



# THÉMIS AND ITS FACEBOOK FRIENDS

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The Honourable Sophie Bourque, S.C.J.

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# Disclaimers and Acknowledgements

- ▶ The author is a judge and does not claim any knowledge of scientific research or interpretation of scientific literature.
- ▶ The words and opinions are of the author.
- ▶ Many and sincere thanks to Ms. Anäelle André and Ms. Rosalie Larouche, researchers at the Superior Court for their invaluable help.

68. [...] the growing availability of and apparently insatiable appetite for information poses a formidable challenge to the right to a fair trial in the 21<sup>st</sup> century. Traditional forms of media have expanded onto the worldwide web. New forms of media have emerged as the web makes everyone a publisher, and social media help disseminate publications, both traditional and untraditional. It has become increasingly difficult to control the dissemination of information, with jurors able to use not only computers and tablets but also smartphones and even watches to access online material, and to curb the appetite of jurors for it. And with little quality control over content. The sensational trumps the accurate; fevered imaginings, truth.

Juge David Watt, dans *R. v. Bain and Pannu* 2015 ONCA 677

# AGENDA

- ▶ 1- EVERYONE IS CONNECTED!
- ▶ 2 – THE EFFECTS OF CONNECTIVITY
- ▶ 3- CONNECTIVITY AND THE TRUTH-SEEKING PROCESS
- ▶ 4- THE LEGAL SYSTEM'S RESPONSE
- ▶ 5- HAPPINESS IS IN ADAPTATION

# THE ROLE OF THE JURY

- ▶ Decide, impartially, based solely on the facts presented in the courtroom, after discussions with the other jurors only.



## SERMENT/OATH

- ▶ *Vous jurez de considérer attentivement tous les faits qui seront mis en preuve dans cette cause, vous jurez de rendre un verdict basé uniquement sur la preuve, vous jurez aussi de garder confidentielles, pendant et après le procès, les discussions et les délibérations auxquelles vous prendrez part.*
- ▶ *Do you swear to consider carefully all the facts which will be aduced in evidence in this case, you swear to render a vectict based solely on evidence, do you swear also to keep in strict confidence, during and after the trial, all discussions and deliberations in which you will participate.*

# THE PLA-NET

## ➤ **CONNECTIVITY**

- 7.6 billion inhabitants
- 4,2 billion internet users (55%)
- 3,4 billion use social media (44%)
  - 93% are mobile users

## ➤ **SOCIAL MEDIA**

- Facebook: 2, 234 billion
- YouTube: 1 900 billion
- WhatsApp: 1 500 billion

# THE PLA-NET

## ➤ SOCIAL MEDIA

- Messenger: 1 300 billion
- WeChat: 1 058 billion
- Instagram: 1 billion
- Qzone: 500 million
- TikTok: 500 million
- Twitter: 335 million
- LinkedIn: 303 million

➤ We Are Social and Hootsuite (oct. 2018)

# CANADA

## ➤ CONNECTIVITY

- 37,580,000 inhabitants
- 33,005,000 internet users
- 25 millions use social media
- 84% are mobile users
  - We Are Social and HootSuite (Jan. 2018)
- 77 % of francophones use Facebook compared to 70% of anglophones
- 31% of Anglophones use Twitter compared to 23% of Francophones
  - The Media Technology Observer, CBC/Radio-Canada (Feb 2019)



