JURY REPRESENTATION IN CANADA

HIGHLIGHTING INDIGENOUS PERSPECTIVES IN JURY REPRESENTATION

Report of the Canadian Institute for the Administration of Justice

By Maria Aylward and Nathan Afilalo, March 2020

ALBERTA REPORT

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- The Honourable Justice David Gates, Court of Queen's Bench of Alberta, Co-chair
- The Honourable Justice Elizabeth Hughes, Court of Appeal, Alberta, Co-chair
- Ms. Mona T. Duckett, Defence Lawyer
- Ms. Suzanne Kendall, Chief Crown Prosecutor
- The Honourable Justice James Langston, Court of Queen's Bench of Alberta
- Mr. Adam Letourneau, QC, Lawyer, Arbitrator, Mediator
- Professor Lisa Silver, Assistant Professor, University of Calgary, Faculty of Law
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- Mr. Jason J. Wuttunee, Crown Prosecutor
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ROUNDTABLE ON JURY REPRESENTATION

November 2, 2019 ▪ Calgary, AB

VENUE: 7th Floor, Hotel Alma, 169 University Gate, NW

Rooms: Senate Room
Breakouts: Montgomery Room, Parkdale Room, Varsity Room

PREVIOUS ROUNDTABLES

- April 6, 2019, Winnipeg, Manitoba
- June 1, 2019, Vancouver, British Columbia
- September 21, 2019, Halifax, Nova Scotia

UPCOMING ROUNDTABLES

- Ontario, Quebec (dates to be confirmed)

PLANNING COMMITTEE

- The Honourable Justice David Gates, Court of Queen's Bench of Alberta, Co-chair
- The Honourable Justice Elizabeth Hughes, Court of Appeal, Alberta, Co-chair
- Ms. Mona T. Duckett, Defence Lawyer
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- Ms. Christine O'Doherty, Lawyer, Executive Director, CIAJ

Official Reporter:
Ms. Maria Aylward, Lawyer, Manager, Project and Business Development, CIAJ

AGENDA

8:00 – 8:45: Registration and Continental Breakfast

8:45 – 9:00 am: Introduction and Welcome Remarks
- The Honourable Justice David Gates, Court of Queen's Bench of Alberta
- Dr. Reg Crowshoe, Member of the University of Calgary Senate, Cultural and spiritual leader from Piikuni First Nation in Southern Alberta, *Welcome Prayer and Land Acknowledgment*

9:00 – 9:30 am: Keynote Speaker
- The Honourable Justice Shannon Smallwood, Supreme Court of the Northwest Territories

9:30 – 10:30 am
- Dr. Reg Crowshoe, Member of the University of Calgary Senate, Cultural and spiritual leader from Piikuni First Nation in Southern Alberta

10:30 –10:45 am – BREAK –

10:45 – 11:15 am: The Jury Selection Process in Alberta
- Ms. Claudette Vilcu, Acting Inspector, CSPT – Calgary Court Centre
- Ms. Carol Clark, Director of Court of Queen's Bench Administration South
- Ms. Lisa Lindquist, Manager of the Court of Queen's Bench in Calgary

11:15 am – 12:30 pm: Roundtable on Indigenous Perspectives

Moderator: The Honourable Justice James H. Langston, Court of Queen's Bench of Alberta
- Dr. Reg Crowshoe, Member of the University of Calgary Senate, Cultural and spiritual leader from Piikuni First Nation in Southern Alberta
- Mr. Tony Delaney, Coordinator, Kainai Peacemaking Program
- The Honourable Justice Shannon Smallwood, Supreme Court of the Northwest Territories

12:30 – 1:15 pm – LUNCH –

1:15–3:00 pm: Workshop (health break will be taken during the workshop)

Moderators:
Group 1: The Honourable Justice David Gates & Professor Lisa Silver
Group 2: Ms. Suzanne Kendall & The Honourable Justice James Langston
Group 3: Ms. Shelley Tkatch & Mr. Eric Tolppanen

3:00 – 3:15 pm – BREAK –

3:15–4:00 pm: Plenary

Moderator: Professor Lisa Silver
Each group will report on their discussion

4:00–4:10 pm: Closing Remarks
- The Honourable Justice David Gates, Court of Queen's Bench of Alberta

BIOGRAPHIES

Carol Clark is the Director of Court of Queen's Bench Administration South. This role oversees six southern QB locations, and Transcript Management Services for the Province. For the past 20 years, she has held various different leadership roles with Resolution and Court Administration Services, including Provincial Court Criminal, Transcript Management, and Provincial Court Family & Youth. In 2016, Carol completed her Masters in Business Administration and continues to play an active role in various committees. Carol has two active children ages 13 and 16, and during her off time, enjoys spending time in the outdoors.

The Honourable Justice David Gates graduated from Dalhousie law school in 1979, articled in Halifax and called the Nova Scotia bar in 1980. He moved to Yellowknife, Northwest Territories, in September 1980 and called to the NWT bar that same year. Justice Gates joined the federal Department of Justice in June, 1981, and travelled throughout the Northwest Territories as part of the circuit court. He was appointed Regional Director, Whitehorse Regional Office in July, 1985; appointed Regional Director, Yellowknife Regional Office in July 1987; appointed Regional Director, Alberta Regional Office in August 1989, and subsequently Senior Regional Director, Prairie and Northwest Territories Region in 1995. He was also appointed Executive Director, National Crime Prevention Center in 2001; return to active practice with Justice Canada in 2005 and appointed to the Court of Queen's Bench of Alberta in March, 2011, initially in Edmonton, but transferred to Calgary in September 2014. Justice Gates has been the Co-Chair of the Court's Criminal Committee since 2012. He is currently the Supervising Judge for the Judicial District of Fort McMurray.

Suzanne Kendall is currently the Chief Crown Prosecutor of Calgary Prosecutions and the Crown Bail Office of the Alberta Crown Prosecution Service. In that role, Ms. Kendall also sits on the Boards of the Calgary and Area Child Advocacy Centre and Homefront Society Against Domestic Violence. Prior to that position, Ms. Kendall was the Director of Policy for the Alberta Crown Prosecution Service. She provided advice about criminal law reform to the Minister of Justice and Solicitor General and to the Deputy Minister. She also provided advice to Crown Prosecutors across Alberta through development of policies and the Crown Prosecutor Manual. Ms. Kendall joined the Alberta Crown Prosecution Service in 2004 and has held a variety of positions with them including prosecuting in Special Prosecutions (Organized Crime), Assistant Chief Crown Prosecutor, and Education Counsel. Prior to joining Alberta Justice, Ms. Kendall worked for the Federal Department of Justice, first as a prosecutor in Yellowknife, Northwest Territories, and then as Deputy Director of the Calgary Office. Ms. Kendall started her career in London, Ontario where she worked as defence counsel at the firm of Libis and Kendall.

Lisa Lindquist is the Manager of the Court of Queen's Bench in Calgary. Lisa has been with Resolution and Court Administration for 30 years, working in Queen's Bench, Provincial Court Regional, Family and Youth, Traffic Court and Resolution Services. One of the highlights of her career has been presenting at the 7th World Congress on Family Law and Children's Rights in Dublin, Ireland. A few of Lisa's favourite activities include travelling, biking and snow shoeing.

Lisa Silver is a proud Calgarian, lawyer, educator, and avid blogger. She holds a B.A. in Economics (UWO, 1984), LL.B. (Osgoode, 1987), and LL.M. (Calgary, 2001). She is a member of the Bars of Ontario (1989) and Alberta (1998). As a criminal lawyer, Lisa appeared before all levels of court including the Supreme Court of Canada. Presently, Lisa is an Assistant Professor at the University of Calgary, Faculty of Law, where she teaches criminal law, evidence and is the course director for the 3L advocacy

program. Her research and writing explores a broad range of topic areas, including judicial decision-making, confidential informers, and the admissibility and use of expert and digital evidence. She is currently working on Criminal Law Defences, 5th Edition with Pat Knoll, QC. Lisa maintains her own award-winning law blog at www.ideablawg.ca and regularly contributes to the Faculty's ABlawg website. Lisa was awarded the Faculty of Law's Howard Tidswell Memorial Award for Teaching Excellence in 2016-2017. She is also involved in provincial and federal judicial educational programs. Access to justice initiatives are an important facet of Lisa's volunteer work as she sits on the Board of Calgary Legal Guidance and is a long-time member of Legal Aid Alberta's Southern Alberta Appeal Committee.

Shelley Tkatch started her career as a federal prosecutor over 27 years ago in the BC Lower Mainland as an agent for the Federal Prosecution Service of the Dept. of Justice (later to become the Public Prosecution Service of Canada (PPSC). In 2002, she moved to the Yellowknife PPSC office as a Crown Counsel and Senior Counsel, conducting many jury trials throughout the Northwest Territories. In 2009 she moved the Calgary PPSC and took on complex drug and wiretap trial matters. In 2011 Ms. Tkatch was appointed as Deputy Chief Federal Prosecutor for the Alberta Region and ran the Calgary PPSC office. In 2016, she stepped back to a litigation role, responsible for complex litigation, advisory and appellant work. She participates on a number of national and provincial committees regarding law reform and access to justice.

