities in rural locations. Further, as a lawyer working in Smithers, British Columbia noted, even among those courthouses that are rurally located, few are equipped to hold jury trials. Some participants suggested that the one-hour radius exclusion should be removed, or efforts be made to hold jury trials in more rural courthouses or longhouses. Even though the annual number of jury trials in British Columbia is relatively low, the financial cost of travel from rural areas to serve on a jury in a more urban setting can be high and many courthouses require updated facilities to accommodate jury trials. Nevertheless, when a jury trial goes awry, and produces results that are perceived as indicative of systemic racism, the cost of the general public's distrust in the justice system is immeasurable.

### *Personal Hardship*

Participants also acknowledged that jury representation is not simply about racial equality, but also economic diversity. After all, a jury made up of union workers,

[46] *Supra* 42.

retired persons, and students is an inaccurate representation of the community. Yet lawyers express concern that these are the kinds of people who can participate. Low rates and poor access to child or elder care often result in summoned persons applying for an exemption in accordance with Section 6 of the BC *Jury Act* or being granted an excusal by a judge in accordance with Section 632 of the *Criminal Code*. This has an acute effect on jurors with familial obligations, particularly when juries are sequestered for long periods

## RECOMMENDATIONS

Our Roundtable made several recommendations. We have grouped them into eight categories. Given the interconnected nature of the issue of jury representation, there is some overlap between the recommendations made within each group.

### Modify British Columbia's *Jury Act*

The British Columbia *Jury Act*, R.S.B.C. 1996, s. 3(1), currently reads:

> 3 (1) A person is disqualified from serving as a juror who is
>
> (a) not a Canadian citizen,
>
> […]
>
> (p) a person convicted of an offence under the *Criminal Code* or the *Controlled Drugs and Substances Act* (Canada) unless a pardon was granted or issued, or a record suspension was ordered, under the *Criminal Records Act* (Canada) and the pardon or record suspension, as the case may be, has not been revoked or ceased to have effect,
>
> (q) currently charged with an offence under the *Criminal Code* or the *Controlled Drugs and Substances Act* (Canada) […]

We recommend that the requirements that a person not be convicted or currently charged with a criminal offence either be removed or altered to consider the seriousness of the offence and how recently it expired. Where a person was convicted of an offence, the *Jury Act* could specify a minimum sentence of two years that expired within the last ten years. Where a person is currently charged with an offence, the *Jury Act* could specify that the offence be indictable. As it currently stands, an individual convicted years ago of a minor theft would be disqualified from serving as a juror.

We observed that disqualifying potential jurors for having been convicted or charged with a criminal offence creates a self-perpetuating problem for representation of Indigenous people on juries. Indigenous people are disproportionately charged with and convicted of criminal offences. This means that Indigenous people are disproportionately excluded from jury service by s. 3(1) of the *Jury Act*. Excluding Indigenous people from jury service, in turn, has an effect on the ability of juries to understand the lives of Indigenous accused. This leads to more convictions of Indigenous peoples, who are then excluded from serving as jurors.

We also recommend that s. 3(1)(a) be amended to read "not a Canadian citizen or permanent resident". Those who have been admitted to Canada to remain on a permanent basis are subject to Canadian law in an ongoing way in their everyday lives and should have the benefit and obligation of serving as jurors. The benefits for the representativeness of juries would be significant. Those who experience racism, even a different variety of racism, in their everyday lives are more likely to understand the experience of accused who experience racism.

Finally, we recommend that a paragraph be added to s. 3(1) allowing for Indigenous individuals to identify themselves as citizens of their nation rather than as Canadian citizens. Understandably, not all Indigenous peoples identify as being "Canadian." It is vital that these people not be excluded from the jury rolls.

### Reconsider Current Sheriff Services Practices

The current policy of the Ministry of the Attorney General, Sheriff Services in sending out jury summonses is to exclude jurors who live more than one hour from the courthouse for practical reasons. We encourage the Ministry to review and revise this policy. Though well-intentioned, this policy excludes people living in smaller and/or remote communities outside of the city centres, thus inadvertently removing Indigenous persons from the array.

In addition, we encourage the Ministry to continue in their search for a more inclusive data source for the jury array. Our *Jury Act* gives sheriffs broad discretion in choosing which source data to use in selection of the jury roll. Currently, sheriffs use sources of data which, for a variety of socioeconomic, political, and geographical reasons, may exclude Indigenous persons from jury rolls.

Other provinces, such as Nova Scotia, use provincial medical insurance lists. We encourage the Ministry, if possible, to do the same for British Columbia.