# CANADA

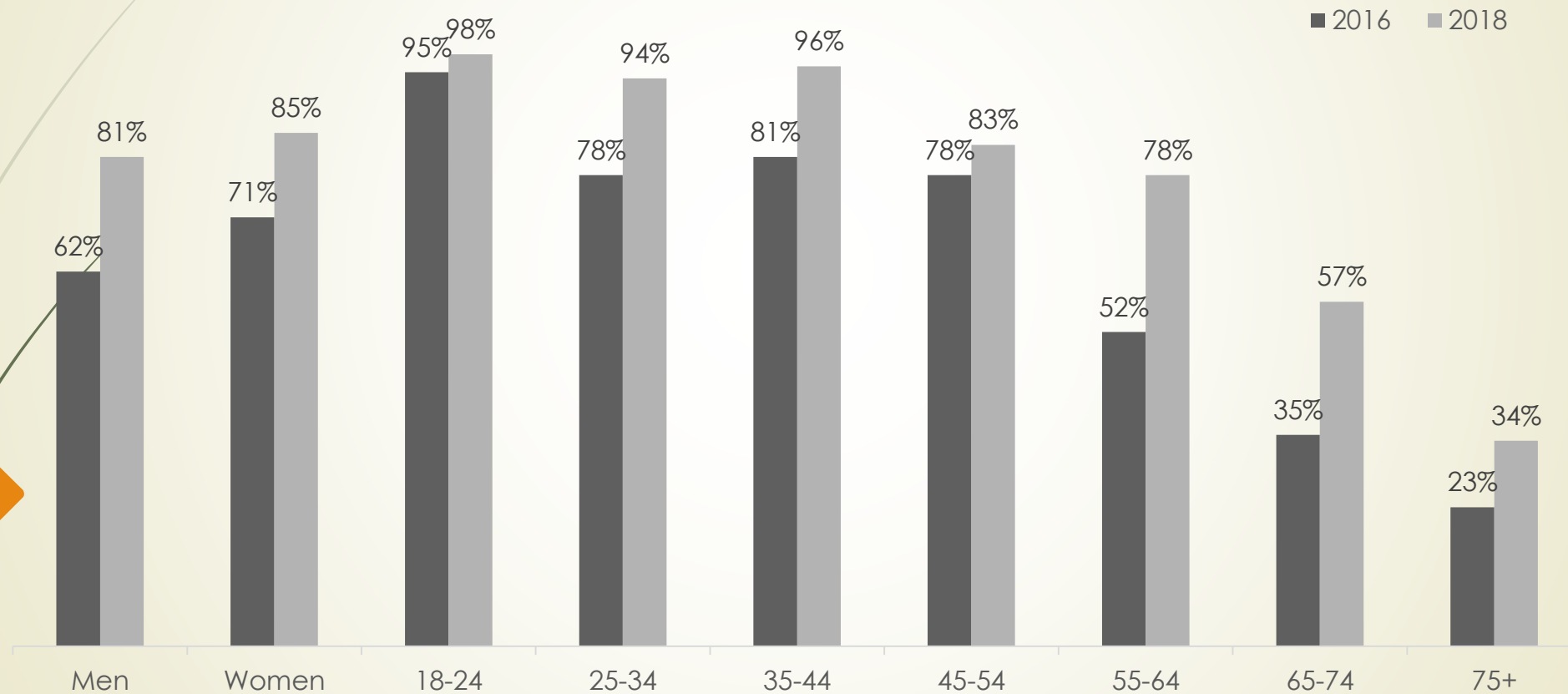
- ▶ USE STATISTICS
- ▶ 74% of Canadians spend at least 3 to 4 hours online per day
- ▶ Social media traffic is the third most common activity for Internet users after reading and sending emails and online banking.
  
- ▶ The Internet Documentary File 2018, Canadian Internet Recording Authority 2018

# QUÉBEC

## ➤ CONNECTIVITY

- 8,390,000 inhabitants in 2018
- 83% use at least one social network (up 16% since 2016)
  - 65% connect at least once a day (up 13% since 2016) of which 45% several times a day
  - 87% use built-in/instant messaging
  - 79% have followed the news , 41% of whom say they do so often
  - 41% asked for advice or solutions for a product or situation
  - 32% posted a comment about a brand or company
  - 30% looked for a job