Eric Tolppanen, Q.C. graduated from Queen's University Law School in 1991. After graduation, he spent a couple of years in the private sector with the Calgary law firm Burnet, Duckworth and Palmer before joining the Alberta Crown Prosecution Service, taking a position as a trial prosecutor in Calgary. He has been with the prosecution service for the bulk of the past 25 years. His previous roles include Appellate Counsel from 2001-2008 and Assistant Chief in Calgary from 2008-2011. In 2015, he was appointed Alberta's Chief Prosecutor and Assistant Deputy Minister. Eric regularly teaches at the University of Calgary and in other legal education programs. Eric's professional responsibilities also include being Co-Chair of the National Committee on the Prevention of Wrongful Convictions; Chair of the Provincial Witness Protection Security Panel and co-Chair of "Chiefs and Chiefs", a provincial committee of all the Chiefs of Police and Chief Crown Prosecutors.

Claudette Vilcu has been with the Sheriffs Branch for 13 years. Currently Claudette is Acting Inspector for the Alberta Sheriffs Branch working alongside Sheriffs at the Calgary Court Centre along with a few Regional Courts. Claudette first joined the Sheriffs in 2006 working in Medicine Hat. In 2007, she transferred to Calgary where she worked in Court Security and Prisoner Transport. In 2013, Claudette worked in the Close Protection Unit at McDougall Center in Calgary providing Security for the Lieutenant Governor and elected officials. In 2015, Claudette was promoted to Sergeant and in 2018 returned to Court Security and Prisoner Transport. Claudette has a BA in Criminal Justice and enjoys learning daily. She is a wife, mother to four kids, and actively involved in her community. She currently chairs a Parent Council and manages two hockey teams. In her free time, she enjoys being with her family, farming, camping, fishing and entering cooking competitions.

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Introduction

CIAJ Roundtables

The following report was produced from a Roundtable held in Calgary, Alberta on November 2, 2019. This was the fourth in a series of roundtables across Canada on jury representation. The Roundtables held under the auspices of CIAJ gather the views and suggestions of the community about jury representation. The purposes are to drive forward the discussion on jury inclusivity and increase confidence in Canada's justice system.

Structured as a one-day event, representatives from all parts of the justice system (defence and Crown lawyers, judges, court administrators, academics and law students) were brought together with members of Indigenous communities such as the Cree Nation, the Piikani First Nation and the Kainai-Blood First Nation of the Blackfoot Confederacy. The event offered the opportunity for participants involved in the various aspects and stages of the criminal justice system to hear from members of these communities.

Jury representation challenges vary across Canada, and having provincial sessions creates the opportunity to explore differences and account for nuances. Each Roundtable is meant to explore jury representation in a specific province, gathering information which will be incorporated with perspectives from other regions in Canada to form national recommendations. This report, together with those of the other Roundtables across Canada, will be discussed at CIAJ's 2020 Annual Conference on Indigenous Peoples and the Law on October 21-23 in Vancouver, British Columbia.

Topics discussed at length in Calgary include the incorporation of Indigenous practices in the Canadian legal system, *Indigenous* education initiatives at the university level, and localized as opposed to centralized jury trials.

This report refers to many studies that rigorously analyze these topics and is by no means a substitute for such resources. Rather, the following is intended to reflect the views of the different groups of people who see themselves as being excluded from participating in juries and the larger legal system, and to delve deeper into certain topics which came to light during the Roundtable.

As Co-Chair Justice David Gates[1] of the Court of Queen's Bench in Alberta reminded the group, our quest for enhanced representativeness on juries in this country is not limited to Indigenous community members. We face other challenges in terms of finding ways to make our juries more reflective of our community. While the Roundtable discussion focused on Indigenous issues, jury representation is lacking in terms of age diversity, racial diversity, and the accommodation of persons with disabilities to enable them to participate in jury service.

Kokopenace

The leading case governing jury representation remains the 2015 Supreme Court of Canada case *R v Kokopenace* [2], where the Court had to determine what efforts must be made by provinces to ensure that a jury is "representative." Representation was examined for its definition and its role respecting the rights guaranteed under ss.11(d) and 11(f) of the *Canadian Charter of Rights and Freedoms*.

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**.[3] This process is said to provide potential jurors with a "fair opportunity" to participate in jury selection.

[1] See Appendix A for more discussion points from Justcie David Gates opening address to the Roundtable.
[2] *R v Kokopenace,* 2015 SCC 28, [2018] 2 SCR 398. [*Kokopenace*]
[3] *Ibid* at para 40. (Emphasis added.)

Provinces need only make "reasonable efforts" to ensure that all conditions are met for a representative jury under ss.11(d)(f) of the *Charter*.[4]

Representation in the context of juries centres around the process used to compile the jury roll and not the jury's ultimate composition.[5] Thus, the inadvertent exclusion of underrepresented people on juries will not violate an individual's rights, as the majority concluded that a jury roll containing few individuals of the accused's race or religion was not indicative of bias. The majority held that representation on juries in light of section 11(d) and (f) of the *Rights* is about the jury selection process and not the final make-up of juries, which need not proportionately represent the diversity of Canada.[6]

Justice Cromwell, delivering minority reasons for Chief Justice McLachlin and himself, 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."[7] Furthermore, the process of random selection should not allow the state to ignore significant departures from a properly conducted selection process.[8] Justice Cromwell emphasized that the "fair opportunity" test removes the focus from the state's constitutional obligation to provide a representative jury.[9] The state has a constitutional obligation to not breach *Charter* rights, and not merely an obligations to make "reasonable efforts" not to breach *Charter* rights.[10]

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[4] *Ibid.*
[5] *Ibid* at para 40 and 42.
[6] *Ibid* at paras 2, 3 and 43; *Canadian Charter of Rights and Freedoms,* s 11, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[7] *Ibid* at para 195.
[8] *Ibid* at para 233.
[9] *Ibid* at para 249.
[10] *Ibid* at para 250.

Highlighting Indigenous Perspectives in Improving Jury Representation

The Importance of Oral Tradition in Indigenous Practices

Dr. Reg Crowshoe, Elder and leader from the Piikani nation of the Blackfoot Confederacy, used his discussion on the practice of an oral system of governance and law to frame the problem of Indigenous representation on juries. He said that there must be space alongside and in the Canadian system for Indigenous communities to practice their oral systems. Indigenous communities need buy-ins to enter and feel safe in the jury process. When Indigenous Peoples began signing or being forced to sign treaties, two systems met that did not understand one another. Since then, Dr. Crowshoe believes that oral systems have been disregarded and confined in Canada. To begin reconciliation, he explained, trust and respect can be fostered by acknowledging, incorporating and giving room for oral systems to be put into practice. Incorporating Indigenous practices and symbols, such as smudging or using eagle feathers to swear oaths, are a good start. The law should go further with the evidentiary development in *Delgamuukw v. British Columbia*[11] of using Indigenous oral histories as proof to claims of lands and practices, to having the Canadian system at large accommodate for Indigenous songs, for example, as oral legal documents. However, while finding space in the Canadian "written system" for oral practices is crucial, allowing Indigenous people to practice their own laws is paramount.

Before Dr. Crowshoe detailed the practice of an oral system, he explained the importance of *maintaining the practice of oral systems* for Indigenous Peoples. He said that while many Indigenous communities are alienated from the Canadian justice system, the suppression of Indigenous legal systems forces those same communities to assimilate into the Canadian one. Indigenous systems are thus not only threatened by conformity to the "written" Canadian system, but also by

[11] *Delgamuukw v British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 SCR 1010.

Indigenous Peoples losing familiarity with the oral nature of their traditional systems. Dr. Crowshoe explained that, along with maintaining Indigenous practices, it is crucial to preserve the oral and verbal quality of those practices because of the importance of Indigenous languages and stories to their working.

Dr. Crowshoe told his audience that in the Piikani tradition language is not merely understood as an artefact of culture, nor just a tool to speak to each other in a particular way. Rather, language is the method through which one can understand how to learn from the wider environment in which humans conduct their activities. Dr. Crowshoe described part of the Piikani creation story:

> "After Creator created the world, he projected sound and vibration into this creation, into those environments, and as he projected sound, that is where our language came from, the environment."

Language is a phenomenon that comes from the world itself and is not only an effective communication tool. He continued:

> "That story of projecting sound into the environment is a law in a verbal society…. So, to be transparent and responsible to that law, we have to follow the teachings of that language, like a language act, so environmental teaching is very important, to be able to connect to the land."

Dr. Crowshoe further shared that language itself has normative consequences. If language comes from the land, then one must be taught how to learn, listen and respect that land. This is what he calls "environmental teachings." Dr. Crowshoe detailed that Indigenous language policies are not only meant to encourage the preservation and growth of that language, but also to encourage learning from the land as it is fundamental to that language. He relayed a lesson given to him by his grandmothers, that he ought to listen to the sound of bees as that sound communicates the name of the bee in Piikani. Thus, when the language is understood as being part of the land, practices and policies must not only respect the language as a language, but also the environment which the language is an extension of and sourced from.

Dr. Crowshoe continued to explain the important role of language through the role of story and song in the practice of an oral system. He said that oral systems exist in the context of ceremonies, and ceremonies are populated by stories and song. Stories however are not just tales, but vehicles for laws, and act as sanctioned methods of norm transmission. To guide the audience through the process of how a story can transmit law, he elaborated using the story of a hunter coming upon a deer.

