

# JURY REPRESENTATION IN CANADA

## HALIFAX ROUNDTABLE

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

Representation for Indigenous Peoples and African Nova Scotians, accessibility for persons with disabilities, the recruitment of volunteer jurors, cultural competency training and a discussion of R. v. Kokopenace and Bill C-75.

By Maria Aylward, December 2019

ATLANTIC  
CANADA



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## ROUNDTABLE ON JURY REPRESENTATION September 21, 2019 ▪ Halifax, Nova Scotia

Schulich School of Law, 6061 University Avenue, Halifax, NS  
Weldon Law Building – **Rooms:** W305 (Plenary), W308 and W309 (Breakouts)

### PREVIOUS ROUNDTABLES

- April 6, 2019, Winnipeg, Manitoba
- June 1, 2019, Vancouver, British Columbia

### UPCOMING ROUNDTABLES

- Alberta, November 2, 2019
- Ontario, Quebec (Dates to be confirmed)

### PLANNING COMMITTEE

- The Honourable Duncan Beveridge, Chair, Court of Appeal, Nova Scotia
- Mr. Donald Clairmont, Director at Atlantic Institute of Criminology, Dalhousie University
- H. Archibald Kaiser, Professor, Schulich School of Law and Department of Psychiatry, Faculty of Medicine (Cross-Appointment) Dalhousie University
- L. Jane McMillan, PhD, Chair & Associate Professor, Department of Anthropology St-FX University
- The Honourable Chief Justice Michael J. Wood, Court of Appeal, Nova Scotia
- Ms. Christine O'Doherty, Executive Director, CIAJ

**Official Reporter:** [Ms. Maria Aylward](#), Lawyer, Manager, Project and Business Development, CIAJ

# AGENDA

## **8:45–9:00 am: Introduction and Welcome Remarks**

- [The Honourable Chief Justice Michael Wood](#), Court of Appeal, Nova Scotia
- [Bernie Francis](#), Welcome Prayer and Land Acknowledgment

## **9:00–10:00 am: The Need for Radical Jury Reform**

- [Professor Kent Roach](#), Professor & Prichard Wilson Chair in Law and Public Policy, University of Toronto, Faculty of Law

## **10:00–10:15 am**

- [Senator Kim Pate](#)

Topic: Bill C-75

## **10:15–11:00 am: The Jury Selection Process in Nova Scotia**

- [Ms. Dawn Bishop](#), Coordinator of Administrative Services, NS Public Prosecution Service

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## **11:00–11:15 am – HEALTH BREAK –**

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## **11:15 am–12:30 pm: Concrete Experiences of the Jury Selection Process: How Does It Impact Communities?**

**Moderator and Speaker:** [H. Archibald Kaiser](#), Professor, Schulich School of Law

**Speakers:** [Kelly J Serbu](#), Q.C. Serbu Law Firm; [Jennifer Cox](#), Mi'kmaq Rights Initiative, [Alexander MacKillop](#), Barrister & Solicitor at Mackillop Pictou Law Group Inc.

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## **12:30–1:30 – LUNCH –**

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**1:30–3:00 pm: Workshop** (Health Break will be taken during the workshop)

### **Moderators:**

Group 1: The Honourable Duncan Beveridge & L. Jane McMillan

Group 2: Mr. Donald Clairmont & The Honourable Chief Justice Michael J. Wood

Group 3: Prof. H. Archibald Kaiser & The Honourable Colleen Suche

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## **3:00–3:15 pm – BREAK –**

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## **3:15–4:15 pm: Plenary**

**Moderator:** [Prof. H. Archibald Kaiser](#), Schulich School of Law. Each group will report on their discussion.

## **4:15–4:30 pm: Closing Remarks**

- [The Honourable Chief Justice Michael Wood](#), Court of Appeal, Nova Scotia

## BIOGRAPHIES

**Justice Duncan Beveridge** is a graduate of Acadia and Dalhousie Law School. He was admitted to the N.S. Bar in 1979, practicing mainly in the fields of criminal and administrative law. A regular presenter at Bar Admission courses, and C.L.E. conferences, he also taught part-time at Dalhousie Law School for 10 years, and was on the Faculty of the Federated Law Society's Annual Criminal Law Programme for several years. He received the designation of Queen's Counsel in 1997, and was appointed to the Nova Scotia Supreme Court in 2008 and then to the Court of Appeal in 2009.

**Dawn Bishop** moved to Canada from the United States in 2004 and was sworn in as a Canadian Citizen in 2013. She graduated from Bergen Community College, Paramus, New Jersey - Degree in Paralegal Studies and started her Paralegal career in 1999. In 2010, she accepted a position with the Department of Justice, working in all levels of the courts. In October, 2014, she accepted the position of Jury Coordinator at the Halifax Law Courts and held it until May 2019. She now works with the Public Prosecutions Services as a Coordinator of Administrative Services. She was President of the Paralegal Association at Bergen Community College and a member of the Paralegal Association of New Jersey. She is also an active participant in the Court Services Jury Administrative Review Project.

**Donald Clairmont** is professor emeritus and director of the Atlantic Institute of Criminology at Dalhousie University. Over the past 30 years he has specialized in research focusing on the criminal justice system at different levels (policing, prosecution, defence, sentencing, extra-judicial programs and corrections). More recently he has emphasized research dealing with troubled young people (causation, involvement in the criminal justice, and rehabilitation /reintegration) and especially the experiences of young people in Indigenous communities. In all Maritime provinces he has worked with First Nations in their developing their own justice systems and confronting specific issues such as FASD and substance abuse. Currently he is engaged in similar collaborative projects in three Maritime provinces. He has been senior researcher in three Royal Commissions (Nova Scotia, Ontario and Manitoba).

**Jennifer Cox** joined KMKNO in the fall of 2018. She graduated with a Bachelor of Arts in 91, and a Bachelor of Law in 94 from Dalhousie University. Born and raised in Truro, Nova Scotia and a member of the Fort William First Nation in Thunder Bay. Proud mom to two young ladies: Kate, 24 and Jill, 19. Jennifer has worked as a private family practitioner and defence counsel, drug prosecutor, civil litigator, counsel to the Minister of Justice at the Inquiry into the wrongful conviction of David Milgaard, a staff lawyer with both Dalhousie Legal Aid Service and Nova Scotia Legal Aid (NSLA) and was recently Lead Commission Counsel for the National Inquiry into Missing and Murdered Indigenous Women and Girls. Jennifer has also worked with APC, KMKNO and FSIN in various portfolios and was part of the KMKNO team advocating for changes to Children and Family Services legislation in Nova Scotia in 2015.