# EVOLUTION OF THE UTILIZATION OF SOCIAL NETWORK BY QUEBEC ADULTS.



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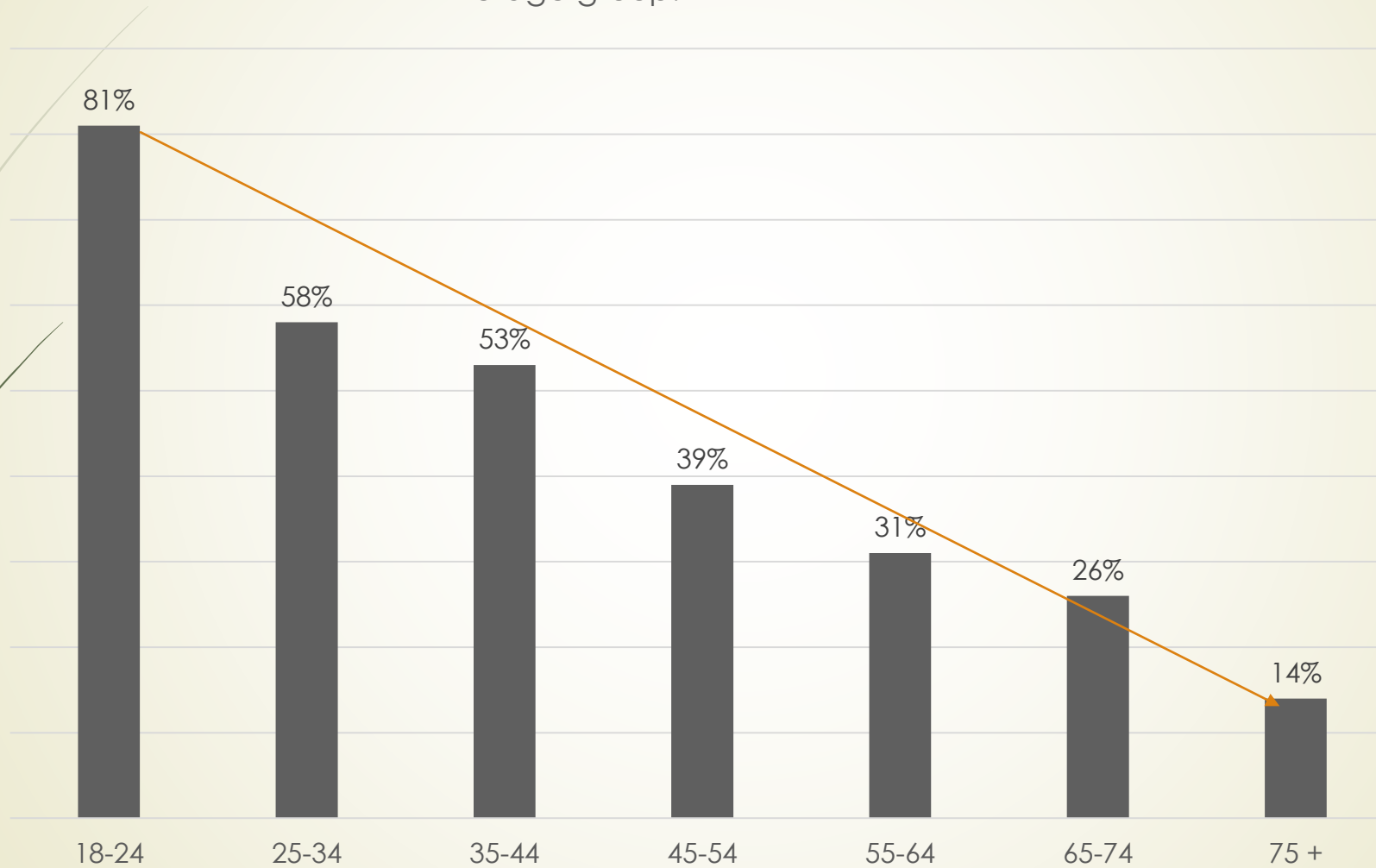
**The use of social media in Quebec, NETendances 2018, 2018 Edition, Volume 9 - Number 5, Cefrio**