A hunter comes upon a buck and wounds it. The hunter follows the buck back to a clearing where there are more deer. The deer heal the wounded buck by chewing on the bark from a particular tree and apply it to the buck's wound. Once the deer are gone the hunter cut himself and went to the tree. He chewed some bark and applied it to his cut and the hunter saw that his wound healed much faster, thanks to the bark. To turn this knowledge into a norm the hunter had to go to the healers. In Dr. Crowshoe's terms the hunter asked the healers "for a smudge" and told them his story. Dr. Crowshoe continued:

> "The healers assessed his story, because the healers themselves had heard about natural law, heard about healing laws, and they had their stories based on their traditional laws, and used all those stories to assess the hunter's story. Once they assessed it, they agreed, and they put a deersong to that story. Once they put a deersong to that story, it was given back to the man. That was a validation that a formal venue was called to order through a smudge, that the assessors agreed his story was medicine, and they put the deersong to it, and that story went out with the individual as a source of information to the community that had a deersong that was physical documentation of navigating that oral system to be able to have the right to administer this medicine."

Dr. Crowshoe's story demonstrates the practice of an oral tradition. He explained that the story was like the hunter's intellectual property. The smudging performed by the healers acts as an official protection for the story while declaring that this story will be scrutinized for its truth. The Elders' deliberative process and

attachment of the deersong are official sanctions of the story and the truth that it carries. Dr. Crowshoe explained "...if I just told the story then it is just a story, but once you put the smudge to it, then we are acknowledging a knowledge package that came from natural laws," meaning that the Elders are acknowledging that what the hunter has told them is true. The knowledge the hunter witnessed is now stored in the story, which is kept by him and the Elders and transmitted to the community.

The oral practices of smudging, storytelling and song, Dr. Crowshoe elucidated, are fundamental to the practice of Indigenous law. Such sanctioned stories discuss creation, moral values and governance. Furthermore, they give people theories, knowledge and inspiration on how to tackle future problems. Sanctioned stories can also help one understand a person's or a group's mandates and rights that come from the land or an event. If a song or a story came from the land or environment, then those songs and stories are documentation of the territory and the people. Turning to Indigenous documents laws and practices to detail obligations, responsibilities, and paths forward set the tone for the discussions to be had throughout the day.

Looking to National and International Norms to Implement and Revitalize Indigenous Legal Practices

One panel, chaired by the Honourable Justice James H. Langston, of the Court of Queen's Bench in Alberta, combined the perspectives of four of the speakers: Justice Shannon Smallwood of the Supreme Court of the Northwest Territories, Dr. Crowshoe, Mr. Tony Delaney, Elder from the Kainai-Blood Tribe and Coordinator of the Kainai Peacemaking Program, and Dr. Wilton Littlechild, Cree lawyer and former Member of Parliament. The panelists engaged in a fruitful discussion about revitalizing Indigenous law and jurisdiction, while simultaneously creating space in the Canadian legal landscape for Indigenous practices.

Dr. Littlechild began by presenting an international perspective on Indigenous justice issues. With much personal experience to share, he first explained that 20 years ago he chaired Saskatchewan's Commission on First Nations and Métis Peoples and Justice Reform. At the Commission's outset, there had already been 33 studies on how to improve the justice system, producing over 3,000 recommendations. Since then, considerable recommendations have been added to that tally, including the fundamental Calls to Action made by the Truth and Reconciliation Commission (TRC) and the Calls for Justice made by the National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG).[12] Of those recommendations made by the Commission on First Nations and Métis Peoples and Justice Reform, only one related to juries. Similarly, jury representation was not directly mentioned in the Calls to Actions or Calls to Justice by the TRC and MMIWG. This omission is not due to the irrelevance of juries, Dr. Littlechild explained. Indeed, Dr. Littlechild brought the issue of the *Stanley* case before the UN's Committee on the Elimination of Racial Discrimination.[13] Rather, he said the omission occurred because the discrete issue of jury representation is connected to other fundamental issues concerning the relationship between Indigenous Peoples and the justice systems imposed upon them.

The interconnection between jury representation and wider Indigenous issues is clear when one turns to the jury-specific literature available in Canada such as the *Manitoba Aboriginal Justice Inquiry Final Report* and the *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by the Honourable Frank Iacobucci*. As detailed in both reports, jury representation touches upon many issues such as language, education, outreach, implicit racial bias, legislative change and Indigenous self-government, going beyond problems associated with criminal law institutions and procedures. The four panelist agreed

[12] The Master List of Report Recommendations Organized By Theme and Colour-Coded by Jurisdiction and the Consolidated Literature Review of Reports relating to Violence Against Indigenous Women, Girls, and 2SLGBTQQIA People of the National inquiry into Missing and Murdered Indigenous Women and Girls provide good examples of the number and scope of recommendations made.

[13] Executive Summary, Commission on First Nations and Métis Peoples and Justice Reform. See also *R v Stanley*, 2018 SKQB 27.

that undergirding the web of issues remains the fundamental problem of Indigenous Peoples being governed by legal systems that disproportionately persecutes them and displaces their own systems.

Dr. Littlechild explained that if we want to improve jury selection, we should turn to instruments that contain norms and conflict resolution principles put together by Indigenous Peoples from multiple jurisdictions. Such instruments seek to resolve issues underpinning low representation of Indigenous Peoples on juries. While the workings of jury selection are set out in jury legislation, jury selection and representation are grounded in the broader principles set out in the *Charter*. The United Nations Declaration on the Right of Indigenous People (UNDRIP), the Organization of American States Declaration on the Rights of Indigenous Peoples (OASDRIP), the TRC's Calls to Action and the MMIWG Calls to Justice provide road-maps to resolve conflicts and principles upon which reform ought to be based.[14]

Dr. Littlechild explained that these norm-generating texts, such as the UNDRIP, offer comprehensive approaches to multifaceted problems such as the lack of Indigenous representation on juries. The federal, provincial and territorial governments should turn to these texts for principled and holistic approaches to Canadian-Indigenous relations, and not only seek to patch distinct problems. Following Dr. Crowshoe's discussion of maintaining Indigenous oral practices and Justice Smallwood's explanation of the use of Indigenous languages in the courts of the NWT (discussed below), it is instructive to view how language could be treated in reference texts referred to by Dr. Littlechild; the UNDRIP and the MMIWG Calls to Justice. While the following provisions were not directly discussed, it might be helpful to concretely explore what implementation might look like for a particular topic, namely language. *Article 13*[15]of the UNDRIP holds that:

[14] As discussed at length in CIAJ's Roundtable on Jury Representation, held in Winnipeg, Manitoba. Accessible at https://ciaj-icaj.ca/wp-content/uploads/2019/10/r83c_report_jury-representation-in-canada_manitoba.pdf?id=10965&1580168992

[15] United Nations Declaration on the Rights of Indigenous People, UN General Assembly, 2 October 2007, A/RES/61/295.

> 1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.
>
> 2. States shall take effective measures to ensure that this right is protected and also to ensure that Indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

One of the MMIWG Calls to Justice concerning "Culture" helps concretize the UNDRIP principle in Article 13 in the context of juries and Indigenous representation:

Call to Justice 2.2.:[16]

> We call upon all governments to recognize Indigenous languages as official languages, with the same status, recognition, and protection provided to French and English. This includes the directives that:
>
> i. Federal, provincial, and territorial governments must legislate Indigenous languages in the respective territory as official languages.

Firstly, in the context of jury representation, inclusive practices undertaken by the NWT with respect to Indigenous languages seem to follow Article 13(2) much more closely than the majority of jury legislation in Canada, let alone s.638(f) of the *Criminal Code* barring from service people who can neither speak nor read English and French.[17] The NWT's practices can be used as a model for transforming the MMIWG's Calls to Justice from principle into law in a particular jurisdiction in need of reform. Reading 13(2) closely while borrowing from Dr. Crowshoe's discussion, the obligation for Indigenous Peoples to understand and be understood in legal proceedings would not just mean that Indigenous Peoples have a right to conform

[16] National Inquiry into Murdered and Missing Indigenous Women and Girls Calls for Justice "Culture" 2.2.
[17] *Criminal Code* s.638(1)(f) at paras 78-88. At paras 87.

to the “default” written Canadian system, but interact with that system as Indigenous Peoples practicing Indigenous customs and traditions - in their own language through oral practice.

Secondly, article 13(1) speaks directly to the thrust of Dr. Crowshoe’s discussion. The fundamental question he posed was “how can we culturally translate or interpret the mechanics of the jury act to Indigenous communities?” This idea does not mean merely incorporating Indigenous practices and laws into the Canadian “written” system (which in and of itself would be an incredible step forward). Rather, Dr. Crowshoe pushes the question, positing that Indigenous legal practices need to be exercised by Indigenous Peoples in both content and in form. Indigenous Peoples should wield jurisdiction, and further exercise their oral form of jurisdiction.[18] Applied in the Canadian context, article 13(1) instructs to “revitalize, use, develop and transmit to future generations their histories, languages [and] oral traditions”, meaning to allow space for an oral system apart, within and alongside a written one. Dr. Crowshoe points to *Delgamuukw*, in which the law of evidence was changed to allow for the “use of oral histories as proof of historical facts.” The result of this case is that oral histories stand on equal footing with historical documents in establishing Aboriginal title.[19] The task is not only to allow another legal tradition to flourish alongside the “default one,” such as Civil Law in Quebec, but to further incorporate oral methods of practicing law into Canadian legal tradition.