**H. Archibald (Archie) Kaiser** is a Professor at the Schulich School of Law and is cross-appointed to the Department of Psychiatry at Dalhousie University. At the Law School, he teaches Criminal Law,

Criminal Procedure and Mental Disability Law: Civil and Criminal. In the Department of Psychiatry, he presents Legal Issues in Psychiatry in the Residency Training Program. He has been a director of several organizations, including the Canadian Mental Health Association, Nova Scotia Division, the Healthy Minds Co-op and reachAbility and was a member of the Mental Health and the Law Advisory Committee of the Mental Health Commission of Canada. He is currently a Provincial Advisor to People First Nova Scotia and a member of the Board of the Nova Scotia Association for Community Living. He has been active in several law reform campaigns. His publications are fairly evenly split between Criminal Law and Mental Disability Law.

Originally from Truro, Nova Scotia, **Alexander MacKillop** obtained a Bachelor of Arts degree with a major in Criminology from Saint Mary's University in 2011. Alexander obtained his law degree from the Schulich School of Law at Dalhousie University in 2015, and was called to the Nova Scotia Bar June 2016. Alexander opened his own law firm in Halifax, Nova Scotia with his partner. Alexander has a general practice with a focus on criminal law, frequently litigating in Provincial Court and also having experience litigating in the Supreme Court of Nova Scotia and the Court of Appeal. Furthermore Alexander practices corporate law, business law, and medical cannabis law. He is a member of the Nova Scotia Barristers' Society Race & Equity Committee, the Criminal Lawyers' Association, the Dalhousie Pro-Bono Committee, and the Canadian Bar Association.

**Dr. L. Jane McMillan** is the former Canada Research Chair for Indigenous Peoples and Sustainable Communities (2006-2016), and is Chair and Associate Professor of the department of Anthropology at St. Francis Xavier University. Jane received her PhD from UBC in 2003 and is a cultural and legal anthropologist with a specialization in Indigenous law. She is the author of Truth and Conviction: Donald Marshall Jr. and the Mi'kmaw Quest for Justice (UBC Press 2018) and a board member of Innocence Canada.

**Kent Roach** is a Professor of Law at the University of Toronto. He represented Aboriginal Legal Services of Toronto in the jury selection case of R. v. Williams and the David Asper Centre for Constitutional Rights in its intervention in the Ontario Court of Appeal in R. v. Kokopenance. He was volume lead for the Truth and Reconciliation Commission's fifth volume on the legacy of residential schools. His 14th book is Canadian Justice Indigenous Justice The Gerald Stanley Colten Boushie case published by McGill Queens Press this year and he has an article on Bill C-75 and jury selection forthcoming in the Canadian Bar Review.

**Kelly J. Serbu Q.C.** is a proud member of his Métis community. He is also visually impaired as a result of Stargardt's disease. Mr. Serbu's Q.C. preferred areas of practice as a lawyer are criminal law and personal injury/civil litigation law. He has argued many constitutional cases involving violations of the Canadian Charter of Rights and Freedoms. He has appeared at all levels of court including the Provincial Court, Supreme Court and Nova Scotia Court of Appeal. He has also presented cases before a variety boards and tribunals throughout New Brunswick and Nova Scotia. Since 2008, Mr. Serbu Q.C. has been an Adjudicator with the Indian Residential Schools Adjudication Secretariat. As such, he is responsible for conducting hearings and rendering decisions on compensation for survivors of

the Indian Residential Schools. This incredible work has taken Mr. Serbu Q.C. all over Canada where he has heard hundreds of these compensation hearings.

**Chief Justice Michael J. Wood** was born in Portsmouth, England, while his father was on exchange with the Royal Navy. He studied chemistry at Acadia University and graduated with a Bachelor of Laws degree from Dalhousie University in 1982. He was admitted to the Nova Scotia Bar that same year. As a lawyer, Chief Justice Wood practiced law for almost 30 years with Burchells LLP, focusing primarily on civil litigation and administrative law. As a Judge, Chief Justice Wood was active in the administration of the Supreme Court through his involvement in many committees, including those related to the Civil Procedure Rules, court clerkship, and insolvency. Chief Justice Wood has also served as a mentor for African Nova Scotian and Indigenous lawyers interested in applying to become a Judge, an initiative launched by his predecessor, Chief Justice MacDonald, in partnership with the Indigenous Blacks & Mi'kmaq Initiative at the Schulich School of Law at Dalhousie University. Chief Justice Wood is also active in legal education, including as a member of the board of directors of the Canadian Institute for the Administration of Justice and has lectured for many years at the Schulich School of Law.

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## **Introduction: Spotlight on Jury Representation in Canada**

### ***CIAJ Roundtables***

This report was produced from the third of a series of Roundtables on jury representation held in Halifax, Nova Scotia on September 21, 2019. The objective of CIAJ's Roundtables is to gather the views and suggestions of a cross-section of the community about juries with a goal to achieving greater inclusivity and building 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 several communities: Indigenous Peoples, African Nova Scotians, persons with disabilities and newcomers. 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.

Issues in Nova Scotia are not necessarily the same issues as elsewhere in the country, and having regional sessions creates the opportunity to explore differences and account for nuances. Each Roundtable is meant to explore jury representation in a specific region, gathering information which will be assimilated with perspectives from other regions in Canada to form national recommendations. Part of 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.

Topics discussed at length in Halifax include the importance of accessibility for persons with disabilities, the option of recruiting volunteer jurors, the necessity for cultural competency training for actors in the justice system and the failings of *R v Kokopenace* and Bill C-75.

This report refers to many studies that rigorously analyze these topics and is no substitute for them. 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.

### ***Kokopenace***

The leading case governing jury representation remains the 2015 Supreme Court of Canada case *R v Kokopenace*<sup>1</sup>, 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 *Charter*.

Writing for the majority, Justice Moldaver determined that a jury roll will be considered representative where the source lists used to collect the names of jurors **randomly draws** from a “**broad cross-section of society**” followed by the **delivery of notices to the persons randomly selected**.<sup>2</sup> This process is said to provide potential jurors with a “fair opportunity” to participate in jury selection. Additionally, the requirements are further narrowed since the state must only make “reasonable efforts” to ensure that all conditions are met for a representative jury under ss.11(d)(f) of the *Charter*.<sup>3</sup>

Representation in this context centres around the process used to compile the jury roll and not the jury’s ultimate composition.<sup>4</sup> Thus, the 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.

Justice Cromwell, delivering minority reasons for himself and Chief Justice McLachlin, remarked that ignoring the state’s obligations of inclusion “is an affront to the administration of justice and undermines public confidence in the fairness of

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<sup>1</sup> *R v Kokopenace*, 2015 SCC 28, [2018] 2 SCR 398. [*Kokopenace*].

<sup>2</sup> *Ibid* at para 40. (Emphasis added).

<sup>3</sup> *Ibid*.