## EVOLUTION OF THE UTILIZATION OF SOCIAL NETWORK BY QUEBEC ADULTS

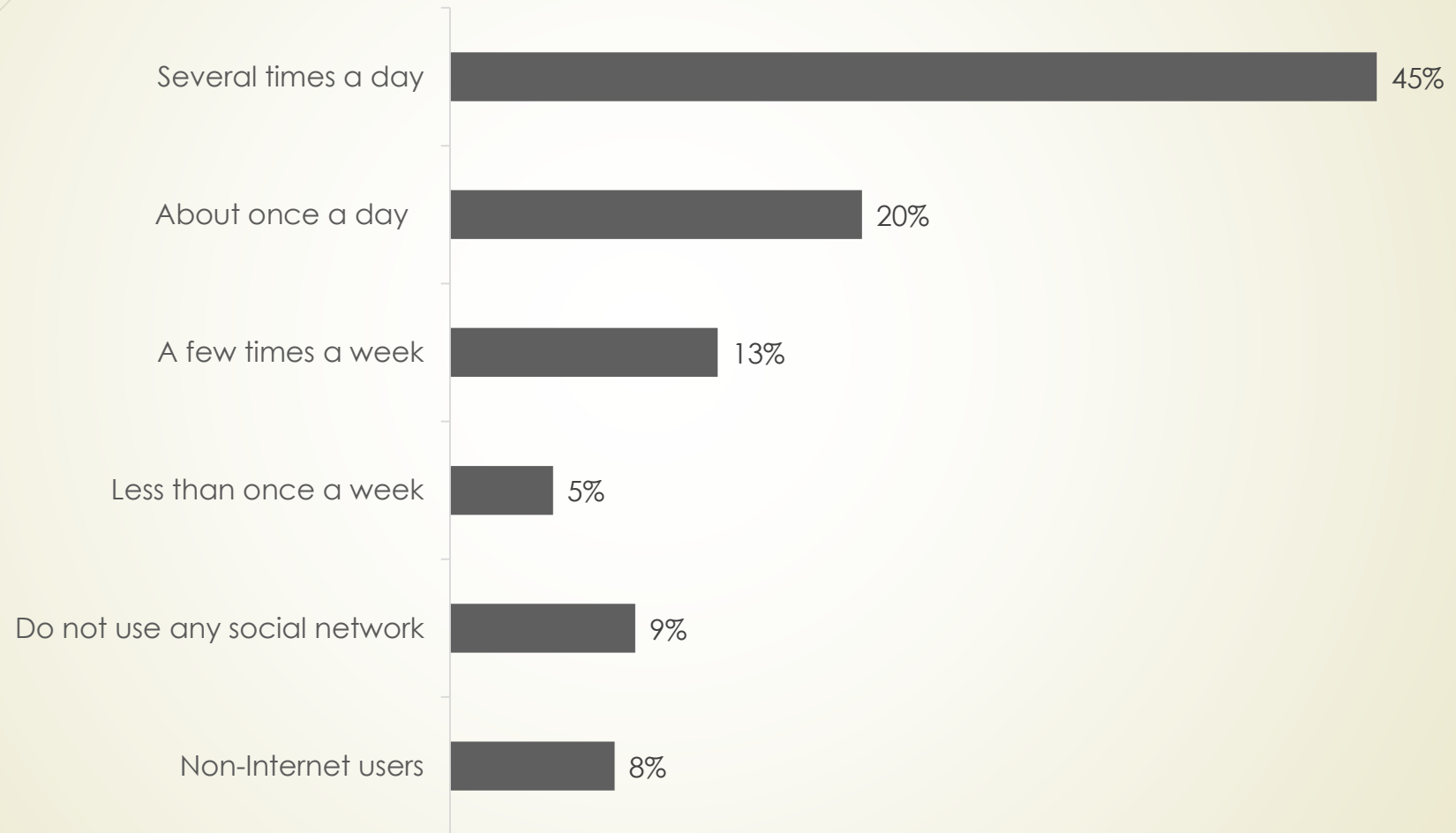


**The use of social media in Quebec, NETendances 2018, 2018 Edition, Volume 9 - Number 5, Cefrio**

Social connexion frequency  
Percentage of Quebec adults connecting more by day according to  
the age group.



