ARTICLE

SEEING JUSTICE DONE: INCREASING INDIGENOUS REPRESENTATION ON CANADIAN JURIES

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CITED: (2021) 26 *Appeal* 51

ABSTRACT

The underrepresentation of Indigenous people on Canadian juries threatens public confidence in the criminal justice system, particularly in cases involving Indigenous accused or defendants. Despite being the subject of many high-profile legal cases, inquiries, and reports, the problem endures today, and meaningful reform has been elusive. This paper considers the ways in which Indigenous people are excluded at each of the three stages of the juror selection process. It critiques the Supreme Court of Canada's ruling on the issue in the 2015 case of *R v Kokopenace* and concludes with several recommendations including that citizens be allowed to volunteer for jury duty in order to remedy the race-based disparity in representation on juries.

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TABLE OF CONTENTS

INTRODUCTION

On February 9th, 2018, a jury acquitted Saskatchewan farmer Gerald Stanley of murder and manslaughter in the death of Colten Boushie, a 22-year-old Cree man from the Red Pheasant First Nation. Stanley claimed to have accidentally shot Boushie while he was trespassing on Stanley's farm, whereas Boushie's friends claimed they drove onto the property in search of help with a flat tire. The shooting inflamed racial tensions in the province, and Stanley's acquittal by what appeared to be an all-white jury prompted an outpouring of anger and grief across Canada. Thousands attended protests in cities across the country, and the Prime Minister and multiple Cabinet ministers took the unusual step of commenting publicly on the trial's outcome, all to the effect that, as a country, "we have to do better."[1]

Much of the criticism of the verdict in the Stanley trial focused on the lack of visibly Indigenous people on the jury, a troubling and enduring issue in the Canadian criminal justice system. Part I of this paper highlights the jury's important role in the criminal justice system and outlines the history of Indigenous underrepresentation on Canadian juries. The following three parts discuss issues affecting Indigenous representation at each of the three stages of the jury selection process and address possibilities for reform at each stage. Finally, Part V considers allowing Indigenous people to volunteer for jury duty as one possible reform to remedy Indigenous underrepresentation and increase the Indigenous community's trust and confidence in the Canadian criminal justice system.

I. THE SCOPE OF THE PROBLEM

In *R v Sherratt*, the Supreme Court of Canada (the "Supreme Court") summarized the importance and role of the jury as follows:

> The jury, through its collective decision making, is an excellent fact finder; due to its representative character, it acts as the conscience of the community; the jury can act as the final bulwark against oppressive laws or their enforcement; it provides a means whereby the public increases its knowledge of the criminal justice system and it increases, through the involvement of the public, societal trust in the system as a whole.[2]

The longstanding exclusion and underrepresentation of Indigenous people from serving on juries has denied them the many benefits outlined above. It contributes to the pervasive belief that the Canadian justice system is a tool of colonial oppression, securing justice for the colonizers at the expense of the colonized. The issue was extensively canvassed in the 1999 *Report of the Aboriginal Justice Inquiry of Manitoba*,[3] as well as a 2013 report by

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1 "Ministers say Canada must 'do better' after Boushie verdict", *CBC News* (10 February 2018), online: <https://www.cbc.ca/news/politics/trudeau-ministers-boushie-verdict-reaction-1.4530093> [https://perma.cc/KV7S-7H2P] [CBC].

2 [1991] 1 SCR 509, 1991 CarswellMan 7 at para 30 [*Sherratt*].

3 The Aboriginal Justice Implementation Commission, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People*, vol I (Manitoba: AJIC, November 1999), at Chapter Nine: Juries, online: <http://www.ajic.mb.ca/volumel/chapter9. html> [https://perma.cc/Q66L-ZKZR] [Aboriginal Justice Inquiry].

former Supreme Court Justice Frank Iacobucci, *First Nations Representation on Ontario Juries*.[4] The issue was also considered by the Supreme Court in the 2015 case of *R v Kokopenace*.[5] This paper draws extensively on the calls for reform made in both the above reports, and the *Kokopenace* decision is summarized and critiqued in Part II.

In the introduction to his report, Justice Iacobucci notes that First Nations[6] people are "overrepresented in the prison population … [but] significantly underrepresented, not just on juries, but among all those who work in the administration of justice in this province, whether as prosecutors, court officials, defence counsel, or judges."[7] Despite constituting only 4.3 percent of the Canadian population, 25 percent of the country's federal prison inmates are Indigenous.[8] Indigenous people, especially women, are also significantly overrepresented as victims of crime. Indigenous women are three times more likely to be victims of violent crime compared to their non-Indigenous counterparts.[9] Indigenous people are dramatically overrepresented as both homicide victims (25%) and those accused of committing homicide (33%).[10] The fact that Indigenous people are both victims of crime and face criminal charges at disproportionately higher rates than the general Canadian population makes the need for their equal participation in the country's jury system all the more vital.

The Canadian justice system has a long history of all-white juries hearing cases involving Indigenous people, from the conviction of Manitoba Métis leader Louis Riel by an all-white jury and his subsequent hanging in 1885,[11] to the wrongful murder conviction of Donald Marshall Jr. by an all-white jury in 1971,[12] to Gerald Stanley's controversial acquittal by an all-white jury in 2018.[13] Manitoba's Aboriginal Justice Inquiry was prompted in part by the brutal murder of an Indigenous woman, Helen Betty Osborne, in 1971.[14] Sixteen years after her death, when two of her suspected murderers were finally put on trial, the case was heard by an all-white jury in an area where almost a third of the population was Indigenous.[15]

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4 Independent Review Conducted by The Honourable Frank Iacobucci, *First Nations Representation on Ontario Juries* (Ontario: Ministry of Attorney General, February 2013), online <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/iacobucci/First_Nations_Representation_Ontario_Juries.html> [https://perma.cc/KP4ACFXE] [Iacobucci Report].

5 2015 SCC 28 [*Kokopenace*].

6 Today, "Indigenous" is considered the correct and most inclusive term to refer to First Nations, Métis, and Inuit peoples living in Canada. The terms "Aboriginal" and "First Nations" have also been used in the past to refer to Indigenous peoples as a whole and are used in the reports discussed in this paper.

7 Iacobucci Report, *supra* note 4 at para 14.

8 Department of Justice, *Indigenous overrepresentation in the criminal justice system* (January 2017), online: <http://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2017/jan02.html> [https://perma. cc/88BU-EQW8].

9 *Ibid.*

10 *Ibid.*

11 *R v Riel*, [1885] UKPC 3.