<sup>4</sup> *Ibid* at para 40 and 42.

the criminal process.”<sup>5</sup> Furthermore, the process of random selection should not allow the state to ignore significant departures from a properly conducted selection process.<sup>6</sup> Justice Cromwell emphasized that the “fair opportunity” test removes the focus from the state’s constitutional obligation to provide a representative jury.<sup>7</sup> The state has a constitutional obligation not to breach *Charter* rights, not just to make “reasonable efforts” not to breach their rights.<sup>8</sup>

The majority said that representation on juries in light of section 11(d) and (f) of the *Canadian Charter of Rights and Freedoms* is about the jury selection process and not the final make-up of juries, which need not proportionately represent the diversity of Canada.<sup>9</sup> Justice needs to be perceptible to marginalized communities to be accepted and legitimized—and for some that means seeing community members on their juries.

### ***The Importance of a Representative Jury***

As John Adams said in 1774, “representative government and trial are the heart and lungs of liberty.” As stated above, the strong minority in *Kokopenace* dissented with a focus on the role of the jury: acting as the conscience of the community, providing a bulwark against oppressive laws, serving as an educational tool about the criminal justice system, and assisting in increasing societal trust in the system as a whole.<sup>10</sup> Indeed, the jury has historically been revered as an institution essential to democracy and the legitimization of the criminal justice system in the eyes of the public. The political and symbolic significance of jury representation is paramount.<sup>11</sup>

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<sup>5</sup> *Ibid* at para 195.

<sup>6</sup> *Ibid* at para 233.

<sup>7</sup> *Ibid* at para 249.

<sup>8</sup> *Ibid* at para 250. See also the reasons of Karakatsanis J. at paras 160-162.

<sup>9</sup> *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.

<sup>10</sup> *Kokopenace*, *supra* note 1.

<sup>11</sup> Law Reform Commission of Canada, *The Jury*, Report 16 (1982).

Representation on juries is not a new issue in Canada and has been considered at length through government reports<sup>12</sup> and by the Supreme Court of Canada.<sup>13</sup> Bill C-75 also aims to rectify certain jury representation issues by abolishing peremptory challenges to address the concern that this aspect of the jury selection process may be used to discriminate unfairly against potential jurors.<sup>14</sup>

This legislative change has been described as a response to the acquittal of Gerald Stanley (a white Saskatchewan farmer) in the case concerning the shooting death of Colten Boushie (a 22-year-old Cree man) by an all-white jury.<sup>15</sup> During the case, the defence used five peremptory challenges to remove all visibly Indigenous persons from the jury. The *Stanley* case was one example where members of marginalized or racialized communities were underrepresented on a jury.

*Stanley* helped shed a light on jury representation from an Indigenous perspective. The Roundtable also included perspectives from African Nova Scotians and persons with disabilities. From a common-sense perspective, an accused would theoretically hope for jury members that understand their background and lived experience. One of the presenters at the Roundtable, Alexander MacKillop of the Mackillop Pictou Law Group observed that African Nova Scotians often face unique social and economic challenges. This issue was also identified during *The Royal Commission on the Donald Marshall, Jr Prosecution*.<sup>16</sup> Many problems

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<sup>12</sup> Ontario, *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by the Honourable Frank Iacobucci* (Toronto: Ministry of the Attorney General, 2013) [*"Iacobucci Report"*]; Debwevin Jury Review Implementation Final Report (2018). Retrieved from:

<https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/debwevin/> [*"Debwevin Report"*]

Manitoba, *The Aboriginal Justice Implementation Commission, Report of the Aboriginal Justice Inquiry of Manitoba* (1991) vol 1 [*"The Manitoba Aboriginal Justice Inquiry"*]; Nova Scotia, *Royal Commission on the Donald Marshall, Jr, Prosecution: Digest of Findings and Recommendations* (Nova Scotia: 1989) [*"The Royal Commission on the Donald Marshall, Jr Prosecution"*]. Truth and Reconciliation Commission of Canada. (2015). 'Calls to Action.' [TRC] Retrieved from:

[http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls\\_to\\_Action\\_English2.pdf](http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf)

<sup>13</sup> Kokopenace, *supra* note 1.

<sup>14</sup> Legislative Background: *An Act to Amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, as enacted (Bill C-75 in the 42<sup>nd</sup> Parliament)

<sup>15</sup> *R v Stanley*, 2018 SKQB 27 (CanLii). [*Stanley*] This case is often referred to as the "Colten Boushie Case."

<sup>16</sup> Nova Scotia, *Royal Commission on the Donald Marshall, Jr, Prosecution: Digest of Findings and Recommendations* (Nova Scotia: 1989) [*"The Royal Commission on the Donald Marshall, Jr Prosecution"*].

discussed therein are felt to remain relevant, including a lack of proportional representation of visible minorities on juries.<sup>17</sup> The historic distrust between African Nova Scotians and the legal system combined with their over-representation in legal custody<sup>18</sup> and underrepresentation on juries results in a multifaceted problem.

Similarly, people with disabilities are often forgotten in conversations about the representation of juries despite making up approximately 22% of the Canadian population over the age of 15.<sup>19</sup>

### ***The Jury System in Nova Scotia***

In Canada's criminal justice system, only a portion of scheduled jury trials occur. In Nova Scotia, only 27 jury trials were held in 2015–2016 from the 142 originally scheduled.

The province's jury panels are compiled from the list of people who hold Nova Scotia Health cards, the appropriateness and effectiveness of which will be further discussed below. The Jury Coordinator requests approximately 30,000 names and associated addresses per year. Once this master list is reviewed and approved by a Justice of the Nova Scotia Supreme Court<sup>20</sup>, the Jury Coordinator creates panels from this list.

In order to determine how many jury summonses will be required in each trial, the Jury Coordinator prepares monthly forecasting sheets based on several factors

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<sup>17</sup> *Ibid.*

<sup>18</sup> The numbers showed that in 2014–2015, about 16 percent of youth sentenced to a youth correctional facility were African Nova Scotian and 12 percent were Indigenous. For adults sentenced to jail, about 14 percent were African Nova Scotian and seven percent were Aboriginal.  
<https://www.cbc.ca/news/canada/nova-scotia/black-indigenous-prisoners-nova-scotia-jails-1.3591535>  
(May 20, 2016)

<sup>19</sup> Statistics Canada, *A demographic, employment and income profile of Canadians with disabilities aged 15 years and over, 2017*, by Stuart Morris, Gail Fawcett, Laurent Brisebois & Jeffrey Hughes, Catalogue No 89-654-X (Ottawa: Statistics Canada, 28 November 2018).

<sup>20</sup> Section 10(2) of the *Juries Act*, S.N.S. 1998, c. 16, O.I.C. 2000-356 (June 29, 2000).

such as the length and nature of the trial, the number of accused and charges, and whether a challenge for cause is anticipated.