## Social connexion frequency Percentage of Quebec adults



# QUÉBEC

## ➤ SOCIAL MEDIA

➤ Facebook: 70%

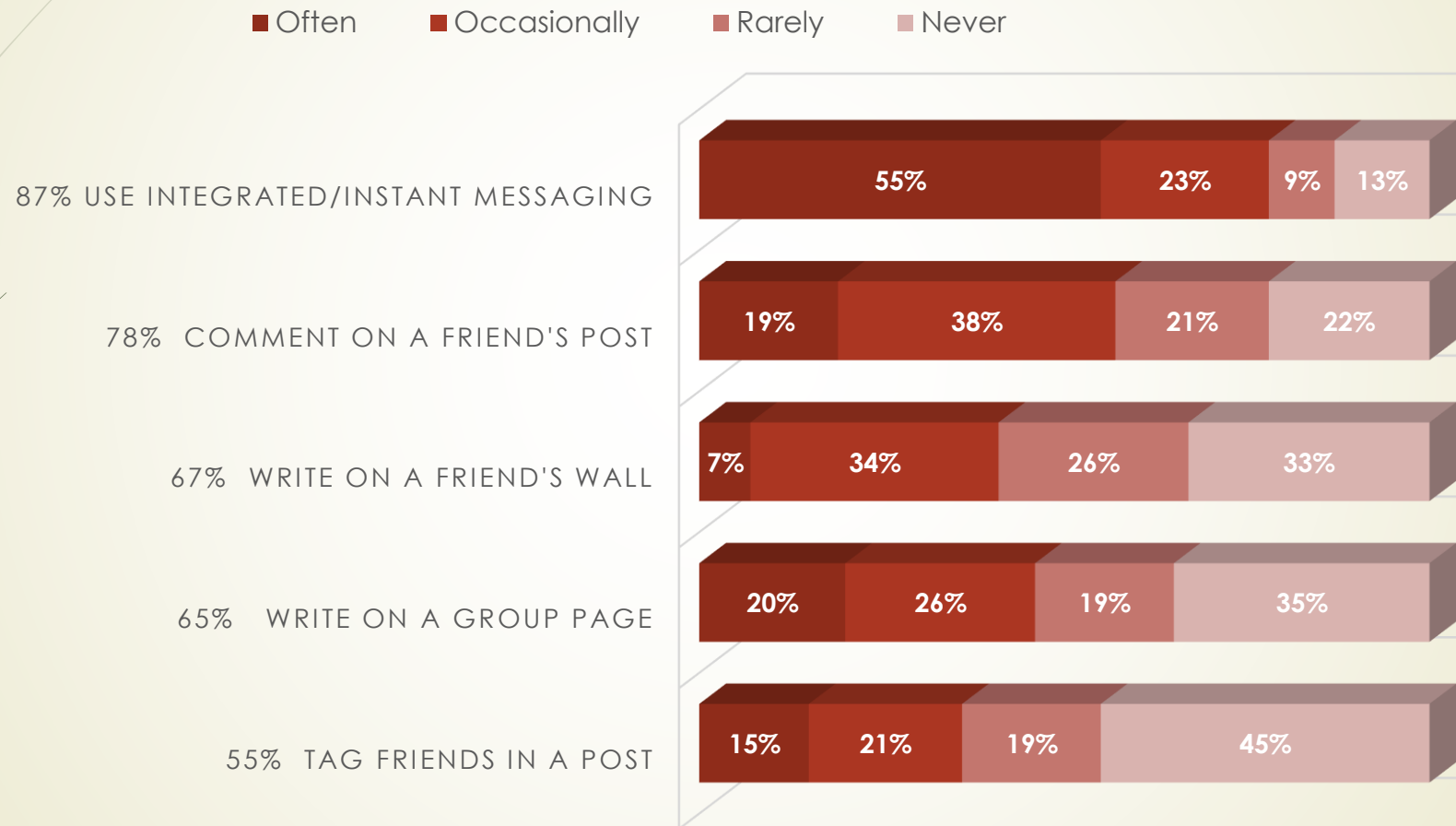
➤ YouTube: 64%

➤ Instagram: 24 %

➤ Québec's statistics are similar to those in the US

➤ The Use of Social Media in Quebec, NETendances 2018, Edition 2018, Volume 9 -  
Number 5 , Cefrio

## USE OF SOCIAL MEDIA AS A COMMUNICATION TOOL





# THE EFFECTS

- ▶ **The information circulating on social networks is:**
  - ▶ Often false
  - ▶ Often incomplete
  - ▶ Often biased
- ▶ **Social media visits:**
  - ▶ Affect decision-making, for example in voting, purchasing, interpersonal choices
  - ▶ Changing the perception of time - deconstructurisation of time
    - ▶ Immediacy is the norm
  - ▶ Declining attention span
    - ▶ Attention capacity dropped from 12 to 8 seconds (Microsoft Canada Study, 2015)
    - ▶ 70% of Internet users watch a 2-minute video until the end (unverified figures)
    - ▶ Internet users read only 50% of the words (unverified numbers)

# THE EFFECTS

- ▶ Development of a culture of the immediate and the ephemeral
  - ▶ Information is immediately and easily accessible
- ▶ Rise in bullying and harassment through cyber bullying

# CONNECTED BUT HUMAN

- ▶ Clinically significant trauma and stressor symptoms in a significant percentage of jurors who have served in violent crime trials:
  - ▶ Intrusive memories
  - ▶ Nightmares
  - ▶ Insomnia
  - ▶ Hypervigilance
  - ▶ Avoidance behaviours
  - ▶ Relationship difficulties
  - ▶ Depressive symptoms (persistent sadness, loss of interest, energy, feelings of guilt or worthlessness).

*Prevalence and severity of trauma – and stressor –related symptoms amongs jurors: A review . Lonergan, Leclerc et all. Journal of Criminal justice 47 (2016)*

# Potential impacts on how the trial unfolds

- ▶ Changing attention span
- ▶ Cultural clash between the methods of searching the facts of Internet users and those of the judicial system
- ▶ Instant access to external and sometimes damaging information
- ▶ Activity about the trial on social networks
- ▶ Third-party pressure
  - ▶ Previously expressed opinions by the jurors on social media
  - ▶ Comments during the trial
  - ▶ Post-verdict comments on social media

# REPORTED CONDUCT OF JURYS

- ▶ Court of Appeal: Search for information about the case
  - ▶ R. v. Baths and Pannu 2015 ONCA 677
    - ▶ Found in the deliberation room after the verdict:
      - ▶ Document from an American blog denigrating jurors who returned a verdict of acquittal in a murder case in the United States
      - ▶ Incomplete excerpt from a reasonable doubt directive model, other than that used by the judge, on the analysis of the credibility of witnesses.
  - ▶ R. v. Kenol 2016 QCCA 509
    - ▶ Found in the deliberation room after the verdict:
      - ▶ Justice Canada's Guide to Police and Prosecutors on Stalking, with annotations