12 Kent Roach, "Juries, Miscarriages of Justice and the Bill C-75 Reforms" (2020) 98 Can Bar Rev at 325.

13 CBC, *supra* note 1.

14 Aboriginal Justice Inquiry, *supra* note 3 at Volume II: The Death of Helen Betty Osborne.

15 *Ibid.*

As the *Report of the Aboriginal Justice Inquiry of Manitoba* stated, "whether it is the accused or the victim who is Aboriginal, the perception of a fair trial will be enhanced if Aboriginal people are properly represented on juries. They are, after all, very much affected by the outcome of trials in their communities."[16]

Whether or not increased representation on juries will necessarily lead to more just verdicts for Indigenous victims or those accused of crime, the law has long recognized that justice must not only *be* done, but must be *seen* to be done.[17] Where Indigenous participation on juries is concerned, justice is not being seen to be done. Increasing Indigenous participation in the jury system is a crucial step towards increasing the confidence and trust placed in the justice system by Indigenous people and Canadians in general.

II. THE JURY ROLL

The first stage in the jury selection process is the creation of the jury roll—the list of names from which potential jurors are drawn. Separate legislation in each province and territory governs the process followed in creating the list. Generally, the sheriff or another court services official in each judicial district compiles the list by drawing names from various provincial records. The type of record used to compile the jury roll can be crucial in ensuring a representative jury.

A. The *Kokopenace* Decision

Clifford Kokopenace, an Indigenous man from a reserve in northern Ontario, was convicted by a jury of manslaughter in 2008.[18] When significant problems with the 2008 jury roll came to light, Kokopenace appealed his conviction. While Indigenous people living on reserves made up more than 30 percent of the population in the judicial district of Kenora, where the trial took place, they constituted only 4.1 percent of the potential jurors on the 2008 roll.[19] Of the 175 people summoned for jury selection prior to Kokopenace's trial, only eight were residents of reserves.[20] Four of the eight were excused by the sheriff, and two did not respond to the summons.[21] The case reached the Supreme Court of Canada in 2015. In a strong dissent, with Chief Justice McLachlin concurring, Justice Cromwell stated that the issue at stake in the appeal was whether the guarantee of a representative jury "is real or illusory for Aboriginal people."[22]

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16 *Ibid* at Volume II: The Death of Helen Betty Osborne and Chapter Eight: The Jury.

17 *R v Sussex Justices, ex parte McCarthy*, [1924] 1 KB 256 at para 259.

18 *Kokopenace*, *supra* note 5 at para 4.

19 *Ibid* at para 197.

20 *Ibid* at para 305.

21 *Ibid* at para 305. As a person's race is not listed on the jury roll, residence on a reserve is the most accurate way to estimate Indigenous representation on the roll, as almost all those living on reserves are Indigenous. It is unclear whether either of the two on-reserve residents who attended the jury selection ultimately served on the trial jury.

22 *Ibid* at para 190.

The right to a representative jury is enshrined in sections 11(d) and 11(f) of the *Canadian Charter of Rights and Freedoms*.[23] Section 11(d) provides that any person charged with an offence has the right to a fair and public hearing before an independent and impartial tribunal, and section 11(f) confers the benefit of a trial by jury to any person charged with an offence punishable by at least five years of imprisonment.[24] The courts have held that a representative jury helps guarantee that jury's impartiality, though a lack of representativeness will not necessarily mean that the jury is not impartial.[25] The Supreme Court has also held that representativeness is an essential component of the right of the accused to a trial by jury.[26] If the jury is to fulfill its role as the "conscience of the community", it must be representative of that community.

Having recognized the importance of representativeness, the question becomes: What does it mean for a jury to be 'representative' of the community? How far does the requirement extend? As Justice McLachlin (as she then was) put the question in *R v Biddle*:

> The community can be divided into a hundred different groups on the basis of variants such as gender, race, class and education. Must every group be represented on every jury? If not, which groups are to be chosen and on what grounds? If so, how much representation is enough? Do we demand parity based on regional population figures? Or will something less suffice?[27]

In subsequent judgements, the courts have affirmed that requiring a trial jury to be truly 'representative' would be a problematic and unworkable approach.[28] An accused person has no right to a specific number of individuals of a certain race or background on either the jury roll, jury panel, or the trial jury.[29] The requirement of representativeness is imposed on the process used to compile the initial jury roll, rather than on the composition of the final 12-member trial jury.[30] It was on this basis that a majority of the Supreme Court in *Kokopenace* developed a test for representativeness that significantly circumscribes the meaning of the term 'representative' in Canadian law. Justice Moldaver, writing for the majority, articulated the representativeness test as follows:

> To determine if the state has met its representativeness obligation, the question is whether the state provided a fair opportunity for a broad cross-section of society to participate in the jury process. A fair opportunity will have been provided when the state makes reasonable efforts to: (1) compile the jury roll using random selection

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23 *Ibid* at paras 47—58.

24 *Canadian Charter of Rights and Freedoms*, ss 11(d) and (f), Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982 c 11.

25 *R v Williams,* [1998] 1 SCR 1128 at para 46, [1998] SCJ No 49; *Kokopenace*, supra note 5 at para 148.

26 *Sherratt, supra* note 2 at para 35; *R v Church of Scientology*, 33 OR (3d) 65, [1997] OJ No 1548 (CA) at para 48, leave to appeal refused: [1997] SCCA No 683 9 [*Church of Scientology*].

27 *R v Biddle*, [1995] 1 SCR 761, [1995] SCJ No 22 at para 58, McLachlin J, concurring in the result.

28 *Kokopenace*, *supra* note 5 at para 39.

29 *Church of Scientology, supra note 26; R v Kent, Sinclair and Gode,* 1986 CarswellMan 178, [1986] MJ No 239 (CA) [*Kent*].

30 *Kokopenace*, *supra* note 5 at para 40.