Those summoned can apply to be excused or deferred from jury duty for medical reasons.<sup>21</sup> Residents of the province who are not Canadian citizens are disqualified as are those who have served in the Armed Forces.<sup>22</sup>

Included in the speakers was Dawn Bishop, Coordinator of Administrative Services, NS Public Prosecution Service (and former Jury Coordinator). She provided the statistics concerning the number of summonses mailed versus the number of jurors who attended. For 2018–2019, it was rare for more than 1/3 of the jurors summoned to respond.

## **Barriers to Access**

### ***Criminal Records***

Section 4 of the *Nova Scotia Juries Act* disqualifies certain groups of people from serving as jurors such as judges or officers of any court, police officers and sheriffs. Furthermore, a person convicted of a criminal offence for which he was sentenced to two or more years in prison cannot serve.<sup>23</sup> This differs from province to province. For example, Saskatchewan's *Jury Act* only prohibits people who are imprisoned.<sup>24</sup>

During her presentation, Senator Kim Pate also raised the issue of actors in the justice system being unaware of the true consequences of sentencing, and that

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<sup>21</sup> *Ibid* at Section 5(1) and (3).

<sup>22</sup> *Juries Regulations* made under Section 27 of the *Juries Act*, S.N.S. 1998, c. 16, O.I.C. 2000-356 (June 29, 2000), N.S. Reg. 126/2000 as amended to O.I.C. 2015-277 (August 21, 2015), N.S. Reg. 308/2015

<sup>23</sup> Section 4 (e) of the *Juries Act* S.N.S. 1998, c. 16 O.I.C. 2000-356 (June 29, 2000). This is in line with the Criminal Code amendment (section 683(1)(c)) under Bill C-75 focusing on jurors convicted of more serious offences by only barring those who have been convicted of an offence for which they received a prison sentence of two years and have neither received a pardon nor a record suspension for it.

<sup>24</sup> Kent Roach "Juries, Miscarriages of Justices and the Bill C-75 Reforms," Forthcoming (2020) 98 (1) Canadian Bar Review, at 18. Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3453206](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3453206)

practical education in the way of visiting prisons would help address some of those knowledge gaps. Prison visits and education of sentencing consequences may potentially encourage people to reconsider excluding criminal record holders from serving as jurors, which is one of the most straightforward solutions to certain problems of representation.

### ***Insufficient Juror Compensation***

Compensation for jurors in Nova Scotia is \$40 per day.<sup>25</sup> Participants agreed the amount is far too low. As one participant noted, this amount barely covers taking the bus and buying lunch. Moreover, it was acknowledged that generally those who are able and willing to appear for jury duty have certain life circumstances, which limits how representative a jury may appear.<sup>26</sup> For jury service to be financially feasible, those called are often retired, unemployed or work for an institution that pays for time on jury duty, as there is no legal obligation on employers to grant a paid leave of absence. Newfoundland and Labrador is the only province where employers must grant their employees a paid leave of absence.<sup>27</sup>

Further, daily payment is only received if someone is selected to serve, meaning that people made to show up multiple times for jury selection will not receive anything. Anyone receiving social assistance is likely precluded from jury duty as recipients must demonstrate that they are looking for work in order to continue receiving payments.

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<sup>25</sup> Section 5(c) of the *Juries Regulations* made under Section 27 of the *Juries Act* S.N.S. 1998, c. 16 O.I.C. 2000-356 (June 29, 2000), N.S. Reg. 126/2000 as amended to O.I.C. 2015-277 (August 21, 2015), N.S. Reg. 308/2015

<sup>26</sup> *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. 30.

<sup>27</sup> *Jury Act*, 1991, SNL 1991, c 16, s.42. 130 The Toronto Star has also published a comparative list of the fees of all the provinces and territories in Canada. See "Can you afford jury duty? Here's how each province compensates you for your service" by Miriam Katawazi in the Toronto Star, February 2016. <https://www.thestar.com/news/investigations/2018/02/16/canyou-afford-jury-duty-heres-how-each-province-compensates-you-for-your-service.html>

## **Childcare**

The *Iacobucci Report* recommended that childcare and elder care expenses ought to be paid by the province for people selected, or children and elderly people ought to be able to accompany the potential jurors on an expense-paid basis.<sup>28</sup>

One of the presenters explained that access to childcare is a substantial barrier. While a childcare program through the Court was suggested by some participants, others deemed it unrealistic. Other suggestions included a childcare program cooperative. The participants felt that there was no easy solution to this issue, and that most of the time the Jury Coordinator would be prepared to exclude someone outright from jury duty who has childcare responsibilities. This may well be one of the reasons juries are often composed of younger persons and retired persons.

## **Delivery of Summons**

The *Manitoba Report* and *Iacobucci Report* both found that the practice of mailing summonses to jurors had the effect of excluding Indigenous Peoples both on and off reserves. Instead of regular mail, one participant suggested that registered mail would be more appropriate and to “really demand responses.” On the other hand, it was pointed out that many Indigenous Peoples in the province do not have access to mail due to difficult financial circumstances. It was suggested that Facebook may in fact be the best way to reach many Indigenous Peoples in Nova Scotia.

## **The Language of the Summons**

The 10<sup>th</sup> recommendation of the *Iacobucci Report* explains that the language used in juror summons is threatening and imperious. Most acutely, this occurs where the summons demands the potential jurors return the form or else risk incurring fines or imprisonment. While meant to encourage participation in the jury system,

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<sup>28</sup> *Iacobucci Report*, *supra* note 12.



the threat of fines or imprisonment deters people from participating in the first place, and results in potential jurors not returning the questionnaire at all. Further, imprisonment or fines resulting from a lack of response are not enforced in many jurisdictions, and thus serve little purpose on the summons form.<sup>29</sup>

The language used in the Nova Scotia summons is an example of this language.<sup>30</sup> This may aggravate the perspective of a person already wary of the justice system. It was agreed that language in the summons ought to be more accommodating and include useful information such as juror compensation and available accommodations.

### ***Citizenship***

Despite the changes to the wording of section 638(d) under Bill C-75, those who are not Canadian citizens are still prohibited from serving as jurors. In contrast, Manitoba's legislation allows for "residents" of the province to serve as jurors.<sup>31</sup> One participant observed that new Canadians would add fundamentally to the face of juries, since representation is meant to convey an accurate portrait of society's makeup. Professor Roach drew attention to 2016 census data revealing that only "3 in 10 of the 22% of Canada's population who are visible minorities were born in Canada."<sup>32</sup> It was suggested that allowing permanent residents to sit on juries

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<sup>29</sup> See *Iacobucci Report*, *supra* note 12 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, at 22.

<sup>30</sup> The Nova Scotia Supreme Court Jury Notice reads as follows: This summons requires action by you immediately. Failure to obey this summons is an offence punishable by a fine. Every person who is required to complete and return a juror information form, and without reasonable excuse, fails to do so; or gives false or misleading information in a juror information form or in an application to be excused/deterred from service as a juror; is summoned to attend and, fails to obey the summons or fails to answer when called by the jury coordinator or contravenes any other provision of the Juries Act, is guilty of an offence and liable on summary conviction to a penalty of not more than one thousand dollars. (Summons to Jury Duty, Form 1 September 2019)

<sup>31</sup> *The Jury Act*, C.C.S.M. J30, at s.3 (b).