# REPORTED CONDUCT OF JURYS

- ▶ Research on the accused during the jury selection process
- ▶ Research on the accused once selected
- ▶ Research on the participants in the case, prosecutors, judge
- ▶ Comment on the ongoing trial on social media
- ▶ Request for an opinion on the verdict to be given and a commitment to respect it
- ▶ Internet consultation on legal terms
- ▶ Internet consultation to obtain additional information on evidence related to the trial (exe: on subjects of expertise, on witnesses, etc.)
- ▶ Disclosure of deliberations by email

# REPORTED CONDUCT OF JURYS

- ▶ The prevalence of misconduct is uncertain
  - ▶ Age of studies vs. rate of increase in the connected population
  - ▶ Recognized difficulty in having a fair picture, people reluctant to admit to having committed a fault
  - ▶ Difficulty in detecting misconduct both in real time and after the fact
- ▶ No study in Canada on jurors and social networks
  - ▶ The Secret of Deliberation (R. v. Pan, R. v. Sawyer 2001 CSC 42)
- ▶ USA: Juror and jury use of new media: a baseline exploration. 2012, National Center for State Courts
- ▶ The limited data available does not seem to indicate an alarming prevalence of misconduct, however they exist and the impact of the arrival of a connected generation can not be ignored.

# JUDICIAL RESPONSE

## ➤ DURING THE SELECTION

- In Quebec, lawyers do not have the names of candidates prior to selection
- Candidates do not have the name of the accused or any information about the case prior to selection
- Directive to the panel of candidates not to do any research on the internet once the information is given

## ➤ PRELIMINARY INSTRUCTIONS, MID-TRIAL, FINALS

- Can be adapted and repeated depending on the situation



# THE INSTRUCTIONS

## Relevant instructions– Canadian Judicial Council (CJC – 3.2, 3.6, 3.8)

- You are the sole judges of the facts. You must decide this case only on the evidence presented to you in this courtroom.
- I am the sole judge of the law, and it is your duty to accept the law as I explain it to you. You must not use your own ideas about what the law is or should be, and you must not rely on information about the law from any other source.
- Keep an open mind as the evidence is being presented. Do not be influenced by sympathy for or prejudice against anyone.

# THE INSTRUCTIONS

- ▶ During the trial, you may discuss the case amongst yourselves but only when all of you are together in the jury room. You must not, however, come to any conclusions about the case until you have heard all of the evidence, listened to the lawyers on both sides, and received my instructions about the law. Keep an open mind.

# THE INSTRUCTIONS

- ▶ Some of your family, friends, fellow workers or others may ask you about jury duty. You must not talk to them about the case. Nor should you discuss the case with anyone involved in it, including (NOA), (NOC), their friends or families, witnesses, investigating officers, or lawyers. You may, of course, give a polite greeting to someone you see around the courthouse, but do not talk about the case with anyone except your fellow jurors.
- ▶ If anyone else approaches you to discuss any part of the case, please tell that person that you cannot discuss it. If the person does not stop, please tell me about it. I will deal with it.

# THE INSTRUCTIONS ON THE USE OF INTERNET AND SOCIAL MEDIA

- ▶ Do not use the Internet or any electronic device in connection with this case in any way. This includes chat rooms, Facebook, MySpace, Twitter, apps, or any other electronic social network. Do not read or post anything about this trial. Do not engage in tweeting or texting about this trial. Do not discuss or read anything about this trial on a blog. Do not discuss this case on e-mail. You must decide the case solely on the evidence you hear in the courtroom.

# INSTRUCTIONS ANALYSIS

- ▶ The directive on the use of social media is detailed.
- ▶ Only the CRIMJI guideline model uses the word "impartiality," and none explains it
  - ▶ Canadian Judicial Council
  - ▶ Watt's specimen jury instructions
  - ▶ CRIMJI (1.02.25) - Keep an open mind
    - ▶ On the other hand, no mention of the internet and social media
- ▶ The guidelines describe, in different contexts, the decision-making process that guarantees impartiality:
  - ▶ Rely solely on evidence presented in the courtroom
  - ▶ Without prejudice or sympathy, keeping an open mind
  - ▶ After discussions with the other members of the jury only

# INSTRUCTIONS ANALYSIS

- ▶ None alert the jury to unconscious biases (postulate: they increase with social media attendance)
- ▶ Unconscious Bias Video for Potential Juror – USA
  - ▶ <https://www.cand.uscourts.gov/attorneys/jury-video>
  - ▶ Explains what prejudice is
  - ▶ Explains what unconscious prejudice is
  - ▶ Explains how and why it affects impartiality
- ▶ Impartiality is a challenge for all, judge and juror:
  - ▶ We're not being impartial, but we're working on it.