> from lists that draw from a broad cross-section of society, and (2) deliver jury notices to those who have been randomly selected. In other words, it is the act of casting a wide net that ensures representativeness. Representativeness is not about targeting particular groups for inclusion on the jury roll.[31]

In a forceful dissenting opinion, Justice Cromwell urged the Court to adopt a significantly broader conception of representativeness, stating that a "representative jury roll is one that substantially resembles the group of persons that would be assembled through a process of random selection of all eligible jurors in the relevant community."[32] The majority emphasized that they were "in no way suggesting that the state should not take action to address this pressing social problem" but maintained that an accused's right to a representative jury was "not the appropriate vehicle for this task."[33] Justice Cromwell strongly disagreed:

> I do not regard compliance with the Constitution as either optional or as a matter of social policy. An Aboriginal man on trial for murder was forced to select a jury from a roll which excluded a significant part of the community on the basis of race – his race. This in my view is an affront to the administration of justice and undermines public confidence in the fairness of the criminal process. … [T]he *Charter* in my view ought to be read as providing an impetus for change, not as an excuse for saying that the remedy lies elsewhere.[34]

The majority in *Kokopenace* distort the plain meaning of the word 'representative', stating that while the jury roll must be representative, it need not be *proportionately* representative of the community from which it is drawn. They justify this position by conflating the problems occasioned by requiring a proportionately representative *trial jury* with those of a proportionately representative *jury roll*.[35] Certainly, it would be impossible to find a group of twelve people who proportionately represent every facet of Canadian society. But proponents of a strengthened representativeness requirement do not advocate for that position. Justice Cromwell simply asks that the jury roll be roughly proportionately representative of the judicial district. If one third of the population of that district is Indigenous, roughly one third of the names on the jury roll should be those of Indigenous people. It is debatable whether efforts that fall so substantially short of their purported goal are ever "reasonable." As Justice Cromwell notes, in no other area of Canadian law is the state required only to make "reasonable efforts" not to breach a citizen's *Charter* rights.[36]

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31 *Ibid* at para 61.

32 *Ibid* at para 226.

33 *Ibid* at para 65.

34 *Ibid* at paras 195–196.

35 *Ibid* at paras 42–43. Justice Moldaver quotes an Ontario Court of Appeal decision, *R v Brown,* (2006) 215 CCC (3d) 330 (CA), outlining the problems created by requiring a representative trial jury. He then makes the significant assumption that these problems are equally applicable to the jury roll, stating that "even if a perfect source list were used, it would be impossible to create a jury roll that fully represents the innumerable characteristics existing within our diverse and multicultural society." That it may be impossible to achieve absolute perfection does not mean that Canadian law and policy should not try to come as close as reasonably possible.

36 *Ibid* at para 250.

B. Source Lists

The type of source list used to compile the jury roll for a judicial district plays an important role in ensuring a representative jury. While the requirement set out in *Kokopenace*—random selection from a list drawing from a broad cross-section of society—would seem to be fairly easy to satisfy, jury rolls have historically been compiled from lists that are far from representative. For centuries, juries were composed exclusively of white, property-owning men, and provinces only began to allow women to serve as jurors in the mid-1960s.[37] The use of provincial electoral lists in compiling jury rolls effectively barred Indigenous people from serving as jurors until most provinces extended the franchise to include them in the mid-twentieth century.[38] As the *Report of the Aboriginal Justice Inquiry of Manitoba* aptly stated in 1999, "for a century the legal system made it clear that it did not want or need Aboriginal jurors. It is a message that Aboriginal people have not forgotten."[39]

The use of health records in compiling the jury roll is widely seen as a best practice, as virtually every Canadian citizen accesses the country's universal healthcare system.[40] While a majority of provinces now employ health records as the source list for their jury rolls, British Columbia and Quebec continue to rely on provincial electoral lists.[41] Ontario used municipal property assessment records to compile its jury roll for many years, until it switched to health records in 2019, in accordance with the recommendations made in Justice Iacobucci's 2013 Report.[42]

Sheriffs in British Columbia and Ontario are directed to supplement their jury rolls by obtaining lists of names of those living on reserves from First Nations officials.[43] As detailed in Justice Iacobucci's 2013 report, this approach is largely ineffective.

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37 Susan Altschul & Christine Carron, "Chronology of Some Legal Landmarks in the History of Canadian Women" (1975) 21 McGill L J 476, online: <https://lawjournal.mcgill.ca/wp-content/uploads/pdf/7591703-carron.pdf> [https://perma.cc/2A44-UX9P].

38 John F. Leslie, "Indigenous Suffrage", *The Canadian Encyclopedia* (1 March 2016), online: <https://www.thecanadianencyclopedia.ca/en/article/indigenous-suffrage/> [https://perma.cc/746B-4CZG].

39 Aboriginal Justice Inquiry, *supra* note 3 at Chapter Nine: Juries.

40 Mark Israel, "The Underrepresentation of Indigenous Peoples on Canadian Jury Panels" (2003) 25:1 L & Policy at 38.

41 The source list to be used in each province is sometimes specified in the provincial legislation itself or in the regulations, while in other provinces the source list is specified in a policy manual or guidelines which may or may not be publicly accessible. The Quebec *Jurors Act* specifies that electoral records are the source to be used in compiling the jury roll: *Jurors Act*, RSQ c J-2, ss 3(c), 7.1. British Columbia does not specify either in the provincial legislation or regulations that electoral records are the source to be used. The British Columbia *Jury Act* gives the sheriff wide discretion to select jurors through any procedures the sheriff deems appropriate (s 8). The Sheriff Policy Manual, which provides that the roll is compiled from voting records, does not appear to be publicly available.

42 *Juries Act*, RSO 1990, c J-3, ss 6(2), 6(8); See generally: Robert Cribb & Jim Rankin, "Ontario abandons property ownership as source of jurors", *Toronto Star* (18 April 2019), online: <https://www.thestar.com/news/investigations/2019/04/18/ontario-abandons-property-ownership-as-source-of-jurors.html> [https://perma.cc/AZ3G-WYM6].

43 For British Columbia, see: "Sheriff Policy Manual", 2011, published on the website of the BC Civil Liberties Association after being obtained through an access to information request, online: <https://bccla.org/wp-content/uploads/2012/03/2011-BC-Sheriffs-Office-Response-Policy.pdf> [https://perma.cc/2VUR-GKX4]. For Ontario, see: *Juries Act*, RSO 1990, c J-3, s 6.

First Nations leaders place great importance in safeguarding the privacy of their members and are therefore often unwilling to divulge the list of names sought by the sheriff's office. Chiefs whom Iacobucci spoke with expressed their beliefs that they were under an obligation to consult with their members before releasing their personal information, that more education about the jury system was needed, and that "it was unfair to subject their people to what they regarded as a completely foreign process."[44]

With regard to the 'reasonable efforts' test developed in *Kokopenace*, Justice Cromwell noted in his dissent that one significant, "obvious" effort that the province of Ontario had not made was to consult with First Nations leaders to determine why response rates to summonses were so low among Indigenous communities.[45] This echoes many of the recommendations made by Justice Iacobucci in his report, which squarely places the issue of Indigenous underrepresentation on juries within the wider context of systemic racism and colonial attitudes towards Indigenous people in Canada's criminal justice system. Engaging Indigenous leaders in a government-to-government relationship is crucial to addressing the issues that continue to plague the jury selection process.