[18] This can be just one interpretation of the many calls for Indigenous Peoples to revitalize their traditions and practices found in various sources such as the Royal Commission on Aboriginal People, the TRC and the MMIWG.

[19] *Supra* note 11 at para 87. See also the full discussion at paras 78-88.

To Obtain Indigenous "Buy-In" and Implement UNDRIP, We Must Truly Learn How Indigenous Law Works

Such an approach requires actors in the Canadian legal system to first learn and understand the organizing principles, worldviews, legal traditions and procedures of First Nations, Inuit and Métis people. Dr. Crowshoe noted that the approach also demands serious efforts to listen, learn, and develop necessary cross-cultural skills. Concerning the effort required of such a task, Aaron Mills et al in their paper "An Anishinaabe Constitutional Order" say the following:

> "Thus, to understand Anishinaabe law, one must first understand Anishinaabe epistemology and ontology, constitutional order, and legal tradition (institutions and processes. This is a tall order-and one which Indigenous people are not asked but expected to meet every time they engage in one of Canada's legal or administrative processes."[20]

Dr. Crowshoe repeated the notion of "buy-in" from Indigenous communities. Well-documented in the *Iacobucci Report* and *AJI*, one of the causes for low Indigenous representation on juries is the mistrust of the justice system and lack of knowledge of the jury process. Indigenous Peoples need to feel protected by the justice system, in order for it to provide practices and procedures meaningful to them.

Both Dr. Crowshoe and Mr. Delaney brought up the recent introductions of eagle feathers in Alberta,[21] Manitoba,[22] Nova Scotia,[23] New Brunswick[24] and

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[20] Aaron Mills, Karen Drake, Tanya Muthusamipilla, "An Anishinaabe Constitutional order," in *Articles and Book Chapters*, Osgoode Digital Commons, 2017 at 18.

[21] Jay Rosove, "We're bound to tell the truth: Alberta Courts step towards reconciliation with eagle feather option," CTV News, November 19th 2019: https://edmonton.ctvnews.ca/we-re-bound-to-tell-the-truth-alberta-courts-step-toward-reconciliation-with-eagle-feather-option-1.4676915

[22] *Ibid*.

[23] Nic Meloney, "Eagle feather introduced to Nova Scotia court system for legal affirmations," CBC News, November 8th 2018. https://www.cbc.ca/news/indigenous/eagle-feathers-affirmations-nova-scotia-court-1.4897541.

[24] Nathalie Sturgon, "Eagle feathers introduced to court system for legal affirmations," CBC News, November 18th 2018. https://www.cbc.ca/news/canada/new-brunswick/eagle-feather-swearing-an-oath-1.4923212.

Newfoundland and Labrador[25] courts for Indigenous Peoples to swear oaths with. The use of eagle feathers to make the courtroom more familiar and meaningful is an important step toward obtaining "buy-in" from communities and establishing trust in the justice system.

Mr. Delaney told a story from his community that further supported this point. A group of grandmothers were concerned about the escalating level of youth violence in the community. These Elders got together and repurposed an old abandoned trailer from the Chief Counsel's office. They took down the judge's dais and the picture of the Queen. Instead, they abrought in a smudge bowl with sweetgrass, put prints on the four walls, and brought an eagle feather to the room. Once the "youth court" was running, the grandmothers noticed that the frequency of offences began to go down. The youths told the grandmothers that they felt responsible to the iconography and practices in the courtroom, one of them saying:

> "I know when I go in that room, I know I have to tell the truth, I know what that smudge means, what those prints on the wall mean."

Mr. Delaney pressed the point so engrained in him by his Elders that if people practiced their own ceremonies and languages, there would be less dysfunction in communities. He explained that when a death occurs in the community, a set of norms are in place to help guide people through the mourning process, such as "the smudge, painting your face with sacred ochre, or going into a sweat lodge to rejuvenate the soul." He said disharmony follows when people don't turn to those systems designed to help them.

While taking different approaches to the topic, Dr. Crowshoe and Mr. Delaney explained that for juries to have relevance among some Indigenous communities, more nuanced and inclusive practices are required. As Justice Smallwood discussed, Indigenous communities in the NWT trust jury trials because of pluralistic practices of the court. The jury draws from affected communities and

[25]Justice and Public Safety "Eagle Feathers Introduced to Provincial Courts," January 25th 2019. https://www.releases.gov.nl.ca/releases/2019/just/0125n02.aspx.

admits jurors who speak an Indigenous language as their mother tongue. It is a system that includes the qualities of the people who must participate in it.

Mr. Delaney continued to speak of the significance of specialized processes for different communities from a Blackfoot perspective. He offered that a list of volunteer jurors from a given community would be feasible and appropriate. He suggested that the list would be comprised of 20-30 trusted and respected people and Elders chosen by the community. The idea of volunteer juries is not completely foreign to Canada. It was recommended in the *Iacobucci Report*, [26] while Ontario has continued since 2014 its pilot-project of volunteer jurors for coroner's inquests in the district of Thunder Bay and Kenora.[27] [28] Despite similar requirements for randomness in jury selection, New York state also supplements its source lists with volunteer jurors.[29] However, the majority in *Kokopenace* implicitly dismissed the possibility of volunteers jurors as it may "destroy" the requirement of randomness, which could provide ground for a challenge even if the *Criminal Code* and provincial legislation were amended to provide a special regime for volunteer jurors.[30]

Returning to Dr. Crowshoe's comments above, more community specific practices would require some familiarity and dialogue with Indigenous communities in the province. Perhaps the principle of randomness as set out in *Kokopenace* for representation under s.11(d)(f) of the *Charter* will need revision in light of Canada's adoption of the UNDRIP. Even if volunteer jurors *per se* are not an option, what is clear from the discussion between Dr. Littlechild, Justice Smallwood, Dr. Crowshoe and Mr. Delaney is that a community-specific, collaborative and open approach

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[26] Iacobucci, Frank, *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by the Honourable Frank Iacobucci*, Toronto: Ontario Ministry of the Attorney General, 2013 at Recommendation 12 [*Iacobucci Report*].

[27] Debwewin Jury Review Implementation Committee, Final Report April 2018, "Creating a volunteer Juror Roll for Coroner's Inquest Juries."

[28] On-Reserve Representation, Juries at Coroners' Inquests, Territorial Districts of Kenora and Thunder Bay, O Reg 266/14.

[29] *Supra* note 26 at para 200. See New York State Court website : http://ww2.nycourts.gov/COURTS/10JD/nassau/cojask.shtml

[30] Kent Roach, "Juries, miscarriages of Justices and the Bill C-75 Reforms," in Canadian Bar Review 98 (1), (2020) *Forthcoming*, at 20. *Supra* note 2 (*Kokopenace*) at 88. *Rice c R*, 2016 QCCS 4507 at para 13.

based on reconciliatory principles is required to have more Indigenous Peoples participate as jurors in the Canadian justice system.

Incorporating Indigenous Courts and Indigenous Practices into the Canadian Legal System

A theme shared by many of the speakers at the Roundtable was the importance of adopting Indigenous practices in the courtroom. The Calgary Indigenous Court ("CIC") opened in September 2019 with the purpose of providing a "culturally relevant, restorative and holistic system of justice for Indigenous individuals, including offenders, victims and the community harmed by an offender's actions."[31]The CIC primarily deals with bail and sentence hearings of Indigenous people in the province charged or found guilty of a criminal offence. A rising tide of similar courts have already been open in British Columbia, Ontario and Nova Scotia.[32] Often referred to as Gladue Courts or First Nation Courts ("FNCs"),[33] these courts set out holistic approaches to Indigenous people charged and/or convicted of a crime based on restorative justice principles.[34]

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[31] Provincial Court of Alberta website, "Calgary Indigenous Court,": https://albertacourts.ca/pc/areas-of-law/criminal/calgary-indigenous-court. The court describes how it takes on its mission thusly: "It seeks to address the issue of over-representation of Indigenous people in the justice system and is a step forward in implementing recommendations from the Truth and Reconciliation Commission (TRC) as well as the Missing and Murdered Indigenous Woman and Girls National Inquiry (MMIWG) Report.//The CIC focuses on a restorative justice approach to crime through peacemaking and connecting accused people to their cultures and communities…When an offender is sentenced to probation, a Healing Plan specific to the offender may be included in the probation order. Healing Plans use identified Indigenous community support agencies to assist in re-integrating offenders into the community, and, where appropriate, also encourage offenders to learn about and reconnect with their Indigenous heritage. A ceremony may be held in the CIC to acknowledge the successful completion of a probation order and the Healing Plan."

[32] In Ontario, there are 13 Indigenous Criminal Courts (as of April 30th, 2018). Marg Bruineman, "More Indigenous Courts Open across Province," Law Times, April 30th 2018: https://www.lawtimesnews.com/news/focus-on/more-indigenous-courts-open-across-province/263023 In 2018, Nova Scotia saw the official opening of new Provincial Court at Wagmatcook, aptly titled the Donald Marshall Jr. Court, which includes provincial, Gladue, Wellness and Family Court.

[33] Yvon Dandurand and Annette Vogt, "Documenting the Experience and Successes of First Nation Courts in British Columbia," International Centre for Criminal Law Reform and Criminal Justice Policy, University of the Fraser Valley, 2017,

[34] *Ibid* at 2 and 3.