<sup>32</sup> "Immigration and Ethnocultural Diversity: Key Results from the 2016 Census" The Daily 25 Oct 2017.

would increase the representation of visible minorities and new Canadians on juries, though would do little to increase Indigenous representation.

### **Source Lists**

In *Kokopanace*<sup>33</sup> the majority concluded that the right to jury representation does not focus on the ultimate composition of the jury roll. Rather, it is a right to a fair procedure for randomly selecting and forming a jury from a broad cross-section of the community. As such, the representation of 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.

Because the administration of justice falls under provincial jurisdiction, there is no uniform source list used across provinces and territories in Canada. Nova Scotia, Manitoba, New Brunswick, Northwest Territories, Newfoundland and Labrador, Prince Edward Island, Quebec and Saskatchewan all use a form of provincial health insurance records as at least one source to compile their jury rolls. Most recently, in 2019, Ontario amended its *Juries Act* to now use provincial health insurance-based source lists provided by the Minister of Health and Long-Term Care.<sup>34</sup>

The information used from health insurance records includes only names and addresses of potential jurors. One participant observed that creating a more representative jury pool is challenging without more information about the individuals summoned. Another noted that even if more information about potential jurors was known, in smaller provinces it is possible to run out of prospective jurors from underrepresented communities since they make up such a small proportion of the overall population.

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<sup>33</sup> *Supra* note 1.

<sup>34</sup> *Juries Act*, R.S.O. 1990, c. J.3, s.4.1.

Participants discussed whether health records form the most representative source lists. The Law Reform Commission of Nova Scotia has recognized that provincial medical insurance lists act as strong source lists.<sup>35</sup> Voters lists were used in Nova Scotia in the past but they quickly became outdated, losing track of voters that changed residences.<sup>36</sup> The Manitoba Aboriginal Justice Inquiry found that the province's switch to its medical insurance lists "contained a properly representative number of Aboriginal people" notwithstanding that underrepresentation remained an issue in Winnipeg.<sup>37</sup> The *Iacobucci Report* and *Debwewin Report* recommended using Ontario's health insurance list even though it was known that the list was incomplete for on-reserve names.<sup>38</sup> Prior to the amendment, Ontario used lists of the Municipal Property Assessment Corporation for jurors. For people living on reserve, sheriffs looked to Indian Band lists and Indigenous & Northern Affairs lists that were used despite being deemed out of date and inaccurate.<sup>39</sup>

It was suggested that drawing names from multiple sources may be a better method, provided a computer program can account for duplication. Some provincial health insurance lists are supplemented with other source lists. Taking Quebec as an example, sheriffs collect juror names from electoral rolls. However, the province uses the population register of the *Ministère de la Santé et des Services Sociaux* in addition to municipal valuation rolls and *Indian Act* Band Lists for names of Indigenous people living on reserves.<sup>40</sup>

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<sup>35</sup> Law Reform Commission of Nova Scotia 1994:3, Israel "The Underrepresentation of Indigenous Peoples on Canadian Jury Panels," *Law and Policy* Vol 25, No.1, 2003, at 45.

<sup>36</sup> *Ibid.*

<sup>37</sup> Public Inquiry into the Administration of Justice and Aboriginal People, Report on Aboriginal Justice Inquiry of Manitoba, Vol. 1 by A.C. Hamilton & C.M. Sinclair. (Winnipeg: Public Inquiry into the Administration of Justice and Aboriginal People, 1991) online: The Aboriginal Justice Implementation Commission <<http://www.ajic.mb.ca/volumel/toc.html>> at chapter 1.

<sup>38</sup> *Iacobucci Report*, *supra* note 12 at para 256, *Debwewin Report*, *supra* note 23 see "Exploring Alternative Databases to Create the Source List for the Ontario Jury Roll."

<sup>39</sup> *Iacobucci Report*, *supra* note 12 at paras 98–100, and Annexe B. *Kokopenace*, *supra* note 1 at paras 27 and 28.

<sup>40</sup> *Jurors Act*, RSQ, c J-2, s. 42.

Where provincial health lists are not used, many provinces provide for a host of other public sources. For example, Alberta and Yukon’s jury acts prescribe the use of voter lists, assessment rolls and “other public documents”.<sup>41</sup> In sum, the best lists are those which do not inadvertently favour a particular class of citizens and that are kept current within each province.

As to the larger problem of underrepresentation of Indigenous Peoples it was suggested that community-based solutions are the obvious first step. A representative should be going into communities asking how the legal system can best recruit their community members for jury-related purposes.

Targeting geographically in Nova Scotia to acquire more jurors from certain groups could be possible in areas where there are Indigenous or African Nova Scotian communities, however, this runs up against the issue of the fairness of representation versus randomness. Furthermore, summoning in smaller communities, especially one that is likely to harbour a distrust of the legal system, may not be a perfect solution—especially in reference to a trial featuring one of its members – as community members may not be eager to participate in such a trial.

## **Transformative Recommendations**

### ***Reaching the Public: Engaging Citizens in the Jury Process***

One participant noted that many people do not want to serve on juries even though serving is pivotal to continuing democracy. It was suggested that reaching out to students, community associations and churches to educate the public about the duties and benefits of jury service would be an important step. This should include education about the court system generally and begin as early as elementary school. Otherwise, the status quo will likely prevail. Social media was also

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<sup>41</sup> *Jury Act*, RSA 2000, c J-3, s.7, *Jury Act*, RSY 2002, c.129, at s.10.

suggested as an avenue to educate the public and encourage conversations in new forums.

A recent visit by the Supreme Court of Canada to Winnipeg where the judges met with high school students was cited as an example of what can be done to engage the public in the legal system,<sup>42</sup> with the hope of shaping the public's perception of the legal system in a positive way.

It was also pointed out that serving on a jury is a good learning experience and a way for people to contribute to their communities. Judges should emphasize the civic duty dimension of participating in the jury process to jury panels.

Sending representatives into rural communities to provide education sessions was suggested, though the cost is potentially prohibitive. An advertising campaign meant to prompt public interest in jury duty could emphasize its importance to the justice system and democracy. Testimonials featuring people with positive experiences serving as jury members were also proposed as part of the information provided with a jury summons.