As a final point in regard to the choice of source list, it should be noted that the use of provincial health records is in itself no guarantor of a representative jury roll and certainly does not guarantee a representative trial jury. Gerald Stanley was tried by an all-white jury in Saskatchewan, in an area of the province where roughly 30 percent of the population is Indigenous, despite that province's use of health records as a source list. In a recently published book focused on the Stanley trial, professor Kent Roach concludes that at least 20 of the 178 people who attended the jury selection for the trial were Indigenous.[46] That perhaps only 11 percent of the jury panel was Indigenous, in a 30 percent Indigenous judicial district, suggests that Indigenous people were likely underrepresented on the jury roll in the first place. The use of a representative source list is an important step in working towards a representative trial jury, but it is no panacea.

III. THE JURY PANEL

Even in cases where Indigenous people are represented on a jury roll in rough proportion to their population in a judicial district, they face numerous barriers to participation at the second stage of the juror selection process. When a jury trial is scheduled, a sheriff mails notices to potential jurors whose names have been randomly selected from the jury roll. This 'summons' cautions recipients that service is not optional and that a fine may be imposed on those who fail to respond. Despite this, response rates amongst Indigenous people tend to be far lower than those of the general population. In *Kokopenace*, for example, the response rate amongst residents of the district living on First Nations reserves was a dismal 10 percent, while the response rate amongst off-reserve residents was 56 percent.[47] This section considers some of the factors driving this disparity, as well as proposed solutions.

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44 Iacobucci Report, *supra* note 4 at para 231.

45 *Kokopenace*, *supra* note 5 at para 240.

46 Kent Roach, *Canadian Justice, Indigenous Injustice: the Gerald Stanley and Colten Boushie case* (Montreal & Kingston, McGill-Queen's University Press, 2019) at 97—98.

47 *Kokopenace, supra* note 5 at paras 18, 24.

The *Report of the Aboriginal Justice Inquiry of Manitoba* concluded that "the summoning procedure works against Aboriginal people in a number of ways."[48] Mail and telephone service is slower and of poorer quality in Indigenous communities than in the rest of Canada, and Indigenous people living in urban areas are more likely to be renters, who change addresses frequently.[49] For these reasons, Indigenous people living in both rural and urban areas are less likely to receive a summons than their non-Indigenous counterparts. In *Kokopenace*, nearly 28 percent of the summonses mailed to those living on a reserve in the judicial district were returned undelivered, compared to an overall provincial rate of less than 6 percent.[50] The time it takes a potential juror to respond to the summons is also important. Despite the warning of penalties for failure to respond, sheriffs do not typically follow up when a summons goes unanswered. Anticipating that some of those selected will not respond, sheriffs mail notices to far more potential jurors than are actually required for the in-court selection stage. If a recipient responds to the summons after the necessary number of people required for the jury panel has been reached, the sheriff may tell them they are no longer needed.[51]

A. Juror Qualifications

Prospective jurors who receive a summons must return the form, either online or by mail, within a specified number of days. They must also attest that they meet the qualifications to serve as a juror in their province. Though these qualifications vary slightly by jurisdiction, every province and territory requires that jurors be ordinarily resident therein and be Canadian citizens over the age of majority. Members of certain professions are also excused from serving on a jury: members of the Legislature or Parliament, judges, lawyers, sheriffs, and others involved with the justice system or law enforcement.[52] Citizens with a criminal record or those who are facing charges at the time of jury selection will also generally be disqualified.[53]

While the requirement that jurors be Canadian citizens would seem relatively uncontroversial, and has been upheld by the courts as constitutional,[54] many Indigenous people in Canada identify exclusively as citizens of their First Nation, not as Canadian citizens. Indicating on

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48 Aboriginal Justice Inquiry, *supra* note 3 at Chapter Nine: Juries.

49 *Ibid.*

50 *Kokopenace*, *supra* note 5 at para 270.

51 Aboriginal Justice Inquiry, *supra* note 3 at Chapter Nine: Juries.

52 While all provinces exempt persons involved with the justice system or law enforcement on the basis that they may not be impartial between the prosecution and the accused, the scope of the exemptions varies slightly by province. Some exclude law students or anyone with a law degree, for example, while others exempt only lawyers. Some provinces exclude certain professions on the basis that what they do is of more value to society than serving on a jury—typically doctors and firefighters, and in some provinces dentists and veterinarians as well.

53 "Here as well, qualifications vary by province. Ontario, for example, allows persons convicted of certain summary offences to serve on juries. Even where some offences will not disqualify a potential juror, these rules are not always clear and may lead to some people indicating they are ineligible when they are not in fact disqualified. See Ontario Ministry of the Attorney General, "Instructions and Information About Completing the Juror Questionnaire", online: Ontario Ministry of the Attorney General <https://www.attorneygeneral.jus.gov.on.ca/english/courts/jury/instructions.php> [https://perma.cc/NU4S-H3YD]."

54 *Church of Scientology*, *supra* note 26.

the summons that they are not Canadian citizens automatically disqualifies them from serving as jurors. Providing Indigenous people with the option to declare on the summons that they are First Nations citizens (and therefore legally Canadian) would easily remove this obstacle.[55]

Disqualification based on a criminal record also creates a significant hurdle for would-be Indigenous jurors, due to the pervasive overincarceration of Indigenous people in Canada.[56] Some provinces, such as British Columbia, disqualify all jurors with a criminal record, while others, such as Ontario, only disqualify those convicted of a more serious offence that may be prosecuted by indictment.[57] If a juror has been convicted of an offence for which they have received a pardon, they are eligible to serve. However, a lack of awareness of pardon procedures amongst Indigenous people, as well as costs associated with applying for a pardon, may nevertheless lead to the exclusion of a significant number of Indigenous jurors, often due to an old conviction for a minor offence.[58] The Iacobucci Report recommends that provinces amend their respective jury legislation to achieve uniformity with the federal *Criminal Code* provisions, which disqualify only those convicted of an offence for which they were sentenced to a term of imprisonment of two years or more.[59]

B. Economic Barriers

A sheriff or judge can excuse potential jurors if serving on the jury would cause them serious personal hardship.[60] Universally low rates of juror compensation lead to frequent exclusion of Indigenous jurors on this basis, as Indigenous people are more likely to be unable to afford the cost of missing work to serve on a jury.[61] Juror compensation rates currently range from no compensation for the first ten days of trial in Ontario, to $20 per day in British Columbia, to $103 per day in Quebec.[62] Compensation for elder and child care, meals, and accommodation varies by province, but in all cases jurors are reimbursed for these expenses after the trial concludes. This further disadvantages Indigenous jurors who lack

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55 see Iacobucci Report, *supra* note 4 at para 238.