Importantly, courts like the CIC do not abide by a single model and can vary in form and procedure even when several of these courts are in the same province.[35] Generally, these courts adopt non-adversarial and non-retributive approaches to justice "that focus [sic] on healing, holding the offender accountable, and reintegrating the offender into the community to achieve better justice outcomes."[36] Thus, the level of community and Elder involvement in FNCs differs from court to court, depending on mandate and resources. The CIC employs a wide-ranging staff, from designated Indigenous Legal Counsel, Restorative Justice Peacemakers to Traditional Knowledge Keepers, Indigenous Court Works and community support agencies.[37] Indeed, the CIC uses this extensive staff to create Healing Plans tailored to the needs of people on probation once they have gone through the sentencing process.

The Supreme Court in *Gladue* and *Ipeelee* held that criminal courts in Canada must take judicial notice of the factors outlined in *Gladue* when sentencing an Indigenous person.[38] However Courts like the CIC, such as the Aboriginal Wellness and Gladue Court in Wagmatcook First Nation in Nova Scotia,[39] seek to bring Indigenous practices and customs into the courtroom and connect offenders with Indigenous support structures and agencies. As is clear from the diversity of the staff the CIC employs, it goes far beyond encouraging judges to take the *Gladue* principles into consideration. The CIC incorporates many of the elements explained by Mr. Tony Delaney, Coordinator of the Kainai Peacemaking Program, regarding the youth court established by a community's grandmother. Elements involved included the smudging and burning of sweet grass, a circular and evenly-levelled table so that the judge, accused and counsel all sit at the same level designed to replicate a teepee, and an eagle feather to be used when swearing

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[35] *Ibid*.
[36] *Ibid*.
[37] Provincial Court of Alberta website, "Calgary Indigenous Court,": https://albertacourts.ca/pc/areas-of-law/criminal/calgary-indigenous-court.
[38] *R v Ipeelee* [2012] 1 SCR 443, 202 SCC 13 at paras 59 and 60.
[39] Nova Scotia Premier's Office, "Grand Opening of the Wagmatook Court, "Justice/Aboriginal Affairs, June 21st 2018: https://novascotia.ca/news/release/?id=20180621004.

oaths.[40] In one interview done in 2017 on the CIC, Dr. Crowshoe said of its circular design:

> "The circle model and teepee speak to governance, or Aakaak'tsimaan, in terms of Blackfoot cultural values and practicality […] The teepee design perfectly meets the needs of our traditional society. For example, the circular shape is constructive for face-to-face communication by promoting a sense of equity and participation and consensus in discussions and decision-making. There is nowhere to hide in a circle."[41]

As discussed by Dr. Crowshoe and Mr. Delaney, changing the setting of the courtroom and incorporating Indigenous practices is not merely a cosmetic change, but a true transformation that seeks to imbue meaning into the bail-hearing or sentencing process for an Indigenous accused. The incorporation of Indigenous practices is a step towards changing attitudes throughout the justice system towards Indigenous accused such that they may be understood from a different perspective. It cannot be overstated: currently 30% of inmates in Federal and Provincial prisons are Indigenous.[42]

While the CIC or FNC administer Canadian law and not Indigenous law, the presence and authority of the smudge, eagle feather and level circular table incorporate First Nations' normativity and legitimacy into Canadian legal practices.[43]

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[40] Brent Scout "Inside the Aboriginal Courtroom in the Calgary Courts Centre" in *Avenue Calgary Magazine* January 16th 2017: https://www.avenuecalgary.com/city-life/inside-the-aboriginal-courtroom-in-the-calgary-courts-centre/

[41] *Ibid*.

[42] https://www.cbc.ca/news/politics/canada-votes-2019-voting-incarcerated-house-arrest-1.5285711

[43] *Supra* note 90.

Bill C-75: Uncertainty in Applying New Law

The coming into force of Bill C-75 and the elimination of peremptory challenges from the *Criminal Code* has divided trial judges in applying the law.[44] Some participants at the Roundtable discussed how the changes in the law were being applied across Canada, and whether there has been consistency.

Peremptory challenges have been used in the past to shape the ethnicity and composition of juries.[45] The concerns demonstrated by participants at the Alberta Roundtable echo those heard in other provinces. One recurring issue addressed in recent cases and during the roundtables is whether or not the elimination of peremptory challenges is retrospective, meaning applying to active cases that arose before the law came into force.[46] In Canadian law there is a presumption against the retrospective application of legislation, particularly in the context of criminal law, as reiterated in *Tran v Canada*.[47] The Supreme Court referred to the rules of statutory interpretation:

> "Those who perceive it (that retrospective and retroactive legislation can overturn settled expectations) as such can perhaps take comfort in the rules of statutory interpretation that require the legislature to indicate clearly any desired retroactive or retrospective effects. Such rules ensure that the legislature has turned its mind to such effects and "determined that the benefits of retroactivity (or retrospectivity) outweigh the potential for disruption or unfairness": *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), at p. 268. [Emphasis added.]"

[44] "Law to Speed up Canada's Justice System creates chaos due to lack of clarity," https://www.theglobeandmail.com/canada/article-canada-justice-system-confusion-over-jury-selection-rules/ See also *R v Kebede*, 2019 ABQB 858.
[45] One highly publicized incident of such was *R v. Stanley*, 2018 SKQB 27 where the defense used five peremptory challenges to remove all visibly Indigenous people from the jury.
[46] *Supra* note 44 at paras 15 and 16.
[47] *Ibid* at para 17. *Tran v Canada*, 2017 SCC 50, [2017] 2 SCR 289 at paras 48-49.

The crux of the debate lies in qualifying the amendment to the *Criminal Code* eliminating peremptory challenges as a substantive change to a right, or merely a procedural one.[48] If the legislatives changes affect substantive rights, the legislation will only be prospective, and if the changes affect only procedure, the law is both prospective and retrospective. Justice Deschamps writing for the majority in the 2012 Supreme Court of Canada case *R. v. Dineley* explained:

> "New legislation that affects substantive rights will be presumed to have only prospective effect unless it is possible to discern a clear legislative intent that it is to apply retrospectively [...] However, new procedural legislation designed to govern only the manner in which rights are asserted or enforced does not affect the substance of those rights. Such legislation is presumed to apply immediately to both pending and future cases (*Application under s. 83.28 of the Criminal Code (Re)*, at paras. 57 and 62; *Wildman*, at p. 331)."[49]

If a new law contains procedural provisions that also affect substantive rights, those provisions would only apply prospectively.[50] In a recent decision, Justice Nixon of the Alberta Court of Queen's Bench explained that some case law refers to peremptory challenges as a right while others refer to them as procedural tools.[51] The problem remains determining whether the Bill C-75 amendments are designed to govern only the *manner* in which rights are asserted and not the *substance* of those rights, and therefore, would be only procedural.[52]

The position that Bill C-75's amendment to the *Criminal Code* eliminating peremptory challenges applies retroactively can be summed up in Justice Thomas' reasons in *R. v. Lako and McDonald*,[53] wherein many cases that distinguish between substantive and procedural rights are considered.[54] Justice Thomas

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[48] *R v Chouhan* 2019 ONSC 5512, [2019] O.J. No. 4797 at 105-113.
[49] *R. v Dineley*, 2012 SCC 58, [2012] 3 S.C.R. 272, at para 10.
[50] *R. v Thomas Lako and William McDonald*, 2019 ONSC 5362 at para 35.
[51] *Supra* note 44 at para 20.
[52] *Ibid*.
[53] These cases include *R v Cumberland,* 2019 NSSC 307, *R v Lako and McDonald*, 2019 ONSC 5362, *R v Chouhan,* 2019 ONSC 5512, *R v McMillan* 2019 ONSC 5616 and *R. v. Marshall*, 2019 ONSC 7376.
[54] Some examples of substantives changes were: (1) altering the existence or content of a previously available substantive defence (*R v Dineley*, *supra* at paras. 17 and 22, *R v Bengy*, *supra* at paras. 31, 45-50

ultimately found that the right to a peremptory challenge is only a procedural tool.[55] He reasoned that the substantive right of the accused is the right to select a jury, enshrined in s.11(d) of the *Charter* as the right to a fair hearing by an independent and impartial tribunal. However, concerning the content of the right, he explained:

> "Ultimately, the accused does not have a right to a favourable jury (*Sherratt*, para 58). The accused does not have a right to an unbiased jury (*Find*, para. 41). "The ultimate requirement of a system of jury selection is that it results in a fair trial. A fair trial, however, should not be confused with a perfect trial, or the most advantageous trial possible from the accused's perspective." (*Find*, para. 28.)"[56]

Justice Thomas' remarks also align with those of the majority in *Kokopenace* that stress the procedural nature of representation for the purposes of s.11(d)(f) of the *Charter*. Justice McMahon in the Ontario Superior Court case of *R. v. Chouhan* agreed with Justice Thomas in determining that peremptory challenges only impact the process of selecting a jury and do not constitute a substantive right on its own or affect the content of the right to a fair trial and an independent and impartial jury.[57]

A second line of cases in Ontario have deferred to the reasoning in *R v. Chouhan* and *R v. Thomas Lako and William McDonald* mainly for the sake of judicial comity (and that these courts cannot prove those reasons "plainly wrong.")[58] In *R. v. Marshall*, Justice Goldstein points out that in *R. v. R.S.,* 2019 ONCA 906 the Ontario Court of Appeal held that the Bill C-75 provisions dealing with the right to

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and (2) and (2) changes affecting constitutional rights, even where justified under section 1 (*R v Dineley* at para. 21), while some examples of procedural changes being: (1) Making documentary evidence admissible against the accused even though it was inadmissible at the time of the alleged offence (*Howard Smith Paper Mills Ltd. v The Queen,)* and (2) Removing the statutory requirement of corroboration of a child witness that had been in place at the time of the alleged offence thereby having a profound affect on the accused's defence (*R v Bickford* (1989), 1989 ONCA 7238 , 51 C.C.C. (3d) 181 (Ont. CA).