# ADDITIONAL PRECAUTIONS

## ▶ **During the trial**

- ▶ Jury supervision by sworn special constables
- ▶ Explanations on how to adjust cell phone privacy settings (placemats)
- ▶ During the deliberation: no access to cell phones or landlines, computers, tablets, television, radio.

## ▶ **After the verdict**

- ▶ Post-verdict support service via sheriff
- ▶ The power of the trial judge to order special assistance

# REMEDIES IN CASE OF MISCONDUCT

- ▶ **On a case-by-case basis**
  - ▶ Depending on the stage of the trial - the main question is:
    - ▶ During the trial: Affects the ability of the juror to be impartial
    - ▶ After the verdict: Reasonable possibility that it affected the verdict
- ▶ **Factors to consider**
  - ▶ The nature of misconduct
  - ▶ Its relevance on an issue
  - ▶ Potential harm procedure
- ▶ **Procedure**
  - ▶ Investigation with the jurors
    - ▶ Respect the secrecy of deliberation
  - ▶ Survey of any other relevant source
  - ▶ Possibility of new evidence on appeal



# REMEDIES IN CASE OF MISCONDUCT

## ➤ Possible remedies

- Release of the jurors
- New selection if the evidence on the merits has not begun
- Jury specific instructions remaining
- Abortion of trial
- New trial if on appeal

## ➤ Possible consequences for the juror

- Citation for contempt of court
- Charge of obstruction of justice

# HOW CAN WE DO BETTER?

## ▶ **Jury selection**

- ▶ State on the summons that all internet search on the cause is prohibited
  - ▶ Explain why this ban is necessary at this stage
- ▶ At the reception, make a formal order to the panel, and advise that its violation is liable to contempt of court
- ▶ Explain what it means to restrict the use of the internet during the trial and the conditions of sequestration during deliberation, to allow Internet users for whom this burden would be too heavy to apply for an exemption
- ▶ Putting up posters recalling the ban (selection room, deliberation room)
- ▶ Explore the possibility of asking questions about putting an opinion on the case online beforehand
- ▶ C-25, which came into force on 19 September 2019: abolition of peremptory challenges, modification of the challenge process for cause, new reason for being sidelined

# HOW CAN WE DO BETTER?

- ▶ **During the trial**
  - ▶ Review guidelines to formulate them in plain language
  - ▶ More explanatory guidelines on the main principles justifying restrictions
  - ▶ Repeat the directive regularly and what motivates it
  - ▶ Submit written instructions
  
- ▶ **To limit the urge to search the internet**
  - ▶ Inform the jury about the participants (judge and lawyer)
  - ▶ Encourage questions by the jury instead of inhibiting them and provide for the procedure
  - ▶ Encourage jurors to report infractions to the judge in this regard.

# HOW CAN WE DO BETTER?

- ▶ **Attention and change in decision-making**
  - ▶ Assess the possibility of providing the jury with something other than a paper tablet and HB pencils to take notes
  - ▶ Allow more breaks
  - ▶ In lengthy trials, allow evidence to be considered as it arises on the supervision of special constables
  - ▶ Modernize the presentation of evidence
    - ▶ Using technology tools
    - ▶ Rethinking and easing the order of presentation of evidence
    - ▶ Photos of witnesses in long-term trials
    - ▶ Pleas with Power Point

# HOW CAN WE DO BETTER?

## ➤ **Final guidelines**

- Power Point presentation of the main principles
- Written instructions
- Judge's Positioning - 7th round

## ➤ **Sequestration**

- Is it still necessary and justified?
- Could the secrecy of deliberation be set up to allow scientific studies on juries?  
Canada. Law Reform Commission. Report 16. *The Jury*. Ottawa: The Commission, 1982, cited in *R. v. Pan, R. v. Sawyer* 2001 CSC 42, p. 384.