56 See "Indigenous overrepresentation in the criminal justice system" (January 2017), online: Department of Justice <https://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2017/jan02.html> [https://perma.cc/6RYZ-ML8W].

57 *Jury Act*, RSBC 1996 c 242, s 3(1)(p); *Juries Act*, RSO 1990 c J-3, s 4(b).

58 Iacobucci Report, *supra* note 4 at para 244.

59 *Ibid* at para 376 (Recommendation 14). See also *Criminal Code of Canada*, RSC 1985, c C-46, Part XX – Procedure in jury trials, s 638(1) [*Criminal Code*].

60 See provincial jury acts.

61 Aboriginal Justice Inquiry, *supra* note 3 at Chapter Nine: Juries; Iacobucci Report, *supra* note 4 at para 243.

62 British Columbia pays $20/day for the first ten days of trial, $60/day for days 11 to 49, and $100/day thereafter (*Jury Regulation*, BC Reg 282/95, s 1). British Columbia's initial rate is the lowest in the country after Ontario, which provides no compensation for the first 10 days of trial. The highest is Quebec, which provides $103/day, rising to $160/day if the trial exceeds 57 days (*Jurors Act*, Regulation respecting indemnities and allowances to jurors, Chapter J-2, r 1). For a general overview of compensation by province, see Miriam Katawazi, "Can you afford jury duty? Here's how each province compensates you for your service," *Toronto Star* (16 February 2018), online: <https://www.thestar.com/news/investigations/2018/02/16/can-you-afford-jury-duty-heres-how-each-province-compensates-you-for-your-service.html> [https://perma.cc/74E7-HSET].

credit and cannot pay these extra expenses out of pocket.[63] In many cases, compensation rates have not been adjusted in several decades. Increasing compensation apace with cost-of-living increases would provide more equitable access to jury duty for Indigenous people as well as other economically disadvantaged segments of society.[64]

C. Geographic Area

The delineation of the geographic, or 'catchment,' area from which the jury panel is drawn can significantly impact the jury's representativeness. A jury panel selected from a smaller area will be more representative of that area, but many jurors may know the complainant, accused, lawyers, or judge involved in the case. A jury panel drawn from a larger area will be more impartial but will also cause hardship for jurors who have to travel long distances, and the jury may be less representative of the community in which the offence took place.[65]

In assembling a jury panel, sheriffs typically summon people who live within a certain radius of the courthouse. As many Indigenous people live far from major city centres, they may never have the chance to serve on a jury for this reason.[66] The Quebec *Jurors Act*, for example, disqualifies all persons living in certain northern judicial districts from serving on juries, unless they live within 60 kilometres of a courthouse.[67] Crime does not limit itself to within a certain radius of courthouses, however. Policies such as Quebec's can obstruct the assembly of a representative jury in cases of alleged offences committed in remote communities.

The Northwest Territories ("NWT") has taken a distinctly different approach to this issue.[68] The NWT encompasses a vast expanse of Canadian tundra, interspersed with many small communities accessible only by air or winter ice road.[69] As in many of the provinces, jurors are drawn from within a certain radius of the court.[70] However, the location of that court is flexible, and the practice in the territory has long been to hold the trial in the community where the alleged offence took place.[71] While this may lead to more prospective jurors being excused for a lack of impartiality, it virtually guarantees that the jury is representative of the

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63 Aboriginal Justice Inquiry, *supra* note 3 at Chapter Nine: Juries; Iacobucci Report, *supra* note 4 at para 242.

64 As recommended in the Iacobucci Report, *supra* note 4 at para 379.

65 Israel, *supra* note 40 at 47.

66 *Ibid.*

67 *Jurors Act*, CQLR c J-2, s 4(k).

68 *Jury Act*, RSNWT 1988, c J-2.

69 For an interesting, though now slightly dated, discussion of the NWT's unique approach to the jury system, see Christopher Gora, "Jury Trials in the Small Communities of the Northwest Territories" (1993) 13 Windsor YB Access Just at 156.

70 In British Columbia, for example, the Sheriff's Policy Manual directs Sheriffs to obtain names of inhabitants of reserves only if those reserves are located within 100 kilometres of the Sheriff's Office. As the British Columbia Civil Liberties Association notes, many reserves are located in remote parts of the province far outside this radius. Ontario appears to draw jurors from the entire judicial district. However, this approach may simply result in a greater number of jurors being excused by the judge or sheriff for hardship when they are called to appear, rather than being overlooked at the jury roll stage as occurs in provinces with a set radius.

71 *R v Tatatoapik*, 1995 CarswellNWT 65, 28 WCB (2d) 493 (SC(AD))

community. Courts in the NWT have recognized not only the right to a jury of one's peers, but also the right to be tried in one's own judicial district.[72]

The practice in the NWT accords with the recommendation of the Aboriginal Justice Inquiry of Manitoba that trials be held in the community in which the alleged offence took place, and that jurors be drawn from within 40 kilometres of that community. If that radius yields an insufficient number of jurors, the inquiry recommended that additional jurors be summoned from demographically and culturally similar communities.[73]

Unfortunately, concerns have arisen in recent years regarding practical difficulties in implementing the NWT approach described above. The very small size of communities outside the NWT capital, Yellowknife, has led to difficulties in finding a suitable number of impartial jurors to hear trials in those locations.[74] A 2014 CBC News article reported that the inability to find sufficient numbers of jurors had led to 11 mistrials in the preceding two years, with the retrials then being moved to Yellowknife.[75] However, if larger southern provinces were to follow the NWT approach of holding trials in the community where the offence took place, the problems encountered by the NWT courts may be less pronounced by reason of those provinces' larger geographic size and populations. Moreover, it may be easier and less expensive in many provinces to bring in jurors from demographically similar nearby communities, as recommended by the Aboriginal Justice Inquiry.

IV. THE TRIAL JURY

Indigenous people whose names make it onto the jury roll, who receive a summons and attend court for jury selection, then face the possibility of being excluded at the in-court selection stage. A major issue and source of criticism following Gerald Stanley's trial was his defence counsel's use of the peremptory challenge mechanism, discussed further below, to exclude every prospective juror who appeared to be Indigenous. This tactic gave Colten Boushie's family the impression that the "deck was stacked against them."[76] Regardless of the verdict's legal merit, justice in this case was not seen to be done through the eyes of the Boushie family. There are three ways in which Crown or defence counsel can attempt to prevent members of the jury panel from appearing on the 12-member trial jury. This section considers each of these three challenge procedures in turn.