### ***Acknowledging Underrepresentation for Persons with Disabilities and Reducing Barriers to Participation***

Professor H. Archibald Kaiser, Professor at Schulich School of Law, noted that people with disabilities are often left out of the discussion on jury representation. While no single definition of disability can fully capture the experiences of persons with disabilities, any definition must recognize the complexity that results from the interaction of an individual with their environment. The *Convention on the Rights of Persons with Disabilities* expresses the definition as “includ[ing] those who have long-term physical, mental, intellectual or sensory impairments which in interaction

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<sup>42</sup> <https://winnipeg.sun.com/news/news-news/back-to-school-supreme-court-judges-fan-out-to-take-students-questions>

with various barriers may hinder their full and effective participation in society on an equal basis with others.”<sup>43</sup>

Central to the discussion is the recognition of the prevalence of disability in Canadian society - 22% of Canadians aged 15 years and over (or about 6.2 million individuals) have one or more disabilities.<sup>44</sup> The number is even higher in Nova Scotia at 30%.

As per article 13 of the *Convention on the Rights of Persons with Disabilities*—which Canada has ratified—the country has an obligation to equally provide access to justice for persons with disabilities. Participation of people with disabilities on juries remains limited and few attempts have been made through federal or provincial legislation to achieve representation.<sup>45</sup> While the *Criminal Code* says that a juror with a physical disability may be permitted by the judge to have “technical, personal ... interpretive or other support services,”<sup>46</sup> people with disabilities are left unsure if they will be able to participate in the jury process effectively or with accommodation.

The question of whether section 628 of the *Criminal Code* provides enough support for people with disabilities to sit on juries was discussed. There are many venues through which they can be excluded by counsel or the judge due to hardship, or by self-elimination not only due to hardship but also lack of proper compensation and support.<sup>47</sup> With the threshold for representation set out in *Kokopenace* being so low, provinces have no legal incentive to increase measures

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<sup>43</sup> *Convention on the Rights of Persons with Disabilities*, 30 March 2007, 2515 UNTC 15 (entered into force 3 May 2008) article 1.

<sup>44</sup> Statistics Canada <https://www150.statcan.gc.ca/n1/pub/89-654-x/89-654-x2018002-eng.htm> (accessed on November 27, 2019).

<sup>45</sup> *Convention on the Rights of Persons with Disabilities*, 30 March 2007, 2515 UNTC 15 (entered into force 3 May 2008); Michelle Bertrand, Richard Jochelson & Lauren Menzie, “The Jury Representation Guarantee in Canada: The Curious Case of Disability and Justice Making” (2017) 10 *J Ethics in Mental Health* 3; Ontario is the only province to implement a duty to accommodate, see *Juries Act*, RSO 1990, c J.3, s4(a).

<sup>46</sup> *Criminal Code* Section 649.

<sup>47</sup> *Criminal Code* Sections 632, 633 and 638 (1) (e).

to reach out to underrepresented communities, consult with them or implement measures to increase their representation on juries.

Over and above barriers of stigma, discrimination and poverty faced by people with disabilities, Professor Kaiser also highlighted deficits in Jury Acts across Canada when it comes to protecting people with disabilities. For instance, in the British Columbia *Jury Act*, a person is disqualified if they are “subject to a mental or physical infirmity incompatible with the discharge of the duties of a juror,”<sup>48</sup> with no mention of provision of supports or assistive devices. The *Juries Acts* of Alberta, Manitoba, New Brunswick and Prince Edward Island use equally exclusionary and outdated language. While Nova Scotia’s language is fairly neutral stating “unable for any reason to discharge the duties”<sup>49</sup>, the language in Ontario’s *Jury Act* is the most inclusive, providing the inability to serve as a juror if one is “physically or mentally unable” and “cannot reasonably be accommodated in such a way as to allow them to perform those duties.”<sup>50</sup> Ultimately, provinces should discuss altering Juries Acts to specifically mention the duty to accommodate, and hence to provide support for persons with disabilities.

As discussed during the Roundtable, the process in Halifax seems to be that jury coordinators approach judges to ask about specific accommodations when the need arises. However, many jury deliberation rooms in Nova Scotia are not currently accessible to people with mobility issues. While some courtrooms in Nova Scotia are accessible (Bridgewater was a noted example) featuring elevators, accessible jury boxes, hearing and visual aids—many others cannot accommodate people with limited mobility. Participants agreed that this is a basic issue that can easily be addressed.

Accommodations are useless if people do not know that they exist or are available. In Nova Scotia people often get automatically excluded for mobility issues and it can be difficult for court staff, who are attempting to be sensitive to the

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<sup>48</sup> *Jury Act* [RSBC 1996] CHAPTER 242 (s. 3(1)(o)).

<sup>49</sup> *Juries Act*, CHAPTER 16 OF THE ACTS OF 1998 (s. 5(1)(4)).

<sup>50</sup> *Juries Act*, R.S.O. 1990, c. J.3 (s. 4(a)).

circumstances of any individual, to encourage them to appear when summoned. Better advertisement of the accommodation available,<sup>51</sup> in addition to providing better services, may encourage more people with disabilities to serve on juries.

### ***Jury Challenges are a Competency Issue: Cultural Competency Training for the Legal Community***

Lawyers and actors in the legal community must understand the interplay between the Canadian legal system and indigenous self-governance in order to move forward together. The Final Report of the *Truth and Reconciliation Commission of Canada (TRC Report)* included 94 calls to action to affect reconciliation with Indigenous Peoples.<sup>52</sup> Call to Action 27 was directed at the legal community of Canada, as follows:

Ensure that lawyers receive appropriate cultural competency training, 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 antiracism.<sup>53</sup>

Since the *TRC Report*, other bodies have contributed resources to reform and promote awareness of Indigenous issues in Canada.<sup>54</sup> In addition to understanding the current challenges that Indigenous Peoples face in the justice system, participants at the Roundtable agreed that the legal community should be

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<sup>51</sup> Accessibility includes more than accessing the physical space of the courtroom, but also interpreting visual or auditory evidence for people that are visually or hearing impaired. For example, one participant noted that recent changes have made the Nova Scotia Justice website less accessible to those using screen readers.

<sup>52</sup> *The Final Report of the Truth and Reconciliation Commission of Canada (TRC Report)*. Available at: [http://www.trc.ca/assets/pdf/Honouring\\_the\\_Truth\\_Reconciling\\_for\\_the\\_Future\\_July\\_23\\_2015.pdf](http://www.trc.ca/assets/pdf/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf)

<sup>53</sup> *Ibid.*

<sup>54</sup> Among other things, see *Brown v. Canada (AG)*, 2017 ONSC 251 and the National Inquiry into Murdered and Missing Indigenous Women and Girls. Available at: <https://www.mmiwg-ffada.ca/>



aware of the historical inequities of Indigenous Peoples which includes residential schools, dispossession of land and forced relocation.