### Ameliorate Current Geographical Constraints

Jurors in certain rural areas in British Columbia are currently effectively excluded from service by geographical requirements. As noted above, Sheriff Services excludes jurors who live more than one hour from the courthouse for practical reasons.

Removing this restriction would have practical consequences, as it would be difficult for those summoned to attend selection. This problem can be alleviated in three ways. First, as discussed below, transportation costs could be paid in advance to reduce financial stress on jurors. Next, jury trials could be held in smaller communities to facilitate the participation of individuals who live in the communities in which offences have allegedly been committed. Although there are undoubtedly challenges in conducting jury trials in remote communities, the gains in widening participation on juries and ensuring that accused are judged by their peers should outweigh those difficulties.

Finally, technology may be appropriately used to facilitate participation on juries. Videoconferencing equipment may be used in nearby courthouses or other facilities to allow prospective jurors to take part in the selection process remotely.

### Reduce Financial Stress on Jurors

The overwhelming conclusion reached by participants at our Roundtable was that juror compensation is insufficient. Jurors generally face significant financial stress while serving on a jury. Accordingly, we make a number of recommendations to alleviate the financial burden of juror service:

1. *Provide adequate funding for childcare and elder care.* This might include daycare services, personal support worker service, and/or allowing children and elders to accompany jurors on an expenses-paid basis when the trial takes the juror away from home.

2. *Pay transportation costs in advance.* This may include funds for public transit, gas, taxi services, and even airfare. As opposed to a reimbursement that requires a juror to pay upfront, we hope prepaid costs would make juror

service more financially accessible. Many jurors do not have the financial means to fund these types of costs upfront.

3. *Increase the daily rate of juror service*. This should be evaluated in light of the cost of living in the jurisdiction of juror service. There should be sufficient funding to allow for nutritious meals.

4. *Consider implementing tax credits for juror service*. It might be appropriate to pro-rate such credits based on days of service. *Consider making employers pay*. This is an option that may be appropriate on a pro-rated basis or based on an employer's number of employees. For example: an employer with ten or more employees could be required to pay for one juror a year; an employer with 50 or more employees could be required to pay for five jurors a year. There should also be a tax benefit to any employer who pays an employee while they are serving on a jury.

### Modernize the Summons Process

The current message in the jury summons could be improved. Similar wording was described in the *Iacobucci Report* as "threatening" and "imperious." Though compliance with the summons is mandatory, there are ways to convey that message in a more encouraging way. Currently, summonses warn potential jurors that failure to comply will result in fines or imprisonment, but this is not enforced and thus serves very little purpose. This type of "threatening" language risks compounding the overall mistrust in the legal system that has been documented in Indigenous communities. We recommend that the Ministry revise the summons to limit "threatening" language and instead emphasize the civic duty aspect of the juror role, which will hopefully encourage participation in the process.

The *Iacobucci Report* also documented issues surrounding mail delivery. People in remote communities have more infrequent access to mail than do those in urban centres. Further, renters of property (as opposed to owners) change their addresses more frequently and therefore, Ministry data is often not up-to-date. It might be appropriate to do "follow-up calls" after summonses have been mailed out. The appropriateness of Internet options for summonses should also be canvassed.

In addition, the language on the summons should be more accessible. Legalese should be omitted, and plain language should be used. Translations of the jury

summons should be made available to encourage participants who speak an Indigenous language or a language other than English/French. It will be appropriate to draw on local knowledge in determining what languages exist within each community and, therefore, what translations are necessary.

### Emphasize Civic Involvement through an Educational Campaign

At our Roundtable, many of the judicial participants spoke of their experiences working with juries. Those judges indicated that feedback from jurors was overwhelmingly positive and that the jurors enjoyed and valued their experience. Along those lines, we recommend that the Ministry undertake an educational campaign geared towards the "civic involvement" component of juror service. This might include informational brochures at courthouses and high schools, mail-outs, and even television or newspaper service announcements. Educational materials should be made available in a multitude of languages and available online.

In addition, the creation of a public "check-in" system allowing people to ensure their names are on the juror roll should be considered. Options for voluntary participation or "signing up" for service might also be appropriate, particularly for persons who identify as Indigenous.

### Foster Relationships with Indigenous Communities

Given the positive experiences jurors have, it is troubling that participants observed that members of Indigenous communities tend to exclude themselves from jury service by declining to report. There is a profound lack of trust in the criminal justice system among many Indigenous people that cannot be ameliorated in a simple way. We recommend that all participants in the criminal justice system, including the Ministry of the Attorney General, Crown counsel, defence counsel, judges and Sheriff Services, recognize that building relationships with Indigenous communities is central to improving jury representation.