Before proceeding, however, it must be acknowledged that a further major barrier to enhanced Indigenous participation on juries is the perceptions and desires of many Indigenous people themselves. Many people from all walks of life seek ways to avoid the time, expense, and effort

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72 *R v Pudlook*, 1972 CarswellNWT 20 at para 4, [1972] 6 WWR 641 (SC(AD)).

73 Aboriginal Justice Inquiry, *supra* note 3.

74 See e.g. *R v Blackduck*, 2014 NWTSC 48 (CanLII).

75 "Filling juries in small N.W.T. communities a growing problem", CBC News (14 August 2014), online: <https://www.cbc.ca/news/canada/north/filling-juries-in-small-n-w-t-communities-a-growingproblem-1.2735550> [https://perma.cc/D7CV-WW4E].

76 Kent Roach, "Colten Boushie's family should be upset: Our jury selection procedure is not fair," *The Globe and Mail* (30 January 2018), online: <https://www.theglobeandmail.com/opinion/colten-boushies-family-should-be-upset-our-jury-selection-procedure-is-not-fair/article37787115/> [https://perma.cc/C5KD-GWY9].

that service as a juror entails. Indigenous people have a much more compelling reason for wanting to avoid serving as jurors—Canada's shameful history of deeply embedded racism in the country's criminal justice system. Moreover, aspects of the Canadian criminal process are frequently at odds or incompatible with traditional precepts of justice in many Indigenous cultures. As recognized in the Iacobucci Report, such cultural barriers must be meaningfully addressed if the problem of Indigenous underrepresentation on juries is to be fully resolved. A fulsome discussion of these cultural barriers and how they might be overcome is beyond the scope of this paper. However, in order to make progress on this issue, the federal and provincial governments must build meaningful, respectful, nation-to-nation relationships with Indigenous communities and must demonstrate that they are prepared to make changes to the Canadian legal system to identify and address cultural barriers to Indigenous participation on juries. By making some of the legislative and policy reforms outlined in this paper, the government could demonstrate it is acting in good faith and that the Canadian state values the perspectives of Indigenous people as jurors.

A. Challenge to the Entire Panel

At the outset of the jury selection process, section 629 of the *Criminal Code* allows either the accused or the prosecutor to challenge the jury panel in its entirety based on "partiality, fraud or wilful misconduct on the part of the sheriff or other officer by whom the panel was returned."[77] Successful challenges on this basis are exceedingly rare, and as some form of deliberate wrongdoing by the sheriff is required, it is unlikely to be an effective means of remedying underrepresentation of Indigenous people on jury panels. In one of the only recorded instances of a successful challenge on this ground, *R v Butler*, the Indigenous accused's counsel alleged in an affidavit that the sheriff had told him in the courthouse hallway that "Indians" had been deliberately excluded from the jury panel because they were "unreliable – they may show up one day for trial and then not come the next because they've gone out and gotten drunk the night before."[78] Absent such a "smoking gun" as the sheriff's admission of deliberate discrimination in *Butler*, the vast majority of attempts to challenge underrepresentation of Indigenous people on jury panels have been unsuccessful.[79]

If the federal government were serious about remedying the problem of Indigenous underrepresentation on juries, it would compensate for the Supreme Court's timid ruling in *Kokopenace* by amending the *Criminal Code.* Specifically, section 629 could be amended to provide a method by which Crown or defence counsel could challenge substantial underrepresentation of Indigenous people on the jury panel in cases involving an Indigenous accused or victim. Gross disparities in representation, such as the 30 percent Indigenous judicial district in the *Kokopenace* case where only 4.1 percent of those on the jury roll were Indigenous, are unacceptable and threaten public confidence in the fairness of jury trials involving Indigenous people. The slippery-slope objection that such a challenge procedure

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77 *Criminal Code*, *supra* note 60 at s 629. Courts have set a high bar for excluding jurors on this basis: see *R v Butler*, 1984 CarswellBC 526, [1984] BCJ No 1775 (CA) [*Butler*]; *Kent*, *supra* note 29.

78 *Butler*, *supra* note 77. On appeal, the BCCA held that the affidavit raised sufficient doubt about the jury selection process and that the trial judge's failure to investigate warranted a new trial.

79 Roach, *supra* note 46 at 97.

would need to be extended to guarantee the representation of myriad other groups on jury panels can be answered by reference to Indigenous peoples' treaty and constitutional rights, as well as Canada's sordid, genocidal history involving Indigenous people. The *Criminal Code* already contains provisions directing the courts to accord special consideration to Indigenous people in certain contexts, and there is no reason that such rights cannot be extended to the jury system.[80] Contrary to the rhetoric of some judges that any interference with the jury will be its downfall, guaranteeing true representation of Indigenous people will only serve to strengthen the jury system and public confidence in that system overall. Given that this federal legislative change would require provinces to take substantial action to remedy underrepresentation, the coming into force of the amended section could be delayed, allowing provinces adequate time to bring their jury selection processes into compliance.[81]

Once the jury panel has been accepted, the trial judge may excuse jurors who have an obvious personal interest in the outcome of the trial or a relationship to one of the parties to the case.[82] The judge can also excuse people who would suffer personal hardship if forced to serve as jurors.[83] This provision often eliminates Indigenous or other marginalized people who cannot afford the economic toll of serving on a jury.[84] As previously discussed, increasing rates of juror compensation would be preferable to the current practice of excusing jurors, which essentially limits service as a juror to those privileged enough to afford it.

B. Challenge for Cause

In most cases, no challenge to the entire panel is made, and jury selection proceeds to the second stage, in which the accused or the prosecutor can challenge either an unlimited number of individual jurors, or the panel as a whole, 'for cause.' While somewhat collateral to the issue of Indigenous underrepresentation on juries, the challenge for cause stage of the process can play a key role in addressing the type of widespread racial prejudice displayed by part of Saskatchewan's population in the lead-up to Gerald Stanley's trial.

Challenges for cause are typically based on the ground that the juror "is not impartial."[85] As jurors are presumed to be impartial, counsel making a challenge on this ground must convince the judge that there is a reason to doubt the impartiality of members of the jury

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80 See e.g., *Criminal Code*, *supra* note 59 at s 718.2(e) and *R v Gladue*, [1999] 1 SCR 688, [1999] SCJ No 19.

81 Roach, *supra* note 46 at 213.

82 Steve Coughlan, *Criminal Procedure*, 3rd ed (Toronto: Irwin Law, 2016) at 354. Note that this exclusion is only applied in obvious situations where consent of counsel to excuse the juror can be presumed. If counsel does not consent, the matter will be dealt with under the challenge for cause procedure.

83 *Criminal Code, supra* note 59 at s 632.