[55] *Supra* note 50 at para 35.

[56] *Ibid* at para 32.

[57] *Supra* note 48 at para 111.

[58] See *R v Marshall*, 2019 ONSC 7376 (CanLII) at paras 25 and 26 and Dambrot J. in *R v MacMillan and Carrasco*, 2019 ONSC 5616 at paras 9 and 10.

a preliminary inquiry did not have retrospective effect.[59] The inference here is that the provisions pertaining to juries may be analyzed in a similar manner. Notably, there is an expedited appeal of *R v. Chouhan* that may resolve the matter in Ontario.[60]

In contrast, a host of cases from British Columbia, Alberta, Saskatchewan, Manitoba, Quebec and New Brunswick have held that the amendment eliminating peremptory challenges does not apply retrospectively. [61] While the cases vary in reasons, they make similar holdings, many pointing to the reasons found in and *R v. Raymond* and *R v. Subramaniam*.[62] Similar to the Ontario cases, these two rulings turn on the issue of whether the Bill C-75 amendment in question affects the substance of the right.[63]

The focus of whether the elimination of peremptory challenges affect the substantive rights in s.11(d)(f) of the *Charter* follows from *Dineley* that "procedural legislation designed to govern only the manner in which rights are asserted or enforced does not affect the substance of those rights."[64] The Court explains:

> "Procedural provisions may, in their application, affect substantive rights. If they do, they are not purely procedural and do not apply immediately (P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at p. 191). Thus, the key task in determining the temporal application of the Amendments at issue in the instant case lies not in labelling the provisions "procedural" or "substantive", but in discerning whether they affect substantive rights."[65]

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[59] *Supra* note 58 (*R v Marshall*) at para 20.
[60] *Ibid* at para 27.
[61] *R v Raymond,* 2019 NBQB 203, *R v Kebede*, 2019 ABQB 858 (CanLII) , *R v Subramaniam* 2019 BCSC 1601, *R v Dorion*, 2019 SKQB 266, *HTMQ v Luc LeBlanc* 2019 NBQB 241, *R c Lindor* 2019 QCCS 4232, and *R v Ismail*, 2019 MBQB 150. Further this position is also held in *R. v. King*, 2019 ONSC 6386 (CanLII).
[62] *R v Levaillant*, 2019 ABQB 837 (CanLII) at 11, *R v LeBlanc*, 2019 NBQB 241, at 9, 10 and 24.
[63] *R v Subramaniam* at para 36.
[64] *Supra* note 49 at para 10.
[65] *Ibid* at para 11. In *Peel v Ontario*, 2012 ONCA 292 the Ontario court of Appeal held that procedures that affect substantive rights and obligations were not purely procedural and could not be applied retrospectively. *Supra* note 44 at para 25.

A New Brunswick case, considering *Raymond* and its concurring caselaw, understood "affect" to mean neither a positive nor a negative impact, but rather a neutral one. Yet even a neutral impact can alter and affect the right.[66]

The judge in that case explained the substance of the ss.11(d)(f) rights are changed because the Bill C-75 amendments are meant to address issues of discrimination and Indigenous underrepresentation on jury panels, which in turn would better guarantee the independence and impartiality of the jury fostering public confidence in the criminal justice system."[67] The ultimate result changing the content of the right through procedure.[68] Furthering this point are the statements made by the Attorney General in the House of Commons regarding Bill C-75 in which she stated that the changes were made to affect the representativeness and impartiality of the jury.[69]

In short, the trial courts in Canada await the decision of an appellate jurisdictions to settle the matter. Until then, the application of the law will remain a problem, as while the issue of the retrospective application of Bill C-75 falls into two large camps, there is no monolith even within those circles.[70]

Indigenous Education in Canadian Law Schools

Education was discussed during the Roundtable as a solution to many Indigenous issues across the board. Are faculties of Canadian law schools covering enough ground in terms of Indigenous topics and education? One participant of the Roundtable reflected that upon entering law school in the 1990s, there were very few Indigenous subjects covered in the curriculum.

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[66] *HTMQ v Luc LeBlanc* 2019 NBQB 241 at *36,* A similar argument is present in *R v MacMillan and Carrasco*, 2019 ONSC 5616 at para 8.
[67] *Ibid* at para 39.
[68] *Ibid* at para 43.
[69] *Ibid* at para 39. *Supra* at note 44 paras 34 and 35.
[70] It is important to reiterate, not all the decisions in this camp agree on the reasons, though they come to the same conclusions. The judge in *R v Subramaniam* understood peremptory challenges as rights in themselves that are being negated. *Supra* note 61 (*R v Subramaniam*) at para 44.

Due to the changing legal landscape and in response to the 2015 Truth and Reconciliation Commission of Canada's Calls to Action, more is being offered in the way of Indigenous legal education.[71] Prior to the TRC's Calls to Action, only two law schools – Lakehead University's Bora Laskin Faculty of Law and the University of British Columbia's Peter A. Allard School of Law – offered mandatory courses in Aboriginal law.[72] In 2018, York University's Osgoode Hall, Canada's largest law school added their own mandatory course in Indigenous Law.[73]

The Council of Canadian Law Deans organized the creation of a report wherein law school Indigenous initiatives throughout Canada are listed and described.[74] The responses of Canadian law schools are varied. Initiatives include new courses, integration of relevant material across the law school curriculum, and increased exposure to Indigenous culture and practices.

For example, the University of Calgary presently offers five courses devoted specifically to First Nations issues: Canadian Law and Indigenous Peoples; Comparative Indigenous Law; Seminar on the Residential Schools Litigation; Seminar on the Land Claims process; and Kawaskimhon Aboriginal Law Moot, a non-competitive national forum where law students negotiate and debate Indigenous legal issues.[75] Moreover, the Faculty has appointed Lee Francoeur as an Indigenous faculty member. Francoeur is an accomplished lawyer and member of the Taku River Tlingit First Nation. Furthermore, through the Justice Partnership and Innovation Program, some funding has been provided to the University of

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[71] *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: TRC, 2015) at 168. Call to action 28 reads as follows: "We call upon law schools in Canada to require all law students to take a course in Aboriginal people and the law, which includes the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism."

[72] The Rise of Aboriginal Law, University Affairs, Kerry Banks, September 5, 2018. https://www.universityaffairs.ca/features/feature-article/the-rise-of-aboriginal-law/

[73] *Ibid.*

[74] https://ccld-cdfdc.ca/wp-content/uploads/2018/07/CCLD-TRC-REPORT-V2.pdf

[75] "Kawaskimhon Moot 2019" (no date), online: *Dalhousie University* www.dal.ca/faculty/law/current-students/kawaskimhon-moot-2019.html

Alberta for the development of the new Wahkohtowin Law and Governance Lodge, as announced by the Minister of Justice and Attorney General of Canada.[76]

Perhaps the most important of these initiatives is the University of Victoria's four-year law degree in which students study both Indigenous and non-Indigenous law, the first program of its kind in the world. Upon graduation, students are awarded both a Canadian Common Law degree (Juris Doctor) and a degree in Indigenous Legal Orders (Juris Indigenarum Doctor).[77] Furthermore, Federal Budget 2019 announced $9.1 million over 3 years, starting in fiscal year 2019 to 2020, to support the construction of an Indigenous Legal Lodge at the University of Victoria, a leader in this field. The Indigenous Legal Lodge will house the university's new dual degree program in Canadian Common Law and Indigenous Legal Orders and will serve as a foundation for debate, learning, public education and partnership on the revitalization of Indigenous laws.[78] Participants acknowledged that it was time Indigenous Law was recognized as worthy of a law degree in Canada.

One law school professor who attended the Roundtable put forward further obstacles that surround Indigenous studies in law schools. She noted that it is often difficult to encourage non-Indigenous students to engage in Indigenous-focused curriculum. She noted that Indigenous faculty are lacking across Canada. Participants agreed that there is no easy solution and that initiatives to increase the number of Indigenous law students should reap benefits in coming years. Finally, the Professor acknowledged that she has witnessed discrimination against Indigenous law students at her university. The participants discussed the positive gains that a mandatory course in Indigenous law could provide in at an institutional level and among the student body.

[76] https://www.ualberta.ca/law/faculty-and-research/wahkohtowin
[77] https://www.uvic.ca/law/about/indigenous/jid/index.php
[78] https://www.rcaanc-cirnac.gc.ca/eng/1524503744418/1557511885830

Barriers to Access and Practical Concerns in Jury Selection

The Roundtables on Jury Selection and Representation hosted in Winnipeg, Vancouver, Halifax and now Calgary, have discussed similar threads across Canada, which have been acknowledged in past reports.[79] Commonly discussed barriers to access include low juror compensation, problems with source lists, the accusatory language of the summons form, and criminal records. In Calgary, Justice Smallwood gave the participants a glimpse into the successes and barriers of the jury system in the Northwest Territories. Ms. Claudette Vilcu, acting inspector at the Calgary Court Centre, Ms. Carol Clark, director of the court of Queen's Bench Administration South and Ms. Lisa Lindquist, Manager of the Court of Queen's Bench in Calgary, helped the audience understand Alberta's system.