# REFERENCES

- ▶ *L'usage des médias sociaux au Québec*, NETendances 2018, Cefrio, Édition 2018, Volume 9 – Numéro 5
- ▶ *Facebook: numéro un des Québécois pour l'information*, Insarta infos – communiqué de presse – 2 juin 2017
- ▶ *Les 50 chiffres à connaître sur les médias sociaux en 2019*, BDM/média – 2 janvier 2019
- ▶ *Qui utilise quel réseau social au Canada?* LaPresse.ca, Brousseau-Pouliot, Vincent, 4 février 2019
- ▶ *Médias sociaux: 93% des utilisateurs y accèdent depuis un appareil mobile*. Actus Médias, 30 janvier 2018
- ▶ *Médias sociaux Canada 2019: 67% des Canadiens y sont actifs*. Actus Médias, 13 mars 2019

# REFERENCES

- ▶ *L'impact des réseaux sociaux sur la santé mentale: Que du mauvais?*  
Reflet Salvéo, 31 juillet 2019
- ▶ *Les statistiques de l'intimidation au Canada*, Instituts de recherche en santé du Canada
- ▶ *Internet et les réseaux sociaux modifient notre perception du temps.*  
Cohen, Jo. 18 décembre 2017
- ▶ *Prevalence and severity of trauma – and stressor –related symptôms amongs jurors: A review .* Lonergan, Leclerc et all. *Journal of Criminal justice* 47 (2016)

# DOCTRINE

- ▶ *Innocent until tweeted : how new media threaten an old system, and a framework for fixing american courts*, Dillon Michael WHITE, mémoire de maîtrise, Université du Minnesota, 2016.
- ▶ L'Honorable Brenda KEYSER, « Les médias sociaux dans la salle d'audience », *Criminal Jury Trials 2015, updated 2017*
- ▶ « Should Voir Dire Become Voir Google? Ethical Implications of Researching Jurors on Social Media », BROWINGS, John G.(2014) *Media, 17 SMU Science and Technology Law Review 603-629*
- ▶ « Yes, Jurors Have a Right to Freedom of Speech Too!...Well, Maybe, Juror Misconduct and Social Networks », ROBINSON, Prosha M.(2013) *11 First Amendment Law Review 593-635 (n° 3)*



# DOCTRINE

- ▶ L'Honorable juge Elizabeth A. BENNETT, « La conduite fautive des jurés », INM (2018)
- ▶ « Ensuring an impartial jury in the age of social media », L'honorable Amy J. St. EVE et Michael A. ZUCKERMAN, (2012) 11 *Duke L. & Tech. Rev.* 1
- ▶ Eric P. ROBINSON, « The wired jury : an early examination of courts' reactions to jurors' use of electronic extrinsic evidence », (2012) 14 *Florida Coastal Law Review* 131
- ▶ « Friend or Foe? Social media, the jury and you », ELLIS, Leslie (2011) 23 *The jury expert* 1
- ▶ « Jurors' Use of Social Media During Trials and Deliberations" - Meghan DUNNA Report to the Judicial Conference Committee on Court Administration and Case Management, Federal Judicial Center, (2011)

# DOCTRINE

- ▶ John G. BROWINGS, « The Online Juror », (2010) 93 *Judicature* 231-235
- ▶ NCSC-Harvard-Juror and Jury Use of New Media, a baseline exploration, en ligne : < <https://www.ncsc.org/Services-and-Experts/Court-leadership/Harvard-Executive-Session/Juror-and-Jury-Use-of-New-Media-A-Baseline-Exploration.aspx> >

# JURISPRUDENCE

- ▶ *R. v. Pan, R. v. Sawyer* 2001 CSC 42
- ▶ *2R. c. Auger* 2012 QCCS 7189
- ▶ *R. v. Bain and Pannu* 2015 ONCA 677
- ▶ *R. c. Kenol* 2016 QCCA 509

# INSTRUCTIONS MODELS

- ▶ **Additional models of guidelines can be found in the documentation:**
  - ▶ Canadian Judicial Council
  - ▶ Watt's specimen jury instructions (criminal)
  - ▶ CRIMJI
  - ▶ American College of Trial Lawyers
  - ▶ The text "*Jurors' Use of Social Media During Trials and Deliberations*" - Meghan DUNNA Report to the Judicial Conference Committee on Court Administration and Case Management, Federal Judicial Center, (2011) contains several models of U.S. directives.
- ▶
- ▶

# SUGGESTIONS

- ▶ <https://www.c-span.org/video/?300990-1/social-media-courts>: Social Media and Court Conference, Washington, DC, 42:35 mntes. Organized by Court Public Information Officers and the Reynolds (Donald W.) Center for Courts and Media.
  - ▶ Several links on the site on courses and social media.
- ▶ American College Trial Lawyers, Jury Committee: *Improving jury delibatrions through jury instructions based on cognitive science*. 2019