84 Cynthia Petersen, "Institutionalized Racism: The Need for Reform of the Criminal Jury Selection Process" (1993) 38 McGill L J 147 at 153.

85 *Criminal Code*, *supra* note 59 at s 638. Prior to the passage and coming into force of Bill C-75 in 2019, which amended s 638, the relevant ground of challenge was that the juror "is not indifferent between the Queen [in whose name prosecutions are conducted in Canada] and the accused." In my view, the amendment is simply a modernization of the language and should not change the test for a challenge for cause on this ground. Indeed, the Supreme Court of Canada affirmed in *R v Williams*, [1998] 1 SCR 1128, 1998 CanLII 782 at para 9 that "indifference" and "partiality" are interchangeable terms.

panel in judging the case. However, in contrast to the American system in which defence counsel and prosecutors may question jurors in great detail and conduct extensive research into their backgrounds,[86] lawyers in Canada are only provided with each juror's name, address, and occupation. The presumption of impartiality, combined with the limited information counsel receives about each potential juror, means that successful challenges for cause are rare.

In the 1993 case of *R v Parks*, defence counsel argued that anti-black racism in Toronto was so prevalent that each potential juror should be asked whether the fact that the accused was black and the alleged murder victim was white would affect their ability to judge the case impartially. The trial judge's refusal to allow this question to be put to members of the jury panel was overturned on appeal.[87] Five years later, in *R v Williams*, a unanimous Supreme Court held that evidence adduced by the accused of widespread racism against Indigenous people in Canadian society was sufficient to displace the presumption of juror impartiality. Accordingly, both the trial judge in the accused's second trial and the Court of Appeal had erred in refusing to allow defence counsel to question potential jurors as to whether their ability to act impartially would be affected by the fact that the accused was Indigenous and the complainant was white.[88]

In the first trial of the accused in *Williams*, the judge allowed jurors to be questioned as to potential bias, but a mistrial was subsequently declared on procedural grounds.[89] Out of the 43 members of the jury panel who had been questioned, 12 were dismissed due to a risk that they would be racially biased against the accused.[90] Twenty years after *Williams*, however, it is fair to wonder whether most potential jurors in today's society would admit to overt racism against Indigenous people or other minorities. Unfortunately, attempts by defence counsel to ask more nuanced questions of jury panel members, such as "would you agree or disagree that some races are, by their nature, more violent than others?" or "would you agree or disagree that discrimination against racial minority groups is no longer a problem in Canada?" have been rejected by courts on the grounds that they would result in longer, more expensive jury trials and be overly invasive of juror privacy.[91]

While courts often raise the spectre of the American jury system as an argument for the status quo,[92] modest reforms to the challenge for cause stage can be made while avoiding the pitfalls inherent in the US selection process. Given that the Supreme Court in *Williams* unanimously

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86 See e.g. the 15-page questionnaire distributed to prospective jurors in a recent US federal court civil case involving the singer Taylor Swift, which includes questions such as "What are your primary sources of news?"; "Is anyone in your immediate family a fan of Taylor Swift?"; and "Have you, your spouse/partner, or your children, ever been inappropriately touched?" online: <http://www.cod.uscourts.gov/Portals/0/Documents/Media/15cv1974/15-cv-1974_Juror_Questionnaire.pdf> [https://perma.cc/W6YS-3Z3Q].

87 See *R v Parks*, 1993 CarswellOnt 119, [1993] OJ No 2157 (CA).

88 *R v Williams*, [1998] 1 SCR 1128, 1998 CanLII 782.

89 *Ibid* at para 3. Defence counsel argued that the application for a mistrial was really an attempt to re-litigate the challenge for cause application before a new judge.

90 *Ibid.*

91 See e.g. *R v Gayle*, [2001] OJ No 1559, 2001 CanLII 4447 (CA).

92 See e.g. *R v Williams, supra* note 88 at para 51.

endorsed the value of questioning jurors in some contexts in order to root out those with racist attitudes, a strong argument exists that the question to be asked of jurors should be more effective than merely asking what amounts to "are you a racist?". Such a question, asked in open court in front of the whole jury panel, has only one socially acceptable answer in modern-day Canada. More nuanced questions regarding jurors' attitudes towards interracial relationships or whether members of certain races tend to be more violent would be far more effective and would still be a far cry from the detailed inquiries conducted in American courts.

C. Peremptory Challenges

Until recently, a third stage in the challenge process allowed Crown and defence counsel to use 'peremptory challenges' to prevent a certain number of jury panel members from sitting on the trial jury without having to provide any justification for the challenge. Gerald Stanley's use of these peremptory challenges to secure an all-white jury prompted widespread calls for reform following his acquittal. Critics argued that the lack of a requirement that lawyers give reasons for their use of peremptory challenges allowed for blatant racial discrimination in jury selection. In response, the federal government abolished peremptory challenges altogether, as part of a larger reform to the *Criminal Code*.[93] The Supreme Court of Canada recently held that the abolition of these challenges was not unconstitutional.[94] While the move to eliminate these challenges was criticized by some defence lawyers,[95] it is very unlikely that any future federal government will move to reinstate them, and therefore this article does not discuss the issue of peremptory challenges further.

V. VOLUNTEER JURORS

In his 2013 Report, Justice Iacobucci recommends that Ontario develop a process whereby Indigenous people living on reserves could volunteer for jury service as a way to supplement the jury roll developed from other source lists that may overlook or underrepresent Indigenous people.[96] The state of New York has allowed residents to volunteer for jury duty for several decades in order to supplement its jury roll, which is developed from five different source lists.[97] In 2014, a member of the New Jersey legislature introduced a bill that would have allowed the government to compile a separate list of citizen volunteer jurors, which would then be added to the jury roll drawn from the regular source lists.[98]

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93 Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, cl 271 (first reading), cl 271. The peremptory challenge provision is abolished in favour of giving the trial judge the power to stand by any juror for reason of personal hardship, maintaining public confidence in the administration of justice, or any other reasonable cause.

94 *R v Chouhan*, 2020 CanLII 75817 (SCC). As of this paper's publication, written reasons for judgment (and the accompanying neutral citation) had yet to be released by the SCC.

95 See e.g. Justin Ling, "Why are we eliminating peremptory challenges?", *CBA National* (19 October 2020), online: < https://www.nationalmagazine.ca/en-ca/articles/law/in-depth/2020/why-are-we-eliminating-peremptory-challenges> [https://perma.cc/M895-GS2B].

96 Iacobucci Report, *supra* note 4 at para 376 (Recommendation 12).

97 *Ibid* at para 200.