Compensation and Expenses

Participants at the Roundtable agreed that juror compensation is inadequate. Section 4 of the Alberta *Jury Act Regulations* provides that a juror's allowance of $50 per day.[80] One participant noted that in a province where the minimum wage is $15/hour, jurors should receive more than $50 a day. This lack of daily compensation is compounded by the fact that jurors receiving nothing during the selection process, which can require potential jurors to show up to court several times before the jury is chosen.

Participants agreed that increasing juror compensation would likely increase participation and decrease absenteeism. Low-paid workers would no longer suffer financially as jurors. Some people, like part-timers and the unemployed, may find the service more attractive. Finally, participants acknowledged the high regard that juries should have in the legal community and beyond.

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[79] https://ciaj-icaj.ca/en/library/papers-and-articles/roundtables/#goto-jury-representation

80 *Jury Act*, RSA 1980 c J-2 | CanLII Revised Statutes of Alberta 2000 Chapter J-3. Current as of September 1, 2019.

Source Lists

Problems with jury rolls and the selection of names in which to fill them is often discussed in the context of increasing representation of juries in Canada.[81] Because the administration of justice falls under provincial jurisdiction, there is no uniform source list used across provinces and territories in Canada. The sources from which the sheriff can compose the juror list are specified in the Alberta *Jury Act Regulations*.[82] The regulations stipulate that jury selection can be made from:

> a. lists of electors, assessment rolls and other public papers obtained from municipalities;
>
> b. telephone directories;
>
> c. Henderson's Directories for municipalities; and
>
> d. any other source that the sheriff considers appropriate.

Practically speaking, Alberta's source lists come from Motor Vehicle Registration lists. Participants agreed that this limits which sections of the population can be summoned for jury duty. A combination of different lists could be used, as laid out in the Regulations.

In the 1991 Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta, it was detailed that Indigenous People were not being summoned for jury duty.[83] In *R v Nepoose,* it was reported by the sheriff of the Alberta Court of Queen's Bench that voter lists (which were used in the past) generally constituted a small percentage of persons resident in the given area, and only provided names of persons who own property and did not include Indigenous People living on reserves.[84]

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81 *Supra* note 2.
[82] *Jury Act,* RSA 2000, c J-3.
[83] Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta, vol. 1 (Main Report) (Alberta: Justice and Solicitor General, March 1991) at 44-45.
[84] *R v Nepoose* (1991), 128 A.R. 250 (QB).

Summons Form

In Alberta summonses warn potential jurors that failure to comply will result in fines or imprisonment. This type of language risks compounding the overall mistrust in the legal system that has been documented in Indigenous communities. The 10th recommendation of the *Iacobucci Report* explains that the language used in juror summons is "threatening and imperious."[85] Most acutely, this occurs where the summons demands that potential jurors return the form or else risk incurring fines or imprisonment. While meant to encourage participation in the jury system, the threats of fines or imprisonment deter people from participating in the first place, and results in potential jurors not returning the questionnaire at all. Though compliance with the summons is "mandatory", participants emphasized that there are surely options to convey that message in a more encouraging way. Further, imprisonment or fines resulting from a lack of response are not enforced in many jurisdictions, and thus serve little purpose on the summons form.[86]

Ms. Clark explained that digital advancements are being made now to allow the public to respond to juror summons electronically. There is a similar project to respond to summons online already in place in British-Columbia.[87] Unlike the British-Columbia system which allows for both online and mail responses, the challenge in Alberta will be to stop mailing summons entirely and to contact people electronically.

Exclusions Based on Criminal Records

Among persons excluded from serving as jurors in the Alberta *Jury Act* are "persons who have been convicted of a criminal offence for which a pardon has not been granted or are currently charged with a criminal offence."[88] There are

[85] *Supra* note 26 at para 237. See also Systemic Barriers and Biases in the "Conscience of the Community": Report of the Canadian Institute for the Administration of Justice, By Nathan Afilalo, July 2018, p. 22.
[86] *Supra* note 26.
[87] https://www2.gov.bc.ca/gov/content/justice/courthouse-services/jury-duty/respond-to-summons
[88] *Supra* note 3 at s. 4(h).

similar provisions in jury acts across Canada. Both the *Iacobucci Report* and *Debwewin Report*[89] call for reform in the area of criminal ineligibility for jury service. The *Debwewin Report* asks that instead of reforming provincial jury act provisions, Public Safety Canada undertake to (1) create a program where the criminal records of all Indigenous People convicted of crimes are expunged after five years, (2) to recognize the authority of Indigenous communities to offer its members amnesty, and (3) repeal the amendments in the 2012 *Safe Streets and Communities Act* decreasing the amount of pardons granted, thereby disproportionately affecting Indigenous People found guilty of criminal offences.[90] While provincial jury acts apply in civil cases, the new criminal code provision (amended under Bill C-75) supersede the provincial act in criminal cases, allowing people who have spent less than two years in jail to serve on juries.[91]

In exploring legislated barriers to jury representation, participants at the Roundtable delved into the rationale behind criminal record exclusions. Participants voiced that the treatment of criminal record holders when it comes to juries holds some contradiction. Indeed, the enactment of Bill C-75 allowed those who have served less than two years in jail to participate in juries, just as in the past, only inmates serving less that two years could vote.

One participant noted that the main justification for barring criminal record holders is that they are deemed to be less honest than non-criminal record holders. Another participant likened it to the historical limitations on allowing inmates to vote. Today, Canadians who will be 18 years of age or older on polling day and who are in a correctional institution or a federal penitentiary in Canada may vote by special ballot in an election or referendum.[92] This has not always been the case. The change occurred in 1993, when Parliament amended the law to

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[89] *Debwewin Jury Review Implementation Committee Final Report* (2018). Retrieved from: https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/debwewin/ [*"Debwewin Report"*]
[90] *The Debwewin Report* at para 279. 74 Safe Streets and Communities Act, SC 2012, c 1.
[91] 638 (1) Challenge for cause: A prosecutor or an accused is entitled to any number of challenges on the ground that (c) a juror has been convicted of an offence for which they were sentenced to a term of imprisonment of two years or more and for which no pardon or record suspension is in effect;
[92] See Elections Canada website: https://www.elections.ca/content.aspx?section=vot&dir=bkg&document=ec90545&lang=e.

allow prisoners serving sentences of less than two years to vote. Individuals serving longer sentences were still not able to cast ballots.[93] In 2002, a prisoner serving a 25-year sentence challenged the law. The Supreme Court of Canada ruled that denying longer term inmates the ability to vote was a violation of their Charter rights.[94]

At the intersection of the problem of criminal exclusion from jury service is the overrepresentation of Indigenous peoples in Canadian prisons. In a news release on January 21, 2020, Dr. Ivan Zinger, the Correctional Investigator of Canada, reported that persons of Indigenous ancestry have surpassed 30% of the total inmate population in Federal Custody.[95] Notably, Indigenous peoples only account for 5% of the Canadian population, and as noted in the *Iacobucci Report*, overrepresentation combined with bars to jury service due to time in person disproportionately excludes Indigenous people from sitting on juries.[96] Looking at overincarceration alone, urgent calls to action are raised in the reports of the TRC and the MMIWG. Other initiatives recommended by the Correctional Investigator of Canada and supported by such reports include:

- Transfer resources and responsibility to Indigenous groups and communities for the care, custody and supervision of Indigenous offenders.
- Appoint a Deputy Commissioner for Indigenous Corrections.
- Increase access and availability of culturally relevant correctional programming.
- Clarify and enhance the role of Indigenous elders.
- Improve engagement with Indigenous communities and enhance their capacity to provide reintegration services.[97]

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[93] https://www.cbc.ca/news/politics/canada-votes-2019-voting-incarcerated-house-arrest-1.5285711
[94] *Sauvé v Canada* (Chief Electoral Officer) [2002] 3 SCR 519; 2002 SCC 68.
[95] https://www.oci-bec.gc.ca/cnt/comm/press/press20200121-eng.aspx
[96] *Ibid.* See *Iacobucci* report *supra* note 23 at para 17.
[97] *Ibid.*

- Enhance access to screening, diagnosis and treatment of Indigenous offenders affected by Fetal Alcohol Spectrum Disorder.

- Develop assessment and classification tools responsive to the needs and realities of Indigenous people caught up in the criminal justice system.[98]

Localized Jury Trials: A Closer Look at Successes and Barriers in the Northwest Territories Jury System

The keynote speaker for the Roundtable was Justice Smallwood of the Supreme Court of the Northwest Territories ("NWT"). She shared some unique challenges and opportunities relating to jury trials conducted in the various communities up North. Justice Smallwood is also a member of the NWT, Nunavut and Yukon courts of appeal.