Examples of cultural competency deficiencies are present in Nova Scotia case law. In its 2011 decision *R v Fraser*, the Nova Scotia Court of Appeal (NSCA) considered defence counsel to be ineffective by failing to advise a client as to the statutory right to challenge for cause,<sup>55</sup> following the reasoning of the 1993 ONCA decision of *R v Parks*.<sup>56</sup>

Mr. Fraser, a black high school teacher accused of sexually assaulting a 15-year-old white girl, indicated that he had concerns regarding the all-white jury. In response, Fraser's counsel advised him that nothing could be done, and that he had "gotten lots of black guys off before with all-white juries."<sup>57</sup> The NSCA allowed the appeal and ordered a new trial on the basis of ineffective assistance of trial counsel. The Court held that trial counsel's "failure to provide advice to the appellant in response to his client's explicit and perfectly reasonable inquiries, effectively denied him his statutory right to challenge potential jurors for cause."<sup>58</sup> The ability to advise one's client on different facets of challenges for cause, including discrimination against Indigenous people, minorities and people with disabilities, is a basic competency required by defence counsel.

One participant voiced that she was unaware whether cultural competency training was available for lawyers in Nova Scotia. Indeed, if we want to encourage cultural competency among lawyers, the legal community must know where to access such resources. It was suggested that counsel in jury trials may not have been educated in cultural competency issues since law school. A helpful resource for lawyers in that regard is a joint project of the Advocates' Society, The Indigenous Bar Society and The Law Society of Ontario: [Guide for Lawyers working with Indigenous Peoples](#).

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<sup>55</sup> *R v Fraser*, 2011 NSCA 70, 273 CCC (3d) 27. [*Fraser*]

<sup>56</sup> *R v Parks*, 15 OR (3d) 324, 24 CR (4th) 81. [*Parks*]

<sup>57</sup> *Fraser*, *supra* note 55 at para 69.

<sup>58</sup> *Ibid* at para 76.

## ***Resources Needed for Community-Based Solutions and a Mi'kmaq Justice Strategy***

It was acknowledged that a one-size-fits-all approach for Indigenous communities across Canada is of no value, and community consultation is key. One of the groups in the breakout session developed the following Proposed Model for Inclusion:

1. Identify the individual(s) who could reach out to communities
  - Legal aid, Crown, Health Directors
  - Court outreach to communities
2. Interact and engage in communities affected by jury representation issues
  - Explain limitations from a court's perspective
  - Ask for suggestions and advice
3. Compile information
4. Identify and deal with other systemic issues
  - Race, sex, lack of resources, language barriers, etc.

Presenter Jennifer Cox, from the Mi'kmaq Rights Initiative and Nova Scotia Legal recommended consultation with the Chief and Council, elder forums, youth forums and health directors to obtain community input. Discussions with community members could include questions such as:

- What is the best approach for acquiring names and addresses of your community members for the purpose of a jury source list?
- What would a representative jury look like for your community?
- What does substantive equality mean to your community?
- What questions posed to jurors might reveal bias against a member of your community?

In discussing possible solutions, one participant voiced that the pressing issues in marginalized communities are often unknown by the general population. If systemic discrimination and distrust of the legal system lead to unwillingness by

communities to engage, then consultation and information gathering becomes paramount in rebuilding their trust in the justice system.

Support for a Mi'kmaq Justice Strategy and nation-to-nation building is supported in *UNDRIP*<sup>59</sup> and the *Royal Commission on the Donald Marshall, Jr. Prosecution*.<sup>60</sup> Elements of this justice strategy might include promoting culturally appropriate practices within the justice system, jury reform, education initiatives and advocacy. In Nova Scotia, the resources have not yet been put in place to allow such an undertaking within the Mi'kmaq nation.

### ***A Substantive Approach is Best: Kokopenace and the Legislature***

Though not new law, legal actors are still discussing if the majority in *Kokopenace* fell short. The Supreme Court's treatment of the notion of a representative jury revealed divergent views on the role of the *Charter* and of state responsibility in remedying patterns of inequity and discrimination in Canada's criminal justice system. By rejecting substantive equality, the majority dismissed the suggestion that the state is responsible for unintended effects of its actions.

Professor Roach pointed to section 629 in the *Criminal Code* as a provision where the federal government could have legislated above the requirements for representation set out in *Kokopenace* and implemented measures to substantively increase the number of jurors from underrepresented communities that sit on juries.

Section 629 of the *Criminal Code* allows the accused or the prosecutor to challenge the jury array on "the ground of partiality, fraud or wilful misconduct on the part of the sheriff." Professor Roach argued that a "substantive equality standard" for challenges under section 629 is needed and ought to provide for a

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<sup>59</sup> *UNDRIP: United Nations Declaration on the Rights of Indigenous Peoples*: resolution / adopted by the General Assembly, UN General Assembly, October 2, 2007.

<sup>60</sup> Support is further outlined in *TRC Report 2015*, *supra* note 12 and *MMIWG Report 2019*, *supra* note 54.

challenge on the grounds of “significant under-representation of Aboriginal people or other disadvantaged groups that are over-represented in the criminal justice system.”<sup>61</sup> Professor Roach’s method is akin to Justice Cromwell’s dissenting opinion in *Kokopenace* in which he advocated for a results-based approach to representation on jury arrays and panels and not the formalistic approach as adopted by the majority. Such a method would not be unique in the *Criminal Code* as it sets out in section 626(2) explicit prohibitions of disqualification of jurors based on sex.

Professor Roach further observed that despite the long history of section 629 (enacted in 1892), challenges based on it have been unsuccessful short of demonstrating intentional discrimination.<sup>62</sup> Section 629 uses a formalist vision of equality that only takes into account explicit and wilful bias, but not implicit bias on the behalf of individuals or the structural bias of legal institutions.<sup>63</sup> This formalist approach is supported by the majority ruling in *Kokopenace*’s qualification of representation for the purposes of ss.11(d)(f) of the *Charter* of representation being satisfied where there is random selection.<sup>64</sup>

Participants of the Roundtable discussed whether Bill C-75 has gone far enough to increase the representation of juries. While abolishing peremptory challenges was recommended by both the *AJI* and the *Iacobucci Report*, some participants were of the view that there were nevertheless more transparent tools to increase the representation of juries. Section 633 of the *Criminal Code* gives judges the

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<sup>61</sup> Roach, *supra* note 24 at 16, Kent Roach *Brief to the House of Commons Justice and Human Rights Committee September 2018*. See also Aboriginal Legal Services *Brief to the House of Commons Justice and Human Rights Committee September 2018*.

<sup>62</sup> Richard Jochelson et al., “Revisiting Representation in the Manitoba Jury,” (2015) 37 Man L.J. 365, Mark Israel “The Underrepresentation of Aboriginal People on Canadian Jury Panels” (2005) 25 Law and Policy 37.

<sup>63</sup> Jerry Kang et al., “Implicit Bias in the Court Room,” (2014) 59 UCLA L.Rev 1124.