98 US, *An Act concerning voluntary jury service and amending NJS2B:20-2 and supplementing Title 2B of the New Jersey Statutes*, 216th Legislature, Assembly No 2949, NJ, 2014 (not passed), online:<https://www.njleg.state.nj.us/2014/Bills/A3000/2949_I1.PDF> [https://perma.cc/CEL2-ZDXG].

While that private member's bill did not pass, the policy merits serious consideration as a means to make jury rolls more representative of the community overall.

The most common objection to volunteer jurors is that it would interfere with the foundational principle that jurors are to be randomly selected from a broad cross-section of society. If volunteer jurors were placed directly onto a 12-member trial jury by virtue of them having volunteered, this would clearly be problematic. What these volunteers would actually be volunteering for, however, is simply for their names to be added to the jury roll, on which they did not already appear. Insofar as this increases the overall pool of available jurors, it not only does no damage to the principle of random selection, but actually furthers representativeness by broadening the cross-section of the community from which jurors are chosen. Despite this, Justice Moldaver in *Kokopenace* criticized attempts to "carve out special rules allowing Aboriginal people to volunteer for jury duty", warning that this would "destroy the concept of randomness that is vital to our jury selection process."[99] This was an unfortunate and unwarranted criticism of a reform that was not before the Court. If it is accepted that Indigenous people are significantly underrepresented on jury rolls, the current selection process cannot fairly be characterized as randomly drawing from society. Efforts to remedy the disparity, such as allowing for volunteer jurors, do not detract from the goal of random selection—they further it.

As previously mentioned, central to the Iacobucci Report is an awareness that Indigenous underrepresentation on juries is situated in the broader context of Indigenous peoples' historical and continuing alienation from and distrust of the Canadian justice system and colonial government generally. Mere amendments to federal and provincial jury legislation and policies will not solve this problem. Instead, the Canadian and provincial governments must engage with Indigenous leadership in good faith and on a nation-to-nation basis with respect to jury underrepresentation as well as other criminal justice issues. Following extensive consultation, Justice Iacobucci reported that "First Nations observe the Canadian justice system as devoid of any reflection of their core principles or values, and view it as a foreign system that has been imposed upon them without their consent."[100] He noted that "substantive and systemic changes to the criminal justice system are necessary conditions for First Nations participation on juries in Ontario."[101] A fulsome discussion of the types of systemic changes that are necessary is beyond the scope of this article, yet it is important to bear in mind that specific jury reforms will not achieve their goal absent an awareness of their place in a broader push for Indigenous rights and self-determination. The jury system is a foundational component of our criminal justice system and is unlikely to be abolished in the foreseeable future. If we are to achieve meaningful reforms that will successfully address the issue of Indigenous underrepresentation on juries, Indigenous people and their governments must be at the *centre* of the discussion.

A change that allows Indigenous people to volunteer to have their names added to the jury roll would first require an amendment to provincial legislation. A successful volunteer program would require much more than simply mailing a letter to each Indigenous community

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99 *Kokopenace*, *supra* note 5 at para 88.

100 Iacobucci Report, *supra* note 4 at para 210.

101 *Ibid* at para 207.

or its members, however. The distrust between many Indigenous people and the justice system necessitates a more involved outreach effort. One possible model would involve court services officials meeting with Indigenous officials to discuss the program with them and listen to any concerns they may have. With Indigenous leaders' permission, court services workers could hold educational events in each community in order to provide information on the jury system and the benefits of jury service. Those interested in volunteering could complete a form, similar to a jury summons questionnaire, to determine whether they are eligible, and court services workers could answer questions regarding their eligibility to ensure that eligible persons are not erroneously disqualified. The names of eligible persons would then be added to the province or territory's jury roll, if they did not already appear on it. Wherever possible, information distributed to community members regarding the jury system should be translated into Indigenous languages or delivered in other culturally relevant ways. Ultimately, experts with cultural expertise and experience should be engaged to help design this outreach process.

CONCLUSION

The current jury selection process in Canada leads to the widespread exclusion and underrepresentation of Indigenous people at each of the process's three stages. This pattern of exclusion denies Indigenous people the many benefits of jury service catalogued in *Sherratt* and reinforces perceptions that the Canadian criminal justice system is indifferent or even hostile to Indigenous concerns and perspectives. The persistent phenomenon of non-Indigenous juries hearing cases in parts of Canada where large percentages of the population are Indigenous threatens public confidence in the administration of justice in this country. Cynthia Petersen, then a University of Ottawa professor and now a Justice of the Ontario Superior Court, eloquently summarizes the message sent by all-white juries in a 1993 article on the need for reform to Canada's criminal jury selection process:

> The disproportionate over-representation of white people on jury panels implies that their values are more important, that their judgment is more respected, and that their perspectives are more legitimate than the values, judgment and perspectives of those who are under-represented. Jurors are invested with the power to make vital decisions which not only affect the outcome of individual trials but also contribute to the formation of community standards. The concentration of that power in the hands of white people constitutes institutionalized racism.[102]

The problem of Indigenous underrepresentation is complex and multi-faceted, but it does not lack potential solutions. While fundamental reform to the criminal justice system is ultimately required to repair Indigenous peoples' broken relationship to that system, many proposed reforms to jury selection procedures are process-oriented and can be implemented fairly quickly. Many of these reforms were proposed by Manitoba's Aboriginal Justice Inquiry twenty years ago, and it is long past time that these recommendations were acted upon. These reforms could be criticized as merely tinkering with a broken system. Alternatively, they

102 Petersen, *supra* note 84 at 165.

could be seen as the first step in an ongoing and evolving process of working with Indigenous people and governments to restore their faith in the country's criminal justice system. To be clear, the problem will not be solved merely by implementing the reforms discussed in this paper, but key to addressing the issue as a whole is ensuring that the message sent by Canada's legislation and policies is one of inclusion. As the Supreme Court has stated, a representative jury acts as the "conscience of the community."[103] Serving on a jury allows members of the public to increase their understanding of the criminal justice system, and the public's involvement increases confidence in that system as a whole.[104] Service on a jury can help "demystify" the legal system.[105] The systematic underrepresentation of Indigenous members of the community on juries unfairly denies Indigenous people these benefits. Moreover, it sends a clear message to Indigenous people in Canada that the Canadian justice system values the perspectives and judgment of some members of society above others. Ensuring that Indigenous people are properly represented on juries is critical to enhancing the confidence they place in the justice system. Proper representation affirms Indigenous peoples' value within the Canadian community and allows the public to see justice being done for *all* members of society.

103 *Sherratt*, *supra* note 2.

104 *Ibid.*

105 Petersen, *supra* note 84 at 165.