Localized jury trials have a long history in the NWT In 1955, the Supreme Court of the Northwest Territories began the practice of travelling to the place of offence to hold criminal jury trials, pulling jurors from those particular communities.[99] Today, this practice is captured under rule 37(1) of the *Criminal Procedure Rules of the Supreme Court of the Northwest Territories* which states that criminal trials will be held in the community "at or nearest the place where the offence is alleged to have been committed," unless it is inconvenient for the parties and witnesses to do so, and there are adequate facilities to conduct a jury trial.[100] The ethos of localized trials can also be found in the NWT *Jury Act* which implicitly explains that it has been the practice in the NWT to draw jurors from a distance of no more than 30 kilometres of the court.[101] The law stipulates that no one is required to serve as a juror more than once in a two-year period unless there is an "insufficient number

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[98] *Ibid*.
[99] Mark Israel, "The Underrepresentation of Indigenous People on Canadian Jury Panels" Law and Policy, 2003 at 48.
[100] Criminal Procedure Rules of the Supreme Court of the Northwest Territories, SI/98-78, <http://canlii.ca/t/l657>
[101] *Jury Act*, RSNWT 1988, c J-2.

of persons qualified to serve as jurors within a distance of 30 km from the place of trial."[102]

The localized jury trial approach of the NWT was praised in the *Manitoba Aboriginal Justice Inquiry's* Report (*AJI* Report).[103] The *AJI* Report commented that limiting the area from which a jury is drawn and holding a trial in the community in which the offence was committed gave the community a more "direct sense of involvement, control and understanding of the justice system," combatting the feelings of alienation towards the justice system on behalf of the many different Indigenous peoples in the territory.[104] The *AJI* looked to the practices of handling jury trials in the NWT to make their recommendations for increasing Manitoba jury representation.[105]

Justice Smallwood expressed that there are strong levels of confidence in juries in the NWT. Between 2016 and 2019 there were on average 35 jury trials scheduled a year, which is high for jury elections in Canada relative to the size of the population of the NWT. While it is difficult to state that confidence in juries is shared amongst all Indigenous communities in the territory, Justice Smallwood did offer some interesting statistics in support of such a conclusion.

According to the NWT Bureau of Statistics, 50% of the NWT's population are members of the territory's many Indigenous communities,[106] while 88% of adults admitted into custody are Indigenous people, and 28% of adult Indigenous people report being victims of crime.[107] Based on these statistics, a large majority of jury elections are made by accused who identify as Indigenous. Most of the NWT's non-Indigenous population is concentrated in Yellowknife. Given the demographic

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[102] *Ibid.* See also Israel *supra* note 99 at 48,

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

[104] *Ibid*.

[105] *Ibid*.

[106] 2018 Population Estimates, NWT Bureau of Statistics (22,369 Indigenous people).

[107] The following are statistics from the Honorable Justice Shannon Smallwood's presentation taken from Statistics Canada and NWT Bureau of Statistics: .28% of adult Indigenous people report being victims of crime.

layout, trials conducted in the five other NWT administrative regions (beyond Yellowknife) have a strong likelihood of high Indigenous representation on juries, and in some cases, all Indigenous jurors.[108] Nevertheless, the practice of going to communities to try a case, combined with the population distribution in the territory and high rate of jury elections, may indicate a higher level of trust in the jury process amongst Indigenous peoples in the NWT than in the rest of Canada. However, it must also be said that in 2018 the NWT had the highest crime rate per 100,000 people in Canada, as well as being number one on the crime severity index.109 Thus, the higher rate of jury elections might correlate to the higher number of indictable and violent offences.

Justice Smallwood discussed some of the "philosophical tensions" that exist in the NWT when it comes to juries, the Canadian justice system at large and Indigenous Peoples. On the one hand, there is evidence that juries are well-trusted given their high use. On the other hand, there remains the well-documented scepticism towards the Canadian justice system that leads many Indigenous Peoples to choose not to answer summons or seek to be excused from jury service.110

In smaller communities in particular, people might not want to judge a neighbour using an alien system. Similarly, passing judgment on another community member can be difficult and cause problems within that community. The higher rate of jury elections may not necessarily be a reflection of a wide trust in the justice system, but rather an expression of the need that harm and violence be addressed through available means. Justice Smallwood explained that people still want a form of justice, even if the justice system that seeks to address problems and violence in a community is one that has been imposed upon them.

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[108] Inferences are gleaned from statistics presented during Justice Smallwood's Presentation during the Roundtable.

[109] The following are statistics from the Honorable Justice Shannon Smallwood's presentation taken from Statistics Canada and NWT Bureau of Statistics: In 2018, there were a reported 19, 985 Criminal Code Violations, 3,862 Violent Criminal Code Violations, 3,029 of which were assaults (including sexual violence) and 221 Sexual Offences (including sexual offences against children).

[110] *Ewert v Canada*, 2018 SCC 30 at para. 57. Indeed, as it pertains to juries, this is well documented in the *Iacobucci Report* and the *Aboriginal Justice Inquiry.* See also *supra* note 2 (*Kokopenace*).

According to Justice Smallwood, the practices of the NWT are being challenged. While historically jury trials were held in small communities, there have been a gradual move towards bigger towns. Today, jury trials are only held in eight communities across all six administrative regions of the territory.[111] This change is the result of a combination of factors: the strict timelines for delays set out in the *R v Jordan* decision[112], the NWT's intensive caseload, and the territories' vast landscape.

Fundamental problems can arise when empanelling a jury from a small community. According to justice Smallwood, the success of the empanelling procedure depends on the size of the community, and the identity of the victim, accused and witnesses. Family connections can quickly disqualify many people. In small communities, there is not only the problem of "everyone knowing everyone," but also the correlative issue of people knowing the details of the offence before the trial.

Justice Smallwood also said that some communities repeatedly have low response rates without there being a discernible cause. Moreover, the empanelling process can be interrupted by a host of activities, ranging from a funeral in the community to activities like community hunts.

Language is often an issue. The NWT has eleven official languages, nine of which are Indigenous. The NWT' *Jury Act* sets out that unilingual speakers (meaning speakers of only one of those eleven official languages) can serve on juries.[113] However, the problem lies not in the province's laws but instead in the practical

[111] The following are statistics from the Honorable Justice Shannon Smallwood's presentation taken from Statistics Canada and NWT Bureau of Statistics: Inuvik (3,536 people / 68% Indigenous), Tuktoyaktuk (982 people / 88% Indigenous), Fort Simpson (1,296 people / 70% Indigenous), Norman Wells (818 people / 37% Indigenous), Fort Smith (2,709 people / 59% Indigenous), Hay River (3,824 people / 46% Indigenous), Behchoko (2,010 people / 91% Indigenous) and Yellowknife (20,607 people / 24% Indigenous).

[112] *R v Jordan*, 2016 SCC 27 [2016] 1 SCR 631.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

[113] *Jury Act,* RSA 1980 c J-2 s.4(c).

difficulty of finding interpreters. The court may bring in an interpreter to assist jurors, but these interpreters may not be available during the trial. A trial itself requires two interpreters to do consecutive translation. Because the government does not train interpreters, there are challenges to finding two who have the skills required for legal language. If appropriate interpreters are found and hired, the length of the trial usually doubles, which begins to create problems concerning the ceiling for delays as set out in *Jordan*.

Justice Smallwood explained the above-mentioned problems coexist with the more commonplace issues of compensation, transportation, work, hardship, physical and economic accessibility and return rates of summons sent out by the sheriffs. She echoed the sentiments expressed by the *Iacobucci Report* and the *AJI* concerning the increased difficulties that northern life possesses regarding jury representation.

Conclusion

Barriers to access and practical concerns in jury selection discussed at the Alberta Roundtable included insufficient compensation and expenses, the effectiveness of the source lists, the language of the summons form, and exclusions based on criminal records.

In terms of delving into deeper and often systemic issues, participants discussed the uncertainty surrounding Bill C-75 and Indigenous-focused education in Canadian law schools. The Alberta Roundtable had a rich attendance of Indigenous speakers and participants. In that vein, the day was filled with a robust discussion concerning oral traditions, jury trials in Indigenous communities and Indigenous Courts and practices. The focus on Indigenous perspectives from this Roundtable will be invaluable in assembling viewpoints and recommendations from across Canada at CIAJ's Annual Conference in October 2020.

Appendix A

Other insights from Justice David Gates Opening Address are as follows:

This report will, we hope, drive further community dialogue, greater understanding of what a more inclusive jury system should look like, modernization and reform of our current practices and procedures and, ultimately, lead us to a jury system and, indeed, a justice system that more fully reflects the diversity of our country.

Our program today has a strong focus on the representation of indigenous people on juries in Alberta and across the country. We are delighted to have a number of Indigenous leaders with us today – elders, judges, lawyers and other leaders. I urge you to keep these other challenges in mind while you reflect on what you hear over the course of the day and in how you share your thoughts, ideas and experiences throughout the time we are together.

As we start our journey together today to share ideas and experiences, I would urge you to be careful in making the assumption that everyone in the community is necessarily eager to participate in the jury process. Public trust and confidence in the criminal justice system is, I suggest, intimately connected to strong public participation in our jury system. In particular, I suggest that we need to be open to hearing and understanding that Indigenous people may be suspicious, even hostile to a justice system that is not part of their history and traditions and was imported into modern-day Canada from Europe.

The devastating experiences of Indigenous people with the residential school system, the significant over-representation of Indigenous people in our criminal justice system, our social welfare system and, most particularly, in our prison populations across Canada, speak strongly to the need for reconciliation, building trust, and the strengthening of relationships between Indigenous and non-Indigenous people in our country. over the course of today, I encourage you to consider the issue of jury representativeness as regards indigenous people in Canada in a much, much broader context.

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