<sup>64</sup> *Kokopenace*, *supra* note 1 at paras 48–50. The test in *Kokopenace* sets a low bar for provinces to implement measures to increase representation of groups historically and currently underrepresented as ss.11(d)(f) will only be breached by the state if it is willfully excluded a group and does not take reasonable measures to compile a jury roll that draws from a broad section of society from which jurors are to be randomly chosen.<sup>64</sup>

ability to direct jurors to “stand by” for reasons of “maintaining public confidence in the administration of justice.”

Professor Roach suggested that for the amendment to increase representation, judges should use the public confidence “stand by” in cases where the inclusion of a visible minority would increase public confidence in the administration of justice.<sup>65</sup> While the question of visibility itself possesses problems<sup>66</sup>, the section 633 “public confidence” ground should be informed by section 15 of the *Charter* principles of substantive equality where the concern is “whether the accused, the complainant or even critical witnesses come from a disadvantaged group that may be vulnerable to discriminatory stereotypes or animus.”<sup>67</sup> This principle moves beyond considering juries as merely representative upon the satisfaction of the appropriate procedures and instead concerns itself with the composition of the jury that actually tries the case.<sup>68</sup> Due to uncertainty concerning how to use the new ground under section 633 operates (*vis-à-vis* what questions will be permissible to put to a juror by the judge or even by counsel for the purposes of representation), judges will try to implement the provision in such a way that provides for substantive representation.

### ***Should the Legal System Change the Way It Assesses Bias?***

Bill C-75 has now placed judges as triers for challenges for cause instead of jurors.<sup>69</sup> However, even with experienced judges vested with powers under section 633 and presiding over challenges for cause, it seems beyond question that problems of detecting bias in jurors remain. As it currently stands, the case law permits questions to be put to jurors that essentially ask jurors whether they

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<sup>65</sup> Roach, *supra* note 24 at 25.

<sup>66</sup> Roach, *supra* note 24 at 34. These problems being that of privacy and the issue of how a judge is to know when a person is Indigenous or part of a minority group.

<sup>67</sup> Roach, *supra* note 24 at 26.

<sup>68</sup> Roach, *supra* note 24 at 26.

<sup>69</sup> *Criminal Code* s.640.

are likely to act in a discriminatory manner.<sup>70</sup> In *R v Williams*, Chief Justice McLachlin J. (as she was then) wrote:

The defence may question potential jurors as to whether they harbour prejudices against people of the accused's race, and if so, whether they are able to set those prejudices aside and act as impartial jurors. The question at this stage is whether the candidate in question will be able to act impartially.<sup>71</sup>

The earlier case *R v Parks* provides a good example of the kind of question to jurors that is permitted:

(2) Would your ability to judge the evidence in the case without bias, prejudice or partiality be affected by the fact that the person charged is a black Jamaican immigrant and the deceased is a white man?<sup>72</sup>

The “yes/no” posed in *R v Parks*<sup>73</sup> was also accepted in the context of prejudice against Indigenous people in *R v Williams*:<sup>74</sup>

(1) Would your ability to judge the evidence in the case without bias, prejudice or partiality be affected by the fact that the person charged is an Indian?

(2) Would your ability to judge the evidence in the case without bias, prejudice, or partiality be affected by the fact that the person charged is an Indian and the complainant is white?<sup>75</sup>

However, these questions do little to detect for more deep seeded implicit racial bias which jurors may not be aware that they hold.<sup>76</sup> The accepted questions can

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<sup>70</sup> *Parks*, *supra* note 56, 1993 CanLII 3383 (ON CA) [*Parks*], at “C. The Challenge for Cause.” Roach 32, In the *R v Khill* case the question posed to the jurors was “Would your ability to judge the evidence in this case without bias, prejudice or partiality, be affected by the fact that the deceased victim is an Indigenous person and the person charged with this crime is a white person?”

<sup>71</sup> *R v Williams*, 1998 CanLII 782 (SCC), [1998] 1 SCR 1128 [*Williams*] at 33.

<sup>72</sup> *Parks*, *supra* note 56, 1993 CanLII 3383 (ON CA). One can also see those questions deemed impermissible as they relate to juror’s prejudices towards crimes or crime in the first question posed to the jury in *Parks* and *R v Find*, 2001 SCC 32 (CanLII), [2001] 1 SCR 863 and *R v Spence*, 2005 SCC 71 (CanLII), [2005] 3 SCR 458.

<sup>73</sup> *Parks*, *supra* note 56 at “C. The Challenge for Cause.”

<sup>74</sup> *R v Williams*, 1998 CanLII 782 (SCC), [1998] 1 SCR 1128, at par 3 and 32-50.

<sup>75</sup> *Ibid.*

<sup>76</sup> Jerry Kang et al, “Implicit Bias in the Courtroom,” 59 UCLA L.Rev. 1124 (2012).

even exclude those who are aware of societal and systemic biases undergirding the case and may apply a more contextual understanding of the relation between the individual and institutional parties in the case than allowed.<sup>77</sup> In short, these questions in no way guarantee an honest or critical response from jurors.

Some participants at the Roundtable advocated for more precise and introspective questions to be put to jurors about their own implicit biases. In his presentation, Professor Roach suggested more open-ended and contextual questions to discern whether a juror is partial, or judges being open to allow for multiple choice questions to be put to jurors to probe for bias.<sup>78</sup>

Ultimately, Parliament ought to amend section 638 to include more precision to probe jurors for bias or create guidelines for their new powers and roles under ss.633 and 638(1). How can judges best use their power to create more representative and unprejudiced juries? Without further legislative guidance, will judges have to pose questions that fall outside established boundaries in case law? Bill C-75 gives judges new breadth in which to act, and it remains to be seen in which ways they take up the charge.

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<sup>77</sup> Ameil Joseph, “Erasing race but not racism in the Peter Khill trial,” CBC News 6 July 2018 at <https://www.cbc.ca/news/canada/hamilton/erasing-race-but-not-racism-in-the-peter-khill-trial-1.4736894>.

<sup>78</sup> Roach, *supra* note 24 at 33 and 34. Regina Schuller, Veronica Kazoleas and Kerry Kawakame “The Impact of Prejudice Screening on Racial Bias in the Courtroom” (2003) 33 Law and Human Behav.

## **Conclusion**

Participants discussed many levels of potentially transformative recommendations. Some impediments are “low hanging fruit” that can be addressed more easily, while others require a sweeping change in the way the legal system interacts with marginalized groups.

Overall, it was agreed that in Nova Scotia, the bar, judiciary and government need to consult with advocacy groups from marginalized communities such as African Nova Scotians, Indigenous communities and people with disabilities. Individuals from underrepresented groups should be included in the conversation. Reflecting a mantra that Professor Archibald Kaiser put forward from his work with people with disabilities, “nothing about us, without us”—we cannot move forward with solutions before we understand where the issues lie.

It was observed that the court in Nova Scotia has undertaken outreach measures and has engaged with communities on specific issues in the past. This puts it in a good position to take a leadership role to move forward in this area.



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