Participants repeatedly recognized that it is not enough to simply send a letter. Those who work in the criminal justice system must develop a personal relationship with communities that they seek to reach.

### Prioritize Accessibility in Eligibility

There are various accessibility concerns that prevent potential jurors from participating in the process. For example, there are insufficient accommodations for non-English speakers and readers. As discussed briefly in the “Modernize the Summons Process” recommendation above, language barriers arise as early as the summons stage. These barriers further pervade the selection process. Section 4 of the *Jury Act* disqualifies jurors who are not able to understand, speak or read the language in which a trial is to be conducted. Other provinces, however, such as Ontario, do not have an equivalent provision. Accordingly, we recommend reassessing that provision. This may require funding translation services for jurors who need assistance in understanding, speaking or reading the trial language.

Accessibility concerns also arise for potential jurors with physical or mental disabilities. Social determinants of health (such as income, education, employment, and childhood development) may make Indigenous persons more susceptible to physical and mental disabilities for a variety of reasons, including the legacy of residential schools. This means that a disproportionate number of Indigenous jurors could be ineligible on the basis of disability.

We encourage increased flexibility in the trial process and greater use of accommodations. This might, for example, require counsel to prepare accessible exhibits. It would also require the Ministry to ensure accommodations are available in courtrooms and courthouses. Judges can also assist by being flexible during the course of the trial. Sample accommodations might include:

- Braille and/or large-print materials,
- Captioned video recordings,
- Note-taking services,
- Ramps or assistive methods for the jury box,
- Spaces for service animals in the jury box, and
- Frequent nutritional or rest breaks.

The accommodation, however, will always depend on the specific needs of the juror and should be appropriately and respectfully canvassed from the outset.

**CONCLUSION**

As the Honourable David Eby Attorney General of British Columbia reminded the Roundtable participants, a failure in the jury system can undermine public confidence in our justice system. The majority in *Kokopenace* concluded that the *Charter* is not the appropriate instrument to "repair the damaged relationship that may cause some to disengage from the justice system."[47] However, as in *Stanley*, the lack of Indigenous jurors in a proceeding where the accused and community members are Indigenous, strikes at the core of the public's faith in the justice system.

Doug White, BC First Nations Justice Council and Councillor of the Snuneymuxw First Nation Canada, insightfully acknowledged that Indigenous people who participate in the justice system are often critically questioned by their own communities – why would an Indigenous person engage with a system that has historically oppressed them? It is also noteworthy that some Indigenous peoples do not accept the imposition of our colonial systems and therefore do not identify as Canadians. This excludes them from jury selection on its face, given that jurors must be Canadian citizens.

CIAJ's recommendations to improve jury representation include amending legislation, addressing practical issues and modernizing certain processes. For true change to occur, however, actors in the justice system must focus on fostering relationships with Indigenous communities, to move forward together towards a fair and accessible legal system for all.

[47] *Kokopenace*,*supra note* 9 at para 188.

## SHARING YOUR VALUES FOR 45 YEARS

Since its inception in 1974, the Canadian Institute for the Administration of Justice (CIAJ) brings together individuals and institutions involved in the administration of justice and promotes excellence through knowledge, learning and the exchange of ideas. CIAJ is recognized for the high quality of both its programs dedicated to the judiciary and those designed for a multidisciplinary audience, bringing together many decision makers in the justice system.

CIAJ's programs provide an opportunity for federal, provincial and territorial court judges not only to interact with judges of courts from all across the country, but also with professors, lawyers, representatives from governments and community organizations. The roundtables, seminars and conferences allow participants to learn and discuss the challenges facing the justice system and to contribute actively in finding solutions.

## KEEP IN TOUCH!

Sign up to CIAJ's Bulletin to receive relevant information and updates on our training programs and more. CIAJ also publishes a blog where experts offer unique and insightful perspectives. We are also active on Facebook, Twitter and LinkedIn. All links can be found on the main page of our website at www.ciaj-icaj.ca.

**Canadian Institute for the Administration of Justice** | www.ciaj-icaj.ca | ciaj@ciaj-icaj.ca
5950 Chemin de la Côte-des-Neiges, Office 450, Montreal, QC H3S 1Z6 ▪ Phone: 514-731-2855 ▪ Fax: 514-731-3247